IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **vs.** **JOSEPH KEKOA MANIBUSAN,** Defendant and Appellant.	**Case No. S094890** Monterey County Superior Court No. SM 980798 **CAPITAL CASE**

Appeal from the Judgment of the Superior Court
of the State of California, County of Monterey

The Honorable Jonathan R. Price, Judge Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant's Opening Brief (hereafter AOB) raised and explained trial errors in 16 major issue areas which individually and collectively require that Mr. Manibusan's convictions and death sentence be reversed. Respondent has attempted to challenge appellant's analysis as to each of these issue areas in the Respondent's Brief (hereafter RB). In this reply, appellant will show that respondent has failed to effectively counter the substantive issues raised in the AOB, and thus Mr. Manibusan's convictions and sentence may not stand.

Appellant thoroughly presented the procedural history, the facts and the issues in the AOB. Here, appellant will address only those contentions in the RB which do not require needless repetition of arguments or analysis made in the AOB. Appellant does not intend to concede any argument or any factual discrepancy by omission in this brief

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SECTION ONE

THE JURY'S MISCONDUCT AND THE TRIAL COURT'S FAILURE TO ADDRESS THAT MISCONDUCT ONCE IT BECAME APPARENT REQUIRE REVERSAL

I. BY FAILING TO HEED THE TOTALITY OF THE CIRCUMSTANCES SHOWING THAT THE JURY HAD ENGAGED IN SERIOUS AND ONGOING MISCONDUCT, THE TRIAL COURT'S FAILURE TO GRANT THE MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO CONDUCT FURTHER INVESTIGATION WAS REVERSIBLE ERROR

A. Introduction

In the opening brief, appellant demonstrated that on many occasions during the trial the trial court was presented with facts demonstrating a reasonable likelihood that the jury was engaged in misconduct. Each warning the trial court received presented further evidence of an obvious and escalating pattern of misconduct. The AOB addressed the cumulative impact of the various acts of jury misconduct (AOB 86-87, Argument IV) after describing each form of misconduct in separate arguments. (AOB 31-85, Arguments I, II and III.)

Respondent ignores the impact of this progressive march of irregularity and seeks to divide appellant's argument into bits, minimizing the signs of misconduct when possible, ignoring them when not, and ultimately declaring each bit to be harmless, and thus harmless as a whole. (See RB 15-43.) Respondent fails to address, however, the glaring fact that

the warning signs of misconduct were not independent, but cumulative. (See RB 42-43.) Each new showing was additional evidence that, in conjunction with what had been presented before, showed with ever greater certainty that the jury's forays into misconduct were not isolated and harmless, but part of an ongoing pattern.

Thus, for example, while respondent seeks to parse the escalating indicators of misconduct on the part of Juror 58 into a discussion of the admissibility of the evidence presented in support of a motion for a new trial (see RB 23-26), the primary issues raised in appellant's first argument were not the denial of the new trial motion, but rather the trial court's failure to accept that a cascade of new information cast serious doubt upon its initial conclusions as to Juror 58's credibility and her ability to proceed fairly, and the court's subsequent failure to conduct additional inquiry into the misconduct. (AOB 49-61.)

As will be shown, each of respondent's analyses of appellant's jury misconduct arguments fails to address the question of a trial court's proper response when presented with multiple indications of jury misconduct. Because this Court must provide guidance to trial courts confronted with similar situations, appellant will urge this Court to first consider the trial court's failure to act in the face of several different indicators of

misconduct (AOB argument IV[1]), before addressing each of respondent's individual arguments.

This argument thus discusses the intertwined issues raised in the first four arguments in the AOB, that the trial court committed reversible error when it failed to conduct further investigation in the face of facts showing multiple acts of jury misconduct (section D below) and that, based on the information presented, the trial court's denial of the new trial motion was prejudicial error similarly requiring reversal. (Section E below.)

B. The Many Factual Indications of Juror Misconduct Known to the Trial Court When Considered Together Raised a Reasonable Likelihood of Juror Misconduct More Compelling Than Any Single Act of Misconduct

The first hint of trouble arose during the guilt phase deliberations when Juror 58 wrote a note to the judge asking to be discharged as a juror because a person she knew had come to court to support Mr. Manibusan. This, she claimed, compromised her anonymity and led her to feel threatened. (7 CT 2012, 77 RT 15202.) The trial court questioned the juror about her request and learned that Juror 58 had discussed the matter with her husband and remained uncomfortable about the situation. She asserted, however, that she would not be influenced by the event and wished to

[1] Respondent fails to consider the trial court's response when confronted with multiple indications of misconduct, arguing only that none of the identified issues constituted misconduct and there was thus no cumulative prejudice. (RB 42-43.) Appellant did not argue this point. Appellant argued that when shown the likelihood of multiple forms of misconduct, the trial court's duty to investigate was triggered, and that the failure to undertake the investigation was prejudicial error. (AOB 86-87.)

continue after all. (77 RT 15205-15213.) Over defense objections that the juror would be affected by the events regardless of her assurances to the contrary, the trial court found "no demonstrable reality that she is unable to perform her duties as a juror." (77 RT 15214-15218.) The trial court did not consider the new indication of misconduct that the juror had discussed aspects of the case with her husband.

The next indicator of misconduct also involved Juror 58 and arose later the same day that she had claimed that she would be unaffected by the presence of an acquaintance among Mr. Manibusan's supporters. She sent another note to the court, this time asking whether she could be relieved as foreperson of the jury. (7 CT 2015.) Although defense counsel pointed out that this change of heart showed that the juror's assurances of impartiality had been flatly contradicted, the trial court refused to investigate or otherwise act on the new information. (77 RT 15234-15240.)

After the trial, additional information concerning Juror 58's conduct was brought to the trial court's attention. Juror 58 told the defense investigator that during the trial she had telephoned a friend to ask why her acquaintance was attending the trial, and learned that the acquaintance had talked to Mr. Manibusan's mother about Juror 58. She also told the investigator that she had told the other jurors that she did not want to sign the verdict forms because she feared for her safety. (6 CT 1692-1693.) The investigator also learned that Juror 58 had discussed her participation

on the case with a sheriff's deputy, and that the discussion may have occurred while the case was still ongoing. (7 CT 1807.)

Another trial juror, Juror A.G., confirmed that Juror 58 had asked not to sign the verdict because she knew someone who had a connection to the Manibusan family and feared that she would be in danger if she were to present the verdict of the jury. (6 CT 1701.)

Opening an entirely new area of misconduct, this same juror provided information that the jury received "a lot of information" bearing on penalty phase deliberations from an extrajudicial source. (6 CT 1701.) Juror A.G.'s sworn statement included the new information that Juror R.M., a vocational instructor at Salinas Valley State Prison, had been asked by several of the jurors about the conditions inmates faced while in prison, and that the juror responded with a significant amount of information which Juror A.G. considered as evidence when deliberating the penalty decision. (6 CT 1701; 96 RT 19014-19015, 19041.)

Other jurors confirmed this. Juror 58 agreed that Juror R.M. had talked about conditions for inmates, and recalled that he had mentioned that inmates received cable TV, prompting another juror to complain that even the juror did not have cable. (CT 1806.) Another juror, D.S., confirmed that Juror R.M. had answered other jurors' questions about the facts of prison life. (7 CT 1809.)

A third separate area of misconduct came to light after the conclusion of the trial. Jurors A.G., D.S., and number 58 all confirmed that the jurors had considered, as a fact relevant to their penalty decision, the fact that Mr. Manibusan exercised his constitutional right not to testify. (6 CT 1701, 7 CT 1806, 1809.)

At the time of the motion for a new trial, all of these factual allegations were known to the trial court. At the hearing of that motion defense counsel explained that the trial jurors were, for the most part, unwilling to provide declarations. As a result, counsel asked not to submit the motion on the hearsay statements contained in the defense investigator's declarations. Instead, counsel repeatedly asked the trial court to conduct further investigation, and noted that several of the jurors were currently present in court and thus available for testimony. (96 RT 19002, 19004, 19006, 19011, 19014, 19041.) The trial court, however, turned a blind eye to the blatant indicia of misconduct, and refused to take any steps to make a record of the facts or to address the profoundly disturbing disclosures in any way.

C. The Trial Court's Responses to Showings of Misconduct Must Take Into Account All Relevant Information and The Court Is Obliged To Reconsider Previous Holdings In Light of New Facts

When confronted with indications of jury misconduct, the trial court must act to protect the accused's right to a fair trial by an untainted jury.

The trial court is tasked with determining whether the misconduct, if proved, would constitute good cause to remove the juror, and if so to conduct an investigation to determine the facts.[2]

> "When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is required. [Citations]" (*People v. Barnwell* (2007) 41 Cal.4th 1038,1051.) If the trial court has good cause to doubt a juror's ability to perform his duties, the court's failure to conduct a hearing may constitute an abuse of discretion on review. [Citations] "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists. [Citations.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 532 [250 Cal. Rptr. 550, 758 P.2d 1081].)
> (*People v. Lomax* (2010) 49 Cal. 4th 530, 588.)

This duty continues throughout the trial and does not end even though the trial court has conducted an investigation and concluded there was no reason to discharge the compromised juror. When new facts arise that cast further doubt on a juror's ability to perform her duties or disclose additional misconduct, the judge must investigate again. (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067.)

As shown above and in arguments I, II and III in the AOB, there were numerous allegations of misconduct presented to the trial court throughout the course of this trial. As shown in the AOB, and in arguments II, III and IV in this brief, any one of the allegations was sufficient to raise

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[2] The duty to conduct a hearing to investigate misconduct arises under the Sixth and Fourteenth Amendments to the United States Constitution as part of a trial court's obligation to protect the right to a trial before a fair and unbiased jury. (*Remmer v. United States* (1954) 347 U.S. 227, 229-230)

good cause to investigate further. In the last instance, however, the trial court was not confronted with one, two or even three allegations of substantial misconduct. Instead, the trial court was informed of factual allegations sufficient to raise a reasonable suspicion of five separate acts of jury misconduct.

First, the trial court was reminded that Juror 58's note seeking authorization to step down as foreperson contradicted the assurance, made after her initial request to be discharged because she felt threatened, that her performance as a juror would not be affected by the compromise of her anonymity. (6 CT 1685-1744, 7 CT 1798-1809 [Appellant's motion for a new trial].) Although not a completely new allegation of bias, this was a new fact casting doubt upon the veracity of her earlier disclaimer, or at very least her ability to accurately assess the degree to which she was affected by the courtroom incident. (See also argument II.)

Second, the court had before it the defense investigator's statement that Juror 58 admitted that she had told the other jurors that she was afraid to sign the verdict forms because she knew one of Mr. Manibusan's supporters and was afraid of retaliation. This statement confirmed that defense counsel's logical inference that this had occurred, dismissed by the

trial court as "pure speculation" at the time it was first raised,[3] was in fact correct. (77 RT 15236-15237; see also argument II.)

Third, counsel presented uncontroverted evidence that the jurors received and considered extrajudicial evidence during penalty deliberations. Juror A.G. provided a declaration that included a statement that Juror R.M. had provided "a lot of information about what life in prison was like for inmates"[4] and that this information comprised "[o]ne of the most compelling arguments that may have convinced the jury to vote for death." (6 CT 1701; 96 RT 19014-19015, 19041.) The allegation that this information was provided and discussed was confirmed by other jurors. (7 CT 1806, 1809.) Thus Juror A. G.'s declaration shows both that the evidence had been presented to the jurors, and that it was actually considered by the jurors in deciding to impose the death penalty. (See also argument III.)

Fourth, the evidence showed that the jury violated their oaths and discussed Mr. Manibusan's failure to testify during the penalty deliberations. At least 3 jurors confirmed this. (6 CT 1701; 7 CT 1806, 1809; see also argument IV.)

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[3] Respondent repeats the trial court's assessment in the RB, and ignores Juror 58's own admission that she told the other jurors that she feared retaliation which unequivocally removes this misconduct from the realm of speculation. (See RB 20 ["Appellant asks this Court to speculate that . . . the second note was motivated by a renewed fear of retribution".].)

[4] The trial court had specifically ruled that such evidence could not be presented during the penalty phase. (3 CT 842-865, 40 RT 7925.)

Fifth, Juror 58 admitted that, while the case was still ongoing, she violated her oath by discussing the case with at least two people who were not on the jury. (77 RT 15205-15206 [her husband – this was disclosed by the juror when questioned by the trial court concerning her request to be discharged from the jury]; 6 CT 1693 [a close friend]; see also argument II.)

The allegations of misconduct here are precisely the kind that have been described by this Court as sufficient, individually, to compel further investigation. As the Court noted in *People v. Adcox*:

> In the context of a claim of juror misconduct we have held that the court must conduct "an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener* (1986) 41 Cal.3d 505, 519 [224 Cal.Rptr. 112, 714 P.2d 1251]; see also *People v. Andrews* (1983) 149 Cal.App.3d 358, 366 [196 Cal.Rptr. 796, 46 A.L.R.4th 1].) In those cases placing ultimate responsibility upon the court to make such inquiry, the trial court had been alerted to facts suggestive of potential misconduct, and hence had proceeded to voir dire the jurors or other relevant witnesses to determine the extent, if any, of prejudice. (See, e.g., *People v. Knights* (1985) 166 Cal.App.3d 46, 51 [212 Cal.Rptr. 307] [report by foreman that two jurors had outside discussions regarding case]; *People v. McNeal* (1979) 90 Cal.App.3d 830 [153 Cal.Rptr. 706] [report by jury foreman that another juror had personal knowledge of case]; *People v. Thomas* (1975) 47 Cal.App.3d 178, 180 [120 Cal.Rptr. 637] [fact that four jurors had read prejudicial newspaper article brought to trial court's attention].)
> (*People v. Adcox* (1988) 47 Cal. 3d 207, 253.)

If shown to be true, any of these allegations would have been good cause to remove jurors. (*People v. Gates* (1987) 43 Cal. 3d 1168, 1199

[Good cause exists when facts in the record show " 'an inability to perform the functions of a juror . . . as a demonstrable reality.' "]; *People v. Johnson* (1993) 6 Cal. 4th 1, 21; see argument D below and arguments II, III and IV *post.*) But the trial court did not receive the warnings of misconduct in a vacuum. Each of the individual allegations was part of a totality of circumstances showing an even greater likelihood of misconduct than any of the allegations taken individually. As stated in the AOB, "Thus even if the trial court was unconvinced to conduct further inquiry by any one area of misconduct, the combination of facts showing that three different types of misconduct occurred should have done so."[5] (AOB 87.)

These allegations of misconduct are truly cumulative, building together to show a jury repeatedly violating the trial court's orders either through a failure to understand the trial court's instructions or by a willingness to disregard them. Either way, the totality of the circumstances presented to the trial court compelled further investigation, and the trial court's refusal to take that step was, as shown below, a prejudicial abuse of discretion. (See sections D and F below.)

D. When A Trial Court Fails To Investigate Allegations That Would Support A Finding of Juror Misconduct, The Trial Court Abuses Its Discretion

[5] Above, appellant has identified five acts of misconduct. Three of these, however relate to the same area of misconduct, that Juror 58 had violated her oath as a juror.

If a trial court is aware of facts raising good cause to believe that jury misconduct may have occurred, a failure to investigate the potential misconduct is an abuse of discretion. (*People v. Allen and Johnson* (2011) 53 Cal. 4th 60, 70; *People v. Lomax, supra*, 49 Cal.4th at p. 588; *People v. Burgener* (1986) 41 Cal.3d 505, 520.) The duty to investigate continues even though the jury has returned a verdict. If the trial court receives evidence sufficient to show a strong possibility of jury misconduct, the trial court should conduct a hearing to resolve any material questions of fact. (*People v. Brown* (2003) 31 Cal. 4th 518, 581-582.)

On review, this Court will accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. However, the trial court's choice not to investigate upon a showing of likely juror misconduct, is a mixed question of law and fact which is subject to this Court's independent determination. (See *People v. Ault* (2004) 33 Cal. 4th 1250, 1263; *People v. Nessler* (1977) 16 Cal.4th 561, 582, fn. 5.)

Here, the only credibility determination made by the trial court occurred when the court evaluated Juror 58's assertion that her conduct as a juror would not be affected by her knowledge that one of Mr. Manibusan's supporters knew who she was. All other rulings by the trial court concerning the need to investigate were based on written materials which are subject to this Court's independent review. (See, e.g., *People ex rel*

Department of Corporations v. Speedee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1144.)

Any of the events known to the trial court were sufficient cause to investigate further. (See arguments II, III and IV *post.*) Cumulatively they showed a compelling picture of a jury that profoundly misunderstood the court's instructions about what they could and could not consider in their deliberations. Specifically, the trial court was presented with facts showing that even though the jurors were told that they must not allow bias or prejudice against Mr. Manibusan to interfere with their objectivity, Juror 58 allowed her fear to influence her actions in the jury room. (7 CT 1836 [CALJIC No. 1.00]; Argument II, *post.*) The trial court also had facts showing that while the jurors were directed to consider only evidence that was received in court, the jurors considered juror R. M.s extrajudicial evidence concerning prison conditions as evidence supporting a death sentence. (7 CT 1836 [CALJIC No. 1.00], 1841 [CALJIC No 1.03]; Argument III, *post.*) Finally, the trial court was aware that the jurors had considered Mr. Manibusan's failure to testify during their deliberations. (7 CT 1856 [CALJIC No. 2.60].)

This cascade of corroborated facts, known to the trial court, was sufficient to support the defense request for a new trial based on jury misconduct. (See argument E below.) It was ample evidence to show good cause to believe that misconduct had occurred and thus support counsel's

request that the trial court undertake further investigation. (*People v. Lomax, supra*, 49 Cal.4th at p. 588; *People v. Burgener, supra*, 41 Cal.3d at p. 520; *People v. Brown, supra*, 31 Cal. 4th at pp. 581-582.)

The trial court's refusal to conduct an investigation in the face of the substantial evidence of jury misconduct discussed above is an abuse of discretion. (*People v. Burgener, supra*, 41 Cal.3d at pp.520–521. See also *People v. Foster* (2010) 50 Cal.4th 1301, 1342.) Respondent's contention that this evidence is either hearsay or otherwise incompetent is unavailing in this context. Admissibility of evidence is not the question. When, as here, the trial court had been informed that some of the trial jurors were unwilling to sign written declarations even though they had talked with investigators, their hearsay statements were amply sufficient to raise a likelihood that the deliberations had been compromised. Further, the statements were corroborated by the declaration of A.G., the only juror who was willing to sign a declaration. Given the serious nature of the misconduct alleged, the corroborated factual basis to believe that it likely did occur, and the presence at the hearing of several jurors who could easily have been examined, the trial court's reluctance to look into the matter is inexplicable and an abuse of discretion. (96 RT 19002; *People v. Adcox, supra*, 47 Cal. 3d at p. 253 [failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review].)

E. Regardless of The Need For Further Investigation, The Trial Court Abused Its Discretion By Denying the Motion For a New Trial When Presented With Competent Evidence That The Jury Had Considered Both Outside Information and Mr. Manibusan's Failure to Testify During Penalty Phase Deliberations

Because the bulk of the facts showing the likelihood of jury misconduct were discovered after the jury had returned its verdicts, many of those facts were first presented in the defense motion for a new trial. (6 CT 1685-1744, 7 CT 1798-1809; 96 RT 19001-19050.) The motion raised the several reasons that jury misconduct was likely. During argument, counsel expressly argued that the totality of the circumstances showed that the jury members violated their oaths. (96 RT 19016, 19018-19019.)

Much of the prosecutor's oral argument centered on the allegations of misconduct concerning Juror 58. (96 RT 19026-19035.) Although the prosecutor acknowledged the cumulative impact of misconduct, like respondent here, he gave short shrift to the idea, responding simply "there were no errors." (96 RT 19037; RB 42-43.) To support this contention, both the trial prosecutor and respondent in the RB attack the admissibility of the evidence offered in support of the motion as either hearsay or violative of Evidence Code, section 1150.

Three sorts of declarations were offered in support of the motion for a new trial: a juror's declaration; declarations by the defense investigator regarding contact with other jurors; and a declaration concerning Juror 58

by the woman whose appearance in the courtroom triggered Juror 58's request to be discharged. All of these were properly offered as support for the repeated defense requests for additional investigation since, as shown above, when considered both separately and cumulatively the statements showed a strong likelihood of jury misconduct.

Respondent's attack, however, is to the admissibility of these documents as evidence in support of a motion for a new trial. Respondent discards the declarations by investigator Lepore and Christy Page as containing only multiple levels of hearsay. (RB 24-25, 31, 40.) Respondent dismisses the declaration of Juror A. G. as violative of Evidence Code, section 1150. (RB 31-32, 40-41.) As shown below, each of these documents was admissible, in part, as support for the motion for a new trial. Further, when considered in the totality of the circumstances, the admissible allegations show that there was good cause to believe that jury misconduct had occurred and that the trial court abused its discretion by denying the motion.

