S115284

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DUNG DIHN AHN TRINH, Defendant and Appellant.	Orange Co. Sup. Ct. No. 99NF2555

APPELLANT'S REPLY BRIEF

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

HONORABLE JOHN J. RYAN, JUDGE

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DUNG DINH ANH TRINH, Defendant and Appellant.	No. S115284 (Orange Co. Superior Ct. No. 99NF5284)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

For the convenience of the Court, the arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.[1]

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[1] In this brief appellant employs the following acronyms for citation to the record in this matter: "AOB" refers to appellant's opening brief, "RB" refers to respondent's brief, and "RT" and "CT" refer to the reporter's and clerk's transcripts, respectively. Finally, all statutory references are to the Penal Code unless otherwise noted.

STATEMENT OF FACTS

Appellant amply summarized the facts of this case in his opening brief (AOB 13-76), but here corrects several material errors in respondent's statement of facts (RB 3-21).[2]

Respondent states that "Rosa Marie [*sic*] Augustin" was working on the first floor when she heard the code grey announcement, and that she hid in the hospital's boardroom after hearing the gunfire in the stairwell. (RB 4.)[3] In fact, Rosa Maria Augustin was working on 2 West, an area on the second floor, at the time of the incident. She did not testify that she heard a code grey. (RT Vol. 5 1234-1254.) She hid in a hospital room on the second floor, not in the boardroom. (RT Vol. 5 1241-1245.)

Respondent also states that the two guns recovered from appellant were determined to be functioning properly in all respects. (RB 6, citing RT Vol. 6 1505-1506, 1509.) In fact, the testimony of firearms examiner Jimmy Ernest Turner indicates that he examined only one of the handguns, a Smith & Wesson. (RT Vol. 6 1505-1510, 1531.) Turner did not testify that he tested the functionality of the other handgun, a Charter Arms. (RT

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[2] In other instances not discussed below, respondent's characterization of the facts is supported by the record, but the page citations are incorrect. (See, e.g., RB 6 [in noting that paramedics transported appellant's mother to the hospital, respondent mistakenly cites RT Vol. 7 1303-1304, rather than RT Vol. 7 1703]; RB 7 [in noting that appellant called 911, respondent mistakenly cites RT Vol. 7 1548, rather than RT Vol. 7 1648].)

[3] Respondent also misspells the names of witnesses Marella Mabaquiao (RT Vol. 9 2059), Matthew Maxson (RT Vol. 8 1884) and Carol Aneshensel (RT Vol. 8 1831). (RB 8, 9, 11-12.) Similarly, the witness respondent refers to as Hao Thi Nguyen (RB 15) identified herself as Thi Hao Nguyen. (RT Vol. 26 6230.)

Vol. 6 1521, 1530.)

Respondent indicates that Dr. Joseph Halka, a forensic pathologist, testified that the cause of Marlene Mustaffa's death was "fragmentation of the brain and skull fractures due to a gunshot wound to the head. (7 RT 1524 [*sic*].)" (RB 6.) Dr. Halka actually testified that "there was a fragmentation of the brain due to the skull fracture and the gunshot wound to the head." (RT Vol. 7 1542.)

Respondent further states that "[appellant's mother] was frequently loud, *obnoxious* and uncooperative" [during the time she was a patient at West Anaheim Medical Center]. (7 RT 1703-1710; 9 RT 2182, 2205, 2207, 2210.)" (RB 8, italics added.) However, the word "obnoxious" does not appear, either explicitly or implicitly, in either the hospital staff notes or the testimony of medical care providers who worked with her around that time. If anything, her conduct clearly was a product of pain, fear and confusion. (RT Vol. 7 1575-1592 [testimony of Marcy Diana Hauer], 1599-1614 [testimony of Jacqueline Bostrom], 1615-1627 [testimony of Sharal Vu], 1703-1720 [West Anaheim Medical Center staff notes]; RT Vol. 8 1929-1944 [testimony of Justin Le]; RT Vol. 9 1951-1979 [testimony of Eli Bolado], 2019-2024 [testimony of Nieve Abueg], 2059-2076 [testimony of Marella Mabaquiao], 2116-2139 [testimony of Dr. Van Vu], 2140-2142 [testimony of Dr. Raymond Folmar], 2149-2160 [La Palma Intercommunity Hospital staff notes], 2166-2169 and 2174-2181 [testimony of Nellie McCain], 2181-2185 [testimony of Glenda Ocampo], 2186-2202 [testimony of Ruth Hardcastle], 2204-2213 [testimony of Jean Yu]; RT Vol. 10 2224-2242 [testimony of Sylvia Weber]; 11 RT 2402-2426 [testimony of Ernesto

Vina].)[4]

Respondent states that appellant became "angry" when he saw that his mother had been placed in restraints at La Palma Intercommunity Hospital. (RB 8, citing RT Vol. 9 2197.) Actually, witness Ruth Hardcastle testified that he was "upset" (RT Vol. 9 2197), which could mean something other than anger, such as shock or concern. Significantly, Hardcastle testified that appellant "inquir[ed] as to why she was tied in the bed and what had happened with her care the night before" (9 RT 2197-2198), and that, after she explained what had happened, he thanked her for explaining it to him (9 RT 2199).

Respondent states that when Dr. Jai Ho informed appellant that his mother had died, appellant responded, "She is okay?" (RB 9.) In fact, appellant asked, "She is okay, right?" (RT Vol. 9 2144.) Arguably, the question as phrased in the record – i.e., "She is okay, right?" – more accurately captures appellant's state of denial and shock.

Respondent notes that, as he was leaving the witness stand, appellant said, "May I say to all of you, down with the U.S. government, down with the capitalism, down with the –" (RB 17) but fails to note that the trial court struck that statement. Appellant then continued, saying, "long live Communist, Viva Socialist." The court interrupted him, but appellant continued, "Do your job, thank you." (RT Vol. 24 5713.) The court did not expressly strike the latter statements.

Contrary to respondent's statement (RB 17), the first interview of

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[4] "Obnoxious" is defined as ". . . deserving of censure: REPREHENSIBLE . . . forming an object of dislike or disgust: OFFENSIVE, ODIOUS, OBJECTIONABLE . . . ." (Webster's Third New International Dictionary (2002) p. 1557.)

appellant by the police ended at 3:23 p.m., not 3:26 p.m. (RT Vol. 25 5781.)

According to respondent, appellant told the police that he shot Vince Rosetti because Rosetti was in his way. (RB 19, citing CT Vol. 7 1808.) In fact, he told police, "I try to open the door the stair, the stairway door to go down to the lobby so I can go out to the uh parking lot. But because that man, you know, I don't know, he come from nowhere. Just jump out and he try to you know. So I have to shoot him. I don't mean to shoot him to kill him, you know? I just try to shoot him so he can, I just point at somewhere to shoot." (CT Vol. 7 1808.)[5]

Respondent states that appellant told the police that, at the time he was subdued, he said, "You guys killed my mother." (RB 20, citing CT Vol. 7 1743.) Actually, appellant reported that he had said, ["]Your guy kill my mother["], and explained that by "your guy," he meant the people upstairs. (CT Vol. 7 1743.)

Finally, appellant said "Please forgive me" to conditional witness Marjorie Schiller, not to Chau Stotelmyre, who was appellant's translator during the conditional examination. (RT Vol. 26 6267; cf. RB 21.)[6]

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[5] Contrary to respondent's summary, appellant did not tell the police that Rosetti "appeared from nowhere." (RB 19, citing CT Vol. 7 1740.) However, appellant acknowledges that he made statements to that effect during the interrogation.

[6] The defense presented extensive evidence regarding the close, even familial, relationship between appellant and the Schiller family. (See AOB 54-56.)

ARGUMENTS

I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RECUSE THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

A. Introduction

In his opening brief, appellant argued that the trial court abused its discretion in denying his motion to recuse the entire Orange County District Attorney's Office,[7] violating his constitutional rights to due process, equal protection, and a reliable adjudication at all stages of a death penalty case, as well as the constitutional prohibitions against cruel and unusual punishment (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 17).[8] (AOB 77-120.)

Respondent contends that there was neither a constitutional violation nor error under state law. Moreover, respondent contends, appellant has failed to demonstrate that the trial court's rulings deprived him of a fair trial. (RB 21-42.) Respondent's position is incorrect.

B. The Trial Court's Denial of Appellant's Recusal Motion Was Error Under the State and Federal Constitutions, As Well As State Law

Respondent first contends that the trial court did not abuse its discretion in denying appellant's recusal motion, and that, in any event, its denial of the motion was not error under state law (i.e., Penal Code section

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[7] Specifically, appellant argues that the trial court abused its discretion in denying his initial recusal motion (AOB 87-99), his motion to reconsider his recusal motion (AOB 99-106), and his recusal motion as renewed prior to the third penalty trial (AOB 106-107).

[8] Respondent acknowledges only two of the constitutional bases for appellant's argument, i.e., due process and equal protection. (RB 21.)

1424). According to respondent, appellant failed to carry his burden below of showing it was likely he would be treated unfairly because the Orange County District Attorney's Office had a conflict of interest. (RB 31-38.) Appellant maintains that the trial court's denial of his recusal motion was error not only under state law, but the state and federal Constitutions as well. (See AOB 107-116 and pp. 23-30, *post*.) However, even assuming arguendo that the court's ruling was state law error only, respondent's contention is incorrect.

According to respondent, appellant fails to identify the conflict of interest involving Orange County District Attorney Tony Rackauckas. Respondent asserts that, "[i]n an exercise of circular reasoning, [appellant] suggests that because the District Attorney decided to seek the death penalty, without a review by the special circumstances committee or input from the defense, the District Attorney did not exercise his discretion in a fair manner. Therefore, [appellant] claims, the District Attorney had a conflict of interest." (RB 34, citing AOB 93.) Contrary to respondent's position, however, appellant has demonstrated that District Attorney Rackauckas's "prosecutorial discretion was exercised with *intentional and invidious discrimination*" (*People v. Keenan* (1988) 46 Cal.3d 478, 506 (italics in original)), if it was exercised at all, and therefore he had a conflict of interest.

First, contrary to respondent's claim (RB 34), appellant's argument does not rest solely on the fact that Rackauckas's father had been a patient at the hospital where the shootings occurred. Rather, *numerous* circumstances demonstrated that Rackauckas sought the death penalty based upon personal motives and animus, in a manner amounting to rash, arbitrary fiat, not prosecutorial discretion. (See, e.g., AOB 109, 114, 116.)

Among other things, appellant submitted several exhibits describing the Orange County District Attorney's Office's longstanding policy with respect to special circumstance reviews, i.e., a committee of senior prosecutors reviewed evidence and made a recommendation as to whether a death sentence should be sought (CT Vol. 1 201 [a March 28, 1997, District Attorney's Office memorandum regarding the review process to be followed in all special circumstances cases]; see also CT Vol. 1 138 [a September 1, 1999, District Attorney's Office memorandum, which was essentially identical to the 1997 memorandum], 159-161 [declaration of former Assistant District Attorney Mike Jacobs], 211-212 [a declaration from James Enright, former Chief Deputy District Attorney, describing the creation of the special circumstance review committee in the early 1980s]);[9] a declaration of former Assistant District Attorney Mike Jacobs,[10] which

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[9] Respondent maintains that the final decision whether to seek the death penalty was up to Rackauckas. (RB 34; see also CT Vol. 1 251 [declaration of Tony Rackauckas].) However, the District Attorney Office's own memorandum regarding the special circumstance review process states that "[a]fter recommendation of the special circumstance committee, the *Senior Assistant District Attorney makes the final decision whether or not to seek the death penalty*. Once this decision is made, it will be reviewed by the District Attorney, and the Special Circumstance file is returned to the trial deputy." (1 CT 140 (emphasis added); see also 1 CT 154 [a blank copy of the form to be filled out by the special circumstance committee and Chief Assistant District Attorney during the special circumstance review process].) The memorandum does not say what the District Attorney's review entails; significantly, it does not set forth any standards guiding the District Attorney's review of the Senior Assistant's decision, nor does it indicate that the District Attorney may reverse the Senior Assistant's decision.

[10] Respondent mistakenly describes Jacobs as a (former) deputy district attorney. (RB 23, 36.) In fact, Jacobs was an Assistant District

(continued...)

addressed a number of matters, including his recollection that Rackauackas was particularly upset because his father had been hospitalized at West Anaheim Medical Center, expressed concern about what the media would do if they discovered his father had been a patient there, and accused deputies in the Homicide Unit of insubordination for disagreeing with his new policy (CT Vol. 1 161-165); a December 20, 2001, internal memorandum by Deputy District Attorney Jim Mulgrew, which corroborated Jacobs's declaration in several critical respects (CT Vol. 1 271); a declaration from Assistant Public Defender Brooks Talley and a newspaper article by reporter Stuart Pfeifer which indicated that – contrary to a declaration submitted by Rackauckas (CT Vol. 1 251-252) – Rackaukas told Pfeifer in November, 2000, not September, 1999, that his father had been a patient at West Anaheim Medical Center (CT Vol. 1 272-276);[11] and, a grand jury report finding numerous improprieties in the administration of the Orange County District Attorney's Office (CT Vol. 4 1013-1113).[12]

Second, there is reason to question Rackauckas's claim that he implemented the new policy in response to a series of mass shootings

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[10](...continued)
Attorney and the head of the office's Homicide Unit at the time Rackauckas announced the new policy. (CT Vol. 1 159.)

[11] The discrepancy is significant, in that the District Attorney's Office did not disclose this information to the defense until November, 2000, at the earliest. (See CT Vol. 1 179 [November 2, 2000, memorandum from Deputy District Attorney Chris Kralick to Senior Assistant District Attorney Claudia Silbar, asking that she advise the defense as soon as possible that Rackauckas, Sr., was hospitalized at Anaheim Medical Center [*sic*] on September 10, 11, and 12, 1999].)

[12] These exhibits are described in greater detail in appellant's opening brief. (AOB 87-92, 101-103.)

around the country. (RB 34, citing CT Vol. 1 134-135 [Gottlieb and Leonard, *D.A. Will Seek Execution in Rampages*, L.A. Times (Sept. 17, 1999) pp. B1, B4], 136 [Tran, *D.A.: Killings in public warrant death*, O.C. Register (Sept. 17, 1999)]; see also CT Vol. 1 251-252 [declaration of Tony Rackauckas].) Neither the District Attorney's Office internal memoranda nor the declarations of individuals involved in the special circumstance review process (other than Rauckackas himself) indicate that other mass shootings were a factor in the policy change. (CT Vol. 1 159-165 [declaration of Mike Jacobs], 175 [August 25, 2000, memorandum from Rackauckas to Deputy District Attorney Kralick and Jacobs], 176 [October 25, 2000, memorandum from Jacobs to Senior Assistant District Attorney Claudia Silbar], 271 [memorandum from Jim Mulgrew to Deputy District Attorney Brian Gurwitz], 273 [declaration of Assistant Public Defender Brooks Talley].) Moreover, other newspaper articles regarding the case, including one cited by respondent, do not support its contention. (CT Vol. 1 136 [Tran, *D.A.: Killings in public warrant death*, O.C. Register (Sept. 17, 1999) pp. B1, B4], 276 [Pfeifer, *Lawyers for Man Accused in Killings Want D.A. Off Case*, L.A. Times (Nov. 10, 2000)].) Finally, and tellingly, there was no evidence that such a policy already was being developed as a result of prior shootings.[13]

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[13] Although appellant cannot provide precise statistical support for this proposition, it stands to reason that rampage crimes are relatively rare, and that, contrary to respondent's claim (RB 35), implementation of the new policy was not based on "considerations necessary for the effective and efficient administration of law enforcement." Rackauckas claimed that the shootings in this case "followed a number of other highly-publicized cases where various individuals indiscriminately murdered innocent victims in public places in order to make a statement about a perceived injustice," and (continued...)

Third, respondent is mistaken in asserting that there was no evidence of any connection between Rackauckas, Sr.'s, hospitalization and the new policy. (RB 34-35.) According to respondent, appellant showed at most that "Rackauckas was 'angry' about the shootings, a few other deputies disagreed with the policy change, and one of them was terminated for unknown reasons." (RB 35, citing CT Vol. 1 159-165.) Respondent has misstated certain critical facts and omitted others.

For instance, appellant has demonstrated not only that Rackauckas was angry about the shootings, but that his anger represented the sole motivation for the policy change. (AOB 87-94, 101-107, 109-116; see also CT Vol. 1 134-136, 159-165, 176, 271; CT Vol. 4 1013-1113.) That his policy change involved "intentional and invidious discrimination" based on his anger and personal animus is further evinced by his belated disclosure of information regarding his father's hospitalization at West Anaheim Medical Center. As early as September 16, 1999, Rackauckas expressed concern about what the media would do if they were to learn his father had been a

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[13](...continued)
that "[i]t was [his] duty . . . to take a strong stand against these types of killings in order to deter similar conduct." (CT Vol. 1 251.) However, if he genuinely had wanted to take a strong stand against indiscriminate, public killings, it would have made more sense to implement such a policy with respect to robbery-murders, which arouse the same sort of fears among the public as rampage-murders yet are far more common. (See Kreitzberg, et al., *A Review of Special Circumstances in California Death Penalty Cases* (Jan. 2008) pp. 8, 30-39 <http://ccfaj.org/documents/reports/dp/expert/Kreitzberg.pdf> (as of May 11, 2012) [showing that felony murder (robbery) was either the first or second most frequently used special circumstance]; see also California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* (June 2008) p. 66 [citing Kreitzberg's findings].)

patient there (CT Vol. 1 163, 271), yet the District Attorney's Office failed to disclose that information to the defense for at least another year. (CT Vol. 1 176 [October 25, 2000, memorandum from Jacobs to Silbar seeking direction as to whether information regarding Rackauckas, Sr.'s, hospital stay should be disclosed to the defense, and recommending that that information be disclosed], 177-178 [memorandum from District Attorney's Office investigator C. Reese to Kralick regarding an October 30, 2000, interview of hospital administrator Janet Calliham], 179 [November 2, 2000, memorandum from Kralick to Silbar, asking that she advise the defense as soon as possible that Rackauckas, Sr., was hospitalized at [West] Anaheim Medical Center on September 10, 11, and 12, 1999].)[14]

Jacobs's declaration and other documents demonstrate Rackauckas's resistance to disclosure of his father's hospitalization. (CT Vol. 1 163-165 [following an August, 2000, meeting in which Jacobs predicted that the defense would move the recuse the district attorney, and was accused by Rackauckas of insubordination, Jacobs was unexplainedly reassigned from his position as head of the Homicide Unit], 176 [memorandum from Jacobs stating that "[o]ver the past few months, I've discussed with Jim Mulgrew and Chris Kralick, the trial attorney, whether or not these statements/facts regarding Tony's father and his visit to the hospital should be discovered as being relevant as to a possible basis for a recusal motion"], 271 [memorandum from Mulgrew stating that, beginning during the summer of 2000, he had several discussions with Jacobs regarding whether the District

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[14] Respondent states that information showing the dates of Rackauckas, Sr.'s, hospital stay was attached to appellant's recusal motion as Exhibit F (RB 24-25), but the information actually was attached as Exhibit G. (1 CT 172-173.)

Attorney's Office was obligated to disclose that Rackauackas, Sr., had been a patient at the hospital].)[15]

Respondent allows that "a few deputies" disagreed with the policy change (RB 35), but ignores evidence that Rackauckas refused to tolerate and even punished such disagreement. (See AOB 89-90.)[16] In particular, respondent does not squarely confront Jacobs's statements that: during a September 16, 1999, conference, he and Chief Assistant District Attorney Chuck Middleton questioned Rackauckas regarding the reason and need for, and the timing of, the new policy, and Rackauckas responded that he had made up his mind; during an August, 2000, meeting, Rackauckas said he was very upset because Kralick had stated to the press and the court that there remained a possibility that the defense would have a special circumstance review hearing, contrary to Rackauckas's new policy; Rackauckas accused attorneys in the Homicide Unit, particularly Jacobs and Kralick, of insubordination for disagreeing with his new policy; and, Rackauckas apparently did not care that in the future a federal court might hold that his new policy constituted reversible error. (CT Vol. 1 162-165.)

Similarly, in claiming that appellant has shown that only that one of the "deputies" was terminated for unknown reasons (RB 35), respondent

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[15] Respondent mistakenly states that the prosecution argued that there was no evidence "the new policy" was hidden from the defense. (CT Vol. 1 242-252, cited at RB 26.) In fact, the prosecution asserted a very different claim: that there was no evidence Rackauckas intentionally failed to disclose that "his father was once a patient at the hospital." (CT Vol. 1 246.) In any event, the prosecution was wrong, as these exhibits demonstrate.

[16] Among those who questioned the new policy were Chief Assistant District Attorney Chuck Middleton and Assistant District Attorney Mike Jacobs. (CT Vol. 1 159, 162-164.)

fails to squarely confront Jacobs's declarations and memoranda, which strongly suggest that he was terminated because he had questioned the new policy and repeatedly urged that information regarding Rackauckas, Sr.'s, hospitalization be disclosed to the defense. As appellant has explained (AOB 90), Jacobs declared that he was reassigned from his position as head of the Homicide Unit approximately five or six weeks after the August, 2000, meeting, and he was given no explanation for the transfer; about two weeks later, he wrote a memorandum to Senior Assistant District Attorney Silbar explaining that he believed the information regarding Rackauckas, Sr., must be disclosed to the defense, and asking whether he should prepare a declaration; Silbar told him not to prepare a declaration, and that Rackauckas would take care of it; when a District Attorney's Office investigator contacted the hospital at Jacobs' request, he was told that they had not had an in-patient by the name Rackauckas, Sr., during the time frame in question; on April 2, 2001, Rackauckas placed Jacobs on administrative leave; and, on June 15, 2001, Jacobs received a letter of dismissal. (CT Vol. 1 164-165; see also CT Vol. 1 175-176, 271.)

As appellant has noted (AOB 105, fn. 50), the grand jury observed that the "actions [addressed in the grand jury report] set the wrong tone, which continues to the present, that loyalty to the District Attorney, personally, is of prime importance, as compared to loyalty and dedication of prosecutors to the District Attorney's Office and its mission." (CT Vol. 4 1018.) In this context, it is significant that Jacobs worked alongside Rackauckas in the District Attorney's Office for a period of approximately four to five years between 1981 and 1988; he was an active supporter of Rackauckas's campaign for District Attorney; immediately after Rackauckas took office, Jacobs was promoted to Assistant District Attorney

and assigned to head the Homicide Unit, a position he held from January, 1999, until October, 2000; Rackauckas told Jacobs that, because of their common background and attitudes, he was not concerned about how he (Jacobs) would run the Homicide Unit; and, at the time of his termination, Jacobs had served as a prosecutor for 25 years, under three different administrations. (CT Vol. 1 159, 165.) Moreover, nothing in the record indicates that Jacobs was terminated due to deficient performance.

The circumstances surrounding Rackauckas's decision to seek the death penalty in this case – e.g., the fact that, within two days of the shootings, Rackauckas decided that the Orange County District Attorney's Office would automatically seek the death penalty in cases involving public rampage killings; that he apparently implemented the policy change without consulting anyone else; his anger at underlings who questioned the policy change, and the apparently vindictive termination of Assistant District Attorney Jacobs; and, the extremely belated disclosure of information regarding his father's hospital stay – establish that he did so because he was angry that the shootings took place at the very hospital where his father had just been a patient, not by any prior shootings.[17]

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[17] Providing no supporting citations, respondent claims that

> [t]he trial court's finding that the fact that Rackauckas, Sr., was at the location of the murders days before they occurred, like the fact that the District Attorney or any member of his staff might be in any public location in the community where a crime is subsequently committed, did not give rise to the possibility of bias, is fully supported by the record.

(RB 35.) Appellant searched relevant portions of the record and came across no such finding. (See, e.g., RT Vol. 1 66-68 [Judge Fitzgerald's (continued...)

Respondent's reliance upon *People v. Keenan*, *supra*, 46 Cal.3d 478, is misplaced. There, Keenan sought extensive discovery about the capital-charging policies and practices of the San Francisco District Attorney's office, for the purpose of challenging the constitutionality of the special circumstance allegations against him on the following grounds: (1) that the district attorney had no standards for deciding whether to charge special circumstances in an eligible case, and (2) that the prosecution was arbitrarily alleging special circumstances in this case. (*Id.* at p. 504.) Keenan did not allege purposeful, invidious discrimination, but merely asserted that capital charging by the San Francisco District Attorney's office appeared to be "standardless," that capital charges against him were delayed, and that he sustained harsher charges than others whose crimes he deemed similar. This Court deemed his claims "patently insufficient" to raise the issue of individual or systematic discrimination on invidious grounds, and concluded that they constituted no plausible justification for granting defendant's discovery request. (*Id.* at p. 507.) By contrast, appellant has "show[n] by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination in his case. [Citations.]" (*Id.* at p. 506.)

Fourth, respondent is incorrect in contending that the grand jury report did not add facts which were not known before (RB 35-36), and ignores critical facts undermining its position. As respondent notes, the grand jury found that confidential documents were leaked to the press,

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[17](...continued)
ruling on the recusal motion]; RT Vol. 14 3139-3144 [hearing on appellant's motion to reconsider the recusal motion]; RT Vol. 21 4780-4781 [trial court's ruling on renewed recusal motion].)

office computers were searched without authorization, and Rackauckas should have recused himself from a case involving Patrick DiCarlo. (RB 36.) However, respondent fails to address the following: (1) the leaked documents were copies of confidential letters relating to Jacobs's termination, and the District Attorney's Office did not act on an investigator's recommendation that an investigation be conducted to determine who released them; (2) the improperly searched computers were those assigned to Rackauckas's election opponents; and, (3) Rackauckas and DiCarlo were close personal friends. (CT Vol. 4 1063, 1065-1066, 1078.)[18]

Indeed, what respondent euphemistically calls "the difficulties noted by the Grand Jury" (RB 36), were in fact a wide-ranging array of improprieties affecting the operation of the entire agency. The fact that appellant's case was not specifically mentioned is insignificant because the report constituted strong evidence that Rackauckas repeatedly and improperly intervened in cases in which he had some personal connection, and that he punished those he viewed as disloyal. Contrary to respondent's position, then, appellant's suggestion that those "difficulties" might have affected his case is no mere speculation. (RB 36, citing AOB 105.)

Respondent's reliance upon *People v. Hernandez* (1991) 235 Cal.App.3d 674, 680, is entirely misplaced. Defendant Hernandez was charged with assault with a deadly weapon, a charge arising from the stabbing of Allie Braverman in a courthouse elevator. The trial court granted his motion to recuse the entire Los Angeles County District

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[18] The grand jury's findings regarding improprieties stemming from Rackauckas's involvement with DiCarlo are summarized in greater detail in appellant's opening brief. (AOB 102-103.)

Attorney's Office pursuant to Penal Code section 1424 (disqualification of the district attorney for conflict of interest). Specifically, the trial court found that it was unlikely Hernandez would be fairly prosecuted by the district attorney's office because he was the victim-witness in a preexisting case in which Braverman was the defendant, making it necessary for the district attorney's office simultaneously to rely upon Hernandez as a witness in the first case and prosecute him in the second. (*Id.* at pp. 676-677.) The court of appeal modified the order, concluding that the trial court properly recused deputy district attorneys who had received information from Hernandez about the Braverman case (on the ground they might not be evenhanded in prosecuting Hernandez) as well as deputies who personally witnessed Braverman entering a court of law bleeding from wounds caused by Hernandez. (*Id.* at p. 679.)

