IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,** | Case No. S105097 |
| Plaintiff/Respondent, | **CAPITAL CASE** |
| vs. | |
| **DEWEY JOE DUFF,** | |
| Defendant/Appellant. | |

Automatic Appeal From the Superior Court of the State of California
County of Sacramento (Case No. 98F01583)

The Honorable Thomas M. Cecil, Judge

# APPELLANT'S REPLY BRIEF

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Under Appointment by the California Supreme Court

Attorney for Appellant

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**APPELLANT'S REPLY BRIEF**

**INTRODUCTION**

Defendant and Appellant Dewey Joe Duff hereby replies to certain points made in the Respondent's Brief. Appellant believes a further discussion of these points will assist this Court in deciding the issues presented.

Appellant believes certain points have been adequately briefed, and that any further discussion of these points is unnecessary. Appellant's failure to reply to any particular point made by Respondent should not be misconstrued as a waiver or a concession. (People v. Hill (1992) 3 Cal.4th 959, 995, f.n. 3.)

## ARGUMENT

## JURY SELECTION ARGUMENTS

### I.

### THE TRIAL COURT COMMITTED REVERSIBLE WITT-WITHERSPOON ERROR BY EXCUSING SEVERAL PROSPECTIVE JURORS FOR CAUSE DESPITE THEIR WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

Appellant argues his federal constitutional rights to a fair and impartial jury trial and reliable penalty determination were violated by the summary excusal of three prospective jurors (Jurors C.L., S.K., and D.L.), based upon their checked answers and brief written comments concerning capital punishment on their juror questionnaires, without an adequate inquiry. (AOB 13-21.) Appellant relies upon previous opinions of this Court reversing penalty determinations in capital cases for this precise reason. (People v. Cash (2002) 28 Cal.4th 703; People v. Heard (2003) 31 Cal.4th 946; People v. Stewart (2004) 33 Cal.4th 425.) In Cash the death penalty judgment was overturned for failure to allow sufficient inquiry into jurors' attitudes about particular facts that could cause some jurors invariably to vote for the death penalty regardless of the strength of the mitigating circumstances. (Cash, supra, 28 Cal.4th 721.) In Heard, the judgment was reversed because the trial court erroneously excused a single prospective juror for cause based on his isolated answers on the juror questionnaire which had been lost or destroyed and ambiguous answers to questions posed during an inadequate oral examination. (Heard, supra, 31 Cal.4th at 964-

966.) In Stewart, this Court reversed because the trial court erroneously excused prospective jurors for cause, based solely upon their written answers to a jury questionnaire concerning their views relating to the death penalty and without any follow-up questioning by the court and counsel which might have been able to clarify these responses and determine whether, in fact, the prospective jurors were disqualified from service. (Stewart, supra, 33 Cal.4th at 440.)

Respondent does not argue that any of the prospective jurors in the instant case were excusable for cause based upon their death penalty views. Indeed, his own summary of their questionnaire responses precludes any such argument since he acknowledges all three jurors stated they were neutral concerning the death penalty and were willing to impose it if warranted based upon the applicable law and the evidence. (RB 17-19; 5 C.T. 1393, 6 C.T. 1562, 9 C.T. 2618-2620.)

Nor does Respondent contend the inquiry of the prospective jurors was adequate. Indeed, according to Respondent, two of the three prospective jurors, C.L. and D.L., were dismissed based solely on their written questionnaire responses without any further questioning by the trial court or the attorneys and the third, S.K., was questioned only very briefly by the trial court. (RB 17; 6 R.T. 2481-2483, 2522-2524, 7 R.T. 2776-2777.)

Instead, Respondent asserts Appellant waived the issue when his counsel agreed to dismiss the jurors in question.

Alternatively, he claims the jurors were dismissed for cause for legitimate reasons unrelated to their views on the death penalty. (RB 17, 21-32.)

However, neither of these points is well taken and the cases Respondent relies on are inapplicable.

Respondent relies on People v. Holt (1997) 15 Cal.4th 619, at 654-658, to support his waiver argument. But Holt holds only that a defendant must object when jurors are excused on grounds other than a Witt-Witherspoon challenge to preserve the issue for appeal and, as shown post, that simply did not happen here. Both the United States Supreme Court and this Court have held that the failure of defense counsel to object to the excusal of prospective jurors who can be fair and impartial in regard to the death penalty does not forfeit his client's right to raise this issue on appeal. (Wainwright v. Witt (1985) 469 U.S. 412, at 434-435; People v. Schmeck (2005) 37 Cal.4th 240, 262.)

While Respondent insists that each of the prospective jurors was excused for a legitimate reason that had nothing to do with his or her views regarding the death penalty, this is pure speculation. Nowhere in this record does the trial judge or the prosecutor or defense counsel state the reason for excusing juror D.L. was his inability to concentrate due to the recent death of his wife, or that juror C.L. was excused because she was mentally impaired and unstable, or that juror S.K. was so upset by the terrorist attack on September 11, 2001 she was unable to perform her duties in a rational manner. The fact a juror **might** be

excusable for cause is not good enough to sustain the excusal in the absence of a finding by the trial court. As stated in Mitchell v. Superior Court (1984) 155 Cal.App.3d 624, at 629, ". . .the specific narrow question. . . which we decide. . .[is] whether there is sufficient evidence to support the finding of fact by the trial court that the juror was unable to perform his [or her] duty. . . . we are not concerned with whether certain other facts or events may or may not be good cause to discharge a juror. We here test only the fact finding determination by the trial court of the. . .[excused juror's] inability."

The cases cited by Respondent are easily distinguishable since, unlike in the instant case, the trial court made a finding of good cause for excusing the juror and that finding was supported by substantial evidence. For example, in People v. Cunningham (2001) 25 Cal.4th 926, at 1029, the trial court, after commenting the court doubted the juror's sanity, expressly found she was unable to perform her duties because of her distress over, and need to visit, her dying father and that finding was supported by substantial evidence. (See also People v. Holt, supra [juror disqualified for actual bias after trial court found her pending law suit against the District Attorney created a conflict of interest as a matter of law despite the juror's assertions she would nonetheless be fair to the prosecution]; People v. Leonard (2007) 40 Cal.4th 1370, 1409-1410 [trial court expressly found good cause to excuse juror after juror's wife told the clerk her father had been killed in an automobile

accident, she and her husband would be attending the out-of-town funeral, and her husband would be unavailable as a juror for the rest of the week]; Mitchell v. Superior Court, supra, 155 Cal.App.3d at 628-629 [trial court made specific and repeated findings that juror was unable to perform his duties after juror unequivocally stated he could not concentrate on the evidence because his mind wandered].)

But here the trial court never made **any** finding - - either express or implied - - that any of the excused jurors' ability to perform their duties would be substantially impaired. While Respondent urges this Court to defer to the trial court's findings, there are simply no findings to defer to.

The improper excusal for cause of jurors who were fair and impartial concerning the death penalty, and who were not excused for other legitimate reasons, constitutes reversible penalty phase error per se (People v. Cash, People v. Stewart, People v. Heard, all cited supra.) Consequently the death sentence must be vacated and the case remanded for a new penalty trial.

