IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LESTER WAYNE VIRGIL, Defendant and Appellant.	Supreme Court No. S047867 Los Angeles County Superior Court No. YA016781

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

HONORABLE STEVEN C. SUZUKAWA, JUDGE PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

CALIFORNIA JURY INSTRUCTIONS

FEDERAL CONSTITUTION

STATE CONSTITUTION

INTERNET CITATIONS

TREATISES/DICTIONARIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LESTER WAYNE VIRGIL,** **Defendant and Appellant.**	**Supreme Court No. S047867** **Los Angeles County Superior Court No. YA 016781**

INTRODUCTION

Beyond whether Mr. Virgil was properly sentenced to death, the primary questions in the present case are the identity of the man who killed Soy Sung Lao [hereafter "Ms. Lao"] at the Donut King in Gardena and whether the perpetrator's intent to steal arose before or after Ms. Lao was stabbed. Appellant, Lester Wayne Virgil [hereafter "Mr. Virgil"], was identified by some witnesses as the man seen seated at a dining room table inside the Donut King minutes before Ms. Lao was stabbed and by other witnesses as the man seen running out of the donut shop after taking money out of the cash register. Because the judgment against Mr. Virgil was the product of the trial court's many errors and otherwise not supported by substantial evidence, the entire judgment against him must be reversed.

RESPONDENT'S STATEMENT OF FACTS

A. The Crimes Against Ms. Lao at the Donut King – Counts 2 and 3

1. Sgt. Donald Tiller – The First Person Who Reported Seeing The Man Suspected Of Killing Ms. Lao And His Uncertain Identification Of That Man

Respondent's discussion of the crimes against Ms. Lao begins with the testimony of Sergeant Donald Tiller ["hereafter "Tiller"], the Los

Angeles Park Police Officer who was at the Donut King shortly before the commission of the crimes against Ms. Lao. (V7, RT 924-931, 983-983.) [1] Respondent provides that Tiller was at the Donut King on "October 24, 1992, at approximately 3:30 p.m." when appellant [Mr. Virgil] was seated at a dining room table. (RB 3.) Respondent ignores that Tiller changed his testimony at trial in a way that made it more consistent with the prosecution's evidence about the events at the Donut King. Tiller's revised testimony is critically important because it calls into question the overall reliability of his testimony and Mr. Virgil's identification as the man in the donut shop.

Consistent with his statement to the police just hours after Ms. Lao was stabbed, Tiller testified at the preliminary examination that he "was positive" he arrived at the donut shop at 3:15 PM. (V7, RT 982-983, 991, 1019.) Almost three years later, Tiller changed his story by testifying he arrived at the Donut King at approximately 3:40 PM, a time more consistent with the prosecution's theory of when the crimes against Ms. Lao were committed. (V7, RT 935, 982-983; V8, RT 1029, 1212; V19, RT 3261.)

Tiller first viewed a six-pack photographic lineup containing Mr. Virgil's photograph approximately eight months after the events at the Donut King. (V7, RT 967.) Tiller was uncertain of his identification – he could not decide between Mr. Virgil's photograph and the photograph of another man who was closer in age and appearance to the man he remembered seeing in the donut shop. (V7, RT 972-974.) Given his

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[1] All references to the record on appeal will be preceded by the Volume number ["V#"] followed by either the Clerk's Transcript ["CT"] and page number or the Reporter's Transcript ["RT"] and page number. Unless provided to the contrary, all statutory references are to the Penal Code.

uncertainty, Tiller asked if Sergeant Lobo [the lead detective investigating the crimes against Ms. Lao's] could prepare a six-pack photographic lineup containing profiles of the men's faces. (V2, SCT2, 379, 388-397; V7, RT 959-960, 963-964.)

After viewing the lineup with profiles [People's Nos. 22-B and 22-C], Tiller identified Mr. Virgil as the man in the donut shop. (V7, RT 942-942, 956-957.) [2] Regardless of his identification, Tiller was "equally sure" that either of the two men he detained while trying to solve Ms. Lao's homicide on his own looked like the man in the donut shop. (V7, RT 958-959.) [3]

Tiller attended the live lineup almost one year after Ms. Lao's homicide. (V2, SCT2 398.) Tiller identified Mr. Virgil, but admitted the other men in the lineup "look[ed] substantially different," Mr. Virgil was the only man with a goatee, and he was the only person who was also in the photographic lineups shown to him. (V7, RT 1010-1011.) [4] Respondent's reliance on Tiller's identification of Mr. Virgil as the man in the donut shop is misplaced.

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[2] Like the photograph of him facing forward, Mr. Virgil's profile photograph was also highlighted with a yellow background.

[3] Tiller admitted he was very upset about Ms. Lao's homicide and wanted to do all he could to solve the crimes against her. (V7, RT 957-958; V11, RT 1831.)

[4] Moreover, Mr. Virgil was the only man standing immediately behind a low object in the foreground. (People's Exhibit No. 8.)

2. Lavette Gilmore – The Second Person To Identify Mr. Virgil As The Man In The Donut Shop, Her Admission Of Lying During The Identification Process, And Her Testimony That Differed Greatly From Other Eyewitnesses In The Donut King

Respondent discusses Lavette Gilmore's identification of Mr. Virgil, but omits several key factors that call into question her credibility and the reliability of her identification of Mr. Virgil as the man in the donut shop. Specifically, Respondent fails to address the great differences between Gilmore's story about the events inside the donut shop and the stories of other witnesses and her knowing false statement during the identification process. (RB 3.)

Gilmore testified she was in the donut shop between 3:30 PM and 4:00 PM using her "big mouth" to talk with Ms. Lao and many other customers during that time. Further, Gilmore said she talked with a "park policeman" both inside and outside the shop about her suspicions of the man seated at one of the customer tables and later suspected to be the man who killed Ms. Lao. (V18, RT 2860, 2861, 2864, 2879, 2880-2881, 2887, 2896-2897, 2900-2901.)

Donald Tiller, the park policeman present just before the crimes against Ms. Lao were committed, testified differently about the people in the donut shop. Besides Tiller, the only people in the donut shop with him were Ms. Lao and the man seated at a table in the dining room. (V7, RT 934-935, 939, 948; V19, RT 3090-3091.)

Beyond her story about talking with Tiller, Gilmore said for the first time at trial that she was in the donut shop with a bald man [DeAndre Harrison]. (V9, RT 1404-1405.) Both Harrison and Debra Tomiyasu, the eyewitnesses who saw a man take money out of the cash register just before Ms. Lao appeared and collapsed in front of them, testified they were the only customers inside the shop when they entered and until they left to call

911 and report Ms. Lao's injuries and the man seen taking money out of the register. (V8, RT 1033-1034, 1118; V9, RT 1261-1263, 1276-1277; V18, RT 2891-2892, 2916-2917, 2923, 3088-3089, 3091.) [5]

Beyond her different tales about the people inside the donut shop, Gilmore's identification of Mr. Virgil as the man in the donut shop was not certain and not reliable. Almost 10 months after Ms. Lao was stabbed and killed, Gilmore was shown People's Nos. 6 [front facial view] and 22-B [left facial view] containing the yellow, highlighted photographs of Mr. Virgil. These photographs were taken about 10 days after the events at the Donut King and depicted Mr. Virgil with a goatee [the man in the donut shop was said by most witnesses to have had a full beard]. (V2, SCT2 379; V3, SCT2 649-654.) Gilmore could not decide between the men in Position No. 1 [an otherwise unidentified man] and No. 2 [Mr. Virgil] in People's No. 6 and her subsequent identification of Mr. Virgil in People's No. 22-B was because he was "closest" in her memory of the man in the donut shop. (V3, SCT2 654)

After Gilmore identified someone other than Mr. Virgil at the live lineup [Mr. Virgil was the only man to appear in both the photographic lineups and the live lineup], the prosecutor and the investigating officer interviewed Gilmore again and confronted her about failing to identify Mr. Virgil, the prosecution's only suspect. (V7, RT 1010; V18, RT 2888-2889, 2969-2971.) Suddenly, many, many months after the events at the Donut King, Gilmore changed from being uncertain about whether Mr. Virgil was

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[5] Respondent does recognize the problems between Gilmore's story and the stories by Harrison and Tomiyasu. (RB 4.)

the man in the donut shop to being "more than 100 percent" certain he was that man. (V18, RT 2889-2890, 2968-2971.) [6]

Given Gilmore's evolving testimony, the investigating officer and the prosecutor went Gilmore's work place the night before she testified at trial to resolve the problems presented by her inconsistent identifications. (V18, RT 2969-2971.) Gilmore reportedly cried during that interview and disclosed for the first time that she lied at the live lineup by not identifying Mr. Virgil and testified that she was certain all along that he was the man in the donut shop. (V18, RT 2889-2890, 2968-2972.) Given the circumstances of Gilmore's identification, Respondent is mistaken by relying on Gilmore's testimony that Mr. Virgil was the man in the donut shop. (RB 3.)

3. Ella Ford – The Fifth Person Who Reported Seeing The Man Suspected Of Killing Ms. Lao And Her Refusal To Attend The Live Lineup And Cooperate With The Police Investigation

Felipe Santoyo worked at the Bates Fish Market that was located in the same strip mall as the Donut King. (V8, RT 1211-1213.) Between 3:40 PM and 4:00 PM on October 24, 1992, he heard shouts to call 911 because someone was injured and bleeding. (V8, RT 1212-1213, 1229, 1230.) Because he heard that the injured person was at the Donut King, Santoyo went there to render assistance. (V8, RT 1214-1215, 1230-1231.) En route, he encountered a 40-45 year old black woman [Ella Ford] wearing a black

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[6] People's Exhibit No. 95 reflects that Gilmore was interviewed on January 20, 1994, but Sgt. Lobo testified that the interview was on January 20, 1995. (V3, SCT2 659; V18, RT 2968-2970.) Regardless of whether it was fifteen months or more than two years after the events in October 1992, Gilmore's certainty arose long after the events at the Donut King and then only after she viewed the same photographic lineup several times and the live lineup with Mr. Virgil, the only man to appear in both lineups.

and white dress standing outside Conway Cleaners [the business immediately next to the Donut King in the strip mall] holding her laundry. (V8, RT 1228-1229, 1233-1235, 1239, 1392; V9, RT 1427, 1432; V11, RT 1751.) According to Santoyo, the woman [Ford] told him that she had been inside Conway's when she saw a man hurry through the parking lot. (V8, RT 1236-1237, 1244.)

Although Ford remained at the scene and gave a statement to police, she refused to attend the live lineup and avoided the police for a long time because she was afraid the crimes against Ms. Lao might be gang related. (V9, RT 1384-1385, 1387; V18, RT 3040-3041.) Like Tiller's and Gilmore's, Ford's version of the events changed dramatically between the time of her statement immediately after those events and her testimony years later at trial.

Ford testified that her statement to Gardena Police Officer Nick Pepper at the scene was true and accurately reflected where she was and the events she experienced on the day Ms. Lao was stabbed. (V9, RT 1384, 1405-1406.) According to Officer Pepper, Ford said she saw a man running though the strip mall's parking lot from some distance away and described him as a male black, 6'2" tall, weighing 150 pounds, in his 20s, with black hair and brown eyes and a full beard "lightly grown," and wearing a black T-shirt with the continent of Africa in red, green and yellow and blue jeans and unknown color shoes. (V11, RT 1830-1831, 1836-1837.)

On the eve of trial and more than two years after the events at the Donut King, Ford told the investigating officer and the prosecutor that she was putting laundry into the trunk of her car when she heard someone shout that a person had been stabbed and she saw a man run past her after she turned back to look where the shouting had come from. (V9, RT 1399-1401.)

At trial, Ford testified differently by saying that she first saw the man after she paid for her laundry, walked outside Conway's, and saw him from 2-3 feet away as he left the donut shop and ran across the parking lot. (V9, RT 1354-1355, 1359, 1400-1401, 1406, 1411, 1415, 1436-1437.) According to this version of her story, the man was six to seven inches shorter than her description of him to Officer Pepper and she added an entirely new fact – the man's hands were at his sides and he appeared to be clutching something in his left hand, the hand closest to her. (V9, RT 1356-1358, 1361-1362, 1402.) [7] According to Ford, Mr. Virgil's height and facial features were consistent with the facial features of the man she saw that day. (V9, RT 1375, 1419-1420, 1432, 1434.)

Ford attempted to explain the differences in her many statements by testifying that she must have been confused when she talked with the police and the prosecutor on the eve of trial. (V9, RT 1401.) Finally, Ford added yet another new fact to her story by saying for the first time at trial that she saw the man twice – once as she was coming out of Conway Cleaners and he was leaving the donut shop and a second time when she was at her car and saw the man turn and look back at the donut shop in response to shouting about a stabbing. (V8, RT 1399-1401, 1437-1438.) Accordingly, Respondent is mistaken by relying on Ford's testimony that Mr. Virgil was the man running from the donut shop. (RB 3.) (RB 4-5.)

4. Elizabeth Devine, Ty And Lynne Ngov, And Detective Bartlebaugh – The Inept Investigation Of Ms. Lao's Homicide By The Gardena Police Department

Given the testimony that Mr. Virgil's right palm print was found on the edge of the dining room table where the man suspected of killing Ms.

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[7] In his Opening Brief at page 41, footnote 36, Mr. Virgil discussed the incredibility of Ford's testimony about seeing the man's left hand.

Lao was seated, the cleaning practices at the Donut King were critical evidence. (V6, RT 645.) Although the palm print was critical evidence, the police failed to photograph it in place [reportedly because of inadequate photographic equipment]. The police also failed to collect and preserve knives from the shop and serology evidence that could have identified Ms. Lao's attacker with scientific certainty; instead, they allowed all such evidence to be destroyed by allowing the shop to be cleaned before Ms. Lao's attacker was identified. And, the police waited almost two years before questioning Ms. Lao's relatives about the cleaning procedures at the shop generally and specifically about the day of the homicide. (V11, RT 1739, 1748, 1758, 1762-1763, 1767, 1772-1774, 1778-1779, 1785-1788, 1790-1791, 1795, 1796, 1804-1805, 1808, 1811, 1865-1869; V12, RT 1905-1906, 1908, 1913, 1936-1937-1941, 1945-1959, 1971-1972, 1984-1985, 1989; V14, RT 2026, 2140-2141 2150; V19, RT 3028, 3091.)

Elizabeth Devine, the prosecution's serology expert, was first asked to investigate Ms. Lao's homicide years after the crime. (V15, RT 2346-2347.) Ms. Devine, a nationally recognized expert in her field (V15, RT 2337-2339) and now a driving force behind the popular "CSI" television shows, [8] testified that she would have done things completely differently if she had been called to the Donut King crime scene. (V15, RT 2369-2381.) Unlike the procedures used by the Gardena Police Department's crime investigation unit, Devine would have collected and preserved blood samples from various places in the donut shop, based on her experience and knowledge within the law enforcement community that the attacker in a stabbing crime often cuts himself and leaves blood at the scene. (V15, RT 2373-2374.)

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[8] http://sandysiegel.homestead.com/Emmy.html; http://www.csifiles.com/news/250706_01.shtml

Under the circumstances, the Gardena's Police Department's handling of the crime scene and delayed investigation regarding critical evidence called into question the reliability of the forensic evidence linking Mr. Virgil to Ms. Lao's homicide and the crimes at the Donut King. Accordingly, Respondent's reliance on the certainty of that evidence is misplaced. (RB 7.)

GUILT PHASE

ARGUMENTS OF LAW

I.

THE MANY PROCEEDINGS CONDUCTED OUT OF MR. VIRGIL'S PRESENCE DURING HIS TRIAL VIOLATED HIS RIGHTS TO BE PRESENT AND ASSIST IN HIS DEFENSE AND AFFECTED THE RELIABILITY OF THE PROCEEDINGS AND REQUIRE THE REVERSAL OF THE ENTIRE JUDGMENT

A. Respondent's Contention

"APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL ." (RB 19.)

B. The Trial Court Violated Mr. Virgil's Federal And State Constitutional And Statutory Rights To Be Present At All Critical Stages Of The Proceedings

Respondent begins by providing in a footnote that it will not address Mr. Virgil's claim that his statutory rights to be present were violated by the trial court because he failed to identify any single statutory provision at issue. (RB 19, fn. 4.) Mr. Virgil respectfully directs the Court's attention to page 111 of his Opening Brief where he provided that

> "A criminal defendant has a right under the Sixth and Fourteenth Amendments to the United States Constitution, under section 15, article I of the California Constitution and California Penal Code

sections 977 and 1043 to be personally present during his trial. (*People v. Cole* (2004) 33 Cal.3d 1158, 1230; *People v. Waidla* (2002) 22 Cal.4th 690, 741; *People v. Weaver* (2001) 26 Cal.4th 876, 976; *Clark v. Stinson* (2d Cir. 2000) 214 F.3d 315 [the right to be present is grounded in the due process and confrontation clauses of the United States Constitution].) (Emphasis added.)"

Mr. Virgil also respectfully directs the Court's attention to his citation and reliance on *People v. Waidla, supra,* 22 Cal.4th at p. 741, where this Court held that a defendant's right to be personally present is based on various provisions of law, including the Sixth and Fourteenth Amendments to the United States Constitution, section 15 of article I of the California Constitution and Penal Code section 977 and 1043. (Opening Brief at page at 111.) According to the *Waidla* court, the defendant's statutory right to be personally present is conditioned on the existence of his rights under the California Constitution. (*Id.* ,at p. 742.) Because Mr. Virgil's claim is grounded on his federal and state constitutional rights to be present and his statutory rights under *Waidla* exist to the extent he has such rights under the state Constitution, Mr. Virgil discussed his claim on the basis of his federal and state constitutional rights. (See also *People v. Rogers* (2006) 39 Cal.4th 826, 855 [the standard under Penal Code sections 977 and 1043 "is similar" to the standard under the federal and state Constitutions].)

In *Rogers*, defendant claimed that his absence from unreported in-chambers conferences where his counsel stipulated to excuse potential jurors for hardship violated his federal and state constitutional rights to be present at all critical stages of his trial. Relying on its decisions in *People v. Ervin* (2000) 22 Cal.4th 48, 72-74, and *People v. Hardy* (1992) 2 Cal.4th 86, 178, and the United States Court of Appeals' decision in *Cohen v. Santowski* (2d Cir. 2002) 290 F.3d 485, 490, the Court said it has repeatedly rejected claims of error based on a defendant's mere absence

from discussions involving juror hardship excusals. (*People v. Rogers, supra,* 39 Cal.4th at pp. 855-856.) [9] Because *Rogers* and the decisions on which it is based are distinguishable given Mr. Virgil's exclusion from so many proceedings and the record reflects that he did not have an opportunity to consult with defense counsel about jury selection matters that occurred secretly out of his hearing and presence, Mr. Virgil's federal and state constitutional and statutory rights were violated by his exclusion from the proceedings at issue.

Respondent's details the many instances throughout Mr. Virgil's trial where he was absent from the proceedings and upon which his instant claim of error is based. (RB 19-20.) Contrary to the nature and importance of the proceedings at issue and reason, Respondent relies on *People v. Cole, supra,* 33 Cal.4th at pp. 1230-1232, to conclude that Mr. Virgil had no right to be present at any of these proceedings because they merely involved discussions about legal issues between the court and counsel. (RB 19-21.)

In *Cole*, the defendant claimed that the trial court erred by assertedly excluding him from a variety of pretrial and trial proceedings. After considering each proceeding in question, the Court concluded that defendant's absence from these proceedings did not affect his constitutional rights under the Sixth Amendment [right to the assistance of counsel and confrontation] and the Fourteenth Amendment [right to due process], or his state constitutional and statutory rights regarding his ability to defend against the charged offenses because there was no restriction on the defendant's ability to communicate with his attorney or anything else

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[9] Mr. Virgil was advised of his right to be present when prospective jurors were screened for hardship and waived his right to be present with the consent of trial counsel. (V1, RT 18-19.) Consequently, Mr. Virgil is not claiming that his exclusion from those proceedings violated his rights to be present at that critical stage of his trial.

related to his Sixth Amendment constitutional tights. (*Id.*., at pp. 1231-1232.) Because Mr. Virgil was excluded from proceedings that were important and relevant to his ability to communicate with counsel about the overall fairness of the jury that decided his guilt and punishment of death, his ability to monitor the effectiveness and quality of defense counsel's representation, and the overall fairness of his trial, the decision in *Cole* is distinguishable and inapposite from Mr. Virgil's case.