1. The Declaration of Juror A. G. Contained Admissible Evidence of Multiple Acts of Jury Misconduct And Was Sufficient, On Its Own, To Require A New Trial

The admissibility of evidence to impeach a verdict is limited by Evidence Code, section 1150(a), which provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made,

> or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.
> (Evid. Code, § 1150, subd. (a))

Juror A. G.'s declaration contains a mixture of matters made admissible by section 1150 and matters that are inadmissible. A juror's declaration is precisely the sort of evidence of jury misconduct that should be considered in a motion for a new trial. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 80; *People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) A declaration containing both admissible and inadmissible matters is not made inadmissible as a whole, and the admissible evidence may be considered alone. (See, e.g. *People v. Smith* (2007) 40 Cal. 4th 483, 523-524.) The text of the declaration reads, in its entirety, as follows:

> 1. I was a juror in the trial of the case of People vs. Joseph Manibusan which took place in September and October of 2000 in the Superior Court of Monterey County.
> 2. During deliberations on the morning of the day that the jury rendered its verdict on the guilt phase of the trial, the foreperson, [Juror 58], told us that she did not want to read the verdict because she knew someone who had a connection with the Manibusan family and she feared for her safety.
> 3. I understood that she feared that she might be in danger later on if she read the verdict.
> 4. The fact that the defendant did not testify came up during deliberations.
> 5. It was the general consensus of the jury that if the defendant testified he would subject himself to damage by the prosecutor's questions.
> 6. During deliberations in the penalty phase of the trial the

first poll of the jury showed four in favor of death, five in favor of life without the possibility of parole and three undecided.
7. I believe that I was the last to vote for life.
8. The second to last vote was eleven to one for death.
9. One of the most compelling arguments that may have convinced the jury to vote for death was from juror [R. M.] who works in a prison and provided the jury with a lot of information about what life in prison was like for inmates.
10. The information from Mr. [M.] showed me that while life in prison isn't much of a life, it is still a life.
11. Mr. [M.] has spoken to me since trial because he is trying to organize a tour of the prison for the jurors.
12. I am interested in touring the prison.
13. During the deliberations in the penalty phase the court responded to a question from us regarding what would happen if we couldn't agree on a verdict. After the response from the court we decided that we needed to make every possible effort to come up with a verdict.
(6 CT 1701.)

In this declaration, paragraphs 1, 2, 4, 5 and 9 are "statements made, or conduct, conditions, or events occurring, either within or without the jury room", and admissible under Evidence Code, section 1150. Paragraphs 1, 2 and 4 are simple statements of fact. Paragraph 5's mention of the word "consensus" shows that Mr. Manibusan's failure to testify was discussed by the jury.[6] Similarly, paragraph 9 shows that Juror R. M. brought extrajudicial evidence about prison living conditions into the deliberation process, and that the information was heard by the other jurors and actively considered during penalty phase deliberations.[7]

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[6] See argument IV, *post.*
[7] See argument III, *post.*

The declaration thus provides evidence of three separate types of misconduct: corroboration of counsel's inference that Juror 58 had asked to resign as foreperson because she was afraid of retaliation and in the process brought outside matters into the deliberations by explaining her fear to the other jurors; evidence that the jurors violated their oaths by considering considering extrajudicial evidence; and evidence that the jurors violated their oaths by considering Mr. Manibusan's failure to testify. Through this declaration the trial court had sufficient evidence of multiple incidents of misconduct to grant a new trial.

The trial court's aversion to considering this juror's declaration actually turned Evidence Code, section 1150 on its head. The trial court made two statements suggesting that the court did not understand the law. The statements: "This juror does not say they would change their vote" in a context suggesting that the court would have considered the statement if that were so , and "There is no indication Juror 58 influenced negatively any juror or their vote" suggest that the trial court was evaluating "the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." in direct contravention of section 1150. Although the trial court did see that A. G.'s reference to the impact of Juror R. M.'s extrajudicial evidence as "one of the most compelling arguments . . . for death", was speculation as to the thought

processes of the other jurors[8], the trial court completely missed the point that in order to reach that conclusion, A. G. and the other jurors heard and actively discussed that information, treating it as evidence in the penalty phase. (96 RT 19047; 6 CT 1701.)

Respondent similarly ignores the fact that juror A. G.'s declaration shows that the jury's decision making process was influenced by the receipt of extrajudicial evidence. A. G.'s statement that the extrajudicial evidence was a "compelling . . . argument for death" shows that the jurors improperly discussed R. M.'s statements as evidence in aggravation. As explained by this Court in *Krouse v. Graham*, evidence of this nature is admissible under section 1150.

> We carefully explained in *People v. Hutchinson* (1969) 71 Cal.2d 342, that section 1150 properly distinguishes between "proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . ." (P. 349.) In *Hutchinson* we approved the admission of jurors' affidavits, for purposes defined and limited by section 1150, adding, however, that "The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citations.]" (P. 350.) *Hutchinson* involved jurors' affidavits regarding a bailiff's improper statements to the jury, prompting them to reach a premature verdict. Since these remarks were "likely to have influenced the verdict improperly" (Evid. Code, § 1150, subd. (a)), we vacated the order denying new trial and directed the trial court to redetermine the motion in the light of these affidavits. By similar reasoning, if the jurors in the

[8] The court seems to draw a distinction between a juror's statement that the misconduct would have changed his or her vote, and a juror's statement about what other jurors did as the result of the same misconduct. The statue makes no such distinction.

> present case actually discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees, such discussion and agreement would appear to constitute matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150. (See also *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 19 [jurors' declarations re bias and misconduct of fellow juror].) (*Krouse v. Graham*, *supra*, 19 Cal.3d at pp. 80-81.)

In *Krouse*, juror declarations showed that the jury had discussed the likelihood that one third of any award they made would go to the attorneys as fees. Accordingly, the jury increased their award of $60,000 by $30,000. This Court reviewed the declarations and noted that although the declarations did not make clear whether the assertion that the jurors "considered" the question of attorneys' fees was a description of an individual juror's thought process or a description of an objectively verifiable event occurring in the jury room, the clear assertion that the award was increased by $30,000 to account for attorneys' fees provided showed that the declarations should have been admitted and considered as evidence. (*Krause v. Graham*, *supra*, 19 Cal.3d at pp. 81-82.) Here, Juror A. G.'s statement that Juror R. M. provided a "compelling" argument supporting the death verdict does not turn on the word "compelling", but on the word "argument". This shows without question that in debating the penalty verdict, the jury had received extrajudicial information and then treated that information as evidence.

Respondent, however, recasts A. G.'s declaration as stating "in essence" "(1) that the jury may have been swayed by information about prison conditions . . ., (2) that the information influenced A. G.'s vote in the penalty phase, and (3) that after the trial R. M. offered to organize a tour of the prison." (RB 31.) As shown above, this summary is wrong and misleading. The use of the word "compelling" does not justify respondent's characterization of the statement as describing the impact of the evidence. While the word does describe A. G.'s reaction to the evidence, the statement as a whole describes matters discussed during deliberations and is "objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150." (*Krouse v. Graham, supra*, 19 Cal.3d at p. 81: and see *People v. Jones* (1998) 17 Cal. 4th 279, 316 [juror's post-trial statement to press regarding the verdict presenting a deterrent did not show misconduct but could provide grounds to investigate whether the jury considered deterrence in their deliberations].)

Finally, A. G.'s description of the voting process, showing that the jury was at first leaning slightly toward life without the possibility of parole only to shift to death during the discussions of prison conditions faced by inmates, is also admissible. This too describes events that transpired in the jury room, not thought process, much like the discussion of attorney's fees in *Krouse*. These events are verifiable and subject to corroboration as well,

and show the likelihood that the death verdict was connected to the discussion of extrajudicial evidence.

Thus juror A. G.'s declaration contained admissible statements about the events occurring in the jury room, and showed that the jury engaged in several acts of misconduct. Standing alone, this declaration provided sufficient evidence of misconduct to compel the trial court to grant the motion for a new trial, unless the truth of juror A. G.'s allegations was contested in some meaningful way. Those allegations were not challenged at all and were, in fact, corroborated by other admissible evidence.

2. The Declaration of Christy Page Contained Relevant and Admissible Information Based On Personal Knowledge Corroborating the Allegations that Juror 58 Committed Misconduct

The declaration of A. G. was not the only admissible evidence available to the court. Christy Page provided a declaration that, while containing hearsay, also contained relevant and admissible evidence showing how she knew Juror 58. Ms. Page explained that she met Mr. Manibusan through her boyfriend, who had been incarcerated with Mr. Manibusan. Ms. Page's then explained that her boyfriend is the brother of Juror 58's friend Jessica. While insufficient, standing alone, to show misconduct, Ms. Page provides corroboration that she did see and recognize Juror 58 when she came to court and provides context for Juror 58's request to be discharged as a juror. (7 CT 1803.)

3. The Declaration of Defense Investigator Lepore Contained Admissions by Jurors of Misconduct and Were Admissible Under An Exception To The Hearsay Rule

Investigator Lepore's declarations contain no statements made of his personal knowledge regarding events during deliberations, but do contain statements made to him by Juror 58 and by Juror D. S. In these statements, both jurors admit that they had discussed Mr. Manibusan's failure to testify and that they had sought or obtained and discussed extrajudicial information during their deliberations. (7 CT 1806, 1809.) In addition, Juror 58 admitted that she talked with a Sheriff's Deputy, disclosed her role as a juror in the Manibusan case, and learned that the Deputy knew Mr. Manibusan. She believed that this conversation may have happened while the case was still in progress. (7 CT 1807.)

To the extent that these jurors admitted violating their oaths and committing misconduct, the admissions fall within the admissions against interest exception to the hearsay rule, and would be admissible. (Evid. Code, section 1230; *People v. Gonzales* (2011) 51 Cal. 4th 894, 933.)

This Court recently reviewed Evidence Code section 1230 and described its operation succinctly as follows:

> Evidence Code section 1230 permits a hearsay statement to be admitted if it "so far subjected [the declarant] to the risk of civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true." " 'The focus of the declaration against interest exception to the hearsay rule is the basic

> trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584 [61 Cal. Rptr. 3d 580, 161 P.3d 104] (Geier).) n22 (*People v. Gonzales, supra*, 51 Cal. 4th at p. 933.)

This exception was applied in similar circumstances in *People v. Von Villas* (1992) 11 Cal. App. 4th 175, 254. In that case, the defense investigator's declarations regarding two juror interviews were seen as properly before the court since they contained admission by the jurors of conduct that constituted misconduct.[9] The exception was found to apply because both jurors "were subject to prosecution for violation of their oaths as jurors by disobeying the orders of the trial judge in contempt proceedings as well as for perjury by criminal prosecution. Both jurors were also exposed to the risk of civil liability and of being made objects of ridicule and social disgrace in the community." (*Ibid.*)[10]

Here, Mr. Lepore's declarations show that both Juror 58 and Juror D. S. revealed that the jury engaged in discussions of Mr. Manibusan's failure to testify, and of the extrajudicial evidence provided by Juror R. M.

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[9] One admitted discussing the case outside of the jury room with one other juror, the other admitted learning that a separate jury had convicted appellant's co-defendant and discussing that fact in deliberations. (*People v. Von Villas, supra*, 11 Cal.App.4th at pp. 251-253.)

[10] In *Von Villas* the jurors were unavailable within the meaning of Evid. Code §1230 because they had invoked their 5th Amendment privilege against self-incrimination. Here, the jurors had made themselves unavailable by invoking the provisions of Code of Civil Procedure section 206, after initially agreeing to talk with the defense investigator.

The declaration of Juror 58 also confirms that she had discussed her participation as a juror in the case with a Sheriff's deputy and, although she was not sure of the date, believed that it could have occurred while the trial was still in progress. (7 CT 1806-1807, 1809.) To the extent that these statements can be considered declarations against interest, they would be admissible as evidence and subject to consideration by the trial court at the motion for a new trial.

4. The Totality Of The Circumstances That Were Properly Before The Trial Court Showed A Likelihood Of Jury Misconduct And The Trial Court's Denial Of The Motion For A New Trial Was An Abuse Of Discretion And Presumptively Prejudicial

At the hearing on the motion for a new trial, the trial court had before it substantial evidence presenting good cause to believe that the jury had committed misconduct. As shown above and in arguments II, III and IV, *post*, the evidence showed that the jury had improperly received and considered extrajudicial evidence, that their deliberations included the fact that Mr. Manibusan did not testify, that Juror 58 introduced outside evidence of the fact that she felt personally threatened by her acquaintance with a supporter of Mr. Manibusan, and that there was strong reason to doubt that she had been honest with the trial court in disclaiming any effect of that fear on her deliberations. In the face of the strong likelihood that

these allegations were true, the trial court's denial of the motion for new trial was an abuse of discretion.

As noted by respondent, a trial court needs to make a three-step inquiry in ruling on the request for a new trial based on jury misconduct. (RB 23.) First, it must determine if the declarations offered in support of the motion were admissible. (Evid. Code, § 1150.) If so, the trial court must determine if the evidence establishes misconduct. (*Krouse v. Graham*, *supra*, 19 Cal. 3d at pp. 79-82.) Finally, the trial court must determine whether any misconduct was prejudicial. (*People v. Marshall* (1990) 50 Cal. 3d 907, 950-951; *People v. Miranda* (1987) 44 Cal. 3d 57, 117.) The trial court has discretion to rule on each of these issues, and on review those rulings will not be disturbed unless there is a clear showing that the trial court abused its discretion. (*People v. Von Villas*, *supra*, 11 Cal. App. 4th at p. 255.) If an abuse of discretion is shown, the error is presumed to be prejudicial. (*People v. Zapien* (1993) 4 Cal. 4th 929, 994.)

As shown above and in arguments II, III and IV, *post*, the trial court here was confronted with clear evidence of jury misconduct, yet either declared it simply not to be misconduct or inadmissible. (96 RT 19046-19050.) To the extent that the trial court's actions were based on its misapplication of the admissibility requirements of Evidence Code section 1150, the court abused its discretion. (*People v. Superior Court* (2008) 43 Cal. 4th 737, 746 [when a trial court's decision rests on an error of law, that

decision is an abuse of discretion]. Further, the trial court's reluctance to disturb the verdicts in the face of the accumulated and admissible evidence of misconduct was also an abuse of discretion. (*People v. Burgener*, *supra*, 41 Cal.3d at pp.520–521.) As such, the misconduct is presumed to be prejudicial.

F. In Light Of Evidence Showing That Jury Misconduct Influenced The Verdict, Reversal Is Required

Even inadvertent jury misconduct creates a presumption of prejudice, which if not rebutted requires a new trial. (*People v. Zapien*, *supra*, 4 Cal. 4th at p. 994; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108; *Remmer v. United States*, *supra*, 347 U.S. at pp. 229-230.) The presumption of prejudice can be rebutted by "a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425.) This Court has also phrased this test as requiring a showing of "a substantial likelihood of juror bias." (*People v. Danks* (2004) 32 Cal.4th 269, 303.) To make such a showing, the Court has considered two alternative measures of prejudice, 1) whether the misconduct is inherently and substantially likely to have influenced the jury or 2) if the misconduct is not inherently prejudicial, whether a review of the totality of the circumstances shows a substantial likelihood that bias arose. (*Ibid.*) The existence of prejudice is a mixed question of law and

fact subject to this court's independent determination, (*People v. Bennett* (2009) 45 Cal. 4th 577, 626-627; *People v. Danks*, *supra*, at pp. 303–304.)

Here, the totality of the circumstances shows that the misconduct created a substantial likelihood of bias. Most directly, juror R. M.'s information concerning the sort of life inmates have while in custody had a direct impact on the jury's verdict at the penalty phase. Juror A. G.'s declaration shows that the information was treated as evidence in aggravation of the penalty, and that it had an impact on the verdict. In addition, Juror 58's dishonesty concerning the extent of her fear constituted ample grounds for removing her from the jury for implied bias, and her presence for both the guilt and penalty verdicts requires reversal. (See argument II, *post*; *In re Hitchings* (1993) 6 Cal. 4th 97, 120.)

Because there was a strong likelihood of jury misconduct presented to the trial court, the court's denial of the motion for a new trial on that ground was an abuse of discretion. Further, the court's failure to investigate that misconduct, in the face of an even greater showing of likely misconduct and multiple requests to inquire further, was also an abuse of discretion. Both of these abuses raise a presumption of prejudice. As shown above, neither of these presumptions is rebutted by the record. Under the totality of the circumstances presented here the trial court's abuses of discretion compel reversal of Mr. Manibusan's convictions and death sentence.

II. BECAUSE NEW FACTS SHOWED A REASONABLE LIKELIHOOD THAT JUROR 58 WAS BIASED AND ALSO DISREGARDED THE COURT'S INSTRUCTIONS, THE TRIAL COURT'S REFUSAL TO INQUIRE INTO THAT LIKELIHOOD WAS PREJUDICIAL ERROR

In the AOB, appellant showed that facts had been presented to the trial court showing a reasonable likelihood that Juror 58 was biased due to fear of retaliation for her participation on the jury. Appellant demonstrated that the first of these facts, a letter from the juror asking to be discharged, was treated appropriately by the trial court. After conducting that initial hearing, however, the trial court thereafter disregarded its duty to safeguard against jury misconduct by twice ignoring new facts showing that the juror was actually biased. The first instance occurred shortly after the initial hearing when another note from the juror gave substantial reason to question her ability to obey her oath, the second when the juror herself admitted that her actions had been influenced by outside events.[11]

The defense also showed that there were additional acts of misconduct by Juror 58. In addition to the statement of Juror 58 that directly contradicted her assurances made to the trial court in response to her first note, at the motion for a new trial the defense showed that Juror 58 had disregarded her oath in several respects. She had discussed the case

[11] Between these two occurrences, the trial court was given an opportunity to reconsider its refusal to investigate the potential for misconduct based on the juror's note. The renewed motion to discharge the juror was not supported by any new evidence, but gave the trial court an opportunity to correct its error at an early stage. (AOB 37; 6 CT 1638-1639; 79 RT 15601.)

with outside parties; she had, with the other jurors, discussed Mr. Manibusan's failure to testify; and she had considered facts not in evidence. Despite all of this new information, the trial court refused to investigate further. By its failure to act, the trial court allowed a tainted juror to sit and a tainted verdict to stand. (AOB 31-67.)

Respondent's two pronged challenge to appellant's showings of misconduct by this juror does not address all of the contentions made in the opening brief. Instead, respondent attempts to minimize the showing of bias and misconduct. Respondent thus dismisses as speculation the reasonable inference that juror 58 had not been truthful in her answers to the trial court about the depth of her fear and its impact on her ability to carry out her duties.

In discussing the showings made in conjunction with the motion for a new trial, respondent's main argument is that the supporting declarations contain incompetent hearsay that could not be considered by the trial court. In this, Respondent does not acknowledge the juror's own statement showing that she had misled the trial court by minimizing her fear, and instead focuses this Court's attention on a more collateral issue concerning the juror's discussion of the case with a sheriff's deputy. (RB 15-26.)

A. Juror 58's Bias Was Readily Apparent From Her Second Note to the Trial Court

At the time the trial court received the second written communication from Juror 58, the court knew the following facts:

1. The juror had written a letter requesting to be discharged from the jury because had seen a person she knew in the courtroom and had become aware that the person was "a close friend of the defendant and his family." The juror also wrote that she had been informed by a close friend that her name had been revealed to Mr. Manibusan's family, and that she did not feel comfortable continuing as a juror because she was afraid for her safety and the safety of her family. (7 CT 2012.)

2. The juror, when examined by the court and counsel, testified that she knew the person as her friend's brother's girlfriend; that she had talked to her friend about the situation and learned that the spectator was a good friend of Mr. Manibusan's mother and had talked about the juror with a member of Mr. Manibusan's family; and that she had then discussed the matter with her husband and they concluded that it would be best for her to be excused from the jury. (77 RT 15204-15206.)

3. The juror then testified that she did not want to be discharged as a juror, but that she and her husband were still "very, very concerned that something bad could happen to us or me because of all this." (77 RT 15206-15207.) She claimed that these events would have no effect on what

she felt about what she heard in the courtroom, and when asked specifically whether it would "affect your actions as a juror", responded "No." (77 RT 15207.)

Following these assurances, and over the objection of defense counsel who asked that she be replaced by an alternate, the trial court allowed the juror to return to deliberations. The trial court noted that he had observed the juror's demeanor and determined "no demonstrable reality that she is unable to perform her duties as a juror." (77 RT 15217-15218.)

A few hours later, the trial court received the second note, in which Juror 58 asked if she could be replaced as foreperson of the jury "for purposes of reading and signing the verdicts." (7 CT 2015.)

Defense counsel recognized the import of the note and moved for a mistrial based on the likelihood that Juror 58 had told the other jurors about her fear of retaliation when she asked to be replaced as foreperson. [12] Counsel also charged that the juror's assurances of neutrality made to the trial court a few hours before were inconsistent with the ongoing fear implied in the note. (77 RT 15234-15236.) The trial court denied the motion, calling counsel's logical inferences "pure speculation." (77 RT 15236.) Respondent echoes this theme, claiming that appellant has asked "this Court to speculate that juror 58 was not candid when initially

[12] Although dismissed by the trial court as pure speculation, counsel's logical inference was absolutely accurate. Juror 58 admitted later that she had informed the jury that she wanted to be replaced as foreperson because of her fear of retaliation, and her admission was corroborated the declaration of another juror. (6 CT 1692-1693, 1701.)

questioned by the court, or that the second note was motivated by a renewed fear of retribution." Respondent goes so far as to claim that "the second note did not provide any new or contradictory information relative to the claim that juror 58 was biased based on her attenuated connection to a person who was friends with appellant's family." (RB 22.)