However, the court of appeal further held there was no evidence one way or the other as to whether information or impressions obtained from Hernandez by the deputies prosecuting Braverman had permeated, or would permeate, the entire 900-member Los Angeles County District Attorney's office, and therefore recusal of the entire agency was not justified. (*People v. Hernandez*, *supra*, 235 Cal.App.3d at p. 680.) In so holding, the court of appeal expressly distinguished *People v. Lepe* (1985) 164 Cal.App.3d 685, in which the defendant's former lawyer occupied a supervisory position in the district attorney's office during the defendant's prosecution. Because the district attorney in that case evaluated, promoted, and fired the deputies in his office, the office could not be effectively sanitized from considerations barring the district attorney's own personal participation in the case, and therefore recusal of the entire office was necessary. (*People v. Hernandez*, *supra*, 235 Cal.App.3d at p. 680.) There can be no doubt that

the instant case is closer to *Lepe* than *Hernandez*.

Respondent next contends that even if appellant had demonstrated a possible conflict, he still failed to demonstrate it was unlikely he would receive a fair trial. (RB 36-37.) In particular, respondent complains that appellant has failed to present information showing that, had a special circumstance review committee been convened, its recommendation would have been life imprisonment without possibility of parole ("LWOP"). (RB 36.) In support of its contention, respondent claims that Mike Jacobs, "the deputy who was later terminated," told the Orange County Register that at any review committee hearing, he would recommend the death penalty in appellant's case. (RB 36-37, citing CT Vol. 1 167.) Respondent also notes that, prior to the third penalty trial, Deputy District Attorney Bruce Moore informed the trial court that he alone had decided to try the case again, without any input from Rackauckas. (RB 37, citing RT Vol. 21 4781.) Respondent further complains that appellant has not shown that another prosecutorial agency would have sought LWOP. (RB 37.)

In fact, the trial deputy (Kralick), not Assistant District Attorney Jacobs, told the Orange County Register that he would recommend the death penalty in appellant's case. (CT Vol. 1 167.)[19] At any rate, the trial deputy's recommendation is only the first step of the special circumstance review process, and it is not dispositive. (See CT Vol. 1 139-140, 182-183.) For the same reason, Moore's statement that he alone had decided to retry the case carries little weight, especially given Rackauckas's obvious

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[19] Jacobs actually told the Register that "We have a procedure that we follow unless the district attorney says we don't follow it." Jacobs also said that he would discuss the issue with Rackauckas and follow his direction. (CT Vol. 1 167.)

determination to seek the death penalty, and the manner in which he had dealt with those who disagreed with or questioned the policy change.

More important, appellant need not, and arguably cannot, show that a special circumstance review committee would have recommended, or that a different prosecuting agency would have sought, LWOP. The pertinent question was whether it was unlikely appellant would receive a fair trial, and the trial court's findings on that question (RT Vol. 1 67-68; RT Vol. 14 3144; RT Vol. 21 4781) are not supported by substantial evidence. (AOB 77-120.)

Finally, respondent contends that it is clear from the evidence that Rackauckas decided to seek the death penalty in this case based on the horrific nature of the crimes and not on any conflict due to his father's stay at West Anaheim Medical Center. (RB 37-38.) According to respondent, there was no evidence that personal animosity, bias or personal emotions affected the office as a whole, and therefore the instant case is distinguishable from those where recusal of an entire District Attorney's office was found appropriate. (RB 37-38, citing *People v. Vasquez* (2006) 39 Cal.4th 47, 56; *People v. Eubanks* (1996) 14 Cal.4th 580, 599-600; *People v. Conner* (1983) 34 Cal.3d 141, 148-149; *People v. Choi* (2000) 80 Cal.App.4th 476, 481-482; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277, 1280-1287; *People v. Lepe*, *supra*, 164 Cal.App.3d at pp. 686-689.)

Appellant has already addressed all of these cases other than *Lewis v. Superior Court*, *supra*, 53 Cal.App.4th 1277. (AOB 94-97, 106-110.) Appellant need not repeat that discussion here, but notes that the law does not require evidence affirmatively showing that "personal animosity, bias, or personal emotions affected the office as a whole." For instance, in *People v. Lepe*, *supra*, 164 Cal.App.3d at pp. 689, the Court of Appeal

recognized that, "[a]s the deputies are hired by Storey [the defendant's former attorney, now the District Attorney], evaluated by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case."

In *Lewis*, which arose from Orange County's December, 1994, bankruptcy, the county's auditor-controller petitioned to vacate the denial of his motion to recuse the Orange County District Attorney from prosecuting an accusation under Government Code section 3060, seeking to remove him from office. (*Lewis v. Superior Court, supra*, 53 Cal.App.4th at p. 1280.) The court of appeal held that there was an apparent conflict of interest because, among other things, Lewis remained the auditor-controller while the proceedings were pending and was thus in a position to make decisions affecting the operations of the District Attorney's Office; the District Attorney's Office was a direct victim of the losses resulting from the bankruptcy, and thus of Lewis's alleged misconduct, because of resulting drastic cuts in its budget; the District Attorney and his staff were personally affected by the bankruptcy (e.g., previously promised pay raises were rescinded); there was evidence potentially implicating the District Attorney in the alleged misconduct which led to the county's financial disaster; and, the District Attorney became personally involved in attempts to repair the damage caused by the bankruptcy. (*Id.* at pp. 1283-1285.) The court of appeal further held that the apparent conflict was "so grave as to render it unlikely that [Lewis would] receive fair treatment during all portions of the . . . proceedings." (*Id.* at pp. 1285-1286.) Thus, *Lewis* involves an exceedingly unique factual background and is therefore of questionable relevance to the instant case. To the extent it is relevant, the opinion

supports *appellant's* argument in that Rackauckas, like Lewis, wielded power over the entire District Attorney's Office.

Therefore, contrary to respondent's position (RB 35), this Court should hold that the trial court abused its discretion in denying appellant's motion to recuse the District Attorney's Office, thereby violating Penal Code section 1424. Moreover, as demonstrated further in the next section, the trial court's abuse of discretion violated appellant's rights under the state and federal Constitutions.

C. The Trial Court's Abuse of Discretion Violated Appellant's State and Federal Constitutional Rights

Respondent contends that appellant is mistaken in claiming that denial of his recusal motion deprived him of his federal constitutional rights to due process, equal protection, and to be free from cruel and unusual punishment. (RB 38-41.) Respondent's contention is incorrect.

Relying on *People v. Vasquez*, *supra*, 39 Cal.4th 47, respondent first asserts that appellant's due process claim must be rejected because he has not shown a violation of fundamental fairness. (RB 38-39.) The conflict in that case involved a close family relationship between one of the two defendants and two employees of the district attorney's office, i.e., an administrator and a deputy district attorney. (*People v. Vasquez*, *supra*, 39 Cal.4th at pp. 52, 55.)[20] Despite the conflict, this Court held that the erroneous denial of the defendants' motion to recuse the district attorney's office did not deprive them of due process because: (1) "[n]either [the prosecutor] nor her supervisors had a direct, substantial interest in the outcome or conduct of the case separate from their proper interest in seeing

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[20] Appellant has already distinguished *Vasquez* in his opening brief. (AOB 108-109.)

justice done" (*id.* at pp. 64-65); (2) "[g]iven that 'matters of kinship' do not necessarily create a constitutional bar even to a judge's participation [citation], we are unable to conclude the family relationship between a defendant and two employees out of hundreds in a public prosecutor's office [] constitutionally bars that entire office from participating in the prosecution" (*id.* at p. 65); and, (3) the defendants could not point to any "specific prosecutorial actions taken as a result of the conflict that deprived them of a fundamentally fair proceeding" (*ibid.*).

Here, on the other hand, Rackauckas's personal bias and interest in this case led to his total *failure* to exercise his prosecutorial discretion, and the pressure he brought to bear on his office to pursue the death penalty, created an actual likelihood that appellant would not receive a fair trial. Even assuming, arguendo, that Rackauckas did not dictate Moore's handling of the trial, it cannot be assumed that the District Attorney's Office would have sought the death penalty had it conducted a special circumstances review hearing. (See AOB 108-109.)

Contrary to respondent's position, it is immaterial that Rackauckas had no financial stake in the outcome of this case, and that this was not a prosecution by a private party. (RB 39.) Appellant was singled out for prosecution and for the death penalty based on invidious criteria: Rackauckas's personal bias in the case and his personal animus against appellant in particular. (AOB 112.)

Respondent next challenges appellant's argument that the prosecutor's conduct violated equal protection and the Eighth Amendment, contending that appellant has not identified any invidious discrimination in the charging decision. (RB 39.) As described above and in his opening brief (see AOB 112-114), appellant *has* identified invidious discrimination

in this case, namely, Rackauckas's rash decision to change the special circumstance review policy, his single-minded pursuit of a death sentence, and his apparent punishment of those who questioned him, all of which were motivated by his personal bias against appellant. In addition, principles of justice and fairness should not allow a district attorney to base charging, sentencing and policy decisions on personal motives, at least where they were not part of his or her campaign platform or implemented without input by other members of the office. To hold otherwise would permit a district attorney to engage in personal vengeance, something the law affords to no one else.

Respondent states that a defendant is not denied due process because of the district attorney's discretion to decide whether to seek the death penalty in any given case. (RB 39, citing *People v. Redd* (2010) 48 Cal.4th 691, 758; *People v. Davis* (2009) 46 Cal.4th 539, 628.) Moreover, respondent states that prosecutorial discretion to select from eligible cases those in which the death penalty will be sought does not, in and of itself, violate equal protection or constitute cruel and unusual punishment. (RB 39, citing *People v. Bennett* (2009) 45 Cal.4th 577, 629; *People v. Carter* (2005) 36 Cal.4th 1215, 1280.)

Appellant does not dispute these general propositions here,[21] but they are inapplicable where the district attorney fails to exercise discretion altogether. Indeed, each of the cases cited by respondent (RB 39-40, citing *McCleskey v. Kemp* (1987) 481 U.S. 279, 292-293; *Oyler v. Boles* (1962)

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[21] Appellant argues elsewhere that Penal Code section 190.3, factor (a), which allows prosecutors to seek and argue for the death penalty in almost all cases involving first degree murder, violated his constitutional rights. (AOB 272-274.)

368 U.S. 448, 454-456, *People v. Bennett*, *supra*, 45 Cal.4th at p. 629; *People v. Carter*, *supra*, 36 Cal.4th at pp. 1278-1280; *People v. Arias* (1996) 13 Cal.4th 92, 132; *People v. Lucas* (1995) 12 Cal.4th 415, 478; *People v. Keenan*, 46 Cal.3d at pp. 504-506; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 302) on this point is either inapposite or supports appellant's argument instead.

Bennett and *Carter* merely involved general challenges to California's capital sentencing scheme. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 629; *People v. Carter*, *supra*, 36 Cal.4th at pp. 1278-1280.) Specifically, Bennett argued that the death penalty in California violates the California Constitution and the Eighth and Fourteenth Amendments to the United States Constitution because it is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 629.) Carter argued, among other things, that, because California law gives an individual prosecutor discretion whether to seek the death penalty in a particular case, he was denied his constitutional rights to equal protection of the laws or to due process of law. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1280.) Although appellant raises similar arguments elsewhere (see AOB 272-274 and *post*, p. 154), the instant argument rests on the conceptually distinct premise that prosecutorial discretion was exercised, if at all, with intentional and invidious discrimination.

Similarly, *McCleskey*, *Oyler*, *Keenan*, *Lucas* and *Arias* have no application here in that the defendants in those cases did not allege

intentional and invidious discrimination.[22] In particular, those cases did not involve a personal stake in the case on the part of the district attorney, nor a departure from established policy. For instance, the defendant in *McCleskey* claimed that the Georgia capital punishment statute violated his right to equal protection because race infected the administration of Georgia's statute in two ways: persons who murdered whites were more likely to be sentenced to death than persons who murdered blacks, and black murderers were more likely to be sentenced to death than white murderers. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 291-297.) In denying his claim, the United States Supreme Court observed that McCleskey offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. (*Id.* at pp. 292-293.)

The petitioners in *Oyler* alleged that, although West Virginia's habitual criminal statute imposed a mandatory duty on the prosecuting authorities to seek a severer penalty against all persons coming within the statutory standards, they were among a small minority of men so sentenced. (*Oyler v. Boles*, *supra*, 368 U.S. at pp. 454-455.) In denying the petitioners' claim, the high court explained that: (1) there was no indication whether the failure to proceed against other three-time offenders was due to lack of knowledge of the prior offenses on the part of the prosecutors or was the result of a deliberate policy of proceeding only in a certain class of cases or against specific persons; and, (2) the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation, at least

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[22] Appellant has previously discussed the applicability of *People v. Keenan*, *supra*, 46 Cal.3d 478, to appellant's case (Section B.1, *ante* at p. 17).

where the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. (*Id.* at p. 456.)

In *People v. Lucas*, *supra*, 12 Cal.4th at p. 476, the defendant claimed on appeal that he was "deprived of procedural due process in the charging decision because the factors deemed by the [district attorney] to be essential in determining [whether to charge special circumstances and seek the death penalty] were not properly applied in his case." Specifically, he claimed that the trial prosecutor committed misconduct by providing his supervisors with misleading or erroneous information that may have influenced the charging decision under the district attorney's office's internal charging standards. (*Ibid.*) This Court denied the defendant's claim, noting that he did not claim invidious discrimination or vindictive prosecution. (*Id.* at pp. 476-477.)

Finally, the defendant in *People v. Arias*, *supra*, 13 Cal.4th 92, argued that the prosecutor wrongly opposed, and the trial court erroneously denied, his motion that he be allowed to plead guilty to all the charges relating to the robbery, kidnaping and sexual assault of victim Judy N. (charges which were joined with those relating to the murder and robbery of a second victim), and that the prosecution thereafter be barred from presenting evidence about those crimes. This Court upheld the denial of his motion, reasoning that there is no inherent impropriety in a prosecutorial decision to join capital and noncapital charges where joinder is otherwise proper. (*Id.* at pp. 130-133.)

On the other hand, *Murgia v. Municipal Court*, *supra*, 15 Cal.3d at p. 290, is analogous to the instant case in that the defendants – i.e., members of the United Farm Workers Union – alleged that Kern County law enforcement authorities pursued a "conscious policy of selective

enforcement directed against members or supporters of" the union. In concluding that the trial court erred in denying the motion for discovery, this Court observed "that the equal protection clause is violated if a criminal prosecution is 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' [Citation.]" (*Ibid.*) Accordingly, this Court recognized that the defendants were entitled to pursue discovery with respect to their claim that such prejudice was in fact the moving force behind the criminal proceedings. (*Ibid.*)

Respondent incorrectly asserts that appellant has never demonstrated arbitrary and invidious discrimination, and that the crux of his claim is that in previous cases, the Orange County District Attorney's Office afforded capital defendants a special circumstance review hearing. (RB 40-41.) Again, respondent somehow ignores the evidence presented by appellant showing that Rackauckas's policy change – and, more specifically, the decision to deny him a special circumstance review hearing and to pursue the death penalty – *was* based on invidious criteria, i.e., personal animus and bias. Therefore, as demonstrated above, respondent's reliance upon *Keenan* and its progeny (RB 41) is misplaced.

Even assuming, arguendo, that appellant had no right to a special circumstance hearing (despite the fact that the special circumstance review process had been in place since the early 1980s (CT Vol. 1 159-163, 211-212)), appellant has amply demonstrated that Rackauckas's policy change was motivated by invidious criteria, not the "minimum standards set forth in a constitutional death penalty statute." (Cf. *People v. Lucas*, *supra*, 12

Cal.4th at p. 478.)[23] Accordingly, this Court should reject respondent's contention that, because there is no justifiable claim of invidious discrimination, appellant's equal protection and Eighth Amendment claims must fail. (RB 41.)[24]

D. The Entire Judgment Must Be Reversed

Appellant argues that the trial court's error in denying his recusal motion was structural, and requires reversal per se. (AOB 116-120.) According to respondent, however, this Court rejected an identical argument in *People v. Vasquez*, *supra*, 39 Cal.4th at pp. 66, 70-71, where it held that, absent a due process violation, state law error from failure to recuse a district attorney or district attorney's office is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (RB 41-42.) Under

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[23] According to respondent, "[appellant's] attempt to compare his case to another Orange County matter, *People v. Abrams*, No. 99HF0436 (AOB 112-113 & fn. 52) is unavailing." (RB 41, fn. 6.) Respondent's reliance upon *People v. Keenan*, *supra*, 46 Cal.3d at p. 506, on this point is misplaced. Appellant pointed out that Abrams was subject to the new policy, as his crimes involved a "public rampage of indiscriminate killings," yet the defense was invited to participate in a special circumstances review hearing. (AOB 112-113 & fn. 52; see also CT Vol. 1 125.) That is, appellant referred to *Abrams* not to require the "prosecut[ion] to justify [its] capital-charging decision by reference to others" (cf. *People v. Keenan*, *supra*, 46 Cal.3d at p. 506), but to further support his argument that he was singled out due to Rackauckas's anger and bias.

[24] Respondent's contention is overly narrow in that it addresses only appellant's federal constitutional rights to equal protection and under the Eighth Amendment (RB 41), while appellant argues that the trial court's error violated his state and federal constitutional rights to due process, equal protection, and a reliable adjudication at all stages of a death penalty case, and the constitutional prohibitions against cruel and unusual punishment. (See AOB 77-78, citing U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 17.)

that standard, respondent asserts, appellant has failed to demonstrate any prejudice from the denial of his recusal motion. (RB 42.) Respondent's contention is incorrect.

First, appellant has amply demonstrated that the denial of his recusal motion violated his right to due process. (AOB 107-111.) Therefore, the error is reversible per se. (See *People v. Vasquez*, *supra*, 39 Cal.4th at pp. 66, 70-71; see also *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 809-810.)

Second, respondent incorrectly asserts that appellant failed to explain the prejudice because there was none. (RB 42.) In fact, appellant explained that the effect of the trial court's failure to recuse the District Attorney's Office is not susceptible to harmless-error analysis for the following reasons: it cannot be determined from the record the extent to which Rackauckas's conflict of interest affected his decisions, particularly those which were confidential, not memorialized, or possibly even hidden from the defense (see, e.g., CT Vol. 1 163 [Rackauckas expressed his concern about what the media would do if they discovered that his father had been a patient at West Anaheim Medical Center]); critical information was disclosed to the defense belatedly, if at all (see, e.g., RT Vol. 1 32-45, CT Vol. 1 104 [denial of appellant's motion for discovery relevant to the recusal motion], 164 [more than a year after Rackauckas announced his new policy, Jacobs wrote and submitted a memorandum expressing his opinion that information about Rackauckas, Sr.'s, hospital stay must be disclosed to the defense]); and, the record cannot fully disclose the extent to which the decisions of line deputies were affected, whether consciously or subconsciously, by the knowledge that their boss wanted to pursue the death penalty and that he viewed disagreement as insubordination. (CT Vol. 1

163-165; CT Vol. 4 841-1114.)

The procedural history underlying the instant argument demonstrates appellant's diligence in challenging Rackauckas's denial of a special circumstance hearing, and of his efforts to have the Orange County District Attorney's Office recused. (See AOB 78-83.) If appellant has failed to demonstrate prejudice (beyond the fact that Rackauckas sought death without affording appellant a special circumstance review hearing), it is due to Rackauckas's own resistance to disclosure of information regarding his father's hospitalization, an error compounded by the trial court's denial of appellant's discovery motion. Therefore, even if this Court applies a harmless-error rather than structural-error analysis, appellant must not be penalized for any failure to fully establish prejudice.

Respondent also asserts that there was no reasonable probability the Orange County District Attorney's Office would not have sought death given the facts of the case. (RB 42.) Again, appellant cannot (and should not be required) to affirmatively show that a non-conflicted prosecutor would have decided his sentence merited only life imprisonment without possibility of parole. Still, there is no escaping the fact that appellant never had the chance to weigh in at a review hearing. Appellant had compelling mitigation evidence to offer – including the poverty, social isolation and turmoil he endured in Vietnam, his devotion as a son, his reputation as an extraordinary employee, and the emotional upheaval he experienced when his mother's health declined and, especially, when she died – and defense counsel was ready to present it. (See CT Vol. 1 130, fn. 17 [noting that defense counsel had compiled "significant mitigating information . . . in an effort to convince the District Attorney's office not to seek the death penalty"].) Therefore, it was not a foregone conclusion that the District

Attorney's Office would seek the death penalty.

In support of its point, respondent again mistakenly claims that Jacobs would have recommended the death penalty. (RB 42, citing 1 CT 167.) As explained above (p. 14, *ante*), Assistant District Attorney (not Deputy) Jacobs, the head of the office's Homicide Unit, questioned the new policy (CT Vol. 1 162-164.) It was the trial deputy, Chris Kralick, who recommended that the District Attorney's Office seek death, and his recommendation was only the first step in the special circumstance review process. (CT Vol. 1 139-140, 167, 182-183.) Given Rackauckas's insistence that his office seek the death penalty, and his refusal to entertain dissenting views, neither Kralick's recommendation nor Deputy District Attorney Moore's election to pursue the death penalty at the third penalty trial constituted autonomous decisions.

Under these circumstances, the trial court's failure to recuse the entire Orange County District Attorney's Office was structural error, and the entire judgment must be reversed. (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, *supra*, 481 U.S. at pp. 809-810; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) For the same reasons, the entire judgment must be reversed even if this Court were to apply harmless error analysis. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Vasquez*, *supra*, 39 Cal.4th at pp. 66-71.)

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II

THE PROSECUTION'S DISCRIMINATORY USE OF A PEREMPTORY CHALLENGE TO STRIKE A MINORITY PROSPECTIVE JUROR FROM THE PETIT JURY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

In his opening brief, appellant, who is Vietnamese, argued that the prosecutor used race-based peremptory challenges to exclude a Vietnamese prospective juror from the jury, in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. In so arguing, appellant demonstrated that because the prosecutor's reasons for exercising the peremptory challenge are not supported by the record, and because the trial court failed to make a serious attempt to evaluate the prosecutor's explanations for excusing the juror, appellant's rights to trial by a representative jury and to equal protection were violated, requiring reversal of the entire judgment (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 16). (AOB 121-142.)

Respondent contends that appellant's argument lacks merit because (1) the trial court properly found that the prosecutor had ethnicity-neural reasons for the challenge, and, (2) appellant's comparisons are incomplete, misleading, and do not support a different conclusion. (RB 42-56.) Respondent's contentions are meritless.

B. Applicable Legal Principles

The procedures and standards for a trial court's consideration of a *Batson/Wheeler* motion are well-established. "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised

on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 477.)[25]

A reviewing court must give deference to a trial court's ruling on a *Batson* challenge, but only when certain conditions are met. Specifically, the trial court's ruling is generally sustained if it is supported by "substantial evidence." (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 901, fn 11.) However, this Court has repeatedly stated that deference is only required when the trial court "has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror." (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105, citing *People v.*

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[25] Citing *Johnson v. California* (2005) 545 U.S. 162, 168, respondent states that "[t]o establish a prima facie case, the moving party should first make as complete a record as possible." (RB 45.) However, *Johnson* did not say this, nor has appellant found any other published federal decision setting forth such a burdensome standard. Instead, *Johnson* explained that "the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168.) Moreover, "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 p. 169.) Indeed, *Johnson* arguably overrules California decisions to the extent that they require that the moving party make as complete a record as possible (see, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280) insofar as it held that "California's 'more likely than not' standard is at odds with the prima facie inquiry mandated by *Batson*." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.)

McDermott (2002) 28 Cal.4th 946, 971.) The United States Supreme Court has held that "a trial court's ruling on the issue of *discriminatory intent* must be sustained unless it is clearly erroneous." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477; emphasis added.) It follows, therefore, that where the court does not engage in a sincere and reasoned evaluation of the prosecutor's intent, or where the trial court does not make a ruling on discriminatory intent, no deference is required.

In *Snyder*, the United States Supreme Court described the trial court's duties when engaging in its evaluation at step three of the *Batson* inquiry as follows:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, see 476 U.S., at 98, n. 21, 106 S.Ct. 1712, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez* [*v. New York* (1991)] 500 U.S. [352,] 365, 111 S.Ct 1859 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

(*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477.) As the high court recognized, "'[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" (*Id.* at p. 485, quoting *Hernandez v. New York*, *supra*, 500 U.S. at p. 365 (plurality opinion).)

The United States Supreme Court has made clear that comparative

juror analysis is an appropriate, even necessary, component of assessing *Batson/Wheeler* claims. (*Miller-El v. Dretke* (*Miller-El II*) (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"]; see also *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 483-486; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 369-375; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360-361.) "Comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike." (*United States v. Collins* (9th Cir. 2008) 551 F.3d 914, 921.)

As the Fifth Circuit Court of Appeals has observed,

> [t]he [United States Supreme] Court's treatment of Miller-El's comparative analysis also reveals several principles to guide us. First, we do not need to compare jurors that exhibit *all* of the exact same characteristics. [*Miller-El II*, *supra*, 555 U.S. at p. 247, fn. 6.] If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects. [*Id.* at p. 241.] Second, if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination. [*Id.* at p. 246.] Third, we must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors. [*Id.* at p. 252.]

(*Reed v. Quarterman*, *supra*, 555 F.3d at p. 376 (emphasis original); see also *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3 ["As a threshold matter, we note that there is no requirement that jurors be identically situated in order for meaningful comparison to take place"].)

Recent United States Supreme Court decisions relating to the assessment of *Batson* claims have not called into question the importance of comparative juror analysis. In *Thaler v. Haynes* (2010) 130 S.Ct. 1171, 1175, the Supreme Court held that none of its previous decisions clearly established that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. Comparative juror analysis was simply not at issue in that case. Moreover, as appellant has pointed out (AOB 100, fn. 25), the prosecutor's stated reasons in this case were not demeanor-based. Thus, *Thaler v. Haynes* is inapposite.

More important, in *Felkner v. Jackson* (2011) 131 S.Ct. 1305, the United States Supreme Court addressed the proper standard with respect to federal habeas review of a state appellate court's ruling on a *Batson* claim. There, the trial court credited the prosecutor's race-neutral explanations for exercising peremptory challenges to two African-American prospective jurors, and the California Court of Appeals "carefully reviewed the record at some length in upholding the trial court's findings." (*Id.* at p. 1307.) The Ninth Circuit Court of Appeals reversed that decision, "offer[ing] a one-sentence conclusory explanation for its decision." (*Ibid.*) The high court concluded that the Ninth Circuit Court of Appeals had no basis for concluding that the state appellate court's decision was unreasonable. (*Id.* at pp.1306-1307.) Given the procedural posture of the instant case, *Felkner*

is inapplicable.[26]

Following *Miller-El II*, this Court has held that evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons. (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) In *Lenix*, this Court declared that "*Miller-El II*, *supra*, 545 U.S. 231, 125 S.Ct. 2317, and *Snyder*, *supra*, 128 S.Ct. 1203 demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Ibid.*)

Where the trial court does not satisfy its *Batson/Wheeler* obligations, the conviction must be reversed. (*People v. Allen* (2004) 115 Cal.App.4th 542, 553.) As this Court has recognized, such "error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'" (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283; see also *People v. Khoa Khac Long* (2010) 189 Cal.App.4th 826, 843.) Indeed, "[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386; see also *United States v. Vasquez-Lopez* (9th Cir. 1994) 22

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[26] Even assuming *Felkner* addressed the issue of how similar jurors must be to be meaningfully compared (see *Felkner v. Jackson*, *supra*, 131 S.Ct. at p. 1307), it is distinguishable. Appellant has amply demonstrated that the jurors subjected to comparative analysis in this case are similarly situated. (AOB 138-141; pp. 53-74, *post.*)

F.3d 900, 902 ["the Constitution forbids striking even a single prospective juror for a discriminatory purpose"].)

In light of these principles, the trial court erred in upholding the prosecutor's improper race-based peremptory challenge against N.V., as appellant further demonstrates below.

