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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**CAPITAL CASE**
Plaintiff and Respondent,	Case No. S081918
v.	Superior Court No. CR40930
KENNETH McKINZIE,	
Defendant and Appellant.	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE VINCENT J. O'NEILL, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief (AOB). The decision to not address any particular argument, sub-argument or allegation made by respondent, or to not reassert any particular point made in the AOB, does not constitute a concession, abandonment or waiver of the point made by appellant. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) The decision only reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply brief are numbered to correspond to the argument numbers in the AOB.

ARGUMENT AND AUTHORITY

I.

THAT LEAD PROSECUTOR GLYNN ENGAGED IN A PATTERN OF REPREHENSIBLE AND DECEPTIVE MISCONDUCT IS SHOWN BY HIS REPEATED EFFORTS TO COMMUNICATE HIS VIEWS THROUGH THE PRESS, HIS ATTEMPTS TO CONCEAL WHAT HE HAD DONE AND HIS ADMISSION THAT HE INTENDED HIS LEAK TO REPORTER AMY BENTLEY TO BE COMMUNICATED TO THE PUBLIC SO THAT THEY WOULD KNOW WHAT SORT OF RULINGS THE TRIAL COURT WAS MAKING

In his opening brief, appellant contended that he was denied due process because lead prosecutor Glynn engaged in a pattern of misconduct by attempting to influence the jurors through the media. (AOB 58, 74.) Respondent attempts to counter that claim by asserting that "[a]ppellant has not demonstrated that the prosecutor's release of publicly available information to a reporter comprise[d] a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (RB 36, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

A. Respondent's Claim that Appellant Has Not Shown a Pattern of Misconduct Depends Upon an Unjustifiably Narrow Reading of the Record

What this court should note first about respondent's assertion that appellant failed to show a pattern of misconduct is that it disregards the

extensive discussion of Glynn's conduct set forth in appellant's opening brief. (See AOB 58-63.) On or about September 28, 1998, during jury selection in the guilt phase, Glynn gave an interview to the press in which he was quoted as saying that it took the police more than a year to solve the crime and that appellant was "guilty of murder and special circumstances." (3 RT 541-542, 596.) While discussing a potential juror, defense counsel Wiksell later told the court that:

> There was -- the record may be a little cloudy, but there was a lengthy article in the L.A. Times on Monday which outlined pretty much the entire case from the People's perspective, including some opinions of the prosecutor as to the guilt of Mr. McKinzie. I felt that he -- that this juror was so tainted by that publicity, plus the spillover from the O.J. Simpson case, that he really could not be fair at a guilt phase because of the publicity.

(5 RT 1026.)

The trial court offered Glynn the opportunity to respond to Wiksell's comment, but he declined that offer. (5 RT 1026.) Glynn did not deny that he had discussed the facts of the case and given his opinion as to appellant's guilt. Nor did he make any attempt to explain why he gave that interview during jury selection.

That this first interview with the press was an attempt to influence the prospective jurors by controlling what was disseminated to the public is shown fairly clearly by the prosecution's simultaneous efforts to prevent the dissemination of the information contained in a defense motion for

leave to elicit evidence of third party culpability. Glynn argued that defense counsel had admissibility problems with regard to appellant's third party culpability evidence. (3 RT 541.) Glynn informed the court, "I really hate to see it in the press and have the jurors read about it ahead of time." (3 RT 541.) Glynn wanted his version of the facts and his opinion about appellant's guilt disseminated and defense counsel's views suppressed.

Glynn later continued his efforts to control the information released to the public through the media. On October 26, 1998, after the third party culpability evidence was placed before the jury, Glynn and Deputy District Attorney Morgan both argued against the trial court's suggestion that it should unseal appellant's motion for leave to introduce evidence of third party culpability. Glynn noted that some or most of "those statements never came before the jury, and many of them had a lot more meat to them than the actual testimony that we heard today." Glynn expressed his concern that the statements could be "published in the press." (15 RT 2935.) Deputy District Attorney Morgan suggested to the court that the motions should remain sealed because some of the representations in the motions had been litigated and were proved to be without foundation. Morgan argued that those representations were "prejudicial in the sense that they portray the defense evidence as far stronger that it really was." (15 RT 2935.)

Roughly two weeks later, Glynn objected to a request by a television station for permission to videotape portions of the first penalty phase, arguing that the press was irresponsible. (2 CT 494-495; 19 RT 3437-3439.) Glynn agreed with defense counsel's claim that the press was not interested in gathering the truth. (19 RT 3439.) Glynn believed that granting the request for media coverage would turn the trial into a circus. (19 RT 3439-3440.)

Even under the most charitable view of these events, it is difficult to understand Glynn's conduct as being anything other than an attempt to disseminate the prosecution view of the case while attempting to prevent defense counsel from disseminating facts helpful to the defense. This first attempt to influence the case through the press occurred during guilt phase jury selection, much the same as the second attempt to influence the case through the press during jury selection in the second penalty phase trial.

Glynn did not proffer any purpose for talking to the press during guilt phase jury selection -- he was not asked to provide any justification -- despite his clearly expressed view that the press was irresponsible and not interested in the truth or his concern about the jurors reading about the defense theory of the case "ahead of time." (3 RT 541; 19 RT 3438-3439.) Neither of those concerns prevented Glynn from giving an interview to the press in which he laid out the prosecution's case and opined about

appellant's guilt. Glynn's concerns about trying the case in the press clearly were limited to concern about defense counsel trying the case in the press.

All of the facts discussed above were set out in greater detail in appellant's opening brief. (AOB 58-62.) Respondent's claim that appellant has not shown a pattern of misconduct must be dismissed by this court, because respondent has done little to acknowledge these facts. Respondent instead has chosen to begin its discussion with the material that Glynn leaked to a reporter in his second attempt to influence the jury through the press. (RB 36.)

B. Even Though the Trial Court Did Not Expressly Use the Word Misconduct, the Record Clearly Shows that the Trial Court Found that Glynn Engaged in Misconduct

Respondent notes that "[t]he [trial] court found that Glynn exercised poor judgment, but it did not find that Glynn committed misconduct." (RB 41, citing 29 RT 5804-5805; 30 RT 5811.) Respondent's claim is somewhat inaccurate. While it is true that the trial court seemingly tried to avoid expressly finding that Glynn engaged in misconduct, the court's statements and rulings show very clearly that the trial court believed Glynn engaged in misconduct. At one point during the discussion, defense counsel Wiksell argued that Glynn's leak constituted misconduct and "a violation of professional responsibility." Wiksell indicated his belief the trial court "should do something." (29 RT 5802-5803.) Wiksell asked the court to

state for the record that Glynn had engaged in misconduct. (29 RT 5803.)

The trial court did not do so. It told Glynn that it was greatly troubled that Glynn "went out of the way, your way to bring in completely unnecessary issues in the case" but did not find that Glynn had committed "technical misconduct." (29 RT 5804.) The court declined to give its "personal comments," but indicated its belief that Glynn needed to discuss with his supervisors "the fact of my view." (29 RT 5805.) The court stated that:

> The key problem here to me is that you engineered this article, knowing that there would be a major dispute as to the admissibility of this evidence. And the result is that this article is telling people that as if it is gospel, gospel. It happened and it's gospel that it is admissible. And that is clearly wrong to be bantering about, even indirectly, questionable or inadmissible evidence in the public eye. And it would be -- if it was intended to prejudice the jury, you would be subject to significant discipline.

(29 RT 5807-5808.)

The trial court ultimately excluded the evidence of appellant's outburst on several grounds, but also noted that it "would probably keep it out as a sanction for the People's action in orchestrating the newspaper article." (30 RT 5807-5808.) The following exchange then occurred:

> Mr. Glynn: Is the court saying that the court thinks I acted improperly in alerting the newspaper to read certain parts of the trial that are in the public forum?
>
> The Trial Court: Yes. I've thought long and hard about this. I've spent a few hours researching attorney ethics, reading your D.A.

> ethics manual, which I helped write several years ago. And the key point is the fact that you should have known that the admissibility of this evidence was highly questionable and would be strongly contested. And it's clearly improper to -- for an attorney to make a public statement about such evidence. And I recognize that you didn't do that, but you did indirectly what you're not allowed to do directly.

(30 RT 5809.)

This court needs only to read the first word of the trial court's response, above, to understand that the trial court in fact found that Glynn engaged in misconduct, even though the court did not use the word "misconduct." The trial court clearly held that Glynn acted improperly because Glynn "did indirectly" what he could not do directly. The fact that the trial court would have excluded the evidence as a sanction for Glynn's conduct only cements the conclusion that the trial court held that Glynn engaged in misconduct.

As noted in appellant's opening brief, communicating indirectly with the prospective jurors violated the Rules of Professional Conduct in effect at the time of appellant's trial. (AOB 76-77.) Respondent claims that the Rules of Professional Conduct appellant cited in his opening brief are not applicable because Glynn did not communicate with any prospective juror either directly or indirectly. (RB 41-42.) That claim is both contrary to the trial court's statement in open court and completely unsupported by the record. What respondent did not and cannot deny is that Glynn

communicated his views to a reporter. Those views expressed Glynn's belief that appellant was a dangerous person. Amy Bentley, the reporter to whom Glynn leaked his story, wrote an article conveying Glynn's views to the public generally, and that particular population included the prospective jurors. Glynn ultimately admitted that he intended Bentley to convey the material to the public, but claimed he did so in order to let the public know about the rulings being made by the trial court. (30 RT 5810.) It is difficult to imagine a clearer attempt to communicate with the jurors indirectly.

C. Glynn's Conduct Was Both Deceptive and Reprehensible

Respondent also claims that appellant has not shown that Glynn's actions were a deceptive or reprehensible attempt to persuade the jury. (RB 41.) Respondent argues that Glynn "readily admitted that he provided the documents to the reporter; he did not attempt to hide his conduct from the court." (RB 41.)

It is true that Glynn admitted providing the transcript to reporter Amy Bentley, but he also clearly attempted "to hide his conduct from the court." Glynn admitted providing the transcript to Bentley only after defense counsel informed the court that appellant's investigator observed Bentley come into the courtroom and talk to a bailiff on April 26, 1999. The bailiff then spoke to Glynn. Glynn bent over and picked up a transcript and gave it to the bailiff, who in turn gave the transcript to Bentley. (29 RT

5613.)

When given an opportunity to explain the circumstances of this interaction with Bentley, Glynn repeatedly lied about how Bentley came to be interested in the transcript. Glynn first told the court that "Amy Bentley asked if anything's going on in the trial" and he "directed her to the appropriate day of the transcript." (29 RT 5640.) Defense counsel Wiksell correctly described Glynn's claim that Bentley called Glynn and asked whether anything was going on as being "sugar-coated" and again suggested that Glynn deliberately communicated with Bentley because Glynn was "mindful of negative publicity." (29 RT 5643.) Wiksell asked the court what could be done about "a deliberate dissemination of material with an intent to prejudice the defendant." (29 RT 5644.)

Glynn asked to respond to that question, but he did not avail himself of the opportunity to correct his previous misstatement to the court about how Bentley came to be interested in the transcript. Glynn instead lied again, claiming that "[a] reporter called me up and asked me if anything -- in conversation with a reporter asked me if anything was going on in the McKinzie case." (29 RT 5644-5645.) Glynn protested that it was an open courtroom and claimed that Bentley "took a shortcut and asked me if anything interesting was happening." (29 RT 5645.)

Then, after further discussion, the trial court agreed with Glynn that it was possible for Bentley to have stumbled upon the information or to have gotten the information from another source, but told Glynn that he had "showed very poor judgment" by calling Bentley's "attention to this at this delicate state of the case...." Glynn again did not take this opportunity to correct his previous lies, choosing instead to again claim that "[s]he calls me up and asked me what is going on." (29 RT 5649.)

It was only later that same day that Glynn changed his story about how Bentley came to know about the incident. Glynn told the court he wanted "to clarify" his earlier claim that he had been contacted by Bentley. Glynn informed the court that he initiated the contact by calling Bentley and leaving her a message. Glynn directed Bentley's attention to the transcripts after she returned his call. (29 RT 5656.) The court asked Glynn, "So in other words, you felt the need to have this matter appear in the newspaper, is that it?" (29 RT 5656.) Glynn responded,

> I -- I communicate with Miss Bentley frequently and I brought it to her attention, yes. This is an open court. I directed her to the transcript, but I did not talk to her about it.

(29 RT 5656.)

Nor was this the end of Glynn's explanations. The trial court subsequently told Glynn that he had acted improperly. Glynn responded to that rebuke by telling the court that he believed "the public needs to know

the type of rulings that you're making with respect to shackling a dangerous, convicted murderer, and I thought that this was of interest to the public, and that's why I alerted Miss Bentley to that particular passage in the transcript." (30 RT 5810.)

Appellant acknowledges that the above paragraph shows an attempt by Glynn to justify what he had done, not an attempt to conceal what he had done. Glynn's justification is nonetheless significant, as it directly acknowledged that he was attempting to convey "to the public" both that appellant was a "dangerous, convicted murderer" and that the trial court was deficient in dealing with the danger appellant posed.

It is difficult to see why, given this sequence of events and Glynn's evolving explanations of his conduct, respondent believes that Glynn "did not attempt to hide his conduct from the court." (RB 41.) Glynn did readily acknowledge that he provided the transcripts to Bentley, but he lied to the trial court about the fact that he initiated the contact. When cornered, he tried to justify his conduct by attacking the trial court.

It also is difficult to understand why Glynn believed attacking the trial court diminished what he had done in any way, but it should not be lost on this court that Glynn's attack on the trial court necessarily depended upon dissemination of information to a reporter suggesting that appellant was a dangerous, convicted murderer. Glynn admitted that he intentionally

disseminated information for the purpose of showing that appellant was dangerous. He disseminated such information at least twice, each time during jury selection. That is a pattern of reprehensible conduct; conduct Glynn tried to conceal or minimize by lying to the court.

Respondent's claim that Glynn did not attempt to hide his conduct from the court (RB 41) is plainly and obviously incorrect. Glynn did something he knew he should not have done, and he lied to the court about what he had done when he was caught. Glynn attempted to influence the prospective jurors by placing a story about appellant in the press and he deceived the court, at least initially, when he was caught.

Attempting to influence the prospective jurors through the press is reprehensible, as is attempting to deceive the trial court. When this conduct is considered in conjunction with Glynn's earlier attempts to influence the jury by talking to the press -- while attempting to prevent defense counsel from doing the same thing -- it clearly demonstrates that Glynn engaged in a pattern of deceptive and reprehensible conduct.