## II.

## THE TRIAL COURT COMMITTED REVERSIBLE WITT-WITHERSPOON ERROR BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE BASED SOLELY ON HER PERSONAL RELIGIOUS BELIEFS EVEN THOUGH HER ABILITY TO IMPOSE THE DEATH PENALTY WAS NOT SUBSTANTIALLY IMPAIRED

Appellant argues prospective juror S.L. was improperly excused for cause based upon her religious beliefs even though she repeatedly stated she would be able to set these beliefs aside, do her duty as a citizen, and impose the death penalty based upon the applicable law and the evidence. (AOB 22-31.)

Respondent acknowledges that prospective jurors who are personally opposed to the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly they are willing to temporarily set aside their beliefs and follow the law. (Lockhart v. McCree (1986) 476 U.S. 162, 176; People v. Avila (2006) 38 Cal.4th 491, 529.) However, he asserts, relying upon Uttecht v. Brown (2007) 551 U.S. 1, that juror S.L. was properly excused based upon her equivocal and ambiguous statements and her refusal to make a definite commitment to impose the death penalty if appropriate. (RB 24-32.)

Appellant anticipated Respondent's argument, and demonstrated why it was without merit, in his opening brief.

First, the High Court in Uttecht did not overrule its previous holding in Gray v. Mississippi (1987) 481 U.S. 648 that it is impermissible to excuse for cause a juror who appears confused and who at times seems to equivocate, but eventually acknowledges that she could consider the death penalty in an

appropriate case. (Id, at 653.) Since Juror S.L. - - notwithstanding some equivocation - - stated emphatically that she would follow the law one-hundred percent and impose the death penalty if appropriate (7 R.T. 2757-2769), she was improperly excused.

Second, Uttecht is unlike our case since (1) defense counsel there failed to object to the excusal of the juror in question despite his numerous objections to the excusals of other prospective jurors and challenges for cause and (2) it was a federal habeas (rather than a direct appeal) case and the Supreme Court could not say that the state appellate courts' decisions were not only erroneous, but an unreasonable application of clearly established federal law and grant habeas relief under the Anti-Terrorism and Effective Death Penalty Act.

Respondent's failure to address Appellant's Uttecht analysis speaks volumes. Uttecht notwithstanding, the excusal for cause of Juror S.L. constituted federal constitutional error.

Since the error is reversible per se, the death sentence must be vacated and the case remanded for a new penalty trial.

## III.

## THE DENIAL OF APPELLANT'S BATSON-WHEELER MOTION - - DESPITE THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES AGAINST THREE AFRICAN-AMERICAN JURORS - - WAS REVERSIBLE CONSTITUTIONAL ERROR

Appellant argues the trial court erred in denying his Batson-Wheeler motion challenging the prosecutor's use of his peremptory challenges to excuse several African-American jurors. (AOB 32-54.)

Respondent disagrees. (RB 33-66.)

Respondent emphasizes the substantial deference to be accorded the trial court's Batson-Wheeler determinations. However, as the United States Supreme Court has recognized, deference is not abdication, and reviewing courts have a constitutional duty to reverse the trial court's rulings, the judgment of conviction, and the death sentence, where the prosecutor has been guilty of racial discrimination in the exercise of peremptory challenges. (Snyder v. Louisiana (2008) 552 U.S. 472.)

Respondent acknowledges that a prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias - - that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds - - violates a criminal defendant's right to a representative and impartial jury. (Batson v. Kentucky (1986) 476 U.S. 79, 89, 96; People v. Wheeler (1979) 22 Cal.3d 258, 276-277; People v. Mills (2010) 48 Cal.4th 158, 173.) However, he suggests that, because Appellant Duff is white, and one of

the victims (Roscoe Riley) was an African-American, the prosecutor would have less reason for excluding African-American jurors. Respondent relies upon certain language in People v. Bell (2007) 40 Cal.4th 582, 597.)

However, as this Court recognized in Bell, the defendant need not be a member of the excluded group in order to complain of a violation of his right to a representative jury. (Bell, supra, 40 Cal.4th at 597; Peters v. Kiff (1972) 407 U.S. 493.) Prosecutors may be motivated to exclude African-Americans or other minority groups on the basis of race under the pretense of other legally valid reasons, regardless of whether or not they are of the same race as the victim, because prosecutors believe they are generally less inclined to vote for conviction or impose the death penalty. (Miller-El v. Cockrell (2003) 537 U.S. 322; Miller-El v. Dretke (2005) 545 U.S. 231.) Therefore, contrary to Respondent's suggestion, this Court should not assume the prosecutor in this case did not have a strong motive to exclude the African-American jurors merely because Appellant and one of the victims were of different races.

Respondent insists Appellant did not even make out a prima facie case of prosecutorial racial discrimination sufficient to require the prosecutor to explain himself.

However, Respondent acknowledges that, under Johnson v. California (2005) 545 U.S. 162, all Appellant needed to show was a mere "inference" of racial bias to establish a prima facie case. The United States Supreme Court explained in Johnson that

"we did not intend the first step to be so onerous that a defendant would have to persuade the judge - on the basis of all the facts, some of which are impossible for defendants to know with certainty - that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (Id at 170.) This minimal threshold standard was obviously met here since the prosecutor used three of his peremptory challenges in a row to remove the three remaining African-Americans. The prosecutor's assertion that this was "essentially just a coincidental luck of the draw" is both implausible and incredible.

Respondent seeks to avoid the above conclusion by arguing that, according to his review of the record, the prosecutor struck only three of the four remaining African-Americans. Appellant, based upon his own analysis of the record disagrees. However, even assuming Respondent is correct, this is of no consequence. This Court has expressly held that a prima facie case may be established based upon a showing that the prosecutor has struck all or **most** of the members of the identified group from the venire. (People v. Bell, supra, 40 Cal.4th at 597.)

Respondent, relying on People v. Bonilla (2007) 41 Cal.4th 313, at 342-343, also asserts the number of peremptory challenges exercised against African-American jurors is simply too small to permit drawing an inference of discrimination.

However, Bonilla is very different from Appellant Duff's case. In Bonilla the prosecutor used two of his peremptories to strike the only two prospective African-Americans from the juror pool. However, in between these two challenges, the prosecutor used numerous peremptories against Hispanics, women, and other prospective jurors. This Court, unsurprisingly, found that under these circumstances the striking of the two African-Americans did not in and of itself establish a **pattern** of racial discrimination. However, in our case, where the prosecutor eliminated **three African-Americans in a row**, the opposite conclusion is inescapable. Such "[a] pattern of striking panel members from a cognizable racial group is probative of discriminatory intent" (United States v. Collins (9th Cir. 2009) 551 F.3d 914, 919) even though eliminating one or two black members of the venire might not be enough, in itself, to raise an inference of discrimination.

Thus, the trial court in this case committed step one Batson-Wheeler error.

Respondent also argues that, since the prosecutor stated a number of race-neutral reasons for excusing the three jurors in question, and since there was no evidence that the grounds articulated by the prosecutor for the dismissals were pretextual, the Batson-Wheeler motion was properly denied. He emphasizes the prosecutor was only required to offer a genuine, reasonably specific, race or group-neutral explanation, whereas Appellant had the burden to demonstrate impermissible discrimination.

(Johnson v. California, supra, 545 U.S. at 168-171; People v. Bonilla, supra, 41 Cal.4th at 341; People v. Arias (1996) 13 Cal.4th 92, 136.) He cites a number of cases in which the denial of Batson-Wheeler motions was upheld based upon reasons similar to those advanced by the prosecutor in the instant case.