C. The Trial Court's Decision To Uphold the Prosecutor's Peremptory Challenge To N.V. Is Not Supported By Substantial Evidence

According to respondent, the trial court properly denied appellant's *Batson/Wheeler* motion because substantial evidence supports the court's decision to uphold the challenge. (RB 46-47.) Respondent's contention is incorrect.

1. In Determining Whether The Trial Court's Ruling Is Supported By Substantial Evidence, This Court Must Disregard Any Reasons Not Actually Stated By the Prosecutor

The United States Supreme Court has explained that

> . . . when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. *If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.* The Court of Appeals's and the dissent's substitution of a reason for eliminating [prospective juror] Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

(*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252 (italics added); accord, *People v. Jones* (2011) 51 Cal.4th 346, 365-366.)

Here, the prosecutor stated his reasons for excusing N.V. as follows:

[Prosecutor]: Okay. He is 45 years old. Never been married. Single. Has no kids. That is not the type of juror I would keep.

He is a postal worker, also not the type of juror I would keep.

His answers to the death penalty in his questionnaire, he has no opinion. I couldn't get any opinion about that topic out of him. He was nonresponsive to some of my questions, I would ask him about it and he would just say, yeah, I am ready. He was too easy [*sic*] to please.

And those were the reasons I excused him.

(RT Vol. 21 5018.) Logically, the prosecutor's comment that "those were the reasons I excused him" means that he had no other supposed reasons for exercising his peremptory challenge of N.V.

However, in contending that substantial evidence supports the court's decision, respondent relies upon factors which the prosecutor did not actually state. For instance, the prosecutor observed that N.V. was a "postal worker" (RT Vol. 21 5018), but not that he was a customer services supervisor at the Garden Grove Post Office (RB 47). Moreover, the prosecutor did not rely on N.V.'s statement that he had read a newspaper article about the shooting, or on his statement that he did not pay much attention to the case. (RB 47.) These factors cannot be considered in determining whether the trial court's ruling is supported by substantial evidence, as respondent's attempt to supply race-neutral reasons for eliminating N.V. cannot "satisfy the prosecutor['s] burden of stating a racially neutral explanation for [his] own actions." (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252.)

2. Inaccuracies in Respondent's Factual Summary

Appellant notes that respondent's account of N.V.'s responses, the prosecutor's stated reasons for excusing him, and the trial court's ruling is misleading in several respects.[27] First, in summarizing the prosecutor's reasons for exercising the peremptory challenge, respondent states, "Other times, [N.V.] was 'too easy to please,' answering 'yeah' to questions the prosecutor posed of him *without thinking about what was being asked.*" (RB 43; emphasis added.) This does not accurately reflect what the prosecutor said, which was, "His answers to the death penalty in his questionnaire, he has no opinion. I couldn't get any opinion about that topic out of him. He was nonresponsive to some of my questions, I would ask him about it and he would just say, yeah, I am ready. He was too easy to please." (21 RT 5018.)

Second, respondent states that "*[i]n combination*, these factors made him an undesirable juror for the prosecution." (RB 43; italics added.) Although a reviewing court is required to examine the prosecutor's stated reasons in combination (see, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 678), the prosecutor himself never claimed that the factors in combination made N.V. undesirable as a juror.

Third, respondent asserts that "[t]he prosecutor probed [N.V.] about his answers, but he refused to express an opinion, saying he had none. He

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[27] Respondent confusingly refers to the clerk's transcript volume containing N.V.'s questionnaire as "40 CT." (RB 47.) The original clerk's transcripts were comprised of Volumes 1 through 8, while the clerk's transcripts containing the juror questionnaires and exhibits were labeled "Jury Questionnaires/Exhibits Clerk's Transcript" and were comprised of Volumes 1 through 47. Accordingly, appellant refers to the latter set of transcripts as "Quest./Exh. CT."

also said neither penalty was more severe than the other." (RB 47, citing 21 RT 4981-4982.)[28] In fact, N.V. did not "refuse" to express an opinion, but simply explained, "I mean I don't have any strong opinion to give the death penalty or life in prison without parole. Neither is more severe than the other." (21 RT 4981-4982.)

Finally, as respondent observes, N.V. stated that he wanted to be a juror. (RB 47, citing 21 RT 4984.) However, respondent's claim that the prosecutor was "[s]omewhat surprised" by N.V.'s statement amounts to sheer speculation. (RB 47.) By responding, "You do?," the prosecutor simply may have been asking N.V. to confirm his response, expressing (or feigning) skepticism, or assuming an antagonistic tone.

3. The Cases Cited By Respondent in Support of Its Position Are Distinguishable

Each of the cases cited by respondent in support of its position (RB 46-47) is distinguishable. First, while a prosecutor may dismiss a potential juror whose occupation and/or age, in the prosecutor's subjective opinion, would not render that juror suitable for the case being tried (RB 46, citing *People v. Reynoso* (2003) 31 Cal.4th 903, 924-925), the record suggests that the prosecutor's reference to N.V.'s occupation was pretextual. In *Reynoso*, the prosecutor explained the logic underlying his belief that certain prospective jurors were unsuitable due to their professions. Specifically, he explained that he "dismissed [prospective juror Elizabeth G.] because she was [a] customer service representative. In terms of that, we felt that she

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[28] Respondent erroneously states that N.V. answered "None" with respect to his general feelings about the death penalty at Quest./Exh. CT Vol. 40 10962. (RB 47.) That response actually appears at Quest./Exh. CT Vol. 40 10972.

did not have enough educational experience." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 910.)[29] Even if the prosecutor's logic was questionable, as this Court acknowledged (*id.* at p. 924), the trial court's finding that his stated reason was sincere and legitimate was entitled to deference (*id.* at pp. 924-926).[30]

By contrast, the prosecutor in this case merely stated that "[N.V] is a postal worker, also not the type of juror I would keep." (RT Vol. 21 5018.) He failed to explain *why* N.V.'s occupation made him unsuitable as a juror, nor can his reasons be inferred from the record. (Cf. *Phan v. Haviland* (E.D.Cal. 2011) 2011 WL 3816637, *7, 33 [the prosecutor's concern about a prospective juror's background as a counselor who counseled gang members was held to be supported by the record and race-neutral]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 411 [where each of the prospective jurors excused by peremptory challenge had a connection with an organization that provided health care, either mental or physical, "it could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing care or

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[29] The prosecutor also excused prospective juror Mary L., a counselor for at-risk youth, on the ground that she "would have an undue sympathy for both defendants in this case because they are young and definitely if not at risk, past risk." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 910.) However, the court of appeal decision reviewed by this Court focused solely on the peremptory challenge of Elizabeth G. (*Id.* at pp. 913, 923, fn. 5.)

[30] Respondent notes that the challenged juror in *Reynoso* was a customer service representative. (RB 46.) However, the prosecutor explained that he believed that, as a customer service representative, she lacked sufficient educational experience to effectively serve on the jury. (See *People v. Reynoso*, *supra*, 31 Cal.4th at pp. 923-924.)

social services would not be sympathetic to their case]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [race-neutral factors included job in youth services agency and background in psychiatry or psychology]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged jurors shared characteristic of being single and working in "social services or caregiving fields"]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [proper to challenge kindergarten teacher based on belief that teachers are generally liberal and less prosecution-oriented]; *Siegel v. State* (Fla. 2011) 68 So.3d 281, 284-286 [in a prosecution for attempting to seduce a minor over the Internet, the exercise of a peremptory challenge against a female school teacher who had routine contact with children "was both gender-neutral and eminently reasonable in light of the nature of the charged crime"].)

Second, although a prosecutor may be legitimately concerned about a potential juror who does not meaningfully answer questions (RB 46, citing *People v. Howard* (2008) 42 Cal.4th 1000, 1019), respondent's suggestion that N.V. failed to provide meaningful answers has no basis in the record. In *Howard*, Question No. 60 of the juror questionnaire asked prospective jurors for their thoughts about, among others, prosecutors and defense attorneys. A.A. wrote that prosecutors "are trickly [*sic*] people," and that defense attorneys "will say anything." Question No. 82 of the questionnaire asked whether the prospective jurors had any problems that "might interfere with your ability to concentrate on the case or might cause you to 'hurry-along' your deliberations." A.A. checked "Yes," explaining that "I'm a student and this is my summer vacation[.] I want to have fun and relax and not think about school." On voir dire, the prosecutor asked A.A., "I kind of had the impression that you enjoyed writing about prosecutors

and defense attorneys and all with an eye towards . . . the fact that you would rather not serve on a long case. [¶] Am I right about that?" A.A. answered yes, although he went on to say that if selected, he would not rush to judgment. The prosecutor subsequently asked, "So you are sort of having fun with us a little?" A.A. responded, "Sort of," and admitted that he was essentially saying he would rather have fun that summer. The trial court agreed with the prosecutor, finding that A.A. was flippant in his answers and that he was trying to get off the jury panel. (*Ibid.*)

Here, however, N.V. provided a meaningful response, i.e., he explained that he did not have a strong opinion favoring either the death penalty or life in prison without parole, and stated his opinion that neither penalty is more severe than the other. (RT Vol. 21 4981-4982.) There is nothing to suggest that N.V. was flippant, antagonistic, or evasive, or that he otherwise failed to meaningfully answer any of the questions asked of him.

Third, although a prosecutor may dismiss a potential juror who declines to express any opinion on the death penalty, even when asked to do so (RB 46-47, citing *People v. Mills* (2010) 48 Cal.4th 158, 176), N.V. did not decline to express an opinion on the subject, but simply explained that he did not have a *strong* opinion. In *Mills*, the prosecutor explained that he had exercised a peremptory challenge against prospective juror K.B. "primarily" because she was undecided about the death penalty. (*People v. Mills*, *supra*, 48 Cal.4th at p. 176.) In her juror questionnaire, K.B. stated that she had "[n]o opinion" regarding the death penalty. Asked whether she believed the death penalty is imposed "Too often," "Not often enough," or "About right," she did not check anything and explained, "Don't know." As to what purpose she thought the death penalty serves, K.B. answered,

"Don't know how decided on exact reasoning (based on the law) [*sic*]." She was also asked, "In what type of cases, if any, do you think the death penalty should be imposed?" K.B. responded, "I don't know." Finally, she was asked, "In what type of cases do you think the death penalty should not be imposed?" K.B. answered, "I'm not sure." (*Id.* at pp. 177-179.)

N.V.'s responses in the instant case are distinguishable from those of juror K.B. in *Mills*. Specifically, in his questionnaire, N.V. stated that: although he had read a newspaper article about the incident, he had not paid much attention to the case nor had he discussed it with anyone (Quest./Exh. CT Vol. 40 10964-10965); and, that he had no opinion as to whether the death penalty was used too often or too seldom, and he stated that "I don't really pay attention to the death penalty" (Quest./Exh. CT Vol. 40 10972). On voir dire, N.V. stated, ". . . I don't have any strong opinion to give the death penalty or life in prison without parole, neither is more severe than the other." (RT Vol. 21 4981-4982.) Otherwise, it is clear from N.V.'s responses that he would have made a suitable juror, acceptable to either party.[31]

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[31] As appellant has noted (AOB 125-126), N.V. affirmed that: he was objective and emotionally stable, and that he did not form judgments based on personal feelings (Quest./Exh. CT Vol. 40 10963); he would keep an open mind with respect to expert testimony (Quest./Exh. CT Vol. 40 10963); nothing he had heard about the case led him to believe he could not be a fair and impartial juror (Quest./Exh. CT Vol. 40 10965, 10968-10969); neither he nor anyone close to him had worked in the medical field, and neither he nor anyone close to him had ever been a patient in a hospital or home care setting (Quest./Exh. CT Vol. 40 10966); he could follow the law as the court explained it (Quest./Exh. CT Vol. 40 10972); he was willing to consider all of the aggravating and mitigating factors listed in the questionnaire, and would be willing to vote for either death or life

(continued...)

Respondent next complains that defense counsel made no attempt to rebut the prosecutor's explanations about why he excused N.V. (RB 47-48.) Respondent's reliance upon *People v. Adanandus* (2007) 157 Cal.App.4th 496, 504 & 510, is misplaced. (RB 48.)[32] As the court of appeal explained, defense counsel's *Wheeler/Batson* motion was based solely on the fact that the three jurors stricken by the prosecutor were all African-Americans, which was insufficient as a matter of law to show a prima facie case of discrimination. (*People v. Adanandus*, *supra*, 157 Cal.App.4th at pp. 503-504, and cases cited therein.) Moreover, the court of appeal identified numerous reasons the prosecutor would have wanted to strike the jurors. Prospective Juror Jonet H. had lived on the street where the shooting took place; she had a young cousin who was murdered in a shooting the previous year; her brother had been charged with possession of crack cocaine, was sent to prison, got out, and was now back in prison for parole violation; she opined that the criminal justice system was flawed by an inherent bias against young African–American men; she stated that "I would be more impartial in a different kind of case"; and, she admitted it

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[31](...continued)
imprisonment without possibility of parole (Quest./Exh. CT Vol. 40 10972-10975); he promised to freely discuss the law and evidence with fellow jurors during deliberations (Quest./Exh. CT Vol. 40 10976); he could be fair, objective and completely open to either penalty (RT Vol. 21 4964, 4977, 4981, 4983-4984); he believed expert testimony could be of assistance and that he would treat it as he did other testimony, i.e., weighing it to determine its value (RT Vol. 21 4977); the fact he was Vietnamese would not affect his decision, and he would not act as an interpreter or as "an expert witness" on Vietnamese culture (RT Vol. 21 4983, 4985); and, he wanted to be a juror in the case (RT Vol. 21 4984).

[32] Respondent mistakenly cites to 156 Cal.App.4th 496. (RB 48.)

would be difficult for her to be impartial in "this kind of case." Prospective juror Betty C.'s son had been prosecuted for and pled guilty to a drug offense. Prospective juror Channing W. expressed his opinion that drugs should be legalized; he was ambivalent about whether he would be able to hold the defendant accountable if the offense had stemmed from drug dealing; and, he was equivocal about the effect his views on the drug laws might have if he were selected as a juror. (*Id.* at pp. 504-511.)[33]

The instant case is distinguishable. First, respondent is incorrect in contending that defense counsel made no attempt to rebut the prosecutor's explanations about why he excused N.V. (RB 47-48.) Specifically, defense counsel explained that "I just don't see anything that this juror has said that would cause him to be excused." (RT Vol. 21 5017.) Moreover, in finding a prima facie case, the trial court observed that "[N.V.] voir dired very well, his questions and answers were similar to those offered by other jurors, he is Vietnamese, so there is a prima facie showing." (RT Vol. 21 5018.) Arguably, the trial court's comment fleshed out defense counsel's position; in any event, there was nothing more defense counsel needed to say to make a prima facie case, as the trial court was in the very act of finding one. Additionally, after the prosecutor stated his reasons for exercising the peremptory challenge, defense counsel argued that those reasons were "insufficient" (RT Vol. 21 5017), implicating the genuineness of those reasons. Second, as appellant has explained (AOB 138-141), N.V. offered no disqualifying information, unlike the prospective jurors in *Adanandus*.

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[33] Not insignificantly, the trial court in that case found that the defendant did not make a prima facie case. (*People v. Adanandus*, *supra*, 157 Cal.App.4th at p. 502.)

4. The Prosecutor's Pattern of Peremptory Challenges Provides Further Evidence That the Excusal of N.V. Was Improperly Race-Based

Of the 43 prospective jurors passed for cause and examined on voir dire (setting aside those who were examined during the selection of alternate jurors), 35, or approximately 81%, were white.[34] Four, or approximately 9.5%, were Asian or part-Asian: F.S., who identified himself as Samoan (Quest./Exh. CT Vol. 37 10199); N.V., who identified himself as Vietnamese (RT Vol. 21 4983, 4985); L.W., who identified herself as Chinese (Quest./Exh. CT Vol. 40 10979); and, R.F., who identified himself as Pacific Islander/Hispanic (Quest./Exh. CT Vol. 39 10503).

The initial jury panel included two Asians, F.S. and N.V. (RT Vol. 21 4826-4858, 4863-4901, 4903-4977.) The prosecutor's second peremptory challenge was to F.S., who was replaced by another Asian, L.W. (RT Vol. 21 5002.) At that point, ten whites and two Asians had been called into the jury box and passed for cause, and the prosecutor had used one of two peremptory challenges to excuse an Asian juror.

The prosecutor's third peremptory challenge was to N.V. (RT Vol. 5017.) At the time of appellant's *Batson/Wheeler* motion, eleven whites and three Asians had been called into the jury box and passed for cause, but the prosecutor had used two of three peremptory challenges to excuse Asian

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[34] These 43 jurors comprised the pool the prosecution had the opportunity to challenge. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 346 [in holding that the defendant failed to make a prima facie case of gender discrimination during jury selection, this Court reasoned that looking only at the overall juror pool exaggerates any discrepancy between the prosecutor's use of strikes and the juror pool composition].)

jurors. In other words, the prosecutor had used peremptory challenges to excuse about 9% of the whites and 66% percent of the Asians called to the jury box and passed for cause. (RT Vol. 21 4977-5017.)

The prosecutor used his thirteenth peremptory challenge to excuse L.W., the only Asian in the box. (RT Vol. 22 5183.) At that point, twenty-six whites and three Asians had been called to the jury box; the prosecutor had exercised peremptory challenges against nine of the twenty-six whites (approximately 34.5%), but all three of the Asians (100%). (RT Vol. 21 5017-5023; RT Vol. 22 5024-5089, 5092-5183.)

In all, three of the prosecutor's seventeen peremptory challenges were to Asians, while twelve were to white jurors; that is, the prosecutor used peremptory challenges to excuse 75% of the prospective Asian jurors, but only 37% of the white jurors. By the time the prosecutor accepted any of the jury panels, none of the remaining jurors who had been examined and passed for cause were Asian (RT Vol. 22 5242, 5249, 5303).[35] (Cf. *People v. Thomas* (2012) 53 Cal.4th 771, 796 [in holding that the trial court did not err in ruling that the defendant had not established a prima facie case of racial discrimination, this Court observed that the prosecution repeatedly accepted jury panels which included African–Americans]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1294-1295 [in holding that the trial court did not err in finding no prima facie case of gender discrimination, this Court observed that the prosecutor repeatedly accepted jury panels with seeming

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[35] Defense counsel exercised a peremptory challenge to the fourth Asian prospective juror, R.F. (RT Vol. 23 5266.) Of course, this Court has recognized that the propriety of the prosecutor's peremptory challenges must be determined without regard to defense counsel's exercise of peremptory challenges. (*People v. Snow* (1987) 44 Cal.3d 216, 225.)

disregard for the number of females or the ratio of female to male jurors]; *People v. Bonilla, supra*, 41 Cal.4th at p. 346 [in holding that the trial court did not err in finding no prima facie case of gender discrimination, this Court noted that the prosecution's pattern of peremptories did not suggest it attempted to, nor did it in fact, deprive Bonilla of a jury containing a fair cross-section of men and women].) Therefore, all of the seated jurors were white. (RT Vol. 23 5303, 5305; Quest./Exh. CT Vol. 35 9495 [Juror no. 10], 9628 [Juror no. 2]; Quest./Exh. CT Vol. 37 10009 [Juror no. 3], 10161 [Juror no. 12]; Quest./Exh. CT Vol. 38 10237 [Juror no. 1]; Quest./Exh. CT Vol. 43 11740 [Juror no. 11], 11778 [Juror no. 7], 11816 [Juror no. 4]; Quest./Exh. CT Vol. 44 12102 [Juror no. 6], 12140 [Juror no. 9]; Quest./Exh. CT Vol. 46 12635 [Juror no. 8]; Quest./Exh. CT Vol. 47 12845 [Juror no. 5].)

With respect to the prospective alternate jurors, the prosecutor did not exercise any peremptory challenges. At the time the parties accepted the alternates, there were three whites and one Asian. (RT Vol. 23 5310-5340; Quest./Exh. CT Vol. 36 9704 [Alternate Juror no. 3]; Quest./Exh. CT Vol. 38 10313 [Alternate Juror no. 4], 10332 [Alternate Juror No. 2]; Quest./Exh. CT Vol. 47 12864 [Alternate Juror No. 1].) Alternate Juror No. 3, who was white, later replaced a seated juror. (RT Vol. 24 5657.) Consequently, appellant's jury remained all white.

As demonstrated in the previous section, there was no obvious, race-neutral reason why the prosecutor would have excused N.V. Thus, given how few Asians were in the jury pool, it is telling that the prosecutor used his second and third peremptory challenges to remove F.S. and N.V. (RT Vol. 21 5002, 5017.) As it happened, another Asian, L.W., was randomly selected to replace F.S., but he ultimately excused her too. (RT Vol. 22

5002, 5183.)[36] As a result, the ultimate composition of the jury (0% Asians) was significantly different from that of the pool of jurors who were examined and passed for cause (9.5% Asians). (Cf. *People v. Bonilla*, *supra*, 41 Cal.4th at p. 346 [holding that the defendant failed to make a prima facie case of gender discrimination during jury selection, in part because the ultimate composition of the jury mirrored that of the juror pool].)

Under these circumstances, it cannot be said that the trial court engaged in a sincere and evaluation of the prosecutor's intent. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 476 [prosecutor challenged all five prospective African-American jurors, resulting in none on the actual jury]; *Miller–El v. Dretke*, *supra*, 545 U.S. at pp. 240–241 [prosecutor challenged nine of ten prospective African-American jurors, resulting in only one on the actual jury]; cf. *People v. Jones*, *supra*, 51 Cal.4th at p. 362 [prosecutor challenged African-Americans at a rate only slightly higher than their percentage on the jury, and, if he had exercised one fewer challenge against African-Americans, he would have challenged them at a rate *lower* than their percentage on the jury].) At a minimum, it cannot be said that the trial court's ruling was supported by substantial evidence.

5. Comparative Juror Analysis Further Demonstrates That the Prosecutor's Reasons for Striking N.V. Were Pretextual

Respondent next dismisses appellant's comparisons of N.V. and otherwise-similar white jurors and alternate jurors. (RB 48-56.) In so

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[36] It is likely that the prosecutor waited some time before excusing L.W. to avoid seeming blatant about it, lest appellant renew his *Batson/Wheeler* motion.

contending, respondent claims that comparative juror analysis is only one consideration and will not, standing alone, warrant a conclusion on appeal that there was discriminatory intent. (RB 48, citing *People v. Mills*, *supra*, 48 Cal.4th at p. 177; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 624-627.) Respondent further contends that appellant ignores the fact that each of the circumstances he relies upon in his comparative analysis was only one factor which, when taken in consideration with all of the others, formed the basis for N.V.'s excusal. (RB 49.) Respondent's analysis is flawed.

a. Under Certain Circumstances, Comparative Juror Analysis, Standing Alone, May Suffice to Warrant a Finding That a Peremptory Challenge Was Exercised for Improper Race-Based Reasons

Appellant finds nothing in either *Miller-El II* or *Snyder* indicating that comparative juror analysis may never suffice to overturn a trial court's factual findings. Rather, in each of those cases, the high court concluded that the totality of factors, including comparative juror analysis, demonstrated that the prosecutor exercised peremptory challenges in violation of *Batson*. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 483-485; *Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 253-265.) Thus, in his opening brief (AOB 136, fn. 62), appellant argued that this Court has interpreted *Miller-El v. Cockrell* (*Miller-El I*) (2003) 537 U.S. 322 and its progeny too narrowly. Although the defense in *Miller-El I* presented evidence of the prosecutor's discriminatory intent other than comparative analysis – e.g., evidence that the prosecutor used peremptory challenges to strike 91% of eligible Black jurors but only 13% of eligible non-Black jurors; the prosecutor used a "jury shuffling" procedure to increase the likelihood that preferable venire members would be empaneled; and, the District

Attorney's office had a systematic policy to exclude minority jurors (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 531-535) – the United States Supreme Court has not suggested that such a showing is necessary to establish a *Batson* violation. Indeed, in *Snyder v. Louisiana*, the Supreme Court found a *Batson* violation based upon on nothing more than (1) a comparison of the prosecutor's stated reasons with what the challenged juror actually said, and (2) comparative juror analysis. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-486.)

Upon a close reading of *Mills* and *Lenix*, it is not clear that this Court has in fact declared that comparative juror analysis, standing alone, can never warrant a conclusion on appeal that there was discriminatory intent. In *Mills*, this Court stated that "We have recently explained that '[c]omparative juror analysis is a form of circumstantial evidence' [*People v. Lenix*, *supra*, 44 Cal.4th at p. 627] courts can use to determine the legitimacy of a party's explanation for exercising a peremptory challenge, although such evidence *may* not alone be determinative of that question [*id.* at p. 626], can be misleading, especially when not raised at trial [*id.* at p. 620], and has inherent limitations given the '[m]yriad subtle nuances' of a person's demeanor that might communicate meaning to an attorney considering a challenge [*id.* at p. 622]." (*People v. Mills*, *supra*, 48 Cal.4th at p. 177; emphasis added.) In *Lenix*, this Court observed that, in *Miller-El v. Dretke*, *supra*, 545 U.S. 231 and *Snyder v. Louisiana*, *supra*, 552 U.S. 472, the high court examined all relevant circumstances, including comparative juror analysis, in determining whether the prosecutors had engaged in purposeful discrimination. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 626.) Although this Court stated that "[t]he [United States Supreme C]ourt did not rule that comparative juror analysis, standing alone, would be

sufficient to overturn a trial court's factual finding" (*ibid.*), this does not mean that comparative juror analysis can *never* suffice to overturn a trial court's factual findings. Rather, a close reading of *Lenix* suggests that comparative juror analysis alone may suffice to demonstrate intentional discrimination, at least where the evidence does not reasonably justify a trial court's finding that the prosecutor's reasons for exercising the peremptory challenge were not impermissibly race-based. (*Id.* at pp. 627-628.)

Therefore, appellant submits that, at least under certain circumstances, comparative juror analysis will suffice to show that the prosecutor's stated reasons for exercising a peremptory challenge were pretextual. Indeed, appellant observes, in a similarly critical context – i.e., the guilt-or-innocence phase of a defendant's trial – circumstantial evidence may suffice to prove any fact. (See *People v. Bean* (1988) 46 Cal.3d 919, 932; *People v. Anderson* (2007) 152 Cal.App.4th 919, 930; CALJIC Nos. 2.00, 2.01 and 2.02; CALCRIM Nos. 223 and 224.) However, assuming arguendo that this Court endorses respondent's position, appellant respectfully requests that this Court revisit its analysis of *Miller-El* and *Snyder* in light of his comments above.

b. Comparative Juror Analysis Further Demonstrates That the Prosecutor's Reasons for Striking N.V. Were Pretextual

As appellant discussed in his opening brief, the prosecutor stated that he excused N.V. based on the following factors: his age; he was single; he was childless; he was a postal worker; and, he lacked an opinion on the death penalty. However, the prosecutor did not excuse otherwise-similar white jurors and alternate jurors. (AOB 129, 138-141.)

Again, respondent contends that appellant ignores the fact that each

of the circumstances he relies upon in his comparative analysis was only one factor which, when taken in consideration with all of the others, formed the basis for N.V.'s excusal. (RB 49.) Respondent further denies that the white jurors and alternate jurors discussed in appellant's comparative juror analysis were similarly situated to N.V. (RB 49-56.) Respondent's analysis is flawed.

As appellant demonstrates below, respondent repeatedly relies upon the mistaken notion that jurors must be virtually identical to be deemed "similarly situated." (See *Reed v. Quarterman*, *supra*, 555 F.3d at p. 376; *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3.) Moreover, as appellant discusses below, respondent identifies a number of supposedly distinguishing factors which, in fact, have no evident relevance to show N.V.'s unsuitability as a juror.