Instead, Mr. Virgil's case is governed by the Court's decision in *People v. Wright* (1990) 52 Cal.3d 367, 402-403, where this Court discussed defendant's claim that the trial court's ex parte side-bar communications with the jury foreperson about her financial ability to continue serving as a juror violated his right to be personally present and represented by counsel. ***10*** Although the Court found the error harmless beyond a reasonable doubt under the circumstances, it held that

> "such communications [outside of the presence of counsel and defendant] violate a defendant's right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error, ..."

(*Id.*, at p. 403.)

1. Mr. Virgil's Exclusion During Jury Voir Dire Violated His Federal, State And Common Law Rights To Be Present At All Critical Stages Of His Trial

Mr. Virgil's trial counsel asked that challenges for cause be made in open court, but the court refused and ruled that all such challenges be made only at the sidebar. (V1, RT 22.) Further, the trial court ruled that all proceedings on the challenges for cause were to be conducted out of the

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10 Because trial counsel was present and participated in the sidebar conferences conducted out of Mr. Virgil's hearing and presence, Mr. Virgil is not claiming that the trial court violated his right to be represented by counsel.

presence of everyone in the courtroom other than the court, counsel and the reporter, who was given a headset to monitor and transcribe these proceedings for the record. (V1, RT 22.) Thus, while the proceedings were conducted in the courtroom, they were conducted out of Mr. Virgil's hearing and therefore presence.

It is beyond dispute that jury voir dire is a critical stage of trial, especially in capital cases, and Respondent wisely elects not to argue to the contrary. (See *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15; *People v. Ervin, supra*, 22 Cal.4th at p. 73, citing *Gomez v. United States* (1989) 490 U.S. 858, 873, quoting *Lewis v. United States* (1892) 146 U.S. 370, 374, and authorities cited therein, establishing the critical necessity and importance of voir dire to the overall fairness of a trial and the defendant's right to a fair and impartial jury). Based on the decision in *Wright* and the underlying authority from *Rushen v. Spain* (1983) 464 U.S. 114, 117-120, the trial court violated Mr. Virgil's federal constitutional rights to be present at all critical stages of his trial by refusing to conduct challenges for cause in open court in a manner that would have protected Mr. Virgil's rights to confrontation and due process.

As detailed in his Opening Brief, Mr. Virgil was able to communicate with trial counsel about only the challenge for cause against Juror Saunders because he recognized her in the jury panel as a nurse who worked at the jail where he was housed during trial. Beyond this one juror, there is nothing on the record that suggests Mr. Virgil had an opportunity to communicate with trial counsel about the other prospective jurors who were

questioned at the sidebar out of his presence. (V5, RT 582-585.) [11]

Mr. Virgil's communication about Saunders establishes that he would have been actively involved in jury selection by providing input to defense counsel about selecting the jury if he had been afforded a full and fair opportunity to do so. In other words, Mr. Virgil would have been actively involved in providing input to counsel about the people who were to decide his fate, as is his right, but for the trial court's decision to conduct the proceedings in secret.

Respondent acknowledges that Mr. Virgil's attorney argued in detail about the sidebar proceedings involving Jurors Green, Wiener and Staben, but claims that Mr. Virgil failed to show that these proceedings were critical to the outcome of his trial or that he was prejudiced by proceedings out of his presence. Respondent is wrong because the secret discussions about these jurors affected the composition of the jury that not only found Mr. Virgil guilty as charged, but also rejected his mitigating evidence that his life should be spared.

During the death qualification voir dire, the court called Juror Green to the sidebar and questioned him in detail about his childhood which involved parental abuse, neglect and abandonment fueled by his father's alcoholism. (V5, RT 551; V22, RT 3390.) Juror Green admitted often being abandoned by his alcoholic father [presumably because his father preferred going out and drinking rather than staying home to raise his son], but Green vigorously denied being affected by his father's abuse and neglect and the fact that his mother abandoned him at an early age and allowed him to be raised alone by an alcoholic and abusive parent. (V5, RT

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[11] Defense counsel did say in open court that he wanted to challenge prospective juror Sandra Morrison for cause, but the trial court refused to consider the challenge in open court by saying the challenge had to be made at the sidebar. (V4, RT 473.)

551.) Similarly, Juror Green told the court and counsel that his abusive upbringing had no effect whatsoever on his decisions as an adult and that a person's childhood and upbringing should be ignored once the abuse has stopped. (V5, RT 552.)

For reasons related to Mr. Virgil's anticipated penalty defense that his abusive childhood and abandonment by his father were to be argued as critical mitigating evidence, defense counsel asked to question Green further and thereby decide whether he should be challenged for cause. Despite the importance of Green's views to his ability to be a fair and impartial juror in both phases of Mr. Virgil's capital trial, the trial court refused counsel's request because counsel were out of time for questioning jurors directly. (V5, RT 553.) *12*

Given Mr. Virgil's anticipated penalty defense and defense counsel's belief that Green's experiences and views would be at odds with it, Mr. Virgil might have had substantial and very specific input about Green's statements and belief that his abusive childhood was "no big deal" and he would have been able to provide input to assist counsel in convincing the court to allow further questioning about the specifics of his background and its impact on him as an adult. *13* Accordingly, Respondent is mistaken by concluding that Mr. Virgil's exclusion from the secret proceedings with Juror Green did not violate his rights of confrontation and the fairness of

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12 Defense counsel had exhausted all of his peremptory challenges by this time and so could not exercise a peremptory challenge against Juror Green. (V5, RT 572, 573, 588.)

13 For example, Mr. Virgil would have been able to talk with counsel about the effects of his father's abandonment and how being raised by an abusive and violent mother whose neglect, rage and outbursts against him were fueled by her alcoholism affected him as an adult. (V24, RT 3711-3729, 3765-3767.)

the proceedings and did not prejudice him when the jury rejected his mitigating evidence and sentenced him to death.

Similarly, the trial court asked if Alternate Juror Wiener preferred to discuss her reported childhood abuse during sidebar proceedings. (V5, RT 589.) There, Wiener said that her "mother was an alcoholic, and I was raised in a home where alcoholism was a big factor." (V5, RT 591.) Further, Wiener admitted being robbed by a black man, but claimed it would have no effect on her decision in Mr. Virgil's case. (V5, RT 593.) *14*

Finally, the proceedings at the sidebar involving Juror Roberto Staben were very important to Mr. Virgil because they determined the actual composition of his jury.

After the court and counsel determined that Staben intentionally concealed relevant information during voir dire and committed misconduct by talking about the case with his family, the court and counsel discussed how they should proceed. (V5, RT 530-534.) During the proceedings outside of Mr. Virgil's presence, the trial court and counsel discussed whether to replace Staben and the procedure for doing so and they agreed to seat Harriet Perkins as Staben's replacement. (V5, RT 533-534.) Because the proceedings involving Wiener, Ehiemua, and Perkins determined the actual composition of Mr. Virgil's jury and later impacted the court's decision concerning the nondisclosure of jurors' names for the proposed defense investigation into whether jury misconduct occurred, Respondent is mistaken that these secret hearings did not violate Mr. Virgil's federal and state constitutional rights.

Juror Feliberta Jauregui was questioned at the sidebar about the

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14 Wiener served only as an alternate juror, but spoke out to oppose defense efforts to obtain jurors' contact information so they could be interviewed about deliberations. (V31, RT 3972-3973, 3980-3981.)

alleged error in her questionnaire where she said she would always vote for the death penalty (V3, RT 273-277); Juror William Mosby [the foreperson and the subject of the later defense claim that he engaged in juror misconduct] was questioned about his arrest for driving under the influence and his belief that he was in the wrong and harbored no resentment against the police (V4, RT 425-426); Prospective juror Sandra Morrison [the subject of a successful defense challenge for cause] was questioned at the sidebar and the trial court announced then that counsel were out of time and could no longer question jurors directly (V4, RT 485); John Bruins [the subject of an unsuccessful defense challenge for cause] expressed disgust at the sidebar with trial counsel over the nature of his voir dire (V4, RT 508-514); and Richard Sena was questioned at the sidebar and complained about the Los Angeles County Public Defender's Office generally and how a Deputy Public Defender "railroaded" his brother during his prosecution for a homicide (V5, RT 522-526) [Mr. Virgil's trial counsel was a Deputy Public Defender and presumably a member of the same office that reportedly "railroaded" Sena's brother] (V5, RT 522-526). ***15***

In *United States v. Camacho* (4th Cir. 1992) 955 F.2d 950, 952-953, the United States Court of Appeals considered whether the district court erred by conducting voir dire and other aspects of defendant's trial in his absence. In reversing the judgment, the Court of Appeals considered the relevant authority from the United States Supreme Court and its sister Courts of Appeals and held that the right to be present during voir dire and other aspects of trial is guaranteed by the Sixth Amendment's right to confrontation and the Fourteenth Amendment's right to due process.

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15 Mr. Sena was excused by stipulation, but Mr. Virgil was not privy to the fact that Sena was excused after he complained about the Public Defender's Office's inadequate representation during a homicide trial.

According to the Court of Appeals, a defendant's absence during the impaneling of the jury frustrates the fairness of his trial because it deprives him of the opportunity to give advice or make suggestions to his lawyer concerning potential jurors and to effectively exercise peremptory challenges, both of which are essential components and requirements of an impartial trial. (See also *Johnson v. Norton* (D.Mass., 2000) 151 F.Supp.2d 130, 136 ["The right of a defendant to have a meaningful presence during jury selection is firmly embedded in the federal constitution. An accused has the right to be present at his own trial, including the impaneling of the jury. [Citations.] This right would be hollow indeed were the defendant incompetent to assist his counsel in the exercise of rights to challenge members of the venire."].)

Further, the *Camacho* court recognized that a defendant's right to be present is guaranteed by the common law that affords defendants a greater right to be present than under the federal Constitution. As Mr. Virgil argued in his Opening Brief, the United States Supreme Court recently has insisted that courts more strictly comply with the requirements of the common law because the Framers of the United States Constitution intended to include common law rights as fundamental to our constitutional scheme. (Opening Brief at pp. 114-115.)

Similarly, courts in other states have "clearly stated that a defendant's exclusion from *voir dire* is an impairment of the right to be present and is presumed prejudicial." (*People v. Starks* (3d Dist.1997) 287 Ill.App. 1035, 1038-1039 [679 N.E.2d 764].) In *People v. Bennett* (3d Dist.1996) 282 Ill.App.3d 975, 980 [669 N.E.2d 717], the authority on which *Starks* was based, the Illinois Court of Appeal noted that the defendant had been excluded from 17 individual voir dire sessions involving 16 of the 29 potential jurors, five of whom served on the jury that convicted him. Though defendant was present during some questioning of

jurors, he was thereafter excluded for security reasons and because the trial court believed he had no right to be present during voir dire. The Illinois Court of Appeal reversed the judgment against him "under the United States Constitution" because the trial court's error in excluding him during the questioning of jurors "denied [him] his right to be present and his right to an impartial jury" and the People could not show that the error was harmless beyond a reasonable doubt. (*People v. Bennett, supra,* 282 Ill.App.3d at pp. 978, 981.) ***16***

Camacho, Bennett and *Starks* were not capital cases, but their holdings and rationale along with the other authority cited above and in Mr. Virgil's Opening Brief establish that Mr. Virgil's exclusion during important portions of jury voir dire, a critical stage of his trial intended to protect his most cherished and fundamental rights to confrontation and the overall fairness of his trial, violated his rights under the federal and state constitutions, the governing statutes, and the common law. Further, the violation of his rights is even more compelling and manifest because of the well-settled recognition that death penalty cases are fundamentally different and require heightened standards of scrutiny and reliability. (See *Near v. Cunningham* (4th Cir. 1963) 313 F.2d 929, 931 [the right to be present for every stage of trial is so fundamental that it cannot be waived, "especially where capital punishment is involved;" *Diaz v. United States* (1912) 223 U.S. 442, 455 *Woodson v. North Carolina* (1976) 428 U.S. 280; *Tuilaepa v. California* (1994) 512 U.S. 967; *Gardner v. Florida* (1977) 430 U.S. 349; *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

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16 The *Bennett* court also held that it reversed the judgment under the Illinois Constitution [rights to be present and to an impartial jury] and the federal Constitution [due process right under the Fourteenth Amendment to a fair trial]. (*People v. Bennett, supra,* 282 Ill.App.3d at p. 981.)

2. Mr. Virgil's Exclusion During Evidentiary Portions Of His Trial Where The Court Criticized Defense Counsel Or The Prosecutor Established That Defense Counsel Was Mistaken Violated His Federal, State And Common Law Rights To Be Present At All Critical Stages Of His Trial

After the empanelment of Mr. Virgil's jury and during the substantive portions of his trial, the court conducted a number of sidebar discussions in secret out of his hearing and presence. As with his argument that the trial court erred by excluding him from jury voir dire, Mr. Virgil respectfully refers the Court to the more detailed argument in his Opening Brief [Opening Brief at pp. 102-110] and in the interest of brevity will only highlight certain portions of his exclusion during those proceedings that relate to defense counsel's performance in the case.

As mentioned above, Mr. Virgil was excluded from the sidebar discussion where prospective juror Richard Sena criticized the Public Defender's Office by claiming that his brother's Deputy Public Defender "railroaded" his brother, thereby providing him with deficient representation. During defense counsel's cross-examination of Kim Swobodzinski, the Gardena Police Department evidence technician who reportedly found Mr. Virgil's palm print on the table where Ms. Lao's suspected killer was seen seated, the prosecutor's objection to defense counsel's questioning was sustained and counsel asked for a sidebar conference. (V14, RT 2155.) During that conference, the trial court indicated that defense counsel's questions about whether the Gardena Police Department made reasonable efforts to eliminate others as the source of the palm prints found at the Donut King were proper. The trial court, however, criticized defense counsel for suggesting before the jury that the

defense alone had asked the police to eliminate other people as the source of the fingerprints. (V14, RT 2156.)

Similarly, the trial court interrupted defense counsel's questioning of Linda Schuetze, one of the prosecution's fingerprint experts, and directed that counsel come to the sidebar. (V14, RT 2245-2246.) During this discussion, the trial court criticized defense counsel for wasting the court's time by questioning Schuetze about these matters. According to defense counsel, he questioned the witness in this manner because he had no idea that the prosecution had performed other comparisons and the prosecutor added that he too had no idea what his witnesses had done with this important evidence. (V14, RT 2246-2247.)

During the prosecution's direct examination of Gardena Police Detective Otake about Mr. Virgil's arrest for car burglary on November 3, 1992, the detective testified that during his investigation he spoke with the reported crime victim [David Akimsaya], Mr. Virgil and his parole agent. (V17, RT 2788.) After defense counsel finished his cross-examination, the prosecutor asked for a sidebar conference. (V17, RT 2794.) During that conference, the prosecutor disclosed that he was surprised by the detective's disclosure that Mr. Virgil was on parole and he had no idea that Otake's investigation included contact with Mr. Virgil's parole officer. (V17, RT 2796.) Defense counsel replied that he would not object to the detective's disclosure for tactical reasons. (V17, RT 2796-2797.)

As the prosecution questioned Dr. John Stroh, the prosecution's expert witness about Ms. Lao's blood loss and how long she might have remained conscious after losing so much of her blood, defense counsel objected that the doctor was not qualified to render that opinion and later that the doctor misstated the evidence on which his testimony was based. (V18, RT 2826-2829, 2832-2833.) The trial court called counsel to the sidebar and ruled that counsel was completely in error about the evidence

and the prosecutor had properly elicited the doctor's opinion on this point. (V18, RT 2833-2834.)

During defense counsel's' cross-examination of Lavette Gilmore, an important prosecution eyewitness who identified Mr. Virgil as the man she had seen sitting at the table inside the donut shop and who expressed fear of him as someone who might rob her, the court asked if defense counsel's examination would go much longer. (V18, RT 2915.) The prosecutor asked for a sidebar conference where he announced that Gilmore needed to leave soon to pick up her children and defense counsel agreed to expedite his cross-examination to accommodate this important prosecution witness. (V18, RT 2916.)

After the court agreed to review Ms. Lao's medical records and decide whether to grant the prosecutor's request to admit them over defense counsel's objection, the prosecutor asked to approach the sidebar. (V19, RT 3151-3153.) During that conference, the prosecutor advised the trial court that Juror Bandy tried to contact him and the investigating officer out-of-court and the jury should be admonished that such contact was improper. (V19, RT 3022-3023, 3153-3154, 3155-3156.)

After the prosecutor gave his Opening Statement at the penalty phase, defense counsel asked to approach the sidebar. (RT 3521.) Defense counsel conceded he knew the prosecution would call Benita Rodriguez as a critical witness at the penalty phase [Mr. Virgil had pled no contest to committing violent crimes against Rodriguez five days after Ms. Lao was killed], but counsel argued he was never told Rodriguez was in therapy and asked the court to exclude this mental health evidence as a sanction for the prosecution's violation of the rules of discovery. (RT 3521-3522.) The prosecutor replied that he provided the defense with the relevant discovery, but defense counsel disagreed that he received adequate notice. (RT 3522-

3524.) The court ruled that defense counsel had adequate notice and his argument to the contrary was in error. (V23, RT 3525-3526.)

During defense counsel's cross-examination of Julio Montulfar [Rodriguez's boyfriend and the person who called the police after Mr. Virgil's reported crimes against Rodriguez], defense counsel asked when he was interviewed last by the police and if the officer and/or the prosecutor had taken notes. Then, defense counsel asked if the prosecutor had his notes of that interview with him. (V23, RT 3569.) After the prosecutor produced the notes, the court called counsel to the sidebar. (V23, RT 3570.)

During the ensuring discussion, defense counsel complained about the prosecutor's conduct and pattern of providing discovery at the last possible minute and not providing notice that Montulfar would testify. (V23, RT 3570.) After the prosecutor admitted that he interviewed Montulfar at the last minute, the prosecutor established that he gave proper notice because Montulfar was on his witness list. After defense counsel agreed he had notice, the court ruled that defense counsel's view of whether he had notice of important testimony was again wrong. (V23, RT 3571-3572, 3578-3595.)

During defense counsel's cross-examination of Montulfar, the prosecutor asked to approach the sidebar. (V23, RT 3626-3627.) At the sidebar, the prosecutor argued that defense counsel was confused about some evidence regarding Rodriguez's attack and defense counsel agreed the prosecutor was correct (V23, RT 3627.)

During the discussion about the admission of exhibits, the prosecutor asked to approach the sidebar. (V25, RT 3828-3829.) At the sidebar, defense counsel interrupted and said he just learned his mother-in-law died and he wanted to expedite the proceedings so he could join his wife at the hospital. (V25, RT 3829.) The court asked if defense counsel wanted to recess for the day, but counsel replied that he hoped to expedite the

proceedings and finish within 30 minutes so he could be with his wife. (V25, RT 3829.)

Very recently in *Hamdan v. Rumsfeld* (2006) __ U.S. __ [126 S.Ct. 2749, 2798, fn. 67] (plur. opn. of Stevens, J.), four Justices of the United States Supreme Court reaffirmed their commitment to the common law principles guaranteeing an accused the right to be present. *17* According to the Court, the right to be present is so fundamental that it is akin to the right to trial itself, a defendant's exclusion is "'contrary to the dictates of humanity'" and an accused's right to be present is necessary to establish the fairness of the proceedings where it cannot be assumed "by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly."

In *United States v. Gagnon* (1985) 470 U.S. 522, 526, the Supreme recognized that the right to presence is rooted to a large extent in "the Confrontation Clause of the Sixth Amendment," but is also protected by the "Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." According to the high court,

> "a defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge . . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' [Citations.] . . . the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. [Citation.]"

(*Id.*, at p. 526-527.)

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17 Justice Kennedy concurred with Justice Stevens' plurality opinion, but did not join this portion of Justice Stevens' opinion. (*Hamdan v. Rumsfeld, supra,* 126 S.Ct. at p. 2809 (conc. opn. of Kennedy, J.).)

In Mr. Virgil's case, he was excluded, inter alia, from many proceedings at the sidebar where the Public Defender's Office in Los Angeles County was criticized generally and specifically where his trial counsel was criticized by the court or where defense counsel's unawareness, mistakes, or strategies were disclosed and discussed secretly out of his hearing and therefore presence. It is beyond dispute that a defendant has a Sixth Amendment right to the effective assistance of counsel (see *Strickland v. Washington* (1984) 466 U.S. 668, 668-674) and that right is interwoven with the due process right to counsel's effective aid in the preparation and trial of his case. (See *Brubaker v. Dickson* (9th Cir. 1962) 310 F.2d 30, 37-38.) Though counsel's every mistake in judgment, preparation, or misconception of law does not deprive an accused of a constitutional right, due process requires counsel that is reasonably likely to render effective assistance of counsel. (*Id.*, at pp. 37-39.)