D. The Prosecutorial Misconduct in this Matter Flows From Glynn's Attempts to Influence the Jury, Not From the Instrumentalities He Used in that Attempt

Respondent acknowledges appellant's reliance on this court's decision in *People v. Brommel* (1961) 56 Cal.2d 629, but argues that the discussion of prosecutorial misconduct in *Brommel* is dicta because the

court reversed Brommel's conviction on other grounds. (RB 42.) Respondent argues that the court did not find that the prosecutor's actions in *Brommel* constituted misconduct or that the prosecutor's conduct warranted reversal. (RB 42.)

Respondent's analysis is, again, only somewhat accurate. Respondent is correct in noting that Brommel's conviction was overturned on other grounds. (*People v. Brommel*, *supra*, 56 Cal.2d at p. 634.) Respondent is incorrect, however, in asserting that the court did not find misconduct in *Brommel*. The court specifically held:

> The obvious impropriety of this conduct is only emphasized by the fact that we have now determined that these statements were inadmissible against defendant on the trial. Prosecuting officers owe a public duty of fairness to the accused as well as to the People and they should avoid the danger of prejudicing jurors and prospective jurors by giving material to news-disseminating agencies which may be inflammatory or improperly prejudicial to defendant's rights.

(*Id.* at p. 636.)

The fact that Brommel's conviction actually was reversed on other grounds is not a basis for "distinguishing" *Brommel*. A case is distinguishable if there are facts in that case that render inapplicable the rule stated in that case. *Brommel* is not distinguishable on that ground, as the misconduct in *Brommel* is extremely similar to the misconduct in this matter. Much the same as in this matter, the prosecutor in *Brommel* released material to the press that was inflammatory and/or improperly prejudicial to

Brommel's rights. The only "distinguishing" fact in Brommel was that the prosecutor in *Brommel* disclosed those materials to the press "before they were admitted into evidence by the court, and even before they had been made available to defendant and his counsel." (*People v. Brommel*, *supra*, 56 Cal.2d at p. 636.)

The prosecutor in *Brommel* thus arguably had less notice than did Glynn that the materials being disclosed to the press might not be admissible. Although *Brommel* does not set forth a detailed procedural history of the prosecutor's misconduct, it is difficult to imagine that the parties had litigated the admissibility of the materials disclosed by the prosecutor given that the prosecutor's misconduct in *Brommel* took place even before the materials were disclosed to the defense. (*People v. Brommel*, *supra*, 56 Cal.2d at p. 636.) The issue was litigated in this matter before Glynn leaked his story to the press, and Glynn knew that he might not be able to obtain admission of the evidence.

It also is important to note that this court's finding of misconduct in *Brommel* did not depend upon the admissibility of the evidence in any case. *Brommel* specifically noted that the "obvious impropriety of this conduct is *only emphasized* by the fact that we have now determined that these statements were inadmissible." (*People v. Brommel*, *supra*, 56 Cal.2d at p. 636, emphasis added.) The misconduct in *Brommel*, much the same as the

misconduct in this case, rested in the disclosure of evidence to the media.

Respondent also argues that *Brommel* is distinguishable because the misconduct in *Brommel* involved the disclosure of matters that were not part of the public record. (RB 42.) This is no different than Glynn's repeated claims that he had not done anything wrong because the courtroom was open to the public. (29 RT 5640, 5644-5645, 5656.) Respondent repeats these claims, but does not explain why respondent believes that use of a public record to influence a jury is any less reprehensible than would be the use of non-public records. (RB 41.) Appellant submits that the offense consists of the attempt to influence the jury, not the instrumentality used to achieve that goal.

Respondent argues that appellant's attempt to demonstrate that Glynn acted with improper motivation in providing the transcripts to Bentley is little more than speculation. (RB 43.) Respondent specifically dismisses appellant's reference to the *Holland* matter, a capital case tried by Glynn and Wiksell immediately before this trial in which Glynn obtained only life without parole against Holland. (RB 43.)

Respondent's position is untenable because it disregards much of the history between Wiksell and Glynn. As every trial attorney knows, proof of what is in an individual's mind often depends primarily or entirely upon circumstantial evidence. As noted in appellant's opening brief, Glynn's

"defeat" in *Holland* clearly was on his mind as he went into this trial, as shown by the motion to limit Wiksell's penalty phase argument filed by Glynn on November 6, 1998. (2 CT 473-484.) This motion contained a laundry list of "wrongs" committed by Wiksell during *Holland* and one other matter, *People v. Sattiewhite*, tried roughly four years before appellant's trial. (2 CT 479-480.)

Respondent may be correct that positing what is in the mind of another person may verge on being speculative (RB 43), but this is no more true than most cases in which a jury is asked to determine whether a defendant harbored a specific intent or other specified mental state based on circumstantial evidence. The difference between speculation and reasonable inference in this context probably boils down to whether the conclusion is reasonable in light of the evidence.

There should be no question but that the inferences being urged by appellant are reasonable. What should be clear to this court is that Glynn provided content to the press twice during jury selection, discussing facts from the case and giving his opinions regarding the case. Glynn's state of mind in speaking to the press during guilt phase jury selection is shown by his statements of scorn and distrust toward the media and by his concurrent attempts to prevent defense counsel from disclosing defense-friendly facts to the media. Glynn's state of mind in speaking to the press during jury

selection in the second penalty phase is shown by his efforts to conceal or justify what he had done. Glynn's overall motivation is shown by his repeated references to purported wrongdoings by defense counsel Wiksell in the *Holland* case, in which Wiksell "prevailed" by obtaining a verdict of life without parole.

Respondent argues that appellant's claim that Glynn's conduct deprived him of a fair opportunity to evaluate jurors who were qualified to serve but for their exposure in the media should be disregarded because defense counsel Wiksell "did not feel that the conduct was severe enough to request a mistrial" because Wiksell believed mistrial or repeating jury selection were not proportional. (RB 43-44.) Respondent's position is flawed for two reasons. First, Wiksell's assessment of the prejudice, as posited by respondent, is not entitled to any more deference from this court than is Glynn's stated belief that what he did was proper. The evaluation of prejudice is for this court.

Second, respondent's characterization of Wiksell's evaluation of the prejudice that flowed from Glynn's misconduct provides a strikingly incomplete view of Wiksell's position. The comments by Wiksell relied upon by respondent occurred *before* Glynn "clarified" his repeated false claims that Bentley contacted him. After Glynn came clean, Wiksell informed the trial court that he continued to be bothered by Glynn's

deliberate leak to the press. (29 RT 5802.) Wiksell argued that the prejudice from the article was so great that a juror who was "on the fence" could be "put over the edge." (29 RT 5802.) Wiksell argued that Glynn's leak constituted misconduct and "a violation of professional responsibility." Wiksell indicated his belief the trial court "should do something." (29 RT 5802-5803.)

In the end, the trial court effectively declined Wiksell's request that it "do something" about Glynn's misconduct. The trial court excluded the evidence of appellant's purported threats for several reasons, but it did so on evidentiary grounds. The court did not believe appellant's statements were sufficient to prove a violation of Penal Code section 422. The court also took into consideration the circumstances in which the purported threats arose and found that appellant was simply blowing off steam. The court further excluded the evidence under Evidence Code section 352, finding that the evidence presented a danger of confusing the jury and would cause an undue consumption of time. (30 RT 5807-5808.)

The trial court's statement that it "would probably keep it out as a sanction for the People's action in orchestrating the newspaper article" (30 RT 5808), was both an acknowledgment that Glynn committed misconduct and a clear indication that the court believed Glynn's misconduct merited a sanction. Glynn's conduct constituted prosecutorial misconduct under the

United States and California Constitutions. The penalty phase verdict in this matter must be reversed both because Glynn's misconduct directly and adversely impacted appellant's rights to jury trial and confrontation under the United States Constitution and because it so infected the trial with unfairness as to make the resulting conviction a denial of due process.

II.

COMPARATIVE ANALYSIS IS APPROPRIATE AND REQUIRED IN THIS MATTER BECAUSE THIS COURT MUST CONSIDER ALL AVAILABLE CIRCUMSTANCES IN EVALUATING WHETHER THE PROSECUTION EXERCISED A PEREMPTORY CHALLENGE FOR RACIALLY MOTIVATED REASONS

Respondent has made no effort whatsoever to counter the comparative analysis set forth in appellant's opening brief, arguing instead that the fact that the trial court and parties did not engage in comparative analysis precludes appellant and this court from engaging in comparative analysis on appeal. Respondent wrote:

> Thus, appellant's argument fails because this Court has held that it is not required to undertake a comparative juror analysis for the first time on appeal where the trial court finds that the defense failed to make out a prima facie case.

(RB 51-52, citing *People v. Bell* (2007) 40 Cal.4th 582, 600-601; *People v. Bonilla* (2007) 41 Cal.4th 313, 349-350.)

Appellant's response to this contention is fairly straightforward. The authority cited by respondent no longer is valid. In *People v. Lenix* (2008) 44 Cal.4th 602, this court held that decisions of the United States Supreme Court compelled the conclusion that refusal to conduct comparative analysis for the first time on appeal "unduly restricts review based on the entire record." (*Id.* at p. 622.) Based on that conclusion, the court held:

> Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on

> appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.

(*Id.* at p. 622, citing *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] and *Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 120, 170 L.Ed.2d 175]; see also *People v. Lomax* (2010) 49 Cal.4th 530, 572.)

Respondent's reliance on *Bell* and *Bonilla* also is misplaced. Respondent argues that *Bonilla* stands for the proposition that comparative analysis is not required because "whatever use comparative analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and [this Court should] thus decline to engage in comparative analysis." (RB 52, quoting *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 349-350.)

Respondent accurately quotes *Bonilla*, but does not provide a full and clear picture of what this court did in *Bonilla*. The court rejected Bonilla's attempt to engage the court in comparative analysis for two reasons. First, the court found that Bonilla forfeited his ability to rely upon comparative analysis because he first argued that comparative analysis should be employed in his reply brief. (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 349-350.) The court then held, relying on *Bell*, that comparative analysis has little or no use in a first-stage case because "the analysis does

not hinge on the prosecution's actual proffered rationales." (*Ibid.*)

Respondent would characterize *Bell* and *Bonilla* as establishing a hard and fast rule that comparative analysis is not appropriate "where the trial court finds that the defense failed to make out a prima facie case." (RB 51-52.) That is incorrect, as what *Bell* really stands for is the proposition that comparative analysis is not appropriate or possible if the reasons for the challenge, and the trial court's ruling on the challenge, are not set forth in the record. In *Bell*, the defendant asked the court to reconsider its previous reluctance to engage in comparative analysis for the first time on appeal. (*People v. Bell*, *supra*, 40 Cal.4th at p. 600.) The court declined to do so, finding that *Miller El v. Dretke* did not mandate comparative analysis under the particular facts in *Bell* because "the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any." (*Id.* at pp. 600-601.) The court held that there was "no fit subject for comparison" and held that "comparative juror analysis would be formless and unbounded" because "no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court." (*Id.* at p. 601.)

Those factors obviously are not in play in this matter. The trial court in this matter asked the prosecution to provide justification for the challenge of prospective juror Kelvin Smith. (10 RT 1985.) The prosecutor

provided justifications and the trial court accepted those justifications. (10 RT 1985-1986.) Those justifications must be reviewed on appeal based on an analysis of "all of the circumstances that bear upon the issue of racial animosity." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622, quoting *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 1208.)

The fact that the trial court in this matter declined to find a prima facie case does not mean that the prosecutor's justifications or the trial court's rulings are not part of "all of the circumstances that bear upon the issue of racial animosity." Of necessity, that means this court must consider and compare the responses of the jurors accepted by the prosecution to the justifications offered by the prosecution for its challenge to prospective juror Kelvin Smith.

Appellant has provided such an analysis to this court, showing that the prosecution in this matter retained several jurors whose hobbies and lifestyles were similar to hobbies and lifestyles that purportedly prompted the prosecution's challenge to Smith. Respondent has declined to respond to that analysis, and that refusal is based on apparent misunderstanding of the law with regard to the use of comparative analysis. Respondent's refusal to address appellant's comparative analysis has left that analysis unrebutted.

Respondent also has left other aspects of appellant's argument unaddressed. For example, respondent did not address or dispute appellant's assertion that "[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8; *People v. Silva* (2001) 25 Cal.4th 345, 386.) Nor has respondent addressed appellant's claim that the prosecution's minimal questioning of Smith demonstrated that the justification for the challenge was pretextual. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246, quoting *Ex parte Travis* (Ala. 2000) 776 So.2d 874, 881.) Respondent simply asserts that the trial court's ruling should be accorded deference by this court.

Appellant submits that respondent's failure to adequately address these points should be deemed by this court to be a concession of the validity of appellant's positions, and a concession that comparative analysis demonstrates that the prosecutor's justifications for the challenge to prospective juror Smith were pretextual. Appellant's convictions must be reversed.

III.

THE FACT THAT A PROSPECTIVE JUROR IS AMBIVALENT TOWARD THE DEATH PENALTY DOES NOT MEAN EITHER THAT THE JUROR HAS PROVIDED CONFLICTING OR AMBIGUOUS RESPONSES ON THE ISSUE OR THAT THE JUROR'S AMBIVALENCE WILL SUBSTANTIALLY IMPAIR THE JUROR'S DISCHARGE OF HIS OR HER DUTIES

In his opening brief, appellant argued that the trial court erred by granting a number of cause challenges by the prosecutor. Respondent presses a two-pronged response to appellant's arguments. Respondent first claims that this court must defer to the trial court's rulings because, according to respondent, the responses of the jurors were equivocal or conflicting. (RB 53; quoting *People v. Ghent* (1987) 43 Cal.3d 739, 768 and *People v. Jones* (1997) 15 Cal.4th 119, 164.) Respondent also asserts that the trial court's rulings must be upheld by this court even if the jurors' responses were not equivocal or conflicting because they were supported by substantial evidence. (RB 53, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1285.)

As will be discussed more fully below, respondent's efforts to find conflict or equivocation in the jurors' responses is unavailing and, to a large degree, off point. Virtually all of the jurors discussed in this argument did little more than express their appropriate awareness of the enormity of the decision they would be asked to make if selected for service. All of them

expressed their willingness to set aside their beliefs and follow the court's instructions. None of them suffered a substantial impairment of their ability to discharge their duties as jurors as a result of their beliefs.