(i) N.V.'s Age

One of the prosecutor's reasons for excusing N.V.'s was his age (i.e., 45 years old), yet five seated jurors and three alternate jurors were of or near the same age. (AOB 138, citing RT Vol. 21 5018; Quest./Exh. CT Vol. 35 9628 [Juror No. 2 (48 years old)]; Quest./Exh. CT Vol. 36 9704 [Alt. Juror No. 3 (47 years old)]; Quest./Exh. CT Vol. 37 10161 [Juror No. 12 (45 years old)]; Quest./Exh. CT Vol. 38 10237 [Juror No. 1 (46 years old)]; Quest./Exh. CT Vol. 38 10313 [Alt. Juror No. 4 (45 years old)]; Quest./Exh. CT Vol. 46 12635 [Juror No. 8 (45 years old)]; Quest./Exh. CT Vol. 47 12845 [Juror No. 5 (49 years old)]; Quest./Exh. CT Vol. 47 12864 [Alt. Juror No. 1 (42 years old)].)

This Court has stated that "'[t]wo panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on

balance, more or less desirable.' [Citation.]" (*People v. Jones*, supra, 51 Cal.4th at p. 365.) Accordingly, respondent contends that the prosecutor reasonably could have chosen not to excuse Juror Nos. 1, 2, 5, 8, and 12, and Alternate Juror Nos. 1, 3 and 4, because, unlike N.V., they were married and (except for Juror Nos. 5 and 12) had children. (RB 49-50, 53-55.)[37] However, respondent's suggestion is undermined by the fact the prosecutor did not excuse Juror No. 3, who was single and childless, or Juror Nos. 6 and 12, who were childless. (AOB 139-140.)

In addition, this Court must reject respondent's suggestion that, based on the educational backgrounds of the jurors and alternate jurors, they

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[37] Respondent questions whether comparative analysis should include alternate jurors, on the grounds that (1) in selecting alternates, the number of peremptory challenges is severely limited, and (2) that different considerations come into play once the actual jury is seated and the focus is on alternate jurors. (RB 49, fn. 8.) However, this Court has apparently put the question to rest, as it recently considered a comparative juror analysis which included comparisons to alternate jurors. (*People v. Elliott* (2012) 53 Cal.4th 535, 563-563.) In any event, appellant submits that the rationale underlying comparative juror analysis is as applicable to alternate jurors as it is to seated jurors. Although the number of peremptory challenges is limited, so is the number of alternates to be selected. More important, counsel necessarily engage in the selection of alternate jurors with the awareness that one or more of the alternates may ultimately serve on the actual jury. (See, e.g., *Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1049 ["Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors. (Code Civ.Proc., §§ 233, 234.)"].) Indeed, one of the alternate jurors in this case was called to replace a seated juror. (RT Vol. 24 5657.)

were not similarly situated to N.V. (RB 49-55.) Because none of the prosecutor's stated reasons related to N.V.'s educational background or intellectual abilities, the fact that the jurors and alternates had attended college, whereas N.V. was a high school graduate (Quest./Exh. CT Vol. 40 10962), cannot be used to uphold the trial court's ruling. (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252 ["when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis"]; *People v. Jones*, *supra*, 51 Cal.4th at pp. 365-366.)

Similarly, this Court must reject respondent's suggestion that, in light of their occupations, the jurors and alternate jurors were not similarly situated to N.V. While none of the jurors except Alternate Juror No. 4 (discussed in Section (C)(5)(iv), *post*) was a postal worker, neither the prosecutor nor respondent has explained why they were differently situated from N.V. on that basis. (RB 49-55.) As appellant has pointed out, jurors need not be identically situated to be meaningfully compared. (*Reed v. Quarterman*, *supra*, 555 F.3d at p. 376; *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3.)

Appellant acknowledges that Juror No. 5 opined that the death penalty is a necessary punishment in certain cases, and that it is not imposed often enough. (RB 52, citing Quest./Exh. CT Vol. 47 12846; RT Vol. 22 5121.) However, he also stated that he was "pretty much middle of the road" with respect to the possible penalties in this case. (RT Vol. 22 5119; see also RT Vol. 22 5124 [stating that he could vote for either penalty.) In this respect, Juror No. 5's responses were similar to N.V.'s statements affirming he would be willing to vote for either death or life imprisonment

without possibility of parole. (Quest./Exh. CT Vol. 40 10972-10975.) As such, respondent's contention that Juror No. 5 was not similarly situated to N.V. is without merit.

Respondent also suggests that Alternate Juror No. 3 was not similarly situated to N.V. because several of his family members had been hospitalized. (RB 55.) However, respondent ignores Alternate Juror No. 3's comments regarding substandard medical care received by those family members, experiences that should have evoked the prosecutor's concern that he would favor the defense. For instance, he explained that, "[i]n the case of my niece, paramedics were dispatched or mistakenly went to the wrong school, where my niece was choking on food. She died the next day." (Quest./Exh. CT Vol. 36 9711.) He also commented that, "thru [*sic*] my wife's comments, the feeling was that my [mother-in-law's] care was not always the best," and that "my sister always monitored drug administration [to Alternate Juror No. 3's niece], after a near serious mistake was made." (Quest./Exh. CT Vol. 36 9710.) On voir dire he was asked whether he could keep the experience involving his niece out of his mind while listening to the evidence in this case, and he responded equivocally: "I think I could. There is a lot of – it might bring back some memory what happened with my niece, but I think I could let that go." (RT Vol. 23 5317; see also Quest./Exh. CT Vol. 36 9720 [Alternate Juror No. 3 stated, "Many of the circumstances resulting in my niece's 3 month hospitalization and then ultimate death, came back to me while filling out this questionnaire"].)[38]

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[38] As noted in footnote 37, *ante*, Alternate Juror No. 3 replaced a seated juror. (RT Vol. 24 5657.)

Alternate Juror No. 3's comment that he would always vote for death in cases involving torture/murder, especially of a child, is immaterial given that this case involved neither torture nor children. (RB 55, citing Quest./Exh. CT Vol. 36 9717.) Although Alternate Juror No. 3 did not "feel murder is right," he allowed that "[d]epending on why [appellant] committed the crimes, based on his mother[']s care could prove to be a factor." (Quest./Exh. CT Vol. 36 9717.) Under these circumstances, respondent's contention that Alternate Juror No. 3 was not similarly situated to N.V. is without merit.

Thus, a comparison between the answers given by N.V. and those prospective jurors who were not struck fatally undermines the prosecutor's credibility. (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427.) This Court should conclude that the prosecutor's reference to N.V.'s age was pretextual and, as such, was evidence of discriminatory intent. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 484-485 ["The prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent"]; *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192.)

(ii) N.V.'s Marital Status

One of the prosecutor's stated reasons for excusing N.V. was that he was single, yet he failed to excuse Juror No. 3, who also was single. (AOB 139, citing RT Vol. 21 5018; Quest./Exh. CT Vol. 37 10009.) Respondent acknowledges that Juror No. 3 was single, but contends that he was distinguishable from N.V. because he was single and childless at 22 years old. (RB 51.) However, respondent's suggestion must be rejected. As appellant has demonstrated (AOB 139-140), the prosecutor's statement that he excused N.V. because he had no children is belied by the fact that he did

not also excuse Juror Nos. 3, 6 and 12, who also were childless. (*Burks v. Borg*, *supra*, 27 F.3d at p. 1427.) Consequently, there is reason to doubt the genuineness of the prosecutor's claim that he excused N.V. in part because he was single. (See, e.g., *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830 ["[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination"]; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1331 ["When there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it"].) Accordingly, this Court should conclude that the prosecutor's reference to N.V.'s being single was pretextual and, as such, was evidence of discriminatory intent. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 484-485; *Ali v. Hickman*, *supra*, 584 F.3d at p. 1192.)

(iii) N.V.'s Lack of Children

As noted above, the prosecutor stated that he excused N.V. because N.V. had no children, yet he failed to excuse Juror Nos. 3, 6 and 12, who were also childless. (AOB 139-140, citing RT Vol. 21 5018; Quest./Exh. CT Vol. 37 10009, 10161; Quest./Exh. CT Vol. 44 12102.)

Respondent acknowledges that Juror Nos. 6 and 12 were childless, but contends that they were distinguishable from N.V. because they were married. (RB 52-53.) However, respondent's suggestion is undermined by the fact the prosecutor did not excuse several jurors and alternate jurors who were of or near the same age as N.V., nor did he excuse Juror No. 3, who also was unmarried. (AOB 138-139.)

Respondent further attempts to demonstrate that Juror No. 6 was not similarly situated to N.V. for the following reasons: he had been a safety

officer at the U.S.C. Medical Center's Radiology Department for 35 years; he remembered appellant's case from the news, and recalled that staff members at his workplace had discussed the case; he had undergone surgery at West Anaheim Medical Center a few months before being called for jury duty; and, he felt that all child murderers should be put to death. (RB 52, citing Quest./Exh. CT Vol. 44 12107; RT Vol. 21 4986-4987.) However, these facts hardly distinguish Juror No. 6 from N.V.

First, N.V. stated that he had read a newspaper article about the incident, though he had not paid much attention to the case nor discussed it with anyone. (Quest./Exh. CT Vol. 40 10964-10965.) Second, Juror No. 6 assured the court that his experience at West Anaheim Medical Center would not affect his ability to be impartial. (RT Vol. 21 4986.) As he explained, the fact that he worked in a hospital would not affect him:

> I feel like I have been on both sides of the fence, and on the fence. I have had parents who have been very, very ill, and I have had to take time off from work, and I had to care for them. My dad did pass away, and my mom is very ill now. [¶] I have been working in a hospital for 35 years, so I have had my experience with disgruntled employees and disgruntled patients and relatives, and I have been ill myself.

(RT Vol. 21 4991.) Third, Juror No. 6's beliefs with respect to child murders are irrelevant in that this case does not involve crimes against children. Moreover, his support for the death penalty was not as strong as respondent suggests; as respondent itself acknowledges (RB 52-53), Juror No. 6 explained on voir dire that he no longer felt death sentences were too seldom utilized. (RT Vol. 21 4986-4988.) Finally, as respondent acknowledges (RB 52), Juror No. 6 was similar in age to N.V. and said he wanted to be a juror. (Quest./Exh. CT Vol. 44 12102-12103; RT Vol. 21

4990; see also RT Vol. 21 4995 [Juror No. 6 stated, "I am happy to serve if chosen"].) Under these circumstances, respondent's contention that Juror No. 6 was not similarly situated to N.V. is without merit.

Thus, a comparison between the answers given by N.V. and those prospective jurors who were not struck fatally undermines the prosecutor's credibility. (*Burks v. Borg*, *supra*, 27 F.3d at p. 1427.) This Court should conclude that the prosecutor's reference to the fact that N.V.'s had no children was pretextual and, as such, was evidence of discriminatory intent. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 484-485; *Ali v. Hickman*, *supra*, 584 F.3d at p. 1192.)

(iv) N.V.'s Occupation

The prosecutor stated that he excused N.V. partly because he was a postal worker, yet the prosecutor did not also excuse Alternate Juror No. 4, a consumer affairs associate/clerk for the Postal Service. (Quest./Exh. CT Vol. 38 10314; RT Vol. 21 5018; RT Vol. 23 5320.) Respondent argues that Alternate Juror No. 4 was not similarly situated to N.V. for the following reasons: he was married and had children; he had some college education; his aunt was a nurse and his friend was an anethesiologist; several of his family members had been hospital patients, and he believed that their care had been good; as a motel clerk, he had been robbed at gunpoint more than once; a friend of his had been murdered 10 years earlier; and, his brother was a close friend of Benjamin Brenneman, who had been murdered 20 years earlier, and whose killer was still on death row. (RB 55-56.) Each of the reasons suggested by respondent must be dismissed, as demonstrated below.

First, respondent's contention is undermined by the fact the prosecutor did not excuse Juror No. 3, who was single and childless, nor did

he excuse Juror Nos. 6 and 12, who were childless. (AOB 139-140.) Thus, a comparison between the answers given by N.V. and those prospective jurors who were not struck fatally undermines the prosecutor's credibility. (*Burks v. Borg*, *supra*, 27 F.3d at p. 1427.)

Second, as appellant has already pointed out, Alternate Juror No. 4's occupation and educational background are irrelevant to the issue of whether he and N.V. were similarly situated. (Section (C)(5)(b)(i), *ante*.)

Finally, respondent fails to note that Alternate Juror No. 4 affirmed on voir dire that the remaining factors – i.e., the fact that his aunt was a nurse; his mother's hospitalization; the instances in which he had been robbed; his experiences as a motel clerk; and, his familiarity with two murder cases – would have no impact on his ability to be impartial. (RT Vol. 23 5319-5320.) Significantly, he did not believe that the latter two factors would influence his decision because he recognized that every case is different, particularly in light of the fact that this case does not involve robbery, child molestation or the murder of a child. (RT Vol. 23 5329.) Therefore, the prosecutor had little if any reason to believe that Alternate Juror No. 4 was likely to favor the prosecution.

Accordingly, this Court should conclude that the prosecutor's reference to the fact that N.V.'s had no children was pretextual and, as such, was evidence of discriminatory intent. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 484-485; *Ali v. Hickman*, *supra*, 584 F.3d at p. 1192.)

(v) N.V.'s Lack of Opinion Regarding the Death Penalty

The prosecutor claimed that he excused N.V. because he had no opinion regarding the death penalty and was too eager to please, yet the prosecutor did not excuse other prospective jurors who gave similar responses. (AOB 140-141, citing RT Vol. 21 5018-5019; RT Vol. 23 5337-5338; Quest./Exh. CT Vol. 37 10021 [Juror No. 3]; Quest./Exh. CT Vol. 38 10249 [Juror No. 1]; Quest./Exh. CT Vol. 47 12876 [Alt. Juror No. 1].) Moreover, the prosecutor agreed with the court's assessment that N.V. "was really just quick to give a yes or no answer to satisfy the question" (RT Vol. 21 5019), yet other jurors and alternate jurors gave similarly brief responses during voir dire by the prosecutor. (See RT Vol. 21 4885-4887 [Juror No. 12]; RT Vol. 22 5047-5049 [Juror No. 8], 5103 [Juror No. 2], 5107-5108 [Juror No. 1]; RT Vol. 23 5337-5338 [Alt. Juror No. 1].) Respondent attempts to distinguish each of these jurors, contending that they were not similarly situated to N.V. However, for the reasons set forth below, respondent's contention must be rejected.

As respondent acknowledges (RB 49-50), Juror No. 1 responded to a question about whether the death penalty is imposed too often, too seldom, or randomly, as follows:

> I'm not sure. Because I don't follow murder cases often or at all. I actually don't know how often (what percentage) the death penalty is imposed.

(Quest./Exh. CT Vol. 38 10249.) However, respondent contends that Juror No. 1 was not similarly situated to N.V. because: in discussing her general feelings about the death penalty, Juror No. 1 responded, "For the appropriate circumstances it has its place. But I think that each case must be looked at individually and carefully" (Quest./Exh. CT Vol. 38 10249);

she stated that she had no conscientious objection to the death penalty, thought it should be imposed for crimes involving the torture/murder of children, and that, in cases involving multiple murder, she would examine the killer's motives (Quest./Exh. CT Vol. 38 10250); and, she commented that a list of factors the jury would be asked to consider in determining the appropriate penalty "looks like a good list," and opined that "the feelings of the victim's family should be looked at" (Quest./Exh. CT Vol. 38 10251; see also RT Vol. 22 5107)

However, Juror No. 1's responses were substantively similar to N.V.'s questionnaire and voir dire responses, which made clear that he would have made a suitable juror. Among other things, N.V. affirmed that he could follow the law as the court explained it; he was willing to consider all of the aggravating and mitigating factors listed in the questionnaire, and he believed he could be fair, objective and completely open to either penalty; and, he promised to freely discuss the law and evidence with fellow jurors during deliberations. (Quest./Exh. CT Vol. 40 10972-10976; RT Vol. 21 4964, 4977, 4981, 4983-4984.)

Respondent is also incorrect in suggesting that Juror No. 1 would have been a desirable juror to the prosecutor because she had worked in a hospital for four years,[39] her sister was a secretary at a hospital, and her mother was a retired nurse. (RB 50, citing RT Vol. 22 5104; Quest./Exh. CT Vol. 38 10243.) Respondent ignores the fact that Juror No. 1 suggested that this was "probably an isolated incident" (RT Vol. 22 5105), and therefore the fact that it occurred in a hospital would not lead her to think

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[39] In fact, Juror No. 1 stated that she worked as an emergency room admitting clerk for one to two years. She also worked as a "psych aide" for two years, but did not say where. (Quest./Exh. CT Vol. 38 10243.)

her mother could have been one of the victims (RT Vol. 22 5106). Even assuming the prosecutor could conclude that Juror No. 1's background might have led her to identify with the hospital workers in this case, and therefore to favor the prosecution, a postal worker likely would be at least as sensitive to issues relating to workplace violence, and therefore to favor the prosecution. Indeed, the phrase "going postal," used to describe violent workplace rampages, had entered the popular lexicon well before appellant's trial. (See, e.g., Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill"* (2001) 34 U.C. Davis L.Rev. 849, 850; Laden & Schwartz, *Psychiatric Disabilities, the Americans With Disabilities Act, and the New Workplace Violence Account* (2000) 21 Berkeley J. Emp. & Lab. L. 246, 250-251, 253; see also Jamison, *Hate Mail* (Mar. 7, 2012) SF Weekly, pp. 9-13.)

Respondent contends that Juror No. 3 was not similarly situated to N.V. because he stated that the murder of three people by one person encouraged him to lean towards a stricter punishment (RB 51, citing Quest./Exh. CT Vol. 37 10014), and he opined that the death penalty was automatically warranted in cases involving "planned murders by serial killers, including murdering families" (RB 51, citing Quest./Exh. CT Vol. 37 10014). However, respondent acknowledges that Juror No. 3 "refused to give a general opinion on the death penalty" and felt that the death penalty was imposed too often. (RB 51.) Specifically, Juror No. 3 stated that "I can only form my opinion in specific cases because I cannot decide one way or another, which is best." (Quest./Exh. CT Vol. 37 10021.) Indeed, as

respondent itself points out (RB 51, citing RT Vol. 24 5268),[40] Juror No. 3 affirmed that he was *equally open* to either penalty. Finally, his remarks regarding serial killers and the murders of families were irrelevant, in that neither was involved in this case.

Juror No. 3's responses were thus substantively similar to N.V.'s statements that he was objective, emotionally stable, and did not form judgments based on personal feelings (Quest./Exh. CT Vol. 40 10963); he would keep an open mind with respect to expert testimony (Quest./Exh. CT Vol. 40 10963; RT Vol. 21 4977); he could be a fair and impartial juror (Quest./Exh. CT Vol. 40 10965, 10968-10969; RT Vol. 21 4964, 4977, 4981, 4983-4984); he could follow the law as the court explained it (Quest./Exh. CT Vol. 40 10972); he was willing to consider all of the aggravating and mitigating factors listed in the questionnaire, and would be willing to vote for either death or life imprisonment without possibility of parole (Quest./Exh. CT Vol. 40 10972-10976; RT Vol. 21 4964, 4977, 4981, 4983-4984); and, he promised to freely discuss the law and evidence with fellow jurors during deliberations (Quest./Exh. CT Vol. 40 10976).

Appellant acknowledges that Juror No. 3 stated that his brother was in medical school and that he feared, and would like to prevent, violent incidents in a hospital setting. (RB 51, citing Quest./Exh. CT Vol. 37 10015.) However, respondent again ignores the fact that N.V., as a postal worker, would have been at least as sensitive to issues relating to workplace violence, and therefore to favor the prosecution.

Respondent's contentions as to why Alternate Juror No. 1 was not

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[40] Juror No. 3's response on this question actually appears at RT Vol. 23 5268.

similarly situated to N.V. are likewise without merit, as her responses were substantively identical to N.V.'s questionnaire and voir dire responses. As respondent acknowledges (RB 54), Alternate Juror No. 1 declined to express an opinion as to whether the death penalty was imposed too frequently, too seldom, or randomly, and explained that she had not followed all cases charged as death cases or their end results. Asked about her general feelings regarding the death penalty, she merely replied, "It is an option." (Quest./Exh. CT Vol. 47 12876.) She stated that she wanted to be a juror. (RT Vol. 23 5337-5338.) Finally, she stated that she was open to both penalties and could be the one to sign a verdict form sentencing appellant to death. (RT Vol. 23 5338-5339.)

With respect to other factors listed by respondent (RB 54), Alternate Juror No. 1's responses were similar to those of N.V. For instance, she read about the case in the newspaper, but could recall nothing about the incident beyond the facts set forth in the questionnaire. (Quest./Exh. CT Vol. 47 12868.) Under these circumstances, respondent's contention that Alternate Juror No. 1 was not similarly situated to N.V. is without merit.

Finally, as noted above, the prosecutor agreed with the court's assessment that N.V. "was really just quick to give a yes or no answer to satisfy the question" (RT Vol. 21 5019), yet Juror Nos. 2, 8 and 12 gave similarly brief responses during voir dire by the prosecutor. (See RT Vol. 21 4885-4887; RT Vol. 22 5047-5049, 5103.) For the reasons set forth below, this Court should reject respondent's contentions as to why those jurors were not similarly situated to N.V.

Respondent points out that Juror No. 2 stated that she had read about the case in the newspaper (RB 50, citing Quest./Exh. CT Vol. 35 9632), but ignores N.V.'s statement that he had read a newspaper article about the

incident (Quest./Exh. CT Vol. 40 10964-10965). Similarly, respondent notes that Juror No. 2 stated that she could be impartial (RB 51, citing RT Vol. 22 5102), but ignores N.V.'s statements that he was objective, emotionally stable, and did not form judgments based on personal feelings (Quest./Exh. CT Vol. 40 10963); he would keep an open mind with respect to expert testimony (Quest./Exh. CT Vol. 40 10963; RT Vol. 21 4977); he could be a fair and impartial juror (Quest./Exh. CT Vol. 40 10965, 10968-10969; RT Vol. 21 4964, 4977, 4981, 4983-4984); he could follow the law as the court explained it (Quest./Exh. CT Vol. 40 10972); he was willing to consider all of the aggravating and mitigating factors listed in the questionnaire, and would be willing to vote for either death or life imprisonment without possibility of parole (Quest./Exh. CT Vol. 40 10972-10975); and, he promised to freely discuss the law and evidence with fellow jurors during deliberations (Quest./Exh. CT Vol. 40 10976).

Respondent also contends that because Juror No. 2 was a registered nurse and "several" of her family members were health care professionals, she was not similarly situated to N.V. (RB 50-51, citing Quest./Exh. CT Vol. 35 9629, 9634.)[41] However, respondent ignores the fact that, on voir dire, Juror No. 2 engaged in the following exchange:

> [Defense counsel]: A nurse was killed in this case, and it involves a hospital. So even if it wasn't a nurse there, there are hospital employees. How could you think that is going to impact you in this case?
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> [Juror No. 2]: You know, I have thought a lot about that. In my opinion a hospital is just a place of

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[41] She actually indicated that two, not several, family members were in the health care field. (Quest./Exh. CT Vol. 35 9634.)

> employment. So the fact that the murders occurred in the hospital really has no bearing on this case at all. I don't currently work in the hospital, but it shouldn't have any bearing on the case at all. The fact is that it happened.

(RT Vol. 22 5100.) She subsequently reiterated her stance, as follows:

> [Defense counsel]: Do you think you might find yourself identifying too strongly or maybe even thinking about your daughter [a registered nurse] too much that might bias you in this case?
>
> [Juror No. 2]: I really don't think so. I have thought a lot about that since yesterday. And again a hospital is a place of employment, and right now my job, I don't work with a lot of nurses. I work in the school setting, so I have contact with other people as well.

(RT Vol. 22 5101.) Moreover, respondent again ignores the fact that N.V., as a postal worker, would have been at least as sensitive to issues relating to workplace violence, and therefore to favor the prosecution. Under these circumstances, respondent's contention that Juror No. 2 was not similarly situated to N.V. is without merit.

Respondent notes that Juror No. 8 stated that her brother-in-law worked for the Riverside County Sheriff's Department (RB 53), but ignores the fact that, in the very same sentence, she added, "and I think I can be fair and impartial." (RT Vol. 22 5044.) Contrary to respondent's position (RB 53), her support for the death penalty in "heinous crime cases, *i.e., Ted Bundy*" (Quest./Exh. CT Vol. 46 12647), her belief that the death penalty was not overused in California (Quest./Exh. CT Vol. 46 12647), and her

belief that it was appropriate in cases involving mass murders and extremely heinous crimes (RT Vol. 22 5044; Quest./Exh. CT Vol. 46 12647-12648), were irrelevant in that none of those situations were involved in the instant case. Indeed, Juror No. 8 explained that she did not view the instant case as involving a mass murder, which she considered in terms of "like a Columbine, huge, big type of thing." (RT Vol. 22 5045.)[42] In any event, she affirmed that she would evaluate the mitigating as well as aggravating circumstances, and that she was equally open to both penalties. (RT Vol. 22 5045.) Under these circumstances, respondent's contention that Juror No. 8 was not similarly situated to N.V. is without merit.

Finally, and contrary to respondent's position (RB 53-54), Juror No. 12's comments regarding the death penalty did little to distinguish her from N.V. First, although she gave a relatively lengthy response as to whether she believed the death penalty was imposed too frequently, not enough, or randomly, her comment describing her general feelings about the death penalty was neutral, not pro-prosecution: "I believe that it should exist as an option to be imposed when a jury it feels it is appropriate." (Quest./Exh. CT Vol. 37 10173, cited at RB 53-54.) Her dialogue with defense counsel is largely irrelevant, even assuming it can fairly be characterized as "extensive" (RB 54), as it related only in part to her views on the death penalty. (RT Vol. 21 4885-4887, 4917-4919.)[43] In this respect, Juror No.

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[42] Juror No. 8 also explained that by "mass murders," she was referring to "that term 'serial killer,' something like that." (RT Vol. 22 5044.)

[43] Respondent also cites to RT Vol. 21 4852 (apparently referring to 4952) and 4953, which reflect voir dire by the prosecutor, not defense counsel. (RB 54.)

12's responses were similar to N.V.'s statements affirming he would be willing to vote for either death or life imprisonment without possibility of parole. (Quest./Exh. CT Vol. 40 10972-10975.)[44] Therefore, respondent's contention that Juror No. 12 was not similarly situated to N.V. is without merit.

D. The Prosecutor's Improper Peremptory Challenge in this Case Requires That the Entire Judgment Be Reversed

The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva, supra*, 25 Cal.4th at p. 386; see also *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1255, fn. 4.)

"[T]he inadequacy of the prosecutor's reasons was compounded by the court's apparent acceptance of those reasons at face value." (*People v. Turner* (1986) 42 Cal.3d 711, 727; see also *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 ["The trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."].) As in *Turner*, not only did the prosecution fail "to sustain its burden of showing that the challenged prospective jurors were not excluded because of group bias [citation]," but also "the court failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor [citation]." (*People v. Turner, supra*, 42 Cal.3d at p. 728; see also *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.) Moreover, the prosecutor's peremptory

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[44] In his opening brief, appellant erroneously indicated that the prosecutor's voir dire of Juror No. 12 appears at RT Vol. 21 4885-4887; in fact, it is found at RT Vol. 21 4951-4953. (AOB 141.) However, this does not affect appellant's analysis.

challenge operated to systematically remove Asians from the jury, "a grave constitutional trespass" requiring mandatory reversal. (*People v. Turner*, *supra*, 42 Cal.3d at p. 728.)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264, overruled on other grounds by 8 U.S.C. § 2254, subd. (c) [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error]; *Williams v. Woodford* (9th Cir. 2005) 396 F.3d 1059, 1069 ["A *Batson* violation is structural error for which prejudice is generally presumed"].) The trial court's failure to engage in comparative juror analysis and other critical measures virtually guaranteed that it would accept the prosecutor's reasons as proper and race-neutral. (See *Kesser v. Cambra*, *supra*, 465 F.3d at p. 358 ["We hold that the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine."].)