In *People v. Marsden* (1970) 2 Cal.3d 118, this Court discussed a defendant's right to a hearing where he or she can discuss with the trial court his knowledge of events and conduct of trial counsel that are relevant to counsel's diligence and competence and the overall quality of his representation and the fairness of his trial. It follows from this right that Mr. Virgil had a right to be present during proceedings where the Public Defender's Office was criticized generally and defense counsel's mistakes or shortcomings were discussed and either identified by the trial court or admitted by defense counsel. Given the many proceedings discussed above, Mr. Virgil was effectively kept in the dark about relevant matters concerning his trial counsel's performance and strategic decisions that thwarted his ability and fundamental right to monitor the overall fairness of his trial and the reliability of the proceedings that led to his conviction and judgment of death. Under the circumstances and in light of the whole record of his trial, Mr. Virgil's exclusion from the proceedings highlighted

here and in his Opening Brief were related to the fullness of his opportunity to defend against the charge by ensuring that counsel was representing him adequately and that his trial was fair and just. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106.)

C. Mr. Virgil Was Prejudiced By The Many Proceedings Out Of His Presence And This Requires The Reversal Of The Entire Judgment

In *Cohen v. Senkowski, supra,* 290 F.3d at pp. 489-490, the Court of Appeals held under *Lewis v United States, supra,* 146 U.S. at p. 373, and *Snyder v. Massachusetts, supra,* 291 U.S. at pp. 105-106, that the pre-screening of prospective jurors concerning their ability to be fair and impartial is a material stage of trial at which the defendant has a constitutional right to be present. According to the court in *Cohen,* this is because a defendant has the power, if present, to give advice or suggestions or even supersede his lawyers concerning the selection of jurors.

The key to the decision in *Cohen* and the reason for finding the defendant's exclusion from the juror challenges conducted outside of his presence there harmless beyond a reasonable doubt was that the jury voir dire occurred in his presence and he had a full and fair opportunity to consult with counsel about the pre-screening of jurors, and the proceedings out of his presence merely ratified that which occurred in his presence. (Accord *Evans v. Artuz* (E.D.N.Y.1999) 68 F.Supp.2d 188, 195.)

At Mr. Virgil's trial, in contrast, the proceedings on the challenges for cause all occurred at the sidebar and the record reflects that Mr. Virgil only had an opportunity to consult with defense counsel about the challenge for cause against Juror Saunders and not about the other jurors who answered important questions secretly outside of his hearing and presence. For that reason, it cannot be said the trial court's error of excluding Mr. Virgil from the challenges for cause and other jury voir dire was harmless

beyond a reasonable doubt. (*Chapman v. California* (1967) 368 U.S. 18, 24.) Similarly, it cannot be said the error was harmless under state-law standards, since Mr. Virgil had no opportunity to monitor the proceedings at issue to satisfy his rights to insure that his jury would be fair and impartial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Further, a defendant has a right, if not the duty, to monitor his counsel's performance and bring his concerns about counsel's performance to the trial court's attention. By excluding Mr. Virgil from the proceedings where problems with defense counsel's performance were disclosed out of his hearing and presence, coupled with whatever other concerns he had about counsel, the trial court impaired Mr. Virgil's federal constitutional rights to due process and the effective assistance of counsel in the preparation and trial of his case. (See *Brubaker v. Dickson, supra,* 310 F.2d at pp. 37-38.)

Given the importance of Mr. Virgil's rights at issue and the nature of the matters discussed out of his presence, it cannot be said that his exclusion from so many proceedings where counsel's mistakes and tactical decisions based on information not known to Mr. Virgil were disclosed was harmless beyond a reasonable doubt under the United States Constitution or harmless under the California Constitution. Individually and collectively, the exclusion of Mr. Virgil from so many proceedings jeopardized the overall fairness and reliability of his trial and judgment of death under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the analogous provisions of the California Constitution, the statutory scheme guaranteeing his right to be present, and his rights under the common law. The entire judgment against him must therefore be reversed.

II.

THE TRIAL COURT'S ERRORS DENYING THE DEFENSE CHALLENGES FOR CAUSE AGAINST PROSPECTIVE JURORS JOHN BRUINS AND TRACEY SAUNDERS, GRANTING THE PROSECUTION'S CHALLENGE FOR CAUSE AGAINST PROSPECTIVE JUROR JANICE SMITH, AND LIMITING THE QUESTIONING OF PROSPECTIVE JUROR DUVALL GREEN REQUIRE THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. Respondent's Contention

"THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHALLENGES FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JURORS JOHN B. AND TRACEY S. BECAUSE THEY COULD BE IMPARTIAL JURORS, AND PROPERLY EXCUSED PROSPECTIVE ALTERNATE JUROR JANICE S. IN LIGHT OF HER VIEWS ON THE DEATH PENALTY; FINALLY, THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENSE COUNSEL TO QUESTION PROSPECTIVE ALTERNATE JUROR DUVALL G." (RB 23.)

B. It Would Violate Mr. Virgil's Federal Constitutional Right To Due Process To Bar His Claims Involving The Trial Court's Rulings About The Jurors At Issue By Invoking A Procedural Rule That Was Not Consistently Applied At The Time Of His Trial

Respondent begins by arguing that Mr. Virgil's claim regarding the trial court's denial of his timely challenge for cause for cause against prospective juror John Bruins after exhausting his peremptory challenges is waived because he did not express overall dissatisfaction with the jury. (RB 30.) Respondent cites the applicable law, but ignores Mr. Virgil's argument from his Opening Brief that it would violate his federal

constitutional right to due process by invoking the dissatisfaction requirement and finding waiver in his case.

As established in Mr. Virgil's Opening Brief, the requirement of dissatisfaction announced in *People v. Crittenden* (1994) 9 Cal.4th 83, 121, was not applied consistently by this Court before or even just after Mr. Virgil's trial. (See Opening Brief at pp. 124-126; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159-1160 [a defendant may complain on appeal about the composition of the jury based on the denial of challenges for cause only if he (1) exercises a peremptory challenge against the challenged juror and (2) exhausts his peremptory challenges.) Accordingly, it would violate Mr. Virgil's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution to apply this law to him and find that he waived his claims concerning the trial court's rulings about prospective alternate jurors John Bruins and Janice Smith and Juror Tracey Saunders. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

C. The Trial Court's Error In Failing To Excuse Prospective Alternate Juror John Bruins Requires The Reversal Of The Penalty Judgment Against Mr. Virgil

Respondent relies upon decisions of this Court regarding the deference to be given to a trial court's ruling concerning a juror's ability to be fair and impartial, but fails to address the two-fold argument that Mr. Virgil raised regarding prospective alternate juror John Bruins. (RB 30-31.)

In his Opening Brief, Mr. Virgil argued the trial court erred not only by limiting counsel's questioning of Bruins intended to elicit whether Bruins would invariably vote for the death penalty regardless of the mitigating circumstances, but also the trial court erred by denying the challenge for cause against Bruins based on the substantial evidence of his bias. (Opening Brief at pages 126-129.) Although Respondent failed to address Mr. Virgil's argument about the trial court's error limiting defense

counsel's questioning of this prospective alternate juror, Mr. Virgil will briefly discuss that claim because of its importance to his overall claim about this juror.

Very recently in *Uttecht v. Brown* (2007) ___ U.S. ___ [127 S.Ct. 2218], the Supreme Court considered defendant's claim that the trial court violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution by excusing Juror Z. for cause. The high court ultimately reversed the United States Court of Appeals for the Ninth Circuit's decision that granted defendant relief on the claimed constitutional grounds, but did so mainly because the Court of Appeals violated the procedural requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In analyzing the merits of defendant's claim about Juror Z under the principles set forth in *Witherspoon v. Illinois* (1968) 391 U.S. 510, and *Wainwright v. Witt* (1985) 469 U.S. 412, the high court found it "instructive" to consider the entire jury voir dire. (*Id.*, at p. 2225.) At the beginning of its analysis, the high court recognized the well-settled rule that a trial court's ruling about a juror's ability to be fair and impartial is entitled to substantial deference. (*Id.*, at pp. 2223-2224.) The *Uttecht* court emphasized, however, that such deference should be contingent on the nature and quality of the jury voir dire.

According to the Supreme Court, a trial court's ruling is entitled to substantial deference when the voir dire adequately affords counsel the opportunity to explain any concerns about the juror and to questioning that is intended to clarify the juror's position about capital punishment. (*Id.*, at pp. 2225-2230.) Because "the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning" (*id.*, at p. 2225) that resulted in "lengthy questioning of a prospective juror" intended to resolve doubts about his "equivocal statements" (*id.*, at p. 2227,

2230) and thereby established the existence of "a diligent and thoughtful voir dire" (*id.*, at p. 2230), the high court concluded that the trial court's decision to excuse Juror Z for cause was well within its discretion. (*Ibid.*)

In Mr. Virgil's case, Bruins was a "strong proponent" of the death penalty, but claimed he would fairly and reasonably consider life without possibility of parole as a penalty and follow the court's instructions concerning the evidence to consider in deciding punishment. (V4, RT 506-507; CT Supp. I 1838, 1840.) In a sidebar proceeding, Bruins disclosed he was abused as a child, but claimed his background would not affect his ability to objectively consider evidence of childhood abuse and said people can overcome their past and "turn out positively." (V4, RT 508-509.)

During these sidebar proceedings, defense counsel questioned Bruins about his questionnaire where he wrote that a person who intentionally kills in cold-blood during the commission of robbery has forfeited his right to live. (V4, RT 510.) Bruins agreed with this statement, but denied it meant he would automatically vote for death. (V4, RT 510.) Though Bruins maintained he would not automatically vote for death, he suggested "there would be circumstances" where his vote would be automatic. (V4, RT 510.)

Defense counsel sought to explore Bruins' views by asking "[under w]hat circumstances" would a person committing robbery forfeit his right to live. Bruins replied that a person "forfeit[s] their right" to live when they kill someone who otherwise attempts to cooperate during a robbery. (V4, RT 510-511.) Defense counsel replied that this was exactly what the prosecution sought to prove in Mr. Virgil's case and Bruins answered candidly that he would lean very strongly towards death under those circumstances. (V4, RT 511.) The trial court interrupted defense counsel's questioning at this point and asked if the prosecutor wanted to question Bruins. (V4, RT 511.)

The prosecutor agreed and asked if Bruins meant he would automatically vote for death.. (V4, RT 511-512.) Bruins objected to the "term 'automatic'" and claimed he would weigh the circumstances, but admitted that his responses in his questionnaire and in court were "inconsistent." (V4, RT 511-512.) After Bruins again expressed his very strong preference for the death penalty when a cooperative victim was killed during a robbery, the trial court asked if Bruins could consider life without possibility of parole "under those circumstances?" (V4, RT 512.) Though Bruins claimed he would weigh the circumstances, he repeated that he would strongly lean towards the death penalty for defendants who killed cooperative and unresisting robbery victims. (V4, RT 512.)

After more questioning, Bruins repeated his strong preference for the death penalty when a cooperative victim is killed during a robbery, but said his vote for death would not be "automatic[]." (V4, RT 513.) Defense counsel interrupted Bruins because of the inconsistency between Bruins' strong preference for death given the facts and circumstances expected to be present in Mr. Virgil's case and his refusal to say he would automatically vote for death by asking

> "But if a person goes out of his way to take a robbery victim who is not resisting, and take them to another area and murder them by repeatedly stabbing them --"

(V4, RT 513.)

The trial court sustained the prosecutor's inadequate objection [no grounds for the objection were stated] and Bruins was not allowed to answer whether under facts or circumstances similar to Mr. Virgil's case, he would invariably vote for the death penalty. (V4, RT 513.)

Defense counsel then asked if Bruins would automatically vote for death when the facts are that the murder was "intentional, premeditated, deliberated." (V4, RT 513.) Bruins again "object[ed] to the term

'automatic,'" and claimed he would weigh the circumstances. Bruins concluded by saying, however, that in defense counsel's "scenario," his vote for the death penalty would be "pretty much cut-and-dry." [18] (V4, RT 514.) The court ended all further questioning by recessing for the day and beginning voir dire the next day with prospective juror Richard Sena. (V4, RT 514-515; V5, RT 519.)

When defense counsel later challenged Bruins for cause, the prosecutor argued that defense counsel wrongly questioned Bruins "based on the hypothetical facts of this case, and not the law that applies to his case." (V5, RT 569-570.) The prosecutor's argument was misplaced because counsel are permitted to question prospective jurors in light of the facts or circumstances expected to be present in the case.

Under the circumstances and the rationale from *Uttecht* where the voir dire was lengthy and deemed adequate to resolve concerns about the juror's equivocal statements regarding capital punishment, the trial court in Mr. Virgil's case erred by failing to conduct an adequate voir dire and by failing to excuse Bruins for cause.

In *State v. Williams* (1988) 113 N.J. 393, 438-441, 550 A.2d 1172, 1196-1198, the New Jersey Supreme Court considered the responses of Juror Pfeiffer to voir dire questions addressing her views on capital punishment and found her ability to weigh factors in aggravation and mitigation was substantially impaired by her pro-death penalty bias. After Pfeiffer responded that the death penalty should be imposed for all murder convictions, the trial court told her that jurors would be instructed about the factors that must be considered in deciding penalty and asked if she could

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[18] The phrase "cut-and-dry" means "[p]repared and arranged in advance; settled" or "[o]rdinary; routine." (The American Heritage ® Dictionary of the English Language, Fourth Edition; Houghton Mifflin eReference Suite Copyright © 2001-2004 Houghton Mifflin Company.)

consider those factors and the evidence in deciding between the alternative sentences of death or life imprisonment with a 30-year minimum sentence. Pfeiffer agreed to consider the evidence and the trial court questioned her further, but Pfeiffer said again that she would always impose a death sentence. After more "rehabilitative" questioning by the court, Pfeiffer clarified that she would not "shut her eyes" and automatically impose the death penalty, but would consider the evidence and both sentencing alternatives. In reversing both the guilt and penalty phases of Williams' trial, the New Jersey Supreme Court held

> "The manner in which the court sought clarification, however, was counterproductive; instead of drawing out Ms. Pfeiffer's actual views and intentions, the court's further questions seemed calculated to draw out only such answers as would rehabilitate her as a juror . . . [and were] not conducive to a sound determination of whether a juror should be dismissed for cause."

(*Id.*, at pp. 439-440; *State v. DiFrisco* (1994) 137 N.J. 434, 459-645 A.2d 734, .)

In *People v. Cash* (2002) 28 Cal.4th 703, 718-723, this Court reaffirmed its support for the well-settled rule that counsel are entitled to engage in "particularized death-qualifying voir dire" that is not "so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried" or "so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." According to the Court,

> "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence."

(*People v. Cash, supra,* 28 Cal.4th at pp. 720-721.)

As in *Williams* and *Cash*, the voir dire of prospective juror Bruins case was inadequate to determine if he could be a fair and impartial juror.

Sensing Bruins could not be a fair and impartial juror because of his admitted strong, pro-death penalty bias, defense counsel questioned Bruins about the circumstances where his views would cause him to vote for death every time. After Bruins suggested he would vote for death under the facts and circumstances expected to be present in Mr. Virgil's case, defense counsel sought to clarify Bruins' views and establish whether his pro-death bias would prevent him from being a fair and impartial juror.

Rather than allowing defense counsel's proper inquiry, the trial court abruptly ended voir dire and asked if the prosecutor wanted to question Bruins. After the prosecutor questioned Bruins in a manner calculated only to draw out answers that would rehabilitate him as a juror, defense counsel again tried to question Bruins in a way intended to expose his bias and disqualification to serve as a fair and impartial juror. Although Bruins disagreed he would "automatically" vote for death, his final response established that he would vote for death every time under the "scenario" described by defense counsel.

Under the totality of the circumstances, the voir dire allowed by the trial court was inadequate to determine whether Bruins should be dismissed for bias and thereby violated Mr. Virgil's right to question Bruins in way to determine if he would be a biased juror. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728; *State v. Williams, supra,* 113 N.J. at pp. 438-441; *People v. Cash, supra,* 28 Cal.4th at pp. 718-723; *Uttecht v. Brown, supra,* 127 S.Ct. at pp. 2225-2231.)

Assuming this Court rejects Mr. Virgil's primary argument that the voir dire allowed by the trial court was constitutionally inadequate, the trial court's ruling denying the challenge for cause against Bruins is not supported by substantial evidence. Bruins honestly and candidly expressed

his strong enthusiasm for the death penalty ["The person has forfeit[ed] the right (to live)"] in circumstances where there was an intentional, premeditated and deliberated murder. (V4. RT 513.) Bruins' responses in his questionnaire and in court establishes that he would be greatly troubled by the "vicious" circumstances of Ms. Lao's homicide and suggests he would impose the death penalty in every case under such circumstances. (V4, RT 513.) Although Bruins "object[ed]" to the term "automatic" as accurately describing how he would vote and claimed he would consider the circumstances of the crime, his last statement was that his vote for death would be "pretty much cut-and-dry" in every "scenario" where an unresisting and cooperative victim was intentionally killed with premeditation and deliberation during a robbery. (V4, RT 512- 514.)

Bruins was just like the jurors at issue in *State v. Williams, supra,* 113 N.J. at pp. 438-441, and *People v. Boyette* (2002) 29 Cal.4th 381, 417-418 whose pro-death leanings were so strong that they were substantially impaired. Although Bruins refused to say he would "automatically" vote for death, his responses establish that he would have to be convinced otherwise under the facts and circumstances expected to be present in Mr. Virgil's case. For that reason, the trial court's finding that Bruins would be an impartial juror is not supported by substantial evidence and the inquiry must turn to prejudice.

Respondent cites *People v. Boyette, supra,* 29 Cal.4th at pp. 418-418, as support for his claim that even if the trial court erred by not discharging Bruins for cause, the error was not prejudicial. (RB 31-32.) Respondent is mistaken.

In *People v. Boyette, supra,* 29 Cal.4th at pp. 418-419, this Court held that forcing a defendant to exercise a peremptory challenge against a juror who was wrongly not excused for cause does not violate the defendant's constitutional right to an impartial jury. According to the Court,

prejudice arises only when a defendant can show that the trial court's ruling allowed an objectionable juror to serve on the jury. Because the trial court's erroneous ruling denying the challenge for cause against Bruins allowed two objectionable jurors to serve on his jury, Mr. Virgil's was prejudiced by the trial court's ruling and the reversal of Mr. Virgil's penalty judgment is required.

In Mr. Virgil's case, his counsel used a peremptory challenge against Bruins after his challenge for cause was denied and he exhausted all of his peremptory challenges during the selection of alternate jurors, two of whom served as regular jurors during the guilt and penalty phases of Mr. Virgil's trial. (V5, RT 572, 573, 588.) Accordingly, the trial court's ruling about Bruins was prejudicial and requires the reversal of Mr. Virgil's penalty judgment because it resulted in defense counsel's inability to exercise peremptory challenges against two objectionable jurors, both of whom served on Mr. Virgil's jury. ***19*** Under the circumstances, the trial court's errors violated Mr. Virgil's rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of his judgment of death. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667 (opn. of the court); *Id.*, at pp. 667-668 (plur. opn.); *Id.*, at p. 672 (conc. opn. of Powell, J.); *People v. Stewart* (2004) 33 Cal.4th 425, 432; *People v. Crittenden, supra,* 9 Cal.4th at pp. 121-122.)

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19 Mr. Virgil will not detail his claim here that Jurors Saunders and Green were objectionable jurors. Instead, he respectfully requests refers the Court to his argument below about these jurors.

D. The Trial Court's Error In Failing To Excuse Juror Tracy Saunders Requires The Reversal Of The Judgment Against Mr. Virgil

Respondent cites decisions of this Court about the deference afforded to a trial court's ruling about a juror's ability to serve and the standard for discharging a juror. (RB 32-33.) Respondent then cites *People v. Ramos* (1997) 15 Cal.4th 1133, 1160, as authority for its argument that Mr. Virgil forfeited his ability to claim on appeal that the trial court' erred by denying his challenge for cause against Juror Tracey Saunders. (RB 33.) Respondent's reliance is misplaced. This is especially so under *Uttecht*, where the Washington Supreme Court and the United States Supreme Court considered defendant's claim about the improper removal of a juror for cause, absent any objection in the trial court about the ruling to excuse the juror at issue. (See *Uttecht v. Brown, supra,* 127 S.Ct. at pp. 2229-2231.)