Respondent thus fails to acknowledge the obvious, that after Juror 58 had discounted her ongoing fear of retaliation, her request to be relieved of her perceived duty to sign and announce the verdict in open court showed that her fear was still active and affecting her actions as a juror. This logical inference is no great leap. Defense counsel simply urged that the trial court consider the known circumstances as the context in which the note should be viewed and to draw the appropriate inferences from those circumstances. As this Court has recognized, such inferences are not speculation. (*People v. Story* (2009) 45 Cal. 4th 1282, 1298 ["The Court of Appeal dismissed these inferences as mere 'speculation.' They are not speculation. They are reasonable inferences based on specific circumstantial evidence."].) The circumstances here strongly suggested two important things: 1) despite her assurances to the contrary, Juror 58's actions as a juror were affected by her fear of retaliation, and 2) Juror 58 had not been entirely truthful in her answers to the trial court discounting the effects of her fear.

Respondent chalks the juror's reluctance up to "reluctance and anxiety" rather than a "hypothetical fear" and claims there was "no demonstrable reality that she was biased by fear and unwilling to be publicly connected to the case." (RB 21.) Defense counsel, however, correctly pointed out that this second note from Juror 58 raised facts strongly suggesting that the juror was biased and did not belong on the jury. Based on the facts before it at the time, the trial court acted within its discretion when it relied on Juror 58's verbal assurances to deny the first defense request to discharge her. (See *People v. Harris* (2008) 43 Cal. 4th 1269, 1303-1305.) The trial court's actions after the receipt of the second note cannot be justified, and constitute a prejudicial abuse of discretion.

When a juror's actions are affected by events or information coming from outside the trial, that juror is tainted by bias. ((*In re Hamilton* (1999) 20 Cal.4th 273, 294.) The concern first implicated in this juror's request to be discharged sounds of bias in this sense of the word. Although the juror did not cause the incident, the fact that she was fearful enough to request to be discharged from the jury showed the likelihood of bias, which was then appropriately addressed by the trial court by directly questioning the juror about her ability to serve. When the juror then responded to the implication of bias with assurances of her ability to maintain neutrality, the trial court cannot be faulted for accepting her statements at face value. (*People v. Harris*, *supra*, 43 Cal.4th 1303-1305.)

The second note brought new facts to the table. A plain reading of the note in the context of the facts known to the court carried a strong inference that Juror 58 had misrepresented her neutrality. Whether that was through failure to understand that she could not actually disregard her fear or through active misrepresentation is not as important as the fact of the misrepresentation. This Court has found that a juror's misrepresentation can provide "substantial grounds" for inferring a juror's bias, and provide grounds to disqualify the juror. (*In re Hitchings* (1993) 6 Cal. 4th 97, 120 [in the context of jury voir dire].)

The new information, and the logical inferences derived from that information, raised a strong likelihood that Juror 58 was actively biased. With such information at hand, the trial court was under a duty to investigate further to "nip the problem in the bud" and eliminate the possibility that Mr. Manibusan's constitutional right to a fair trial could be compromised by juror bias. (*People v. Prieto* (2003) 30 Cal. 4th 226, 274; *People v. Keenan* (1988) 46 Cal.3d 478, 532; *People v. Castorena, supra,* 47 Cal.App.4th at pp. 1066-1067 [despite previous inquiry into bias, new facts showing likely bias requires new investigation].) The trial court's failure to act in this circumstance was therefore an abuse of discretion.

B. The New Facts Provided To Support The Motion For A New Trial Confirmed And Strengthened The Likelihood That Juror 58 Was Biased Thus Triggering The Trial Court's Duty To Investigate Anew

In the AOB, appellant demonstrated that defense counsel presented new facts showing the likelihood of bias in support of their motion for a new trial, and that these facts confirmed defense counsel's inference that Juror 58's actions as a juror had been affected by bias. Appellant specifically showed new information presented to the trial court showing that the juror had informed the other jurors that she was afraid to sign the verdict and also told them why she was afraid. The new information also confirmed that she had talked about the case with non-jurors and suggested that she may have received outside information directly relating to the case. (AOB 38-40, 55-61.)

Appellant showed that this new information was amply sufficient to initiate the trial court's duty to investigate, and that the trial court's failure to do so despite defense counsel's specific request to defer ruling on the motion for a new trial in order to conduct such an investigation, was a prejudicial abuse of discretion. (AOB 55-66.) Respondent does not argue that the new information concerning Juror 58 was insufficient to reinvigorate the trial court's duty to investigate likely misconduct. Instead respondent's argument relates to the impact of the juror's second note and the resulting motions for mistrial and to discharge the juror addressed in section A above.[13] (RB 16-22.) Respondent's only response to the

[13] Respondent did, in a footnote to that argument, claim that the portion of juror A. G.'s declaration describing Juror 58's decision to step down as foreperson was merely his "subjective evaluation" of Juror 58's statement. (RB 21, fn. 4.) In making this argument, respondent ignores

subsequent showing is limited to an attack on the admissibility of hearsay statements offered in support of the motion for a new trial coupled with a brief argument that the juror did not discuss the facts of the case with outsiders. (RB 22-26.) Respondent does not address the sufficiency of this new evidence to raise the trial court's duty to investigate.[14]

The evidence was directly relevant and thoroughly contradicted the trial court's previous conclusions about the effect of bias on Juror 58's performance. As stated in the AOB:

> Although the subject of Juror 58's reactions to Ms. Page's presence at the trial was at the heart of the previous rulings and was the subject of the trial court's initial inquiry, the new information all tended to show that the juror was not, in fact, able to keep the events out of her deliberative process, nor keep her concerns to herself. Thus the effect of the events was not just actively on the juror's own state of mind during deliberations (an outcome directly at odds with her assurances to the court), but led the juror to discuss the events occurring during the trial with people outside of the jury room and also to explain her fear and the reason for it to the jury as a whole, both entirely new areas of misconduct. (See *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413-1414 [verdict must be uninfluenced by extrajudicial evidence or communications or by improper association with the witnesses, parties, counsel or other persons]; *People v. Cissna, supra*, 182 Cal.App.4th at p. 1115 [outside conversations about case]; *People v. Gamache* (2010) 48 Cal. 4th 347, 398 [inadvertent exposure to out of court information gives rise to presumption of prejudice because jurors may be

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juror A. G.'s direct statement "During deliberations on the morning of the day that the jury rendered its verdict on the guilt phase of the trial, the foreperson . . . told us that she did not want to read the verdict because she knew someone who had a connection with the Manibusan family and she feared for her safety." and counsel's offer of proof that Juror 58 admitted to investigator Lepore that she had done so. (6 CT 1701, 6 CT 1693.)

[14] Appellant recognizes that this failure is not tantamount to a concession. *People v. Hill* (1992) 3 Cal. 4th 959, 995 fn. 3

influenced by material the defendant cannot confront, cross examine, or rebut].)
(AOB 57-58.)

The information presented to the trial court was also reliable enough to trigger the duty to investigate. Respondent argues that the declarations of Ms. Page and Mr. Lepore were inadmissible to support the motion for a new trial because they "were vague and speculative, containing multiple levels of hearsay." (RB 24.) Appellant has addressed the admissibility of those declarations as support for the motion for a new trial in argument I, *ante*. In the context of the trial court's duty to investigate, however, the admissibility constraints imposed in Evidence Code section 1150 do not apply.

The trial court's duty to investigate is triggered if the defense shows "good cause" to doubt a juror's ability to perform her duties. (*People v. Virgil* (2011) 51 Cal. 4th 1210, 1284; *People v. Ray* (1996) 13 Cal.4th 313, 343.) This is accomplished by showing a "strong possibility" of juror misconduct. (*People v. Brown*, *supra*, 31 Cal. 4th at p. 582; *People v. Hedgecock* (1990) 51 Cal. 3d 395, 419.) While not limiting the nature of this showing to admissible evidence, this Court has held that hearsay alone is usually insufficient to establish a strong possibility of misconduct. (*People v. Hayes* (1999) 21 Cal. 4th 1211, 1256.)

Here, the defense did not rely entirely on hearsay and made a strong showing that Juror 58 had committed misconduct using a juror's

declaration and corroborated hearsay statements from other jurors. The declaration of juror A. G. was admissible at the motion for a new trial, as shown in argument I.

As applicable to this argument, juror A. G.'s declaration stated that Juror 58 told the jurors that she did not want to sign the verdict forms because she was afraid of retaliation. (6 CT 1701.) There were no indications that the declaration was in any way untrustworthy, and the statement concerning Juror 58's actions was consistent with the feelings she expressed in response to the trial court's inquiry. The declaration's recitation of Juror 58's communication to the other jurors is not hearsay, but proof that the words were spoken regardless of the truth of the assertion that she was afraid. The declaration also corroborated counsel's offer of proof that Juror 58 had admitted the same to his investigator. [15] The declaration was thus properly before the trial court, and also confirmed counsel's inference that Juror 58 had told the other jurors why she wished not to sign the verdict forms.

The information before the trial court was thus shown to be reliable and also to be consistent with facts known to the trial court. This information showed that, at the very least, Juror 58 took at least one action as a juror that was affected by bias and that she had contaminated the jury

[15] Counsel informed the trial court that his investigator was present and prepared to testify as to the matters contained in the offer of proof and written declarations. (96 RT 19004.)

by bringing in the outside fact that she knew one of Mr. Manibusan's supporters and that once she was aware that the supporter knew who she was she became fearful of retaliation.

When a juror's actions are affected by events or information coming from outside the trial, the juror is tainted by bias. Juror 58's fear of retaliation did not arise through jury tampering because she had not actually been threatened by one of Mr. Manibusan's supporters. Nonetheless, her fear was of the same nature and called for the trial court to take special care that she was not biased as a result. (See, e.g. *In re Hamilton*, *supra*, 20 Cal.4th at p. 295 [tampering raises a presumption of prejudice].) While the trial court's initial examination of the juror and reliance on her statements was, at the time, reasonable, the additional information presented in the juror's request to be relieved and in the facts offered at the motion for a new trial gave the court good cause to doubt her veracity and re-examine the question of bias.

In addition, the new information showed that Juror 58 had committed additional misconduct when she provided outside information to the jury. Explaining to the other jurors that she was afraid of retaliation because one of Mr. Manibusan's supporters recognized her was not very different from saying that she had personal knowledge that Mr. Manibusan was a dangerous person with dangerous friends.

Under these circumstances the trial court was aware of reliable information showing a likelihood of Juror 58's personal bias, that her actions as a juror were affected by that bias, and that she had shared her bias with the other jurors. This information was more than sufficient to raise the duty to investigate, not only Juror 58's bias, but the impact of that bias on the jury as a whole.

The concerns about Juror 58's ability to perform her duties as a juror did not stop with the likelihood of bias. As shown in the AOB, there was also a substantial likelihood that the juror had talked about the case with her husband and her friend, and that there was a possibility that she had talked about the case with a sheriff's deputy as well. (AOB 56-57.) When interviewed by the trial court, Juror 58 had admitted talking with her husband and friend about her concerns after seeing Ms. Page, but claimed not to have discussed the case, at least with her friend. (77 RT 15213.)

As a result, the trial court had information showing good cause to believe that Juror 58 committed misconduct. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 294 [Juror who "consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors" commits misconduct].) In the face of such information, the trial court's refusal to conduct further investigation was an abuse of discretion.

C. Mr. Manibusan Was Prejudiced By The Trial Court's Failure To Investigate Juror 58's Misconduct

As shown, the trial court knew that it was likely that Juror 58 had committed serious misconduct, both by allowing a personal bias to affect her actions as a juror and by exposing the rest of the jury to inflammatory and prejudicial information. With such knowledge, the trial court was obligated to investigate the misconduct and its failure to do so was an abuse of discretion.

In determining prejudice in such a situation, prejudice must be found if there is a likelihood that even a single juror was influenced by the misconduct.

> Such "prejudice analysis" is different from, and indeed less tolerant than, "harmless-error analysis" for ordinary error at trial. The reason is as follows. Any deficiency that undermines the integrity of a trial -- which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury -- introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. (See *Rose v. Clark*, *supra*, 478 U.S. at pp. 577-578.) Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial.
> (*People v. Marshall*, *supra*, 50 Cal. 3d at pp. 950-951.)

Here, there were ample facts before the trial court to corroborate the likelihood of misconduct. Had the trial court conducted the appropriate

inquiry, the court might have discovered sufficient evidence to explain the juror's conduct in a way sufficiently neutral to rebut the presumed prejudice. The court did not do so however, and neither counsel nor this Court can "speculate about what facts might have been adduced if the inquiry had been conducted." (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1066.)

Because the alleged misconduct shows the substantial likelihood that a biased juror was allowed to remain on the jury, and the known facts also show that the juror exposed the rest of the jury to highly inflammatory and prejudicial information, Mr. Manibusan was prejudiced . As a result his convictions and sentence must be reversed and a new trial ordered.

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III. BECAUSE THE JURY'S USE OF OUTSIDE EVIDENCE IN PENALTY PHASE DELIBERATIONS AFFECTED THE OUTCOME OF THE TRIAL, THE DEATH VERDICT MUST BE REVERSED

In the AOB, appellant showed that one of the jurors shared outside information concerning living conditions in state prison with the other jurors during penalty phase deliberations. This information was brought to the attention of the trial court through declarations supporting a motion for a new trial, and was sufficient to support the defense request that the trial court investigate the misconduct. Even without investigation, the evidence of misconduct provided sufficient grounds to support the new trial motion. The trial court's refusal to investigate and the denial of the motion for a new trial were thus abuses of discretion. Because there was evidence that the jury actually considered the extrajudicial evidence in their deliberations, coupled with evidence showing that it affected the verdict, the trial court's errors were prejudicial and a new penalty trial is required. (AOB 68-80.)

Respondent argues first that the declaration that brought the allegations of misconduct to light was, for the most part, inadmissible and thus not sufficient proof to support the motion for a new trial. (RB 31-32.) Respondent further argues that the admissible portion of the declaration shows only that a juror utilized his life experience in penalty phase deliberations and thus did not commit misconduct. (RB 32-34.) Finally, respondent argues that if misconduct did occur, it was not prejudicial.

Respondent does not address appellant's demonstration that the information concerning the jury's receipt and use of outside information triggered the trial court's duty to investigate.

In argument I E 1 above, appellant showed that juror A. G.'s declaration contained admissible evidence of misconduct and refutes respondent's contentions to the contrary. That evidence showed that the jury received "a lot" of information about living conditions for prison inmates from a civilian employee of the Department of Corrections, that the jury discussed this information in conjunction with their sentencing choice, and that the information had an impact on the verdict.

In argument I F, appellant also demonstrated that this evidence alone compelled the trial court to grant the motion for a new trial, that the trial court's ruling to the contrary was an abuse of discretion and that the error was prejudicial, depriving Mr. Manibusan of his rights to a fair trial and a reliable sentencing determination. (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) Because those issues have been extensively discussed in arguments I E 1 and I F above, appellant will not repeat them here.

A. The Fact That Juror R. M. Was Employed At A Prison Does Not Allow Him To Present Evidence Used In Deliberations Under The Guise Of Permissible Reference To His Life Experiences

In the AOB, appellant showed that by providing extrajudicial information about living conditions in prison, juror R. M. committed

misconduct. Receipt or discussion of evidence not submitted at trial constitutes misconduct. (*People v. Dykes* (2009) 46 Cal. 4th 731, 809; *People v. San Nicolas* (2004) 34 Cal.4th 614, 650.) Appellant also showed that the nature of the information provided and the jury's use of that information demonstrated that R. M. had not merely incorporated his life experience into his deliberative process, but had impermissibly introduced outside evidence into the deliberations. (AOB 72-78.)

Respondent contends that any information introduced into deliberations by juror R. M. was not misconduct but a permissible use of his own life experience in the deliberation process. (RB 29-30, 32-34.) Respondent specifically notes that this Court has found no misconduct when jurors share "experiences gained while working in a prison", citing *People v. Pride* (1990) 3 Cal.4th 195, 267-268 and *People v. Riel* (2000) 22 Cal.4th 1153, 1218-1219. Using these cases to distinguish *People v. Stankewitz* (1985) 40 Cal.3d 391, 399-400, cited in the AOB, respondent concludes that there was no misconduct because "R. M. shared his own factual observations. There is no evidence that he introduced incorrect or extraneous legal principles." (RB 33-34.)

Respondent does not recognize the dividing line between a juror's permissible use of life experience when evaluating evidence and the improper interjection of facts not in evidence into deliberations. As this Court has recently reiterated, "Jurors may not present as facts specialized

knowledge they claim to possess. However, a distinction must be drawn between the introduction of new facts and a juror's reliance on his or her life experience when *evaluating* evidence." (*People v. Allen and Johnson*, supra, 53 Cal. 4th at p. 76 [emphasis in original].)

In *Allen and Johnson*, a juror was discharged, *inter alia*, for utilizing his life experience to determine the credibility of crucial evidence concerning the use of a timecard. The trial court in that case used this fact, coupled with the juror's announced skepticism of the strength of the prosecution's case, to discharge the juror. This Court found the trial court's action an abuse of discretion. As to this aspect of the case, the Court saw that the juror's life experience formed a guide for his own evaluation of the evidence and led him to a conclusion different from that of many of the other jurors. Although he clearly shared his reasoning with the other jurors, sharing the reason for a juror's evaluation of evidence is not tantamount to the introduction of unproven facts into the deliberation process. (*People v. Allen and Johnson*, *supra*, 53 Cal.4th at pp. 76-78.)

Applied here, the distinction explained in *Allen and Johnson* shows that the injection of facts concerning prison living conditions was misconduct. As shown in argument I E 1, juror R. M.'s information was not offered as an explanation of his reasoning process, and does not even appear to have been offered by him spontaneously. Instead, he responded to the questions of other jurors who were seeking facts, not an explanation

of his thoughts. His specialized knowledge was presented as fact, accepted by the other jurors as such, and used as evidence in the sentencing choice.

The cases cited by respondent are not similar and shed no new light on the issue. In *People v. Riel* a juror was reported to have made an isolated comment during deliberations that the judge was likely to commute any death sentence. This Court saw the statement as the type of opinion that lay people often bring into the jury room, and that the injection of such opinions was a risk naturally associated with the "fundamentally human" jury system. The fact that the juror alleged to have made the statement had at one time been employed as a nurse in a jail had no impact on the Court's evaluation since there was no evidence to indicate that she had held herself out as having specialized knowledge. Instead, the Court viewed the statement as merely a "personal opinion." (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1218-1219.)

In *People v. Pride*, a juror's declaration stated that during deliberations the jurors discussed a recent prison escape and a state prison cook opined that it was easier for prisoners incarcerated for life to escape than those on death row. This Court agreed with the trial court's conclusion that "any discussions about escape were based on 'common sense' and general knowledge, and that [the juror] was not 'professing to be an expert on the subject of prison escapes and was [not] somehow bringing

in outside law or making experiments ....' " (*People v. Pride*, 3 Cal. 4th at p. 267.)

The situation presented in this case differed significantly. Juror R. M.'s information was neither isolated nor uttered during a discussion of matters of common sense and general knowledge. Instead, several jurors questioned him, apparently extensively, about prison conditions and he provided "a lot" of information in that regard. (6 CT 1701, 7 CT 1806.) Thus while juror R. M. was not "bringing in outside law or making experiments" the other jurors treated him as an expert on prison conditions and the information he provided was used by them in determining the penalty to be imposed. This is exactly the type of juror conduct that this Court has recognized as misconduct. (*People v. Allen and Johnson*, *supra*, 53 Cal.4th at p. 76 ["Jurors may not present as facts specialized knowledge they claim to possess."] R. M. was seen by the other jurors as having specialized knowledge and it was presented, and received, as fact.

R. M. committed misconduct, as did the jurors who solicited and used the facts he presented. This was not a secret to the trial court, but the facts were not received either as evidence supporting the motion for a new trial or as facts showing a strong likelihood of misconduct requiring further investigation. The trial court's failure to recognize the import of this showing in either capacity was an abuse of discretion. As shown in

argument I F above, the abuse of discretion was prejudicial. As a result, the penalty verdict must be reversed.

B. The Record Shows That The Jury's Verdict Was Influenced By The Receipt Of Extrajudicial Evidence

In the context of jury misconduct, this court will find prejudice if the record, taken as a whole, shows a substantial likelihood that even a single juror was influenced by the receipt of outside information.

> A judgment adverse to a defendant in a criminal case must be reversed or vacated "whenever . . . the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury." (2 ABA, Standards for Criminal Justice, std. 8-3.7 (2d ed. 1980) p. 8.57; see, e.g., *In re Winchester* (1960) 53 Cal.2d 528, 534 [implying that the issue is whether "a juror might have been improperly influenced by" extrinsic material]; *United States v. Vasquez* (9th Cir. 1979) 597 F.2d 192, 193 [stating that "the key question is whether there exists a possibility that [extrinsic] information influenced the verdict"].) This rule "has significant support in the case law" (2 ABA, Standards for Criminal Justice, supra, std. 8-3.7, Commentary, p. 8.58), both within California (see *People v. Stokes* (1894) 103 Cal. 193, 198-199 [37 P. 207]) and without (see *State v. Kociolek* (1955) 20 N.J. 92, 100 [118 A.2d 812]). (See ABA Project on Standards for Criminal Justice, Stds. Relating to Fair Trial and Free Press (Approved Draft 1968) std. 3.6, Commentary, p. 148.)
> (*People v. Marshall, supra*, 50 Cal. 3d 907, 950-951.)