A. Prosecution Cause Challenges Granted by the Trial Court

Prospective Juror Frances Texeira

Respondent argues that Texeira gave conflicting and ambiguous responses regarding her views on the death penalty and whether she could vote to impose it. (RB 55.) In fact, there is absolutely nothing inconsistent or ambiguous about Texeira's statements. She consistently expressed both that the death penalty is appropriate under certain circumstances and that it would be a difficult decision for her. On her juror questionnaire, Texeira wrote that death was appropriate for premeditated murder and murders involving torture or the excessive infliction of pain on the victim. Texeira indicated she was not sure of her general feelings about the death penalty and that it depended on the circumstances in each case. She believed there were cases where she "thought it right." (13 CT 3661.) Texeira indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (13 CT 3662.) Texeira indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (13 CT 3663.)

During voir dire, Texeira informed the court she could vote for death under the right circumstances and would not automatically vote for life without parole. (28 RT 5534, 5542.) Texeira believed there are times when the death penalty is the only just punishment. (28 RT 5532.) She nonetheless could not say whether she would be fair. She would not be comfortable making a decision. (28 RT 5530, 5532-5533.) She believed that someone had to make the decision, she just didn't want the responsibility. (28 RT 5533, 5535.)

Respondent argues for deference to the trial court's ruling on the basis that Texeira's answers were ambiguous or conflicting. This court cannot and should not defer, however, both because there was nothing ambiguous or conflicting in Texeira's responses, and because the trial court applied the wrong standard. The trial court granted the People's challenge for cause because the court felt Texeira could not "assure us in any way that she could ever vote for it and that she said similar things in the questionnaire as well." (28 RT 5543.)

As noted above, that is the wrong standard. The circumstance that a juror's "conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469

U.S. 412." (*People v. Solomon* (2010) 49 Cal.4th 792, 832-833, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 447; *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841].) Even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].) In *People v. Stewart, supra,* 33 Cal.4th at 446, this court recognized that

> In light of the gravity of [the death penalty], many persons are likely to have conscientious views that make it difficult for them to impose such a sentence. Thus, "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled -- indeed, duty-bound -- to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

(*Ibid.*; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776].)

Prospective Juror Edwin Todd

Respondent also claims that the trial court's ruling on Edwin Todd must be given deference because Todd's answers were conflicting and ambiguous. (RB 56-57.) Respondent is again wrong in characterizing Todd's responses, as they were consistent throughout the voir dire process. There again can be no doubt that Todd was conflicted about the death

penalty, but there also should be no question but that his expression of those views was anything but conflicting or ambiguous. Todd felt that the death penalty was imposed "about right." (13 CT 3709.) Todd circled the number "eight" on question number 52.[1] (13 CT 3711.)

There is absolutely nothing about Todd's responses that was ambiguous or inconsistent. The fact that he was concerned about innocent people being convicted and sentenced to death (13 CT 3709) was not a basis for disqualification in and of itself. (*People v. Cowan* (2010) 50 Cal.4th 401, 444; *People v. Stewart*, *supra*, 33 Cal.4th at p. 449.) Todd told the trial court that he "firmly believe[d] in the death penalty" and confirmed that he could impose it in an "extreme" case. Todd gave "murder and child molestation" and "serial" as examples. (28 RT 5580-5581, 5585.) Todd wrote that he did not have any feelings that were so strong that he would always vote for or against the death penalty. (13 CT 3710.) Todd simply would have reached his decision whether appellant should be put to death based on "what plays out in court." (28 RT 5583.) Todd indicated that he would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (13 CT 3711.)

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[1] Question number 52 on the questionnaire completed by the second panel presented prospective jurors with a sliding scale of one to ten, with the number one indicating strong opposition to the death penalty and number ten indicating strong support for the death penalty.

Todd's responses informed the trial court that he had problems with the death penalty, but they also informed the trial court that he would consider voting for death based on the evidence presented by the People. Jurors who are capable of following the law regarding penalty are death-qualified notwithstanding their personal beliefs about the death penalty. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [error to excuse for cause a prospective juror who was personally opposed to the death penalty, but who was "nonetheless[] capable of following [her] oath and the law"].) Even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.) Todd repeatedly gave the trial court precisely such assurances.

Respondent's effort to find conflicts or ambiguity in Todd's statements should be recognized for what it is, namely, an effort to get this court to defer to a decision that deserves no deference. There was nothing ambiguous or inconsistent about Todd's responses. Todd may have been troubled by the death penalty in the abstract, but he would be able to vote for death in appropriate circumstances. There was nothing about Todd's views that would have substantially impaired him in his duties as a juror. The trial court, in granting the cause challenge, certainly did not specify

why it believed Todd's views would substantially impair Todd's performance of his duties. In fact, the trial court did not give any reasons for its ruling.

Prospective Juror Frances Rios

Respondent argues that Rios' "responses support the trial court's finding that her views on the death penalty would prevent or substantially impair her performance as a juror." (RB 58.) Respondent does not argue that Rios' responses were uncertain or ambiguous, instead focusing its efforts on an attempt to show that the trial court's ruling was supported by substantial evidence. (RB 57-59.) Respondent notes that even the prosecutor acknowledged that Rios "never said that she could impose the death penalty, only that she would consider it." (RB 58.) Respondent also acknowledges the trial court's observations that Rios was willing to determine penalty based on the facts and that Rios' responses were "somewhat neutral." (RB 58.) Respondent's argument fails, however, because respondent also acknowledges that the trial court granted the prosecutor's cause challenge because the court did not "see [Rios] being open within the *Witt* criteria." The trial court stated,

> In light of the answers, which admittedly they are somewhat neutral, but they are just, compared to all of the other questionnaires, they are not what we see on somebody that is open. She is not sure about the death penalty in particular in the sense of not sure she could vote for it, is how I read it. All things considered, I'm not sure she could ever vote for it.

(RB 58, citing 29 RT 5684.)

The trial court's ruling was a misapplication of the law. The trial court's uncertainty that Rios "could ever vote for it" is not the same thing as a finding that Rios' views on the death penalty would substantially impair Rios in the discharge of her duties as a juror. The fact that Rios may have been emotional about the decision she would have been asked to make as a juror was not a basis for such a finding.

Nor were the trial court's findings supported by substantial evidence in any case. On her juror questionnaire, prospective juror Frances Rios wrote that she had "no feelings one way or the other" about the death penalty, depending on the type of crime and the circumstances. (12 CT 3389.) She also wrote that she did not have any feelings that were so strong that she would always vote for or against the death penalty (12 CT 3390) and she circled the number "five" on question number 52. (12 CT 3391.) Rios did not belong to any groups that advocated either the increased use or abolition of the death penalty and did not have any religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty. (12 CT 3391-3392.) Rios indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (12 CT 3391.)

During voir dire, Rios indicated she was not 100% opposed to the death penalty. She was wide open to either penalty. (29 RT 5663.) She could impose the death penalty in an appropriate case but would want to know more about the facts before she decided on the penalty. (29 RT 5663-5664.) She would have an open mind and listen to all of the evidence. (29 RT 5665.) She would vote either for life without parole or for death depending on what was appropriate. (29 RT 5665-5666.)

Rios did not know whether a person who killed only one person should get death but would consider voting for death in such a situation if the case involved awful facts. (29 RT 5668.) Rios did not know whether she would be strong enough to vote for death until she heard the evidence. (29 RT 5669, 5677.) She believed she was strong enough to vote for death, but would not want to be put into the position of voting for death for appellant and probably could not do it because she did not know enough about it. (29 RT 5669-5671.) She would not want the responsibility. (29 RT 5671.) These responses are not equivocal in any way. Nor do they indicate that Rios would not be able to discharge her duties after due consideration of the evidence.

Respondent asserts that Rios' responses are similar to the responses of jurors in *People v. Holt* (1997) 15 Cal.4th 619, 652-653 and *People v. Wash* (1993) 6 Cal.4th 215, 255, claiming that Rios "repeatedly could not

answer either the trial court or the attorneys' question about actually imposing the death penalty, and instead only stated that she would consider it." (RB 58.) Appellant sees no such similarities. The juror in question in *Holt*, Erlinda Jones, gave equivocal responses to questions whether she could vote for death. (*People v. Holt*, *supra*, 15 Cal.4th at p. 653.) As noted by this court, Jones

> repeatedly expressed inability to state whether she could vote for death. The closest she came to even implying that she might be able to impose the death penalty was an affirmative answer when asked if she would have great difficulty in doing so.

(*Ibid.*)

Prospective juror Rios' responses may not have been pleasing to the prosecution in this matter, but they were not equivocal and Rios did not have any trouble expressing whether she could, in an appropriate case, vote for death. Defense counsel elicited the following during Rios' examination:

> Defense Counsel: Okay. So you are not totally 100 percent opposed to capital punishment, are you?
>
> Rios: No.
>
> Defense Counsel: All right. In the appropriate case, those are the key words, right? I mean, I'm not talking about putting to death a shoplifter.
>
> Rios: No.
>
> Defense Counsel: In the appropriate case that is an option that you could impose, fair enough?

Rios: Yes.

(29 RT 5663.)

Respondent does not acknowledge this exchange, much less explain how this exchange can be squared with respondent's claim that Rios had any difficulty in stating whether she could vote for death. Nor has respondent identified any specific portions of the record in support of its claim that Rios "repeatedly could not answer either the trial court or the attorneys' question about actually imposing the death penalty, and instead only stated that she would consider it." (RB 58.) To be sure, Rios told the prosecutor that she could not respond to whether a person should be put to death for a single murder, but that that statement was not unqualified. What Rios actually said repeatedly was that she could not respond to the question without first hearing the facts:

> The prosecutor: Now knowing yourself as you do, do you think that you are a strong enough person to impose the death penalty against somebody who had committed one murder?
>
> Prospective Juror Rios: Well, I haven't heard the evidence so I could not make a judgment on that. I don't know how the other people decided that.
>
> The prosecutor: I'm not trying...
>
> Prospective Juror Rios: I mean, you know.
>
> The prosecutor: I'm not trying to ask you to guess what you would do in this case. But what I am trying to find out is you have told us that you have thought that the appropriate -- that the appropriate case for the death penalty would be a serial murder. And we already

know that Mr. McKinzie only committed one murder, right?

Prospective Juror Rios: (moves head up and down)

The prosecutor: So what I am trying to find out is do you ever see yourself imposing the death penalty on somebody who only committed one murder?

Prospective juror Rios: I can't make that decision. I don't know. I don't know the evidence. I can't just say I will because -- just because somebody else voted on it.

The prosecutor: Well, do you feel that -- let's say -- let's say in your heart you feel that the death penalty is appropriate. Do you think that you could impose it on another human being?

Prospective Juror Rios: Yes.

(29 RT 5669-5670.)

The need for more facts or information also was at the heart of Rios' statement to the prosecutor that she "probably" could not vote for death. That statement was made during the following exchange:

The prosecutor: Okay. Well, you told us -- and don't get me wrong ma'am. Your -- your view points and your feelings, there's absolutely nothing wrong with them. I mean, you are entitled to how you feel. And a lot of people have sat in the jury box and told us that they support the death penalty. They circle a 10. They are very supporting of the death penalty. But then when we get down to say, "Well, could you personally impose the death penalty on another human being?" They say, "I couldn't do it." Do you fall in that category?

Prospective Juror Rios: It all depends on the crime. I don't -- maybe. In this situation I probably couldn't do it.

The prosecutor: I'm sorry. What did you say?
Prospective Juror Rios: I don't think in this situation I could do it.

The prosecutor: Now what about this situation makes it unique to you?

Prospective Juror Rios: Well, I don't know enough about it.

(29 RT 5670-5671.)

It's difficult to understand why respondent thinks this is "similar" to Jones' responses in *Holt*. Rios may have been emotional during voir dire, but she clearly and unequivocally told defense counsel that she could impose the death penalty in an appropriate case, and she had no trouble taking or stating that position. The only possible exchange in support of respondent's position had to do with the juror's lack of knowledge about appellant's case, not about her ability to vote for death in the appropriate case.

Nor was there anything on Rios' questionnaire that supported respondent's claim that Rios "repeatedly could not answer either the trial court or the attorneys' question about actually imposing the death penalty, and instead only stated that she would consider it. (RB 58.) Rios wrote that she had "no feelings one way or the other" about the death penalty, depending on the type of crime and the circumstances. (12 CT 3389.) Rios indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (12 CT 3391.)

Rios believed the death penalty would be appropriate for serial killers like Jeffrey Dahmer. (29 RT 5668.) She did not know whether a person who killed only one person should get death but would consider voting for death in such a situation if the case involved awful facts. (29 RT 5668.) Rios did not know whether she would be strong enough to vote for death until she heard the evidence. (29 RT 5669, 5677.) She believed she was strong enough to vote for death, but would not want to be put into the position of voting for death for appellant and probably could not do it because she did not know enough about it. She would not want the responsibility. (29 RT 5669-5671.)

There simply were no similarities between Rios' responses and the responses given by prospective juror Jones in the *Holt* case. Rios answered the questions asked of her both on the questionnaire and during voir dire. Respondent's effort to find similarity to the juror in *Holt* is unavailing.

The *Wash* decision provides even less support for respondent's claims. *Wash* concerned two jurors, Williams and Rhoy. (*People v. Wash*, *supra*, 6 Cal.4th at p. 255.) This court upheld the challenge to Williams because she "stated that she would not under any circumstances impose death unless the defendant had a long history of prior violence." (*Ibid.*) The court held that it was "clear that Ms. Williams's rigid views would substantially impair her ability to follow the law and perform her duties."

(*Ibid.*)

There was absolutely nothing rigid about Ms. Rios' views. She simply needed more information before she could make the decision between death and life without parole. That is something that should qualify a person for service on a capital case. It is not a reason to excuse a juror for cause.

Nor does the basis for excusing prospective juror Rhoy in *Wash* support respondent's position. This court held that Rhoy's responses were equivocal and noted that "she consistently responded, 'I don't know' in answer to the question whether she was capable of voting for death if all the evidence indicated that it was the appropriate sentence." (*People v. Wash*, *supra*, 6 Cal.4th at p. 255.) As noted above, prospective juror Rios' responses were not equivocal. She indicated that she could in fact vote for death in an appropriate case. (29 RT 5669-5670.)