In *People v. Ramos, supra,* 15 Cal.4th pp. 1159-1160, defendant complained on appeal that the trial court erred by denying several of his challenges for cause and not granting him an additional peremptory challenge that he could exercise against Juror Dahlin, a juror not challenged for cause in the trial court. Because defendant did not exhaust his peremptory challenges and thereby satisfy the exhaustion requirement necessary to preserve this claim for appellate review, the Court held that defendant waived the first claim on appeal. Further, because none of the challenged jurors sat on the ultimate jury, defendant could not have been prejudiced by the denial of his challenges for cause.

The *Ramos* court also found that defendant waived his claim involving Juror Dahlin because he never challenged this juror for cause, he never asked for an additional peremptory challenge to exercise against her, and he accepted the alternate jurors that included the juror with two peremptory challenges remaining.

The *Ramos* court relied on its earlier decision in *People v. Coleman* (1988) 46 Cal.3d 749, 770, as support for its holding that a defendant waives his claim against a juror by accepting the jury with the objectionable juror included while peremptory challenges remain. *Ramos* and *Coleman* are limited to their facts – the failures in the trial court to challenge the juror and ask for the proposed remedy and the failure to exhaust all peremptory challenges. Further, the holdings in *Ramos* and *Coleman* regarding waiver on appeal after accepting the jury with the objectionable juror included are mere dictum and Respondent is wrong that Mr. Virgil waived this claim on appeal. (See *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 ["discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum"].)

Further, this Court has never held that counsel waives error in the selection of a juror by passing the jury after that juror is seated, and Respondent cites no authority for such a rule. To find a forfeiture in the present case would amount to an unconstitutional ex post facto enlargement of this Court's waiver doctrine, denying Mr. Virgil due process of law under the United States and California Constitutions. (U.S. Const., Amend. XIV, Cal. Const., Art. I, §§7, 15; *People v. Roldan* (2005) 35 Cal.4th 646, 732, fn. 37; see *Bouie v. Columbia* (1964) 378 U.S. 347, 362; *Clark v. Brown* (9th Cir. 2006) 450 F.2d 898, 911.)

Requiring that counsel immediately use a peremptory challenge on any juror erroneously seated, moreover, would unfairly restrict defense counsel's use of peremptory challenges. Its practical effect would extend only to defense counsel's use of peremptory challenges, requiring them to be used immediately to cure errors in the retention of objectionable jurors, until all the defense's challenges are exhausted, without regard to the overall composition of the jury and the quality of prospective jurors who

might be seated in the future. Under this proposed system, furthermore, all the trial court's errors, except for the last one, will be deemed "cured," because the erroneously seated juror did not sit on the actual jury. The number of defense peremptory challenges will effectively be diminished, also, to the extent that they must be used to fulfill what should be the judge's role of dismissing jurors for cause. Prosecutors, on the other hand, will retain full flexibility to use challenges when they wish, and to form a jury organized to convict.

In Mr. Virgil's case, he objected to Saunders by challenging her for cause, he thereafter exhausted his peremptory challenges, and Saunders actually served on his jury. During the challenge for cause at the sidebar, defense counsel argued that it would be "uncomfortable" to have Saunders serve as a juror because she treated Mr. Virgil at the jail when he was stabbed, she seemed to closely associate with deputies at the jail, and there was a great likelihood she would come in contact with Mr. Virgil during trial despite defense efforts to "pretend" Mr. Virgil was not in custody. (V5, RT 583.) The trial court dismissed defense counsel's concerns about Saunders' out-of-court contact with Mr. Virgil and discovery of his in-custody status by saying "she wouldn't have any contact with him now because she obviously wouldn't be going to work; she would be coming here." (V5, RT 584.) After Saunders failed to identify "anyone [Mr. Virgil]" at counsel's table, the court denied the challenge for cause "[u]nder the circumstances, . . . based on the concerns you have." (V5, RT 584-585.) ***20***

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20 Given Mr. Virgil's identification as the man who committed the charged crimes after eyewitnesses had only brief contact with him and sometimes only from a distance, Saunders' denial that she recognized anyone at counsel's table after treating Mr. Virgil for stab wounds seems to contrast strangely with the prosecution's identification evidence.

Saunders was seated as a regular juror after the discharge of Juror Olivia Duarte and returned to work during a one-day recess in the trial. (V12, RT 1892-1893; V21, RT 3205-3207.) Despite the court's expectation and its important rationale for denying the defense challenge for cause against her, Saunders not only went to work during the trial, but also had contact with Mr. Virgil then. (V21, RT 3205-3207.) According to Respondent, Saunders' conduct of going to work and learning information about Mr. Virgil, including that he was an inmate with special handling privileges, is of no consequence because all "juror[s] would have assumed that appellant was in custody since he was charged with a capital crime." (RB 35.) Respondent's argument defies reason and turns an important aspect of criminal trials, especially those involving capital trials, on its head.

In *Estelle v. Williams* (1976) 425 U.S. 501, 503, the Supreme Court held that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment to the United States Constitution. According to the high court, a defendant is entitled go to trial in civilian clothing because wearing jail clothing identifies him as someone in custody and that "could impair the fundamental presumption of our system of criminal justice that the defendant is innocent until proved guilty beyond a reasonable doubt." (*Id.,* at p. 504.) Further, "[t]o implement and protect the presumption of innocence, 'courts must be alert to factors that may undermine the fairness of the factfinding process.' [Citation.]" (*People v. Taylor* (1982) 31 Cal.3d 488, 494, citing *Estelle v. Williams, supra,* 425 U.S. at p. 503.)

According to the *Taylor* court, the United States Supreme Court has recognized that the fairness of the jury's factfinding process may be jeopardized by reminders defendant is in custody because that "tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor" in subtle ways that jurors may not even know are at work. (*People v. Taylor, supra,* 31 Cal.3d

at p. 494, citing *Estelle v. Williams, supra,* 425 U.S. at pp. 504-505, 518-519.)

As with many constitutional rights, defendants or their trial counsel may waive the right to appear in jail clothing or otherwise communicate to the jury that they are in custody during trial. (See *People v. Hetrick* (1981) 125 Cal.App.3d 849, 853-854.) In Mr. Virgil's case, however, defense counsel emphasized during the challenge for cause against Saunders that he was concerned about jurors learning of Mr. Virgil's custody status, something that Saunders would learn about if she encountered him at the Main Jail during trial, and even the trial court evidenced concern about Mr. Virgil's custodial status by excluding all references to him being in prison during the guilt phase. (V5, RT 583; V6, RT 620.) ***21***

Indeed, what defense counsel feared came to pass and Saunders could have learned that Mr. Virgil was in custody for another serious crime[s] [the ones against Benita Rodriguez]. Regardless of that possible information, Saunders would have learned for certain that Mr. Virgil was a special inmate who was shackled to other inmates, presumably because he was categorized as either a dangerous or violent inmate. (V21, RT 3205; V23, RT 3446.)

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21 Jurors learned that Mr. Virgil was in custody during the live lineup at the Main Jail in October 1993 [he was dressed as an inmate and identical to the other men in the lineup – see People's Exhibit No. 8]. There was not evidence, however, that Mr. Virgil was in custody before and during jury selection and the guilt phase of his trial for crimes for which he was on trial. (V6, RT 710 – it was not suggested to witnesses at the live lineup that the suspect in the charged crimes was in the lineup.) Consistent with that conclusion, the court and defense counsel attempted to prevent the jury from learning of Mr. Virgil's custody status throughout the guilt phase. (V6, RT 736; V23. RT 3205.)

Respondent contends without any citation to authority, that all jurors would have assumed Mr. Virgil was in custody because of the capital charges against him. (RB 35-36.)

Mr. Virgil did not waive his right to have the jury not learn he was in custody during the guilt phase of his trial. Given Respondent's concession that all jurors assumed Mr. Virgil was in custody, the guilt factfinding process was fundamentally unfair under *Estelle v. Williams, supra,* 425 U.S. 501, in violation of Mr. Virgil's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and requires the reversal of his entire judgment. *22*

Respondent also argues the record demonstrates that Saunders was able to remain a fair and impartial juror and her observation of Mr. Virgil in jail had no effect on her fairness and impartiality. (RB 35.) It is true that defense counsel questioned Saunders and she denied being unduly influenced by her observation of Mr. Virgil and his custody status. (V23, RT 3207-3208.) It is equally true, however, that the questioning was inadequate under *State v. Williams, supra,* 113 N.J. at pp. 438-441, because it did not elicit anything other than a programmed response that she could

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22 Mr. Virgil is aware this court has held that the due process and Eighth Amendment standards for reliability in capital sentencing do not apply to determinations of guilt. (See *People v. Williams* (1997) 16 Cal.4th 635, 683.) Mr. Virgil respectfully submits that the Court's holding is contrary to the rationale from cases like *Furman v. Georgia* (1972) 408 U.S. 238, 306, (conc. opn. of Stewart, J.), *Gardner v. Florida* (1977) 430 U.S. 349, 357, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, *Beck v. Alabama* (1980) 447 U.S. 625, and *Schiro v. Farley* (1994) 510 U.S. 222, 238 (dis. opn. of Blackmun, J.), holding that death penalty cases are fundamentally different and require heightened standards of reliability at all stages of the capital trial. Finally, the Court's holding is contrary to California's capital sentencing scheme because juries are allowed to consider evidence from the guilt phase under Factor (a) of Penal Code section 190.3 in deciding penalty.

be a fair and impartial juror. Further, an objection to Saunders' continued service would have been futile given the trial court's earlier ruling denying the challenge for cause. Finally, Saunders' conduct of going to work when she was expected not to was akin to juror misconduct where a juror learned prohibited facts through investigation albeit inadvertent. (See *People v. Lucas* (1995) 12 Cal.4th 415, 486.)

Beyond Respondent's claim that there is no evidentiary support for Mr. Virgil's claim that Saunders did not learn prohibited information about him when she went to work (RB 35), Respondent also claims that Mr. Virgil waived his claim under the rationale that constitutional claims not raised in the trial court are waived on appeal. (RB 35.) Respondent cites *People v. Brown* (2003) 31 Cal.4th 518, 546, for the general rule about waiver. Respondent ignores, however, that the decision in *Brown* involved a constitutional objection to the use of evidence of gang affiliation and not a fundamental constitutional right. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1210 [constitutional objections to evidence rejected because of failure to advance that ground in the trial court].) Instead, Mr. Virgil's objection goes to the deprivation of his fundamental constitutional rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the federal and state constitutions. As such, he is not precluded from raising his claim involving Saunders on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Cole* (2004 33 Cal.4th 1158, 1195, fn. 6; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

As detailed above, Saunders' disqualification as a juror was absolute and her continued service violated Mr. Virgil's rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of Mr. Virgil's penalty judgment. (*Simmons v. South Carolina* (1994) 512 U.S.

154, 164; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 5, fn. 1; *People v. Boyette, supra*, 29 Cal.4th at p. 446; *People v. Ervin* (2000) 22 Cal.4th 48, 99; *People v. LeDoux* (1909) 155 Cal. 535, 543; People v. Yeoman (2003) 31 Cal.4th 93, 114; *People v. Crittenden, supra*, 9 Cal.4th at pp. 121-122.)

E. The Trial Court's Error In Excusing Prospective Alternate Juror Janice Smith Requires The Reversal Of The Penalty Judgment Against Mr. Virgil

Respondent and Mr. Virgil disagree about whether the trial court's questioning of prospective alternate juror Janice Smith was adequate and whether the trial court's failure to allow defense counsel to question Smith was proper. (RB 36-37.) Because the trial court's voir dire was inadequate and the court abused its discretion by refusing to allow defense counsel to question Smith, the trial court's error granting the prosecutor's challenge for cause against Smith requires the reversal of Mr. Virgil's penalty judgment.

Contrary to the trial court's conclusion that its questioning was sufficiently detailed and clear (V5, RT 567), the record reflects that it was inadequate and designed only to elicit questions programmed to disqualify her as a juror. After Smith indicated she harbored significant doubts about whether she could sentence someone to death, the trial court never bothered to ask the most important questions – whether she could set aside her personal beliefs and decide the case based on the law and evidence. (V5, RT 554-557.) (See *Morgan v. Illinois* (1992) 504 U.S. 719, 732-733, 735.) Instead, the court asked only if she could conceive of any circumstances where she could impose the death penalty following a defendant's conviction for first degree murder and a murder committed during the course of a robbery. (V5, RT 557.)

Respondent ignores United States Supreme Court precedent that not all who firmly oppose the death penalty and cannot envision circumstances where they could impose it may be automatically excused for cause. (RB

36-37.) Instead, the inquiry should be whether the juror's opposition to [or enthusiasm for] the death penalty is so strong that he or she cannot set aside personal beliefs and decide the case on the basis of the law and evidence presented. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) Though a trial court's decision about a juror is entitled to deference on appeal if supported by substantial evidence (see *People v. Haley* (2004) 34 Cal.4th 283, 306), the trial court's decision in Mr. Virgil's case is unworthy of such deference.

For example, in *Uttecht v. Brown, supra,* 127 S.Ct. 2218, the high court held

> "Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties."

(*Id.,* at p. 2230.) Though courts reviewing claims of *Witherspoon-Witt* error indeed owe deference to the trial court's ruling, such deference is only extended if the trial court's ruling about a juror's ability to be a fair and impartial juror is supported by substantial evidence based on a review of the entire voir dire. (*Id.,* at pp. 2225-2230.)

When, prospective alternate juror Bruins was questioned, he was asked repeatedly whether he could set aside his strong views favoring the death penalty by following the law and deciding the case based on the evidence. (V4, RT 511-514.) [23] The court never asked a similar question of Ms. Smith. (V5, RT 554-557.) Given the nature of the questioning that was programmed only to elicit Smith's personal views opposing the death penalty, the disparate questioning between prospective alternate jurors Bruins and Smith, and the rigid enforcement of time limits on counsel's

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[23] By this, Mr. Virgil does not suggest the trial court's decision as to Bruins was correct or that his voir dire was adequate.

voir dire, the voir dire was inadequate and the trial court's ruling is not supported by substantial evidence.

Further, the trial court abused its discretion by refusing to allow defense counsel the time and opportunity to question Smith in a way intended to clarify whether she could temporarily set aside her personal views opposing the death penalty and decide the case based on the law and the evidence. (See *People v. Hernandez* (1979) 94 Cal.App.3d 715, 719, citing *People v. Tyren* (1919) 179 Cal. 575, 577; *People v. Carpenter* (1997) 15 Cal.4th 312, 355, citing *People v. Bittaker* (1989) 48 Cal.3d 1046, 1085, citing *People v. Nye* (1969) 71 Cal.2d 356, 364.) [24] Accordingly, Mr. Virgil's penalty judgment must be reversed because of the violations of his rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*People v. Heard* (2003) 31 Cal.4th 946, 966; *People v. Ashmus* (1991) 54 Cal.3d 932, 962; *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668, (opn. of the court); *id.* at pp. 669-672, (conc. opn. by Powell, J.), and *Davis v. Georgia* (1976) 429 U.S. 122, 123.)

F. The Trial Court's Error Limiting Defense Counsel's Examination Of Juror Duvall Green Requires The Reversal Of The Penalty Judgment Against Mr. Virgil

Respondent and Mr. Virgil generally agree on the applicable law regarding the effect of Code of Civil Procedure section 223 that authorizes

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[24] The decision in *Hernandez* is discussed more fully below in light of this Court's decision in *People v. Avila* (2006) 38 Cal.4th 491, 535, a case decided after Mr. Virgil's Opening Brief was filed. Regardless of whether *Hernandez* is inapposite on statutory grounds, Mr. Virgil submits that its underlying rationale requiring trial courts to devote sufficient time for adequate and meaningful death-qualifying voir dire remains in effect and is based on well-settled federal and state constitutional grounds.

trial courts to allow counsel to question jurors directly when good cause appears. (RB 37-38.) Respondent fails to note, however, this Court's recent trend emphasizing the importance of meaningful death-qualifying voir dire and its admonition that trial courts are "to devote sufficient time and effort to the process." (*People v. Stitely* (2005) 35 Cal.4th 514, 539-540, citing *People v. Stewart* (2004) 33 Cal.4th 425, 454-455; *People v. Heard, supra*, 31 Cal.4th at pp. 966-967.) Because the trial court refused to allow defense counsel to ask additional questions and determine if Green could be a fair and impartial juror regarding his views about the facts or circumstances present in Mr. Virgil's case expected to be argued in mitigation, the trial court denied Mr. Virgil the opportunity for adequate voir dire.

Respondent begins by arguing that Mr. Virgil waived his challenge to the time limitations on voir dire by failing to object when the court first announced it would limit each counsel's voir dire to one hour. (RB 38.) Respondent's argument has no merit because defense counsel could not possibly know in advance whether one hour of voir dire would be adequate, especially because prospective jurors would be selected at random and the trial court said it would do its "best" to question and screen jurors so counsel could more efficiently use their time "to hone in on those areas that they really believe are necessary." (V1, RT 19-20.) Under the circumstances, an objection before juror questionnaires were distributed, received, and reviewed by counsel and "*Hovey*" voir dire began would have been futile and the issue is not waived. (V1, RT 18-20.) (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, no waiver if objection/request would have been futile.)

Further, an objection would have been futile because the trial court did not have to permit counsel to voir dire jurors at all because of Code of Civil Procedure section 223 that allowed trial courts to conduct the

examination of jurors. [25] Though the statute contemplated that a trial judge could abuse his discretion by denying a request for voir dire after a showing of good cause, counsel would have had no basis to challenge the trial court's overall order because of the statute's general authorization that trial courts conduct voir dire.

Respondent next argues that Mr. Virgil's waived his claim on appeal regarding Green by later failing to object to the time limitation on questioning Green and by accepting the alternates with one peremptory challenge remaining, even though he ultimately exhausted his peremptory challenges. (RB 38-39.) As detailed above regarding Juror Saunders, the decision upon which Respondent relies, *People v. Ramos, supra,* 15 Cal.4th at p. 1160, is limited to its facts, i.e., where the defense refused to make any request regarding the juror, the defense failed to exhaust all peremptory challenges, and none of the challenged jurors served on his jury. (See *Stockton Theatres, Inc. v. Palermo, supra,* 47 Cal.2d at p. 474.) No claim was made in *Ramos*, moreover, that the voir dire was inadequate. For these

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[25] At the time of Mr. Virgil's trial, Code of Civil Procedure section 223 provided in pertinent part as follows:

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

"Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

"The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."

reasons, Respondent is mistaken by relying on *Ramos* to support its waiver claim.

As appellant argued in section D above [Reply Brief at p. 40], this Court has never held that counsel waives error in the selection of a juror by passing the jury before exhausting his peremptory challenges. Again, to find waiver in this case would amount to an unconstitutional ex post facto enlargement of this Court's waiver doctrine, denying Mr. Virgil due process of law under the United States and California Constitutions. (U.S. Const., Amend. XIV, Cal. Const., Art. I, §§7, 15; *People v. Roldan, supra,* 35 Cal.4th 646, 732, fn. 37; see *Bouie v. Columbia, supra*, 378 U.S. 347, 362; *Clark v. Brown, supra*, 450 F.2d 898, 911.) In addition, as argued above, requiring immediate use of a peremptory challenge on any juror erroneously seated would amount to an unfair limitation on defense counsel's use of peremptory challenges and give unfair advantage to the prosecution in violation of Mr. Virgil's federal and state constitutional rights to due process, the assistance of counsel and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

During the trial court's voir dire of Green, he disclosed that he was robbed at knifepoint and did not bother to call the police because of the high crime area where he lived. (V5, RT 548-549.) Green was in favor of the death penalty, but said he could consider and impose either penalty option. (V5, RT 550-551.)

At the sidebar, Green discussed information from his questionnaire where he disclosed that he was a victim of child abuse. (V5, RT 551.) Green said he was abandoned by his mother after she was beaten by his alcoholic father and he was raised by his father who often left him with people. (V5, RT 551.) According to Green, his father later apologized for his behavior. Most important, he believed that his abusive childhood was

"no big deal" and denied it affected him as an adult because the abuse had stopped long ago. (V5, RT 551-552.)

Continuing, the trial court asked if Green could weigh evidence of abuse objectively and Green replied "I think so." (V5, RT 551-552.) The trial court then asked if Green felt that a person who suffered such abuse could "still make the right choices in life?" (V5, RT 552.) Green responded "[o]f course, they can." (V5, RT 552.) Although the court followed up by asking if Green could consider childhood abuse if a person "made the wrong choices in life," Green never answered the question. (V5, RT 552.) Instead, he said

> "But it would be their choice. It's not like they're still being abused. To me, it's not that deeply rooted, seeded. That's just my personal opinion."