As refined in *In re Carpenter*, the showing of likely prejudice can either be objective by finding that the nature of the outside to be inherently prejudicial, or a finding of "actual bias", based upon an examination of the entire record of the case to determine if there is a substantial likelihood that

even one juror's vote was affected by the misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 652-654.)

As noted in *Carpenter*, the objective bias test is analogous to a traditional harmless error analysis. The actual bias test, however is more stringent.

> [T]he test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. (*People v. Marshall*, *supra* , 50 Cal.3d at p. 951.) A biased adjudicator is one of the few "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-578; *Morgan v. Illinois* (1992) 504 U.S. 719, 729; *People v. Cahill* (1993) 5 Cal.4th 478, 501-502.) Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. Under this second, or "circumstantial," test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. "The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record*, that there is no substantial likelihood that the complaining party suffered actual harm." (*People v. Hardy* (1992) 2 Cal.4th 86, 174 italics added.)
> (*In re Carpenter*, *supra*, 9 Cal.4th at p. 654.)

Applying that test to the facts presented here shows a substantial likelihood of actual bias caused by the dissemination of outside information

to the jury, and the jury's use of that information. As described in juror A. G.'s declaration, juror R. M. provided "a lot of information about what life in prison was like." A. G. also declared that this information was considered by the jury as an argument for death. Finally, the declaration shows that the jury initially favored life without parole by a slight margin, but that this shifted to death. (6 CT 1701.)

This information, available to the trial court at the motion for a new trial, shows that the jury did incorporate the facts provided by R. M. into their deliberations, that they discussed that information as though it was legitimate evidence in aggravation, and that it likely influenced the verdict. Thus the trial court's abuse of discretion in denying the motion for a new trial was prejudicial because the record shows a substantial likelihood that at least one juror was actually biased by the information.

The trial court's abuse of discretion for failure to investigate is even more egregious because there were additional facts supporting the likelihood of actual bias. In addition to the evidence admissible at the motion for a new trial, the trial court also had information confirming that "several" jurors actively solicited the information from R. M., showing that the information was a lively subject of interest during deliberations. (7 CT 1806, 1809.)

The trial court's twin abuses of discretion lead to the same result. Because the trial court failed to act, the integrity of the penalty trial was

undermined because there is a substantial likelihood the jury was not impartial. (*People v. Marshall*, *supra*, 50 Cal. 3d at p. 951.) The trial court's prejudicial abuses of discretion thus require a new penalty trial.

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IV. HAVING RECEIVED EVIDENCE THAT THE JURY'S DELIBERATIONS INCLUDED A DISCUSSION OF MR. MANIBUSAN'S EXERCISE OF HIS FIFTH AMENDMENT RIGHTS, THE TRIAL COURT'S FAILURE TO INVESTIGATE THE MISCONDUCT WAS A PREJUDICIAL ABUSE OF DISCRETION

In the AOB, appellant showed that, in addition to the other evidence of misconduct presented to the trial court as grounds for further investigation of jury misconduct, defense counsel demonstrated a substantial likelihood that the jury had violated the court's instructions not to discuss Mr. Manibusan's failure to testify. (AOB 81-85.) This too was misconduct. (*People v. Loker* (2008) 44 Cal. 4th 691, 749; *People v. Leonard, supra*, 40 Cal.4th at pp. 1424-1425.)

> The Fifth Amendment to the federal Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." A defendant may invoke this right at the penalty phase of a capital case, even though the risk of self-incrimination is diminished because the defendant has already been convicted. (*Estelle v. Smith* (1981) 451 U.S. 454, 462–463; *People v. Thompson* (1988) 45 Cal.3d 86, 124; *People v. Melton* (1988) 44 Cal.3d 713, 757.) The right not to testify would be vitiated if the jury could draw adverse inferences from a defendant's failure to testify. Thus, the Fifth Amendment entitles a criminal defendant, upon request, to an instruction that will "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." (*Carter v. Kentucky* (1981) 450 U.S. 288, 305.) Here, by violating the trial court's instruction not to discuss defendant's failure to testify, the jury committed misconduct. (*People v. Hord* (1993) 15 Cal.App.4th 711, 721, 725; *People v. Perez* (1992) 4 Cal.App.4th 893, 908) This misconduct gives rise to a presumption of prejudice, which "may be rebutted ... by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm."

(*People v. Hardy* (1992) 2 Cal.4th 86, 174; see *People v. Danks* (2004) 32 Cal.4th 269, 303 [8 Cal. Rptr. 3d 767, 82 P.3d 1249] [applying similar standard to allegations of juror bias]; *People v. Nesler*, *supra*, 16 Cal.4th at pp. 582–583 (lead opn.) [same].)
(*People v. Leonard*, *supra*, 40 Cal. 4th at pp. 1424-1425.)

Respondent agrees that this action would be misconduct, but does not admit that the trial court had received facts sufficient to raise a likelihood that this misconduct occurred. Respondent instead claims that any evidence of the misconduct was not admissible. Finally, respondent claims that, assuming the misconduct was shown, the failure to grant a new trial was not an abuse of discretion because there was no prejudice because the facts did not show that there was anything but a fleeting reference to the failure to testify. (RB 38-42.) Respondent does not address the trial court's abuse of discretion for failure to investigate the strong showing of misconduct.

The trial court is required to investigate jury misconduct upon a showing of a "strong possibility" of such misconduct. (*People v. Brown*, *supra*, 31 Cal. 4th at p. 582; *People v. Hedgecock*, *supra*, 51 Cal. 3d at p. 419.) Here, the trial court had the declaration of juror A. G., stating that Mr. Manibusan's failure to testify "came up" during the deliberations. (6 CT 1701.) It also had declarations from the defense investigator who averred that two other jurors had told him the same thing. Juror 58 told him that "the jurors talked about the fact that the defendant did not testify" and

juror D. S. told him that they "discussed the fact". (7 CT 1806, 1809.) These uncontroverted facts show clearly that misconduct had occurred, but do not clearly state the extent of the misconduct. In this circumstance the trial court's duty is clear. Not only was there a strong possibility of misconduct, there was no suggestion that it did NOT occur.

Appellant acknowledges that the trial court, faced with a factual showing of jury misconduct, is faced with an unpalatable menu of choices. (See, e.g. *People v. Fuiava* (2012) 53 Cal. 4th 622, 710-711.) Nonetheless, the trial judge is on the bench precisely to make hard choices when necessary. Here though, the trial court chose to duck the question of misconduct, finding instead that the declarations offered in support of the motion for a new trial were inadmissible. (96 RT 19046-19047, 19050.)

Although respondent echoes this tack, the abuse of discretion raised in the AOB because of the misconduct is the failure to investigate. Appellant did not, and does not now, argue that this evidence alone required the trial court to grant a motion for a new trial.[16]

The trial court had ample facts showing that this jury was extraordinarily prone to playing loose with the rules given by the court. Because the jury had discussed Mr. Manibusan's failure to testify in violation of their oaths, in addition to the other misconduct shown, the need

[16] As shown in argument I, however, this misconduct was properly considered as a part of the totality of the circumstances in support of the motion for a new trial.

to further investigate the jury's misconduct was manifest. The trial court's failure to act accordingly was an abuse of discretion.

As shown in the AOB, the presumption of prejudice raised by the showing of a substantial likelihood of misconduct has not been rebutted. Although the extent of the jury's discussions of Mr. Manibusan's failure to testify is not clear from the record, if the trial court had conducted the appropriate inquiry, the court might have discovered sufficient evidence to explain the juror's conduct in a way sufficiently neutral to rebut the presumed prejudice. The court did not do so however, and neither counsel nor this Court can "speculate about what facts might have been adduced if the inquiry had been conducted." (*People v. Castorena*, *supra*, 47 Cal.App.4th at p. 1066.)

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SECTION TWO

THE JURY SELECTION PROCESS WAS MARRED BY CONSTITUTIONAL ERRORS REQUIRING A NEW TRIAL

V. THE TRIAL COURT IMPROPERLY EXCLUDED JURORS WHO AGREED TO FOLLOW THE LAW DESPITE THEIR RESERVATIONS ABOUT APPLYING THE DEATH PENALTY

In the AOB, appellant showed that the trial court improperly excused three jurors for cause despite the fact that all three maintained that they would apply the death penalty law as instructed. (AOB 88-102.) Appellant showed that each of the three jurors, 24, 199 and 232, expressed general support for the death penalty and a willingness to follow the trial court's instructions. Each, however, stated that they were uncertain about what they would do when in the jury room, and expressed their hesitancy to vote to take a life due to the moral issues at stake in such a decision. (AOB 91-96.)

Respondent contends that each of these jurors "gave conflicting and equivocal answers on their views on capital punishment" and that the trial court acted within the bounds of its discretion by excusing them. (RB 43-47.)

Appellant has set forth and analyzed each of the jurors' responses deemed equivocal by the trial court, and will not needlessly repeat that analysis here. (AOB 91-102.) Of the three jurors considered, the most

troubling is juror 24. The prosecution did not challenge this juror for cause, but the trial court dismissed the juror on its own initiative. This juror expressed moral qualms about imposing a death verdict, but would not "close [her] mind" to the possibility of voting for death. (52 RT 10259-10269, 10473-10474.)

The trial court's analysis focused on the juror's repeated expressions of doubt about her ability or moral authority to impose the death penalty and deemed such answers equivocal. (53 RT 10495.) The answers, however, did not equivocate about the juror's ability to follow and apply the law. Instead, the juror's responses expressed the deep moral quandary faced by an ordinary citizen who is suddenly thrust into the position of making a life or death decision. It is not a question that can be easily answered, nor should it be. Consequently, jurors who have moral reservations about the death penalty are welcome on capital juries so long as they are able to follow the trial court's instructions and apply the law fairly to the question of penalty. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Juror 24's answers showed that she was struggling with the moral question, not the question of her ability to follow the law. This juror was not, therefore, equivocal and should not have been dismissed.

On review, however, this court will accept the determinations of the trial court concerning equivocations and uncertainty expressed by a

potential juror. In the AOB, appellant urged the Court to re-evaluate this deference in light of cases such as this. (AOB 101-102.)

Even under the Court's current standard of review, deference to the trial court's determinations cannot be absolute. If the record as a whole discloses that the trial court's actions were arbitrary and without any rational basis, they must still be viewed as an abuse of discretion. (*Gall v. Parker* (6th Cir, 2000) 231 F.3d 265, 330-331 [overruled on other grounds, see *Matthews v. Simpson* (W.D. Ky. 2008) 603 F.Supp.2d. 960, 1038 fn 65].) Here, the record discloses an arbitrary choice by the trial court. There was no equivocation about the juror's willingness to follow the law, only expressions of doubt natural to someone who has never been in the situation of having to make such a weighty decision.

In order for a capital punishment system to be administered fairly, jurors like number 24 play a vital part. They recognize that they will deal with profoundly moral questions if called upon to decide a sentence, and also recognize that the decisions will be very, very difficult. That difficulty is often expressed in words like those used by juror 24. It is important to note that those words questioned her ability to make the choice, but did not in any way express an inability to follow the law if selected as a juror.

Respondent's reliance on *Uttecht v. Brown* (2007) 551 U.S. 1 [*Uttecht*] is inapposite in this context. *Uttecht* describes a traditional abuse of discretion analysis, noting that deference is appropriate when the trial

court has supervised a thorough voir dire of the juror in question. Because, as shown in the AOB, the trial court did not supervise or conduct a thorough voir dire of these jurors, the decision to excuse them for cause in the face of their demonstrated ability to serve was reversible error.

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VI. THE TRIAL COURT UNFAIRLY APPLIED *WITT* PRINCIPLES TO RETAIN JURORS WHO WERE LIKELY TO AUTOMATICALLY APPLY THE DEATH PENALTY AND TO SUSTAIN CHALLENGES TO JURORS WHO EXPRESSED RESERVATIONS ABOUT APPLYING THE DEATH PENALTY

In the AOB, appellant showed that the trial court did not apply the *Witt* principles[17] in an evenhanded manner, and thus unfairly excluded jurors who voiced worries about their ability to apply the death penalty and retained jurors who would not realistically consider the penalty of life without possibility of parole. Appellant identified particular jurors who expressed contrasting positions on the death penalty with strikingly similar language who were treated differently by the trial court. The result of this different treatment was that jurors who favored the death penalty in all instances of murder or expressed strong skepticism about their ability to apply mitigating evidence were allowed to remain in the jury pool, while jurors who opposed the death penalty or expressed concerns about their ability to apply the death penalty were excused from the jury. Appellant thus showed that the resulting jury pool was unconstitutionally slanted towards death. (AOB 103-121.)

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[17] *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [*Witt*]. *Witt* established the current standard for exclusion of potential capital jurors due to their views on capital punishment. Under this standard, a prospective juror "may be excluded for cause because of his or her views on capital punishment [if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Witt*, *supra*, 469 U.S. at p. 424; citing *Adams v. Texas* (1980) 448 U.S. 38, 40; *People v. Jones* (2003) 29 Cal.4th 1229, 1246 [same standards apply to capital case jury selection under federal and state constitutions].)

Appellant also showed that the procedural hurdle imposed by this Court to raising such claims, the requirement that all peremptory challenges be exhausted, created in this case an unbearable conflict between the constitutional rights to a fair and neutral jury and a reliable death penalty trial, and the right to have effective counsel raising and preserving constitutional challenges for appeal. In light of this conflict, appellant showed that the failure to exhaust all peremptory challenges in this case should be excused. (AOB 117-123.)

Finally, appellant showed that the inclusion of jurors who would likely vote death in any instance and the exclusion of jurors who opposed the death penalty in most circumstances or who doubted their ability to apply it resulted in a jury unfairly stacked towards death, in violation of the constitutional requirements for a fair and reliable death penalty trial before an unbiased jury. (AOB121-123; U.S. Const., Amend. VI, Amend. VIII, Amend. XIV; *Morgan v. Illinois* (1992) 504 U.S. 719, 729.)

Respondent contends that this issue was not preserved for appellate review, and challenges appellant's analysis of trial dynamics and the need for this Court to take the conflict of constitutional rights into account in applying a procedural bar to raising claims of this nature. (RB 52.) Respondent then suggests that the automatic death jurors identified in the AOB were merely confused about the law or equivocal. Respondent then argues that the trial court's decision to retain such jurors is binding on this

Court, and that the trial court did not apply different standards in retaining biased jurors. (RB 53-56.) Respondent concludes by asserting that any error committed by the trial court in retaining these jurors was rendered harmless by the fact that none of the identified jurors was seated on the jury, without addressing appellant's demonstration of prejudice. (RB 56.)

Respondent's contentions, however are based in superficial analysis and misdirection. As shown below, appellant has demonstrated that the trial judge examined jurors differently, spending time and effort attempting to rehabilitate automatic death jurors, while making no such efforts with death penalty opponents. Further, respondent fails to address the basis of appellant's argument for an exception to the exhaustion of peremptory challenges requirement procedural bar, relying instead on an attempt to distinguish the cases cited in the AOB. Respondent's argument regarding prejudice takes a similar tack, and does not address appellant's contention directly, relying instead on general statements of the law.

A. The Trial Court Treated Jurors With Similar Responses Differently Depending Upon Whether They Supported Or Opposed The Death Penalty

Appellant's analysis of the juror responses regarding the death penalty took its lead from the defense motion to quash the venire as unfairly stacked towards death. (6 CT 1509-1519.) In that motion, counsel compared the trial court's response to disqualifying statements made by

juror 50, who gave strong automatic death responses, with those of juror 36, who gave similarly strong anti-death penalty statements.

In her questionnaire, juror 50 expressed her strong support for capital punishment and understood that her religion favored the use of such punishment. (9 CT 2597, 2603, 2605.) She held to her absolutist position during voir dire until firmly pressed by the trial court. The voir dire of juror 50, omitting questions and answers that relate only to the potential juror's health, follows:

> THE COURT: . . . It says if you object to the death penalty, would you automatically vote for something other than murder to avoid the penalty phase. But you had previously indicated you do not object to the death penalty; is that correct?
> JUROR NUMBER 50: No. I'm for the death penalty.
> THE COURT: I know. Yes. But this question says if you object to the death penalty, so is the reason that you didn't answer that because you do not object to the death penalty?
> JUROR NUMBER 50: Yes.
> THE COURT: Do you see it as a reasonable possibility in your mind because of your support for the death penalty that you could under certain circumstances vote for life without possibility of parole for someone?
> JUROR NUMBER 50: In some cases, yes. But just hearing about this in the beginning, before I was ever called to be a juror, I felt very strongly about what had happened. And --
> THE COURT: Well, you realize that how strongly you felt was based on something that's not evidence in a courtroom?
> JUROR NUMBER 50: I realize that.
> THE COURT: And that all you are getting is information from the media.
> JUROR NUMBER 50: Don't they take their reports from the police?
> THE COURT: Not necessarily. No. That's the whole point. I have actually, to be candid with you, I have sat in here and watched a reporting in the newspaper the following day and I

wondered if they were in this courtroom. So what I am telling you is that you have to be very, very, all of us have to be very careful about that. That's why I'm telling jurors, don't read anything, don't do it. The only proper place is right here. But my concern goes back to whether or not you are able to put out of your mind what you may have read or heard about this case.
JUROR NUMBER 50: I don't think so. It would be very difficult for me to, I guess I am biased at this point.
THE COURT: What makes you think that you are biased, based on what you read?
JUROR NUMBER 50: Right. Yeah.
THE COURT: What if I told you you are not supposed to be biased and the law says that you are supposed to just decide this case from the evidence here?
JUROR NUMBER 50: When I read the articles, I didn't have any idea I would be on the jury.
THE COURT: There is a lot of people I'm sure in that same boat. But now you sat on juries before.
JUROR NUMBER 50: Yes.
THE COURT: And you have made decisions before.
JUROR NUMBER 50: Right.
THE COURT: The only thing that makes any difference to you now is that you may have read something in the newspaper or seen on it the news?
JUROR NUMBER 50: I guess that's caused me to form an opinion, yes.
THE COURT: Can you set that opinion aside and decide this only from what happens here in this courtroom?
JUROR NUMBER 50: Yes.
THE COURT: Do you see it as a reasonable possibility that you could ever vote for life without possibility of parole?
JUROR NUMBER 50: I think so.
THE COURT: You indicated that your daughter was an officer of the court in Merced?
JUROR NUMBER 50: Yes.
THE COURT: What does that mean?
JUROR NUMBER 50: Well, she --
THE COURT: What does she do?
JUROR NUMBER 50: She is in the child support division and they have the ability, they go to court to bring in fathers that are not supporting, that kind of

thing.
THE COURT: Does she work for the district attorney's office there?
JUROR NUMBER 50: Yes.
THE COURT: And is she an attorney?
JUROR NUMBER 50: No.
THE COURT: Anything about her relationship with the court that makes you feel like you want to favor one side or the other in this case, because of her employment?
JUROR NUMBER 50: No.
THE COURT: Anybody you know ever been a victim of the crime?
JUROR NUMBER 50: No.
THE COURT: You indicated you knew someone who you thought might be addicted to or abusing drugs. Could you tell us a little bit about that?
JUROR NUMBER 50: Yes. He's been on and off drugs for many years. And he doesn't, he just chosen a life to do nothing except just sit and let someone take care of him. That's it.
THE COURT: And is this person still involved with drugs in your opinion?
JUROR NUMBER 50: Yes.
THE COURT: And how old is this person?
JUROR NUMBER 50: In their thirties.
THE COURT: Is this person related to you?
JUROR NUMBER 50: He's stepson.
THE COURT: Anything about that relationship that makes you feel uncomfortable sitting here as a juror?
JUROR NUMBER 50: No.
(53 CT 10418-10422.)

This juror thus informed the trial court that she had read the newspaper accounts of the crime and had formed an opinion that Mr. Manibusan was guilty, that she would have a hard time setting that information aside and was biased against the defense and that she believed firmly in the use of the death penalty and that the death penalty was called for in this case. Further, when initially questioned about her ability to set

aside her preconceptions, the juror responded that it would be difficult for her and that she considered herself biased. It was only after the trial court pressed her on this point twice, going so far as to tell her that she wasn't supposed to allow her opinions the influence her verdict, that the juror began to back away from her absolutist positions and adopt a more open position towards Mr. Manibusan and to the penalty choice.

In contrast, Juror 36 took an absolutist stance on the other side of the question, avowing that he would not be able to vote for death because of his religious views. The trial court's entire voir dire takes up a mere 18 lines of transcript, during which the court made no attempt, as he did with juror 50, to challenge the juror's stated bias, explain the law, or ask directly if the juror was able to follow the law. (53 RT 10404.)