However, every case is different. The relevant inquiry is not simply whether the reasons stated by the prosecutor were race-neutral, but whether they were relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising his peremptory challenges rather than mere pretexts invented to hide purposeful discrimination. (Batson v. Kentucky (1986) 476 U.S. 79, 93, 95; Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028.)

Here, the prosecutor's allegedly race-neutral reasons for peremptorily challenging the jurors in question are so implausible, once all of the relevant circumstances are considered, that they can only be found to be a pretext for purposeful discrimination. (Purkett v. Elem (1995) 514 U.S. 765, 768.)

Respondent states the prosecutor's reasons for challenging Juror T.M. were (1) she was not there on the final day of jury selection; (2) she had made comments about racial profiling and police brutality which made her unusually susceptible to a possible defense argument that Appellant had been brutalized by the police officers who had arrested him; and (3) her comments

about people generally being the product of their environment could make her susceptible to a defense argument that Appellant's crimes were a result of his upbringing and thus make her more likely to vote for life in prison rather than the death penalty. (RB 64; 11 R.T. 4126-4128.)

However, Respondent does not even mention a fourth allegedly race-neutral reason offered by the prosecutor for peremptorily challenging Juror T.M., that the defense had not exercised a peremptory challenge against her, and that even though she had "come across" as "somewhat neutral," he therefore wanted her off the jury. This reason was completely implausible inasmuch as the prosecutor had failed to challenge **any** of the 12 non-African-American jurors selected to try this case, after the defense failed to exercise peremptory challenges against them, and strongly suggests **all** the prosecutor's purported race-neutral reasons for excusing Juror T.M. were pretextual.

Furthermore, the prosecutor's purported concern about T.M.'s failure to appear in court on a single occasion during a lengthy jury selection process due to a baby-sitting emergency somehow indicating her lack of responsibility could not have been genuine. T.M. had promptly informed the court of this unanticipated emergency, and there was no reason to believe the problem would reoccur. While it is true that failing to challenge T.M. might have caused a short delay, this could hardly have been a legitimate concern in a case which had already been continued for years.

Respondent correctly points out that negative experiences with law enforcement have repeatedly been upheld as proper race-neutral reasons to challenge a juror. (People v. Turner (1994) 8 Cal.4th 137, 171.) However, he fails to explain how T.M.'s comments about racial profiling, brutality and unfair treatment of African-Americans could have caused the prosecutor any genuine concern in **this** case. Appellant Duff was **white**. One of the murder victims was **black**. Juror T.M.'s comments related solely to racial profiling, brutality and unfair treatment of **blacks**. The prosecutor could not possibly have had any legitimate apprehension concerning T.M.'s susceptibility to a possible defense argument that Duff should not be convicted of murder or given the death penalty merely because he may have been injured while fleeing from the police.

Even Respondent does not attempt to justify the prosecutor's purported race-neutral reason for excusing T.M. based upon her comments about people generally being products of their environment. And wisely so. As the prosecutor himself recognized, many other prospective jurors whom he had **not** challenged had made similar comments. Juror T.M. was obligated under the law to consider factor (k) evidence relating to Appellant Duff's "bad childhood" in determining whether he should receive life without possibility of parole or the death penalty, and nothing in her voir dire responses suggests she would have given this factor undue weight in determining the appropriate penalty.

The prosecutor had no legitimate race-neutral reasons for excusing African-American Juror T.M.

Respondent asserts Juror L.T.'s demeanor, experiences with the criminal justice system and the concern he would make the jury less cohesive were all legitimate race-neutral grounds for excusing him via peremptory challenge. However he does not even attempt to defend two other reasons offered by the prosecutor: i.e. that L.T. was about 30 minutes late to court one day and that he thought that prosecutors and defense attorneys both made "way too much money." These obviously bogus reasons strongly suggest **all** of the prosecutor's purported race-neutral reasons were pretextual.

While Respondent correctly points out peremptory challenges may be exercised for demeanor-based reasons (People v. Reynoso (2003) 31 Cal.4th 903, 925-926; People v. Johnson (1989) 47 Cal.3d 1194, at 1217-1219), and while the bailiff may have mentioned L.T.'s unusual mannerisms to the prosecutor, this was not the prosecutor's stated concern. What the prosecutor actually stated was that he was "bothered" by L.T.'s eagerness to serve as a juror as indicated by both his demeanor and his responses during voir dire.

However, this concern could not possibly have been genuine since it was totally inconsistent with the prosecutor's willingness to excuse other jurors who were doing everything they could to evade their civic obligations. For example the prosecutor stipulated to excuse prospective Juror A.S. because he

would literally say anything to avoid being a juror. (11 R.T. 3937-3964.)

Moreover, the prosecutor's alleged race-neutral reason for striking L.T. for being too eager to serve as a juror was inconsistent with his justification for striking Juror T.T. as being too timid and scared and reluctant to serve as a juror. Simple logic dictates that both of these justifications could not be true. The real reason for striking both of these African-American jurors was simply the color of their skin.

As Respondent correctly points out, the prosecutor's primary reason for excusing Juror T.T. was that his brother had been in prison for several years and had been only recently released. It is true this Court has previously upheld a juror's negative view of her brother's involvement in the criminal justice system as a race-neutral reason for exercising a peremptory challenge. (People v. Avila (2006) 38 Cal.4th 491, 554-555; People v. Cummings (1993) 4 Cal.4th 1233, at 1282.)

However, while Avila bears a superficial resemblance to the instant case inasmuch as one of the race-neutral reasons for excusing a prospective juror articulated by the prosecutor was that her brother had been arrested for manslaughter and the experience had been "devastating" for her, this Court did **not** hold in Avila that this reason **alone** would have justified the peremptory challenge. The prospective juror in that case had previously served as a juror in a criminal case which left her with "mixed feelings," had been disturbed when she learned

defense counsel had wanted her as a juror merely because he believed that as a member of a minority group she would "hold out longer than anybody else," and had wondered if she had made a difference. This Court held that this **combination** of reasons would have caused any prosecutor to challenge her and that it could be reasonably inferred that the prosecutor did not excuse the juror on the basis of her race.

People v. Cummings is as different from Appellant Duff's case as night from day as Appellant has previously pointed out. In Cummings the juror's brother had been convicted of a crime, and may have been prosecuted by another deputy in the same office, and the juror had doubts about his brother's guilt and even went so far as to show his resentment by giving the prosecutor "dirty looks." (Cummings, supra, 4 Cal.4th at 1282.) Here, in contrast, Juror T.T. stated he believed his brother had been justly punished for crimes which he committed and manifested no resentment towards the prosecutor whatsoever.

Moreover, this case is distinguishable from both Avila and Cummings inasmuch as T.T. - - unlike the jurors excused in those cases - - had himself been a victim of a criminal assault and was very grateful the criminal justice system had punished his assailant.

Each case must be evaluated on its own unique facts. It is difficult to accept that, in view of the above, the prosecutor's alleged race-neutral reason for excusing T.T. in **this** case was genuine.

Respondent, relying upon People v. Johnson, supra, 47 Cal.3d at 220, argues T.T.'s timidness and reluctance to decide if Appellant would live or die was a legitimate non-racial reason for excusing him.