Prospective Juror Richard Howie

Prospective juror Richard Howie probably presents the closest case for this court's consideration, but appellant does not concede that Howie was challenged properly. Howie certainly felt that the death penalty was wrong, but he also indicated a willingness to set aside his belief. Howie wrote that he did not have any feelings that were so strong that he would always vote for or against the death penalty. (11 CT 2958.) Howie also

indicated that none of his convictions were very strong. It would be hard but not impossible for him to vote for death if 11 other jurors felt that death was the only fair punishment. (11 CT 2958.) He would have to think long and hard before he could vote for death. (11 CT 2958.) He believed he was open to both sides. (11 CT 2958.)

During voir dire, Howie told the court he could vote for death if he thought it was appropriate. (29 RT 5770.) Howie indicated he was not strongly for or against the death penalty. (29 RT 5764.) He would not have a problem voting for death as a juror even though he was against the death penalty in principle. (29 RT 5762-5763, 5766.) He believed he could weigh both options. His decision would depend on how the case was going. (29 RT 5764.)

Prospective Juror Rose Charles

Respondent argues that the prosecutor's cause challenge to prospective juror Rose Charles was properly sustained because Charles gave conflicting responses as to whether she could impose the death penalty. (RB 61.) Once again, this is both an incomplete characterization of Charles' responses and an application of the wrong standard. Respondent seemingly insists on characterizing anything showing an awareness of the enormity of the task as equivocation. On her juror questionnaire, prospective juror Rose Charles indicated that she was for the death penalty

before she was called as a juror for this case, but had come to feel that the "fate of someone's life might be different in this matter." Charles wrote that it depended on the evidence. Charles thought the death penalty was appropriate for brutal murders. In response to the question asking whether she felt the death penalty was imposed too often, not often enough or about right, Charles checked "about right." (9 CT 2365.)

Charles indicated that she did not have any feelings that were so strong that she would always vote for or against the death penalty. (9 CT 2366.) Charles indicated that her views on the death penalty had changed over time. She always thought everyone was good when she was growing up. As she had grown older life had shown her that there are many cruel things. (9 CT 2365.) Charles circled the number "eight" on question number 52. (9 CT 2367.) Charles did not belong to any groups that advocated either the increased use or abolition of the death penalty. (9 CT 2367.) Charles did have religious beliefs that would make it difficult for her to sit in judgment of another person or on a jury considering the death penalty, but she believed she could be open-minded. (9 CT 2367-2368.) Charles indicated that she would listen to all of the evidence and instruction and give honest consideration to both penalties before reaching a decision. (9 CT 2367.)

During voir dire, Charles admitted she had mixed feelings about the death penalty. (27 RT 5250.) She wrote that she was for the death penalty before she was involved but admitted it might be a difficult for her to do it personally. (27 RT 5256.) Charles believed she probably would vote for death if the crime was brutal and there was no remorse. (27 RT 5250.) Charles claimed she had not made up her mind and was not leaning one way or the other. (27 RT 5253-5255.) Charles believed she could apply the law but, when asked by the trial court, also indicated that she did not feel like she could vote for death. (27 RT 5255, 5258.)

Difficulty with the decision whether to impose death is not a disqualifying fact. "Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fn. 8; see also *Eddings v. Oklahoma* (1982) 455 U.S. 104, 127 [102 S.Ct. 869, 71 L.Ed.2d 1], dis. opn. of Burger, J. ["It can never be less than the most painful of our duties to pass on capital cases"]; *McGautha* v. *California* (1971) 402 U.S. 183, 208 [91 S.Ct. 1454, 28 L.Ed.2d 711] [recognizing the "truly awesome responsibility of decreeing death for a fellow human being"].) The pain or extreme difficulty that inheres in the decision to execute another human being simply does *not* establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties.

Prospective Juror Dolores Keim

Respondent argues that the trial court's ruling on prospective juror Keim was supported by substantial evidence. (RB 63.) While there is no doubt that Keim probably was one of the most resistant of the prospective jurors to the death penalty, it also is true that Keim was perhaps the most thoughtful of the prospective jurors with regard to the enormity of the decision she would be asked to make as a juror. During voir dire, however, Keim denied she was absolutely against the death penalty. (26 RT 4962.) Keim told the court she might be able to vote for death, but it would have to be a tremendous, heinously demented crime for her to vote for death. She would have to feel that there is no hope of salvation or rehabilitation. (26 RT 4952-4953.) Keim told the prosecution that it was obvious that she would vote for death, "but it would have to be extreme circumstances." (26 RT 4958, 4961.)

Keim indicated she had given her position a lot of thought since hardship and would follow the law -- and return a death verdict -- even if she disagreed with it. (24 RT 4960-4962.) She had lived her life as a good citizen and did not want to be in a position to vote either for life without parole or the death penalty, but also recognized that it was her responsibility as a citizen. (26 RT 4956.) Keim assured the court she would try to be open-minded even though she was leaning toward life without

parole. (26 RT 4952.)

Many of Keim's statements could very well have come from decisions of this court and of the United States Supreme Court. The fact that Keim leaned toward life without parole was not a reason for a cause challenge any more than would be the case if Keim leaned toward death. The question is not the leanings of the juror, it is whether the juror's beliefs would substantially impair the juror in the discharge of her duty.

The Remaining Challenges

Appellant respectfully submits that the merits of the prosecutor's challenges for cause to Ilse Lopez, Roscoe Barger and Linda Galvan, and the denial of appellant's cause challenge to Juror Number Three, are adequately addressed in appellant's opening brief. What this court should note, both about the trial court's rulings and respondent's efforts to provide support for those rulings, is that the prospective jurors' ability to discharge their duties was not substantially impaired by their views on the death penalty. The trial court actually did not make such an express finding in granting several of the prosecutor's cause challenges. To the extent that such a finding may be implied by the words used by the trial court, this court must hold that the trial court's findings are not supported by the facts.

B. Appellant's Death Sentence Must be Reversed

Appellant recognizes that "a trial court's rulings on motions to exclude for cause are afforded deference on appeal," (*People v. Stewart*, *supra*, 33 Cal.4th at p. 251), but deferential consideration does not mean that such rulings are immune from review or that they should be upheld even when erroneous. (See, e.g., *People v. Harvey* (1984) 151 Cal.App.3d 660, 667 ["notwithstanding the deference to be afforded the trial court's resolution of credibility conflicts, this court should not rubberstamp a decision of the trial court when the totality of the circumstances indicates the court's discretion has been abused"]; *Uttecht v. Brown* (2007) 551 U.S. 1, 20 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment"].)

As noted above, respondent's attempts to justify the trial court's rulings in this really are little more than an attempt to confuse honest and genuine expressions of the difficulties inherent in voting for the death penalty with inconsistency or equivocation. While some of the prospective jurors discussed above clearly were less inclined to vote for death than others, it also should be beyond dispute that their ability and willingness to

follow the law was not substantially impaired by their views.

The erroneous exclusion of a single juror because of his or her opposition to the death penalty is reversible error per se and is not subject to harmless error analysis. (*Gray* v. *Mississippi* (1987) 481 U.S. 648, 668 [107 S.Ct. 2045, 95 L.Ed.2d 622].) By erroneously granting the prosecution's cause challenges, and by retaining Juror Number Three, the trial court artificially created a death prone jury, which violated appellant's due process rights and undermined the reliability of the verdict. (U.S. Const., amends. VI, VIII & XIV; Cal. Const., art. I, §§ 7, 15.) Appellant's death sentence must be reversed.

IV.

CAREFUL REVIEW OF THE RECORD SHOWS THAT EITHER JUROR NUMBER FOUR OR JUROR NUMBER SEVEN WAS EXPOSED TO EXTRANEOUS INFORMATION

Respondent argues that the statements memorialized by the trial court -- both appellant's indication of a desire to "sock" Glynn and appellant's statement that he had nothing to lose -- presumably occurred as prospective juror Ikeida was leaving the courtroom. (RB 74, 76.) That is nothing more than speculation, and it is unsupported by the record. As discussed in more detail below, after Ikeida left the courtroom appellant twice said, "I'll tear his head off" in a voice loud enough for the court reporter to hear and include the statement in the record. (25 RT 4899.)

The reporter's transcript indicates that these statements were made both after Ikeida left the courtroom and after appellant engaged in a discussion with counsel. (25 RT 4899.) The reporter did not include any statements indicating that appellant wanted to sock Glynn or that appellant had nothing to lose, and respondent has done nothing to explain to this court why the reporter would have heard appellant say that he would tear off Glynn's head but not statements indicating that he wanted to sock Glynn and had nothing to lose.

Unfortunately, the trial court did not make the record as to precisely when appellant stated that he wanted to sock Glynn and that he had nothing

to lose. The uncertainty as to when appellant made the statements memorialized by the trial court during the chambers conference is important. According to the trial court's minute order for April 21, 1999, the afternoon session began at 1:42 p.m. (3 CT 701) and the court declared a recess until 3:00 p.m. -- after prospective juror Roman was excused -- at 2:46 p.m. (3 CT 702.)

Deputy Smith's report indicates that she was approached by Deputy Ortiz "at approximately 1430 hours" while she was escorting prospective jurors in and out of the courtroom. (2 Clerk's Transcripts of Exhibits 488.) Using the same language used by the trial court in making the record as to appellant's statements, Ortiz told Smith that appellant had been overheard saying, "I have nothing to lose." (2 Clerk's Transcripts of Exhibits 486, 489.)

Despite the trial court's failure to make a record as to when appellant stated that he wanted to sock Glynn and had nothing to lose, it still is possible to discern which of the jurors may have been exposed to extraneous information. Afternoon session commenced with 10 prospective jurors in the courtroom. (25 RT 4855.) After providing a brief overview to the prospective jurors, the court excused all but one of them and *Hovey* examination began. (25 RT 4857.)

Prospective juror Segarra was excused for cause after a very brief examination by the court. The prosecution did not ask any questions of Segarra or otherwise refer to appellant as "that man" during Segarra's examination. (25 RT 4857-4858.)

Prospective juror Alfred Gonzalez was then excused for cause after an even shorter examination by the court. The prosecution did not refer to appellant as "that man" during Gonzalez's examination. (25 RT 4859-4560.)

Prospective juror John McCarter was then excused for cause after a short examination by the court. The prosecution did not refer to appellant as "that man" during McCarter's examination. (25 RT 4860-4862.)

Sonia Sharp was the next prospective juror to be examined. (25 RT 4862-4873.) During her examination of Sharp, Deputy District Attorney Morgan referred to appellant as "this man over here" and apparently gestured toward appellant while asking Sharp if she believed she could vote for a death sentence after getting to know appellant as a person and hearing about his family and his life. (25 RT 4872.)

Juror No. 7 then entered the courtroom. (25 RT 4873.) The following exchange occurred during Deputy District Attorney Glynn's examination of Juror No. 7:

> Glynn: We've still talked about some imaginary person. If you were a juror on this case you would be sitting in the courtroom with that

> man over there (indicating) sitting at the far table. The man with the striped shirt.
>
> Juror No. 7: Uh-huh.
>
> Glynn: You would have eye contact with him. You would hear about his family. You would hear about him. And by the end of the trial you would get to know him as another human being.
>
> Juror No. 7: All right.
>
> Glynn: Again, same question only now a lot more personal. If you felt the death penalty was the appropriate punishment, could you impose it on that man over there (indicating)?

(25 RT 4882.)

It was immediately after Juror No. 7 left the courtroom that defense counsel Wiksell informed the court both that appellant had objected to being referred to as "that man" during the first trial and that appellant was "getting a little irritated" because he felt he was being demeaned. (25 RT 4884.)

There was a brief discussion of the issue, after which Juror No. 4 entered the courtroom. (25 RT 4888.) During her examination of Juror No. 4, Deputy District Attorney Morgan asked:

> And you will be sitting across from this man over here (indicating) in the striped shirt. You will have eye contact with him. You will get to hear about Mr. McKinzie's life. You will hear, probably, from members of his family. And at the end of this trial we'll ask you to impose a death verdict.

(25 RT 4896.)

Prospective juror Denise Ikeida was the next prospective juror to be examined. (25 RT 4897.) Ikeida was excused for cause after only a brief examination by the court. The prosecution did not ask Ikeida any questions. (25 RT 4897-4899.) It was after Ikeida left the courtroom that appellant twice said, sufficiently loud for the court reporter to take it down, "I'll tear his head off." (25 RT 4899.)

Prospective juror Rosalie Roman was the next prospective juror to be examined. (25 RT 4899.) At 2:46 p.m., a recess was taken until 3:00 p.m. because no other jurors were present and available for examination. (3 CT 702; 25 RT 4903-4904.)

It was after this recess was declared that the court and parties convened in chambers to discuss the bailiff's recommendation that appellant be shackled. (25 RT 4904.) The court made the following statement:

> There really is not much of a record as to what happened. As one juror was leaving and we were waiting for the next one to come in, Mr. McKinzie, in a voice audible to me at the bench, at counsel table there was used some kind of a phrase about socking Mr. Glynn, and "I have got nothing to lose." And then there were some very aggressive comments apparently made in the lockup are and during the break."

(25 RT 4907.)

The record made by the trial court is important for a couple of reasons. First, the court was very specific as to the comments made by

appellant, namely that he was thinking of socking Glynn and that he had nothing to lose. Deputy Ortiz's report also used the same language memorialized by the trial court, indicating that appellant twice stated that he had nothing to lose. (2 Clerk's Transcripts of Exhibits 488.) Deputy Smith's report also confirms that Ortiz told her appellant had said that he had nothing to lose. (2 Clerk's Transcripts of Exhibits 489.)

Although those comments were audible both to Ortiz and to the trial court, they were not included in the reporter's transcript. This suggests that appellant said more than "I'll tear his head off," as was reported after prospective juror Ikeida left the courtroom, but it does nothing to clarify when appellant made the statements memorialized by the trial court in chambers and by Ortiz in his report.

Given that Deputy District Attorney Morgan referred to appellant as "this man" during her examination of prospective juror Sonia Sharp (25 RT 4872), it is possible that Ortiz made statements to Smith either as Smith was escorting Sharp from the courtroom or as Smith was escorting Juror No. 7 into the courtroom. It also is possible, given that Deputy District Attorney Glynn twice referred to appellant as "that man" during his examination of Juror No. 7 (25 RT 4882), that Ortiz made the statements in question to Smith either as Smith was escorting Juror No. 7 from the courtroom or as Smith was escorting Juror No. 4 into the courtroom.