(V5, RT 552.) Though Green later said he "could" consider such evidence, defense counsel asked to question Green about his seemingly contradictory remarks. (V5, RT 552.) The court refused and Green evidenced his hostility towards Mr. Virgil's anticipated mitigation defense by saying mockingly it was "[t]oo late" to question him. (V5, RT 553.)

In the recent case of *People v. Avila* (2006) 38 Cal.4th 491, 533-536, defendant claimed the trial court abused its discretion by establishing a five-day limit for jury voir dire. The court found defendant's claim lacked merit because the version of Code of Civil Procedure section 223 applicable at the trial [the same version applicable to Mr. Virgil's trial] allowed voir dire by the court, but permitted questioning by counsel upon a showing of good cause. Further, this Court found the decision in *People v. Hernandez* (1979) 94 Cal.App.3d 715, 719, upon which Avila relied [as did Mr. Virgil in his Opening Brief, at pp. 141 and 142] inapposite because Hernandez did not exhaust all of his peremptory challenges and the underlying statute, Penal Code section 1078, permitting reasonable

questioning by counsel had been repealed before trial. Regardless of its interpretation of the relevant statutes, the *Avila* court held the trial court did not abuse its discretion because (1) it allowed defense counsel to ask some questions upon request, (2) counsel never asked to question the juror at issue about the matter claimed on appeal to prejudice the defendant, (3) one juror at issue never served on the jury because a peremptory challenge was exercised against her, (4) the request to question of the jurors was untimely, and (5)

> "the court's willingness to permit additional time for counsel-conducted voir dire upon a showing of good cause ameliorated any potential concern that the limitation would somehow be unfair or violate the right to an impartial jury."

(*People v. Avila, supra,* 38 Cal.4th at p. 536.)

In Mr. Virgil's case, the trial court set a limitation for counsel's questioning, but refused defense counsel's request to question Green. Thereafter, the defense exhausted its peremptory challenges and Green served on Mr. Virgil's jury during the guilt and penalty phases. Under the circumstances, the trial court's time limitation was unfair and violated Mr. Virgil's right to a fair and impartial jury. (*Ibid.*)

Further, the trial court's voir dire of Juror Green was inadequate. Given the facts and circumstances of the mitigating evidence expected to be present in Mr. Virgil's case and Green's dismissal of that evidence as having no consequences in adulthood, defense counsel's request to question Green was reasonably intended to elicit whether Green could fairly and impartially consider that evidence. (V5, RT 553.) Because the trial court never asked if Green could set aside his personal views regarding facts and circumstances expected to be present in mitigation, the trial court's voir dire was inadequate and it abused its discretion by refusing to allow defense counsel to ask about these matters. (See *State v. Williams, supra,* 113 N.J. at pp. 438-441; *People v. Boyette, supra,* 29 Cal.4th at pp. 417-418.)

Finally, the trial court abused its discretion by limiting defense counsel's voir dire of Green that was "likely to be of great significance to [the] prospective juror[]" in deciding whether or not to vote for or against the death penalty. (*People v. Cash, supra*, 28 Cal.4th at pp. 718-723.) Although the trial court did not prevent defense counsel from later questioning Alternate Juror Wiener about racial bias, given her experience as a robbery victim after being threatened with a knife by a black man (V5, RT 589, 593), it expressly prevented defense counsel from questioning Green about whether he could be a fair and impartial juror by setting aside his personal views about the defense mitigating evidence and decide the case based on the court's instructions. Because the trial court's voir dire was inadequate and its restriction on defense counsel's questioning of Green was an abuse of discretion and Mr. Virgil exhausted all of his peremptory challenges and Green served on the jury, the trial court's errors were prejudicial and require the reversal of Mr. Virgil's penalty judgment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and its analogous California counterparts. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426; *Murphy v. Florida* (1975) 421 U.S. 794, 800-803; *Aldridge v. United States* (1931) 283 U.S. 308, *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Stewart, supra,* 33 Cal.4th at p. 432; *People v. Cash, supra*, 28 Cal.4th at pp. 718-723.)

III.

THE INTRODUCTION OF PEOPLE'S EXHIBIT NO. 14, FOUR PHOTOGRAPHS OF MS. LAO IN LIFE AND DEATH, AT THE GUILT PHASE VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, AN IMPARTIAL JURY, AND A RELIABLE PENALTY DETERMINATION AND REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT FOR THE CRIMES AGAINST MS. LAO

A. Respondent's Contention

"THE TRIAL COURT PROPERLY ADMITTED THE PHOTOS OF VICTIM SOY SUNG LAO IN LIFE AND IN DEATH." (RB 40.)

B. Mr. Virgil Did Not Waive The Instant Claim

Respondent begins by arguing that Mr. Virgil waived his claim regarding People's No. 14, an exhibit containing four photographs of Ms. Lao – two of her in life and two of her in death – by failing to object when the photographs were first introduced and on the constitutional grounds urged on appeal. (RB 40.) [26] Respondent is mistaken.

When the exhibit was introduced at trial, the prosecution did not focus the jury's attention on the exhibit as a whole. Instead, the witnesses who were shown the exhibit during the evidentiary portion of the guilt phase trial only testified about portions of it. For example, Sergeant Donald Tiller, the park policeman who was in the donut shop before Ms. Lao was stabbed, identified Ms. Lao in the photograph[s] wearing a USC [University of Southern California] sweatshirt and in the upper-right, partially covered coroner's photograph (V7, RT 927-929); Debra Tomiyasu, one of the two eyewitnesses who saw the man in the donut shop take money out of the register and Ms. Lao appear and collapse behind him,

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[26] In the interest of brevity, Mr. Virgil respectfully directs the court's to his Opening Brief at page 151, footnote 116, where he detailed the nature of the photographic exhibit.

identified Ms. Lao in the upper-right, partially covered coroner's photograph and then volunteered that she was the person in the other photograph[s] wearing a USC sweatshirt (V8, RT 1047-1048); Officer Blane Schmidt, the first police officer on the scene, identified Ms. Lao in the upper-right, partially covered coroner's photograph (V11, RT 1500); and Dr. Chinwah focused the jury's attention on the two coroner's photographs in People's No. 14 and related those photographs to People's No. 76, a diagram of a female human body that depicted Ms. Lao's wounds. (V14, RT 2263-2291.)[27] Because defense counsel objected to the exhibit when it was offered into evidence and before the prejudice he feared would arise, his objection was timely and preserved the issue for appellate review.

During the proceedings on the admission of exhibits, defense counsel objected to People's No. 14 as offered into evidence [all photographs uncovered]. According to defense counsel, his objection was based on the Los Angeles County District Attorney's Office's success in prejudicing juries during the guilt phase by showing them photographs of the victim in life next to her in death for comparative purposes. (V19, RT 3134, 3136-3137.) Further, defense counsel argued the exhibit was more prejudicial than probative and not relevant to any contested issue [Ms. Lao's identity or the identity of her killer] during the guilt phase. (V19, RT 3133-3134, 3136-3137.) Because defense counsel's objection to the photographic exhibit was lodged before the jury was allowed to consider the photographic exhibit as evidence and before the prejudice he complained of would arise, he preserved the issue for appellate review. (See *People v. Boyette, supra,* 29 Cal.4th at p. 424, quoting *People v.*

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27 It appears that the entire exhibit was uncovered during the doctor's testimony, but his testimony focused the jury on the right-side coroner's photographs of Ms. Lao in death.

Taylor (1982) 31 Cal.3d 488, 496.) In other words, Mr. Virgil satisfied the requirement of Evidence Code section 353 by advising the trial court when his concern about the prejudicial aspect of the exhibit arose "'so the court may correct or avoid the errors and provide the defendant with a fair trial.'" (*People v. Simon* (2001) 25 Cal.4th 1082, 1103 citing *People v. Saunders* (1993) 5 Cal.4th 580, 590.)

Further, contrary to Respondent's argument, defense counsel's objection on Evidence Code section 352 grounds did not waive the argument made in this appeal that the admission of the exhibit also deprived Mr. Virgil of his federal and state constitutional rights to due process. (V19, RT 3133-3134, 3137-3138.)

In *People v. Partida, supra,* 37 Cal.4th at pp. 433-439, this Court considered whether a defendant's objection to evidence of his gang membership on Evidence Code section 352 grounds also preserved his claim that the wrongful admission of this evidence violated his rights to due process. According to *Partida,*

> "defendant may argue an additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process. [Fn. omitted.]"

(*Id.,* at p. 439.) In the related footnote, the Court "reiterate[d] that a defendant may not argue that the trial court committed error for a reason not included in the trial objection," but nothing prevents him from arguing "that error in overruling the actual objection was so serious as to violate due process." (*Id.,* at p. 439, fn. 3.)

Consistent with the decision in *Partida*, Mr. Virgil argued on appeal that the trial court erred by admitting People's No. 14 as offered into evidence because it was more prejudicial than probative, the same grounds asserted in the trial court. (Opening Brief at pp. 157-159.) Further, consistent with the decision in *Partida* and trial counsel's argument in the

trial court, Mr. Virgil argued on appeal that the trial court's abuse of discretion in admitting the photograph was so prejudicial and serious that it violated his constitutional rights to due process and a reliable determination of whether death was his appropriate punishment. (Opening Brief at pp. 159-160.) [28]

C. The Trial Court Abused Its Discretion By Admitting People's No. 14 Into Evidence And The Error Requires The Reversal Of The Entire Judgment For The Crimes Against Ms. Lao

Respondent cites a variety of cases for the propositions that trial courts have discretion to admit photographs of victims in life and in death. [*People v. Heard* (2003) 31 Cal.4th 946, 975-876; *People v. Boyette, supra*, 29 Cal.4th at p. 424; *People v. Mendoza* (2002) 24 Cal.4th 130, 170-171]. (RB 43.) Respondent's reliance on those cases is misplaced because Mr. Virgil's instant argument is not based on a claim that separate and different exhibits of the victim in life and in death are per se inadmissible and prejudicial. Instead, his claim is that it is error and highly prejudicial when the jury is allowed to consider these photographs together for comparative purposes as part of the same exhibit.

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[28] The defendant in *Partida* was convicted of first degree murder and sentenced to 50 years to life. (*People v. Partida, supra,* 37 Cal.4th at p. 432.) Mr. Virgil submits that in a capital case, a defendant's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution are inextricably tied to his right to a reliable determination of penalty under the Eighth Amendment. (See *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [because death is a different kind of punishment, all aspects of the trial must satisfy the requirements of due process]; Pen. Code §190.3(a) [providing that the jury may consider as a factor in aggravation evidence presented at the guilt phase of trial regarding the circumstances of the crime].) Accordingly, the rationale from *Partida* should apply with even greater force to capital trials. (See *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22; *People v. Cole* (2004) 33 Cal.4th 1538, 1195, fn. 6.).)

Respondent also cites *People v. Martinez* (2003) 31 Cal.4th 673, 692, and *People v. Samayoa* (1997) 15 Cal.4th 795, 833, for the proposition that photographs of the victim in life are admissible at the guilt phase for identification purposes. Again, Respondent's authority is inapposite.

In *Martinez*, the Court considered the admissibility of photographs of the victim in life with some of his relatives and in death [photograph of his face and his chest showing the trajectory of the bullet that killed him]. According to the Court, the photographs were properly admitted for identification purposes of the victim in life and as the subject of the autopsy photographs. In *Samayoa*, the Court considered whether crime scene and autopsy photographs of the two victims were more prejudicial than probative. The Court concluded the photographs were relevant to establishing the prosecution's theory that defendant harbored the intent to kill both victims and to refute the defense theory that defendant harbored no such intent. Because cases are to be understood and interpreted in light of their facts and neither case involved a photographic exhibit depicting victims in life next to photographs of victims in death, Respondent's reliance on these cases is misplaced. (*People v. Scheid* (1997) 16 Cal.4th 1, 17.)

In addition, the photographs of Ms. Lao's wounds had only slight probative value to any contested issue in the guilt phase, were cumulative, and were highly prejudicial given the circumstances of their use. In *People v. Scheid, supra,* 16 Cal.4th at pp. 13-20, the Court discussed its often-repeated holding that trial courts have broad discretion to admit photographs and determine their relevancy and prejudicial effects under Evidence Code sections 210 [relevancy] and 352 [probative and prejudicial effects]. According to the Court, evidence is deemed prejudicial under Section 352 if it "uniquely tends to evoke an emotional bias against a party

as an individual, while having only slight probative value with regard to the issues. [Citation.]" (*Id.*, at p. 19.)

As discussed in more depth in Mr. Virgil's Opening Brief, the photographic exhibit had little probative value. There was no dispute about Ms. Lao's identity and the prosecutor's relevancy argument was specious at best and bordered on misconduct because the exhibit did nothing to establish her height, weight, or the claimed circumstances of being bound with an apron. (Opening Brief at pp. 154-155.) Further, the photographs did not reveal anything about the identity of Ms. Lao's attacker and disclosed very little about the type of knife used or that some of Ms. Lao's wounds were defensive wounds. (Opening Brief at pp. 154-156.) Even the trial court seemed to agree with defense counsel's argument about the prejudicial effect of the photographic exhibit, but rejected defense counsel's claim in Mr. Virgil's case on the basis of the individual photographs and saw nothing prejudicial from their comparative effect in the same exhibit. (V19, RT 3138.)

Regardless of the trial court's view about the individual photographs, it abused its discretion by allowing the prosecution to admit the photographic exhibit as offered based on a longstanding practice of the District Attorney's Office in Los Angeles County of prejudicing guilt phase juries by preparing and admitting photographic exhibits in this manner. In other words, the trial court allowed the prosecution to introduce a photographic exhibit that was intended to elicit a biased, visceral response that unfairly tempted the jury to find Mr. Virgil of the charged crimes against Ms. Lao. (*People v. Box* (2000) 23 Cal.4th 1153, 1200-1201; *People v. Scheid, supra,* 16 Cal.4th at p. 19.) Because the prosecution's use of the exhibit in question was intended to and did render Mr. Virgil's trial fundamentally unfair and affected the reliability of his judgment of death, the trial court's error violated his rights under the Fifth, Sixth, Eighth

and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of the entire judgment for the crimes against Ms. Lao.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION IN A SERIES OF RULINGS DURING LAVETTE GILMORE'S TESTIMONY ABOUT HER IDENTIFICATION OF MR. VIRGIL AND THOSE ERRORS REQUIRE THE REVERSAL OF THE JUDGMENT FOR THE CRIMES COMMITTED AGAINST MS. LAO AND MR. VIRGIL'S JUDGMENT OF DEATH

A. Respondent's Contention

"THE TRIAL COURT'S RULINGS REGARDING THE DIRECT AND CROSS-EXAMINATION OF LAVETTE GILMORE WERE PROPER." (RB 44.)

B. Trial Counsel Properly Objected To Lavette Gilmore's Testimony About Her Fears That The Man In The Donut Shop Might Rob Her And Preserved This Issue For Appellate Review

Respondent claims that Mr. Virgil waived his claim on appeal about Lavette Gilmore's testimony about being afraid that the man in the donut shop might rob her by failing to press the trial court for a ruling and failing to make a motion to strike that testimony. (RB 44.) Respondent is mistaken.

As identified above, the primary questions during the guilt phase of Mr. Virgil's trial involved the identity of the man seated at a dining room table in the Donut King and suspected of killing Ms. Lao and whether he had the intent to commit theft before Ms. Lao was stabbed. During the prosecutor's direct examination of Lavette Gilmore, a witness who testified that she was in the donut shop before Ms. Lao was stabbed and identified Mr. Virgil from a photograph with more than 100 percent certainty as the man seated at a dining room (V18, RT 2860-2865, 2889-2890), the

prosecutor asked Gilmore about her identification of Mr. Virgil in a photographic lineup. (V18, RT 2868-2871.) When the prosecutor asked if she drew something on People's No. 93 [a sixpack photographic lineup containing profile views with Mr. Virgil in Position No. 2], Gilmore answered by saying

> "Because I remember like his eyes. And they're just like those eyes right there. The nose, that hair on his face, and knowing that cap on his head and trying to hide his face. I mean, that was one of his main things, trying to hide his face, you know. And I made sure I, like I said, took the time to look at him. Because I had from that day of working I had a lot of money in my pocket, a lot of money because I'm a hairstylist. And about time four o'clock came, I had a lot of money in my back pocket myself. So --"

(V18, RT 2871.) Defense counsel immediately responded to Gilmore's irresponsive testimony by saying "I'm objecting to what a lot of money in her pocket, whether [sic] her inchoate fears are." (V18, RT 2871.) The trial court ruled on the objection by saying "All right. [Prosecutor, a]sk your next question, please." (V18, RT 2871.)

Respondent cites *People v. McPeters* (1992) 2 Cal.4th 1148. 1179 (mistakenly referred to in the Respondent's Brief as *People v. Roberts*), for the proposition that a defendant waives a claim on appeal by failing to press the trial court for a ruling. (RB 47.) Respondent's reliance is misplaced because *McPeters* involved a mere colloquy between the court and defense counsel that involved no objection or ruling to the habit evidence at issue. Because there was no objection and thus no adverse ruling concerning the evidence at issue, the *McPeters* court held that "the absence of an adverse ruling precludes any appellate challenge. [Citation.]." (*People v. McPeters, supra,* 2 Cal.4th at pp. 1178-1179.) Because defense counsel in Mr. Virgil's case "object[ed]" to a specific portion of Gilmore's testimony and the trial court overruled the objection by saying "[a]ll right" and directing

the prosecutor to continue with his direct examination (V18, RT 2871). Respondent's reliance on *McPeters* is misplaced. [29]

Respondent also cites *People v. Pinholster* (1992) 1 Cal.4th 865, 931, as support for its claim that defense counsel waived the claim on appeal. In *Pinholster,* defense counsel said several times that he intended to make a motion to sever count VI, but never made a severance motion. Under these circumstances, this Court rightly concluded that counsel waived the issue on appeal. Because Mr. Virgil's defense counsel formally objected to a specific portion of Gilmore's answer and the court effectively overruled the objection by telling the prosecutor to continue his questioning, *Pinholster* is inapposite and Respondent's reliance is misplaced.

In *People v. Holt* (1984) 37 Cal.4th 436, defense counsel argued the range of possible verdicts available to the jury and the prosecutor responded during his rebuttal argument that the jury's acceptance of the defense theory could result in the defendant's parole. Defense counsel objected, but the trial court merely stated "'I wouldn't talk any more about that.'" (*Id.,* at p. 458.) The Court concluded the trial court's failure to cure

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[29] In his Opening Brief at page 169, Mr. Virgil argued that the trial court "in effect sustained the objection by directing the prosecutor to ask his next question." After reviewing the record again, Mr. Virgil reasonably concludes that the trial court tacitly overruled defense counsel's objection by directing the prosecutor to ask his next question. Regardless of whether the trial court overruled or sustained the objection, Mr. Virgil's argument on appeal remains that the trial court erred by failing to strike Gilmore's irresponsive testimony.

Respondent concludes in its brief that the trial court never ruled on defense counsel's objection to Gilmore's testimony and defense counsel waived the issue by failing to press for a ruling. (RB 47.) Respondent's view is belied by the record where the trial court's statement immediately after defense counsel's objection can only be reasonably construed as a ruling that made any further objection/request by counsel futile. (V18, RT 2871.)

the error with the proper remedy [an admonition] was prejudicial and reversed the judgment because of that and other errors.

In *People v. Stevens* (2007) 41 Cal.4th 182, 205-206, the Court considered a similar matter where the prosecutor referred to the fact that if defendant was found guilty of second degree murder, the jury could not find the special circumstance true and this could save the defendant's life. Defense counsel objected to the prosecutor's argument and the court admonished the jury that counsels' statements during closing argument are not evidence and the jury must not consider penalty or punishment in its deliberations. According to the Court, the main difference between the circumstances in *Holt* and those in *Stevens* was the trial court's failure to properly and timely remedy the error in the former case. Given the circumstances of Mr. Virgil's case where defense counsel objected to the testimony from Gilmore on a highly contested issue and the trial court failed to remedy the error by striking the irresponsive and prejudicial testimony, the Court should apply the rationale from *Holt* to Mr. Virgil's case and reverse his convictions for the crimes against Ms. Lao.

Respondent also cites *People v. Kennedy* (2005) 36 Cal.4th 595, 612, and *People v. Wilson* (2005) 36 Cal.4th 309, 358, as authority for its argument that defense counsel waived any constitutional claims on appeal by failing to object on the grounds that Gilmore's testimony was unresponsive and violated Mr. Virgil's constitutional rights. (RB 47.) Again, Respondent's reliance is misplaced.