Thus, for the reasons stated above and in appellant's opening brief, reversal of the judgment of death is required because the record clearly reveals that the prosecution's purported race-neutral explanations were pretexts for purposeful discrimination. (See *Ali v. Hickman*, *supra*, 584 F.3d at p. 1182 [concluding that where "'an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's non-racial grounds,' we are 'compell[ed] [to conclude] that his actual and only reason for striking [the relevant juror] was her race'"].)

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III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE SPECIAL I, A DEFENSE-REQUESTED INSTRUCTION EXPLAINING THE CONCEPT OF "PROVOCATION"

In his opening brief, appellant argued that the trial court erred in refusing to give a proposed pinpoint instruction, Special I, which related evidence regarding the factors affecting appellant's mental state (including grief and caregiver stress) to the defense theory that appellant was acting in the heat of passion when he shot the victims. As appellant demonstrated, the proposed instruction should have been given to ensure that the jury properly understood the concept of provocation. (AOB 143-160.)[45]

Respondent contends that trial court properly refused the instruction as argumentative, confusing and unnecessary. Respondent further contends that, even assuming error, the trial court's failure to give the proposed instruction was harmless. (RB 57-62.) Respondent's contentions are incorrect.

Respondent concedes that appellant's proposed instruction "did not affirmatively misstate the legal principles underlying the objective

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[45] The proposed instruction read as follows:

> By saying that a defendant is not permitted to set up his own standard of conduct, the court is not instructing you that the question to answer is whether or not a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under. [¶] Rather the question is whether the provocation was such that a reasonable person would commit any act rashly and from passion rather than judgment because of it.

(CT Vol. 2 550.)

component of the heat of passion requirement." (RB 60, fn. 10, quoting *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224.) Nevertheless, respondent contends that the first paragraph of proposed Special I did not convey a principle of law, but instead directed the jury to specific facts and then told the jury not to consider those facts. (RB 60, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 500; *People v. Ledesma* (2006) 39 Cal.4th 641, 720; *People v. Earp* (1999) 20 Cal.4th 826, 886-887; *People v. Mincey* (1992) 2 Cal.4th 408, 437.)

Respondent's analysis is critically flawed because the instruction did not direct the jury to consider "facts" within the meaning of the cases cited by respondent. (See *People v. Hartsch*, *supra*, 49 Cal.4th at pp. 500-504 [trial court properly refused proposed instructions relating to defendant's third party culpability theory, including one which stated that "[e]vidence has been presented during the course of this trial indicating or tending to prove that someone other than the defendant committed, or may have had a motive and opportunity to commit, the offense(s) charged"]; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 720 [trial court did not err in refusing an instruction directing the jury to consider, for the purpose of determining whether there was reasonable doubt as to the defendant's guilt, evidence that another person had the motive or opportunity to commit the crime]; *People v. Earp*, *supra*, 20 Cal.4th at pp. 886-887 [trial court properly refused proposed defense instructions asking that the jury consider information regarding a third party suspect]; *People v. Mincey*, *supra*, 2 Cal.4th at p. 437 [trial court properly refused to give proposed defense instruction which asked that the jury consider, among other things, whether the beatings which caused the victim's death "were a misguided, irrational and totally unjustified attempt at discipline rather than torture"]; see also

People v. Wright (1988) 45 Cal.3d 1126, 1135 [trial court properly refused a proposed defense instruction listing certain specific items of evidence, and advising the jury that it could consider such evidence in determining whether the defendant was guilty beyond a reasonable doubt]; *People v. McNamara* (1892) 94 Cal. 509, 513-514 [trial court properly refused to give a proposed defense instruction telling the jury that in determining whether it had a reasonable doubt of the assailant's identity, it should consider specific evidence listed in the instruction, e.g., that the victim was the sole witness to identify the defendant, that the victim was a stranger to the city, the victim's "condition of sobriety or insobriety," and that the defendant did not flee the city after the crime].)

By contrast, Special I simply clarified the concepts of "provocation" and "heat of passion" set forth in CALJIC No. 8.42. Specifically, the instruction read in pertinent part that, "[b]y saying that a defendant is not permitted to set up his own standard of conduct, the court is not instructing you that the question to answer is whether or not a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under." (CT Vol. 2 550.) As such, the proposed instruction was necessary to explain CALJIC No. 8.42's admonition that "[a] defendant is not permitted to set up his own standard of conduct," and to make clear that provocation need not be such as would cause an ordinarily reasonable person to kill, but only to act rashly. (See *People v. Valentine* (1946) 28 Cal.2d 121, 139; *People v. Najera*, *supra*, 138 Cal.App.4th at p. 223 ["The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of

passion."].) Contrary to respondent's position, the instruction conveyed a principle of law, and not how the jury should consider particular items of evidence.

Respondent also asserts that, by using the word "not" three times in a single sentence, the instruction was confusing and misleading. (RB 60.) Respondent is incorrect, as the jury would have recognized that the instruction was to be parsed in the following manner: (1) by saying that a defendant is not permitted to set up his own standard of conduct, (2) the court is *not* instructing you that the question to answer is whether a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under, (3) but rather whether the provocation was such that a reasonable person would commit *any* act rashly and from passion rather than judgment because of it. (See CT Vol. 2 550.

Respondent's reliance upon *People v. Burney* (2009) 47 Cal.4th 203, 246, is misplaced. (RB 60.) That case did not involve confusing or misleading instructions, but proposed instructions which merely restated existing instructions. (*People v. Burney*, *supra*, 47 Cal.4th at pp. 246-247.) In any event, respondent has failed to address appellant's argument that, even assuming the instruction was potentially confusing, the trial court should have modified it to properly focus the jury's attention on facts relevant to its determination, rather than refuse it altogether. (AOB 156-157, citing *People v. Falsetta* (1992) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Grant* (2006) 113 Cal.App.4th 579, 592.)

Respondent is also incorrect in asserting that Special I was unnecessary because it merely duplicated the language of CALJIC No. 8.42.

(RB 60-61.) According to respondent, the second paragraph of Special I repeated, nearly verbatim, the fourth paragraph of CALJIC No. 8.42. (RB 60.) Even assuming, arguendo, that the two paragraphs say essentially the same thing,[46] respondent itself acknowledges that defense counsel wanted Special I as an addition to CALJIC No. 8.42. (RB 58.) Thus, any non-duplicative portions of Special I easily could have been incorporated into CALJIC No. 8.42.

More important, as appellant has explained (AOB 156), neither CALJIC No. 8.42 nor any other instruction given to the jurors informed them that legally adequate provocation need not be a provocation that would lead an ordinarily reasonable person to kill. (*People v. Valentine*, *supra*, 28 Cal.2d at p. 139; *People v. Najera*, *supra*, 138 Cal.App.4th at pp. 223-224.) Respondent completely fails to explain why the jury would have gleaned this principle from the jury instructions relating to murder (i.e., CALJIC Nos. 8.20 [deliberate and premeditated murder], 8.30 [unpremeditated murder of the second degree], and 8.31 [second degree murder – killing resulting from unlawful act dangerous to life]) or the

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[46] The second paragraph of Special I read, "Rather the question is whether the provocation was such that a reasonable person would commit any act rashly and from passion rather than judgment because of it." (CT Vol. 2 550.) The fourth paragraph of CALJIC No. 8.42 read, "The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment." (CT Vol. 3 621.) Although the two paragraphs are fairly similar, the former does not "repeat[], nearly verbatim," the latter. Indeed, Special I represented a far more concise statement of the legal principle, and therefore was less likely to confuse the jury than was CALJIC No. 8.42.

general instructions relating to manslaughter (i.e., CALJIC Nos. 8.40 [voluntary manslaughter – defined], 8.43 [murder or manslaughter – cooling period], 8.44 [no specific emotion alone constitutes heat of passion], 8.45 [involuntary manslaughter – defined], 8.50 [murder and manslaughter distinguished], and 8.73 [evidence of provocation may be considered in determining degree of murder]). (Cf. *People v. Moon* (2005) 37 Cal.4th 1, 30, cited at RB 61.)

Thus, the question boils down to whether CALJIC Nos. 8.42 and 8.42.1 informed the jury that provocation need not be such as would cause an ordinarily reasonable person to kill.[47] Appellant maintains that they did not. The instructions advised the jurors that (1) legally adequate provocation was provocation such as would "cause an ordinarily reasonable person of average disposition to act rashly or without due deliberation and reflection" (CT Vol. 621), and (2) that the "question to be answered [was] whether or not, at the time of the killing, [appellant's] reason . . . was

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[47] CALJIC No. 8.42 advised the jury in pertinent part as follows: (1) heat of passion "must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances"; (2) "[a] defendant is not permitted to set up his own standards of conduct and to justify or excuse himself unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation"; and, (3) "[t]he question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment." (CT Vol. 3 621.) The relevant portion of CALJIC 8.42.1 was, in effect, a mere restatement of the principle set forth in CALJIC No. 8.42: "The provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (CT Vol. 3 622.)

obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment" (CT Vol. 3 621). What the instructions did *not* tell the jurors was that the provocation need not be such as would cause an ordinarily reasonable person to kill.

Contrary to respondent's position (RB 59), it is immaterial that CALJIC No. 8.42 referred to malice aforethought, a state of mind which applies only when there is a killing. In the absence of Special I, the jury could not have known whether they should focus on the level of provocation or on appellant's response in determining whether he acted in the heat of passion. (See *People v. Najera*, *supra*, 138 Cal.App.4th at p. 223, discussed in greater detail, *post*.) Nor could the jury have properly determined whether the provocation was legally adequate if they believed that it must be such as would lead an ordinarily reasonable person to kill. (See *People v. Valentine*, *supra*, 28 Cal.2d at p. 139; *People v. Najera*, *supra*, 138 Cal.App.4th at p. 223.)

The trial court's failure to give Special I was especially prejudicial in light of the prosecutor's argument, which suggested that an ordinarily reasonable person would not have killed under the circumstances faced by appellant, or, in other words, that appellant was attempting to set up his own standard of conduct. Specifically, the prosecutor argued as follows:

> There is an ordinarily reasonable person in the same circumstances. There is a standard. We say, you know, if I was that person, and I caught somebody molesting my daughter, that is an ordinarily reasonable person might go kill. That is reasonable. [¶] What if you found your weird neighbor giving your daughter just candy and you kill him? Well, that is not reasonable. That is – you don't get to kill in

> those circumstances. You are not permitted to set up your own standard of conduct.

(RT Vol. 11 2495-2496.) Later, he argued as follows:

> Caregiving, yes, it is stressful. Hell, yeah, it is hard. Oh, yeah. But we all have to go through things like that in life . . . There is no discount, if you are having a difficult time in your life, there is no discount [for] murder. You don't get bonus points if you take care of your mother. You don't get bonus points if you are having a bad day or your mom dies. That ain't the way it works.
>
> The only way out is heat of passion. That is what they are going to go after. All these things were coming down on him. He was having financial difficulties. They raised his rent 20 bucks. He got a parking ticket. He had to quit his job to take care of mom. If you are having a bad day, you don't get to kill, only if there is legally adequate provocation.

(RT Vol. 11 2517-2518.) He also argued that "[y]ou don't get a discount for misperception. You don't get a discount on your murder for misperception or misperceive, you don't understand or paranoia." (RT Vol. 11 2520.) In the absence of Special I, it is reasonably likely that the jury understood the prosecutor to mean that, because the stressors facing appellant would not lead an ordinarily reasonable person to *kill*, appellant – as a matter of law – could not have acted in the heat of passion.

People v. Najera, *supra*, 138 Cal.App.4th at page 223 is instructive. There, the prosecutor told the jury during closing argument, the prosecutor stated:

> Heat of passion is not measured by the standard of the accused. We don't care what the accused did. We don't care what the standard is for the accused. As a jury, you have to apply a reasonable, ordinary person standard, okay. [¶]

> Going back to that intruder hypothetical. *Any reasonable, ordinary person walking in on a child being molested, if they had a gun in their hand, would probably do the same thing.* It's that same hypothetical that was given to you in voir dire by defense. Remember the spider in the sink, the reasonable spectrum? Would a reasonable person do what the defendant did? *Would a reasonable person be so aroused as to kill somebody?* That's the standard.

(Italics added.) During rebuttal, the prosecutor stated: "[*T*]*he reasonable, prudent person standard . . . [is] based on conduct, what a reasonable person would do in a similar circumstance.* Pull out a knife and stab him? I hope that's not a reasonable person standard." (*Ibid.*; italics in original.)

Recognizing that the jury's focus properly should be on the provocation – i.e., the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly, the court of appeal held that the italicized portions of the prosecutor's statements were incorrect. (*People v. Najera*, *supra*, 138 Cal.App.4th at p. 223, citing *People v. Breverman* (1998) 19 Cal.4th 142, 163.)[48] Thus, how the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion. (*Ibid.*) The court of appeal explained that the effect of the prosecutor's statements, which interspersed correct statements of the law with incorrect ones, was to create confusion with respect to whether the jury determines sudden quarrel or heat of passion based on the level of provocation or on the defendant's conduct in response to the provocation. (*Id.* at p. 224.)

For the reasons set forth above and in the opening brief (AOB 157-

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[48] In citing *People v. Breverman*, respondent inadvertently cited to 19 Cal.3d 142, 176. (RB 62.)

160), it is reasonably probable that, had the trial court given Special I, the verdict would have been more favorable to appellant. (*People v. Breverman, supra*, 19 Cal.4th at pp. 163.)

The trial court's refusal to give appellant's requested instruction violated his due process right to present a defense (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294), his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), and his right to the presumption of innocence, requirement of proof beyond a reasonable doubt, and fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence (U.S. Const., 14th Amend.; *Mathews v. United States* (1988) 485 U.S. at p. 63; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Fetterly v. Paskett* (1993) 997 F.2d 1295, 1300.)

Accordingly, the entire judgment must be reversed.

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IV

THE TRIAL COURT COMMITTED "*CARTER* ERROR" WHEN IT INADVERTENTLY FAILED TO SUPPLY THE JURY WITH WRITTEN COPIES OF CALJIC NOS. 2.60 AND 2.61

In his opening brief, appellant argued that the trial court prejudicially erred in failing to provide the jury with written copies of CALJIC Nos. 2.60 and 2.61, which relate to a defendant's constitutional right not to testify.[49] Appellant has demonstrated that the trial court's failure to supply the jury with written copies of those instructions violated his privilege against compulsory self-incrimination and his rights to due process, a fair trial, and a reliable guilt determination under the federal and state Constitutions. (AOB 161-170.)

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[49] CALJIC No. 2.60, as read by the court in this case, provided:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify.
>
> Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(RT Vol. 11 2613.) CALJIC No. 2.61, as read by the court, provided:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him.
>
> No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(*Ibid.*)

Respondent contends that there was no error. Respondent further contends that any error was one of state law only, and was harmless. (RB 62-64.) Respondent's position is incorrect.

Respondent concedes that the defense requested that the trial court instruct the jury pursuant to CALJIC Nos. 2.60 and 2.61, but contends that the defense did not ask the trial court to provide the jury with written instructions, and therefore the trial court had no statutory duty to do so. (RB 63-64.) However, a review of the record shows that both the trial court and counsel operated under the premise that the jury would be provided with a set of written instructions. (RT Vol. 11 2474 [during jury instruction conference, trial court and counsel discussed a new copy of the instructions to be provided to the jury], 2479 [during prosecutor's opening argument, he told the jurors that they would be provided with a copy of the instructions], 2603 [prior to reading the jury instructions, the court advised the jury that it would have a packet of instructions in the jury room].) Under these circumstances, defense counsel reasonably would have presumed that CALJIC Nos. 2.60 and 2.61 would be included in the written instructions provided to the jury. Accordingly, there was no reason to affirmatively request that written copies of the instructions be given.

Respondent's reliance upon *People v. Ochoa* (2001) 26 Cal.4th 398 (RB 63) is misplaced for the reasons set forth in appellant's opening brief. (AOB 166-168.) Moreover, in contrast to *Ochoa*, appellant's trial took place after this Court suggested "that in capital cases the trial court should generally give the jury written instructions to cure the inadvertent errors that may occur when the instructions are read aloud." (*People v. Seaton* (2001) 26 Cal.4th 598, 673.) As such, defense counsel in the instant case – as opposed to defense counsel in *Ochoa* – would have additional reason to

expect the trial court to provide written copies of the instructions.

Respondent has failed to address appellant's arguments as to why it is immaterial that the trial court read the instructions. (RB 63-64.) As appellant pointed out in his opening brief (AOB 164-166), the oral reading of CALJIC Nos. 2.60 and 2.61 was extremely brief; while the court's reading of the guilt phase instructions took up almost 39 pages of the reporter's transcript, its reading of CALJIC Nos. 2.60 and 2.61 took up only 16 lines. (RT Vol. 11 2603-2641.) Moreover, CALIC No. 17.45 – which stated in pertinent part that "the instructions which I am now giving to you will be made available in written form for your deliberations" (RT Vol. 11 2639; CT Vol. 3 643) – would have led the jurors to believe that the set of written instructions provided to them was not only complete, but identical to the instructions the court had read to them. Thus, this Court cannot be certain that the jury even heard the two instructions at issue.

Even assuming the jury heard CALJIC Nos. 2.60 and 2.61, CALJIC No. 17.45 also stated that "[y]ou are to be governed only by the instruction in its final wording" (RT Vol. 11 2639; CT Vol. 3 643), which would have led the jurors to believe that they were obligated to follow the instructions as written, not as they had been read earlier. Indeed, this Court has recognized the "primacy" of written instructions in cases where there is a conflict between the oral instructions and written instructions. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 687; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2.)

Under these circumstances, the failure to provide written instructions regarding appellant's constitutional right not to testify was error. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300; *People v. Evans* (1998) 62 Cal.App.4th 186, 190-191.) Moreover, appellant has amply demonstrated that the error

was prejudicial (AOB 168-170) and need not repeat that argument here. Accordingly, for the reasons set forth in his opening brief and above, the entire judgment must be reversed.

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V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION THAT IT IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE PURSUANT TO PENAL CODE SECTION 190.4, SUBDIVISION (b)

After appellant's second penalty trial, like his first, ended in a mistrial, he filed a motion requesting that the court impose a sentence of life imprisonment without possibility of parole (hereafter, "LWOP") pursuant to Penal Code section 190.4, subdivision (b).[50] In support of appellant's motion, defense counsel argued that: (1) appellant's motive and his lifetime of laudable character traits made LWOP the appropriate sentence; (2) any death verdict reached during the third penalty trial would be based largely upon additional "fabrications" (i.e., appellant's transparent attempts to induce the prosecutor to seek, and the jury to return, a death verdict), not on a fair evaluation of the evidence in mitigation and aggravation; (3) despite appellant's efforts to induce or provoke the previous two juries to vote to impose a death sentence, neither jury reached a unanimous verdict of death; and, (4) confinement in state prison without the possibility of parole would

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[50] Penal Code section 190.4, subdivision (b), provides in pertinent part as follows:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(See also *People v. Thompson* (1990) 50 Cal.3d 134, 177.)

be the appropriate sentence for appellant. (CT Vol. 6 1563-1594).[51] Focusing solely on the numerical divisions among the jurors and the impact on the victims' families were there to be a third penalty trial, the trial court denied the motion. (RT Vol. 20 4716-4720.)

In his opening brief, appellant argued that, because the trial court failed to consider critical factors bearing on the motion, its denial of the motion constituted an abuse of discretion. Appellant further argued that the court's error violated appellant's rights to due process, a reliable penalty verdict, and the constitutional prohibitions against cruel and unusual punishment. (AOB 171-184.)

Respondent apparently concedes that the trial court failed to consider any of the mitigating evidence argued by the defense or what it calls the "alleged" juror misconduct which occurred at the second penalty phase trial[52] (i.e., two of the central grounds of appellant's motion). However,

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[51] Describing appellant's "fabrications," defense counsel observed that: (1) appellant expressed remorse a number of times following the crime and during his first penalty trial, belying his claimed lack of remorse; (2) appellant's earlier statements and testimony suggested that Rosetti and Robertson had surprised him and that he did not know where he was firing when he shot them, belying his testimony at the second penalty trial that he executed them; and, (3) following his second penalty trial, appellant stated to the press that one of the factors leading him to kill was his lingering resentment towards the American government regarding the Vietnam War, completely contradicting his prior statements and testimony, in which he had explained that his sole motivation was to avenge the mistreatment of his mother. (CT Vol. 6 1572-1576.) As defense counsel observed, appellant "desperately" wanted the death penalty and was willing to say anything necessary to get it. (CT Vol. 6 1573-1574.)

[52] The juror misconduct during the second penalty trial was actual, not alleged. In support of the motion, defense counsel submitted several

(continued...)

respondent asserts that the court properly relied on the fact that, in its opinion, a third jury would probably reach a verdict. (RB 68, citing AOB 30-31.)[53] Accordingly, respondent contends, the trial court's denial of the motion was an appropriate exercise of its discretion. (RB 64-70.) Respondent's analysis is flawed.

First, respondent claims that appellant does not explain why it would be error to consider the likeliness of a verdict upon retrial. (RB 68.) Not so. Appellant actually argued that the trial court erred in failing to consider *all* of the relevant factors bearing on his motion. Even assuming the trial court properly considered the numerical divisions among the jurors and the impact of a third penalty trial on the victims' families, it failed to also consider the mitigating evidence, the effect of appellant's efforts to obtain a death verdict, and the defense position that LWOP represented the appropriate punishment in this case (AOB 171-173, 175-184.)

Second, this Court should reject respondent's suggestion that decisions regarding the denial of a defendant's automatic motion to modify penalty (Pen. Code, § 190.4, subd. (e)) are instructive, a contention which is

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[52](...continued)
exhibits establishing that, following the second mistrial, defense investigators interviewed three jurors who described the introduction, and extensive discussion, of extraneous information during deliberations. (CT Vol. 6 1585-1586, 1588-1589, 1591-1592, 1593-1594 [reports regarding interviews with Vada Bloom, Ken Lindberg and Roy Kenney, and declarations of Cathy Clausen and Alan Dean Clow]). (See AOB 172, fn. 78, 179-181.)

[53] Respondent presumably meant to cite AOB 172-173.

simply without merit. (RB 68-70.)[54] Respondent acknowledges that section 190.4, subdivision (b), "gives no guidance to trial courts as to what factors to consider in deciding whether to empanel a third penalty phase jury." (RB 68.) By contrast, the standards for implementation of section 190.4, subdivision (e), are well established:

> "'In ruling on the application, the trial judge must independently reweigh the evidence for aggravating and mitigating circumstances and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict.'" [Citation.] The judge also must state on the record the reasons for the ruling, and on appeal we subject the ruling to independent review.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 859.) Although the trial court need not describe "every detail" supporting its ruling, its statement of reasons must allow meaningful appellate review. (See *People v. DePriest* (2007) 42 Cal.4th 1, 56.) Section 190.4, subdivision (e), further requires that the appellate court independently review the trial court's ruling after

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[54] Penal Code section 190.4, subdivision (e), provides in pertinent part that:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. [Footnote omitted.] In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

reviewing the record. (See *People v. Geier* (2007) 41 Cal.4th 555, 617.) Notwithstanding the plain language of subdivision (e), an extensive body of case law provides further guidance to a trial court ruling on an automatic motion for modification of penalty. (See, e.g., *People v. Romero* (2008) 44 Cal.4th 386, 427; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1063-1064; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 859; *People v. Arias* (1996) 13 Cal.4th 92, 192.)

Because respondent offers no persuasive theory as to why this Court should insert into subdivision (b) the provisions explicitly set forth in subdivision (e), this Court should decline to do so. As the court of appeal observed in *People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 357,

> in construing any particular provision of a statute, we do not insert words into it as such would "violate the cardinal rule that courts may not add provisions to a statute. [Citations.]" [Citation.] Nor are we permitted to rewrite the statute to conform to an assumed intent that does not appear from its plain language. [Citation.] We assume the Legislature in enacting a new law "is . . . aware of statutes and judicial decisions already in effect and to have enacted the new statute in light thereof." [Citation.]

Had the Legislature intended that subdivision (b) and subdivision (e) were to be implemented in the same manner, the language of both subdivisions would have been similar, if not identical. Thus, respondent's reliance upon *People v. Arias*, *supra*, 13 Cal.4th at p. 192, *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at pp. 1063-1064, *People v. Romero*, *supra*, 44 Cal.4th at p. 427, and *People v. DePriest* (2007) 42 Cal.4th 1, 56 (RB 68-70) – all of which involve application of section 190.4, subdivision (e) – is misplaced.

Nevertheless, the trial court in this case was bound by the general

principles governing the exercise of discretion. That is, "[t]o exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65 [holding that the trial court erred in concluding that it had no discretion to exclude the defendant's prior convictions]; see also *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [applying these principles to a prisoner's application for a proper hearing before the sentencing court to determine whether a prior narcotics conviction should be stricken in the interests of justice].) Tellingly, respondent fails to address the cases cited by appellant on that point. (AOB 173-175.)

The record makes clear that the court considered only two of several factors bearing on the motion – i.e., the numerical divisions among the jurors and the impact on the victims' families of a third penalty trial – and essentially ignored appellant's arguments as to why LWOP should be imposed. Although the trial court asked the prosecutor to address the evidence of juror misconduct (RB 70), its unwillingness to inquire into the juror misconduct[55] and its failure to mention the misconduct in its ruling indicates that it was not a factor in its decision. For this reason, it is immaterial that, after asking the prosecutor to address the juror misconduct,

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[55] Respondent alludes to the fact that the trial court asked the prosecutor, "What about the alleged misconduct?" (RB 70), but ignores the fact that it then stated the following:

> I understand from the papers – *I have no way of knowing because we haven't had a hearing on it, nor should we.* – But the split was eight to four before they went on their recess.

(RT Vol. 20 4716-4717; italics added.)

the court commented, "[The misconduct] may be relevant to whether or not any 12 people will ever agree to a verdict in this case. That is the issue." (RT Vol. 20 4717.) Consequently, the trial court failed to consider appellant's argument that, because the mitigating evidence in this case was so strong, no jury would have voted in favor of death absent jury misconduct. (CT Vol. 6 1576-1578.) Similarly, appellant maintains that the trial court's remark that its ruling represented a "[v]ery hard decision" (RT Vol. 20 4720) reflected its concern that a third penalty trial would be too difficult for the victims' families, not that it considered the defense evidence offered in support of the motion.

Under these circumstances, it cannot be said that the trial court "kn[e]w and consider[ed] all material facts and all legal principles essential to an informed, intelligent, and just decision" (*People v. Stewart*, *supra*, 171 Cal.App.3d at p. 65), and it abused its discretion in an arbitrary and capricious manner (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712). Moreover, appellant has amply demonstrated the prejudice flowing from that error. (AOB 175-184.) Therefore, the death judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one involving purely statutory law, the death judgment must be reversed because it is reasonably possible that it affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

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VI

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS TO BAR A PENALTY RETRIAL VIOLATED HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, A RELIABLE PENALTY VERDICT, EQUAL PROTECTION, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

In his opening brief, appellant argued that the trial's denial of his written motion to bar a second penalty trial (CT Vol. 4 1115-1121; RT Vol. 14 3130) and his oral motion to bar a third penalty trial (RT Vol. 21 4777) violated his rights to due process, a fair trial, a reliable penalty verdict, equal protection, and the prohibitions against cruel and unusual punishment under the state and federal Constitutions. In particular, appellant argued that Penal Code Section 190.4, subdivision (b), is unconstitutional insofar as it mandated that the trial court deny his motion to bar a second penalty trial, and permitted a third penalty trial. (AOB 185-199.)[56]

Respondent first contends that this Court rejected an identical argument with regard to the mandatory penalty retrial following a first jury's inability to reach a verdict. (RB 70-71, citing *People v. Taylor* (2010) 48 Cal.4th 574, 635.) As respondent observes (RB 71), appellant

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[56] Penal Code section 190.4, subdivision (b), provides in pertinent part as follows:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

disagrees with *Taylor* and has asked that this Court reconsider its holding. (AOB 194.) However, contrary to respondent's position (RB 71), appellant has offered persuasive reasons in support of his request.