Respondent asserts that no jurors received extraneous information because, according to respondent, the record demonstrates that no jurors were present in the courtroom "when appellant's outburst occurred." (RB 76.) There are several problems with respondent's position. First, there is absolutely nothing in the record establishing that appellant had a single "outburst." As discussed above, the court reporter heard and transcribed one statement and the trial court and Deputy Ortiz heard different statements that are not contained in the reporter's transcript. It is unclear why respondent believes the record shows that no jurors were present when it is in fact impossible to know which statements are at issue.

Second, even if respondent is correct that no jurors were present, extraneous information probably was received by whomever Smith was escorting when Ortiz told her that appellant said he had nothing to lose. The fact that there may not have been any jurors in the courtroom when appellant uttered his comments, if in fact there were no jurors in the courtroom, thus is somewhat irrelevant to the issues before the court.

Nor does appellant agree with respondent's claim that respondent has demonstrated that no jurors were in the courtroom when appellant stated that he had nothing to close. (RB 76.) In fact, respondent seems to acknowledge that its claim is speculative, as respondent twice wrote that appellant "presumably" made the statements in question as prospective

juror Ikeida was leaving the courtroom. (RB 74, 76.) There is a significant difference between a demonstrated certainty that no jurors were in the room and a presumption that the statements were made as Ikeida was leaving the courtroom. It should be clear to this court that respondent is speculating, even as respondent is claiming that it has "demonstrated" that no jurors were present when appellant made the statements in question.

In attempting to distinguish *Remmer*, respondent argues that any information received by prospective jurors would not constitute misconduct if the juror actually overheard appellant making the statement or statements in question while the juror was present in the courtroom:

> Here, even if the facts alleged by appellant are true, *Remmer* is distinguishable. In *Remmer*, it was clear that a juror had been contacted by someone offering a bribe. Here, according to appellant, a juror was interviewed by a Sheriff's Deputy regarding an outburst by appellant that occurred while court was in session. Thus, the alleged extraneous information was appellant's own remark made in open court. Appellant cannot now claim that a juror committed misconduct by overhearing the remark during voir dire.

(RB 77.) Respondent's position is flawed because it is not at all clear which of the "facts alleged by appellant" necessarily must be true before respondent's attempt to distinguish *Remmer* can succeed. Respondent acknowledges appellant's claim that misconduct occurred when a deputy interviewed a juror "regarding an outburst by appellant that occurred while court was in session," but nonetheless asserts that no misconduct occurred

because the juror overheard the remark during voir dire.

Appellant did not argue that misconduct occurred when a prospective juror overheard appellant make a comment in open court. Respondent's position is not merely a straw man argument, it is a straw man argument that is not supported by any facts. As was the case in *Remmer*, the prospective juror received information from a third party outside the trial courtroom. To the extent that respondent may be suggesting that the deputy's repetition of appellant's remarks to the juror, would not constitute misconduct, such an argument clearly is incorrect due to respondent's failure to distinguish between information received directly from appellant's mouth and information relayed to the juror by a third party.

Nor does respondent's speculation end with the questions of whether and when prospective jurors heard Deputy Ortiz repeating appellant's statements to Deputy Smith. Ortiz's report provides, "After an interview of a potential juror, Smith requested a court recess to evaluate the situation and inform Judge O'Neill of McKenzie's [sic] statement." (2 Clerk's Transcripts of Exhibits 487.) Respondent argues that:

> the record makes plain that, in reality, there was no "interview" of any prospective juror by Deputy Smith. Indeed, earlier in the same report, Deputy Ortiz referred to the *Hovey* examination as "pre-jury interviews."

(RB 76.)

Although respondent correctly notes that Ortiz used the word "interview" in reference to *Hovey* qualification, there is nothing about the record that "makes plain" that Ortiz used the word "interview" exclusively to refer to *Hovey* qualification rather than using it in its ordinary meaning; of a process during which Smith asked and received answers from the juror.

Appellant respectfully submits that respondent is engaging in speculation and attempting to distinguish *Remmer* because of an important similarity between *Remmer II* and this matter. As was the case in *Remmer I*, remand is necessary in this case due to the "paucity of information relating to the entire situation, coupled with the presumption which attaches to the kind of facts alleged by petitioner." (*Remmer v. United States* (1956) 350 U.S. 377, 379-380 [76 S.Ct. 425, 100 L.Ed. 435].) Respondent is speculating, and inviting this court to do the same, precisely because there is a paucity of information relating to the entire situation. Respondent is doing so because that paucity of information precludes respondent from demonstrating that the presumption of prejudice was rebutted.

In fact, respondent's entire argument regarding prejudice seems to depend upon a discussion of the prejudice flowing from the newspaper article written by reporter Amy Bentley after Deputy District Attorney Glynn attempted to prejudice the jury by trying the case in the press. Citing *People v. Zapien* (1993) 4 Cal.4th 929, respondent argues that the trial

court's admonition to the jury to disregard the newspaper article somehow dispelled the presumption of prejudice that arose as a consequence of the juror or jurors hearing Ortiz tell Smith about appellant's remarks.

Respondent does not explain why an admonition to disregard one source of extraneous information -- the newspaper article -- also rebutted the presumption of prejudice that arose from the receipt of extraneous information from another source -- Deputy Ortiz's statements to Deputy Smith. Appellant contends that the opposite result is far more likely. The prospective jurors in this matter were exposed to extraneous information from separate and distinct sources: reporter Amy Bentley (in a newspaper article) and Deputies Ortiz and Smith (in person). The court told the jurors that they were to disregard the information from Bentley, but did not do the same thing for the information from the deputies.

Zapien provides an interesting contrast to the facts in this matter. The trial court in *Zapien* actually did something that the trial court in this matter did not do: it conducted a hearing on the misconduct during which the juror who was exposed to extraneous information assured the trial court that he would not divulge the information to other jurors and would disregard it in performing his duties as a juror. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 994.) The trial court in *Zapien* stated that it believed the juror, and this court treated that as being a finding that the presumption of

prejudice had been rebutted and upheld that finding by "according proper deference" to the trial court's ruling. (*Ibid.*)

There is no such finding to defer to in this matter. The trial court did not conduct a hearing and it did not make any statements, findings or conclusions that could remotely be interpreted as a finding that the presumption of prejudice had been rebutted.

The receipt of extraneous information by a single juror raises a presumption of prejudice that places upon the prosecution the burden of establishing, "after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." (*Remmer v. United States* (1954) 347 U.S. 227, 229 [74 S.Ct. 450, 98 L.Ed. 654]; *People v. Williams* (2006) 40 Cal.4th 287, 333; *People v. Mendoza* (2000) 24 Cal.4th 130, 195.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472 [85 S.Ct. 546, 13 L.Ed.2d 424].) Due process under the United States Constitution is offended when a criminal defendant is denied a fair trial by a panel of impartial, indifferent jurors. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, §16; *Turner v. Louisiana*, *supra*, 379 U.S. at pp. 472-473, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *Jeffries v. Wood* (9th

Cir. 1997) 114 F.3d 1484, 1490-1492; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; *People v. Nesler* (1997) 16 Cal.4th 561, 578; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

Respondent argues that because "appellant was provided with all information about the incident below including both Deputies' incident reports, therefore any further inquiry concerning the alleged interview should have been made at trial." (RB 77.) Appellant submits that respondent is correct to the extent it suggests that further inquiry should have been made at trial, but incorrect insofar as respondent is suggesting that appellant had any burden over and above bringing the misconduct to the attention of the court.

As noted in appellant's opening brief, the incident reports prepared by Ortiz and Smith were marked as Court's Exhibit Number Five on April 22, 1999. (2 Clerk's Transcript of Court's Exhibits 485; 26 RT 5072.) The trial court and prosecution knew the contents of those reports but neither the court nor the prosecutor made any effort to ascertain the nature and contents of the *ex parte* communications between the court's bailiffs and prospective jurors. Because of this, there is no way for this court to find that the presumption of prejudice has been rebutted, either by the prosecutor or by reference to the entire record. Appellant's death sentence must be reversed.

V.

RESPONDENT'S CLAIM THAT APPELLANT HAS NOT MET HIS BURDEN OF SHOWING THE INADEQUACY OF THE RECORD IS NOT SUPPORTED BY THE CASE LAW UPON WHICH RESPONDENT RELIES

Respondent asserts that appellant has not met his burden of demonstrating that the record is inadequate to permit meaningful appellate review. (RB 79-80.) In support of its position, respondent cited four cases in which the court considered lost juror questionnaires: *People v. Ayala* (2000) 24 Cal.4th 243, *People v. Alvarez* (1996) 14 Cal.4th 155, *People v. Haley* (2004) 34 Cal.4th 283 and *People v. Heard* (2003) 31 Cal.4th 283. (RB 80.) As will be shown below, none of these cases really supports respondent's position. What they instead establish is that whether the loss of juror questionnaires requires reversal depends upon whether a reviewing court can conclude that the lost information can somehow be recreated, or rendered inconsequential, by the record on appeal.

Appellant contends that respondent has failed to provide this court with any reasoned guidance, based on the record, for concluding that the lost information can be recreated or rendered inconsequential based on matters contained in the record. In fact, respondent made no effort whatsoever to address most of appellant's factual contentions. For example, respondent notes that this court found, in *Heard*, that there was no basis for reversal even though the questionnaires for all prospective jurors except

those actually seated were lost. (RB 80, citing *People v. Heard*, *supra*, 31 Cal.4th at p. 969.) Respondent then concludes,

> Thus, appellant's claim that the missing juror questionnaires denied him an adequate record on appeal must be rejected.

(RB 80.)

Respondent's argument seemingly takes an astonishing leap, suggesting that retention of the questionnaires completed by the jurors who were seated renders the loss of the other questionnaires harmless. *Heard* does not stand for that proposition. The court found the record adequate in *Heard* because the record otherwise made it possible for the court to address Heard's specific claims. For example, the court relied on the record in *Heard* to dismiss the People's claim that the prosecutor's cause challenge to Prospective Juror H. was supported by the juror's questionnaire response indicating that H. believed life without parole was a "worse" punishment than death. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 963-964.) The court noted that the loss of Prospective Juror H.'s questionnaire made it impossible to review H.'s response to that particular question in light of the other information on the questionnaire. (*Id.* at p. 964.) The court nonetheless held that the record of voir dire, and specifically H.'s clarification of his views during voir dire, demonstrated that H.'s views regarding punishment would not significantly impair H. from following the law. (*Id.* at pp. 964-965)

Respondent's application of the *Heard* decision to this matter thus is missing a critical component, namely a factual analysis showing why the record on appeal in this matter contains sufficient information to permit this court to find that the loss of the questionnaires was harmless. The fact that the record was adequate in *Heard* does not mean that the record always will be sufficient to remedy the loss of juror questionnaires.

Appellant contends that *Heard* actually supports his position with regard to the loss of the juror questionnaires in this matter. The lost juror questionnaires in *Heard* were analyzed by this court with regard to two different issues: improperly granted challenges for cause -- discussed above -- and the denial of Heard's *Batson/Wheeler* motion. (*People v. Heard*, *supra*, 31 Cal.4th at p. 969.)

With regard to this latter claim, Heard did not "present any substantive objection to the trial court's rejection of his *Wheeler-Batson* claim as to any particular prospective juror." (*People v. Heard*, *supra*, 31 Cal.4th at p. 970.) Heard instead complained that the lost juror questionnaires "prejudiced his ability to obtain meaningful appellate review of the trial court's rulings relating to his *Wheeler-Batson* claim" for three reasons. Heard first argued that the loss of the questionnaires made it impossible to determine which of the jurors were African-American. (*People v. Heard*, *supra*, 31 Cal.4th at p. 970.) This court ruled that Heard

could not properly maintain that claim on appeal both because the prosecutor identified the jurors in question when asked to justify the challenges and because defense counsel did not specify any additional jurors who were challenged inappropriately. (*Id.* at p. 970.)

None of those deficiencies are present in this matter. Defense counsel Wiksell informed the court that there were only three African-American people in the panel. (10 RT 1923-1925.) Wiksell's assertion was not challenged either by the prosecution or by the trial court. In fact, the trial court seemed to agree with Wiksell's assertion, noting that the racial composition of the jury was "entirely normal in this county, the way the population is made up, to have so few African-American jurors in a group of 72." (10 RT 1925.) During the record correction and settlement proceedings conducted in this appeal, the trial court indicated that two African-American jurors actually made it into the box. One of those jurors was challenged by each side. (1 RT August 21, 2006 35.)

Heard also argued that it was not possible to obtain adequate review of the prosecutor's justifications without the questionnaires because the prosecutor referred to the questionnaires in stating those justifications. (*People v. Heard*, *supra*, 31 Cal.4th at p. 970.) This court noted that while defense counsel could justifiably assume that the questionnaires would be retained as part of the appellant record, that expectation did not relieve

defense counsel of his duty "to bring to the trial court's attention any disagreement with the prosecutor's representations as to the content of the questionnaires." (*Ibid.*) The court held:

> In the absence of any indication from defense counsel at the time of the trial court's ruling that the prosecutor was misrepresenting the contents of the questionnaires upon which the prosecutor relied, we have no reason to question the trial court's acceptance of the prosecutor's race-neutral explanations as genuine.

(*Id.* at p. 971.)

Appellant makes no claim that the prosecution in this matter misrepresented the contents of prospective juror Smith's questionnaire. The problem caused by the loss of Smith's questionnaire rests in the denial of appellant's ability to compare all of Smith's responses to the responses of the other relevant jurors. That loss has nothing to do with whether the prosecutor misrepresented the contents of Smith's questionnaire.

Heard's third contention was that the loss of the questionnaires prevented appellant from providing comparative analysis of the responses from the challenged jurors with the responses from other jurors retained by the prosecutor. (*People v. Heard*, *supra*, 31 Cal.4th at p. 971.) The court held that Heard could not raise the issue on appeal because the trial court and parties had not conducted comparative analysis. (*Id.* at p. 971.) The court held:

> Although the trial court and the objecting party may rely at trial on comparative juror analysis in evaluating whether a prima facie case has been established and whether the prosecutor's proffered reasons are legitimate and genuine (*id.* at pp. 1324-1325), in the absence of any reliance upon comparative juror analysis in the trial court it is inappropriate for a reviewing court to second-guess *Wheeler-Batson* rulings on that basis. (*Ibid.*; see also *id.* at p. 1331 (dis. opn. of Kennard, J.).) Here, neither the trial court nor defense counsel engaged in any comparative juror analysis at trial, and thus defendant may not raise this claim on appeal.

(*Id.* at p. 971.)