The trial court's disparate treatment of potential automatic death jurors and potential automatic life jurors was frequently displayed towards jurors who seemed equivocal. The trial court, on more than one occasion, found that an apparently equivocal death juror was qualified to sit, while a seemingly equivocal life juror was not.

Thus Juror 24, who expressed doubt about her ability to impose the death penalty, despite clearly stating that she remained open to the use of the death penalty was excused by the trial court despite the fact that the prosecutor did not challenge her for cause. (See AOB 91-92) Juror 199 believed firmly in the death penalty, also expressed concern about voting to

impose the death penalty, and was visibly emotional in attempting to explain her position. Throughout the process, however, she maintained that she could consider death as a possible sentence. She was excused for cause as the result of a prosecution challenge, the trial court noting that although she did consistently answer that she could consider voting for death, he found her to be inconsistent in her answers. (See AOB 93-94.) Similarly, Juror 232 explained that she considered life sacred, but that the death penalty was appropriate for serious murders. She doubted only her ability to impose the death penalty personally. When challenged by the prosecution, defense counsel noted the disparate treatment given by the court, noting that the court had not asked any clarifying questions as had been the case with other challenged jurors. (AOB 94-95.)

Similarly situated jurors who expressed automatic death sentiments were retained by the court, often after protracted court voir dire characterized by the defense as rehabilitation. Thus juror 139, who expressed a religious belief that murder calls for the death penalty, and that if murder with special circumstances was proved beyond a reasonable doubt she "would have to" vote for death, was retained after a court voir dire in which she reiterated her automatic death views but promised to

follow the law and to not let her view of the law be clouded by her religious views.[18] (AOB 109-111.)

Similarly, Juror 230 plainly told the court that if Mr. Manibusan was convicted, she would strongly weigh the fact of the murder as justification for death, would require the defense to convince her otherwise, and that she would give no weight to any evidence concerning Mr. Manibusan's background, although she promised to consider such evidence. Notwithstanding her minimal retreat from an absolutist position favoring the death penalty, the trial court overruled the defense challenge, finding her not to be substantially impaired. (AOB 111-113.)

As developed in the AOB, the trial court thus showed unconstitutional favoritism toward equivocal pro-death jurors by retaining them over defense challenges, while excluding pro-life jurors who similarly promised to follow the law.

B. Because He Had Used Peremptory Challenges To Excusing Each Of The Jurors To Whom A *Witt* Based Challenge Had Been Improperly Denied, And Because He Objected To The Composition Of The Jury Ultimately Sworn, Appellant Was Not Required To Forego The Jury Deemed Best To Try The Case In Order To Use His Last Peremptory Challenge Simply To Preserve The Issue On Appeal

[18] During this process, although she told the prosecutor that the death penalty was biblically sanctioned, but that she would not always impose it, she did not explain the circumstances under which she would consider a vote other than for death. Further, at no point when questioned specifically about the appropriate sentence for murder with special circumstances did she disavow her automatic death views. Nor did she tell the trial court that she would consider life without possibility of parole if murder with special circumstances was proved beyond a reasonable doubt.

In the AOB, appellant examined the procedural bar to raising a claim that the trial court improperly failed to excuse potential jurors who do not qualify under *Witt* because they maintain automatic death penalty views. Appellant showed that the procedural bar will, on occasion, place a capital defendant's counsel in an untenable position, forced to choose whether to forfeit his or her client's right to a fair trial before an unbiased jury or to accept the best available jury but forfeit the ability to challenge a trial court's failure to discharge an unqualified juror. In situations like that presented here, the Court will not require counsel to forfeit the right to appeal constitutional errors in jury selection in order to make the best possible decision about jury composition. Counsel here did everything possible to alert the trial court that the jury selection process was not acceptable, that the resulting jury was not the jury that counsel would have selected had the court sustained the *Witt* challenges to unqualified jurors, and that counsel wished to preserve the objection.

Where, as here, counsel has taken steps to preserve the record, has made a timely objection to the errors complained of, and has made a timely objection to the composition of the jury, the wrongful failure to sustain challenges for cause is cognizable on appeal despite the failure to exhaust all peremptory challenges. (See *People v. Box* (1984) 152 Cal. App. 3d 461, 464-466.) Although this Court has never specifically adopted *Box*, the Court has recognized that the procedural bar can be overcome upon a

showing of good cause. (See, e.g. *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 ["To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so"]; *People v. Danielson* (1992) 3 Cal.4th 691, 714 ["In *People v. Box, supra*, 152 Cal.App.3d at page 465, relied on by defendant, the court observed that the proper practice is for trial counsel 'to express a timely on-the-record dissatisfaction with the jury at the time the jury is accepted so the reviewing court knows that in fact this was the situation at trial.' . . . Although the present case was tried several years after Box was decided, no such on-the-record statement was made herein."]; *People v. Raley* (1992) 2 Cal.4th 870, 904-905) [defendant "offers no justification for his failure to exhaust his peremptory challenges, and he did not indicate any dissatisfaction with the jury when it was sworn. Thus he cannot complain on appeal of any error in refusing to excuse the jurors for cause."]; *People v. Medina* (1990) 51 Cal. 3d 870, 889 [application of procedural bar questioned if defense has objected to the venire as a whole.[19]].)

In the AOB, appellant noted this Court's recognition of the advocate's task in balancing the mix of people and personalities during jury selection, and that the addition or subtraction of a single juror can change

[19] Here, counsel objected to the existing venire and requested a new venire due to the trial court's unequal application of *Witt* principles. (6 CT 1509-1520.)

the dynamics of the whole. (*People v. Lenix* (2008) 44 Cal.4th 602, 623-624.) The context in *Lenix* was different than that presented here, but the Court's recognition of the many factors to be balanced by counsel in jury selection is directly applicable. Trial counsel here was faced with the prospect of removing a juror in order to preserve the objection to jury composition, even though counsel's assessment was that the juror would be replaced with one or more jurors deemed likely to affect the jury dynamics in a way less favorable to the defense. If the right to counsel is to be meaningful, counsel's experience and judgment in the selection of the best possible jury must not be manipulated by technical rules that do not take into account the realities of trial practice.

Respondent does not recognize the flexibility of the procedural bar in the face of the dilemma faced by counsel, and merely seeks to distinguish the *Lenix* example by noting that it occurred in a different context than that presented here, and goes so far as to suggest, without authority, that "counsel's calculation that a particular juror may be more or less favorable to their client is irrelevant. . ." (RB 52.) Similarly, respondent ignores the intolerable conflict of constitutional rights identified in the AOB. (AOB 118.)

This case raised the Hobson's choice directly, in a context in which defense counsel had undertaken to perfect the record so far as was possible without risking jeopardy to their client. Counsel had utilized 19 of their 20

peremptory challenges, including challenges to the five jurors identified above, but saw that exercise of the last peremptory would bring an unfavorable juror to the box, and that there were several more following and felt compelled to pass the challenge. Following the swearing of the jury, counsel reiterated their dissatisfaction with the trial court's *Witt* rulings, and with the jury as constituted, and explained that their failure to exhaust all peremptory challenges was based on their need to select the best possible jury, to avoid upcoming jurors deemed unfavorable, and to prevent the prosecutor from stacking the jury. (59 RT 11677, 11678, 11684, 11692, 11693, 11696-11699.)

In this situation, the procedural bar to raising the issue serves no legitimate purpose. Counsel clearly understood what was required to preserve a legitimate appellate issue, and also understood that they had a primary duty to utilize their best judgment in jury selection. The situation presents the illusion of choice, but to jeopardize the best remaining jury for the sake of an issue that might not bear fruit for years to come is no real choice.

Appellant should not be penalized by having this issue foreclosed when counsel did everything they could to preserve it, short of allowing a less favorable jury to hear the case than the jury actually sworn. Counsel expressed firmly their dissatisfaction with the jury, but should not be required to make a bad situation worse by selecting an even less

satisfactory jury. In these circumstances there is good cause to excuse counsel's failure to exhaust all peremptory challenges and to address the merits of the issue directly.

C. The Trial Court's Unequal Application of *Witt* Resulted In An Improper Limitation of Peremptory Challenges, Created A Death Biased Jury, and Compels Reversal

As shown in the AOB, the trial court's uneven application of the *Witt* principles was shown both in an examination of the treatment of the jurors and in the trial court's own statement regarding the purpose of capital case voir dire[20]. This disparity left the jury pool unfairly weighted towards death, and also forced the defense to use peremptory challenges to exclude jurors who should have been excused for cause, resulting in depriving the defense of five of its allotted 20 challenges.

As a result of these errors, the convictions and sentence rendered by this improperly constituted jury must be reversed. (*People v. Coleman* (1988) 46 Cal. 3d 749, 770-771.)

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[20] As noted in the AOB, the trial court saw the *Witt* process as "death qualification, not a LWOP qualification." (56 RT 11007.) The trial court's distinction shows a fundamental misunderstanding of the *Witt* principles where there is no distinction between a juror leaning towards death and one towards life. Either should have an equal chance at rehabilitation, and each should be excused if they cannot realistically follow the court's instructions about the choice of penalty.

VII. THE TRIAL COURT'S RESPONSES AND THE PROSECUTOR'S JUSTIFICATIONS IN RESPONSE TO APPELLANT'S *WHEELER/BATSON*[21] OBJECTIONS CONSTITUTE REVERSIBLE ERROR

In the AOB, appellant showed that several jurors were improperly subject to race-based peremptory challenges by the prosecutor, and that despite timely objection the trial court erred in failing to grant the *Wheeler/Batson* objections. (AOB 124-166.) Respondent does not contest the applicable law cited in the AOB, but seeks to counter each of appellant's demonstrations that the objections should have been sustained, and then argues that the trial court's rulings were supported by substantial evidence. (RB 57-78.)

Because the applicable law is not challenged, appellant will not reiterate these well-settled principles, and instead move directly to a discussion of the individual jurors.

A. The Prosecutor's Attempts to Justify His Peremptory Challenges Were Neither Plausible Nor Supported By The Record And Showed That The Strikes Were Motivated By Bias

In the third, decisive, step of a *Wheeler/Batson* analysis, the trial court must make " 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' (*People v. Hall* (1983) 35 Cal.3d 161, 167-168) and to clearly express its findings (*People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 5)." (*People v. Silva* (2001) 25 Cal.4th 345, 385. See also *People*

[21] *Batson v. Kentucky* (1986) 476 U.S. 79 [hereinafter *Batson*]; *People v. Wheeler* (1978) 22 Cal.3d 258 [hereinafter *Wheeler*].)

v. Reynoso (2003) 31 Cal.4th 903, 925.) In the RB, respondent sought to justify the trial court's failure to make adequate third-prong findings on the defense claim of purposeful discrimination by claiming that the trial court was not confronted with implausible explanations or by explanations that were contradicted by the record. This, according to respondent, relieved the trial court of the duty to probe deeply into the prosecutor's explanations or to explain its findings on the record. (RB 70, citing *People v. Lewis II* (2008) 43 Cal.4th 415, 471.)

Respondent's reliance on *Lewis II* is misplaced. As shown in the AOB, the explanations offered by the prosecutor were both implausible and contradicted by the record. As shown below, the prosecutor's justifications do not hold water and do not rebut the inference of a discriminatory purpose. The trial court's error in sustaining the peremptory challenges over appellant's *Wheeler/Batson* objection was thus reversible error. (*Batson* at p. 100; *Dawson v. Delaware* (1992) 503 U.S. 159, 169 (conc. opn. of Blackman, J.); *People v. Silva, supra*, 25 Cal.4th at p. 386; *Wheeler* at p. 283.)

1. Juror 20

As shown in the AOB, Juror 20 was one of only six African-American women among the potential jurors. She was a neutral juror, presenting answers that favored the prosecution (discounting the importance of background evidence in determining penalty) and the defense

(philosophical opposition to the death penalty). (AOB 132-134.) When asked to justify his use of a peremptory challenge on this juror the prosecutor explained that because the juror "sat in a previous jury in a different murder case and it was a hung jury" he applied his "absolute policy of getting rid of people whose only jury experience resulted in a hung jury." (59 RT 11671.) Although the prosecutor also mentioned concerns about the juror's opposition to the death penalty, these statements were rendered moot by his reference to and apparent reliance on his "absolute policy."

Respondent attempts to avoid the prosecutor's own statement of his absolute policy, and broaden his explanation to include the juror's opposition to the death penalty, and his purported reliance on the juror's demeanor. (RB 73-74.) These attempts not only ignore the prosecutor's words, they point out the lack of any plausible justification advanced by the prosecutor.

The prosecutor's actions show that the prosecutor had no intention of allowing Juror 20 to sit on the jury, and that his motives for this bias were discriminatory. Despite her stated opposition to the death penalty the prosecutor made no attempts to establish the basis for a cause challenge or to question her modified (and *Witt* acceptable) answers during voir dire. In fact, he asked no questions at all. Further, the prosecutor's misstatement of

the juror's prior experience[22] shows that he was paying scant attention while she was responding verbally.

The prosecutor's statements regarding the juror's feelings about the death penalty may well have been sufficient to justify the challenge had they been offered alone. The prosecutor's inclusion of his "absolute policy" negates these reasons, however, and casts reasonable suspicion on his true motive. When the prosecutor's attempts to justify the challenge is seen in the context of the record as a whole is thus revealed as implausible and contrary to the known facts.

Respondent's last attempt to justify the prosecutor's action delves into speculation, suggesting that Juror 20's demeanor played a role in the decision to strike her. There is no support in the record for this proposition, neither the trial court nor the prosecutor suggested in any way that Juror 20's demeanor detracted from her credibility. It was incumbent upon the prosecutor to make the record clear if there was something of significance to be gleaned from her actions. (*People v. Harris*, *supra*, 43 Cal. 4th at p. 1280.)

The prosecutor's justifications are not plausible and, in at least one particular, contrary to the facts. The trial court erred both in failing to probe the prosecutor's justifications more deeply and in overruling the

[22] The juror explained that the jury had been discharged before reaching a verdict due to illness and injury, not for inability to reach a decision. (52 RT 10250-10251.)

defense objection. This error requires reversal of Mr. Manibusan's convictions and sentence.

2. Juror 32

Juror 32 was also an African-American woman. She had a relative and friends in law enforcement, but little contact with the criminal justice system. Her questionnaire answers reflected no qualms about the death penalty either in theory or practice, and she also considered life without possibility of parole to be a severe sentence. Without hesitancy or equivocation, she agreed to follow the law regarding the penalty choice. In voir dire, the prosecutor asked only if she could return a death verdict and she responded affirmatively.

In the AOB, appellant showed that the prosecutor's responses were implausible and contradicted by the record. Appellant also showed that the trial court accepted the prosecutor's justifications without question and without noting or commenting on the deficiencies raised by the justifications. (AOB 139-144, 163.)

Respondent simply parrots the prosecutor's attempts to justify the challenges (See AOB 142-143; RB 61-62, 75), and does not respond to appellant's arguments other than to suggest that the prosecutor could legitimately rely upon the juror's brother's legal difficulties despite the fact that they were not close and had had no communication for nearly 20

years[23], and contend that the prosecutor could rely upon her alleged "equivocation" and her view that LWOP was a more severe punishment than death. (RB 75.) As shown in the AOB, these justifications were patently implausible. (AOB 142-144, 163.)

3. Juror 59

Juror 59 was another African-American woman. She stated that she preferred not to sit on a death penalty case, but would do so if called and would follow the law. Although she was a Jehovah's Witness, who did not believe in sitting in judgment of others, she did not feel that performing her duty to serve as a juror would violate that belief.

In the AOB, appellant showed that the prosecutor asked only one general question of the witness, and that his justification for excusing her was based her religion and on his investigator's assessment that she was not being truthful in saying that she understood that following secular law would not compromise her religious prohibition against judging others. The prosecutor claimed this was an "artificial distinction" but did not describe anything else that led him (or his investigator) to conclude that the prospective juror was being untruthful.

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[23] Respondent argues only that the prosecutor could rely upon this fact because no cases hold "that a juror must have a frequent interactions [sic] with the convicted family member before a prosecutor can rely on it as a basis for a peremptory challenge." (RB 75.) Respondent does not suggest any reason that the prosecutor's reliance on that relationship under these circumstances could be considered reasonable. In fact, the prosecutor's use of this fact underscores the paucity of legitimate reasons to strike this juror, since she clearly stated that she had abandoned contact with that brother some four years before his conviction, and had gone 19 years without contact with him. (8 CT 2383, 52 RT 10291-10292.)

Respondent contends that the juror's answers gave the prosecutor legitimate reason to discharge her, and particularly relies on the ability of the prosecutor to judge the juror's demeanor in assessing her credibility. (RB 60, 74.) The prosecutor, however, did not rely upon his own assessment of the juror's demeanor. The only reference made by the prosecutor to observations of the juror described his investigator's reaction, and even that contains only a conclusion and no indication that the investigator relied upon or conveyed anything about the juror's demeanor. (59 RT 11674.[24])

As with Juror 20, the prosecutor failed to describe any behavior, appearance or attitude that caused him to doubt the juror, but simply said that the investigator "felt" that she was not being truthful. If there was anything significant in the juror's actions that the prosecutor relied upon, it was his responsibility to make a record of those actions. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1280.) The prosecutor's failure to do so further suggests that his reasons were pretextual.

Respondent also suggests that the trial court's response showed that the court had undertaken the obligation to evaluate the prosecutor's justifications and to make its ruling clear for the record. (RT 71.) As

[24] The prosecutor's comment was: "In addition in discussing this juror with my investigator, who was observing her answers to the court's questions in which they sort of backtracked from this and created kind of artificial distinction between a reference to the four walls of the courtroom and her religious views, he personally felt that she was not being truthful in trying to create that artificial distinction. I have a bad feeling about her." (59 RT 11674.)

shown in the AOB, however, the trial court did not evaluate the juror's credibility or the strength of the prosecutor's argument and instead recalled that she felt bound to follow secular law. (AOB 156, 59 RT 11675.) The trial court thus failed to make a sincere and reasoned evaluation of the prosecutor's justifications for the challenge. Because no legitimate justification for the peremptory challenge was offered, the trial court committed reversible error by overruling the defense *Wheeler* objection.

4. Juror 156

As shown in the AOB, although this Hispanic woman was challenged for being "extremely weak" on the death penalty (59 RT 11686), this rationale was contrary to the record. Although she expressed concern about being accurate in arriving at a conviction that could lead to the death penalty, she said that it would be "very difficult" but expressed no qualms about imposing that penalty if warranted. (AOB 144-147, 164; 55 RT 10847.)

Respondent simply repeats the prosecutor's justification and claims that the record supports that justification by taking bits of the juror's responses out of context. Contrary to respondent's contentions, the juror's hesitancy was not to the nature of the penalty, but to the need to make sure that a person facing the death penalty was truly guilty. As the juror stated, she had no objections to the death penalty and took the responsibility of making a penalty choice "with the utmost seriousness" because they were

dealing with "somebody's life". (55 RT 10851-10852, 10905[25].) Respondent goes so far as to suggest that the juror's answers were equivocal and supported the prosecutor's statement that the juror would not vote death in any case. (RB 77-78.) Respondent, like the prosecutor, relies on matters not in the record. The record supports only the conclusion that the juror was careful and mindful of the serious nature of the task before her.

Similarly, respondent only notes the trial court's ruling and makes little attempt to rebut appellant's showing that the judge was, under these circumstances, required to do more than merely accept the prosecutor's unsupported justification. (AOB 152-161.) Regarding this juror, and the other jurors for whom a prima facie case was found, respondent admits that the trial court did not make detailed findings, but nonetheless claims that the trial court met its obligations by listening carefully and recalling the voir dire responses of some jurors, pointing specifically to the ruling regarding Juror 59. (RB 70-72.) As shown above and in the AOB, however, the trial court's responses were plainly inadequate in light of the pretextual justifications offered by the prosecutor.

B. Respondent Did Not Address Appellant's Demonstration That The Trial Court Applied An Unduly Restrictive

[25] Appearing to anticipate the nature of a juror's task when weighing the penalty choice, Juror 156 explained to the prosecutor "...I think when you take somebody's life into consideration, you better make sure that that's exactly, you know, what you have got everything, all your ducks in a row, you know in your heart that that's what's got to be done." (55 RT 10905.)

Standard In Reviewing The Stage One Showing of Discriminatory Purpose

In the opening brief, appellant showed that the trial court should be presumed to have applied an unduly restrictive test to the first stage analysis regarding Jurors 47 and 200, and that this Court should review the first stage question for these jurors *de novo*. (*Johnson v. California* (2005) 545 US 162, 168; AOB 149-150.) Respondent did not contest this point and appellant will therefore rely upon the argument presented in the AOB without further embellishment.

C. There Was Sufficient Evidence Surrounding The Challenges To Jurors 47 And 200 To Show An Inference Of Discriminatory Purpose

In the AOB, appellant showed that the challenges against Jurors 47 and 200 each had sufficient evidence of discriminatory intent to require that the trial court ask the prosecutor to justify the challenges. Juror 47, an Hispanic man, was as close to an actual peer of Mr. Manibusan as there was in this panel, a younger minority male, who had no obvious disqualifications. Juror 200 was an Asian woman who provided thoughtful answers and also had no obvious disqualifications. The prosecutor did not seriously question either of these jurors, asking Juror 47 only if he would vote for death if appropriate, and asking Juror 200 no questions at all. (AOB 137-139, 147-149.)