The decisions in *Kennedy* and *Wilson* do stand for the propositions that defendant is required to state the specific grounds for his objection and defendant may not raise different grounds on appeal. Both decisions, however, are inapposite because the objection in the present case conveyed to the court that counsel objected to testimony that was not responsive to the question asked [whether she drew something on the lineup she was

shown] and any further discussion would have been futile in light of the trial court's ruling directing the prosecutor to move on with his questioning.

Evidence Code section 766 and *People v. Dad* (1921) 51 Cal.App. 182, 185-186, provide that trial courts are responsible for controlling the proceedings during trial; that the obligation to control the proceedings extends to insuring that witnesses answer the questions asked of them; and that trial courts are obligated to strike offensive testimony on their own and need not await counsel's motion to strike unresponsive answers. Though defense counsel did not expressly move to strike Gilmore's unresponsive testimony, his objection to the improper portion of her answer and the trial court's ruling establish that any further objection or motion to strike would have been futile. (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821.) For these reasons, Respondent is mistaken that Mr. Virgil waived the instant claim on appeal. (RB 47-48.)

Respondent also claims that defense counsel waived the instant claim under Evidence Code section 353 by failing to make a motion to strike. (RB 47-48.) Beyond ignoring Mr. Virgil's argument that any further request would have been futile and hence unnecessary, Respondent cites only a portion of Evidence Code section 353. As Respondent fails to note, Evidence Code section 353, subdivision (a) requires "an objection to or motion to exclude or strike (Emphases added.)" in order to preserve a claim for appellate review. Because defense counsel objected to the unresponsive and prejudicial portion of Gilmore's testimony that is claimed as error on appeal, Respondent is mistaken that defense counsel failed to preserve the issue for appellate review. (See *People v. Stewart* (2004) 33 Cal.4th 425, 493.)

Respondent also claims that even if the issue was not waived, the error was harmless because Gilmore testified that she put her money away, Mr. Virgil saw her do this, and others identified Mr. Virgil as the man in

the donut shop. (V18, RT 2879-2880.) Respondent's argument distorts the record on appeal and Mr. Virgil's argument.

Gilmore testified that she looked back at the man in donut shop as she pulled money out of her pocket to pay for her donuts and when she returned money to her pocket (V18, RT 2779-2880.) When the prosecutor asked if the man was looking at her "at that time," Gilmore answered

> "At the way we were standing, you can see from the side of your eye like that (indicating). You can see that extra little view. You could see me. Uh-huh. I mean, not like the person did this (indicating). It was like, you know, you could see something going on."

(V18, RT 2880.)

Contrary to Respondent's characterization of Gilmore's testimony, Gilmore did not say that the man "saw" her taking out or replacing her money. (RB 48.) Instead, her testimony was simply that she was looking at the man seated at the table and his position and manner of sitting afforded him an opportunity to see what she was doing with her money. The record does not support a conclusion that the man actually saw Gilmore take out or replace her money. And, even if Respondent is correct about the man's observation, Respondent's argument is irrelevant because a customer buying several donuts in a small, family-owned donut shop would be expected to pay for her purchase with cash.

Mr. Virgil's argument is based on the prejudice flowing from Gilmore's "inchoate fears" about being robbed by the man who was sitting silently and passively at a table in the dining room. Because Gilmore was not present when Ms. Lao was stabbed and money taken out of the register, her testimony that she was afraid the man might rob her was based on mere speculation and thereby negatively affected the highly contested issue of whether the man in the donut shop had the intent to commit robbery. As such, Gilmore's testimony was inadmissible and highly prejudicial under

the circumstances of Mr. Virgil's case. (See *People v. Melton* (1988) 44 Cal.3d 713, 744, *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470-1471, citing *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582.)

Respondent also argues that the point of Gilmore's testimony was not to establish that Mr. Virgil had planned to commit robbery, but to explain her conduct in paying careful attention to him. (RB 47.) Though Respondent's argument has some superficial appeal, it remains that Gilmore's testimony was inadmissible because it was unresponsive to the question asked and allowing it to remain was extremely prejudicial under the circumstances of Mr. Virgil's case.

Finally, as detailed in Mr. Virgil's Opening Brief, Gilmore's identification of Mr. Virgil as the man in the donut shop was not without significant question, given the testimony of other witnesses that Gilmore was not even in the donut shop when they were there and the man was seated at the table and Gilmore's admitted lie about her identification of Mr. Virgil. Under the circumstances, Gilmore inadmissible testimony about one of the primary and highly contested issues in Mr. Virgil's case was prejudicial and requires the reversal of the entire judgment for the crimes against Ms. Lao. Under the rationale from *People v. Partida, supra,* 37 Cal.4th at pp. 433-439, and *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22, Mr. Virgil is entitled to claim that the trial court's ruling allowing Gilmore's unresponsive and prejudicial testimony to stand had the effect of violating his rights to due process, a fair trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

C. The Trial Court's Error Allowing Gilmore To Make a Belated Identification Of Mr. Virgil From A Photograph Of The Live Lineup Requires The Reversal Of The Entire Judgment For The Crimes Against Ms. Lao

Respondent begins by arguing that Mr. Virgil waived his constitutional claims on appeal because defense counsel argued at trial that Gilmore should not be allowed to make a belated identification from a photographic exhibit depicting the live lineup without the prosecution laying a proper foundation about what she saw at the lineup; that her identification from a photograph of the lineup would not be fresh and would be affected by the passage of time; and that there was no foundation "whether or not she [Gilmore] could make an in-court identification from a line-up." (V18, RT 2874; RB 48-49.) Defense counsel's objection, coupled with his later comment that the photographic exhibit contained a "bigger than life" solo photograph of Mr. Virgil below the photographs of the lineup (V18, RT 2875), communicated to the trial court that defense counsel's objection was based on his concerns that any in-court identification of Mr. Virgil by Gilmore would be tainted and the product of the unduly suggestive photographic exhibit depicting Mr. Virgil standing alone.

In *People v. Ochoa* (1998) 19 Cal.4th 353, 413, this Court held that a witness identification procedure violates a defendant's federal and state rights to due process when the procedure suggests in advance who the police want the witness to identify as their suspect. As noted by defense counsel and evidenced by the prosecutor's conduct and questioning in court, the identification procedure at issue with Gilmore violated Mr. Virgil's federal and state rights to due process by suggesting in advance that Gilmore should identify Mr. Virgil as the man in the donut shop. (*Ibid.*)

When the prosecutor asked Gilmore if the man she saw in the donut shop was in court, Gilmore answered "I didn't really take a good look at

him." (V18, RT 2860.) The prosecutor attempted to have Gilmore identify Mr. Virgil in court by walking up behind him as he was seated at counsel's table and asking if he was the person she identified as the man in the donut shop. (V18, RT 2865-2866.) Gilmore testified that Mr. Virgil looked nice, clean and healthy now and defense counsel objected that Gilmore's testimony was "[n]onresponsive." (V18, RT 2866.) After the trial court directed Gilmore to answer the prosecutor's question, Gilmore testified "I can't say. Just can't say." (V18, RT 2866.)

The prosecutor went on to question Gilmore about her identification of the man in the donut shop from photographic lineups shown to her. Gilmore testified that she circled two photographs in People's No. 91 [the men in Positions 1 and 2] because she could not adequately distinguish between the men. (V18, RT 2868-2869.) Gilmore testified, however, that she focused on the person in Position 2 [front view of Mr. Virgil's face from a booking photograph taken on November 3, 1992 – Mr. Virgil had a goatee in that photograph like he had during trial and most witnesses said the man in the donut shop had a full beard] because he looked more like the man in the donut shop than the other five people in the lineup. (SCT II, Vol. 3, 651-652; V18, RT 2866.) Gilmore also testified that she was shown People's No. 93, a sixpack photographic lineup containing profiles and selected the man in Position 2 [a left profile view of Mr. Virgil's face from his November 3, 1992, booking photograph – Mr. Virgil had a goatee in this photograph as well, just like he had during trial], and she selected Mr. Virgil because his profile was "consistent" with Mr. Virgil's profile in court. (SCT II, Vol. 3, 653-655; V18, RT 2871-2872.)

After the trial court ruled that Gilmore was allowed to make an identification from a photograph of the live lineup [People's No. 8], Gilmore testified she knew at the time of the lineup that the man in the donut shop was in Position 4 [Mr. Virgil]. (V18, RT 2875-2877.)

According to Gilmore, she did not become "over 100% sure" in her identification of the man in the donut shop until January 20, 1995, more than two years after the events at the Donut King and only after the investigating officer and the prosecutor told her that her earlier identifications were questionable and not helpful to the prosecution's case. (SCT II, Vol. 3, 650-659; V8 , RT 1121; V18, RT 2889-2890.) *30*

Under the circumstances, defense counsel's objection preserved Mr. Virgil's claim on appeal that allowing Gilmore to make an identification from a photograph of the live lineup would be unreliable and violate Mr. Virgil's federal and state constitutional rights to due process, a fair trial, and reliable guilt and penalty determinations.

Further, under this Court's decisions in *People v. Partida, supra,* 37 Cal.4th at pp. 433-439, and *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22, Mr. Virgil's constitutional claim is preserved that the effect of the trial court's ruling allowing Gilmore to make a belated identification based on an unduly suggestive identification procedure violated his rights to due process, a fair trial, and a reliable determinations of guilt and penalty.

Respondent also claims that Mr. Virgil cannot argue on appeal that the trial court's ruling allowing Gilmore to make a belated identification from a photograph of the live lineup violated his Sixth Amendment right to counsel because he did not object on that basis below and he was represented by counsel at trial. (RB 48-49.)

Mr. Virgil respectfully submits that this Court should address his instant claim under the well settled rule that reviewing courts in California can consider claims of constitutional error without an objection at trial.

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30 Mr. Virgil was the only man whose photographs were repeatedly shown witnesses in photographic lineups containing men who looked different and he was the only man in the photographic lineups who was also in the live lineup. (V7, RT 1011, 1014, 1016-1017; V9,1347-1348 .)

(See *Carman v. Alvord* (1982) 31 Cal.3d 318, 324; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) This is especially so under the equally well settled rule that reviewing courts in California may consider a pure issue of law that does not require resolution of opposing facts. (See *Hale v. Morgan, supra,* 22 Cal.3d 388, at p. 394, citing *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.* (1973) 36 Cal.App.3d 46, 56; *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

Mr. Virgil acknowledged in his Opening Brief that a defendant generally does not have the right to counsel at a photographic lineup. (Opening Brief at p. 175.) [31] But, Mr. Virgil cited *People v. Fowler* (1969) 1 Cal.3d 335, 279, *Moore v. Illinois* (1977) 434 U.S. 220, 231, and *Gilbert v. California* (1967) 388 U.S. 263, 272, as support for his argument that the trial court's error allowing Gilmore to make a belated identification of Mr. Virgil from a photographic exhibit violated, inter alia, his Sixth Amendment right to counsel. (Opening Brief at p. 176) In other words, Mr. Virgil argued that allowing Gilmore to belatedly identify Mr. Virgil from a photograph of the live lineup after failing to do so at the lineup would allow an "independent source" identification, based on an unduly suggestive photographic exhibit in violation of Mr. Virgil's right to counsel. (Opening Brief at pp. 175-176.) [32] Because such an identification after the right to

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[31] In Argument VI, Mr. Virgil does claim he was deprived of the right to counsel at a photographic lineup concerning the identification by Ella Ford, but only because of the unique circumstances of her identification. (Opening Brief at pp. 197-222.)

[32] As noted above, defense counsel argued that the photographic exhibit of the live lineup was unduly suggestive and allowing Gilmore to make an identification from such an exhibit would violate the principles announced in *United States v. Wade* (1967) 388 U.S. 218, 228-235, and *Gilbert v. California, supra,* 388 U.S. 263, concerning the role and

counsel had attached would be impermissible, the trial court's ruling allowing Gilmore's revisionist identification testimony not only violated Mr. Virgil's Sixth Amendment right to counsel, but also his rights to a fair trial and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

D. The Trial Court Improperly Limited Defense Counsel's Cross-Examination Of Gilmore And This Requires The Reversal Of The Entire Judgment For The Crimes Against Ms. Lao

Respondent argues that Mr. Virgil waived any constitutional claim regarding the trial court's limitations on his cross-examination of Gilmore because he did not object on that basis below, the trial court properly limited cross-examination by sustaining the prosecutor's objections, and, if there was any error, it was harmless. (RB 51-52.)

Respondent relies on *People v. Williams, supra,* 16 Cal.4th at p. 250, as authority for its argument that defense counsel waived the constitutional claim regarding the limitation on Gilmore's cross-examination. In *Williams,* the issue before the trial court was whether defense counsel's objection to gang evidence on relevance grounds waived defendant's claim on appeal that the evidence was inadmissible under Evidence Code section 352. (*Id.,* at p. 250.) Because the issue in Mr. Virgil's case involves the same theory of objection expressed as both a claim of state law error and a claim of constitutional error, Respondent's reliance on *Williams* is misplaced. (See also *People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6; *People v. Partida, supra,* 37 Cal.4th at pp. 433-439.)

Respondent also argues that the trial court properly sustained the prosecutor's objections and cites as an example that Gilmore's lie at the live

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importance of counsel at the live lineup to identify and object to identification procedures are tainted.

lineup on October 19, 1993, occurred before Mr. Virgil was arraigned in the Superior Court on November 19, 2003. (RB 50.) Further, Respondent claims that Mr. Virgil provides no support for his claim that because Gilmore knew that the present case involved a murder, she would also have known that there was a possibility that it might involve the death penalty. (RB 51.) Respondent is again mistaken.

Well before the live lineup where Gilmore testified she deliberately lied about her failure to identify Mr. Virgil, the South Bay Daily Breeze and Los Angeles Times newspapers published articles about Ms. Lao's homicide and disclosed that Mr. Virgil might face the death penalty if convicted of the crimes against her. *33* Because the Los Angeles County District Attorney's Office publicly took the position that Ms. Lao's killer could face the death penalty two months before Mr. Virgil's live lineup and three months before his arraignment in Superior Court, Respondent's argument that Gilmore could not have had access to information that this was capital case is wrong.

There is no evidence in the record that Gilmore actually read the article in question. The record shows, however, that at least one critical eyewitness [Debra Tomiyasu] who was a customer at Girls Will Be Girls hair salon where Gilmore worked was aware of the publicity associated with the case (V8, RT 1099-1102) and Gilmore knew that the newspapers at issue were sold near the donut shop and the hair salon. (V18, RT 2881.) Because the District Attorney's Office publicized that Mr. Virgil could face the death penalty for the crimes against Ms. Lao well before the live lineup,

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33 See Los Angeles Times, August 22, 1993, Sunday, South Bay Edition, SECTION: Metro; Part B; Page 7; Column 1, where Los Angeles County Deputy District Attorney Martin Oghigian disclosed that Mr. Virgil could face the death penalty or a life term in prison without parole if convicted of the crimes against Ms. Lao.

defense counsel's first question to Gilmore on cross-examination about whether she knew she was lying in a "capital murder case" was akin to matters of common knowledge. (See *People v. Young* (2005) 34 Cal.4th 1149, 1197.) For that reason, Respondent is mistaken by concluding there is no evidence that Gilmore "had, or would have had, access to information regarding the penalty sought in this case prior to appellant even being charged with the instant crimes." (RB 51.) [34]

Finally, as noted in Mr. Virgil's Opening Brief, it was not certain that defense counsel was questioning Gilmore about her knowledge at the time of the live lineup or the time of trial. (Opening Brief at p. 178, fn. 130.) Given the trial court's ruling without seeking clarification of defense counsel's question, the trial court's abuse of discretion was manifest.

Next, Respondent claims that the trial court properly sustained the prosecutor's objections to defense counsel's questions as argumentative. (RB 51-52.) Again, Respondent is mistaken.

As detailed in Mr. Virgil's Opening Brief at pages 178-182, defense counsel sought to question Gilmore in detail about matters within her knowledge and about her willingness to lie in an extremely serious criminal case with Mr. Virgil's life on the line. As established in his Opening Brief, defense counsel's questions were not argumentative. Instead, the questions were within the bounds of proper cross-examination and necessary to

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[34] Respondent gives great effect to Mr. Virgil's arraignment in Superior Court as support for its argument that Gilmore would not have had notice, but ignores that a Felony Complaint charging Mr. Virgil with murder and robbery against Ms. Lao with a related special circumstance was filed in Municipal Court against Mr. Virgil on August 20, 1993. (V1, CT 184-187.) Notably, the article in the Los Angeles Times about the prosecution seeking the death penalty or life without possibility of parole against Mr. Virgil for Ms. Lao's murder appeared on August 22, two days after the filing of the Felony Complaint.

adequately explore Gilmore's demeanor while testifying, the character of her testimony, her character for honesty, the existence or nonexistence of her bias or other motive for her statements, her attitude toward the action where she testified or towards giving testimony, and her admission of untruthfulness. (See Evid. Code §780, subds. (a), (b), (e), (f), (h), (j), and (k).)

Further, the trial court limited defense counsel's ability to challenge the reliability of the overall identification process concerning the identification of the man in the donut shop. During defense counsel's cross-examination of Gilmore about her identification of Mr. Virgil as that man, defense counsel questioned Gilmore about her statement to Officer Pepper where she said the man in the donut shop was "clean shaven." (V18, 290.) Gilmore denied at trial that the man was "clean shaved" and could not recall describing him in that manner. (V18, RT 2906.) Defense counsel was going to question Gilmore further about this important topic and prefaced his next question by saying "Yeah, I know, all these pictures you have looked at [were of men with facial hair]." (V18, RT 2906.) The prosecutor interrupted, however, by objecting that counsel's question was argumentative and the trial court sustained the objection. (V18, RT 2906.)

As noted in Mr. Virgil's Opening Brief at pp. 180-181, some witnesses claimed the man in the donut shop did not have a beard, some said he did, some said he only had a goatee with facial hair on the side of his face, and Gilmore reported to the police just after the incident that the man was "clean-shaven." For that reason, defense counsel was entitled to question Gilmore at length and in a manner intended to challenge the reliability of the identification process as unduly suggestive by exploring the fact and effect that she had only been shown photographs of men with facial hair, i.e., men resembling Mr. Virgil as he looked in booking photos taken near the time of the crime.

Respondent is correct that defense counsel questioned Gilmore in some detail regarding her reported lie about the live lineup, the circumstances of her observation of the man in the donut shop, and her belated identification of Mr. Virgil as that man. (RB 52.) Regardless of defense counsel's permitted cross-examination, the limitation on defense counsel's cross-examination prevented the defense from adequately exploring Gilmore's bias and willingness to lie in a capital trial, from adequately exploring Gilmore's state of mind regarding her feelings about lying in such a serious case, and from adequately exploring the suggestive nature of the identification process and her questionable credibility and eventual identification of Mr. Virgil's photograph.

Because the effect of the trial court's rulings limited Mr. Virgil's ability to adequately explore Gilmore's bias and elicit evidence from which to argue that this witness's bias provided a reason not to believe her testimony and professed certainty that Mr. Virgil was the man in the donut shop, the trial court's rulings violated Mr. Virgil's rights to due process, confrontation, counsel, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*United States v. Schoneberg* (9th Cir. 2005) 396 F.3d 1036, 1042, citing *Davis v. Alaska* (1974) 415 U.S. 308, 316-318.)

V.

THE TRIAL COURT VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, TRIAL BY AN IMPARTIAL JURY, AND A RELIABLE PENALTY DETERMINATION BY ALLOWING DETECTIVE COHEN TO TESTIFY ABOUT WHY HE BELIEVED MR. VIRGIL WAS THE SUSPECT IN MS. LAO'S HOMICIDE

A. Respondent's Contention

"THE TRIAL COURT PROPERLY PERMITTED DETECTIVE RICHARD COHEN'S TESTIMONY REGARDING APPELLANT'S BEING A SUSPECT IN LAO'S MURDER." (RB 52.)

B. The Trial Court's Ruling That Detective Cohen Could Testify About His Beliefs That Mr. Virgil Resembled The Composite Sketch Of The Man In The Donut Shop And Was The Likely Suspect In The Crimes Against Ms. Lao Was An Abuse Of Discretion And Invaded The Province Of The Jury

Respondent and Mr. Virgil agree that Evidence Code section 800 and this Court's decision in *People v. Farnum* (2002) 28 Cal.4th 107, 153, are instructive concerning the instant claim. (RB 54; Opening Brief 187.) Respondent fails to consider, however, that although a lay witness's opinion testimony is generally admissible, lay opinion testimony about the guilt or innocence of the accused is inadmissible because it invades the province of the jury as the factfinder entitled to draw the ultimate inference of guilt or innocence from the evidence. (*People v. Torres* (1995) 33 Cal.App.4th 37, 47; *People v. Melton* (1988) 44 Cal.3d 713, 744.)