This portion of *Heard* no longer is valid in light of *Lenix* and cases following *Lenix*. As noted in *People v. Lomax*, this court now must conduct comparative analysis even though it is raised by the defendant for the first time on appeal. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 572, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 624; *People v. Salcido* (2008) 44 Cal.4th 93, 141.) *Heard* cannot, therefore, be read as supporting the proposition that a trial record is adequate when it is missing material that is necessary for comparative juror analysis.

Respondent's reliance on *People v. Ayala* is flawed for much the same reason as its reliance on *Heard*. Ayala raised two separate issues with regard to his *Batson/Wheeler* objections. Ayala first complained about being denied the opportunity to participate in the hearings during which the prosecutor justified his challenges. Ayala was denied the right to be present during those hearings because the prosecutor requested and obtained three

in camera hearings on the reasons for his challenges to specific jurors after the trial court found a prima facie case. (*Id.* at pp. 259-260.)

The court held that it was error to exclude defense counsel from these hearings. (*People v. Ayala*, *supra*, 24 Cal.4th at pp. 262-264.) After reviewing the reasons proffered by the prosecutor during the in camera proceedings, however, the court held that the trial court's rulings on the prosecutor's justifications were supported by the record. (*Id.* at pp. 264-267.) The court stated:

> On these facts, we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings.

(*Id.* at p. 266.)

Ayala also claimed that his constitutional right to meaningful review of his conviction and sentence was infringed by the loss of juror questionnaires. Unlike this matter, the questionnaires for the jurors and alternates who were seated in *Ayala* were preserved. What was lost were the questionnaires completed by "the bulk" of the remaining prospective jurors. (*People v. Ayala*, *supra*, 24 Cal.4th at p. 269.) This court held that it would not "compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis." (*Id.* at p. 270.) The court also found harmless, both under the state and federal standard, the loss of questionnaires completed by prospective jurors who were the

subject of Ayala's *Batson/Wheeler* objections:

> With regard to the prospective jurors whose questionnaires were lost and who were the subject of *Wheeler* challenges, we have already explained that the record is sufficiently complete for us to be able to conclude that they were not challenged and excused on the basis of forbidden group bias.

(*People v. Ayala*, *supra*, 24 Cal.4th at p. 270.)

People v. Alvarez provides even less support for respondent's claims, as it is far from clear which questionnaires were lost in that case and the decision does not indicate precisely how Alvarez claimed the loss of those questionnaires impacted his constitutional rights. *Alvarez* merely notes, in a footnote, that "certain questionnaires" completed by prospective jurors had been lost. (*Id.* at p. 196, fn. 8.) The court noted that "material from the now lost items survives in the reporter's and clerk's transcripts through quotation and paraphrase" and held that Alvarez failed to meet his burden of showing that the loss of the questionnaires was prejudicial to his ability to prosecute his appeal. (*Ibid.*)

In *People v. Haley*, Haley claimed that the loss of juror questionnaires impeded judicial review both of four prosecution cause challenges that were sustained by the trial court and of review of the denial of his *Batson/Wheeler* motion. (*People v. Haley*, *supra*, 34 Cal.4th at p. 304.) Citing *Alvarez* and *Ayala*, the court held that the record on appeal was sufficiently complete to decide Haley's claims. (*Id.* at p. 305.) With regard

to the cause challenges, the court observed that the trial court afforded the attorneys "considerable latitude" during voir dire and held that "portions of the juror questionnaires have been preserved for appellate review through quotation and paraphrase." (*Ibid.*)

Respondent's position regarding the adequacy of the record for the purposes of determining appellant's claim that jurors were exposed to extraneous information is little more than a reiteration of respondent's insistence that Deputy Ortiz's use of the term "interview" in his written report can only mean voir dire. (RB 80-81.) As discussed in Argument IV, above, respondent's insistence is little more than speculation that is unsupported by the record.

Nor should the court give any credence to respondent's suggestion that communication between the trial court's bailiffs and jurors is not an oral proceeding subject to settlement. In *People v. Hawthorne* (1992) 4 Cal.4th 43, the trial court's bailiff conveyed a communication from the trial court to the jury during guilt phase deliberations after the jurors submitted a note asking for guidance because one of the jurors could not decide whether the defendant was guilty. (*Id.* at pp. 61-62.) The defendant contended on appeal that the absence of a reporter's transcript regarding that communication violated his right to have all proceedings transcribed under Penal Code section 190.9.

The court expressly declined to determine whether the communication between the bailiff and the jurors constituted proceedings within the meaning of section 190.9. The court instead held that the violation of section 190.9, if any, did not require reversal of the defendant's conviction. (*People v. Hawthorne*, *supra*, Cal.4th at p. 66.) The court noted that a defendant must proceed with other available alternatives to reconstruct the record and held that the settled statement regarding those communications provided a sufficient basis for the resolution of the defendant's claims. (*Id.* at pp. 66-67.)

The court really does not have that option in this matter, as appellant's attempts to obtain a settled statement were denied both in the trial court and in this court. Because of this, the court must and should determine whether communications from a bailiff to a prospective juror -- or comments in the juror's presence -- regarding the case are oral proceedings subject to settlement.

Appellant contends that the fact that the communications in this matter did not occur in the courtroom in the presence of counsel does not mean that the communications were not oral proceedings subject to settlement. Appellant submits that any communication between the trial court's bailiffs and prospective jurors was effectively a communication between the trial court and those jurors. Because any such communications

in this case took place during the *Hovey* process they would of necessity constitute part of those oral proceedings.

Respondent has not provided this court with any basis for concluding that the gaps in the record in this matter can somehow be recreated or rendered inconsequential by the record on appeal. The trial court's refusal to settle the record with regard to the omitted matters denied appellant his right to an appellate record that is adequate to permit meaningful review. (U.S. Const., amends. V, VIII and XIV; Cal. Const., art. I, §§ 7, 15 and 17; *Griffin v. Illinois* (1956) 351 U.S. 12, 16-20 [76 S.Ct. 585, 100 L.Ed. 891]; *Draper v. Washington* (1963) 372 U.S. 487, 495-496 [83 S.Ct. 774, 9 L.Ed.2d 899]; *People v. Young* (2005) 34 Cal.4th 1149, 1170.) Appellant's convictions must be reversed.

VI.

RESPONDENT'S CLAIM THAT NO MISCONDUCT OCCURRED FAILS TO ACKNOWLEDGE ALL OF THE STATEMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENTS

In his opening brief, appellant argued that the prosecutor's closing argument constituted misconduct in that the argument invited the jurors to find aggravation based on non-statutory factors. (*People v. Crittenden* (1994) 9 Cal. 4th 83, 148, citing *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Appellant identified a number of statements by the prosecutor that, whether considered together or in isolation, constituted misconduct. Appellant argued that the prosecutor's comments must be found to violate the law if it is "reasonably likely" that a juror would construe a prosecutor's comments as suggesting the defendant's lack of remorse militated in favor of imposing the death penalty. (*People v. Payton* (1992) 3 Cal. 4th 1050, 1071 [effect of prosecutorial argument to be judged under reasonable likelihood standard]; see *Boyde v. California* (1990) 494 U.S. 370, 378-381, 386 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Respondent's brief really does not address any of the specific comments made by the prosecutor. Respondent instead attempts to counter appellant's argument by claiming that the prosecutor did not argue that the absence of mitigation constituted aggravation (RB 82, citing AOB 151-152.) Respondent does not argue that it was not reasonably likely that a

juror would construe the prosecutor's argument as suggesting the defendant's lack of remorse militated in favor of imposing the death penalty. Respondent instead simply contends that the prosecutor did not make such an argument:

> On the contrary, most of the prosecutor's comments regarding appellant's lack of remorse occurred while he was discussing the mitigating evidence presented by the defense. (36 RT 7079-7103.) Such an argument is not tantamount to arguing that the absence of mitigation constitutes a factor in aggravation.

(RB 82, citing *People v. Burney* (2009) 47 Cal.4th 203, 266.)

Respondent's position would have more persuasive force had respondent actually addressed appellant's claims. For example, and as pointed out in appellant's opening brief (AOB 149), during Deputy District Attorney Glynn's closing argument he effectively urged the jury to return a death verdict based on non-statutory factors by quoting Lord Justice Denning as follows:

> Punishment is the way in which society expresses its denunciation of wrongdoing. In order to maintain respect for the law, it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion felt by the majority of citizens for those crimes. The truth is that some cases are so outrageous that society insists on adequate punishment because the wrongdoer deserves it.

(36 RT 7122-7123.)

Respondent's brief does not contain any mention of this quote. Respondent makes no attempt to explain how the revulsion felt by the

majority of citizens for a crime falls within any of the acceptable statutory bases for aggravation. The reason for that omission should be clear to this court. Respondent did not address this quote because respondent could not address this quote. Respondent instead merely makes a generalized claim that Glynn's comments regarding lack of remorse did not constitute misconduct.

Respondent's brief also does nothing to counter appellant's argument that the jury understood Glynn's arguments urging the jury to consider appellant's purported lack of remorse and the "crassness" of appellant's conduct after the killing -- including conduct that occurred long after the killing such as appellant's attempt to blame Donald Thomas for the killing -- as authorization for them to consider non-violent conduct unrelated to the killing as an aggravating factor. (AOB 148; 36 RT 7116-7117, 7165-7167.) Nor does respondent explain why Glynn's claim that they had "less reason" to show appellant leniency because none of the factors in mitigation listed in the court's instructions were applicable was not understood by the jurors as an assertion that the absence of those mitigating factors could be considered in aggravation of the offense. (36 RT 7079.)

Despite its failure to address the specific acts of misconduct set forth in appellant's opening brief, respondent nonetheless asserts that any error

was harmless because there is no reasonable possibility the error affected the verdict. (RB 83, citing *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) In support of that claim, respondent simply lists the factors in aggravation and mitigation argues that "[t]hus the factors in aggravation overwhelmingly outweighed any factors in mitigation." (RB 83.) Respondent did not provide this court with any meaningful discussion of why or how respondent believes the factors in aggravation outweigh mitigation. Respondent merely states its position as a given.

Appellant submits that respondent's reliance on the argument that aggravation "overwhelmingly outweighed any factors in mitigation" is flawed in that the balancing required at penalty phase differs greatly from a determination of guilt. The question before the jury during penalty phase is not as amenable to measurement as would be the question whether the evidence was strong in proof of any particular element of an offense. As this court noted in *Brown*,

> A capital penalty jury, on the other hand, is charged with a responsibility different in kind from such guilt phase decisions: its role is not merely to find facts, but also -- and most important -- to render an individualized, normative determination about the penalty appropriate for the particular defendant -- i.e., whether he should live or die.

(*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

Respondent also claims that the trial court's instructions compel the conclusion that there is no reasonable possibility that the prosecution's

remarks on appellant's "lack of remorse affected the verdict." (RB 83.) The first thing this court should note about that argument is that it again completely fails to address the second claim of misconduct raised by appellant, namely that the prosecutor urged punishment based on a non-statutory factor in aggravation: "the revulsion felt by the majority of citizens for those crimes." (36 RT 7122-7123.) The second thing this court should note is that respondent's recitation of the instructions given by the trial court is just that, a recitation without any analysis. For example, respondent observes that the jury was instructed that statements by counsel are not evidence. (RB 83.) However true that may be, it also is true that the instructions are not evidence and respondent does not explain why being instructed that statements of counsel are not evidence would affect a juror's understanding of the instructions based on counsel's explanation of how those instructions were to be applied to the evidence.

The same lack of analysis also diminishes respondent's reliance on the trial court's instruction on the factors to be considered by the jurors and the court's instruction that the absence of mitigation could not be considered in aggravation. (RB 83.) The "revulsion felt by the majority of citizens for those crimes" is not included in Penal Code section 190.3, yet prosecutor Glynn clearly urged the jury to return a death sentence based on that non-statutory factor. The fact that the court instructed on the factors to

be considered by the jury, and instructed that the absence of mitigation cannot be used as aggravation, does nothing to change the fact that Glynn argued that "since none of those factors apply, you have less reason to show him leniency." (36 RT 7079.)

As noted in appellant's opening brief, Glynn's misconduct during closing argument was directed toward illegitimately adding to the aggravating side of the ledger. A defendant's perceived lack of remorse is deeply offensive to a jury. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 [a "defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision" whether to impose death].) Putting appellant's alleged lack of remorse at the center of the case for aggravation was bound to "create the most severe 'type of prejudice' to [appellant]." (*Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 684 [prosecutor's equating failure to testify with lack of remorse requires reversal of death sentence].)

Respondent asserts that appellant has forfeited this issue for the purposes of appeal due to trial counsel's failure to object and seek a curative instruction. Appellant submits that this court should reject that claim notwithstanding trial counsel's failure because Glynn's misconduct constituted plain error affecting appellant's substantial rights. (Penal Code section 1259; see also *Johnson v. United States* (1997) 520 U.S. 461, 466-

467 [117 S.Ct. 1544, 137 L.Ed.2d 718], and *United States v. Olano* (1993) 507 U.S. 725, 730 [113 S.Ct. 1770, 123 L.Ed.2d 508].)

Glynn's remarks to the jury put appellant's "lack of remorse" at the center of the People's case for aggravation. Glynn's suggestion to the jurors that they should vote for death to reflect the "revulsion" felt by society urged the jury to return a death verdict based on a non-statutory factor in aggravation. Both arguments are misconduct, and respondent has not given this court any reason to find otherwise. Imposing a sentence of death on the basis of aggravating factors not permitted under state law violates the Fifth, Sixth, and Eighth Amendments to the United States Constitution. (*Zant v. Stephens* (1983) 462 U.S. 862, 880-882 [103 S.Ct. 2733, 77 L.Ed.2d 235].) Appellant's death sentence must be reversed.

VII.

THE PROBATIVE VALUE OF THE PHOTOGRAPH OF AVRIL'S BODY IN AN IRRIGATION DITCH AND THE AUTOPSY PHOTOGRAPH DEPICTING AVRIL'S EXPOSED BRAIN WAS MINIMAL AT BEST, AND WAS THE SORT OF EVIDENCE THAT UNIQUELY TENDS TO EVOKE AN EMOTIONAL BIAS AGAINST A PARTY AS AN INDIVIDUAL

In his opening brief, appellant contended that the trial court erred and abused its discretion by admitting a number of highly inflammatory photographs. Respondent argues that appellant's contentions lack merit because the trial court properly exercised its discretion under Evidence Code section 352 when it considered the relevance and admissibility of the crime scene and autopsy photos. (RB 84.) Respondent asserts that the trial court carefully considered each of the photographs and noted that the court actually excluded some of the photographs. (RB 89.)