First, appellant has demonstrated that, in the majority of jurisdictions in which the death penalty is currently authorized (i.e., in 23 of 33 states, and under the federal death penalty law), if the jury is unable to agree unanimously on a penalty phase verdict, there is no penalty retrial and the defendant is instead sentenced to life imprisonment or LWOP. (See AOB 188-189 and fns. 83 & 84.) Addressing a similar claim in *Taylor*, this Court concluded as follows:

> Although we have never addressed the precise Eighth Amendment challenge defendant raises, we have determined that "California's asserted status as being in the minority of jurisdictions worldwide that impose capital punishment" does not establish that our death penalty scheme per se violates the Eighth Amendment. [Citations.] Likewise here, that California is among the "handful" of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or "evolving standards of decency that mark the progress of a maturing society." [Citation.]

(*People v. Taylor*, *supra*, 48 Cal.4th at p. 634; see also *People v. Gonzales* (2011) 52 Cal.4th 254, 311 [denying a claim identical to that raised in *Taylor*].) This analysis is seriously inadequate in light of recent high court decisions applying "evolving standards of decency." (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 418-426 [holding that the Eighth Amendment prohibits the death penalty for the rape of a child, relying partly on the fact that, of the 37 jurisdictions which had the death penalty, only six authorized the death penalty for that offense]; *Roper v. Simmons* (2005) 543 U.S. 551, 564 [holding that the execution of juveniles is unconstitutional, relying

partly on the fact that 30 states prohibited the juvenile death penalty, comprising 12 that had rejected the death penalty altogether and 18 that maintained it but, by express provision or judicial interpretation, excluded juveniles from its reach; the high court further noted that, even in the 20 states without a formal prohibition on executing juveniles, the practice was infrequent]; *Atkins v. Virginia* (2002) 536 U.S. 304, 313-315 [holding that execution of the mentally retarded is unconstitutional based on the fact that 30 states prohibited such executions, including the 12 states that prohibited the death penalty in any circumstance].) Appellant maintains that this Court has not explained why section 190.4, subdivision (b), does not violate the Eighth Amendment or "evolving standards of decency that mark the progress of a maturing society."

Moreover, the provision is unconstitutional as applied in this case. Because the trial court was statutorily required to order that a new jury be impaneled, it was precluded from considering the arguments and evidence presented in, and ruling on the merits of, appellant's motion to bar a second penalty trial. (CT Vol. 4 1116-1121.) Instead, the court was obligated to summarily deny the motion. (RT Vol. 14 3130.)

Tellingly, respondent virtually ignores appellant's argument insofar as it challenges the constitutionality of the statute to the extent it allows *more than* one penalty retrial. (AOB 186-199.) In particular, respondent fails to address appellant's argument that, because California is one of only *two* jurisdictions which allow for a third penalty phase trial, section 190.4, subdivision (b), is contrary to the notions of "fundamental fairness" and "human dignity," and therefore violates the Eighth Amendment. (AOB 188-196.) It is of little consequence that appellant theoretically had the same opportunity to convince the court to grant him LWOP as would every

other defendant facing a third penalty trial, and the same opportunity to convince the jury to show him leniency as does every other capital defendant. In 32 of the 34 jurisdictions in which the death penalty is authorized, no capital defendant would ever face a third penalty trial. Even in California and Alabama, the two jurisdictions allowing more than two penalty trials, the chance of a capital defendant actually facing a third penalty trial is necessarily quite small.

Moreover, appellant submits that any further retrial in this case was certain to be futile. For instance, any retrial was virtually certain to be marred by serious error in light of the following factors: appellant's determination to goad the jury into voting for death; the emotionally volatile courtroom atmosphere, including a number of improper outbursts by victim impact witnesses; and the possibility that jurors at a retrial would engage in misconduct similar to what occurred at the second penalty trial. (See Arguments V, VIII, IX and X, incorporated by reference as if fully set forth herein.) At a minimum, the 10-2 juror split at the first penalty trial and the (pre-misconduct) 8-4 juror split at the second penalty trial suggest that appellant's mitigating evidence was so compelling that no jury would reach a unanimous verdict of death in the absence of serious trial error, such as jury misconduct. Thus, the trial court's denial of appellant's motion to prohibit a third penalty trial permitted the arbitrary imposition of the death penalty in violation of the Eighth Amendment to the federal Constitution and article I, section 17, of the California Constitution.

Respondent next disputes appellant's argument that section 190.4, subdivision (b), also violated his rights to equal protection and due process under the state and federal Constitutions because, in a case like this one, where both the first and second penalty trial end with a hung jury, it

contains no standards to guide a trial court's discretion as to whether to grant LWOP or order that a new jury be impaneled (AOB 197-198). (RB 71.) Respondent's contentions in this regard are incorrect.

As appellant has already noted, he is aware that this Court has upheld the constitutionality of various provisions of the Penal Code which vest a trial court with discretionary power to sentence defendants convicted of certain crimes to state prison or to jail but do not mention standards for the exercise of that discretion. (AOB 197, citing *In re Anderson* (1968) 69 Cal.2d 613, 626, and Penal Code sections cited therein.) In *Anderson*, this Court rejected a claim that Penal Code sections 190 and 190.1 are unconstitutional because they impose on the trier of fact the duty of selecting the penalty, without specifying any standards for exercising its discretion in carrying out that task. (*In re Anderson*, *supra*, 69 Cal.2d at pp. 621-628.)

However, respondent's reliance upon *In re Anderson*, *supra*, 69 Cal.2d 613 is misplaced. (RB 71.) First, *Anderson* pre-dated *Gregg v. Georgia* (1976) 428 U.S. 153, 195, in which the United States Supreme Court declared that

> the concerns expressed in *Furman* [*v. Georgia* (1972) 408 U.S. 238] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Therefore, the "unguided discretion" authorized in *In re Anderson*, *supra*, 69 Cal.2d at p. 625 no longer passes constitutional muster. (See *Ghent v.*

Superior Court (1979) 90 Cal.App.3d 944, 952, fn. 9 [noting that successive death penalty schemes were held to be unconstitutional prior to enactment of 1977 death penalty statute]; see also Pen. Code, § 190.3 [relating to the determination of death penalty or LWOP, and listing factors in aggravation and mitigation].)

Second, although this Court noted that "[m]any sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of such crimes to state prison or to jail, without mention of standards for exercise of that discretion," the sections it cites (i.e., Pen. Code, §§ 17, 476a, 489, 496, and 524) all relate to the discretion conferred on the trial court to punish certain crimes as either felonies or misdemeanors. (*In re Anderson*, *supra*, 69 Cal.2d at p. 626.) As appellant has pointed out, there is a profound difference between a death sentence and the punishments for the relatively minor offenses to which those sections pertain. (AOB 197-198, quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 188 (lead opn. of Stewart, J.) ["the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"].)

Third, in denying the petitioners' claim, this Court identified safeguards protecting against any possibility of arbitrary action: (1) in disposing of a defendant's motion for a new trial, the trial judge has the duty to review the evidence to determine whether in his independent judgment the weight of the evidence supports the jury's verdict, and if he decides it does not, he has the power to reduce the penalty to life imprisonment; and, (2) the Governor has the power to grant a pardon or commutation. (*In re Anderson*, *supra*, 69 Cal.2d at p. 623.) However, although these safeguards ostensibly apply in this case as well, they are little more than theoretical safeguards. Appellant has already demonstrated

that the trial court erred in denying his motion for a new trial. (AOB 239-249 and pp. 119-129, *post.*) Moreover, no California condemned inmate has been granted clemency since 1967. (*Condemned Killer Spared by Reagan*, L.A. Times (June 30, 1967) p. 3.)

Finally, and contrary to respondent's position (RB 71), it was of no consequence that appellant had the same opportunity to convince the court to grant him LWOP as would every other defendant facing a third penalty trial, and the same opportunity to convince the jury to show him leniency as does every other capital defendant. Again, in 34 of the 35 jurisdictions in which the death penalty is authorized, no capital defendant would ever face a third penalty trial. Even in California and Alabama, the two jurisdictions allowing more than two penalty trials, few if any other capital defendants would ever face a third penalty trial.

For the reasons set forth above and in appellant's opening brief, he has shown a violation of his rights under the state and federal Constitutions.[57] Because the state cannot show that the violations of the federal Constitution were harmless beyond a reasonable doubt, appellant's death judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one of state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable

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[57] Respondent refers only to appellant's rights to due process and equal protection. (RB 71.) However, appellant maintains that the error here violated his federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, equal protection, and due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as analogous protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution. (See AOB 186-187.)

possibility" that it affected the penalty decision (*People v. Brown* (1988) 46 Cal.3d 432, 447), as was the case here.

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VII

THE TRIAL COURT ERRED BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE

In his opening brief, appellant argued that the trial court erred by denying most of appellant's motion to confine the scope of victim impact testimony and denying altogether his motion to limit the number of victim impact witnesses, thereby admitting foreseeably inflammatory, irrelevant and unduly prejudicial victim impact evidence. (AOB 200-229.) Respondent contends that this Court has repeatedly rejected similar claims and should do so here. (RB 71-81.)

Respondent relies upon decisions of this Court regarding the admissibility of victim impact evidence (RB 72, 77-78), a matter adequately addressed in appellant's opening brief (AOB 214-222). No further discussion of the governing law is therefore necessary. Accordingly, appellant limits his discussion to respondent's contention that admission of the victim impact evidence in his case was not prejudicial. (RB 78-81.)

First, even assuming it is constitutionally permissible to allow more than one impact witness per victim (but see *Payne v. Tennessee* (1991) 501 U.S. 808, 811-812; *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180), any such witness must offer the sort of "unique perspective" respondent wrongly claims was presented in this case. (RB 80.) Indeed, respondent's own summary of the evidence in *People v. Russell* (2010) 50 Cal.4th 1228, 1240, 1264-1265, where nine witnesses testified at the penalty phase, demonstrates that each victim impact witness in that case covered distinct subject matter. (RB 78.)

Other cases cited by respondent on this point are similarly

distinguishable. (RB 77-78.) For instance, in *People v. Brady* (2010) 50 Cal.4th 547, 553-554, the victim, Martin Ganz, was a police officer. Four of Officer Ganz's sisters, his fiancée, the treating physician at the hospital, two fellow officers, and his police chief testified during the penalty phase. Although it is not entirely clear what each particular witness testified to, the witnesses covered a wide range of topics – Officer Ganz's childhood hardships, his lifelong desire to be a police officer, his achievements, his engagement and future plans, his death, his funeral service, and the aftereffects of his death – suggesting that their testimony was largely non-duplicative. (*Id.* at p. 573.)

In *People v. Taylor* (2010) 48 Cal.4th 574, 585-586, the defendant was tried for, among other things, the murder, rape and forcible oral copulation of victim Rosa Mae Dixon. Each of the victim impact witnesses in that case presented a relatively unique and personal perspective: one family member testified that Dixon's death "devastated four generations of a very close family"; Dixon's sister, who personally witnessed the crimes, testified that she constantly thought about the sexual assaults, making her "scared all the time now," and that her sister's death "spoiled the rest of [her] life"; Dixon's daughter, who suffered from multiple sclerosis, testified that the stress and shock of her mother's death had exacerbated her disease and caused her incontinence and loss of sight in one eye; a granddaughter indicated that in the two years since her grandmother's death, she suffered insomnia, withdrew from friends and activities she used to enjoy, and gained 50 pounds; and, Dixon's great-grandson described her as his "best friend," and testified that he sometimes woke up crying in the middle of the night thinking about her. (*Id.* at pp. 644-645.) Moreover, Dixon's daughter and two witnesses who were not members of her family testified about the

effects of her death on the community. For example, the director of the afterschool program for which she had volunteered once a week testified that some of the staff and children had known "Grandma Mae" for years, and that many of them cried when they learned she had been murdered. (*Id.* at p. 645.)

Finally, in *People v. Jurado* (2006) 38 Cal.4th 72, 82, the defendant was charged with the murder of Teresa Holloway. There, too, each of the victim impact witnesses presented a relatively unique, personal perspective. Carol Holloway, Teresa Holloway's mother-in-law, testified primarily about the impact of the murder on Teresa's young daughter, but also about its impact on herself. James and Joan Cucinotta, Teresa's parents, testified mainly about the impact of the murders on themselves, but also about its impact on their other two children and on their grandchild. (*Id.* at pp. 132-133.)

In contrast, much of the victim impact evidence in this case was truly cumulative, as described in appellant's opening brief. (AOB 209-214, 223-224.) As appellant has noted (AOB 223-224), there was cumulative testimony regarding Vince Rosetti's character (RT Vol. 24 5618 [Debbie Marshall], 5621 [Michael Rosetti], 5631 [Becky Rosetti], 5635 [Agnes Rosetti]); devotion to his family (RT Vol. 24 5617 [Marshall], 5626 [Angela Rosetti-Smith], 5630-5631 [B. Rosetti], 5635-5636 [A. Rosetti]); sense of humor (RT Vol. 24 5617-5618 [Marshall], 5635 [A. Rosetti]); kindness and generosity (RT Vol. 24 5617-5618 [Marshall], 5621 [M. Rosetti]); willingness to offer advice (RT Vol. 5617 [Marshall], 5622 [M. Rosetti], 5626 [A. Rosetti-Smith], 5630 [B. Rosetti]); his father's grief (RT Vol. 24 5622-5623 [M. Rosetti], 5637 [A. Rosetti]); and, the fact that he would miss important family events, such as his daughter's wedding and the

births of his grandchildren (RT Vol. 24 5627 [A. Rosetti-Smith], 5631-5633 [B. Rosetti]). Similarly, both Suzanne and Derek Robertson testified about Ron Robertson's devotion to his family (RT Vol. 24 5638-5640, 5642 [S. Robertson], 5660 [D. Robertson]), his strong character (RT Vol. 24 5639, 5642 [S. Robertson], 5659-5660 [D. Robertson]), his service in Vietnam (RT Vol. 24 5639 [S. Robertson], 5659 [D. Robertson]), and the devastating effect his death had on his family (RT Vol. 24 5640-5642 [S. Robertson], 5659-5660 [D. Robertson]).

Respondent purports to summarize the "unique perspective" offered by each of the witnesses, plucking specific aspects of each witness' testimony and ignoring any overlap with the testimony of others. (RB 80.) Debra Marshall described Vince Rosetti's personality (RB 80, citing RT Vol. 24 5617), but so did Michael, Becky and Agnes Rosetti. (RT Vol. 24 5622, 5631, 5635.) She discussed the impact his death had on her and on the family (RB 80, citing RT Vol. 26 5617),[58] but so did Michael, Becky and Agnes Rosetti, and Angela Rosetti-Smith. (RT Vol. 24 5622-5624, 5627, 5632, 5634-5637.) Robertson's wife, Suzanne Robertson, testified about the type of parent he was and about the effect his death had on the entire family (RB 80, citing RT Vol. 24 5638-5642); so did Robertson's son, Derek (RT Vol. 24 5659-5661) .

Respondent mistakenly claims that appellant points to nothing particularly objectionable about the testimony other than his disagreement with the law on victim impact evidence and with the scope of the victim impact evidence in this case. (RB 80.) Cumulative victim impact evidence, in and of itself, is objectionable. (See *Payne v. Tennessee*, *supra*, 501 U.S.

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[58] The testimony actually appears at RT Vol. 24 5617-5620.

at pp. 811-812 [victim impact evidence presented by a single witness].) As the Supreme Court of New Jersey has explained, "[t]he greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.)

Moreover, respondent fails to address angry outbursts by Suzanne and Derek Robertson (see AOB 222-223 & fn. 104, and 239-249), which would have inflamed the jurors and biased them against appellant.[59] Not only were these outbursts foreseeable, as appellant has demonstrated (AOB 234-236), but they belie respondent's claims that the victim impact witnesses exercised emotional restraint, that the testimony expressed sadness, not outrage, and that there was no "clarion call for vengeance." (RB 79.)

Because respondent cannot show that the error was harmless beyond a reasonable doubt, the death judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one of state law, the death judgment must be reversed because there was a "reasonable possibility" that it affected the penalty decision. (*People v.*

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[59] After defense counsel objected to a question posed by the prosecutor (an instance of prosecutorial misconduct addressed in appellant's opening brief (AOB 230-238 and pp. 114-115, *post*)), Suzanne Robertson interjected, "This is a never-ending story. I am real tired of your objections." (RT Vol. 24 5641.) Appellant presented evidence that Derek Robertson then told defense counsel to "[s]hut up, bitch." (CT Vol. 8 2140; see also p. 120, *post*.) Shortly thereafter, Suzanne Robertson addressed appellant, apparently trying to speak in Vietnamese. (RT Vol. 24 5643.) At the bench, the interpreter surmised that she was trying to say, "It is your fault," among other things. (RT Vol. 24 5645-5647.)

Brown (1988) 46 Cal.3d 432, 447.)

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VIII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE REPEATEDLY VIOLATED A TRIAL COURT RULING BY ASKING VICTIM IMPACT WITNESSES QUESTIONS INTENDED TO INFLAME THE WITNESSES AND JURORS, AND TO ELICIT IRRELEVANT, INFLAMMATORY TESTIMONY

In his opening brief, appellant argued that the prosecutor committed misconduct by repeatedly asking variations of questions the trial court previously had prohibited him from asking, thereby violating federal and state due process guarantees and the requirements for a reliable death judgment (U.S. Const., 8th & 14th Amends.; Cal. Const., art 1, §§ 7 & 15). (AOB 230-238.) Respondent contends that there was no misconduct, and that appellant's claim fails for lack of prejudice. (RB 81-86.) Respondent's contention is incorrect.

Contrary to respondent's apparent insinuation (RB 82),[60] appellant's argument is cognizable on appeal. This Court has explained that "[t]he purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Here, defense counsel objected to each of the questions challenged in this argument. (RT Vol. 24 5614, 5618, 5622,

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[60] Respondent does not explicitly contend that appellant has waived the argument, but merely states the general principle that, "[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (RB 82, quoting *People v. Earp* (1999) 20 Cal.4th 826, 858.)

5625, 5626-5627, 5631, 5641.)

It is immaterial that defense counsel did not also request admonitions. The trial court itself had pointed out that, during the previous penalty trial, the prosecutor's questions had elicited improper responses, and reminded him that it had been very difficult to control the victim impact witnesses. The court itself had described the questions the prosecutor could not or should not ask. (RT Vol. 21 4789-4792.) Thus, the court was fully in position to "admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties." (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.) Under these circumstances, if admonitions were necessary, the trial court was obligated to issue them in light of its duty to ensure that appellant received a fair trial. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 615 [trial court has the duty to keep the trial within the bounds of the issues and not to stray into collateral matters]; *People v. Worthy* (1980) 109 Cal.App.3d 514, 521 [the court has inherent power to guarantee to criminal defendants a fair trial].)

Even assuming that the defense should have requested admonitions, they could not have cured the harm caused by the prosecutor's misconduct. For instance, admonishing the jury to disregard the prosecutor's questions likely would have been futile because the prosecutor continued to ask those questions over and over again. For the same reason, it would have been futile to admonish the jury not to speculate as to what the witness's answer would be; it is likely the jurors did just that, particularly given the bias they likely felt against appellant as a result of the victim impact evidence, including the outbursts by Suzanne and Derek Robertson. Therefore, appellant's argument is cognizable on appeal. (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.)

Respondent further asserts that the trial court "listed specific questions which the prosecutor *should either rephrase or eliminate*," i.e.: (1) "How did you learn of the murder?"; (2) "What was the hardest thing for you to do after you found out he was murdered?"; (3) "What happened at the funeral?"; (4) "Anything else you need to tell us?"; and, (5) any questions calling for opinions about appellant or his crimes. (RB 84-85, citing RT Vol. 21 4788-4792; emphasis added.) Not so. The court categorically prohibited the prosecutor from asking some of those questions, so the prosecutor was not at liberty to rephrase them. (RT Vol. 21 4789 [prohibiting the prosecutor from asking how the witness learned of the murder, and from eliciting comments about appellant and how he committed the crimes, as such questions would elicit irrelevant testimony], 4791-4792 [prohibiting questions about what happened at the victim's funeral because they elicited irrelevant and highly emotional testimony].) The court also barred the prosecutor from asking, "What was the hardest thing for you to do after you found out he was murdered?" (RT Vol. 21 4792.) However, the court suggested that the question, "What was the hardest thing to do because of his loss?" *might* be appropriate, but did not expressly rule that it *would* be appropriate. Finally, the court noted that the question "Anything else you need to tell us?" had elicited "a lot of improper responses." Therefore, the court added, "I would either eliminate that question or change it." (RT Vol. 21 4792.)

Although the court indicated at that time that the latter two questions might be permissible if rephrased, it later sustained defense counsel's objections that they were improper as asked. For example, during the prosecutor's examination of Dave Mustaffa, he asked, "After you learned that your wife was killed, what was the hardest thing for you to do

initially?" The trial court sustained defense counsel's objection that the question was improper in form. (RT Vol. 24 5614.) Nevertheless, the prosecutor continued to pose essentially the same question, though the court sustained the defense objection each time. (RT Vol. 24 5618 ["After you learned of Vince's death, what was the hardest thing for you?"], 5622 ["After you learned of his death, what was the hardest thing for you?"], 5626 ["Initially what was the hardest thing for you after your dad was killed?"], 5631 ["Initially after your dad was killed, what was the hardest thing for you –"].) The prosecutor also asked Michael Rosetti, "Is there anything else that you need to tell us?" (RT Vol. 24 5625.) This question was in substance identical to the question the court had instructed the prosecutor to rephrase or eliminate altogether. (RT Vol. 21 4792.)

Under these circumstances, it is hard to take seriously respondent's contention that the prosecutor did not repeatedly and intentionally elicit inadmissible evidence. (RB 84-85.) By focusing on "the hardest thing" for the witness, the prosecutor's question was likely, if not calculated, to elicit an inflamed or improper response. Moreover, by repeatedly asking questions the trial court had already ruled were improper, the prosecutor placed defense counsel in a quandary, i.e., they were forced to choose between (1) continually objecting at the risk of provoking the wrath of the trial court, witnesses, and/or jurors, and (2) declining to object, thereby forcing appellant to suffer the prejudice caused by the prosecutor's misconduct. (See AOB 235.)[61] In at least one instance, that is exactly what happened:

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[61] As defense counsel pointed out in arguing appellant's motion for a new trial, forcing them to repeatedly object "essentially defeated the purpose of having the [Evidence Code] 402" hearing. (RT Vol. 27 6408.)

[Prosecutor]: What is the hardest thing for you now?

[S. Robertson]: I think that –

[Defense counsel]: Objection –

[S. Robertson]: This is a never-ending story. I am real tired of your objections.

(RT Vol. 24 5641.)

Respondent also asserts that nothing in the record suggests the prosecutor sought to present testimony he knew was inadmissible (RB 85), but entirely fails to confront appellant's argument that it was entirely foreseeable that one or more of the victim impact witnesses would lash out at appellant and his attorneys. (AOB 235-236.) Indeed, a fair portion of the discussion regarding appellant's motion to limit victim impact testimony and the number of victim impact witnesses (during which the trial court made its initial ruling limiting what the prosecutor could ask victim impact witnesses) related to irrelevant or inflammatory testimony, or "rhetoric," presented at the previous penalty trial, and the fact that the prosecutor had shown little if any ability to control the victim impact witnesses. (RT Vol. 21 4784-4793.)

Respondent's reliance upon *People v. Hawthorne* (2009) 46 Cal.4th 67, 98, is misplaced. (RB 85.) There, the defendant claimed that the prosecutor engaged in misconduct by asking him whether a prosecution witness (i.e., a police officer) lied, as that question invaded the province of the jury regarding credibility determinations, elicited improper lay opinion about the veracity of witnesses, and constituted misconduct by attempting to induce defendant to call a law enforcement witness a liar. (*Id.* at p. 97.) However, the trial court had not previously barred the prosecutor from

asking the defendant whether the witness had lied. Moreover, the trial court overruled defense counsel's objection to the prosecutor's question, which was posed just one time. (*Ibid.*) Finally, *Hawthorne* did not involve a trial atmosphere fraught with the risk that a prosecution witness would behave or testify improperly.

In the instant case, however, the prosecutor repeatedly asked questions the court had previously ruled were improper. Moreover, those questions were not only open-ended, but posed to witnesses who were particularly emotional, even outraged (i.e., victim impact witnesses), in an already tense atmosphere, i.e., a *third* penalty trial. Therefore, *Hawthorne* has no application to the instant case. For the same reasons, respondent's reliance upon *People v. Chatman* (2006) 38 Cal.4th 344, 379-380, is misplaced. (RB 85.)[62]

Respondent also cites several cases relating to the wide latitude afforded to a prosecutor in arguing his case. (RB 81-82, citing *People v. Bandhauer* (1967) 66 Cal.2d 524, 529, *People v. Milner* (1988) 45 Cal.3d 227, 245, *People v. Szeto* (1981) 29 Cal.3d 20, 34, and *Boyde v. California* (1990) 494 U.S. 370, 385.) While a prosecutor enjoys extra latitude in presenting certain areas of his case (see, e.g., *People v. Milner*, *supra*, 45 Cal.3d at p. 245 [a prosecutor is afforded wide latitude in argument]; Evid.

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[62] In *People v. Chatman*, *supra*, 38 Cal.4th at pp. 353-356, 379-380, the defendant claimed that the prosecutor committed misconduct by repeatedly asking him to comment on the veracity of other witnesses, all of whom were friends or relatives to whom he had admitted his participation in the crime. In denying Chatman's claim, this Court noted there was nothing in the record to suggest that the prosecutor sought to present evidence he knew was inadmissible, "especially given that the court *overruled* [Chatman's] objections and . . . the applicable law was unsettled at the time of trial." (*Id.* at p. 380; italics added.)

Code, § 721 [conferring wider latitude in the cross-examination of expert witnesses]), this is not so with respect to direct examination. In any event, it is well established that, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Appellant has amply demonstrated that the prosecutor's misconduct was prejudicial. (AOB 234-238.) In particular, appellant argued that neither the jury instructions nor the court's sustaining of the defense objections could cure the error where the prosecutor's questions: placed defense counsel in the untenable quandary described above; were intended, or at least very likely, to incite antipathy towards the defense on the part of the jurors and victim impact witnesses; and, raised the danger that the jurors would infer that the prosecutor possessed emotionally devastating facts which would have come into evidence but for the defense objections. (AOB 235-237.)