However, this is totally inconsistent with the prosecutor's purported justification for challenging Juror L.T. as being over eager. Once again this inconsistency shows the prosecutor's real concern was not that these two black jurors were either too eager or too reluctant. His real reason for wanting to get rid of them was that they were black.

Respondent also argues the prosecutor was justified in excusing T.T. because he was initially unsure about the applicable burden of proof in a murder case. He relies on People v. Mills (2010) 48 Cal.4th 158, at 177; People v. Kelly (2008) 162 Cal.App.4th 797, 805 f.n. 10, and People v. Rodriguez (1999) 76 Cal.App.4th 1093, at 1114.

However those cases are distinguishable in that the jurors had difficulty in understanding the burden of proof or were equivocal about whether they could follow the law **after** the law had been explained to them. T.T. never indicated in any way that he was incapable of understanding the prosecutor's burden of proof or that he would be unable to follow the law. All he said was that - - like most prospective jurors - - he did not know the applicable burden of proof since no judge had ever explained it to him. Appellant submits this was not a legitimate race-neutral reason for excusing T.T.

The prosecutor's final reason for excusing T.T. was that, during a break, the prosecutor had observed him stretched out on a bench outside the courtroom dozing. But this supposed race-neutral reason is so lame that even Respondent makes no attempt to defend it. Once again the prosecution's proffer of such a bogus reason suggests **all** of his reasons were pretextual.

In summary, none of the prosecutor's supposed race-neutral reason for getting rid of literally all of the remaining black jurors was valid, Respondent's arguments notwithstanding. And, once again, the very fact the prosecutor succeeded in excusing **all** of the African-Americans and that **none** of them served on the jury is in and of itself compelling circumstantial evidence that excluding blacks merely because of their race was the prosecutor's goal from the outset.

The exclusion of the three African-Americans in a row by peremptory challenge requires the judgment be reversed.

## GUILT PHASE ARGUMENTS

## IV.

### THE DESTRUCTION OF THE AUTOMOBILE AND THE EVIDENCE CONTAINED THEREIN DEPRIVED APPELLANT DUFF OF A FUNDAMENTALLY FAIR TRIAL

Appellant argues the denial of his motion for appropriate sanctions, pursuant to California v. Trombetta (1984) 467 U.S. 479 and Arizona v. Youngblood (1988) 488 U.S. 51, constituted reversible error. The automobile in which the decedents' bodies had been found had been destroyed before Appellant's forensic expert could examine it and neither the prosecutor nor the police had bothered to notify defense counsel the car would be destroyed. (10 R.T. 3691-3695, 3701) Furthermore, the car may have contained potentially exculpatory evidence including inter alia gunshot residue, bullet holes in the rear of the car, and blood splatter patterns which would have corroborated Appellant's post-arrest interrogation statements that the drug dealer "victims" fired first and that Appellant shot them in self-defense. (10 R.T. 3646-3676, 3709-3712.) While the police provided video tapes and photographs of the decedents' automobile to the defense, they were of such poor quality that they were virtually useless for purposes of the defense forensic expert's analysis. (10 R.T. 3652.) Since the Trombetta-Youngblood error in this case was not harmless beyond a reasonable doubt, the judgment must be reversed. (AOB 55-61.)

Respondent concedes the prosecutor handling the case at the time was unable to recall notifying Appellant's current defense

attorney of the intention to destroy the car and that the car was later destroyed before Appellant's forensic expert was able to examine it. However, Respondent argues there was no showing of bad faith, defense counsel had ample opportunity to examine the automobile before it was actually destroyed, and there was no reasonable possibility any exculpatory evidence would have been found. (RB 66-76.)

None of these arguments has merit.

According to the prosecution witnesses' testimony during the motion hearing, the car needed to be destroyed in order to protect the public health since it had been super glued and contained carcinogenic chemicals. (10 R.T. 3690 et seq.) And yet, despite this, the car was not actually destroyed until it was crushed seven months later at the Pick 'n' Pull lot. (10 R.T. 3695.) There was no legitimate reason the car had to be **immediately** destroyed. The prosecutor, if acting in good faith, could easily have notified defense counsel of the intended destruction and given the defense a reasonable opportunity to analyze the car before it was destroyed.

Respondent correctly points out that, since the automobile was still in existence for seven months after the shooting, it could have been tested by the defense if defense counsel had been more diligent.

However, this merely means the judgment would have to be reversed on the alternative ground of ineffective assistance of counsel.

Appellant was represented during this seven month period by an attorney named Lloyd Riley. Mr. Riley was appointed to represent Appellant in early March, 1998 and continued to serve as lead defense counsel until November 28, 2000. During this 32 month period Riley, an elderly attorney who was obviously "past it," repeatedly failed to appear in court, was continuously unprepared, and was unable to focus his attention and perform his duties. He did little (if any) investigation. Finally, following Keenan[1] counsel's repeated requests and a Marsden[2] hearing, and in the midst of jury selection, Riley was relieved. New lead counsel was substituted in, and the matter was continued. (1 R.T. 7-11, 13, 17, 32-54, 92; 4 R.T. 2072-2106.)

Appellant was entitled to the assistance of a competent attorney who would defend him based upon an adequate and thorough investigation. (Strickland v. Washington (1984) 466 U.S. 668, 686; Wiggins v. Smith (2003) 539 U.S. 510; In re Marquez (1992) 1 Cal.4th 584, 602; In re Gay (1998) 19 Cal.4th 771.) Riley's total failure to conduct an adequate investigation, particularly his failure to examine the automobile which may have contained critical exculpatory evidence bolstering Appellant's self-defense claims, constituted an egregious violation of Appellant's right to effective assistance of counsel.

Since there could not possibly be any legitimate tactical reason for failing to conduct an adequate investigation, a

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[1] Keenan v. Superior Court (1982) 31 Cal.3d 424.

[2] People v. Marsden (1970) 2 Cal.3d 118.

reversal based upon Riley's deficient performance is appropriate even on direct appeal. (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266; People v. Wilson (1992) 3 Cal.4th 926, 936; People v. Pope (1979) 23 Cal.3d 412, 426.)

Appellant recognizes that normally a criminal defendant must show a reasonable probability that, but for counsel's deficiencies the result of the trial would have different. However, as this Court has recently reaffirmed, this merely means counsel's deficient performance rendered the result of the trial unreliable or the trial fundamentally unfair. (In re Valdez (2010) 49 Cal.4th 715, 729.)

Moreover a criminal defendant is not required to demonstrate "prejudice" where counsel's inadequacy resulted in a complete failure to subject the prosecution's case to meaningful adversarial testing. (United States v. Cronic (1984) 466 U.S. 648; Bell v. Cone (2002) 535 U.S. 685.)

Here, the prosecution's case rested heavily upon forensic expert Faye Springer's examination of the automobile containing the decedents' bodies. Riley's failure to arrange for a qualified defense forensic expert to examine the automobile, which may well have contained critical physical evidence bolstering Appellant's self-defense claims, failed to subject the prosecution's case to meaningful adversarial testing, resulted in a fundamentally unfair guilt phase trial, and requires reversal even in the absence of an affirmative showing of prejudice.

Respondent argues it was unlikely exculpatory evidence

would have been discovered. For example he argues gunshot residue consistent with Appellant's self-defense claims would probably not have been found because one of the decedents (Hagen) was wearing gloves.