This court should scrutinize carefully both the photographs in question and the justifications for admission of the photographs argued both by the prosecutor below and by respondent in this appeal. With regard to People's Exhibit No. 125, the prosecution argued that Avril's hands in the photograph were in a defensive position. The prosecution argued that injuries to the victim and the blood on the victim's clothing as depicted in the photograph demonstrated malice and intent. (1 CT 133-134; 2 RT 284.)

Respondent also argues that the position of Avril's hands suggests that she was trying to defend herself. (RB 88.) Unfortunately, and like the prosecutor below, respondent fails entirely to explain why that is so given that there is nothing to suggest that appellant attacked Avril while she was in the ditch. Nor has respondent explained why Avril's hands remained on her chest "in a defensive posture" if she was killed shortly before being thrown into the ditch. Appellant contends that there really is nothing about the position of Avril's hands in People's Exhibit No. 125 suggesting that her hands are in a defensive posture.

Respondent asserts that the evidence was relevant to illustrate the callousness with which Avril's body was cast aside by appellant. (RB 88.) Respondent claims that the photographs "demonstrated the malice of appellant in killing her and his intent to kill her and leave her body in a remote location." (RB 88.) Appellant submits that respondent's arguments do little more than reveal the true purpose of the evidence, namely to inflame the jurors. That appellant was "callous" with Avril's body after she was killed would certainly degrade him in the jury's opinion, but it does nothing to prove that appellant intended to kill her, and appellant was not charged with abusing her corpse.

Respondent notes that People's Exhibit No. 125 depicts the severe injuries to Avril's face and head, and argues that the "blood on Avril's

clothes and face indicated the brutality of the attack." (RB 88.) What respondent ignores is that the prosecutor had, and offered into evidence, a considerable number of photographs that supported those conclusions with far more graphic effect. Even more to the point, the justification proffered by respondent isn't supported by the photograph, as Avril's injuries really are not depicted in the photograph.

Respondent argues that People's Exhibit No. 125 was relevant to corroborate Loganbill's testimony about finding Avril's body in the ditch. (RB 88.) This is perhaps the most transparent of the People's justifications for admission of the photograph, as there was absolutely no need to corroborate Loganbill's testimony that he found Avril's body in the ditch. Whether Loganbill testified truthfully that he found Avril's body in the ditch simply was not at issue. Even if that was not so, the fact remains that Avril's body still was in the ditch when law enforcement arrived on the scene -- and photographed Avril's body -- and that fact alone would have served to corroborate Loganbill's testimony that he found Avril's body in the ditch.

Respondent asserts that photographs are not deemed cumulative simply because witness testimony explaining the photographs goes unchallenged. (RB 90, citing *People v. Scheid* (1997) 16 Cal.4th 1, 14.) Appellant contends that respondent has missed the point both of appellant's

argument and of this court's decision in *Scheid.* What *Scheid* actually held, ultimately, was that the admission of the gory photographs in *Scheid* depends upon the relevance of the photographs (Evid. Code, § 210) and the weighing process required by Evidence Code section 352. (*Id.* at pp. 14, 18-19.)

Evidence is prejudicial within the context of section 352 when it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Scheid, supra*, 16 Cal.4th at pp. 14, 19.) People's Exhibit No. 125, depicting Avril's body in a ditch, clearly was of limited or no relevance and was of such a nature as to evoke an emotional bias against appellant as an individual. People's Exhibit No. 164, depicting a full image of Avril's exposed brain, is an incredibly disturbing photograph. It was offered by the prosecution to show hemorrhage in the scalp tissue along the side of Avril's brain. (2 RT 306), but the truth is that the photograph shows very little about the hemorrhage and what little is depicted is completely lost in the horrible image of the victim's brain. To the extent that it may have shown that the victim suffered trauma to her head, that trauma was amply shown by many other autopsy photographs.

Respondent argues that reversal would not be required under the California standard of review even if this court finds error in the admission

of these photographs because the photographs "did not disclose to the jury any information that was not presented in detail through the testimony of witnesses "and they were "no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses." (RB 90, quoting *People v. Heard*, *supra*, 31 Cal.4th at p. 978.) Respondent's claims regarding prejudice under the California standard are not supported by the evidence. People's Exhibit No. 125 is a disturbing photograph, the only purpose of which was to evoke an emotional bias against appellant, but it pales in comparison to People's Exhibit No. 164. Appellant submits that it would be impossible for any testimony, however graphic, to be as inflammatory as the image depicted in People's Exhibit No. 164.

This court also should notice that respondent has addressed appellant's claims that the introduction of these photographs violated his right to a fair trial and a reliable determination of punishment under the Eighth Amendment with but a single sentence. Respondent asserts, "Further, for the same reasons [this court should find any error harmless under the California standard of review] any error would also be harmless beyond a reasonable doubt." (RB 91, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

The photographs at issue in this matter were gruesome and disturbing, so much so that the admission of these photographs rendered

appellant's trial fundamentally unfair and undermined his right to a reliable determination of penalty. Appellant's conviction and death sentence must be reversed.

VIII.

THE REQUIREMENT THAT EVIDENCE OFFERED BY AN ACCOMPLICE SHOULD BE VIEWED WITH CAUTION CANNOT BE LIMITED TO THE SPECIFIC COUNTS FOR WHICH THE INDIVIDUAL IS AN ACCOMPLICE BECAUSE THE MOTIVATION TO PLACE BLAME ON APPELLANT IS NOT NECESSARILY LIMITED TO THE OFFENSES FOR WHICH THE ACCOMPLICE IS LIABLE

In his opening brief, appellant argued that the trial court's instructions on accomplice liability were erroneous in two respects. First, the instructions on accomplice testimony were limited to counts six and eight. Second, because that instruction was limited to counts six and eight, the instructions on accomplice liability necessarily would be understood by the jurors as not applying to Donald Thomas.

Respondent attempts to counter those arguments by asserting that there was no evidence that Johnson was an accomplice to Avril's murder. (RB 93.) According to respondent, Johnson was not an accomplice to the murder because there was no evidence that she participated directly in the murder or aided and abetted the murder. (RB 93.) Respondent claims Johnson was only an accomplice as to the use of Avril's ATM card. (RB 91.) Respondent argues that Johnson was not even aware that a murder had been committed until after the fact. (RB 93.)

From this, it appears evident that respondent misapprehends either appellant's argument or the rationale underlying the requirement of

corroboration. Penal Code section 1111 "serves to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives." (*People v. Davis* (2005) 36 Cal.4th 510, 547; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132; *People v. Belton* (1979) 23 Cal.3d 516, 526.) Such a motivation to shift blame to another person is a form of bias affecting the credibility of a witness. (*People v. Belton*, *supra*, 23 Cal.3d at p. 526.)

Respondent's position essentially is that an accomplice's testimony should be suspect, but only as to the specific counts for which the accomplice may be criminally liable. Respondent argues:

> Section 1111, by its terms, is offense-specific. It defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." See *People v. Boyce* (1980) 110 Cal.app.3d 726, 736 [testimony of the defendant's accomplice in sale of stolen property did not require corroboration as to initial receiving of the property]; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [testimony of the defendant's accomplice in first burglary did not require corroboration as to second and third burglaries]; *People v. Ward* (2005) 36 Cal.4th 186, 212; *People v. Arias* (1996) 13 Cal.4th 92, 142-143.)

(RB 92.)

Boyce is the only case cited by respondent that even remotely supports respondent's position, and that support is based on a misreading of this court's decision in *People v. Owens* (1946) 28 Cal.2d 191. In *Boyce*, Richard Boyce stole a television, a saddle and other horse equipment during

a burglary of the home of Mr. Buchanan, his girlfriend's ex-husband. (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 729.) Shortly after the burglary, Butch Miller offered to take Raymond Verduzco to Slug Carmack's home to see about a saddle. Verduzco, a friend of the Buchanans, was not interested in buying a saddle but was curious because he knew that the Buchanans had lost a saddle in a burglary. (*Id.* at p. 730.)

While they were en route to Carmack's home, Miller told Verduzco that the saddle was "hot." (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 730.) Carmack subsequently told Verduzco that the saddle was hot and that it had been stolen "near the "Y" on the east side of town on a date near to the time of the Buchanan burglary." Carmack told Verduzco that "the guy" who gave the saddle to him wanted $100 for it. Verduzco countered with an offer of $50, and Carmack promised he would convey the offer to "the guy." (*Ibid.*)

After leaving the Carmack residence, Verduzco contacted the Buchanans and set into motion a series of events that led to the arrests of Carmack and Boyce. (*People v. Boyce*, *supra*, 110 Cal.App.3d at pp. 730-731.) Carmack was arrested for receiving stolen property after some of the Buchanans' property was recovered during a search of Carmack's residence. Carmack gave a statement to the officers implicating Boyce after the arresting officers promised Carmack he would not be prosecuted if he

talked to them and testified in the case. (*Ibid.*)

Boyce was charged with burglary (Pen. Code, § 459) and receiving stolen property (Pen. Code, § 496) but was convicted only of receiving stolen property. (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 729.) During Boyce's trial, Carmack testified that Boyce brought the property to his house, gave Carmack the television and asked Carmack to sell the saddle for him. Boyce told Carmack that the property was "hot" and that the property "came from 'a house out near the Y Bar' and from the ex-husband of Boyce's girlfriend." (*Id.* at p. 731.)

Carmack also testified that he told Miller that he wanted to sell a saddle, and that the saddle was "hot." (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 731.) Miller contradicted that claim, asserting instead that he did not learn that the saddle was stolen until the meeting between Verduzco and Carmack. Miller also testified that Carmack subsequently told Miller that "Richard" had accepted Verduzco's offer of $50 for the saddle. (*Ibid.*)

Boyce moved for dismissal at the end of the prosecution case pursuant to Penal Code section 1118.1. That motion was denied. Boyce later asked for instructions on accomplice testimony. That request also was denied. Boyce challenged both rulings on appeal. (*People v. Boyce*, *supra*, 110 Cal.App.3d at pp. 731, 738.) Boyce argued that his motion to dismiss

should have been granted because there was no evidence corroborating the testimony and extrajudicial statements of Carmack who, as a matter of law, was Boyce's accomplice. (*Id.* at p. 736.)

Based on the an analysis of the difference between receiving stolen property and concealing, selling or withholding stolen property -- all of which are criminalized by Penal Code section 496 -- the Court of Appeal for the Fifth Appellate District concluded that Carmack and Miller were accomplices as a matter of law to concealing, selling and withholding the stolen saddle. (*People v. Boyce*, *supra*, 110 Cal.App.3d at pp. 733-735.) The court also held that whether Carmack also was an accomplice with regard to Boyce's initial receipt of the stolen property was a question for the jury. (*Id.* at pp. 735-736.)

Boyce contended that Carmack's testimony relating to Boyce's initial receipt of the stolen property required corroboration even if Carmack was not an accomplice as to the initial receipt of the stolen property, arguing that Carmack's testimony was tainted by Carmack's complicity in the subsequent sale of the property. (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 736.) The court rejected that claim -- within the context of the propriety of the trial court's ruling on Boyce's motion to dismiss -- holding that corroboration was required as a matter of law only as to concealing, withholding or selling the stolen property because a jury

question remained as to whether Carmack was an accomplice to Boyce's initial receipt of the property. (*Ibid.*) The court held:

> Essentially, appellant is contending that evidence gained by a witness during complicity with a defendant in one crime will require that he be treated as an accomplice when he testifies to such evidence during the trial of the defendant as to another crime. Appellant has cited us no authority for that proposition. It does not appear to be the law. (See *People v. Owens* (1946) 28 Cal.2d 191 [165 P.2d 945].)

(*Ibid.*)

Interestingly, the court then reversed Boyce's conviction because there was insufficient corroboration for concealing, selling and withholding the stolen property and remanded the matter to the trial court for a retrial limited to receiving stolen property. (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 738.) The court held that Boyce's instructional error claims were moot in light of the reversal and held both that the question whether Carmack was an accomplice as to the initial act of receiving was a question for the jury and that Boyce was entitled to accomplice instructions, including the instruction requiring jurors to view Carmack's testimony with caution. (*Ibid.*)

As noted above, *Boyce* relied upon *People v. Owens*, *supra*, to reject Boyce's claim that "evidence gained by a witness during complicity with a defendant in one crime will require that he be treated as an accomplice when he testifies to such evidence during the trial of the defendant as to

another crime." (*People v. Boyce*, *supra*, 110 Cal.App.3d at p. 736.) Appellant contends that *Owens* does not support the conclusion reached in *Boyce*.

Owens is a case about corroboration, not about whether the jury should have been instructed that the testimony of an accomplice should be viewed with caution or distrust. Owens was convicted after a court trial, so there necessarily would not have been any issue as to whether the trial court should have instructed to view the testimony of an accomplice with caution.

Owens was charged with a violation of Penal Code section 337a, subdivision (3), after he solicited and obtained $100 each from men named Jordan and Kilkelly for the purposes of betting on a horse race. (*People v. Owens*, *supra*, 28 Cal.2d at p. 191-192.) Owens wrote the name of a horse on a piece of paper and gave it to the men. (*Id.* at p. 192.) Owens argued on appeal that his conviction should be reversed because Jordan and Kilkelly both were accomplices whose testimony was uncorroborated. (*People v. Owens*, *supra*, 28 Cal.2d at pp. 192-193.) This court assumed that Jordan and Kilkelly were accomplices for the purpose of resolving this issue, but concluded that Jordan and Kilkelly were able to corroborate the testimony of one another because they were accomplices to different crimes. (*Id.* at p. 193.) The court also noted that the testimony of Jordan and Kilkelly was corroborated by the piece of paper bearing the name of a horse given to the

men by Owens. (*Ibid.*)

Owens also is notable in that the court did not really spell out what each accomplice said on the stand. (*People v. Owens*, *supra*, 28 Cal.2d at p. 192.) Because of this, there is no way to know whether either witness, Jordan or Kilkelly, offered any evidence relevant to the offense for which the other person was an accomplice. It is entirely possible that Jordan's transaction with Owens was completely separate and independent from Kilkelly's transaction with Owens and thus the testimony of each witness was admissible only under Evidence Code section 1101, subdivision (b).

Owens thus can only stand for the proposition that a person who is an accomplice to one offense can corroborate the testimony of an accomplice to a separate offense. *Owens* does not really support the proposition that the testimony of an accomplice should be viewed with caution as to the offense for which he or she is an accomplice, but not as to other offenses about which he or she testifies.