Respondent contends that both of these jurors had obvious disqualifications sufficient to negate any inference of discriminatory purpose. Concerning Juror 47, respondent relies heavily upon the prospective juror's single brush with the law as a ground for disqualification since he was prosecuted by the Monterey County District Attorney's Office. (RB 67.) Respondent does not, however suggest any reason to discount Juror 47's clear statements that the prosecution helped him to mature, that it was the "best thing" that happened to him at that time in his life, and that the citizens of Monterey County were "lucky" to have the law enforcement and prosecutors that they do. (53 RT 10411.) Nothing in the record intimates that the prosecutor read anything into the juror's demeanor to suggest that he was untruthful, and respondent does not so claim.

Similarly, Respondent categorizes Juror 200 as showing obvious reasons for a peremptory challenge, noting that her husband had been arrested "many years ago" and that she was "equivocal in her support for the death penalty", relying particularly upon the latter. (RB 69-70.)

Respondent's description of this juror as "equivocal" in her views of the death penalty is curious.[26] At no time did Juror 200 express any

[26] Also curious is respondent's assertion that appellant objected to the challenge to this juror only on the basis of gender. Although counsel elaborated the gender point, the objection was clearly made on the basis of race and gender. (59 RT 11690 ["The motion is that *Wheeler* simply indicates this woman both being a minority and Asian, but also I think if the court will recall, and I

philosophical difficulties with the death penalty, or personal reservations about applying it. She did express concern about wrongful convictions that could lead to innocent parties being executed, and only conditioned her ability to vote for death upon being convinced of guilt beyond a reasonable doubt. (56 RT 11030-11031.) Nothing in the record suggests that this juror was equivocal at all about the use of the death penalty in general or about her ability to impose it if warranted.

Respondent's mention of the juror's husband's incarceration is also surprising. The juror indicated that the incident happened some 25 years previously, 10 years before she met her husband, and that it occurred in Florida. (56 RT 11029-11030.) Nothing in the record suggests any reason to believe that this incident would have any bearing upon her ability to serve.

Neither of these jurors presented any clear reasons for disqualification. Both, however, presented ethnic qualities that raise an inference that the peremptory challenges were improperly made. Juror 47 was a young minority male like Mr. Manibusan. Juror 200 was of Asian/Pacific Islander descent, like Mr. Manibusan. Juror 200 was also female, and women were frequently targeted by the prosecutor's peremptory challenges. With these racial and gender characteristics, and

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don't have accurate statistics up to this moment. In the first 13 challenges the prosecutor exercised, ten were women . . ."].)

without any obvious disqualifications, respondent's argument that appellant did not meet the first stage burden is without factual foundation and must be rejected.

D. The Discriminatory Use of Peremptory Challenges Requires Reversal

In the AOB, appellant showed that the prosecutor's use of peremptory challenges was unconstitutionally discriminatory. As demonstrated above, respondent has not shown that no discrimination occurred. The discriminatory use of even a single peremptory challenge, if uncorrected by the trial court, is a structural constitutional error and requires a reversal of the conviction. (*Batson*, *supra*, at p. 100; *People v. Silva* (2001) 25 Cal.4th 345, 386; *Wheeler*, *supra*, at p. 283.)

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VIII. THIS ARGUMENT NUMBER WAS INADVERTENTLY PASSED OVER IN THE AOB

SECTION THREE

ISSUES AFFECTING THE TRIAL AS A WHOLE

IX. REQUIRING MR. MANIBUSAN TO BE HARNESSED WITH AN ELECTRONIC SHOCK GENERATOR THROUGHOUT THE TRIAL WITHOUT JUSTIFICATION WAS REVERSIBLE ERROR

In the AOB, appellant showed that the trial court required Mr. Manibusan to wear an electronic shock generating belt as a restraint, over counsel's objection and without making any finding of need. Appellant claimed that this unjustified shackling was constitutional error, relying primarily on *People v. Mar* (2002) 28 Cal.4th 1201. Appellant further noted that the trial court had compounded the error by failing to give a curative instruction, and that the error was prejudicial. (AOB 167-183.)

Respondent makes two primary arguments in opposition: first that Mr. Manibusan waived the issue by agreeing to wear the shock device, and second that *Mar* is not retroactive, so no error occurred. Respondent also claims that no curative instruction was required and that any error was harmless. (RB 79-83.)

As shown below, respondent's claims have no merit. Appellant did not consent to the use of the shock device, but merely expressed a preference that it be used over other restraining devices if any were to be required at all. Further, while this Court's opinion in *People v. Mar* had not

been released at the time of this trial, the appellate court's decision in that case had been rendered by the Court of Appeal for the Fifth District (*People v. Mar* (2000) 77 Cal.App.4th 1284, opinion vacated and superseded by *People v. Mar, supra*, 28 Cal.4th 1201), directly contradicting the Second District decision in *People v. Garcia* (1997) 56 Cal.App.4th 1349. Thus at the time of this trial, two contradictory opinions had been rendered by the Courts of Appeal, and this Court had granted review of *Mar* to resolve the conflict. The trial court's reliance on *Garcia* was both shortsighted and wrong.

A. Mr. Manibusan Did Not Consent To The Use Of A Shock Device

Respondent claims that Mr. Manibusan "withdrew his objection and agreed to wear a stun belt", citing 46 RT 9003. Respondent mischaracterizes the record. The trial court announced an understanding that Mr. Manibusan had agreed to wear the shock device. Defense counsel replied "That's his request, or our request on his behalf **in lieu of shackles or any other form of restraint**." Mr. Manibusan then personally agreed. (46 RT 9003, emphasis added.) The original objection to the use of any restraining devices was never withdrawn or abandoned.[27]

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[27] The entire exchange takes less than one page of transcript:

THE COURT: The first order of business is there was a request by the sheriff that Mr. Manibusan wear the REACT belt and it's my understanding that he's agreed to do that.

MR. MARTINEZ: That's his request, or our request on his behalf in lieu of shackles or any other form of restraint.

THE COURT: Okay. Is that what you want to do?

THE DEFENDANT: Yes.

B. The Trial Court Improperly Relied On *People v. Garcia*, And Misapplied The Court of Appeal's Holding In Any Regard

Respondent does not address the merits of appellant's argument regarding the use of an electronic shock device as a restraint, and appears to argue simply that this Court's determination that *Mar* is not retroactive resolves the matter.[28] (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1271.) As shown below, *Virgil* does not resolve the issue here.

Assuming for this argument that *Mar*'s requirement of a finding of manifest need is not retroactive, at the time of this trial, there were two applicable decisions from the Courts of Appeal, neither from the Sixth District in which this case originated. The 1997 case of *People v. Garcia* was the first to review the use of electronic shock devices like the belt used here. (*People v. Garcia*, *supra*, 56 Cal.App.4th 1349.) In *Garcia*, the Court of Appeal for the Second Appellate District determined that such devices did not fall within the ambit of *People v. Duran* (1976) 16 Cal.3d 282 which required the trial court to find "manifest need" before applying restraints to a defendant before a jury. *Garcia* determined that a lesser showing of need was required to justify the electronic device, which it

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THE COURT: All right. Then that will be the order.

[28] In a footnote, respondent suggests that a jail fight between Mr. Manibusan and his former co-defendant supplied the necessary reason to subject Mr. Manibusan to the use of a security device. Respondent borrows this incident from the penalty phase. It was not before the trial court at the time the motion to prevent the use of restraints was argued or at the time of the ruling. Respondent's suggestion that the trial court would have ordered Mr. Manibusan restrained on the basis of these incident occurring outside the courtroom is overtly speculative and unhelpful. (RB 80, fn 24.)

defined as a factual showing sufficient to constitute "good cause" (*People v. Garcia*, *supra*, 56 Cal.App.4th at p. 1357.)

In 2000, the Fifth Appellate District took up the issue in *People v. Mar*, *supra*, 77 Cal.App.4th 1284, opinion vacated and superseded by *People v. Mar, supra*, 28 Cal.4th 1201. In that case, the Court of Appeal for the Fifth Appellate District determined that *People v. Garcia* had been wrongly decided and applied the more stringent *Duran* test. This Court granted review in *Mar* prior to the primary hearing at which the use of restraints was discussed.

Thus at the time the trial court discussed the use of restraints generally and an electronic shock device in particular, the law was in flux with conflicting statements from the Courts of Appeal and pending resolution by this Court. In such a situation, the trial court must take the risk to determine the most persuasive statement of the law, and to follow it. (See, e.g. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 456 ["the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions."].)

Here, however, the trial court appeared to be unaware of the conflict, and mentioned only the *Garcia* holding. The trial court's discussion of this issue reflected its uncertainty to the state of the law, but some awareness

that shock devices had been differentiated from other types of restraints, and that some sort of factual findings were needed to justify the use of the device. (40 RT 7930-7931.) This discussion does not indicate that the trial court had found *Garcia* more persuasive than *Mar*, nor does it suggest in any way that the court was even knew of the existence of *Mar*.[29] The trial court's misunderstanding of the state of the law at the time of the ruling thus renders the trial court's decision to use the shock device an abuse of discretion.

Even if the trial court had been aware of the conflicting authority and made a reasoned choice that *Garcia* was a correct statement of the law, the trial court did not comply with the duty to find good cause for the use of the shock device established in that case. As noted in the AOB, the trial court did not rule on the motion to prohibit the use of restraints until September 6, 2000. After learning that Mr. Manibusan would, if forced to choose, prefer wearing the shock device over manacles or other restraints the trial court simply ordered the use of the REACT belt at the request of the sheriff's department. (46 RT 9003.) No showing of any cause to use

[29] The trial court referred to "decisions coming out" saying that use of a shock device was not shackling, At the time, however, the only decisions concerning the use of a shock device in lieu of other restraints available to the court were *Garcia* and the Court of Appeals decision in *Mar*. The trial court's summary of the existing law does not take *Mar*'s rejection of *Garcia* into account but rather cites *Garcia*'s holding as the applicable law. The trial court's full discussion of this issue was included in the AOB at pp. 169-172. The only other discussion of the issue at that hearing was a decision to continue the discussion at the time of the pretrial conference scheduled for August 7, 2000. No further discussion was had at the subsequent date, however.

the belt was offered and no finding of good cause was ever made, either expressly or impliedly.

The trial court's decision to require the use of the electronic shock device was unsupported and thus a violation of Mr. Manibusan's constitutional right to due process of law under any view of the law existing at the time. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217; *People v. Duran*, *supra*, 16 Cal.3d at pp. 282, 293, fn 12.)

C. The Use of The Shock Device Was Prejudicial

In the AOB, appellant demonstrated that the use of the electronic shock device in this instance, and particularly in light of the failure of the trial court to give a curative instruction, was inherently prejudicial. Further, because Mr. Manibusan's failure to testify was discussed by the jury during their deliberations, anything that created an impediment to his ability to testify must be seen as having a profound and prejudicial impact on the outcome. (AOB 181-183.) Because of this prejudicial violation of Mr. Manibusan's constitutional rights to due process and a fair trial, his convictions and sentence must be reversed.

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SECTION FOUR

ISSUES AFFECTING THE GUILT PHASE

X. MR. MANIBUSAN DID NOT HAVE THE INTENT NECESSARY TO SUPPORT THE CONVICTION FOR AGGRAVATED MAYHEM

In the AOB, appellant showed that a sudden explosion of gunshots took place at the botched attempt to rob Jennifer Aninger and Priya Mathews, and that event could not reasonably be mistaken for an intentional maiming of Ms. Aninger. There was no suggestion that Mr. Manibusan was the gunman, and no suggestion that the event was anything but a failed attempt to rob. (AOB 184-197.)

Respondent, without benefit of direct authority, argues that despite the clear robbery motive and the sudden explosion of undirected gunshots, the jury might reasonably have found the shooter, Willover, had the intent to maim Ms. Aninger as well as to rob, that the intent to maim would be shared by Mr. Manibusan (or at least known to him), or that Mr. Manibusan was guilty even if he did not share Willover's alleged intent to maim because intentional maiming is a natural and probable consequence of an attempted robbery. (RB 83-93.)

In this, respondent stretches familiar concepts beyond recognition. As shown below, there was nothing about the circumstances presented in this case to suggest that Mr. Willover intended to maim Ms. Aninger and

that while his actions could justify a charge of simple mayhem, they do not support a charge of aggravated mayhem. Further, there is nothing to suggest that anyone else in the car, including Mr. Manibusan, sought to aid, abet or otherwise encourage anything but a robbery. Finally, respondent's suggestion that intentional maiming is a natural and probable consequence of robbery defies both the law and common sense.

A. Standard of Review

Respondent's recitation of the standard of review begins with the unremarkable premise that to evaluate a claim of insufficiency of the evidence to support the verdict, this Court must review the entire record in the light most favorable to the verdict. (*People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Pensinger*, (1991) 52 Cal.3d 1210, 1237; *People v. Staten* (2000) 24 Cal.4th 434, 460.) This is also the law set forth in the AOB. (AOB 186-188.)

Respondent does not, however, acknowledge that the "whole record" is not merely the bits of evidence favorable to the prosecution. "'[W]e must resolve the issue in the light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent.'" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577, emphasis in original.) This Court cautioned that a review limited to evidence favorable to the prosecution "'leaps from an acceptable premise, that a trier of fact could reasonably

believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence.'" (*Id.* At pl 578, quoting Traynor, *The Riddle of Harmless Error* (1969) p. 27.)

As shown below, respondent's analysis is infected by the sort of dubious reasoning Justice Traynor warned against. The question before the Court is not whether some cobbling together of isolated bits of evidence would support the verdict, but whether the whole record provides support for a reasonable trier of fact to render this verdict. As appellant demonstrated in the AOB, the evidence presented in this case does not support the verdict finding appellant guilty of aggravated mayhem.

B. The Evidence Does Not Support A Reasonable Inference That Willover Intended To Maim Jennifer Aninger, or Anyone Else

Aggravated mayhem and simple mayhem (§§ 205 and 203 respectively) are similar crimes distinguished primarily by the element of specific intent appearing in section 205. Aggravated mayhem requires proof the defendant specifically intended to cause permanent disability or disfigurement, while simple mayhem does not. (Compare *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 [aggravated mayhem defined] with *People v. McKelvy* (1987) 194 Cal. App. 3d 694, 702 [regarding simple mayhem "No specific intent to maim or disfigure is required, the necessary intent

being inferable from the types of injuries resulting from certain intentional acts"].)

Respondent correctly observes that the issue presented in this case is not whether the injuries were sufficient to meet the statutory definition, but whether the specific intent to maim existed, and whether it is imputable to Mr. Manibusan. (See RB 86.) Respondent's first complication is that Mr. Manibusan did not fire the gunshots that killed Ms. Mathews and maimed Ms. Aninger. To surmount this problem, respondent follows the prosecutor's lead in setting out the theories by which the maiming intent could be placed on Mr. Manibusan: that Mr. Manibusan aided and abetted Willover's act of mayhem[30], or that intentional mayhem is a natural and probable consequence of robbery.

Respondent's analysis of the issues of intent, however, is based on facts bearing only a vague resemblance to the record in this case. Thus, respondent's claim that there is "ample" evidence that Willover intended to cause permanent disability or disfigurement to Ms. Aninger is based upon the following premises, unsupported by facts or logic:

- The evidence showed preparation and "careful inspection" of the victims. (RB 86.)

[30] Respondent does not argue which prong of aiding and abetting applies, whether Mr. Manibusan should be seen as acting with knowledge of Willover's purported intent to maim, or whether intentional maiming was a reasonably foreseeable consequence of robbery. Regardless, appellant has shown in the AOB, and will further show here, that neither option is a reasonable conclusion from the facts presented here.

- Willover and Mr. Manibusan made a "special trip" to collect Willover's gun. (RB 87, citing *People v. Park* (2003) 112 Cal.App.4th 61.)
- Willover didn't fire at the women immediately, but only after the car had turned to put him close to the women. (RB 87.)
- Willover demonstrated antagonism to the women. (RB 87, again citing *Park.*)
- That the shooting was a "focused, limited attack" (RB 87.)
- That the shooting was focused on a "particularly vulnerable part of Aninger's body – her head." (RB 88.)

None of respondent's premises withstand even cursory examination. Three are, at best, unreasonable inferences drawn from selected facts rather than the record as a whole. The purported "careful inspection" of the victims was prompted by Tegerdal, not Willover, and amounted to nothing more than driving by to see whether they carried purses to rob. (61 RT 12066-12069, 66 RT 13106-13119.) The "focused, limited attack" was actually Willover's sudden emptying of his pistol in the general direction of the women. (60 RT 11877-11882, 61 RT 12070-12075, 66 RT 13031-13033, 68 RT 13407-13408.) Respondent's reliance on Willover's purported focus on a particularly vulnerable part of Aninger's body is patently ludicrous in light of the facts that at least eight shots were fired (65 RT 12808-12812), that Ms. Mathews was hit by four of the bullets (68 RT

13414-13422), that Ms. Aninger saw bullets hitting Ms. Mathews before she was shot herself (69 RT 13678-13679), that Ms. Aninger was shot in the arm as well as the head (69 RT 13682-13686), and that at least two of the shots missed entirely.

Of the remaining premises, one is irrelevant (obtaining the gun is meaningless in this context unless accompanied by facts suggesting that Willover did so with the dual intent to rob and commit mayhem, AND Mr. Manibusan could reasonably have known of that intent); one is a shameless twisting of the facts in an attempt to bring this case within the ambit of *People v. Park* (2003) 112 Cal.App.4th 61 (*Park*) (Willover's "antagonism" to the women) and one is incompreshensible (had Willover fired as soon as the car approached the women, the action could be seen as evidence of an intent other than to rob; however, Willover did not fire immediately, but only after his demand for money was ignored.)

More specifically, to find Mr. Manibusan guilty of aggravated mayhem as an aider and abettor requires a showing that he provided aid or encouragement to Willover with knowledge of Willover's purpose and with the intent to help carry out that offense.[31] (*People v. Beeman* (1984) 35 Cal.3d 547, 561 ["a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the

[31] An aider/abettor may also be found guilty without the specific intent to aid or encourage the offense committed by the perpetrator if that offense is a reasonably foreseeable result of the crime that the aider/abettor intended to assist or encourage. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-262.) This aspect of the issue is addressed in section C below.

perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime"].)

As shown in the AOB there is no reasonable inference to be drawn from the evidence that even Willover committed aggravated mayhem. (AOB 188-194.) Respondent suggests that Mr. Manibusan accompanied Willover on a "special trip" to retrieve Willover's gun, and that this is an indication that Willover intended to commit mayhem on some person or persons unknown later that day; respondent cites *People v. Park*, *supra*, 112 Cal.App.4th 61 as authority for that proposition. (RB 87.)

A review of *Park* shows no support for respondent's contention that the retrieval of the gun here was evidence from which an intent to maim could reasonably be inferred. Instead, the case shows the limited sort of circumstances in which a verdict of aggravated mayhem will withstand appellate scrutiny, and patently shows that such circumstances do not exist in this case. *Park* further applied the principles of appellate review of a sufficiency of the evidence claim set forth above, and emphasized the review of the whole record. (*Id* at p. 69 ["In this case, there are multiple factors which, when taken together, constitute substantial evidence defendant entertained the specific intent"].)

Park involved a confrontation that began in a restaurant with the exchange of glares between two groups of young Asian men. When one

group went outside to smoke, the defendant became angry, armed himself with a knife sharpener, and went out. Outside, the defendant, joined by his group, made a gang challenge and identified his own gang. He then approached one member of the other group and hit him several times (either on the head and face, or on the arm with which the victim attempted to protect his face) with the knife sharpener using a particular type of overhand throwing motion. This caused facial lacerations and broke several of the victim's teeth. (*Id* at p. 65.)

The Court of Appeal in *Park* determined that this evidence was sufficient to support a verdict of aggravated mayhem and explained the factors leading to that conclusion. The Court found that the manner in which the sharpener was used brought more force to bear than a poking or jabbing motion, that the defendant's blows were focused to the head and not to any other part of the body, and that the attack was planned as the culmination of an escalating pattern of aggression between the rival groups. Specifically, the Court noted

> The first manifestation of animosity was when defendant's group began the "out-staring fight" with Ja's party in the restaurant. Tension escalated when Ja's group made a verbal threat as they left the restaurant. At that point, defendant, although very angry, had the presence of mind to walk to the back of the restaurant, locate and take the knife sharpener, leave the restaurant, find Ja's group, and confront them. After asking a hostile question and stating his association with "K.P.," defendant, without any verbal or physical provocation, attacked Ja with the knife sharpener. Taken together these circumstances show defendant's attack was the

> product of deliberation and planning, not an explosion of indiscriminate violence.
> (*Park*, *supra*, at pp. 69-70.)

Park's facts thus show a strong connection between the initial confrontation, the arming, the second confrontation and the maiming. When coupled with the facts regarding the manner and focused nature of the attack, the whole of the record in that case was seen to reasonably support the conclusion that the defendant intended to maim.