However, this argument fails. The other decedent (Riley) was **not** wearing gloves. Moreover, the prosecution had little interest in discovering bullet trajectories, gunshot residue, or blood splatter patterns which might have supported Appellant's self-defense claim. Surely this Court should not assume no additional exculpatory evidence would have been discovered merely because such evidence would have been inconsistent with the prosecution's theory of the case and was not discovered by the prosecution's "world renowned" expert who was obviously not looking for defense evidence.

Thus, the denial of the defense Trombetta motion, or alternatively the ineffective assistance of Appellant's attorney, requires reversal.

## V.

## THE TRIAL COMMITTED REVERSIBLE ERROR BY ADMITTING POST-ARREST STATEMENTS WHICH WERE EXTRACTED IN VIOLATION OF MIRANDA AND WERE INVOLUNTARY

Appellant argues the trial court committed reversible constitutional error in admitting his post-arrest interrogation statements that he shot the decedents since he never unambiguously waived his Miranda rights, the interrogating officers failed to honor his request to terminate the interrogation because he was too "brain boggled" to continue, and the statements were involuntary under the totality of the circumstances. (AOB 62-74.)

Respondent counters that, since Appellant never unequivocally requested an attorney and later waived his Miranda rights, the post-arrest statements were admissible. Respondent relies heavily on the United States Supreme Court's holding in Davis v. United States (1994) 512 U.S. 452 that a suspect "must unambiguously request counsel," as interpreted by this Court in People v. Gonzalez (2005) 34 Cal.4th 1111, 1122 et seq. (RB 77-86.)

However, Davis holds only that once a suspect has clearly stated he is willing to waive his Miranda rights, the police may proceed to question him. (Davis, supra, 512 U.S. 464.) The "clear statement" rule of Davis applies only in a post-waiver context. The invocation and waiver of Miranda rights are entirely distinct inquiries and the two must not be blurred by merging them together. (Smith v. Illinois (1984) 469 U.S. 91,

98.) In a pre-waiver context the police must clarify the meaning of an ambiguous or equivocal response to the Miranda warning before proceeding with general interrogation. (Michigan v. Mosley (1975) 423 U.S. 96, 104; Nelson v. McCarthy (9th Cir. 1981) 637 F.2d 1291, 1296; United States v. Rodriquez (9th Cir. 2008) 518 F.3d 1072.) Thus, even if Appellant's statement to Detective Winfield that "I don't know, sometimes they say it's better if I have a lawyer" was ambiguous, the police had a clear duty to clarify Appellant's wishes before proceeding further. Indeed this Court has so indicated in a number of similar cases. (People v. Farnam (2002) 28 Cal.4th 107, 181 [defendant's refusal to answer officers' questions, even though not made in response to Miranda advisement, warranted clarification]; People v. Box (2000) 23 Cal.4th 1153, 1195 [defendant's statement to officer that either an attorney or his attorney had told him not to speak with anyone was sufficiently ambiguous to justify the officer's clarification as to whether the defendant was exercising his right to remain silent or right to counsel].)

Gonzalez, supra, is not only not contrary to, but actually supports Appellant's position. The suspect in that case had stated during interrogation that he wanted a lawyer **if** he was going to be **charged**. The conditional nature of the statement was ambiguous and equivocal. However, this Court held the interrogating officers respected his Miranda rights by explaining to him the difference between being arrested and booked and being charged, thus providing him with an opportunity to clarify his

meaning, and proceeding with the interrogation only when he failed to request the immediate presence of an attorney before he would answer any more questions. (Gonzalez, supra, 34 Cal.4th 1126-1127.)

Moreover, Respondent inexplicably overlooks the significance of Appellant's later request to terminate the interrogation because his "fuckin brain" had "gone numb," and he was unable to think and wanted to "**stop. . . this interview.**"

Respondent insists Appellant's waiver of his Miranda rights and later statements acknowledging he shot the decedents were voluntary. Respondent correctly points out that Appellant was 41 years old at the time, had done stints in prison, had had a number of previous encounters with the police, and requested to talk to a detective whom he knew. Thus, according to Respondent, the officers could reasonably assume Appellant was capable of voluntarily waiving his Miranda rights and that any subsequent admissions would be voluntary.

However, Respondent ignores a number of other relevant factors. The interrogating officers knew Appellant had been convicted and served time in prison for various drug offenses, that he was a long-term methamphetamine user who habitually shot up "crank," that he had been "beat-up" during a scuffle with the arresting officers and had complained about his resultant physical pain and the lack of any medical attention or medication, and that he was clearly of low intelligence and mentally challenged. Moreover they made it clear to Appellant that, if he did not

admit his involvement in the shootings, they would cause problems for his family, his mother, his brother Pumpkin who was a parolee at large, and his road dog companion Cindy. Appellant submits that, under the totality of the circumstances, the conclusion that his "waiver" of his Miranda rights and his subsequent admissions were voluntary is completely untenable.

Thus, notwithstanding Respondent's arguments, the trial court erred in refusing to suppress the post-arrest statements.

Since even Respondent does not argue that the admission of these statements was harmless beyond a reasonable doubt, the judgment must be reversed.

## VI.

## THE TRIAL COURT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL BY ADMITTING INFLAMMATORY, GRUESOME, CUMULATIVE, AND TOTALLY UNNECESSARY PHOTOGRAPHS OF THE DECEDENTS' BODIES

Appellant argues the trial court abused its discretion and deprived him of a fundamentally fair trial in ruling a video tape and photographs showing the bodies of the decedents admissible because their probative value outweighed their prejudicial effect. (AOB 75-83.)

Respondent claims Appellant waived this issue and that the video tape and photographs were not so gruesome that they were likely to prejudice the jury. Respondent also attempts to distinguish cases cited by Appellant which are contrary to his position and insists any error in admitting the photographs and video tape was harmless. (RB 87-98.)

Respondent's rather perfunctory waiver or forfeiture argument is based on what he views as an implied concession that the use of the photographs was proper.

However, while one of Appellant's arguments in the trial court was that admission of both the video tape and the photographs would be unnecessarily duplicative, Appellant never at any time conceded the admissibility of the photographs. In fact requiring Appellant to expressly and separately object to both the video tape and the photographs in order to preserve this issue for appeal would be absurd since the photographs were largely taken from the video tape. Respondent's waiver argument

is based upon a distinction without a difference.

The issues of whether the video tape and photographs were unduly gruesome and unnecessary in view of the testimony of the prosecution witnesses on the only real issue in this case (i.e. whether the decedents were deliberately murdered or killed in self-defense), have been more than adequately briefed by both parties. Indeed many of Respondent's arguments were anticipated and replied to in the opening brief and no purpose would be served by simply repeating these same points here. Suffice it to say that, while Respondent argues at length that the video tape and photographs in question were relevant to the prosecution's case, their real purpose was simply to inflame the passions of the jury and ensure multiple first degree murder convictions which a dispassionate consideration of the evidence did not justify. It is reasonably probable the admission of the video tape and photographs affected the jury's verdict.

## VII.

## THE TRIAL COURT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL BY EXCLUDING A RELEVANT PHOTOGRAPH OF DECEDENT ROSCOE RILEY'S GUN TATOO

Appellant argues a photograph of a tatoo on Riley's shoulder of a handgun being pointed at the observer was admissible to show Appellant's perception of Riley as being armed and dangerous, and hence to Appellant's self-defense claim. (AOB 84-88.)