As noted above, respondent's position really is not supported by the other cases respondent has cited. For example, respondent asserts that *Wynkoop* held that the "testimony of the defendant's accomplice in [a] first burglary did not require corroboration as to second and third burglaries." (RB 92.) That actually was not the holding in *Wynkoop*. Stanley Wynkoop and James Alvord were charged by indictment with burglarizing a Firestone

tire store on August 25, 1956. Wynkoop also was accused of committing two other burglaries on November 10, 1956. The indictment subsequently was dismissed as against Alvord and Alvord testified against Wynkoop. (*People v. Wynkoop*, *supra*, 165 Cal.App.2d at p. 542.) During that trial, Alvord testified that he drove Wynkoop to the tire store and the two of them burglarized the store. (*Id.* at p. 543.)

Alvord also testified that he visited Wynkoop at his home on November 11, 1956, where he observed money stacked on a coffee table. Alvord testified that Wynkoop told him that he "had 'hit some shows' on Robertson Boulevard that weekend and had obtained about $9,000. He said that he had opened three safes to get the money and had cracked them by punching around the tumbler pins until he could loosen them and pull them out the front." (*People v. Wynkoop*, *supra*, 165 Cal.App.2d at p. 543.)

After Wynkoop was convicted on all three counts of burglary, he contended on appeal that his conviction for burglarizing the Firestone store, the August burglary, should be reversed because Alvord's testimony was not sufficiently corroborated. (*People v. Wynkoop*, *supra*, 165 Cal.App.2d at p. 545.) The Court of Appeal rejected that claim, reasoning that Alvord's testimony was corroborated by the fact that Wynkoop had been found in possession of two tires that were consistent with tires taken in the burglary. (*Id.* at p. 546.) The court also found corroboration of Alvord's testimony

regarding the burglary of the Firestone store based on statements made by Wynkoop showing his consciousness of guilt. (*Ibid.*)

Wynkoop also challenged the sufficiency of the evidence as to his convictions on the November burglaries. (*People v. Wynkoop*, *supra*, 165 Cal.App.2d at p. 546.) What is interesting about this claim is that while the *Wynkoop* decision discusses whether Alvord's testimony required corroboration, it seems clear that Wynkoop was not necessarily asserting that his conviction should be reversed due to the absence of corroboration of Alvord's testimony regarding the November burglaries. Wynkoop instead was raising a general claim of insufficiency. The Court of Appeal rejected Wynkoop's argument with regard to these two burglaries based on Alvord's testimony, footprints found at the scene that were consistent with Wynkoop's shoes, tool marks found at the scene that were consistent with a screwdriver that belonged to Wynkoop and Wynkoop's statements to police officers. (*Id.* at pp. 546-547.) *Wynkoop*'s holding that Alvord's testimony regarding the November burglaries did not need to be corroborated thus was dicta, as it addressed an issue that was not raised by Wynkoop.

Respondent's reliance on *Ward* and *Arias* is somewhat mystifying, as neither case addresses any of the issues present in this matter. Ward was charged with the murder of Ronald Stumpf in one incident and with the murder of David Adkins and the attempted murder of Kenneth Shy in a

second incident. (*People v. Ward*, *supra*, 36 Cal.4th at p. 193.) After the two incidents were severed for trial, Ward was convicted of second degree murder as to Stumpf. He was then convicted by a second jury of the attempted murder of Shy and of the first degree murder of Adkins with a special circumstance (multiple murders) and was sentenced to death. (*Ibid.*)

The issues related to accomplice testimony in *Ward* pertained to testimony by George Springer in the Stumpf murder trial. Stumpf encountered Springer while Stumpf was driving down Long Beach Boulevard prior to the shooting. Springer previously had assisted Stumpf in buying rock cocaine. Stumpf asked Springer where he could "go score." Springer got into Stumpf's car and directed him to drive to Norton Avenue, where they saw Ward standing on the sidewalk. Springer previously had engaged in drug deals with Ward. (*People v. Ward*, *supra*, 36 Cal.4th at p. 194.)

Stumpf pulled to the curb. Ward approached the passenger side of Stumpf's car and asked what they wanted. Springer, who was holding money in his hand, told Ward that they wanted a $20 rock of cocaine. Ward put a rock into Springer's hand. Springer returned the rock to Ward because it was undersized. Believing that Springer had broken off a piece of the rock, Ward pulled a handgun, leaned into the vehicle and fired several times, killing Stumpf. (*People v. Ward*, *supra*, 36 Cal.4th at p. 194.)

Ward contended on appeal that the trial court had a sua sponte duty to instruct on accomplice testimony with regard to Springer's testimony. Ward offered two theories in support of this claim. Ward argued first that Springer was in fact the shooter. Ward argued in the alternative that because Springer aided and abetted Ward in the sale of rock cocaine to Stumpf, Springer was guilty of Stumpf's murder under a natural and probable consequence theory. (*People v. Ward*, *supra*, 36 Cal.4th at p. 212.)

This court rejected both claims, but it did so because there was no evidence supporting Ward's claims. The court noted that in order to be an accomplice within the meaning of Penal Code section 1111, "the law further requires a relationship between the defendant and accomplice, either by virtue of a conspiracy or by acts aiding and abetting the crime." (*People v. Ward*, *supra*, 36 Cal.4th at p. 212.) The court held that there was no evidence showing either the existence of a conspiracy between Ward and Springer or any other evidence showing that Springer aided and abetted Ward "in the commission of any crime." (*Ibid.*)

Ward thus cannot stand for the proposition asserted by respondent, as there is no duty to instruct a jury either on the requirement of corroboration or that it must view a witness's testimony with caution when that witness is not an accomplice. The *Ward* decision has nothing whatsoever to do with the question whether corroboration is required when

an accomplice to one offense testifies against a defendant on an unrelated offense. Nor does *Ward* address whether trial courts must instruct the jury to view accomplice testimony about an unrelated offense with caution. *Ward* simply held that there was no evidence suggesting that Springer was an accomplice to Ward in the Stumpf killing.

Much the same as *Ward*, *Arias* has nothing whatsoever to do with whether a trial court must instruct on accomplice liability -- including the instruction directing jurors to view accomplice testimony with caution -- when the witness is an accomplice as to one crime but not another crime. The "accomplice testimony" in *Arias* pertained to the murder of a clerk at a gas station convenience store in Sacramento. Arias was driven to the gas station by his friend, James Valdez. Arias and Valdez both entered the store. Valdez grabbed a 12-pack of beer and ran out of the store, leaving Arias behind. After one of the clerks yelled at Valdez to stop, Arias grabbed the clerk, held a knife to her hip and demanded that she open one of the cash registers. She was unable to do so because the other clerk had the only key to that register, so she called out repeatedly for the other clerk. As the other clerk approached, Arias turned and stabbed him in the abdomen. The knife penetrated the victim's abdominal wall and liver and pierced the front wall of his aorta. He subsequently died during emergency surgery to treat the wound. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 113-

115.)

Arias was sentenced to death after a jury convicted him of first degree murder and found true the allegation that the murder was committed during a robbery. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 113-115.) Arias contended on appeal that the trial court erred by failing to instruct on accomplice liability because Valdez was, or could have been, an accomplice to the robbery. (*Id.* at p. 142.) This court rejected that claim without determining whether Valdez was in fact an accomplice, finding that Valdez's testimony was corroborated by other evidence. (*Id.* at p. 143.)

Appellant contends that there is no basis for limiting a cautionary instruction on accomplice testimony to specific counts. The cautionary instruction is necessary because the testimony of an accomplice is inherently suspect. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 955-965, quoting *People v. Bowley* (1963) 59 Cal.2d 855, 862.) "An accomplice is recognized to be a 'tainted' source of evidence." (*People v. Gordon* (1973) 10 Cal.3d 460, 471; *In re Mitchell P.*, *supra*, 22 Cal.3d at p. 955.) A witness who has a motivation to lie on the stand can and will say whatever is necessary to deflect blame to the defendant. "The rationale for requiring corroboration of an accomplice is that the hope of immunity or clemency in return for testimony which would help to convict another makes the accomplice's testimony suspect, or the accomplice might have many other

self-serving motives, that could influence his credibility." (*People v. Belton*, *supra*, 23 Cal.3d at p. 525, quoting *People v. Marshall* (1969) 273 Cal.App.2d 423, 427.)

A. Donald Thomas Was an Accomplice

Respondent's efforts with regard to whether the trial court's instructions were erroneous as applied to Donald Thomas vary from its arguments regarding Theresa Johnson, perhaps in recognition of the fact that CALJIC No. 3.10 as given completely precluded the jury from applying the instruction to Thomas' testimony. (2 CT 56.) Respondent thus focuses its argument on claims that Thomas was not an accomplice to any of the crimes charged against appellant because, according to respondent, Thomas was not liable to prosecution for any of the offenses charged against appellant. (RB 91, 94.) Respondent claims that the trial court did not have a duty to instruct on accomplice liability with regard to Donald Thomas because the evidence was insufficient as a matter of law to establish that Thomas was an accomplice. (RB 94, citing *People v. Horton* (1995) 11 Cal.4th 1068, 1114; *People v. Hoover* (1974) 12 Cal.3d 875, 880.) Respondent argues that the trial court properly determined that Thomas was not an accomplice as a matter of law. (RB 95.)

Respondent relies on *Hoover* for the proposition that it is for the trial court to determine whether a witness is an accomplice when the facts

related to the participation of a witness in the crime for which the accused is on trial are clear and not disputed. (RB 94.) Respondent argues that the evidence was insufficient as a matter of law to support a finding that Thomas was an accomplice because (1) Thomas denied being involved in Avril's murder (RB 94, citing 15 RT 2838), (2) Thomas testified that he knew Avril and often helped her carry groceries up to her apartment and did other odd jobs for her (RB 94, citing 15 RT 2818-2820), (3) Thomas testified that he helped set up Avril's stereo, explaining why his palm print was found on Avril's stereo cabinet (RB 94, 15 RT 2787-2790), and (4) Thomas testified that he asked the detectives whether Avril's stereo had been stolen because he had heard that appellant was trying to sell a stereo. (RB 94, 15 RT 2818-2820.)

It should be apparent to this court that the facts relied upon by respondent do nothing to prove that Thomas was not an accomplice as a matter of law. Nor do they establish that Thomas' participation in the crimes for which appellant was charged was clear and undisputed. To the contrary, the facts relied upon by respondent do nothing more than contradict evidence indicating that Thomas may have been involved in Avril's murder and theft of and/or possession of Avril's property after the killing.

That respondent is aware of this flaw in its argument is shown by the few facts respondent acknowledged. As noted in appellant's opening brief, Young testified that toward the end of 1995 or the early part of 1996, while in Thomas' bedroom, Young heard Thomas talking about a burglary. (15 RT 2865-2867.) Thomas said that he had a TV and VCR that he had to sell that he got from an apartment across the way from Mike Fontenot's garage.[2] (15 RT 2868, 2876.) Thomas said that he went into the apartment but got scared and left when somebody woke up. (15 RT 2868-2870.) Thomas said that things got bad in the house. (15 RT 2870.) Thomas used the word "we" while talking about being in the apartment but did not say who the other person was. Young understood that to mean that Thomas was not alone in the apartment. (15 RT 2876-2877.)

Respondent argues that James Young's testimony was ambiguous and did not indicate that Thomas was an accomplice to appellant's crimes. (RB 95.) Respondent claims that Young provided almost no detail about Thomas' alleged burglary confession. (RB 95.) Respondent also notes that Young did not state that Thomas was involved in a murder. (RB 95.)

Appellant submits that respondent's characterization of Young's testimony is entirely self-serving. It is not at all clear why respondent believes Young's testimony was ambiguous. (RB 95.) There really is

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[2] Someone standing outside the Fontenot garage would be able to see Avril's garage. (15 RT 2879.)

nothing ambiguous about Young's testimony. Nor is it at all clear why respondent believes that Thomas' participation in the offenses was clear and undisputed. (RB 94.) Respondent treats Thomas' testimony as to why his palm print was found in Avril's stereo cabinet as being a conclusive fact, when it is in fact merely testimony contradicting circumstantial evidence that Thomas stole Avril's stereo. Theft of Avril's stereo was, of course, also circumstantial evidence that Thomas killed Avril, either by himself or while acting in concert with another individual.

B. Conclusion

The trial court below erred by instructing the jury that they should consider Johnson's testimony with caution only as to counts six and eight. Johnson's motivation in testifying against appellant was the same as to all of the various charges. Assisting the prosecutor in obtaining convictions against appellant served Johnson's interests.

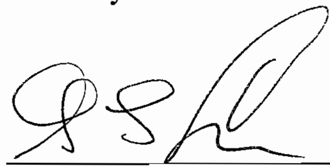
The trial court also erred by failing to instruct the jury on accomplice testimony as to Donald Thomas. The very facts relied upon by respondent negate respondent's claim that the trial court justifiably found that Thomas was not an accomplice as a matter of law. Thomas' trial testimony did nothing more than to place into dispute the conclusion that Thomas was involved in the burglary and killing.

The jury in this matter should have been charged with determining whether Thomas was an accomplice, and they should have been instructed on the requirement that Thomas' statements be corroborated and viewed with caution. For the reasons set forth in this brief and in appellant's opening brief, the trial court's errors require the reversal of appellant's convictions.

Dated: September 14, 2011

Respectfully submitted,

Cannon & Harris
Attorneys at Law



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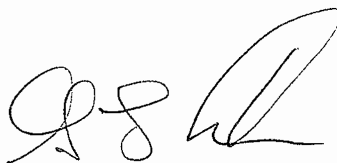
CERTIFICATION OF WORD COUNT

I hereby certify that I have checked the length of this computer-generated brief using the word count feature of my word-processing application. (Cal. Rules of Court, rule 8.630(b).) The brief as currently constituted, excluding tables, indices and this certificate, contains 23,356 words.

Dated: September 14, 2011



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PROOF OF SERVICE BY MAIL

I am over eighteen (18) years of age and not a party to the within action. My business address 6046 Cornerstone Court West, Suite 141, San Diego, California, 92121-4733. On September 14, 2011, I served the within

APPELLANT'S REPLY BRIEF

On each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail addressed as follows:

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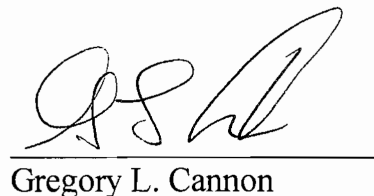
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 14, 2011



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