The facts here lead precisely to the opposite conclusion. As shown in the AOB, the gun in this case was brought along to facilitate robbery. (60 RT 11869-11872, 63 RT 12403-12405.) Any planning activity also went toward that purpose, and there had been a prior attempt to find a robbery victim. (66 RT 13020-13022, 13083-13088, 60 RT 11874-11875.) The way in which the gun was used was also quite different than the use of the sharpener in *Park*. This shooting was nothing like the single focused attack occurring there, and showed instead a particular lack of focus, with bullets striking both women in various areas of their bodies. Unlike *Park*, this case showed no evidence to suggest that Willover paid particular attention to a specific person, much less to a specific body area.

Similarly, the antagonism shown by Willover does not show the building tension and planning demonstrated in *Park*. There, the initial confrontation led to anger, then prompted the arming, then led to the second confrontation and gang claiming, and then led to the focused attack on a

single individual. Here, Willover was already armed when the women were approached and a demand for money was made. When the women did not respond, Willover simply emptied his gun in their direction, picking no particular target in his fusillade of bullets.

In *Park*, the incident at issue was distinguished from the sort of unfocused explosion of violence seen here. The Court of Appeal observed "limiting the scope of . . .[the] attack to Ja's head shows this was not an indiscriminate attack but instead was an attack guided by the specific intent of inflicting serious injury upon Ja's head." (*Id* at p. 69.)

Finally, no circumstances exist to suggest that Willover cared what the effect of the shooting had been. He made no attempt whatsoever to ascertain whether his bullets even hit someone, much less to determine if he had succeeded in maiming a specific target. In *Park*, however, the Court of Appeal noted: "It is particularly significant that defendant stopped his attack once he had maimed Ja's face: he had accomplished his objective." (*Id* at p. 69.) Here, the shooting at the wharf had no such objective or sense of conclusion. The group did not stop after the shooting. Instead they went on, changing cars and contemplating another attempt at robbery. (60 RT 11887-11891, 66 RT 13033-13038.) This, as much as anything, shows that the intent involved was to rob, not to maim.

The evidence thus does not support a rational inference that Willover intended to maim Ms. Anninger, and no such intent can be attributed to an

aider/abettor. In the absence of substantial evidence from which a rational trier of fact could find Mr. Manibusan guilty of aggravated mayhem, due process requires that his conviction be reversed. (*People v. Hill* (1998) 17 Cal.4th 800, 849; *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

C. Aggravated Mayhem Is Not A Natural and Probable Consequence of Attempted Robbery

Under an aiding and abetting theory, the prosecution had an alternative to showing that Mr. Manibusan knew of and tried to help execute Willover's alleged intent to maim. Mr. Manibusan could also be found guilty if aggravated mayhem is a natural and probable consequence of the crime of attempted robbery.

Whether one criminal act is a natural and probable consequence of another criminal act is generally a question for the trier of fact; and the test is objective, depending upon whether the resulting crime "is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened." (CALJIC 3,02; See *People v. Nguyen* (1993) 21 Cal. App. 4th 518, 531.)

Simple mayhem, requiring only a qualifying injury and general criminal intent (§203), is understandably a natural and probable consequence of most violent crimes, and several cases have so held. (See, e.g. *People v. Reed* (1984) 157 Cal.App.3d 489, 492 (bar fight); *Lee v. United States* (D.C. 1997) 699 A.2d 373, 386, fn. 29 (home invasion);

Bowers v. State (Tex. Crim. App. 1888) 24 Tex. Ct. App. 542, 550 [7 S.W. 247] (conspiracy to whip); *Lopez v. Scribner* (C.D. Cal. 2010) No. EDCV 06-623-VBF [2010 U.S. Dist. Lexis 39815, pp. 24-26] (gang assault).)

Aggravated mayhem is another animal altogether. No case has found that aggravated mayhem is a natural and probable consequence of attempted robbery, or any similar offense. The reason is apparent from the formulation of the natural and probable consequences doctrine in *People v. Medina,* cited by respondent.

> "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable. (*People v. Prettyman* [(1996)] 14 Cal.4th [248,] 260–262.)" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) Liability under the natural and probable consequences doctrine "is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)
>
> "[A]lthough variations in phrasing are found in decisions addressing the doctrine—'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'—the ultimate factual question is one of foreseeability." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) Thus, "'[a] natural and probable consequence is a foreseeable consequence'... ." (*Ibid.*) But "to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. ...' (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 132, p. 150.)" (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 535.) A reasonably foreseeable

> consequence is to be evaluated under all the factual circumstances of the individual case (*ibid.*) and is a factual issue to be resolved by the jury. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499.)
> (*People v. Medina* (2009) 46 Cal. 4th 913, 920.)

The question, then, is whether the intentional maiming of a person is a consequence that reasonably could be foreseen by a person in like circumstances. As shown in the AOB, the answer to this question is simply "No." Nothing about an attempt to commit robbery would cause a reasonable person to think it would be accompanied by another, completely unrelated, intent. (AOB 195-198.)

Respondent's argument makes a case for simple mayhem as a natural and probable consequence of any felony involving a weapon.[32] However, foreseeability of injury, even maiming injury, is not the issue.

The charge here is not simple mayhem, but aggravated mayhem. As shown above, aggravated mayhem requires a specific intent to cause a particular sort of injury and without such intent the crime is at most simple mayhem. Respondent seeks to support the verdict rendered here, but presents no reason why the concept that there is a reasonable possibility of

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[32] (See RB 91-92. ["it was reasonably foreseeable that a deadly weapon would be used in connection with the attempted robberies, and that death or grievous injury would result."; "Courts have held that, when a defendant is aware that his confederate possesses a deadly weapon, it is proper for the jury to find that it was reasonably foreseeable that someone could be injured or killed . . . in the commission of the target offense."; "the jury could have relied on appellant's knowledge that Willover was armed with a gun in finding that a crime involving injury or death was a foreseeable consequence of the target offense."; "crimes resulting in severe injury from the use of a gun are often found to be a natural and probable consequence of armed robbery."].)

injury present in most serious felonies should be expanded to include the foreseeability of intentional maiming.

Because no evidence exists from which a jury could draw a reasonable inference that Willover had an intent to cause disfiguring injury to Ms. Aninger and to attribute that intent to Mr. Manibusan, and because aggravated mayhem is not a natural and probable consequence of attempted robbery, this conviction must be reversed.

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XI. CONTRERAS AND TEGERDAL AIDED AND ABETTED ALL OF THE CRIMES CHARGED AND WERE ACCOMPLICES AS A MATTER OF LAW

In the AOB, appellant showed that Melissa Contreras and Adam Tegerdal, the primary prosecution witnesses, were accomplices as a matter of law to any crimes committed by Willover or Mr. Manibusan. Both took active roles in the events leading to the killings of Ms. Mathews and Ms. Olivo, and the shooting of Ms. Aninger. Both facilitated the enterprise in meaningful ways. Although both sought to distance themselves morally from the events, both admitted conduct making them accessories. Because there was no conflicting evidence, they were accessories as a matter of law. (AOB 198-210.)

Respondent argues that despite their participation in the events, both Contreras and Tegerdal made sufficiently exculpatory statements to bring them outside the ambit of accessories as a matter of law, and finds sufficient the trial court's instructions allowing the jury to decide the question. Respondent also argues that there was sufficient corroborative evidence outside their testimony to render any error in their designation harmless. (RB 93-103.)

A. Admissions Made By Both Tegerdal and Contreras Concerning Their Participation in the Scheme of Attempted Robbery Removed Any Doubt About The Nature Of Their Participation

In the AOB, appellant demonstrated that there was undisputed evidence showing that both Tegerdal and Contreras knew of the plan to rob people, and with that knowledge each of them acted in ways that assisted or encouraged that plan. Tegerdal provided two different cars for that purpose during the night, and suggested changing cars after the first shooting to help avoid detection. He also expected to share in the proceeds of the robberies. Contreras drove the car during the night while the group was on the lookout for robbery victims, and was poised to be the getaway driver at one point. Neither left, or abandoned the enterprise despite opportunities to do so, and no evidence suggested that either participated because of force or duress.[33]

To suggest that Tegerdal and Contreras were not unquestionably accomplices, respondent relies primarily on *People v. Williams* (2008) 43 Cal.4th 584, *People v. Avila* (2006) 38 Cal.4th 491, and *People v. Tewksbury* (1976) 15 Cal.3d 953 arguing that the evidence concerning their role in the events giving rise to the charges was subject to differing reasonable interpretations and thus did not support the requested

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[33] Respondent suggests that Contreras' description of her subjective state of mind, that she stayed with the group out of fear of future harm, is sufficient to create a factual question regarding her accomplice status. It does not. To constitute a defense of duress, the fear must be of a present, not future injury. (§26, subd. 6; *People v. Petznick* (2003t) 114 Cal App 4th 663, 676 ["In order to show that his act was not the exercise of his free will, defendant must show that he acted under an immediate threat or menace. (citation.) 'Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent"".]; *People v. Sanders* (1927) 82 Cal. App. 778, 783-784.) Further, even if her statement was true, her fear was not justified by any actions taken by any of the participants. She does not contend she was threatened or forced to participate at any time. She never suggested that she wanted to go home or told the others that they should call it a night. Such subjective and unprovoked fear does not relieve her of accomplice liability.

instruction. These cases, however, demonstrate that in circumstances such as those presented in this case, where the parties' actions are not in question they are properly designated accomplices as a matter of law.

1. Tegerdal Was An Accomplice As A Matter Of Law

Respondent admits that Tegerdal "testified to a number of acts that could have constituted aiding and abetting", but carefully selects bits of his testimony in an attempt to create an appearance of conflicting evidence. (RB 99.) When examined in the totality of the circumstances, none of this testimony supports any conclusion other than Tegerdal's ongoing participation in the attempt to rob people. Nonetheless, respondent relies on Tegerdal's statement "that he did not intend to rob the women . . . and that he was surprised by the shooting, that he was not driving during the commission of the crimes, and that he never touched the gun." (RB 99.)

To be accurate, during this portion of his testimony, Tegerdal said that he had asked if the women had purses to determine if they were worth robbing, disclaiming only his intent to personally get out of the car to accomplish the robbery. (66 RT 13113-13114.) His statement thus shows his active participation in planning the attempted robbery. The facts that he did not intend to personally rob the women, nor expect shots to be fired do nothing to cast any question upon his role as an accomplice.[34] Similarly,

[34] Although respondent finds significance to the question of Tegerdal's state of knowledge by his expression of surprise at Willover's shooting at the wharf, respondent argued that the same facts were not significant when evaluating appellant's state of mind. As shown

the fact that he suggested switching cars to assist the group's further activities by avoiding detection rather than to "further appellant's shooting spree", does not relieve him of liability any more than helping plan the attempt to rob Ms. Mathews and Ms. Aninger relieves him of liability for Willover's shooting spree.

Although respondent relies on *People v. Tewksbury* to support the argument that "the jury could have concluded that, although he furnished transportation, he lacked the intent to aid in the commission of the crimes" (RT 99), that case provides no help. (*People v. Tewksbury, supra*, 15 Cal.3d 953.) There, the purported accomplice [Mary], who was under the influence of drugs, was present when a robbery was planned by others, drove a car to a meeting place, and when the principals arrived, drove them home. During her testimony, Mary was hazy and incomplete. This Court summarized her testimony as follows:

> She testified that she was "loaded" on "reds" on the night in question and neither was fully aware of nor remembered what had happened. Each time Mary returned to the stand her memory improved and her testimony became increasingly detailed. Eventually she was able to corroborate Sheila's testimony that defendant was one of the two robbers. She also remembered receiving a share of the stolen money from either defendant or Sheila when they returned to her house after the robbery. Moreover she recanted somewhat her earlier testimony that she did not have knowledge of the intended robbery and that she did not actually realize that a robbery

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herein, respondent has it backwards. Tegerdal's surprise at the *shooting* has no relevance to his expectations regarding the attempted robbery. Appellant's surprise at the same event has direct relevance to the question of his intent relative to the charge of aggravated mayhem discussed in Argument X.

was to take place until Sheila told her about it while waiting in the car."
Id. at p. 959

The extent of Mary's participation in *Tewksbury* was found to be uncertain enough to make her status as an accomplice a question of fact for the jury to decide. Here, however, Tegerdal's participation in the robbery plans and the subsequent events was far more active, and there was no question that he knew of those plans when he willfully assisted in them. Thus there is no dispute as to the facts or inferences to be drawn from them, and Tegerdal was an accomplice as a matter of law. It was error for the trial court not to instruct the jury of this fact and, as shown below, the error was prejudicial. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

2. Contreras Was Also An Accomplice As A Matter Of Law

Respondent argues that because Contreras gave equivocal testimony about the point at which she became aware of the plans to rob someone to get drug money, testified that she did not personally intend to rob or shoot anyone, and testified that if she would not have gone along if she had known of the plans before leaving in the car in the first place, there was a factual dispute about her accomplice status. (RB 97-99.) Respondent claims that her statements raise the issue of mere presence without intent to aid, assist or encourage the plan to commit robbery, and casts her in a

similar light as the people identified as potential accomplices in *People v. Avila*, *supra*, 38 Cal.4th 491 and *People v. Williams*, *supra*, 43 Cal.4th 584.

Respondent's analysis is faulty, both in its focus on her purported lack of knowledge at various points in the evening and in its reliance on *Avila* and *Williams*. Respondent's use of the incident at Jack's Park demonstrates the futility of the argument. Respondent finds significance in the equivocal testimony about whether Contreras knew of the plan to rob someone when she drove the car to the park, pointing to this as an example of the factual dispute about her role. (RB 97-98.) Contreras' state of mind at the time she *arrived* at Jack's Park has very little to do with her status as an accomplice. Her state of mind when they left the park is a different matter.

Contreras' knowledge of the plan to rob was unquestioned at the point that she said appellant and Willover left the car. She testified that she knew of the intent to use Willover's gun to rob people before they stopped at the park (60 RT 11870-11872; 62 RT 12206-12208), that she thought appellant had the gun when he and Willover left the car at the park to find someone to rob (60 RT 11873-11875), and that she was prepared to be the getaway driver when they returned. (62 RT 12206-12209.) None of these facts were in dispute, and all show that she was present with the intent to aid, assist or encourage the perpetrators. Her attempts to distance herself from the shootings by claiming surprise and lack of intent is thus of no

consequence since murder is a natural and probable consequence of attempted robbery. (See, e.g. *People v. Cavitt* (2004) 33 Cal. 4th 187, 211.) Contreras did not act under duress (62 RT 12208-12209), she was not unaware of the plans to rob, and she intended to go along anyway, and even to assist. Because these facts are not in dispute, she was an accomplice as a matter of law.

Neither *People v. Avila* nor *People v. Williams* provide a reason to see Contreras in any other light. In *Avila*, the purported accomplice was a passenger in a car driven by the defendant. Also in the car were two women, who were subsequently killed. Although one witness said that the accomplice had been armed, there was testimony that he had been pushed into the car against his will. Concerning the purported accomplice [Rodriguez], this Court observed: "There was no evidence that Rodriguez actually shot and killed either Medina or Sanchez. And although it was undisputed that he rode in the car with the victims to the canal bank, there was evidence he did not do so voluntarily. (footnote omitted.) Thus, Rodriguez's status as an accomplice turns on whether, as a conspirator or an aider or abettor, he was aware that Medina and Sanchez were to be killed or was engaged in any other crime the foreseeable result of which might be murder." (*People v. Avila*, *supra*, 38 Cal. 4th at p. 565.)

Here, no evidence suggested that Contreras entered the car against her will and no evidence suggested that she was in any way compelled to

remain in the car once it became clear that robbery was a goal of the evening's activities. Instead, despite two clear opportunities to depart, Contreras voluntarily remained with the others. *Avila* therefore speaks to an entirely different set of circumstances, and one which does not support respondent's contention that Contreras was an unwitting passenger.

Similarly, *People v. Williams* provides no help for respondent's contention that Contreras was not an accessory as a matter of law because she had disclaimed the necessary intent to make her an aider/abettor. In *Williams*, there was evidence that the purported accomplice had acted as a lookout while another person lured the victim into an alley where the victim was assaulted then helped put the victim into the vehicle's trunk. Nonetheless, the accomplice testified that he did not intend to facilitate the robbery, but was merely there to protect a female friend (who was also a participant), from domination and terror by the defendant. This Court found that testimony sufficient to create a question of fact which justified the trial court's decision to allow the jury to decide whether he was an accomplice. (*People v. Williams*, *supra*, 43 Cal.4th at p. 637.)

Here, on the other hand, Contreras did not contend that she did not intend to facilitate the intent to rob people at the time of the killings. While she claimed not to know of the intent to rob when she first joined the others, there is no question that she learned of it later and that she decided to assist if necessary. She did not contend that she was present for any

other purpose as did the purported accomplice in *Williams*, and she did not avail herself of clear opportunities to remove herself from the enterprise.

There is no legitimate issue of fact regarding Contreras' role in the events in question. Her participation and assistance render her an accomplice as a matter of law.

B. The Failure To Designate Willover And Contreras As Accomplices As A Matter Of Law Was Prejudicial

In the AOB, appellant showed that the trial court's refusal to designate Tegerdal and Contreras accomplices as a matter of law enhanced their status and forced the jury to make a confusing and unnecessary decision. The trial court's error allowed the jury to find that Tegerdal and Contreras were not accomplices and that their testimony would be sufficient to convict without corroboration, thus vitiating the protection provided by the accomplice rule. (*People v. Robinson* (1964) 61 Cal.2d 373, 394-395.)

Respondent chooses to focus on whether other evidence could be seen to corroborate the stories of Tegerdal and Contreras, applying the error analysis used in *People v. Williams*, *supra*, 43 Cal.4th 636. Respondent does, in a single paragraph, respond to appellant's contention, and argues that *Robinson* should not apply because the "facts of this case . . . are very different than those in *Robinson*" because the accomplices had "confessed

their guilt" to police officers, and those statements were introduced at trial. (RB 103.)

As shown above and in the AOB, however, Tegerdal and Contreras were shown to be accomplices as a matter of law as surely as if they had confessed. Each admitted acts and knowledge which made them accessories to the attempted robberies and thus to the murders. In this sense they stand in the same shoes as Hickman and Guilex in *Robinsion.* Here, as there, the trial court "should not have invited the jury to speculate on who was and who was not an accomplice." (*People v. Robinson*, *supra*, 61 Cal.2d at pp. 395.)

Tegerdal and Contreras were the prosecution's case. By artificially enhancing their status and forcing the jury to make an unnecessary choice, the trial court violated appellant's right to due process by improperly instructing the jury (see *United States v. Gaudin* (1995) 515 U.S. 506, 510-514; *People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Ford* (1964) 60 Cal.2d 772, 792-793), and also denied him the protection intended by Penal Code section 1111. As shown in the AOB, the failure to designate Tegerdal and Contreras as accomplices as a matter of law was prejudicial because of the pivotal role played by these witnesses. (AOB 208-210.) Respondent's contention that the jury would have found them to be accomplices under the instructions given (See RB 100), is speculative

and falls within the area of concern about which this court warned in *People v. Robinson*:

> By telling the jury that corroboration of his testimony was required only if they found [the witness] to be an accomplice, the court impliedly and erroneously authorized the jury to find him not an accomplice, thereby making corroboration unnecessary. The fact that the court may have, thereafter, given either a proper or an improper definition of accomplice does not cure the error. It only emphasizes it, for such definition serves to strengthen the thought that the jury was the sole judge of whether or not Hickman was an accomplice. . . But the important fact is that Hickman, Robinson and Guliex were all accomplices as a matter of law (each by reason of his own confession, as well as by reason of other testimony). The court should not have invited the jury to speculate on who was and who was not an accomplice. (*People v. Robinson*, *supra*, 61 Cal.2d at pp. 394 395.)

Because the trial court's erroneous failure to designate Tegerdal and Contreras accomplices as a matter of law, the jury was given a confusing and unnecessary task, and risked the determination that corroboration of their stories was unnecessary. Since Tegerdal and Contreras were vital witnesses, without whom the prosecution case would have been fatally weakened, the trial court's error was prejudicial and Mr. Manibusan's convictions and sentence must be reversed.

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XII. THE FAILURE TO REQUIRE THE JURY TO DETERMINE WHETHER THE KILLING WAS FELONY-MURDER OR MALICE MURDER WAS REVERSIBLE ERROR

In the AOB, appellant argued that the murder instructions failed to pass constitutional muster because they did not require that the jury reach a unanimous verdict on the theory of murder notwithstanding the fact that the theories advanced (deliberate and premeditated murder and felony murder) have different elements. (AOB 211-223.) Respondent disagrees, and bases her argument on this Court's decisions in other cases where the Court rejected similar claims. (RB 103-104.) As suggested in the AOB and in light of the holding in *People v. Schmeck,* appellant requests that this Court reconsider its prior rulings in light of the facts and arguments raised in this case. (*People v Schmeck* (2005) 37 Cal.4th 240, 304.) Otherwise, appellant relies on the authorities cited and arguments advanced in Appellant's Opening Brief.