Respondent insists the gun tatoo was properly excluded as irrelevant in view of testimonial evidence that decedent Riley was armed, that there was no basis for admitting this evidence since it was clear Riley was shot in the back of the head and the shootings were unprovoked, and any error was harmless. (RB 98-103.)

However, as Respondent himself argues in regard to the photographs of the decedents' bodies, photographic evidence of this kind is admissible to corroborate the testimony of witnesses and to illustrate that the testimony is accurate. Thus, the gun tatoo photograph was not irrelevant or inadmissible merely because the jury heard other evidence linking Riley to the .357 from which they might reasonably infer he was armed at the time of his fatal encounter with Appellant.

Moreover, Respondent does not address Appellant's argument that the exclusion of the gun tatoo photograph, and the admission of numerous photographs of the decedents' bloody wounds was fundamentally unfair and violated the requirement of reciprocal

parity inherent in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Respondent's argument that the evidence was "overwhelming" in view of the prosecution criminalist's testimony that the victims were taken by surprise and shot in the back of the head disregards (1) the fact that the defense forensic expert was never permitted to examine the physical evidence, (2) Appellant's statement to the interrogating officers that the shooting was done in self-defense, and (3) that the only eye witnesses (bartender Dianna Flint and her customer Filomeno Julian Lujan) were not necessarily in a position to accurately describe the entire incident. The critical issue was whether Appellant committed murder or shot the decedents in self-defense. Since the evidence on this point was conflicting, it cannot be said that at least some of the jurors might not have concluded, had they viewed the gun tatoo photo, that there was a reasonable doubt.

Thus, despite Respondent's contrary arguments, the judgment must be reversed.

## VIII.

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING TWO SITTING JURORS OVER DEFENSE OBJECTIONS AND WITHOUT GOOD CAUSE

Appellant argues the trial court abused its discretion, and violated his right to a fundamentally fair trial and reliable penalty determination, by removing two sitting jurors and replacing them with alternates over defense objections, without conducting an adequate inquiry. (AOB 89-100.)

Respondent claims the dismissal of the two jurors during trial was warranted because they had called in sick, were unable to commit to a specific return date, and were either sick or lying about their illness. Respondent argues it would have been unreasonable to insist that jurors too ill to continue to perform their duties come to court to undergo further questioning. Respondent relies primarily upon People v. Dell (1991) 232 Cal.App.3d 248. (RB 103-115.)

However, while a trial court has discretion to replace an ill juror, that discretion is not unlimited. The trial court must determine, based upon the evidence, that the juror is in fact unable to continue to perform his or her duties as a demonstrable reality. (People v. Roberts (1992) 2 Cal.4th 271, 324-325; People v. Barnwell (2007) 41 Cal.4th 1038, 1053.)

Here the two jurors' inability to continue to perform their duties did not appear in the record as a demonstrable reality. Neither juror asked to be discharged. Indeed both jurors, while they had been taken ill with a stomach flu, believed they

could resume their duties within a day or two. There was simply no reason why the court could not have continued the trial for a day or two before employing the drastic remedy of replacing jurors whom the defense had selected over defense objection. This is especially true since the trial court never actually did make a finding that either of these jurors was unable to perform her duties and did not even bother to speak to the jurors over the telephone.

The court's excusal of these two jurors was based upon mere administrative convenience rather than upon any demonstrable reality that they could not continue to perform their duties. While the court was purportedly concerned about keeping to a schedule and keeping its promise to the jury to allow them an extended Thanksgiving holiday following the anticipated conclusion of the guilt phase trial, this concern was so unfounded that even Respondent does not attempt to defend it. The guilt phase trial was "on schedule" at the time that one of the jurors was excused and (as the trial court acknowledged) there was sufficient "wiggle room" to grant a one or two day continuance without jeopardizing the jury's promised holiday break. Moreover, the jury had already enjoyed their holiday at the time of the second juror's unanticipated illness and a brief one or two day continuance would have caused at worst a slight delay in the commencement of the penalty phase trial.

Moreover, the court's adamant insistence upon immediately removing these two jurors rather than granting a short

continuance until they could recover from the flu and resume their duties was inconsistent with the court's willingness to continue the trial so another juror could leave early to keep a doctor's appointment and yet another could travel to San Francisco to celebrate her birthday at the very time it was anticipated the jury would be deliberating Appellant's guilt or innocence. It is significant that even Respondent makes no attempt to justify this double standard. This inconsistency should completely undermine this Court's confidence that the two jurors dismissed over defense objection were unable to perform their duties as a demonstrable reality and had to be immediately removed.

Respondent also argues Appellant was not actually prejudiced by the substitution of the alternate jurors. He relies upon People v. Dell, supra, 232 Cal.App.3d at 256-257 and People v. Hall (1979) 95 Cal.App.3d 299-307.

However, this Court has more recently held the dismissal of sitting jurors without good cause and their replacement by alternates is necessarily prejudicial error requiring reversal and retrial. (People v. Cleveland (2001) 25 Cal.4th 466, 486; People v. Wilson (2008) 44 Cal 4th 758, 813-842.) While Cleveland and Wilson, unlike this case, involved jurors who were removed for their inability to perform their duties during jury deliberations, the principle is the same. Respondent does not attempt to demonstrate why Cleveland and Wilson are inapplicable in the instant case or why this Court should require

criminal defendants to affirmatively demonstrate prejudice (which is virtually impossible in the great majority of cases) in order to secure a reversal.

The summary improper excusal of the two jurors constitutes yet another reason for reversing the judgment despite Respondent's arguments.

## IX.

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF IMPERFECT SELF-DEFENSE AND HEAT OF PASSION VOLUNTARY MANSLAUGHTER

Appellant argues the trial court reversibly erred in refusing to instruct on imperfect self-defense and heat of passion voluntary manslaughter. According to Appellant's post-arrest statements, both of the decedents were waving their guns around and actually shot at him before he opened fire. There was no cooling off period or opportunity for due deliberation or reflection. Given these circumstances, an ordinary person in Appellant's position would naturally be extremely fearful for his life and would have acted as he did since the only alternative at that point was to kill or be killed. This constituted substantial evidence from which the jurors were entitled to conclude Appellant was guilty of manslaughter rather than murder and instructions on the lesser included manslaughter offenses were thus required. (People v. Breverman (1988) 19 Cal.4th 142; People v. Lewis (2001) 25 Cal.4th 610, 645.) (AOB 101-114.)

Respondent asserts there was no substantial evidence to support any voluntary manslaughter instructions. (RB 116-121.)

However, this Court has held the defendant's statements in and of themselves can constitute substantial evidence requiring the trial court to instruct on voluntary manslaughter regardless of whether or not the trial court feels these

statements are credible. (People v. Breverman, supra; People v. Lewis, supra.) The fact that the prosecution presented contrary evidence suggesting Appellant had premeditated killing decedent Riley and simply walked out of the bar and immediately opened fire does not alter this conclusion. The jury was entitled to believe Appellant's version of this incident rather than the prosecution's.

Respondent argues the High Court's decision in Beck v. Alabama (1980) 447 U.S. 625 is inapplicable since Beck does not require a court to instruct upon a lesser included offense unsupported by substantial evidence, and also because the absence of lesser included manslaughter instructions did not force the jury into a choice between acquittal and a murder conviction that necessarily would lead to the death penalty.