1. Defense Counsel Preserved The Instant Claim For Appellate Review

Detective Richard Cohen was the law enforcement officer who reportedly "solved" Ms. Lao's homicide by advising the Gardena Police Department that Mr. Virgil was the likely suspect in that crime. (V6, RT 651-652.) During direct examination, the prosecutor asked Cohen about his meeting with detectives from the Gardena Police Department who were investigating Ms. Lao's homicide and Sheriff's Detective Jacques LaBerge who was investigating the robbery of Joe Draper at the Southwest Bowl. (V17, RT 2711.) After Cohen confirmed his attendance at the meeting, the prosecutor asked if Cohen's review of the sketch of Ms. Lao's suspected killer and the circumstances of the crimes against Joe Draper led to him any

"suspicions." (V17, RT 2711.) Before Cohen could answer, defense counsel objected that Cohen's suspicions [his opinion or state of mind] were irrelevant and the trial court sustained the objection, subject to an offer of proof. (V17, RT 2711.)

At the ensuing sidebar conference requested by the prosecutor, defense counsel argued that he had no objection to Cohen's testimony that the meeting led to the preparation of photographic lineups containing Mr. Virgil's photograph, but he objected to any opinion testimony from Cohen that the composite sketch of Ms. Lao's suspected killer resembled Mr. Virgil around the time of the homicide. (V17, RT 2711.) After the prosecutor added that he also wanted to elicit Cohen's opinion testimony that the circumstances of the crime at the Southwest Bowl ["MO"] were consistent with the circumstances of the crimes against Ms. Lao, defense counsel objected that Cohen's opinion testimony about a similar "MO" would invade and usurp the right of the jury to make this factual determination. (V17, RT 2713-2714.)

The trial court disagreed and ruled that the "MO" evidence was admissible to support Cohen's belief that the circumstances of the crimes against Draper were sufficiently similar to the crimes against Ms. Lao to "trigger[] his memory" about Mr. Virgil and support his belief that Mr. Virgil was the suspect in Ms. Lao's homicide. (V17, RT 2714.) Consistent with the trial court's ruling, Cohen testified that Mr. Virgil looked like the composite drawing of the suspect in Ms. Lao's homicide; he "frequented" the bowling alley where the crimes against Draper occurred; and he contacted the Gardena Police Department to report his belief that Mr. Virgil was "possibly" the suspect in Ms. Lao's homicide. (V17, RT 2715-2716.)

Respondent takes a narrow view of defense counsel's objection by focusing only on the first part of the objection – the detective's opinion testimony about the whether the sketch resembled Mr. Virgil was irrelevant.

(V17, RT 2711; RB 54.) A complete examination of defense counsel's objection establishes that his objection was based on multiple grounds and especially on Mr. Virgil's federal and state constitutional rights to have the jury determine the facts of his case.

In *Duncan v. State of Louisiana* (1968) 391 U.S. 145, the Supreme Court considered whether the right to trial by jury is a fundamental right, essential to a fair trial. According to the high court,

> "trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee."

(*Id.*, at p. 149.) In subsequent cases, the high court expanded on this fundamental constitutional right by holding that it extends to the right to have the jury apply the facts found to the relevant law. (See *United States v. Gaudin* (1995) 515 U.S. 506, 514-515, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Court of Ulster Cty. v. Allen* (1979) 442 U.S. 140, 156, *Patterson v. New York* (1977) 432 U.S. 197, 206; *In re Winship* (1970) 397 U.S. 358, 364.)

Because defense counsel objected that the detective's testimony would "usurp[] the province of the jury" to find the facts and apply them to the relevant law, Respondent is mistaken by concluding that defense counsel waived the federal and state constitutional claim being raised on appeal. Further, Respondent is mistaken under *People v. Partida, supra,* 37 Cal.4th at pp. 433-439, and *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22, where the Court held that defendant may argue the additional constitutional violations that result from the trial court's errors.

2. The Trial Court Erred By Admitting Detective Cohen's Testimony And The Error Requires The Reversal Of The Judgment For The Crimes Against Ms. Lao

After the trial court overruled defense counsel's objections that Detective Cohen's state of mind was irrelevant and usurped the province of the jury regarding the facts of the case, Cohen testified about his belief that Mr. Virgil was the likely suspect in Ms. Lao's homicide. (V17, RT 2711-2715.) According to Cohen, his conclusion was based on the fact Mr. Virgil resembled the composite sketch of the suspect in Ms. Lao's homicide, Mr. Virgil was "hanging around the Southwest Bowl," and from "information off the [police] teletype." (V17, RT 2715.) Because Cohen's testimony usurped the province of the jury in finding the facts and applying them to the relevant law under *Gaudin* and other relevant authority from the Supreme Court, the trial court abused its discretion by allowing the detective's testimony. As such, the inquiry must turn to prejudice.

Respondent contends that even if the trial court erred by allowing Cohen's testimony, the error was not prejudicial because Mr. Virgil's resemblance to the composite was presented though the testimony from Debra Tomiyasu and it is not reasonably probable that a more favorable verdict would have resulted if the testimony at issue had been excluded. (RB 54-55.) Respondent is mistaken.

Respondent fails to consider that Tomiyasu testified that the composite sketch of the suspect in Ms. Lao's homicide prepared at her direction was only a "little bit" better than the results from the Identi-Kit reconstruction. (V8, RT 1068-1069, 1156.) Although Tomiyasu said she was "happy" with the composite sketch and believed it was sufficiently distinctive to identify a person, she also testified it was not "identical" to the man in the donut shop. Instead, it was merely a "good approximation" and looked "closer" to the man than the results from the Identi-Kit. (V8,

RT 1134-1135, 1186.) Also, the composite did not include any facial hair and the man's cheeks in the composite were different than the man in the donut shop. In other words, Tomiyasu only testified that the sketch was the "best" depiction that the graphic artist from the Sheriff's Department could come up with. (V8, RT 1137, 1187.) Respondent is thus mistaken the error was cured by Tomiyasu's testimony. (RB 55.)

Beyond Respondent's misplaced reliance on Tomiyasu's testimony, Respondent fails to address Mr. Virgil's argument that admitting the detective's testimony was extremely prejudicial because, as a police officer, his testimony would have been viewed differently and given more credibility than other lay witnesses about Mr. Virgil's identification. Because of the detective's enhanced credibility, his testimony about Mr. Virgil and the composite would have suggested to the jury that the other lay witnesses were correct by identifying Mr. Virgil. In other words, the detective's testimony was akin to him vouching for the credibility and accuracy of the witnesses who identified Mr. Virgil as the man in the donut shop.

In his Opening Brief, Mr. Virgil cited the decisions in *People v. Sergill* (1982) 138 Cal.App.3d 34, and *United States v. Butcher* (9th Cir. 1977) 557 F.2d 666, for the proposition that lay opinion identification testimony from police officers that has the effect of vouching for the credibility of other witnesses is more prejudicial than probative. Because of the inherent prejudice flowing from such testimony, these courts held that such testimony should be allowed only in very limited circumstances, i.e., where the matter at issue cannot be established by any other means. (Opening Brief at pp. 193-195.)

As detailed in Mr. Virgil's Opening Brief, the only scientific evidence connecting Mr. Virgil to Ms. Lao's homicide was an undated palm print found in a public area of the donut shop. (Opening Brief at p.

195.) Although the defense did not introduce evidence that the palm print was other than Mr. Virgil's, the defense introduced evidence that questioned the validity of the prosecution's theory that the palm print was left by Mr. Virgil just before Ms. Lao was killed, including the several year delay in learning about the cleaning practices at the Donut King generally and on the day in question and the location of the print in an area that would not necessarily be cleaned daily. (See Opening Brief at pp. 64-66, and 185, fn. 132.)

Further, Mr. Virgil's identification as the man in the donut shop was not without serious question. As noted above, the photographic lineups containing Mr. Virgil's photographs highlighted him as the suspect in the charged crimes against Ms. Lao [dissimilar looking men in the lineup, Mr. Virgil's head was noticeably smaller than the other men's heads in the lineup, and/or the background color of his photograph differed greatly from that of the other photographs]. (V7, RT 999, V9, RT 1423; V2, SCT2, 379, 385, 395.)

Finally, several of the key eyewitnesses who identified Mr. Virgil as the man in the donut shop, including DeAndre Harrison and Sergeant Donald Tiller, admitted they recognized Mr. Virgil in the photographic lineups as the only person repeatedly included in the photographic lineups shown to them and he was the only man in the live lineup who was also included in the photographic lineups. (V7, RT 1010; V9, RT 1347-1348.) And, Tomiyasu initially could not decide if Mr. Virgil was the man in the donut shop and was uncertain of her identification at the live lineup, but later professed certainty that Mr. Virgil was that man after repeatedly being shown sixpacks containing Mr. Virgil's photograph as the only person repeatedly included in the photographic lineups and the live lineup. (V7,

RT 1076-1078, 1080; V12, RT 1921; V18, RT 2940-2942; V2, SCT2, 379, 385, 395.) [35]

Given the questionable scientific and identification evidence that Mr. Virgil was the man in the donut shop, the trial court's ruling allowing Detective Cohen's testimony at issue violated Mr. Virgil's rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of his convictions for the crimes against Ms. Lao. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Sergill, supra*, 138 Cal.App.3d 34; *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.)

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[35] By referring to the size of Mr. Virgil's head in the photographs, the different colored background of his photographs, the dissimilar looking men in the lineups containing his photograph, and his repeated inclusion in photographic lineups and presence at the live lineup, Mr. Virgil is not arguing on appeal that the identification procedure was unduly suggestive and violated his federal and state constitutional rights to due process, because trial counsel did not seek exclusion of the witnesses' identifications of Mr. Virgil on this ground. Those facts are referred to here only to show that the overall identification procedure was not without serious question. They are relevant for purposes of showing prejudice regarding the instant and related claims made on appeal.

VI.

THE TRIAL COURT VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, COUNSEL, AND A RELIABLE PENALTY DETERMINATION BY FAILING TO SUPPRESS ELLA FORD'S LAST MINUTE OUT-OF-COURT PHOTOGRAPHIC AND IN-COURT IDENTIFICATIONS. THE ERROR REQUIRES THE REVERSAL OF THE JUDGMENT FOR THE CRIMES AGAINST MS. LAO AND THE PENALTY OF DEATH

A. Respondent's Contention

"THE TRIAL COURT PROPERLY ADMITTED ELLA FORD'S IN-AND OUT-OF-COURT IDENTIFICATIONS OF APPELLANT BECAUSE THEY WERE NOT THE RESULT OF UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES." (RB 197.)

B. Defense Counsel's Objections And Argument Were Sufficient To Preserve Mr. Virgil's Constitutional Claims Regarding The Trial Court's Ruling About The Admission Of Ella Ford's Identification Testimony

As it does with respect to nearly every argument in Mr. Virgil's Opening Brief, Respondent contends that the issue of the admissibility of Ella Ford's identification testimony was waived by trial counsel's purported failure to object on all pertinent grounds raised in the appeal. Respondent is mistaken.

In his written motion and related argument about the admission of Ella Ford's testimony, defense counsel argued that Ella Ford was a critical prosecution witness and the defense was entitled to notice about the prosecution's delayed interview and identification procedure with Ford many years after the crimes in the donut shop. (V1, CT 232-233; V5, RT 605-606.) Further, defense counsel argued that Mr. Virgil was entitled to the protection afforded by the presence of counsel at such an interview based on the ongoing nature of the Municipal Court's order that an "*Evans* lineup" be conducted for all material eyewitnesses like Ford. (V5, RT 605-

606.) [36] As shown below, defense counsel preserved Mr. Virgil's federal and state constitutional claims for appellate review.

In *Evans v. Superior Court, supra,* 11 Cal.3d at p. 625, this Court concluded that in an appropriate case and upon timely request, due process requires that a defendant be afforded a pretrial lineup. (See *People v. Farnum* (2002) 28 Cal.4th 107, 183.) Under this well-settled rule, Mr. Virgil was entitled to have Ella Ford attend the pretrial live lineup conducted on October 19, 1993.

After reviewing the relevant circumstances, the trial court agreed with defense counsel's argument that Ford was an eyewitness subject to the Municipal Court's order for such a lineup. (V5, RT 614-615.)

When defense counsel argued the order for an *Evans* lineup imposed a continuing obligation on the prosecution to insure that Mr. Virgil's right to counsel was protected, counsel thereby advised the trial court that his objection to the prosecution's last-minute identification procedure with Ford necessarily implicated Mr. Virgil's rights to due process and counsel. (V5, RT 605-606.) The trial court showed that it understood the constitutional nature of defense counsel's objection by relying on the decision in *People v. Fernandez* (1990) 219 Cal.App.3d 1379, 1384-1386, where the Court of Appeal analyzed the defendant's claim that the failure of some witnesses to attend the court-ordered live lineup violated his right to due process. (V5, RT 614.)

The record shows clearly, therefore, that defense counsel satisfied the requirement for raising this claim on appeal: he made a timely assertion of the claim in the trial court and afforded the court an opportunity to correct or avoid the error and provide defendant with a fair trial]. (See

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[36] *Evans v. Superior Court* (1974) 11 Cal.3d 617.

(*People v. Simon, supra,* 25 Cal.4th at p. 1103, citing *People v. Saunders, supra,* 5 Cal.4th at p. 590.)

Further, in the "Request For Discovery" filed on September 28, 1993, defense counsel asked in Item Nos. 7 and 8 for all rough notes and information about the eyewitnesses requested to attend the lineup. (V1, CT 189-190.) Regardless of whether Ford was specifically mentioned in the Request, defense counsel asked that "any other witness who observed any suspect associated with the 10-24-92 homicide [of Ms. Lao]" attend the lineup. (V1, CT 190.) Contrary to the prosecutor's argument at trial where he expressed doubt that Ford was such an eyewitness, the initial prosecutor [Deputy District Attorney Julie Sulman] and the Gardena Police Department treated Ford as an eyewitness subject to the lineup order, based on her statement to Gardena police officer Nick Pepper moments after Ms. Lao's homicide and sending an officer to bring her to the live lineup. (V5, RT 609, 613-614; V9, RT 1387, 1388; V11, RT 1830-1837.) Under the circumstances, Ford was an important eyewitness subject to the lineup order and the prosecutor's contrary argument at trial was duplicitous.

In *Gray v. Netherland* (1996) 518 U.S. 152, 167-170, the United States Supreme Court held in a narrow 5-4 decision that while due process requires a defendant be given notice of the charges before trial, due process does not require the prosecution to disclose its evidence in advance of its introduction at trial. Regardless of that decision, the high court held in *Wardius v. Oregon* (1973) 412 U.S. 470, 475-476, that when discovery is governed by reciprocal discovery statutes, due process requires that the defense be given advance notice of the prosecution's evidence. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371, fn. 9; *Hassinger v.*

Adams (N.D.Cal. 2006) __ F. Supp. __ [2006 WL 294798, p. 12; Pen. Code §§ 1054.1, 1054.3.) [37]

Mr. Virgil's case was subject to the reciprocal discovery provisions of Penal Code section 1054 et seq that applies to all criminal trials commencing after June 6, 1990. Defense counsel filed a timely, pretrial discovery request asking for information about all eyewitnesses requested to attend the live lineup. Further, defense counsel argued during the proceedings on his motion to suppress Ford's identification testimony, the prosecution ignored the ongoing nature of the order for the *Evans* lineup by secretly interviewing Ford and asking her to make an identification outside of the presence of counsel. Finally, defense counsel emphasized that Ford's identification testimony at trial would be unreliable because of the passage of time and her very different statement about the circumstances of her observation of the man outside the donut shop. (V5, RT 605-609.) Under the circumstances, defense counsel preserved the matter for appellate review on the constitutional grounds urged on appeal – the prosecution's identification procedure with Ford violated Mr. Virgil's rights to due process and counsel.

C. Ford's Identification Testimony Was Unreliable And The Admission Of Her Testimony Violated Mr. Virgil's Rights To Due Process And Counsel

Respondent and Mr. Virgil agree the decision in *People v. Ochoa, supra,* 19 Cal.4th At p. 413, establishes that this Court has yet to specify the standard of review for deciding whether an identification procedure is unduly suggestive. (Opening Brief at p. 201; RB 58-59.) As argued in his Opening Brief, Mr. Virgil believes that fairness and reason dictate that this

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[37] In *Gray v. Netherland, supra,* 518 U.S. at p. 168, the Supreme Court noted its decision in *Wardius*, but limited that decision to circumstances involving reciprocal discovery statutes.

Court independently review the record in deciding whether the identification passes constitutional muster.

1. The Violation Of Mr. Virgil's Right To Due Process

Respondent contends Mr. Virgil's due process rights were not violated because he failed to establish that Ford's identification testimony was unreliable. According to Respondent, the dramatic changes in her story about the events outside the donut shop merely go to the weight of her testimony, but not its inherent unreliability. (RB 59.) Respondent is mistaken.

In *Manson v. Braithwaite* (1977) 432 U.S. 98, 113-116, the United States Supreme Court held that "reliability is the linchpin in determining the admissibility of identification testimony" and courts should determine reliability by considering and weighing the following factors:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

(*Id.*, at p. 114.) Thus, contrary to Respondent's argument, Ford's statement to Officer Pepper moments after the crime describing the man she reportedly saw running in the parking lot, the circumstances of her observation and her evolving story that remarkably filled in the gaps in the prosecution's evidence at trial should be considered in deciding whether her identification testimony was sufficiently reliable to warrant its admission at trial.

As detailed in Mr. Virgil's Opening Brief, Ford dramatically changed her story about her description of the man seen outside the donut shop and the circumstances of her observation between the time of her interview with Officer Pepper and the time of her interview with the

prosecutor and investigating officer more than two years later, and between the time of that interview and her testimony at trial several weeks later. (Opening Brief at pp. 201-212.) As such, Ford's testimony called into question her opportunity to view the suspect near the time of the crime, her degree of attention, the accuracy of her prior description, her level of certainty about the identification, and the effect on her memory and testimony of the more than two-year passage of time between the event and her identification, Under the circumstances, Ford's identification testimony was inherently unreliable and it admission violated Mr. Virgil's right to due process. (*Manson v. Braithwaite, supra,* 432 U.S. at pp. 113-116.)

According to Respondent, Mr. Virgil's instant claim is meritless because he has not shown the identification procedures associated with Ford's testimony were unreliable under this Court's decision in *People v. Ochoa, supra,* 19 Cal.4th at p. 412, and *People v. Cunningham* (2001) 25 Cal.4th 926, 989. (RB 58-59.) Respondent is mistaken.

In *Cunningham*, the Court held

> "In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.

(*Id.,* at p. 989.) Because Mr. Virgil satisfied the requirements of

Cunningham, the trial court erred by suppressing Ford's identification. [38]

In Mr. Virgil's case, Ford was shown a photographic lineup in January 1995 by the prosecutor and investigating officer, more than two years after the events she reportedly witnessed outside the Donut King. (V9, RT 1376.) At trial, the prosecutor inadvertently showed her a different photographic lineup, with a different photograph of Mr. Virgil – Mr. Virgil's booking photograph from November 3, 1992, depicting him with a goatee and consistent with his facial hair during trial. Ford agreed with the prosecutor and testified she had been shown that lineup (People's No. 6 then (V2, SCT 2, 379).

In fact, Ford had been shown the lineup introduced at trial as People's No. 12 [V2, SCT 2, 385] which included Mr. Virgil's booking photograph from October 27, 1992, depicting him with a full beard and the size of his head dramatically smaller than the other men, his hair much shorter, and with a colored background different than the other photographs. (V9, RT 1376-1377.) Ford had written on the admonition form that "Based on my memory, No. 3 [Mr. Virgil] looks like the person I saw the day of the incident more so than anyone else in the six-pack file." Despite her inability to correctly identify the photograph of Mr. Virgil she had previously been shown, she testified that she was confident in her identification of Mr. Virgil as the man she saw outside the donut shop. (V9, RT 1375-1376, 1379-1380.)

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[38] Given the prosecution's decision to disregard the order for a live lineup and interview Ford about identification matters outside of the presence of counsel, Mr. Virgil is limited in his ability to establish that the identification procedure with her was unduly suggestive. Instead, he can only argue that based on the dramatic changes in Ford's description, her identification testimony was so inherently unreliable that it had to be the product of undue suggestion.