Respondent asserts that any prejudice was cured because the trial court sustained the defense objections, and because the court instructed the jury pursuant to CALJIC No. 1.02, which stated that questions were not evidence, and that the jury was not to consider evidence that was rejected or stricken by the court. (RB 85-86.) However, each of the cases respondent cites in support of its position is patently distinguishable. (RB 85-86, citing *People v. Dykes* (2009) 46 Cal.4th 731, 764, *People v. Foster* (2010) 50 Cal.4th 1301, 1351, and *People v. Tate* (2010) 49 Cal.4th 635, 692.) Each one involved cross-examination of the defendant, not direct examination of victim impact witnesses. (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1351-1352; *People v. Tate*, *supra*, 49 Cal.4th at p. 691; *People v. Dykes*, *supra*, 46 Cal.4th at p. 764.) None of those cases involved a third trial following

two mistrials. (See *People v. Foster*, *supra*, 50 Cal.4th at p. 1341 [regarding defense counsel's failure to request a mistrial on the ground of juror misconduct]; *People v. Tate*, *supra*, 49 Cal.4th at pp. 641-654 [procedural and factual summary of the case]; *People v. Dykes*, *supra*, 46 Cal.4th at pp 812-813 [regarding the denial of defendant's motion for a new trial].) None involved improper testimony by the victim impact witnesses during prior proceedings, nor did the trial court in those cases express concern that it was becoming increasingly difficult to control them. (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1351-1352; *People v. Tate*, *supra*, 49 Cal.4th at p. 692; *People v. Dykes*, *supra*, 46 Cal.4th at p. 764.)

Because these circumstances *were* present in the instant case, it was immaterial that the witnesses were not allowed to respond to the prosecutor's questions. The questions themselves improperly biased the witnesses and jurors against appellant. Given the inflammatory effect of the prosecutor's questions, as reflected by the outbursts by Suzanne and Derek Robertson, this Court must reject respondent's contention that any error was cured by CALJIC No. 1.02. (RB 85-86.)

Accordingly, for the reasons in appellant's opening brief and those set forth above, the death judgment must be set aside.

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IX

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL

Several days before appellant's sentencing hearing, he filed a motion for a new trial based upon the following grounds, among others: (1) the prosecutor committed misconduct by repeatedly and deliberately asking questions which the trial court had already found to be improper, and which called for inadmissible and prejudicial testimony; (2) Derek Robertson's misconduct during the penalty trial violated appellant's due process rights; and, (3) retrial of the penalty phase in this case violated the due process clauses of the state and federal Constitutions and the Eighth Amendment's prohibition against cruel and unusual punishment. (CT Vol. 8 2120-2140.) Appellant requested that the trial court preclude retrial and sentence him to life imprisonment without possibility of parole (hereafter, "LWOP"), or, in the alternative, grant a new penalty trial. (CT Vol. 8 2138.)

Appellant has argued that the trial court erred in denying his motion for a new trial to the extent it was based on the grounds enumerated above. (AOB 239-249.) Respondent contends that the trial court properly exercised its discretion in determining that there were no bases for a new trial. (RB 87-91.) Respondent's contention is incorrect.

Appellant has adequately argued that the trial court erred in denying his motion for a new trial on the basis of prosecutorial misconduct (AOB 243-244, incorporating Argument VIII by reference)[63] and the court's erroneous denial of his post-verdict motions (AOB 246-248, incorporating Arguments V, VI and X by reference). As to those two arguments,

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[63] Respondent erroneously states that appellant "[s]ummariz[ed] the claim he made in Argument XIII," rather than Argument VIII. (RB 89.)

respondent adds nothing substantive beyond referencing its contentions with respect to Arguments V, VI and VIII. (RB 89.)[64] Therefore, appellant addresses only respondent's contention that the trial court properly denied the motion for a new trial, insofar as it was based on Derek Robertson's misconduct, because he failed to show prejudice. (RB 89-91.)

During the direct examination of victim impact witness Suzanne Robertson (Derek's mother), the prosecutor asked, "What is the hardest thing for you now?" After Assistant Public Defender Brooks Talley objected, she interjected that she was tired of his objections. (RT Vol. 24 5641.) From the spectator section, Derek exclaimed, "Shut up, bitch." In the opinion of defense investigator Cathy Clausen, who submitted a declaration describing the incident, Derek's statement was directed at Mr. Talley. (CT Vol. 8 2140.)[65]

Relying upon *People v. Cornwell* (2005) 37 Cal.4th 50, 84-87, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, respondent contends that Derek's misconduct, if any, did not prejudice appellant. (RB 90-91.) There, Cornwell requested an evidentiary hearing and moved for a new trial on the basis of spectator misconduct he asserted occurred during trial. In support of his motion, he offered the declarations of the defense attorney, a defense investigator, and his (Cornwell's) wife. (*People v. Cornwell, supra*, 37 Cal.4th at p. 84.) Defense counsel declared that spectators had burst into the courtroom during the defense closing argument, and that spectators had rolled their

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[64] In addressing the latter argument, respondent does not refer to Argument X of appellant's opening brief. (RB 89.)

[65] The incident is discussed in greater detail in appellant's opening brief. (AOB 212-213 & fn. 98, 239-242.)

eyes and sighed audibly. He believed they had been attempting to influence the jury. (*Id.* at p. 84.) The investigator declared that he had observed "constant whispered remarks, snickers, laughter and gasps of disbelief from both Ms. Reagan [the victim's daughter] and Ms. Scott [who was both the victim's romantic partner and the owner of a business for which he had been running an errand at the time of the crime], and similar activity from the group seated in front of them" during certain defense testimony. He believed the remarks "could have been overheard by the jurors," who seemed to redouble their attention to the testimony during these episodes – possibly, the investigator believed, in order to "shut out" the disturbance. (*Ibid.*) Mrs. Cornwell declared that she observed members of the victim's family gesturing, whispering, and frowning in response to testimony. (*Id.* at p. 85.) Mrs. Cornwell observed Ms. Scott leave her seat briefly during a prosecution witness's testimony, then greet and touch the witness as she left the courtroom. She also claimed that one juror observed Ms. Scott make a dismissive gesture and statement concerning questions put to a prosecution witness during defense cross-examination. (*Ibid.*) She declared that Ms. Scott gasped, sighed, and shook her head visibly during testimony she found objectionable and that, addressing a spectator seated behind her, she stated, "[Y]ou think he would just jump up saying I did it, I did it." (*Ibid.*) According to Mrs. Cornwell, Ms. Scott was admonished by the prosecutor to stop conversing about the case with the other spectator. Finally, Mrs. Cornwell stated that, when the prosecutor remarked in closing argument that the defendant had underestimated the victim, Ms. Scott audibly said, "[T]hat's right." (*Ibid.*)

The trial court denied Cornwell's motion for an evidentiary hearing and his motion for a new trial. (*People v. Cornwell, supra*, 37 Cal.4th at pp.

85-86.) This Court upheld the ruling, noting that the trial court was satisfied, based on its own observations, that Cornwell's assumptions that the jurors witnessed the incidents were unjustified and that the effect of those incidents was innocuous or, at most, trivial. (*Id.* at pp. 86-87.) In addition, this Court observed that Cornwell did not claim that the spectators actually attempted to convey information to the jury; there was no dramatic, anguished outburst, and the spectator conduct, even taking his claims at face value, was not particularly disruptive or likely to influence the jury. (*Ibid.*)

Respondent mistakenly asserts that the alleged spectator misconduct in this case was even more trivial than that at issue in *Cornwell*. (RB 91.) Even if Derek's outburst constituted the sole instance of *spectator* misconduct, it immediately followed, and was obviously incited by, his mother's outburst from the witness stand. (RT Vol. 24 5641; CT Vol. 8 2140.) Moreover, his mother engaged in yet another outburst very shortly thereafter, when she addressed appellant directly from the stand, apparently trying to speak Vietnamese. (RT Vol. 24 5643-5647.) Therefore, Derek's was just a part of a sequence of misconduct by victim impact witnesses. Derek's misconduct compounded the prejudice from his mother's comments, and vice versa.

Moreover, it is obvious even from the cold record that the courtroom atmosphere was emotionally volatile. During a conference following the outbursts, the trial court stated,

> [Derek Robertson] is going to act up. And I really don't like to stop witnesses while they are testifying, and we're not going to be able to stop him. We'll have a donnybrook in here is what is going to happen.

(RT Vol. 24 5647.) The court then reiterated its belief that the prosecutor

would be unable to control him, adding, "You know, because the law does allow victim impact, and you have had it, and it does not allow the other kind of stuff, the hysteria, hatred, the vengeance, the wishes as to what the jury should do, and we are going to get all of that." (RT Vol. 24 5648.) The court subsequently reported that the bailiff, concerned about courtroom security, had a brief conversation with Derek, who indicated that he was "just a very angry young man." (RT Vol. 24 5655-5656.) The bailiff predicted that Derek might act out vocally; he also reported that he had spoken to Derek "everytime we have had these proceedings when I see him." The court and defense counsel then expressed concern that Derek would testify inappropriately. (RT Vol. 24 5656.)[66]

Contrary to respondent's position (RB 91), it is immaterial that no outside information was conveyed to the jury. The jurors naturally would have recognized that Derek's interjection – "Shut up bitch" – reflected his outrage and contempt for defense counsel and, by extension, appellant. (Cf. *People v. Cornwell, supra*, 37 Cal.4th at p. 87 [trial court properly denied defendant's motion for a new trial where "there was no dramatic, anguished outburst, and the spectator conduct, even taking defendant's claims at face

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[66] Although the record cannot fully capture the courtroom atmosphere, another incident sheds some light on what was happening. During the same conference, the court advised counsel that Juror No. 10 had informed the bailiff that she knew a spectator seated with the Rosetti family, a fact the juror subsequently confirmed. (RT Vol 24 5644, 5649-5651.) Both the court and defense counsel noted that the spectator had comforted Becky Rosetti, Vince Rosetti's daughter, during the court proceedings. (RT Vol. 24 5651.) Although the juror stated that she did not think her acquaintance with the spectator would affect her deliberations, the court was sufficiently concerned about the matter that it replaced her with an alternate juror on its own motion. (RT Vol. 24 5651-5655, 5657.)

value, was not particularly disruptive or likely to influence the jury"].) Even if jurors expect a victim's family members to be anguished and frustrated with the defense (RB 91, citing *People v. Chatman* (2006) 38 Cal.4th 344, 369),[67] the outburst was prejudicial precisely because it reflected his anguish and frustration, which were manifested as contempt and hostility for the defense. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 368-369; *Rodriguez v. State* (Fla.App.1983) 433 So.2d 1273, 1276 [defendant deprived of a fair trial where the victim's widow shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility towards him]; *State v. Stewart* (S.C. 1982) 295 S.E.2d 627, 629-631, cert. denied, 459 U.S. 828, 103 S.Ct. 64, 74 L.Ed.2d 65 [judgment reversed where the trial court failed to explore the prejudice which may have resulted from the conduct of a spectator who continually glared at the jury and who made opinionated remarks regarding the defendant's guilt which were overheard by several jurors; an overcrowded and noisy courtroom also resulted in several outbursts requiring admonitions]; *Price v. State* (Ga. 1979) 254 S.E.2d 512, 513-514, overruled on another ground in *State v. Clements* (Ga. 2011) 715 S.E.2d 59, 67, fn. 7 [judgment reversed where the victim's mother repeatedly disrupted the proceedings with emotional outbursts and other interruptions; the defendant's repeated requests for mistrial or to have the spectator removed

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[67] In fact, *Chatman* does not say that jurors expect a victim's family members to be frustrated with the defense. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 369 [this Court commented that "[e]ven without observing [the victim's mother] in person, any reasonable juror would know that the crime had caused the victim's family anguish"].) In any event, that case did not involve the sort of blistering attacks on the defense present in the instant case. (See *id.* at pp. 366-370.)

from the courtroom were denied]; *Walker v. State* (Ga. 1974) 208 S.E.2d 350 [trial court abused discretion by allowing the victim's mother to sit at the prosecution table throughout the trial over the defendant's objection]; *Glenn v. State* (Ga. 1949) 52 S.E.2d 319, 321-322 [judgment reversed where the widow of the victim wept visibly and audibly during final argument after the prosecutor had asked her to be present to "let the jury know she was interested"]; *State v. Gevrez* (Ariz. 1944) 148 P.2d 829, 832-833 [judgment reversed where the mother of the deceased victim sat within three to four feet of the jury, repeatedly interrupted the trial with emotional outbursts, and wept bitterly throughout the trial]; see also *Payne v. Tennessee* (1991) 501 U.S. 808, 824-825 [victim impact evidence may violate the federal Constitution where it is so inflammatory as to invite an irrational or arbitrary imposition of the death penalty]; *People v. Edwards* (1991) 54 Cal.3d 787, 836 [cautioning that trial court must not admit "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response"].)

Moreover, the prejudice was *heightened*, not lessened, by the fact that Derek's outburst occurred while defense counsel was objecting to a question posed by the prosecutor, rather than during testimony or closing argument. Although this Court has suggested that "because a spectator does not wear the same cloak of official authority as a prosecutor, most instances of spectator misconduct will likely be more easily curable than those of a prosecutor" (*People v. Hill* (1992) 3 Cal.4th 959, 1000, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), appellant submits that, at least in this case, the opposite is true: the jurors would find it even harder to disregard irrelevant or inflammatory

comments from the family member of a victim than the comments or argument of a prosecutor.

A careful reading of the record also undermines respondent's reliance upon the trial court's finding that the jury was paying attention to counsel and the witnesses, not to the spectators. (RB 91.) Referring to Derek's outburst, the court stated, "I am telling you, based upon what I have seen right today, we are going to have a problem. Right today in the back of that courtroom. Nobody else saw it, I don't think." However, defense counsel countered, "We heard it." (RT Vol. 24 5647.) During the hearing on appellant's motion, the court stated,

> I was concerned because of testimony at the two prior trials, and I was watching the audience as well as the jury as best I could. And it was facial expressions. He appeared angry, which he appeared especially during the second trial. *I was concerned that would show up while he was testifying on the witness stand. It did not.* The jury, they were focused on whoever was testifying or whoever was talking, and I believe your investigators will attest to that they were not looking at the audience.
>
> So if anybody heard that, it certainly wasn't the court. And you didn't hear it, and you were as close or closer than the jury –

(RT Vol. 27 6409; italics added.) The court's comments suggest that it was referring to its observations of the jury during Derek's testimony, not at the time of his outburst. In any event, the trial court's belief that the jury was paying attention to the witnesses, not the spectators, must be called into question given that defense counsel and the defense investigator heard Derek's outburst. (RT Vol. 27 6409-6410; CT Vol. 8 2140.) Because they heard the outburst, it is likely the jurors did too.

Finally, respondent fails to address appellant's argument that defense

counsel addressed Derek's misconduct in a timely manner. (AOB 241 & fn. 116, 245.) Specifically, during a bench conference following Suzanne Robertson's testimony – that is, very shortly after Derek's outburst – defense counsel informed the court that they had heard him, although they did not describe what he said. (RT Vol. 24 5647.) Moreover, during a conference following the outbursts, defense counsel proposed that the parties stipulate to the admission of Derek's prior testimony (so long as it was redacted to delete any inappropriate matter), trying to prevent further misconduct by Derek, who was to be the next victim impact witness. (RT Vol. 24 5648, 5655-5658.) Therefore, respondent is incorrect in asserting that the defense did not seek remedial action at the time the misconduct occurred. (RB 91.)

In any event, the trial court could and should have admonished the jury on its own motion. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1022 [holding that, because the isolated outburst in that case was followed by a prompt admonition, and given the broad discretion afforded the trial court in cases of spectator misconduct, the trial court did not abuse its discretion in denying the defendant's motion for mistrial].) Indeed, in *Lucero* this Court explained that

> [a]lthough the court's cursory admonition was better than no admonition, under the circumstances of this case a greater effort should have been made to lessen the prejudicial impact of the misconduct. The court should have clearly admonished the jury not to consider facts outside of the record and not to be influenced by the emotional display. We of course recognize that such judgments are more easily made in retrospect and on the basis of a written record. It is possible the court did not appreciate the full significance of the outburst.

(*People v. Lucero*, *supra*, 44 Cal.3d at p. 1022, fn. 11.) Like the

prosecutorial misconduct discussed in Argument VIII, *ante*, Derek's misconduct placed the defense in an untenable position: either object and thereby risk alienating the jury by appearing callous and antagonistic with respect to the victims' family members, or forego an objection and risk waiving the error.

This Court has the authority to reduce a sentence of death where it is disproportionate to the defendant's individual culpability. (See, e.g., *People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Dillon* (1983) 34 Cal.3d 441, 477-484; *People v. Mora* (1995) 39 Cal.App.4th 607, 615; see also *People v. Davis* (1994) 7 Cal.4th 797, 817 (conc. opn. of Kennard, J.).) This Court also has the authority to reduce a death sentence pursuant to Penal Code sections 1181 and 1260 where there is "prejudicial error or legal insufficiency of evidence." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1427.)[68] Accordingly, under either strand of authority, or both, this Court

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[68] Penal Code section 1181 provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed; . . ."

Section 1260 states: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

should reverse the penalty judgment and impose a sentence of LWOP, particularly because the factors which undermined the reliability of appellant's previous penalty trials (including his determination to give unreliable, inflammatory testimony in order to receive a death verdict, and the repeated outbursts and misconduct by victim impact witnesses) are virtually certain to be present in any future penalty trials as well. Moreover, given the strength of the mitigation evidence in this case, any future penalty jury would be unable to reach a unanimous death verdict in the absence of serious error. It would be futile, and an enormous waste of judicial resources, to order a new penalty trial rather than simply impose LWOP.

Should this Court order that a new penalty trial be held (Pen. Code, § 1181, subd. (5); *People v. Cornwell*, *supra*, 37 Cal.4th at p. 87), it should direct the trial court to impose additional safeguards to better ensure the reliability of the trial.[69] For instance, on remand, the trial court should it make it clear to appellant that, unless he agrees beforehand to limit his testimony to relevant, admissible matters, he will not be allowed to testify. In that event, the trial court should order the jury to consider instead appellant's testimony from the first penalty trial, i.e., the only relatively reliable testimony he gave. Similarly, the trial court should take all necessary steps to prevent the victim impact witnesses from making unduly emotional displays and from offering opinions regarding appellant or the

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[69] Because of the unique constellation of factors in this case – including the trial court's findings, made well before the third penalty trial, that appellant was changing his testimony to get a death verdict, and that he was trying to commit state-assisted suicide (RT Vol. 17 3901, 3909-3912; RT Vol. 19 4463, 4465, 4472-4473) – there is little if any reason to fear that other defendants will be able to manipulate their trial proceedings to force the reductions of their verdicts.

appropriate verdict.

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THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION REQUESTING THAT THE COURT IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE BASED UPON THE IMPROPER GRANTING OF A THIRD PENALTY TRIAL

A. Introduction

In his opening brief, appellant argued that the trial court erred in denying his motion requesting that it impose a sentence of life without the possibility of parole ("LWOP"). (AOB 250-271.) More specifically, appellant argued that the trial court's decision to permit a third penalty trial operated to (1) violate appellant's rights to a fair trial and due process of law, as well as his right to a reliable penalty trial, because the court was aware that, with each successive penalty trial, he was testifying in an increasingly unreliable manner, and to increasingly inflammatory effect, in order to obtain a death verdict;[70] and, (2) effectively allow appellant to waive his right to a fair trial, in contravention of the fundamental public policy that the state's interest in a fair and reliable trial may not be "thwarted through the guise of a waiver of a personal right by an individual." (AOB 250-251.) Respondent contends that appellant's argument is "convoluted and unclear" (RB 92), and that appellant's motion

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[70] According to respondent, appellant argues that the state was precluded from trying him for a third time because the *prosecution* knew the trial would be fundamentally unfair and unreliable. (RB 92.) Indeed, the prosecutor knew or reasonably should have known that appellant was determined to give unreliable and inflammatory testimony in order to get the death penalty, and that the third penalty trial would therefore be rendered unreliable, but appellant's argument is premised upon the fact that the *trial court* was aware of his intentions. (AOB 250-251.)

was properly denied because it was without legal support, relying upon *People v. Guzman* (1988) 45 Cal.3d 915, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, and *People v. Webb* (1993) 6 Cal.4th 494. (RB 91-94.)[71] Respondent's contentions are incorrect.

B. Contrary to Respondent's Contention, Appellant's Argument Does Not Lack Legal Support, and the Trial Court Erred in Denying the Motion

Respondent contends that appellant's argument lacks legal support, in that it is foreclosed by this Court's decisions in *People v. Guzman*, *supra*, 45 Cal.3d 915 and *People v. Webb*, *supra*, 6 Cal.4th 494. (RB 91-92.) However, as appellant discusses below, the instant case is distinguishable from *Guzman* and *Webb* in several critical respects.

In *Guzman*, the defendant testified extensively to substantial mitigating evidence regarding a childhood marked by abandonment and horrific abuse, periods in state mental hospitals, having been the victim of threatened rape while incarcerated as a juvenile, his remorse, and his efforts to solve and control the problems he had "inherited" in his life by asking for help, attempting to educate himself, committing charitable acts, and turning himself in when he had committed crimes. (*People v. Guzman*, *supra*, 45 Cal.3d at pp. 929-933.) He told the jurors that he would prefer the "mercy" of the death penalty over a "cruel and inhumane" life in prison without the possibility of parole. (*Id.* at p. 933.) He explained that if he were sentenced to prison, he would be forced to kill or be killed, that life in prison held the promise of a relentless lifetime of "fighting and violence, which [had] been

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[71] Respondent does not respond to appellant's argument that the trial court erred in failing to address the merits of his motion. (AOB 266-268.)

[typical of his] last 15 years," and that he could not "bear being alone anymore." (*Ibid.*)

On appeal from his ensuing death judgment, Guzman argued that the admission of his death-preference testimony: (1) diminished the jury's sense of responsibility in selecting the appropriate punishment, and thus its death verdict may have been unreliable in violation of the Eighth Amendment; and, (2) amounted to improper aggravating evidence under *People v. Boyd* (1985) 38 Cal.3d 762, 774. (*People v. Guzman*, *supra*, 45 Cal.3d at p. 961.) This Court rejected both arguments.

Although this Court concluded that a defendant's desire to testify might sometimes be at odds with the public's "strong interest in promoting the reliability of a capital jury's sentencing determination" (*People v. Guzman*, *supra*, 45 Cal.3d at p. 961), it did *not* hold that a defendant's constitutional right to testify is absolute or encompasses the right to testify to the appropriate penalty in a capital case. Instead, this Court held that Guzman's testimony did not render the ensuing death verdict constitutionally unreliable for a number of reasons. Guzman had testified at length to substantial mitigating evidence and his defense counsel argued that mitigating evidence to the jurors. (*Id.* at pp. 959-960, 962-963.) Furthermore, the prosecutor did not mention Guzman's death-preference testimony in closing argument, nor did he argue it as a basis for a death verdict. (*Id.* at pp. 962-963.) Finally, the jurors understood the scope of their consideration of Guzman's mitigating evidence and their duty to exercise their discretion to determine the appropriate punishment notwithstanding his testimony. (*Ibid.*)

This Court rejected the claim of error under *Boyd* for similar reasons. First, this Court reasoned, *Boyd* "is distinguishable [because] [i]t stands for

the proposition that the 1978 [death penalty] law prevents the prosecution from introducing, in its case-in-chief, aggravating evidence not contained in the various factors listed in section 190.3. But no such event occurred here; defendant, not the prosecution, presented the evidence." (*People v. Guzman*, *supra*, 45 Cal.3d at p. 963.) Second, because "the prosecutor made no effort to capitalize on the testimony. . . . [w]e conclude no *Boyd* error occurred here." (*Ibid.*)

In *People v. Webb*, *supra*, 6 Cal.4th 494, the defendant testified in narrative form at the penalty phase, over defense counsel's objection and following a competency hearing and determination. He told the jury "in clear and sometimes graphic terms" that he did not want life imprisonment and believed death was the only "appropriate" penalty. Webb explained that he had defied his parents' teaching and societal mores and chosen a life of crime beginning at age 16. He described four different murders for which he was never "busted"—a contract murder, a homosexual murder, a race murder, and a burglary murder – and pointed to the tattoos on his arms which symbolized these events. Webb also indirectly admitted the capital crimes, saying "[t]hose two kids, you know, all they was trying to do was raise a family. . . . They made [the] mistake of crossing the path of me." He said he had "manipulated" the prison system by establishing an art class as a means of smuggling drugs into prison and by tricking officials into believing he was trying to save the lives of inmates he had actually stabbed. Finally, Webb made clear that his testimony was not based on a guilty conscience, but on the realization that he was heartless and would not change: "Some people are salvageable, you know. I'm not. [¶] What do you do with a man that does [not] have any feeling? What do you do with a man that doesn't care? What do you do with a rabid dog? Put it to sleep."

(*Id.* at p. 513.)

On appeal, Webb contended that the trial court prejudicially undermined the reliability of the penalty verdict by allowing him to testify in favor of a death sentence. (*People v. Webb*, *supra*, 6 Cal.4th at p. 534.) Webb attempted to distinguish *Guzman* on the ground that his testimony was uniquely "repugnant" and was purportedly calculated to "inflame" the jury. (*Id.* at p. 535.) This Court rejected his claim, reasoning that a defendant's absolute right to testify cannot be foreclosed or censored based on content. (*Ibid.*) This Court also assumed that the jury followed a limiting instruction stating that, "[d]espite the defendant's testimony, you remain obligated to decide for yourself, based upon the factors in aggravation and mitigation, whether death is the appropriate penalty." (*Ibid.*)

As appellant demonstrates below, respondent is incorrect in contending that his argument lacks legal support, and that the trial court's denial of his motion was not prejudicial error.

1. Neither the *Guzman* Court Nor the *Webb* Court Considered Claims Raised In This Case

As noted above, appellant argued that the trial court's decision to permit a third penalty trial operated to (1) violate appellant's rights to a fair trial and due process of law, as well as his right to a reliable penalty trial, because the court was aware that, with each successive penalty trial, he was testifying to increasingly unreliable and irrelevant matters, and to increasingly inflammatory effect, in order to obtain a death verdict; and, (2) effectively allow appellant to waive his right to a fair trial, in contravention of the fundamental public policy that the state's interest in a fair and reliable trial may not be "thwarted through the guise of a waiver of a

personal right by an individual." (AOB 250-251.) Respondent's reliance upon *People v. Guzman*, *supra*, 45 Cal.3d 915 and *People v. Webb*, *supra*, 6 Cal.4th 494, is misplaced because neither opinion considered claims central to appellant's argument.

First, unlike appellant (AOB 255-268), neither Guzman nor Webb argued that his death-preference testimony effectively constituted a waiver of his right to a fair trial in contravention of the fundamental public policy that the state's interest in a fair and reliable trial may not be "thwarted through the guise of a waiver of a personal right by an individual." (See *People v. Webb*, *supra*, 6 Cal.4th at pp. 534-535; *People v. Guzman*, *supra*, 45 Cal.3d at p. 962.) While this Court rejected Guzman's contention that his death-preference testimony undermined the state's interest in the reliability of a capital jury's sentencing determination (*People v. Guzman*, *supra*, 45 Cal.3d at p. 962), he did not argue that he had effectively *waived* his right to a fair trial. Moreover, as explained in the next section, the instant case involves factors which significantly distinguish this case from *Guzman*, particularly the trial court's prior knowledge that appellant's testimony itself would be unreliable.[72]

Second, defense counsel argued, and the trial court in this case expressly recognized, that appellant did not have the right to present irrelevant or impermissible testimony (RT Vol. 17 3897-3901, 3909-3912;

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[72] It is unclear from the *Webb* opinion whether the defendant in that case invoked the state's interest in the reliability of the sentencing determination. However, his concession that this Court had previously rejected his claim in *Guzman* (*People v. Webb*, *supra*, 6 Cal.4th at pp. 534-535) suggesting that his claim was similar, if not identical, to that raised by Guzman.