However, as noted above, there was indeed substantial evidence supporting manslaughter instructions under this Court's precedent decision in Breverman, supra. Moreover, while it may be true that the absence of lesser included offense instructions did not necessarily mean that the jury was required to find the murders were committed under "special circumstances" or to impose death rather than life without the possibility of parole, it cannot be denied that it required them to choose between convicting Appellant of murder, thus making him eligible for the death penalty, and acquitting him completely and allowing him to walk out of the courtroom a free man. This is precisely what Beck prohibits.

Respondent's final argument is that the instructional error was harmless. He reasons the jury necessarily rejected Appellant's version of events by finding him guilty of premeditated murder. Thus, according to Respondent, the jury necessarily would have returned the same verdicts if given additional instructions on imperfect self-defense or heat of passion manslaughter.

However, the jury's implied finding that this was a case of premeditated murder was not necessarily inconsistent with a finding of imperfect self-defense manslaughter in view of this Court's decisions holding "premeditation" does not require an extended period of time so long as the defendant has an opportunity to meaningfully reflect on what he is doing. (See People v. Manriquez (2005) 37 Cal.4th 547, at 577.) A jury, properly instructed on the lesser included offense of imperfect self-defense manslaughter, could easily have found that Appellant "meaningfully reflected" on the situation confronting him after decedents Riley and Hagen pulled out their guns intent on shooting him, and concluded that this was a case of kill or be killed.

The instructional error in this case was anything but harmless, and the murder convictions must be reversed.

## X.

## THE TRIAL COURT'S MULTIPLE ERRORS DURING THE GUILT PHASE TRIAL, CONSIDERED COLLECTIVELY, WARRANT REVERSAL

Appellant argues that the combined effect of the admission of his involuntary confession extracted in violation of his Miranda rights, **and** the admission of gruesome unnecessary photographs of the decedents' bodies and the surrounding blood soaked crime scene, **and** the denial of the defense Trombetta-Youngblood motion despite the State's bad faith destruction of relevant material evidence, **and** the trial court's refusal to instruct on lesser included manslaughter offenses supported by substantial evidence, **and** the trial court's insistence upon summarily dismissing two sitting jurors without good cause, was to deny him a fundamentally fair trial. (AOB 115-116.)

Respondent acknowledges that in some cases a series of trial errors, though independently harmless, may in combination constitute reversible error. (People v. Cunningham (2001) 25 Cal.4th 926, 1009; People v. Hill (1998) 17 Cal.4th 800, 844.) However, Respondent insists the trial court committed no errors during the guilt phase trial, and that any errors were both individually and collectively harmless. (RB 121.)

Appellant has already demonstrated in considerable detail that the trial court violated his constitutional rights in numerous ways and deprived him of a fundamentally fair trial, and that Respondent's counter arguments are unavailing. This being so, the guilt phase judgment must be reversed.

## PENALTY PHASE ARGUMENTS

## XI.

### THE TRIAL COURT DEPRIVED APPELLANT OF A RELIABLE PENALTY DETERMINATION AND A FUNDAMENTALLY FAIR PENALTY TRIAL BY ALLOWING THE JURY TO CONSIDER UNDULY PREJUDICIAL OTHER CRIMES EVIDENCE

Appellant argues he was deprived of a reliable penalty determination and a fundamentally fair penalty trial as the result of the admission of unduly prejudicial prior crimes evidence. (AOB 117-131.)

Respondent's counter arguments (RB 121-125) are unavailing.

Respondent's first argument is that Appellant waived or forfeited this issue because his objections to this evidence were "overly generalized."

However, as Respondent acknowledges in a footnote, defense counsel did object to this evidence on all relevant "state and federal constitutional grounds" and pursuant to Evidence Code section 352.

Moreover, Respondent does not address Appellant's argument that defense counsel's failure to lodge more specific objections was excusable in any event since, at the time this case was tried, any objection would have been futile in light of this Court's relevant precedents.

Respondent also argues that, under this Court's decision in People v. Balderas (1985) 41 Cal.3d 144, the jury must consider literally any criminal activity, charged or uncharged, violent or non-violent, in determining whether life without possibility of parole or death is the appropriate remedy.

However, Respondent does not really mean this since he grudgingly acknowledges that, under this Court's later decision in People v. Griffin (2004) 33 Cal.4th 536, the trial court has discretion to exclude unfairly persuasive other crimes evidence.

Contrary to Respondent, the mere fact the trial court commented that the "utility of that particular [other crimes] evidence outweighs its prejudicially effect" does not necessarily mean the trial court was correct or that that court did not abuse its discretion.

Appellant has argued the other crimes evidence in this case should have been excluded since (1) at least two of the alleged prior crimes never resulted in any formal criminal charges and were not included in the prosecutor's Penal Code section 190.3 notice of intent to introduce other crimes evidence, (2) the alleged prior incidents took place over a period of more than 20 years, were largely unrelated to one another, and would never have been cross-admissible in a joint non-capital trial, (3) Appellant was never convicted of many of these charges, and (4) parading all of this other crimes evidence - - none of which had anything to do with the charged homicides of Roscoe Riley and Brandon Hagen - - in front of the jury was enormously prejudicial.

Since Respondent has failed to specifically address any of these arguments, they stand unrefuted.

Significantly, Respondent makes no attempt to argue the introduction of this enormously prejudicial prior crimes evidence

did not unfairly skew the penalty determination or that the jury would not have spared Appellant's life had this evidence been excluded.

Thus, even assuming this Court is unwilling to reverse Balderas, supra, the introduction of unfairly persuasive other crimes evidence in this particular case cries out for a reversal of the death sentence and a remand for a new penalty phase trial.

## XII.

## THE TRIAL COURT DEPRIVED APPELLANT OF A RELIABLE PENALTY DETERMINATION AND A FUNDAMENTALLY FAIR PENALTY TRIAL BY EXCLUDING RELEVANT "REVERSE VICTIM IMPACT" EVIDENCE

Appellant argues the trial court violated his constitutional right to a fair penalty trial and determination when it refused to allow him to introduce evidence the decedents had been repeatedly arrested for a variety of violent felonies and domestic violence offenses and were anything but the loving family men the prosecution portrayed them as. (AOB 132-141.)

Respondent argues this rebuttal evidence was irrelevant given the limited nature of the victim impact evidence actually introduced by the prosecutor. Respondent concedes evidence of the decedents' violent character may have been admissible during the guilt phase trial to prove they acted in conformity with that character and that this was a case of self-defense (People v. Rowland (1968) 262 Cal.App.2d 790, 797.) Nonetheless, he insists the only impermissible purpose for introducing this evidence during the penalty phase trial was to make the decedents look bad. (RB 126-132.)

However, while the prosecutor's victim impact evidence was more limited and "pared down" than he originally intended, even this limited presentation created a false impression of who the decedents were. The decedents' common law wives (Maria Correa and Mikala Teller) were allowed to testify as to how difficult it had been for them to learn of the deaths of the fathers of their children, their loving memories of them, and how one of them

(Mikala Teller) had actually erected a shrine. The result, coupled with the refusal of the trial court to allow the jury to hear about the decedents' extensive criminal histories and troubled family relationships (including domestic violence and failure to pay child support) was to completely misrepresent the degree of their surviving common law wives' loss. The defense reverse victim impact rebuttal evidence was relevant to give the jury a complete picture of the uniqueness of the decedents as human beings, including the good, the bad, and the ugly.