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XIII. THE INSTRUCTIONAL ERRORS IDENTIFIED IN THE OPENING BRIEF COMBINED TO VIOLATE MR. MANIBUSAN'S RIGHTS TO A FAIR TRIAL, A TRIAL BY JURY, AND RELIABLE VERDICTS

In the AOB, appellant showed that several of the standard CALJIC instructions used by the trial court have constitutional infirmities. Specifically, appellant challenged the use of CALJIC Nos. 2.03, 2.06, 2.51 and 2.52. Appellant specifically advanced those arguments in light of *People v. Schmeck*, and requested that this court reconsider its many decisions upholding these particular consciousness of guilt instructions. (AOB 224-241, *People v. Schmeck, supra*, 37 Cal.4th at p. 304.) Respondent argues that this Court's decisions rejecting similar claims should be upheld. (RB 105.) As stated in the AOB the instructions create an intolerable inference of guilt and, in light of the holding in *People v. Schmeck* appellant requests that this Court reconsider prior rulings in light of the facts and arguments raised in this case. (*Ibid.*) Appellant thus relies on the authorities cited and arguments advanced in Appellant's Opening Brief and will not repeat those arguments here.

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SECTION FIVE

PENALTY PHASE ISSUES

XIV. MITIGATING EVIDENCE OF WILLOVER'S LWOP SENTENCE WAS CONSTITUTIONALLY ADMISSIBLE AND IMPROPERLY EXCLUDED FROM THE PENALTY PHASE

In the AOB, appellant explained that the trial court's action in preventing the defense from introducing evidence of the sentence received by appellant's co-defendant as evidence relevant to the sentencing choice violated Mr. Manibusan's rights under both the federal and state constitutions. (AOB 242-249.) In doing so, appellant acknowledged this Court's decisions holding that this sort of evidence is not mitigating under California law despite United States Supreme Court holdings to the contrary, but urged the Court to reconsider, particularly in light of the Court's expansive view of section 190.3(a). (AOB 245-249.)

Respondent urges the Court to hold the course and continue to reject such evidence, and argues that it is particularly appropriate here because Willover was ineligible for a death sentence because he was a minor. (RB 106-107.)

Respondent suggests that appellant has offered "no compelling rationale to abandon the long-established rule." (RB 106.) Respectfully, appellant disagrees. The United States Supreme Court's cases following

Parker v. Dugger (1991) 498 U.S. 308 maintain that evidence of an equally culpable co-defendant's life sentence is mitigating evidence and may not be excluded from the jury's sentencing consideration under the Eighth Amendment.

The ultimate Eighth Amendment test for admissibility is simply whether the evidence is something that "might serve 'as a basis for a sentence less than death.'" (*Tennard v. Dretke* (2004) 542 U.S. 274, 287 quoting *Skipper v. South Carolina* (1986) 476 U.S. 1, 5.)

This Court has consistently read *Parker v. Dugger* as resting only on Florida law, and thus not applicable to California. Appellant again urges this Court to reconsider its reasoning on this point. (See, e.g. *People v. Mincey* (1992) 2 Cal.4th 408, 480; *People v. McDermott* (2002) 28 Cal.4th 946, 1005.) These analyses rest first on the fact that some states had found evidence of co-defendant's sentencing relevant as mitigation under *Skipper*, and others had not, and this Court disagreed with courts such as Florida's which found the evidence relevant. (*People v. Belmontes* (1988) 45 Cal. 3d 744, 812.)

The Florida statutes defining mitigating and aggravating factors under consideration in *Parker* bear striking similarity to California's. (Compare Fla. Rev. Stat. § 921.141(6) with California's § 190.3 (a)-(k).) Of note, both statutory schemes allow for non-statutory mitigation, and it was under Florida's non-statutory mitigation section that evidence of the

co-defendant's sentence was offered. That the United States Supreme Court found such evidence to be relevant mitigating evidence is not an interpretation of Florida law, but a statement that such evidence is mitigating within the meaning of *Skipper* and its progeny. This Court's precedents to the contrary thus violate the Eighth and 14th Amendments, and must be brought into line with *Parker*.

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XV. THE TRIAL COURT VIOLATED MR. MANIBUSAN'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY ALLOWING THE JURY TO CONSIDER EVIDENCE THAT HE WAS IN A CAR THAT ALSO CONTAINED WEAPONS WITHOUT PROPERLY INSTRUCTING THEM WHEN THAT CIRCUMSTANCE WAS CRIMINAL

In the AOB, appellant showed that the trial court erroneously allowed the jury to hear evidence that Mr. Manibusan had, on three occasions, been a passenger in a vehicle in which weapons were found without telling them how to determine if those crimes were proved sufficiently to be used as evidence in aggravation.

The facts involved concerned three incidents. On one occasion Mr. Manibusan was with three other people, and two guns were found in the car. On both other occasions, Mr. Manibusan was riding in a car with Adam Tegerdal when the car was stopped and two knives were found in the car. On none of these occasions was a weapon found on Mr. Manibusan's person, and he did not threaten or otherwise take any action to suggest that he would use any of the weapons found.

Appellant showed that each of the crimes alleged had required elements that were required to be found true beyond a reasonable doubt before those crimes could be used as aggravating evidence, and that the jury needed to make those decisions. The trial court's instructions, however, relieved the jury of this task and allowed them to use these events as

aggravating evidence without finding that any crimes had actually been committed.

Appellant showed that the trial court prevented the jury from making the required factual determination that the incidents were crimes involving the threat of force or violence under section 190.3 (b). Appellant concluded by showing that the use of weapons possession crimes under these circumstances impermissibly broadened the allowable scope of aggravating evidence[35], and that the inclusion of the possessory crimes here was prejudicial. (AOB 250-271.)

Respondent counters by arguing first that the circumstances in which the weapons were found indicated "an implied threat of violence" citing *People v. Bacon* (2010) 50 Cal.4th 1082 and *People v. Michaels* (2002) 28 Cal.4th 486. (RB 111-112.) Respondent then argues that the trial court had no duty to instruct the jury to determine whether the crimes involved a threat of force or violence, citing *People v. Lewis II* (2008) 43 Cal.4th 415, *People v. Dunkle* (2005) 36 Cal.4th 861 and *People v. Nakahara* (2003) 30 Cal.4th 705. (RB 112-113.) Respondent concludes by asserting that the possessory crimes were proper aggravating factors and that any error in the use of these aggravating factors was harmless. (RB 113-114.)

[35] Appellant has no additional argument on this point and relies upon the argument presented in the AOB at page 270.

As shown below, respondent's arguments are premised on misinterpretation of the authorities cited and cannot support the trial court's actions.

A. Whether Appellant Possessed Weapons And Whether He Did So Under Circumstances Rendering That Possession Unlawful Raised Questions Of Fact For The Jury That Were Improperly Usurped By The Trial Court

As shown in the AOB, the crimes of weapons possession alleged here do not exist unless Mr. Manibusan is found to be in possession of the items rather than merely being in a place where they are stored by others. As to the knives, even if Mr. Manibusan was found to have possession, the possession of those weapons does not necessarily constitute a crime unless they were concealed upon his person and also meet the definition of a dirk or dagger. Thus whether the conduct is criminal at all is a question of fact that must be resolved by the jury. (AOB 259-264, 267-269.)

Respondent brushes aside the factual questions regarding possession and, without authority, assumes that it was proper for the trial court to determine that Mr. Manibusan possessed the weapons in all three cases. (RB 111 ["The trial court properly found that appellant possessed the knife and the guns under circumstances indicating an implied threat of violence"].) Instead, respondent argues that the possession of weapons in this case carried an implied threat of violence and that the trial court properly resolved that question. (RB 111-112.) The cases respondent uses

to support this argument, however, do not make the point that respondent claims.

In *People v. Michaels*, the defendant had been previously been arrested for unlawful possession of knives in Texas and California, and for unlawful possession of a handgun in California. This Court allowed the use of these possessory offenses as factor (b) evidence because "in each instance defendant's possession was illegal. His possession of knives in Texas was illegal, both because the blades exceeded five inches and because the dagger was double-edged. His possession of knives and a firearm in California were concealed, making the possession illegal under California law." (*People v. Michaels, supra*, 28 Cal. 4th at p. 536.) The Court then used the circumstances of possession to find that they were sufficient to carry an implied threat of violence. (*Ibid* ["We conclude that the criminal character of defendant's possession of knives and firearms, and the evidence of defendant's use of those or similar weapons to commit crimes, are sufficient to permit a jury to view his possession as an implied threat of violence."].)

Similarly, in *People v. Bacon*, the fact that the possession of a firearm by a parolee was illegal, coupled with the placement of the weapon under the defendant's pillow making it available for quick access, led this Court to conclude that evidence of the possessory crime could be offered in

the prosecution's penalty phase. The Court cautioned, however, that this would not be the case in every instance of weapons possession:

> Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1235.) The factual circumstances surrounding the possession, however, may indicate an implied threat of violence. (*Id.* at pp. 1235–1236.) "In a series of cases ... [citations], we have held that the possession of a weapon in a custodial setting—where possession of any weapon is illegal—'involve[s] an implied threat of violence even when there is no evidence defendant used or displayed it in a provocative or threatening manner.' " (*People v. Michaels*, *supra*, 28 Cal.4th at p. 535.) "Even in a noncustodial setting, illegal possession of potentially dangerous weapons may 'show[] an implied intention to put the weapons to unlawful use,' rendering the evidence admissible pursuant to section 190.3 factor (b)." (*People v. Dykes* (2009) 46 Cal.4th 731, 777.)
> *People v. Bacon*, *supra*, 50 Cal. 4th at p. 1127.

Neither of these cases presented any question of whether the defendant actually possessed the weapons in question. Unlike those cases, appellant was, in each instance alleged as a fact in aggravation, a passenger in another person's car. No weapons were found on his person in any of these cases. Possession was a factual issue for the jury, not the trial court, to resolve. This Court has emphasized the fundamental Constitutional underpinnings of the rule requiring a jury's resolution of factual issues:

> It has long been recognized that a trial judge "may not direct a verdict of guilty no matter how conclusive the evidence." (*Brotherhood of Carpenters v. United States* (1947) 330 U.S. 395, 408; accord *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 572-573; *Sparf and Hansen v. United States* (1895) 156 U.S. 51, 105; cf. *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Bollenbach v. United States* (1946)

> 326 U.S. 607, 615.) Only recently, a plurality of the Supreme Court reaffirmed this principle, observing that "[the] Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.'" (*Connecticut v. Johnson* (1983) 460 U.S. 73, 84, quoting *Martin Linen Supply*, *supra*, 430 U.S. at pp. 572-573.)
>
> The prohibition against directed verdicts "includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true." (*United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144.) As one panel of the Fifth Circuit has stated, "[No] fact, not even an undisputed fact, may be determined by the judge." (*Roe v. United States* (5th Cir. 1961) 287 F.2d 435, 440, cert. den. (1961) 368 U.S. 824 [7 L.Ed.2d 29, 82 S.Ct. 43]; accord *United States v. Musgrave* (5th Cir. 1971) 444 F.2d 755, 762.) (*People v. Figueroa* (1986) 41 Cal. 3d 714, 724.)
>
> Here, the jury received evidence that on three occasions, Mr.

Manibusan was found in a car with weapons, but was not told that more was needed to find that he was in possession of those weapons. Further, regarding the allegations concerning knives, the crime did not exist unless the weapons were found to be dirks or daggers and were found to be concealed upon Mr. Manibusan's person within the meaning of section 12020(a), yet the jury was told only that the aggravating factor was "the possession of a dirk or dagger" on the specified dates. Both the nature of the knives and the fact of concealment are necessary elements of the crimes alleged as factor (b) aggravators and are questions of fact. Neither of these factual questions could be found by the trial court, they are questions for

the jury alone. Asking the jury to determine the truth of these crimes without informing them of the legal requirements to sustain a conviction had the effect of removing the issues of possession, concealment and the nature of the weapons from the jury's consideration and was a violation of Mr. Manibusan's fundamental rights to due process, a fair trial and a reliable sentencing proceeding.

Because this Court's holdings that whether a penalty jury is to be instructed on the elements of crimes offered under section 190.3(b) is a tactical choice by counsel also recognize that these crimes must be proved beyond a reasonable doubt, actions by the trial court that usurp the jury's function still create constitutional infirmities.[36] Appellant respectfully requests that this Court reconsider its holdings in this regard in light of the arguments presented here.

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[36] In considering this question, this Court has noted: "The California capital sentencing scheme does require that violent conduct be criminal in fact in order to constitute valid penalty evidence. [citations] Moreover, because evidence that the defendant committed other violent crimes "is often of 'overriding importance . . . to the jury's life-or-death determination,' " California law imposes a foundational requirement--one not mandated by the Constitution--that other-crimes evidence offered for this purpose be subject to the reasonable doubt standard of proof.[citations]. In other words, before a sentencing juror weighs the culpable nature of such other violent criminal conduct on the issue of penalty, he or she must be highly certain that the defendant committed it.

However, the ultimate question for the sentencer is simply whether the aggravating circumstances, as defined by California's death penalty law (§ 190.3), so substantially outweigh those in mitigation as to call for the penalty of death, rather than life without parole. (*People v. Brown* (1985) 40 Cal. 3d 512, 541-542, fn. 13.) In making this essentially normative determination, penalty jurors need not agree on the dispositive factors, or on the existence of any specific aggravating factor or crime, as a prerequisite to imposing the death penalty. [Citations] . . . .

Indeed, we "would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination" (*Ghent, supra*, 43 Cal. 3d 739, 773) were we to require sua sponte instructions focusing on the elements of particular offenses that might be included in the defendant's violent criminal history. We therefore adhere to our rule that such instructions are not required in the absence of a request. (*People v. Anderson* (2001) 25 Cal. 4th 543, 588-589.)

B. The Circumstances Presented Here Did Not Allow The Trial Court To Direct A Finding That The Possession Of Weapons Involved An Implied Threat Of Violence

The trial court's instructions here also removed the question of whether the weapons were possessed under circumstances raising an implied threat of violence from the jury's consideration. In the AOB, appellant showed that this omission violated Mr. Manibusan's fundamental constitutional rights. (AOB 264-267.)

Respondent suggests that his Court has "repeatedly rejected appellant's argument", citing *People v. Lewis II*, *supra*, 43 Cal.4th 415, *People v. Dunkle, supra*, 36 Cal.4th 861, and *People v. Nakahara*, *supra*, 30 Cal.4th 705. None of these cases rejects the argument made here.

In both *Lewis II* and *Nakahara*, the designation that the weapons offenses necessarily included a finding of implied threat of violence stemmed from the fact that the defendant was in actual custody. (*People v. Lewis II*, *supra*, 43 Cal.4th at pp. 529-530; *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 719-720.) This Court has determined as a matter of law that possession of a weapon while in jail or prison is admissible under factor (b). (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) In *Dunkle*, the claimed error was a failure to define "force or violence" in the context of burglary as a factor (b) offense, and the Court did not address the question at issue here. (*People v. Dunkle*, *supra*, 36 Cal.4th at pp. 922-923.)

In attempting to deflect the question, however, respondent does not address the merits of the argument, and appellant will not belabor the point. As shown in the AOB, whether the circumstances of the offense offered under factor (b) involve an implied threat of violence is a question of fact to be resolved by the jury. (AOB 264-267.) As shown, the trial court's usurpation of the jury's task violates appellant's fundamental constitutional rights. (AOB 265-266.)[37]

C. The Errors Regarding The Use Of Weapons Possession Offenses As Aggravating Factors In Support Of The Death Penalty Were Prejudicial And Require Reversal Of The Death Sentence Rendered Here

In the AOB, appellant showed that the errors committed by the trial court regarding the use of the charges regarding weapons possession were prejudicial. (AOB 270-271.) Respondent disagrees, arguing, in essence, there was lots of aggravating evidence and some was much worse than this, so the jury couldn't have been affected. (RB 114-115.)

Respondent ignores the fact that this jury had difficulties achieving a unanimous verdict in the penalty phase and that the prosecutor highlighted this evidence in his argument for death. (AOB 270; Argument III, *ante*; 91 RT 18006 [prosecutor's specific argument that finding appellant and weapons in other cars at other times was significant evidence supporting a

[37] Respondent tacitly admits that a factual finding is required in her argument E, arguing that the use of weapons possession charges under factor (b) is not impermissibly broad precisely because "other circumstances" must indicate there was an implied threat of force or violence. (RB 114.)

death verdict].) In light of these factors, the errors regarding the admission and use of this evidence cannot be said to be harmless, and the death sentence must therefore be reversed.

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XVI. THE TRIAL COURT IMPROPERLY EXCLUDED ANY EVIDENCE DESIGNED TO ADDRESS COMMON MISPERCEPTIONS ABOUT PRISON SENTENCES

In the AOB, appellant showed that the trial court improperly excluded proffered defense mitigation evidence designed to correct common misperceptions about a sentence of life without possibility of parole. (AOB 272-276.)

Respondent attacks an argument not made in the opening brief and contends that the trial court did not err in excluding evidence concerning prison conditions. Respondent then repeats the argument that any error was harmless because there was a lot of other evidence in aggravation. (RB 115-118.) In the process, respondent charges appellant with mischaracterizing the type of evidence trial counsel sought to admit as "evidence that LWOP prisoners faced harsh conditions." (RB 116.)

Through this tactic, respondent chose not to address the argument actually made in the AOB, that evidence designed to address commonly held misconceptions about the sentencing choices is admissible defense evidence in the penalty phase. Because respondent did not address this argument, appellant will not needlessly repeat it here. It is sufficient to say that respondent has not made any argument refuting appellant's actual claim that the trial court erred in excluding the proffered evidence.

Respondent did attempt to minimize appellant's showing of prejudice, contending again that the jury's use of prison condition evidence

presented to it by one of the jurors during deliberations was not misconduct and that the information supplied by the juror was, in any event, outside the scope of the evidence offered by the defense here. (RB 117.) Again, however, respondent does not understand the argument actually made. Appellant cited the jury's use of prison condition evidence to show that the jurors did, in fact, bring misconceptions about the nature of imprisonment into their penalty phase deliberations. (AOB 272, 272 fn 72.) While the evidence offered did not directly address the particular misconception most clearly recalled by jurors, this was certainly not the only misconception considered by them given the fact that juror R. M. provided "a lot" of information. (6 CT 1701.) The fact that even one misconception regarding the nature of imprisonment for life was considered by this jury bolsters appellant's demonstration that the requested testimony was particularly important in this case.

Respondent further discounts the impact of the erroneous exclusion of the evidence by suggesting that it is harmless because there was other evidence in aggravation. (RB 117-118.) In this, respondent fails to recall the importance attached by the jury to improperly received prison condition evidence. (Arguments I and III above, 6 CT 1701.) The proffered evidence would have, to some extent, ameliorated the jury's improper use of prison condition evidence. The exclusion of this evidence is thus not harmless, and the death sentence imposed must be reversed.

XVII. CONSTITUTIONAL CHALLENGES

In the AOB, appellant raised several constitutional challenges to California's death penalty statutes, and to this Court's interpretations of various aspects of that statutory scheme. (AOB 277-307.) Respondent correctly notes that this Court has considered and rejected each of those challenges on multiple occasions. (RB 118-127.) Appellant does not agree with the Court's previous holdings and presented those arguments in accordance with the procedure stated in *People v. Schmeck*, *supra*, 37 Cal.4th at pages 303-304, and for that reason will not repeat them here.

Thus as he did in the AOB, appellant requests that this Court reconsider its previous holdings regarding the constitutionality of California's death penalty process, find that process to be unconstitutional for the reasons stated therein, and reverse appellant's convictions and death sentence.

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XVIII. CUMULATIVE PREJUDICE

In the AOB, appellant showed that the cumulative impact of the errors committed by the trial court undermined the integrity of the guilt and penalty phase proceedings in this case. Appellant showed that this combination of errors leads to the conclusion that appellant's convictions and sentence must be reversed. (AOB 315-317.)

Respondent argues only that no errors were committed, and that there is thus nothing to cumulate. (RB 127.) Appellant disagrees, and for the reasons stated above and in the AOB, urges this Court to reverse Mr. Manibusan's convictions and death sentence.

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CONCLUSION

Throughout the Respondent's Brief, respondent reiterates and relies upon the trial court's erroneous actions and applications of the law. As shown in the AOB and herein, respondent's contentions must fail.

The combination of jury misconduct, jury selection errors, errors regarding the admissibility of evidence, errors in the application of the law and instructional errors, Mr. Manibusan's convictions and sentence are fatally flawed. Appellant respectfully requests that this Court reverse his convictions and sentence.

Dated: August 4, 2012

Respectfully Submitted

David S. Adams
Attorney for Appellant
Joseph Kekoa Manibusan

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(B)(2))

I, David S. Adams am the Attorney assigned to represent appellant, Joseph Kekoa Manibusan, in this automatic appeal. I conducted a word count of this brief using the word count feature in Microsoft Word 2010. On the basis of that computer-generated word count, I certify that this brief is 34,575 words in length excluding the tables and certificates.

Dated: August 4, 2012

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David S. Adams

DECLARATION OF SERVICE

Name: People v. Joseph Kekoa Manibusan
Supreme Court Case No. Crim. S094980
Monterey County Superior Court No. SM980198

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My business address is P.O. Box 1670, Hood River, Oregon, 97031
On August 7, 2012, I served a copy of the following document

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelope/s to be deposited with the United States Postal Service at Hood River, Oregon, with postage thereon fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 7, 2012 at Hood River, Oregon.

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