RT Vol. 19 4460-4461, 4463, 4472-4473; RT Vol. 21 4730-4734),[73] a claim not raised in either *Guzman* or *Webb*. Indeed, although a criminal defendant generally enjoys the right to take the stand and testify in his own *defense* (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53, 55 [recognizing right under due process and compulsory process guarantees to present evidence in one's defense under the Fifth, Sixth, and Fourteenth Amendments]; *People v. Robles* (1970) 2 Cal.3d 205, 215 [recognizing right under California law]), that right is not absolute. It encompasses only "the right to present *relevant* testimony." (*Rock v. Arkansas, supra*, 483 U.S. at p. 55, italics added; see also, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 101-102 [trial court properly precluded defendant from testifying to irrelevant matter at penalty phase without violating his constitutional right to testify]; *People v. Alcala* (1992) 4 Cal.4th 742, 806-807 [same]; *United States v. Carter* (7th Cir. 2005) 410 F.3d 942, 951 ["Simply stated, a criminal defendant does not have an absolute, unrestrainable right to spew irrelevant – and thus inadmissible – testimony from the witness stand"]; *United States v. Moreno* (9th Cir. 1996) 102 F.3d 994, 998 [constitutional right to testify is not violated by exclusion of irrelevant testimony]; *United States v. Gonzalez-Chavez* (8th Cir. 1997) 122 F.3d 15, 18 [court's refusal to permit defendant to testify to irrelevant matter did not violate right to testify].) The defendant must comply with rules of procedure and evidence designed to assure fairness and reliability. (See, e.g., *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332, citing *Chambers v. Mississippi* (1973) 410

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[73] Specifically, during the second penalty trial, the trial court barred appellant from discussing his political views, and even barred him from retaking the stand, recognizing that he was not entitled to testify to irrelevant or impermissible matters. (RT Vol. 19 4460-4461, 4463, 4472-4473.)

U.S. 284, 302.)

Moreover, it is well established that a defendant's "absolute" right to testify does not include the right to testify untruthfully. (See, e.g., *United States v. Dunnigan* (1993) 507 U.S. 87, 96, abrogated on other grounds by *United States v. Wells* (1997) 519 U.S. 482 ["a defendant's right to testify does not include a right to commit perjury"]; *United States v. Havens* (1980) 446 U.S. 620, 627 ["We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences"].)[74]

This Court has pronounced, without independent analysis, that "*Guzman* implies that a defendant's *absolute* right to testify cannot be foreclosed or censored based on content" (*People v. Webb*, *supra*, 6 Cal.4th at p. 535), that "[t]he defendant has the right . . . to take the stand and . . . request imposition of the death penalty" (*People v. Clark* (1990) 50 Cal.3d 583, 617), and that "every defendant . . . has the right to testify . . . even if that testimony indicates a preference for death" (*People v. Nakahara* (2003) 30 Cal.4th 705, 719). However, as this Court held in *People v. Lancaster*, *supra*, 41 Cal.4th at p. 102, the statements in the above-cited cases must be viewed in the context of their limited holdings that the defendants' death-preference testimony did not render the ensuing verdicts in those cases unreliable. Importantly, this Court explained that in those cases, "[*t*]*he relevance of the testimony was not challenged.* It is beyond cavil that evidence presented in mitigation must be relevant" and "'evidence of third persons' having been wrongfully convicted of capital offenses is irrelevant

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[74] To be sure, appellant's testimony should be viewed as different in kind than perjury (see Pen. Code, § 188 [defining perjury]), as his purpose was not to elude justice or achieve some financial or other gain for himself.

to the jury's function in the case before them and is inadmissible.' (Citation.)" (*Id.* at p. 102, italics added; accord, e.g., *People v. Alcala* (1992) 4 Cal.4th 742, 806-807.)[75]

Thus, the unreliability of appellant's penalty trial was compounded by the fact that his testimony encompassed matters which the trial court itself had recognized as irrelevant or impermissible. (RT Vol. 19 4460-4461, 4463, 4472-4473.)

2. In Contrast to *Guzman* and *Webb*, the Trial Court Here Had Prior Knowledge That the Penalty Trial Would Be Unreliable

In *People v. Guzman*, *supra*, 45 Cal.3d at page 929, the defendant insisted on testifying on his own behalf. Although defense counsel felt ethically precluded from presenting evidence in support of a life sentence, they for personal moral reasons were unwilling to assist the defendant in his effort to obtain a death sentence. Accordingly, they requested that he be allowed to testify in narrative form, and the trial court granted their request. In *People v. Webb*, *supra*, 6 Cal.4th at page 513, the defendant testified at the penalty phase over defense counsel's objection and following a

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[75] Even the right to present relevant testimony is "not without limitation" and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 55, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 295.) Thus, the state may restrict the defendant's right to testify so long as the restrictions are not "arbitrary or disproportionate to the purposes they are designed to serve." (*Id.* at pp. 55-56; accord, e.g., *United States v. Gallagher*, *supra*, 99 F.3d 329, 332 [it is "neither arbitrary nor disproportionate" to refuse to allow a defendant to give narrative testimony]; *People v. Lucero* (2000) 23 Cal.4th 692, 717, and authorities cited therein ["we have repeatedly held there is no right of allocution at the penalty phase of a capital trial"].)

competency hearing and determination. Significantly, nothing in either opinion suggests that the defendant's testimony was unreliable, let alone that the trial court knew prior to the penalty trial that the defendant intended to present unreliable testimony.

In contrast, the facts referenced or summarized below[76] make clear that the trial court knew *long before the third penalty trial* that appellant was going to testify to unreliable (that is to say, untrue), irrelevant and inflammatory matters, and that he was trying to commit state-assisted suicide:[77]

Appellant repeatedly expressed remorse during the months following the shootings. Among other things, during interviews with police detectives on the day of his arrest, he made clear that his sole motivation was to avenge what he believed was the mistreatment and death of his mother at the hands of nurses at West Anaheim Medical Center and La Palma Intercommunity Hospital. He also expressed remorse over, and asked forgiveness for, the shootings of Rosetti and Robertson, whom he believed to be innocent. (AOB 72-75 [summarizing interviews of appellant by Anaheim Police Department detectives, and testimony of Susan Webster,

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[76] The pertinent portion of the record is adequately summarized in appellant's opening brief; therefore, except where further explanation of the procedural history is required, appellant cites to the opening brief.

[77] According to respondent, appellant argues that the fundamental unfairness of his trial "resulted from the fact that in each trial, [appellant] gave testimony which increasingly defeated his own interests, and invited the jury to sentence him to death." (RB 92.) Respondent has minimized the thrust of appellant's argument, to the point of distortion. Instead, as defense counsel observed, "[t]he death verdict was grounded on [appellant's] demonstrably false presentation of himself as a remorseless and evil person who was deserving of the death penalty." (CT Vol. 8 2157.)

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Similarly, during the first penalty trial, appellant repeatedly apologized to the families of the victims and expressed remorse for the pain he had caused them, explaining that he had intended to kill only those nurses whom he believed had harmed his mother. According to appellant, he owed the victims' families his life to repay them for the loss of their loved ones. (AOB 67-71.) Even as appellant pleaded with and dared the jury to sentence him to death, he again apologized to the victims' families. (AOB 70-71.) Although appellant claimed that he was a Communist and condemned the United States government, saying it had committed genocide in Vietnam, he did not claim that these beliefs played a part in the offenses. Rather, he simply was making clear that he was apologizing to the American people, but not to the American government. (RT Vol. 12 2805-2806, 2808-2810; see also RT Vol. 12 2777.)

Appellant's testimony at the second penalty trial was far more strident and inflammatory than his testimony at the first penalty trial. In particular, appellant claimed that he now felt no remorse for the killings and stated that he would not apologize for his acts; he disavowed or denied his previous expressions of remorse; he attempted to explain away statements he had made to the police in which he said that both Rosetti and Robertson had confronted him unexpectedly, that he did not know where he was shooting and/or did not intend to kill them, and that he was just trying to get away; and, he repeatedly stated that he had "executed" the victims, and described the shootings in a manner intended to convince the jury that he committed the shootings in a callous manner. (AOB 48-50.)

During cross-examination, appellant requested permission to address

the jury.[78] The trial court instructed appellant that he must first answer the questions asked of him on cross-examination and, if it took place, redirect examination. Nevertheless, the prosecutor seized upon the opportunity to elicit testimony damaging to the defense, asking appellant, "What would you like to tell us?" (RT Vol. 17 3895.)

The court and counsel subsequently discussed appellant's request to make a statement to the jury. (RT Vol. 17 3897.) Defense counsel argued that appellant's testimony must be confined to relevant matters, adding that the admission of irrelevant and highly prejudicial testimony would violate Evidence Code section 352 and the Eighth Amendment guarantee of a reliable penalty verdict. (RT Vol. 17 3898.) The trial court agreed and instructed appellant to answer the questions asked of him, explaining that he might be permitted to address the jury afterward so long as his testimony was relevant. (RT Vol. 17 3900-3901.)

Although appellant stated that he understood, he continued to press the court for permission to make a statement to the jury. The court reiterated that it would allow appellant make a statement so long as it was not irrelevant or highly prejudicial. However, the trial court added,

> Now, you already changed your testimony from the last time, and I know what you have done, Mr. Trinh, you have gone over to the county jail and figured out what the magic words are to get what you want.

(RT Vol. 17 3901.)

A lengthy exchange ensued, in which appellant continued to insist

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[78] Specifically, appellant stated, "I would like to ask the judge permission." (RT Vol. 17 3895.) Both the court and counsel understood that he was requesting permission to address the jury. (RT Vol. 17 3895-3896.) Indeed, appellant subsequently explained that he wanted the judge's permission "[s]o the jury, they can understand." (RT Vol. 17 3896.)

that he be allowed to address the jurors but resisted disclosing what he wished to say to them. He finally admitted that he intended to testify that he committed the shootings in part because he was a communist. (RT Vol. 17 3902-3909.) The trial court sustained defense counsel's objection to appellant's request, finding that his supposed views regarding "communism, Americans killing Vietnamese, et cetera, et cetera" were not in fact motivating factors. (RT Vol. 17 3909-3912.)[79] After the prosecutor completed his cross-examination, appellant complained that he had not been allowed to make his statement to the jury and the trial court assured him that they would revisit the matter. (RT Vol. 17 3913-3916.)

During a subsequent proceeding, the trial court agreed with defense counsel that appellant's testimony was "subject to the same rules of relevance and same limitations" as any other witness, and that he should not be allowed to testify further unless he could offer relevant testimony. (RT Vol. 19 4460-4461.) Responding to the prosecutor's contention that appellant had an absolute right to testify regarding "communism and American government and things of that nature" (RT Vol. 4461), the court observed that it would be constitutionally impermissible for the jury to vote for death because of their prejudice against communism. The court also found that appellant was trying to kill himself through the jury, and noted the strong public policy against state-assisted suicide. (RT Vol. 19 4463.) The court later pointed out that

[appellant] smiled when I suggested what he wanted the jury to hear.

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[79] Appellant does not raise on appeal any arguments relating to his request to testify regarding his supposed communist beliefs. However, the litigation of that request is relevant to show that the trial court was aware that appellant changed his testimony in order to provoke the jury into voting for death.

> I think I can read his body language as well as anybody can. In other words, we all knew what he wants to testify to.

(RT Vol. 19 4465.) After much pressing by the court to divulge what he wanted to tell the jury, appellant acknowledged that he wished to testify that, among other things, his anger and hatred towards the United States government led him to commit the shootings, that he felt no remorse for "execut[ing]" the victims, and that he wanted to convince the jury to give him the death penalty. (RT Vol. 19 4468-4471.)

The court denied appellant's request to testify further, ruling as follows:

> I think it would be constitutional error to allow [appellant] to retake the stand for the purpose of making a statement, and we know what his purpose is. And whether or not he gets the death penalty or life without possibility of parole is a jury decision. We give them the discretion as to how to do it.
>
> There are some constitutional principles which apply, and it is possible that a juror may think the way [the prosecutor] suggested.[80] But unfortunately an appellate court or habeas court would never know that, and they would draw the opposite assumption.
>
> So I really think the reverse of what your argument is is true. We would be destroying the validity of the verdict in this case if we got one. And that if I am wrong, I am wrong. But I think I have a duty to keep irrelevant and impermissible matters from the jury.

(RT Vol. 19 4472-4473.)

Following the second mistrial, defense counsel filed a motion requesting that the court impose a sentence of LWOP pursuant to Penal

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[80] The prosecutor had suggested that jurors might find appellant's testimony regarding his political views to be mitigating. (RT Vol. 19 4461-4465, 4471-4472.)

Code section 190.4, subdivision (b). Defense counsel argued that the trial court should impose LWOP because, among other things, any death verdict reached during a third penalty trial would be based largely upon additional fabrications by appellant, not on a fair evaluation of the evidence. (See AOB 171-184 and pp. 90-96, *ante*.) Defense counsel also observed that the "precipitous swing from life [i.e., the 10-2 split in favor of LWOP at the first penalty trial] to death [i.e., the 11-1 split in favor of a death verdict at the second penalty trial] appears directly proportional to [appellant's] improved performance at making jurors believe that he is a remorseless killer, so as to guarantee that which [appellant] so desperately seeks: death." (CT Vol. 6 1564.) Nevertheless, the trial court denied the motion. (RT Vol. 20 4716-4720.)

During the third penalty trial, at the request of defense counsel, the court renewed its ruling that evidence regarding appellant's supposed political views and motivations were irrelevant. Responding to the prosecutor's assertion that appellant had a right to raise those matters, the court observed that he did not have the right to introduce irrelevant matters. The court granted the defense motion, finding that appellant's views on those matters were irrelevant to his motive. The court also found that such testimony would confuse the jury and take up too much time, for it would be viewed improperly as aggravating in light of Orange County's large military population. (RT Vol. 21 4730-4734.)

Nevertheless, during the third penalty trial appellant claimed that he committed the shootings not only to avenge the death of his mother, but to avenge the "genocide" in Vietnam.[81] Moreover, appellant again refused to

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[81] Appellant acknowledged that he did not tell the police that he (continued...)

apologize, but his testimony on the matter was even more clearly intended to incite the jury's wrath. He repeatedly stated that he "accept[ed]" the death penalty, and even went so far as to demand, "Do your job." (AOB 71-72 and fn. 42.)[82]

Contrary to respondent's assertion (RB 94), then, this is not merely a case in which the defendant testifies, makes inflammatory comments, and asks the jury to sentence him to death. Rather, the trial court was aware, even prior to the third penalty trial, that appellant was trying to kill himself through the jury, and that he would testify in a way likely to induce the jury to render a death verdict. As defense counsel noted in their motion for LWOP, "[appellant] had 'figured out' exactly how to get the verdict he desired by creating even more offensive falsehoods and by acting belligerently in court. The timing of his anti-American proclamations – on the eve of war with Iraq – immensely assisted his cause. [¶] Of course, this event was entirely foreseeable." (CT Vol. 8 2155.) Thus, respondent's reliance upon *Guzman* and *Webb* – cited for the proposition that a verdict is not arbitrary, capricious or unreliable simply because the defendant testifies, makes inflammatory comments, and asks the jury to sentence him to death (RB 94) – is misplaced.

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[81](...continued)
committed the shootings because he was doing his duty as a Vietnamese citizen. (RT Vol. 24 5712.)

[82] By saying he "accept[ed]" the death penalty, appellant obviously was stating his opinion that death was the appropriate penalty. For instance, at one point he explained, "For me, I accept, I kill, I accept to be killed. Simple as that." (RT Vol. 24 5704.)

3. Appellant's Testimony Contained No Overtly Mitigating Elements

In *Guzman*, this Court held that the defendant's death-preference testimony did not render his penalty trial unreliable in part because he presented mitigating evidence in his testimony. (*People v. Guzman*, *supra*, 45 Cal.3d at p. 961.)[83] In *Webb*, this Court rejected the defendant's claim that the jury's sentencing responsibility was diminished as a result of his "pro-death" testimony, assuming that the jury fully considered the penalty evidence, including the extensive case in mitigation presented by witnesses other than defendant. (*People v. Webb*, *supra*, 6 Cal.4th at p. 535)

In contrast to *Guzman*, appellant's address to the jury contained *no* overtly mitigating testimony. Given the content of his testimony, coupled with his unwillingness to cooperate with defense counsel or the court (RT Vol. 24 5703-5713), the jury could not have doubted that he wished to die.

Like the defendant in *People v. Webb*, *supra*, 6 Cal.4th at p. 535, appellant argues that his testimony was repugnant and calculated to inflame the jury. However, appellant's testimony was far more inflammatory, and far more likely to incite the jury into voting for death, than Webb's testimony. Among other things, he testified that "I made a decision to walk in the hospital with a plan to execute three of your fellow U.S. citizen[s]." (RT Vol. 24 5703.) Appellant repeatedly referred to the victims as U.S. citizens, and to the shootings as executions. (RT Vol. 24 5703, 5707, 5710,

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[83] Appellant submits that the jurors reasonably could have concluded that, because his mitigating testimony was so extensive, Guzman did not actually want the death penalty. (See *People v. Sapp* (2003) 31 Cal.4th 240, 311 [it is unlikely that jurors would believe that a defendant "who by presenting a substantial case in mitigation was actively fighting a death verdict, truly believed that he deserved to die"].)

5711, 5712.) He claimed that he committed the shootings in part to avenge the "genocide" in Vietnam (RT Vol. 24 5703-5705, 5707-5708, 5710-5711, 5713), condemned capitalism and the U.S. government while hailing communism and socialism (RT Vol. 24 5713), and claimed that he carried out that revenge as a "Vietnamese citizen" and "comrade" (RT Vol. 24 5710). As he did at the second penalty trial, he refused to apologize, and denied or minimized his previous expressions of remorse, but struck a tone that was far more defiant and antagonistic than before. (RT Vol. 24 5703, 5706, 5707, 5712-5713.) Finally, he repeatedly stated that he "accept[ed]" the death penalty (RT Vol. 24 5703-5704, 5710), commanding the jury to "[d]o your job" (RT Vol. 24 5713).

The incendiary nature of appellant's testimony was compounded by the fact that two of the victims, Rosetti and Robertson, were Vietnam veterans. (RT Vol. 24 5621, 5639, 5659.) Moreover, as the trial court observed, testimony regarding appellant's supposed views on matters such as communism and American involvement in the Vietnam War would be viewed improperly as aggravating in light of Orange County's large military population. (RT Vol. 21 4730-4734.) On top of all that, the United States was on the eve of war with Iraq. (CT Vol. 8 2156.)

Thus, as defense counsel observed in their motion for LWOP, appellant's "offensive statement and conduct in the third trial far eclipsed anything he did in the prior cases." (CT Vol. 8 2155.) Moreover, "it is impossible to calculate the massive inflammatory impact this must have had on the jurors. What is clear, however, is that it created an unreliable penalty verdict." (CT Vol. 8 2156.)

4. The Prosecutor Arguably Capitalized On Appellant's Inflammatory Testimony

The prosecutor may have capitalized on appellant's testimony by repeatedly arguing that he "executed" the victims, taking advantage of appellant's inflammatory characterization of the crimes. (RT Vol. 27 6302, 6304, 6306, 6313, 6315, 6316, 6318.)[84]

5. Appellant's Inflammatory Testimony Most Likely Led the Jury to Disregard the Mitigating Evidence

Under the circumstances described above, the jury would have given little if any weight to the mitigation evidence or to defense counsel's effort to counter appellant's testimony by introducing his expressions of remorse. A review of the jury splits at each successive penalty trial is illuminating. At the time the trial court declared a mistrial during appellant's first penalty trial, the jurors were split 10-2 in favor of LWOP. (RT Vol. 14 3156-3157; RT Vol. 20 4715, 4719-4720; CT Vol. 4 1120-1121; CT Vol. 6 1564.) At the time the trial court declared a mistrial during the second penalty trial, the jury was split 11-1 in favor of death. (RT Vol. 20 4715, 4718-4791; CT Vol. 6 1564.) During the third penalty trial, of course, the jury unanimously voted for death. (RT Vol. 27 6400-6401; CT Vol. 8 2092.)

It cannot be presumed that the jurors understood their duty to exercise their discretion to determine the appropriate punishment notwithstanding his testimony. (Cf. *People v. Guzman*, *supra*, 45 Cal.3d at pp. 962-963.) In particular, respondent is incorrect in contending that the jury would have understood, based upon CALJIC No. 8.085m (RT Vol. 27

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[84] Appellant acknowledges that, even during the first two penalty trials, the prosecutor argued that he executed the victims. (RT Vol. 11 2507, 2510, 2511, 2513, 2519, 2521, 2591, 2600; RT Vol. 20 4589, 4590, 4591, 4595, 4598, 4611.)

6390; CT Vol. 8 2042), that appellant's desires were not relevant to their decision as to the appropriate penalty.[85]

The instruction expressly, and correctly, told the jury that it was not to consider victims' family members' characterizations and opinions about appellant or the appropriate sentence. By contrast, the instruction did not preclude the jury from considering appellant's testimony. Applying the maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another, to the court's instruction prohibiting the jurors from considering *only* the "*victim's family members*[']characterizations and opinions about the defendant or the appropriate sentence (RT Vol. 27 6390; CT Vol. 8 2042), the jurors would have understood that they were to consider any *other* witness's opinion regarding "the appropriate sentence," including appellant's testimony that he "accepted" the death penalty and his demand that he be sentenced to death.[86] As respondent points out, it must

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[85] CALJIC No. 8.085m provided in pertinent part that, "You may not consider the victim's family members[']characterizations and opinions about the defendant or the appropriate sentence. [¶] Despite the testimony of Mr. Trinh, the defendant in this case, it remains your obligation to decide for yourself, based on the statutory factors that I have read to you, whether death is appropriate." (RT Vol. 27 6390; CT Vol. 8 2042.)

[86] This Court, the United States Supreme Court, and many other appellate courts consistently apply the maxim in resolving how lay jurors would understand a particular instruction, whether explicitly (see, e.g., *People v. Castillo* (1997) 16 Cal.4th 1009, 1020; *People v. Watson* (1899) 125 Cal. 342, 344) or implicitly (see, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; *People v. Vann* (1974) 12 Cal.3d 220, 226-227 [where standard reasonable doubt instruction omitted, provision of instruction applying reasonable doubt standard to circumstantial evidence implied that the

(continued...)

be presumed that the jurors followed these instructions. (RB 94, citing *People v. Webb*, *supra*, 6 Cal.4th at p. 535.) Even if, as respondent suggests, it is presumed that the jury fully considered all of the penalty phase evidence (RB 94, citing *People v. Webb*, *supra*, 6 Cal.4th at p. 535), that simply means the jury considered evidence the trial court itself knew to be untrue, incendiary, and intended solely to carry out his aim of state-assisted suicide.

Therefore, it defies belief that the jury did not base its verdict on appellant's inflammatory testimony and his demand that they sentence him to death. For instance, appellant's testimony may have diminished the jury's sense of responsibility – i.e., "the jury might have concluded that if his life was unimportant to him, the jury need not labor over the difficult moral question of whether death [was] appropriate in [his] case" – and therefore the resulting sentence was unreliable. (*People v. Guzman*, *supra*, 45 Cal.3d at pp. 961-963.) As such, defense counsel's effort to counter appellant's testimony by introducing his expressions of remorse would have been futile.

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[86](..:continued)
standard did *not* apply to direct evidence]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser specified first and second-degree murder but did not mention second-degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonable probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge].)

C. Appellant's Sentence Should Be Reduced to LWOP; at a Minimum, a New Penalty Trial Should Be Granted

For the reasons set forth in appellant's opening brief and above, the trial court's denial of appellant's motion violated the interest of both appellant and the state in a fair trial (see, e.g., *Indiana v. Edwards* (1994) 554 U.S. 164, 177) and a reliable penalty verdict (see, e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 411). The trial court's denial of appellant's motion also violated the Eighth Amendment's prohibition against cruel and unusual punishment by upholding a death verdict which was imposed arbitrarily and capriciously (see *Furman v. Georgia* (1972) 408 U.S. 238, 239-240) and in contravention of evolving standards of decency (see *Trop v. Dulles* (1958) 356 U.S. 86, 101).

The trial court's error implicated federal constitutional protections and requires reversal because the state cannot show that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one of state law, the death verdict must be reversed because there was a "reasonable possibility" that the error affected the penalty decision. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

This Court has the authority to reduce a sentence of death where it is disproportionate to the defendant's individual culpability. (See, e.g., *People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Dillon* (1983) 34 Cal.3d 441, 477-484; *People v. Mora* (1995) 39 Cal.App.4th 607, 615; see also *People v. Davis* (1994) 7 Cal.4th 797, 817 (conc. opn. of Kennard, J.).) This Court also has the authority to reduce a death sentence pursuant to Penal Code sections 1181 and 1260 where there is "prejudicial error or legal insufficiency of evidence." (*People v. Leonard* (2007) 40 Cal.4th 1370,

1427.)[87] Accordingly, under either strand of authority, or both, this Court should reverse the penalty judgment and impose a sentence of LWOP, particularly because the factors which undermined the reliability of appellant's previous penalty trials (including his determination to give unreliable, inflammatory testimony in order to receive a death verdict, and the repeated outbursts and misconduct by victim impact witnesses) are virtually certain to be present in any future penalty trials as well. Moreover, given the strength of the mitigation evidence in this case, any future penalty jury would be unable to reach a unanimous death verdict in the absence of serious error. It would be futile, and an enormous waste of judicial resources, to order a new penalty trial rather than simply impose LWOP.

Should this Court order that a new penalty trial be held (Pen. Code, §§ 1181, subd. (5), 1260 [provisions relating to this Court's power to order a new trial]), it should direct the trial court to impose additional safeguards to better ensure the reliability of the trial.[88] For instance, on remand, the trial court should make it clear to appellant that, unless he agrees beforehand to limit his testimony to relevant, admissible matters, he will not be allowed to testify. In that event, the trial court should order the jury to consider instead appellant's testimony from the first penalty trial, i.e., the only relatively reliable testimony he gave. Similarly, the trial court should take all necessary steps to prevent the victim impact witnesses from making

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[87] See footnote 68, *ante*, setting forth the relevant portions of sections 1181 and 1260.

[88] As appellant observed in footnote 69, *ante*, there can be little if any reason to fear that other defendants will be able to manipulate their trial proceedings to force the reductions of their verdicts if appellant is granted relief on this basis.

unduly emotional displays and from offering opinions regarding appellant or the appropriate verdict.

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XI

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Appellant argued in his opening brief that many features of California's capital sentencing scheme violate the United States Constitution. (AOB 272-286.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 94-98.) Accordingly, no reply is necessary to respondent's contentions.

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XII

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 287-291.) Respondent simply contends that few if any errors occurred, and that any errors which may have occurred were harmless. (RB 98-99.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's contentions is necessary.

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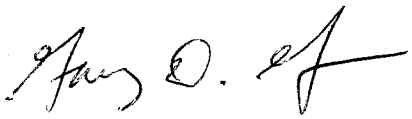
CONCLUSION

For all the aforementioned reasons, appellant's convictions and his sentence of death must be vacated.

DATED: May 14, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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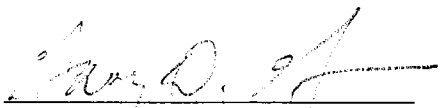
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(1)(c))

I, Gary D. Garcia, am the Deputy State Public Defender assigned to represent appellant Dung Dinh Anh Trinh in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 44,067 words in length.

DATED: May 14, 2012



GARY D. GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Dung Dinh Anh Trinh — Cal. Supreme Ct. No. S115284
Orange County Superior
Ct. No. 99NF2555

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street., 10th Floor, San Francisco, CA 94015. On this day, I served true copies of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Lynne McGinnis, D.A.G.
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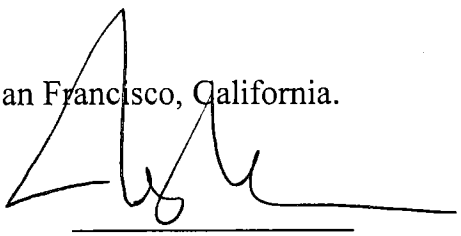
Each said envelope was then, on May 14, 2012, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on May 14, 2012, at San Francisco, California.



DECLARANT