Respondent claims that, under the United States Supreme Court's decision in Payne v. Tennessee (1991) 501 U.S. 808, 825, victim impact evidence is not designed to make character comparisons between the victims and the defendant.

However, Payne held that a defendant in a capital case penalty phase trial must be given the broadest latitude in cross-examining prosecution victim impact witnesses and presenting relevant rebuttal evidence, and in People v. Kelly (2007) 42 Cal.4th 763, at p. 799, this Court expressly stated that "we see nothing in Payne v. Tennessee. . . or our own cases, that prohibits comparing the victim and the defendant." Respondent fails to explain why, in view of this Court's statement in Kelly, a comparative judgment between the defendant and the decedents is somehow inappropriate.

Respondent also argues the error was harmless since the jury must have had at least some inkling the victims were not the most outstanding members of society.

However, while the jury may have been aware the decedents were probably drug dealers and were killed in a dispute over drugs, they did not know the extent of their illegal activities, how they had mistreated those who loved them, and how little they would be missed. There is a reasonable probability that, if the defense had been allowed to elicit the abundant reverse impact evidence it was prepared to present, the jury might have reached a different conclusion.

## XIII.

## THE PROSECUTOR'S MISCONDUCT IN PORTRAYING APPELLANT AS A DEDICATED FOLLOWER OF "MR. MURDER" DURING CLOSING ARGUMENT UNFAIRLY PREJUDICED THE JURY'S PENALTY DETERMINATION

Appellant argues the prosecutor committed prejudicial misconduct by suggesting to the jury, during his closing argument, that Appellant was obsessed with the idea of murder and sitting in his jail cell avidly reading books like "Mr. Murder." He insinuated that Appellant, whom the jury had already found guilty of multiple murders, would likely kill again should his life be spared. In fact there was no evidence Appellant had ever read Mr. Murder or the other books displayed by the prosecutor which were taken from the prosecutor's personal library. (AOB 142-155.)

Respondent asserts Appellant waived this objection by failing to request "further curative procedures," that there was no prosecutorial misconduct, and that any misconduct was harmless. (RB 132-138.)

None of these assertions has merit.

Defense counsel did object, outside the presence of the jury, to the books the prosecutor had displayed to the jury, especially Mr. Murder, and the "subliminal message" the prosecutor was trying to send. Defense counsel also requested a mistrial. It can hardly be said that this constituted a waiver merely because defense counsel failed to take the court up on its offer to give a curative instruction which would have highlighted the problem in the mind of the jury. Moreover, any

perceived waiver or forfeiture would not preclude this Court from deciding this issue on the merits in any event. (People v. Berryman (1993) 6 Cal.4th 1048, 1072-1076.)

Respondent's half hearted argument the prosecutor was merely utilizing Mr. Murder and the other books he displayed in front of the jury to put Appellant's IQ in context will not withstand serious scrutiny. If this had really been the prosecutor's intent, there would have been no need to display these **particular** books, taken from the prosecutor's own library and never referred to by any witness, in front of the jury. While the prosecutor did say that Appellant had not necessarily read these particular books, the very fact he chose to display them to the jury, coupled with his statement that these were the kinds of books Appellant liked to read, left no doubt of the impression he intended to convey.

Finally, it cannot be reasonably asserted that this was a case of harmless error. Even assuming arguendo that the evidence of Appellant's guilt was "overwhelming" (a point which Appellant does **not** concede), the issue for the jury during the penalty phase was not Appellant's guilt, but whether he should be put to death rather than spending the rest of his life in prison. Certainly the prosecutor's suggestion that Appellant was obsessed with murder and that he might kill again if his life were spared might have made a difference to the jury's penalty determination.

## XIV.

## THE EVIDENTIARY ERRORS AND THE PROSECUTOR'S MISCONDUCT DURING THE PENALTY PHASE, CONSIDERED COLLECTIVELY, REQUIRE REVERSAL.

Appellant argues the court's evidentiary errors and the prosecutor's misconduct during the penalty phase, considered collectively, require that the death sentence be set aside. (AOB 156.)

Respondent asserts that any errors were plainly harmless even if viewed cumulatively since the instant case was not a close one.

However, once again, even assuming arguendo that the evidence of Appellant's guilt was really as "overwhelming" as Respondent suggests and ignoring the evidence suggesting that this was a case of self-defense or at worst voluntary manslaughter, this does not mean that the trial court's errors and the prosecutor's misconduct during the penalty phase trial could not have made a difference to the jury in determining whether Appellant was to be put to death rather than spending the rest of his life in prison. Respondent's statement that Appellant may not have received a perfect penalty phase trial is a gross understatement. Appellant's penalty phase trial was fundamentally unfair and the death judgment cannot stand.

## XV.

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

Appellant has argued at length that California's death penalty law, as applied and interpreted by this Court, is unconstitutional. (AOB 157-199.)

Respondent of course disagrees. (RB 139-141.)

Appellant believes this issue has for the most part been adequately briefed, especially in light of People v. Schmeck (2005) 37 Cal.4th 240, 304), and that no further discussion is warranted.

However, there is one particular point which perhaps deserves some brief further comment, and that is whether or not the death sentence imposed in this particular case was unconstitutionally disproportionate to Appellant's personal culpability in light of all of the circumstance. (People v. Dillon (1983) 34 Cal.3d 441, 447-489.)

Respondent emphasizes that Appellant was no spring chicken at the time he "ambushed" the decedents and points to evidence suggesting that this was a "cold blooded calculated killing."

However, as Respondent concedes, the decedents were gun toting drug dealers who had a propensity towards violence and at least to some extent provoked their own deaths.

While Appellant had multiple felony convictions, none of

these were for homicide offenses and many were for mere petty thefts and drug possession.

Moreover, Respondent does not even mention the absolutely overwhelming mitigation evidence that Appellant was the product of an incredibly dysfunctional family, mentally retarded, and clearly suffering from severe and permanent brain damage exacerbated by the use of methamphetamine.

Appellant submits that, under the totality of the circumstances, the death penalty is both constitutionally disproportionate and inappropriate. A sentence of life imprisonment without possibility of parole is more than adequate to punish Appellant and protect society.

## CONCLUSION

For all of the foregoing reasons, as well as those set forth in Appellant's Opening Brief, the judgments of conviction, the jury's special circumstances findings, and the death sentence should be reversed.

Dated: October 28, 2010 Respectfully submitted,

By 
JONATHAN P. MILBERG
Attorney for Defendant and
Appellant DEWEY JOE DUFF

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.630, subdivision (b)(2) the California Rules of Court, I certify that the text of this Appellant's Reply contains 10832 words, as counted by the Corel WordPerfect version 8 program, and does not exceed 140 pages.

Dated: Oct. 28, 2010

Respectfully submitted,

JONATHAN P. MILBERG

**PROOF OF SERVICE BY MAIL**

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of Los Angeles, that I am over the age of 18 years and not a party to the within cause; that my business address is 225 South Lake Ave., Suite 300, Pasadena, CA 91101.

On Oct. 28, 2010 I served the attached

**APPELLANT'S REPLY BRIEF**

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

**PLEASE SEE ATTACHED MAILING LIST**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at Pasadena, California, on Oct. 28, 2010.

Bonnie L. Lingan
(Typed Name)

Bonnie L. Lingan
(Signature)

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