The prosecutor then asked Ford to look at People's No. 4 [three photographs of Mr. Virgil (Photograph A was labeled "Booking Photo 10-26-92" and Photographs B and C were labeled "Booking Photographs 11-3-92"), and asked whether Photograph A accurately depicted Mr. Virgil's facial hair on October 24 [the day of Ms. Lao's homicide]. (V9, RT 1380.) [39] According to Ford, Mr. Virgil's facial hair in October 1992 looked like his facial hair in Photograph A, the booking photograph taken several days after the homicide, rather than Photographs B and C, the booking photographs taken more than 10 days after the homicide. (V9, RT 1380.)

Ford's poor memory and suggestibility, the unreliability of her identification, and the lack of necessity for the prosecution's secret pretrial photographic identification procedure are apparent from the record. The unreliability of her identification is established by her identification of the wrong photographic exhibit that the prosecution had shown to her just weeks before. Further, the photographic exhibit she identified as the one just shown to her was the one that resembled Mr. Virgil's appearance at trial and not how he looked just after the events at the Donut King.

Beyond the inherent unreliability of her identification evidence, the secret pretrial identification procedure was unnecessary. The prosecution knew about the order for a live lineup and had treated Ford as someone subject to the court's order. Instead, of complying with the order and conducting the subsequent identification interview with defense counsel present and thereby insuring Mr. Virgil's rights to due process and counsel, the prosecutor decided on the eve of trial and at the last minute to ignore the order and interview Ford in secret. Because the prosecution's secretive

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[39] People's Exhibit No. 4 had writings on it that identified Photograph A as Mr. Virgil's "Booking Photo" from "10-26-92" and Photographs B and C as Mr. Virgil's "Booking Photo" from "11-3-92."

identification procedure was improper in light of the lineup order and not made necessary by any other circumstance, and because other evidence showed that Ford's identification of Mr. Virgil, independent of the misconduct, was unreliable, Mr. Virgil satisfies the first consideration identified in *Cunningham*. As shown below, Mr. Virgil also satisfies the second consideration identified in *Cunningham* because the identification itself was unreliable under the totality of the circumstances.

As detailed in Mr. Virgil's Opening Brief at pages 201-212, Ford's testimony changed significantly from the time of her initial interview, from the time of her statement to the prosecution team on the eve of trial, and from the time of that interview to her testimony at trial. Officer Pepper, the prosecution's witness and an experienced police officer, took a statement from Ford he believed was accurate and precise about Ford's description of the man she saw outside the donut shop and her vantage point some distance from the man. Ford never said anything about the man having a heavy beard or having some type of object in his hands. (V11, RT 1824, 1830-1837.)

About one year later, Ford refused to attend the live lineup because she was ill from asthma (V9, RT 1387-1388; V18, RT 3041.) Though the investigating officer testified he attempted to contact Ford approximately eight times over the 15-month period following the live lineup, the record belies his claim. Instead, the record establishes he contacted and interviewed Ford when he and the prosecutor believed just before trial that her identification testimony was critical to the prosecution's case. (V9, RT 1387-1388; V18, RT 3040-3042.)

Ford told the prosecution team then a significantly different story from her previous one. She repeated what she had told Officer Pepper, that she was near her car approximately 70 feet from the Donut King's entrance and placing laundry inside her trunk when she heard yelling and turned

back to see a black male walking fast through the parking lot. (V9, RT 1399-1400.) But, she added two new facts: she saw some type of object clenched in the man's left hand and the man was not 6'2" tall as she told Pepper, but approximately 5'5" – 5'6" tall. (V9, RT 1402, 1416-1417, 1431.) It is difficult to see how she could have altered her account so to dovetail with the prosecution's theory of Mr. Virgil's guilt and the fate of the missing murder weapon without some sort of suggestion from her interviewers.

At trial, Ford changed her story again by claiming she saw the man twice, once from several feet away as he was coming out of the donut shop and she was coming out of Conway Cleaners and a second time when she was at her car placing her laundry in the trunk. (V9, RT 1352-1354, 1401, 1406, 1407, 1437.) Ford explained that either her interview with the prosecutor and investigating officer was a product of her confusion or the officer got her statement completely wrong. (V9, RT 1400-1401.) Ford also added for the first time that the man she saw outside the donut shop had a heavy beard. (V9, RT 1373-1374, 1417-1422, 1429-1431, 1433.)

Beyond these significant changes to Ford's stories and their suggestion that they were influenced by information received after her initial sighting of the man in the parking lot, Ford's testimony defied common sense and reason in several regards. Ford testified that she thought she saw an object clutched in the man's left hand. Ford, however, would have been on the man's right side when he left the donut shop and she was leaving Conway's and so his left hand would have been obscured by his body. Similarly, the man's right side would have closest to her when she was at the trunk of her car and she saw the man as he was looking back at the donut shop over his right shoulder. (V9, RT 1357-1362, 1402.) Further, if she saw the fast-moving man as he was leaving the donut shop and running though the parking lot, he would have been long gone by the

time Ford, a middle-age woman carrying an armload of laundry on hangers, would have walked approximately 70 feet to her car and was in the process of placing freshly laundered clothes into the trunk (V9, RT 1354, 1355, 1360-1362, 1392, 1397-1398, 1432.)

Under the totality of the circumstances and given Ford's many stories and the passage of time between the offense and her interview and testimony, Ford's identification was unreliable and Mr. Virgil has satisfied the second consideration identified in *Cunningham*. For these reasons, the admission of Ford's identification testimony violated Mr. Virgil's right to due process.

2. The Violation Of Mr. Virgil's Right To Counsel

As noted above, the prosecution knew Ford did not attend the live lineup because of illness. (V18, RT 3040-3041.) There is no dispute that a suspect has the right to counsel at a live lineup (*United States v. Wade* (1967) 388 U.S. 218) and there is no serious dispute about Ford being subject to the lineup order – she was someone known to have given a statement and description of the suspect at the scene, the police attempted to transport her to the lineup for that reason, and the prosecution team discussed conducting another lineup to comply with the lineup order. (V9, RT 1387-1388; V18, RT 3040-3041.) The investigating officer testified that Ford was reluctant to attend a live lineup, but her reluctance does not justify bypassing a live lineup with its attendant constitutional protections and deliberately conducting photographic identification lineup in secret outside of counsel's presence. (V9, RT 1387-1388; V18, RT 3040-3041.)

In denying the defense motion to suppress Ford's identification testimony, the trial court found "guidance" in *People v. Fernandez, supra,* 219 Cal.App.3d at pp. 1385-1386, where two witnesses subject to an order for an *Evans* lineup personally decided not to attend the lineup. (V5, RT 614.) In upholding the trial court's ruling denying the suppression of the

witnesses' identification testimony, the *Fernandez* court noted the witnesses' failure to attend the live lineup violated defendant's right to due process, but held it would be too harsh to suppress their identification testimony because their failure to attend was not the government's fault. The decision in *Fernandez* is inapposite.

The prosecution discussed conducting an *Evans* lineup with Ford, but decided at the last minute to forego that procedure. Instead, the prosecutor and investigating officer went to Ford's home armed with a photographic lineup containing Mr. Virgil's photograph so Ford could make an identification. Under the circumstances, the prosecution here acted in bad faith by conducting an identification procedure with Ford and then arguing speciously in court that the prosecution had no idea that Ford could make an identification. Because the prosecution acted in bad faith by not conducting a second live lineup, the government was solely responsible for Ford's failure to attend that lineup before trial. As such, the decision in *Fernandez* is inapposite and suppression was the only proper remedy for the prosecution's misdeed.

In *People v. Harmon* (1989) 215 Cal.App.3d 552, 566, the Court of Appeal cited *United States v. Wade* (1967) 388 U.S. 218, *Gilbert v. California* (1967) 388 U.S. 263, *People v. Williams* (1971) 3 Cal.3d 853, and *Evans v. Superior Court, supra,* 11 Cal.3d 617, in support of its holding that a defendant has a right to request a pretrial lineup and to the assistance of counsel at that lineup and immediately thereafter when the witness is asked to make an identification. According to *Williams*, the reason for the presence of counsel at a live lineup is to monitor any suggestion by law enforcement officers, intentional or unintentional, about the identity of the accused. According to this Court, defense counsel's presence at the lineup and identification is necessary to preserve the right to adequately cross-examine the eyewitness about his or her identification because otherwise

"counsel's cross-examination [would be reduced] 'to little more than shooting in the dark,' for he would not be fully apprised of what occurred at the identification interview." (*People v. Williams, supra,* 3 Cal.3d at p. 856.)

The decision in *Williams* was limited to its facts (see *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046), but its rationale should extend to Mr. Virgil's case. By intentionally and deliberately bypassing Mr. Virgil's right to counsel and interviewing Ford on its own, the prosecution limited defense counsel's ability to adequately cross-examine Ford about the circumstances of her identification. The nature of the photographic lineup shown to Ford and the remarkable and unsettling changes in her statements about her observations after the interview indicate that Ford was subjected to suggestion by her interviewers which altered her memory of her interaction with the man in the parking lot. Trial counsel's absence from the interview kept him from objecting to suggestive techniques during the interview and from effectively cross-examining Ford's altered memories of her encounter. Because the trial court sanctioned the prosecution's deliberate choice to bypass Mr. Virgil's right to counsel and limit his counsel's ability to cross-examine Ford, the trial court's ruling violated Mr. Virgil's Sixth Amendment right to the assistance of counsel.

D. Mr. Virgil Was Prejudiced By The Failure To Suppress Ford's Identification Testimony

Respondent argues that even if the trial court erred by failing to suppress Ford's identification testimony, any error was harmless beyond a reasonable doubt. (RB 62-63.) Respondent is mistaken.

In arguing that Ford's identifications of Mr. Virgil out-of-court and in-court were tentative, Respondent ignores the record. Ford testified that she was confident in the correctness of her out-of-court identification of Mr. Virgil and indicated in court that he was the man outside of the donut shop.

(V9, RT 1375-1376, 1379-1380.) Further, the prosecution used Ford's testimony to rebut Mr. Virgil's third-party defense theory, buttress other witnesses' identification of Mr. Virgil as the man in the donut shop, and fill in gaps in the prosecution's evidence, such as the fact that the knife used to kill Ms. Lao was never found at the scene. (V21 RT 3322-3323, 3245, 3260, 3301, 3306-3307)

As noted above, the photographic lineups containing Mr. Virgil's photographs were not without serious question regarding their suggestiveness. Given the photographic lineups and Ford's susceptibility and ever-changing stories, the prosecution's conduct in secretly interviewing Ford outside of the presence of counsel and using her unreliable testimony and identification to convict Mr. Virgil of the crimes against Ms. Lao and obtain a death sentence against him violated his rights to due process, the assistance counsel, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.) For these reasons, Mr. Virgil's convictions for the crimes against Ms. Lao and his judgment of death must be reversed.

VII.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF UNCHARGED CRIMES AND INSTRUCTING THE JURY WITH CALJIC NOS. 2.50, 2.50.1, AND 2.50.2. THOSE ERRORS REQUIRE THE REVERSAL OF THE ENTIRE JUDGMENT

A. Respondent's Contention

"THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR UNCHARGED CRIMES AND INSTRUCTED THE JURY WITH CALJIC NOS. 2.50, 2.50.1, AND 2.50.2." (RB 63.)

B. Defense Counsel's Decision Not To Contest The Evidence Of The Uncharged Offenses And His Agreement To Limit CALJIC No. 2.50 To Proving Identity Does Not Waive The Instant Claim On Appeal

In his Opening Brief, Mr. Virgil acknowledged defense counsel said he planned not to object to the prosecution's uncharged crimes evidence for tactical reasons [defense counsel conceded Mr. Virgil's appearance at the time of those offenses was relevant to the jury's determination of his identity regarding the charged offenses]. (V6, RT 619; Opening Brief at p. 228, fn. 151.) As provided in his Opening Brief, Mr. Virgil is nevertheless entitled to challenge the trial court's decision to instruct the jury with CALJIC Nos. 2.50, 2.50.1, 2.50.2 on appeal because those instructions together affected his substantial rights. (Pen. Code § 1259; Opening Brief at p. 228, fn. 151.)

Mr. Virgil also argued in his Opening Brief that defense counsel did not invite error or waive the claim involving the instructions at issue during the discussion with the court and prosecutor about jury instructions. (Opening Brief at p. 230, fn. 152.) When the prosecutor proposed instructing the jury with CALJIC Nos. 2.50, 2.50.1, and 2.50.2, defense counsel vigorously objected because there was not substantial evidence to support instructing the jury that the uncharged crimes established "a characteristic plan, method, or scheme" within the meaning of Evidence Code section 1101, subdivision (b). (V20, RT 3171.) The trial court agreed and modified CALJIC No. 2.50 to limit its application to whether the evidence "tends to show the identity of the person who committed the crime, if any, of which the defendant is accused." (V20, RT 3176.)

After agreeing to limit CALJIC No. 2.50 to proving "identity," the trial court said "[t]hen (CALJIC Nos.) 2.50.1 and (2.50).2 then must be there. We're up to 2.51, any objection?" (V20, RT 3177.) The record reflects that defense counsel's response "[n]o, your Honor" was to the trial

court's question about CALJIC No. 2.51 and not to whether he objected to CALJIC Nos. 2.50.1 and 2.50.2, the instructions most at issue in the instant claim. (V20, RT 3177.)

C. Mr. Virgil May Argue On Appeal The Instructions Violated His Rights To Due Process, Trial By Jury, And A Reliable Penalty Under The Federal And State Constitutions

In *Henderson v. Kibbe* (1977) 431 U.S. 145, 153, the Supreme Court considered whether the state court trial judge erred by failing to instruct the jury regarding the causation of death. In beginning its analysis, the Court recognized that its decision in *In re Winship* (1970) 397 U.S. 358, 364 ["'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"] was at the center of the issue. Because the trial court here instructed the jury that the uncharged crimes could be proved by a preponderance of the evidence and such evidence merely requires the evidence to have "more convincing force and the greater probability of truth than that opposed to it," Mr. Virgil's jury was allowed to prove his guilt for the charged crimes under a standard more lenient than the beyond a reasonable doubt standard required by *Winship* and due process. (V21, RT 3346-3347.)

Because this standard affected Mr. Virgil's substantial rights and he is entitled to argue on appeal the trial court's error had the effect of violating his rights to due process, Respondent is mistaken by arguing that Mr. Virgil may not raise this constitutional claim on appeal. (RB 69). (Pen. Code § 1259; *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.)

D. The Trial Court's Instructions To The Jury Established A Reasonable Likelihood The Jury Misapplied The Law Requiring Proof Beyond A Reasonable Doubt Of Every Fact Essential To Proving Mr. Virgil's Guilt And His Entire Judgment Must Be Reversed

Respondent contends the instructions as a whole did not mislead the jury into believing they could convict Mr. Virgil of the charged crimes under a less than beyond a reasonable doubt standard. (RB 70.) Further, Respondent contends the evidence of Mr. Virgil's guilt was overwhelming and so any error in giving the instructions at issue must be harmless beyond a reasonable doubt. (RB 70.) Respondent is mistaken.

In his Opening Brief, Mr. Virgil acknowledged the decisions in *People v. Medina* (1995) 11 Cal.4th 694, 762-764, and *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383, where this Court held that facts tending to prove intent and identity are "mere 'evidentiary facts'" that need not be proved beyond a reasonable doubt before they can be considered by the jury. Further, this Court held that allowing these facts to be proved under a more relaxed standard than beyond a reasonable doubt does not violate due process as long as the jury is instructed with the proper constitutional standard for the substantive crimes charged. (Opening Brief at p. 232.)

Regardless of the decisions in *Medina* and *Carpenter*, this Court has yet to resolve the inherent conflict between CALJIC No. 2.01 [circumstantial evidence instruction (RT 3341-3342.)] which requires each essential fact in the chain of circumstances leading to guilt be proved beyond a reasonable doubt and the other crimes evidence instructions [CALJIC Nos. 2.50, 2.50.1 and 2.50.2 (RT 3346-3347)] which allow some inferences leading to guilt to be proved by a mere preponderance of the evidence standard.

In his Opening Brief, Mr. Virgil argued that because of the conflict between CALJIC No. 2.01 and CALJIC Nos. 2.50, 2.50.1, and 2.50.2, his

jury was not properly instructed that it must find him guilty of the uncharged crimes under the beyond a reasonable doubt standard before those crimes could be used to establish his identity as the perpetrator of the charged offenses. (Opening Brief at p. 234.) For that reason, Mr. Virgil argued the trial court's instruction with CALJIC No. 2.50 and its companion instructions violated his rights to due process, trial by jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and constituted structural error requiring reversal of the entire judgment. (*In re Winship, supra*, 397 U.S. at p. 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, 282.) (Opening Brief at p. 234.) Even if this Court concludes the trial court's error is not structural, reversal is still required because the error is not harmless beyond a reasonable doubt.

Mr. Virgil acknowledged in his Opening Brief at pp. 234-235, that under *Estelle v. McGuire* (1991) 502 U.S. 62, 70-75, and *Boyde v. California* (1990) 494 U.S. 370, 378-381 [see also *People v. Lewis* (2001) 25 Cal.4th 610, 649], jury instructions must be considered as a whole in deciding whether there is a reasonable likelihood the jury misapplied the law requiring proof of every fact essential to establishing the defendant's guilt beyond a reasonable doubt. Based on the decision in *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394, and the circumstances of Mr. Virgil's case, the admission of the uncharged crimes evidence here was error and not harmless beyond a reasonable doubt because this evidence was inherently prejudicial and used by the prosecution as essential facts in the chain of circumstances leading to his guilt for the charged offenses. (RB 235.) Consequently, the trial court's error in allowing the other crimes evidence and instructing the jury as it did requires the reversal of the entire judgment against Mr. Virgil. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VIII.

THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 2.51 HAD THE EFFECT OF WITHDRAWING CRUCIAL ELEMENTS FROM THE CRIME OF ROBBERY AND THE SPECIAL CIRCUMSTANCE ALLEGATION FROM THE JURY'S CONSIDERATION AND REQUIRES THE REVERSAL OF THE JUDGMENT INVOLVING THE CRIMES AGAINST MS. LAO

A. Respondent's Contention

"THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51." (RB 70.)

B. The Instant Claim Is Not Waived On Appeal

Respondent contends trial counsel waived the instant claim either by failing to object to the instruction at issue, failing to seek clarification of the instruction, or failing to object to the prosecutor's argument. (RB 71, 72.) Respondent is mistaken.

In his Opening Brief, Mr. Virgil's argued the error in giving CALJIC No. 2.51 violated his constitutional right to have the jury find every element of the charged crimes of robbery and the related special circumstance. (Opening Brief at pp. 236-242.) Because CALJIC No. 2.51 violated Mr. Virgil's federal constitutional right to due process under the circumstances of his case, the error affected his substantial rights and no objection or clarification was required to preserve the instant claim for appellate review. (Pen. Code § 1259; *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.)

C. The Prosecutor's Argument Blurred The Distinction Between Specific Intent And Motive And Thereby Removed An Element Of Robbery And The Related Special Circumstance

Respondent contends even if trial counsel did not waive the instant claim, Mr. Virgil is not entitled to relief because he mischaracterized the

prosecutor's argument. (RB 73.) Mr. Virgil accurately described the prosecutor's argument.

After discussing the five elements of robbery (V21, RT 3219-3223), the prosecutor turned to the special circumstance of murder during the course of a robbery. (V21, RT 3223.) According to the prosecutor,

> "What we have here [as to the crimes against Ms. Lao] basically is a murder that is alleged. And it's alleged as a first degree murder because it occurred in the commission of a robbery. What does that mean, basically? It means that the compelling motive in this case was robbery, and that motive must exist before the actual killing takes place."

(V21, RT 3223.)

The prosecutor then used an analogy to emphasize his point that the jury should find the special circumstance alleged against Mr. Virgil true. (V21, RT 3223.) According to the prosecutor,

> "For instance, a man goes into a liquor store with a gun and says, 'Give me all the money.' And the guy says, 'I'm not giving you any money.' And decides to shoot the man and shoots him fatally and takes the money from the register. We know there was a robbery as he went in. That was his motivation. That was the entire controlling motive in the crime and that a person died as a result of that motivation."

(V21, RT 3223.)

The prosecutor continued his argument by turning to the charged crime of robbery against Beatriz Addo. After detailing the circumstances of that crime, the prosecutor argued "[r]obbery was the motive there" (V21, RT 3226) and the "one compelling motive in this case is simple human greed. And that is why you kill someone " (V21, RT 3226.)

After arguing that Ms. Lao was murdered during the course of a robbery, the prosecutor argued the only way for the jury "to figure out what they are [sic] specific intent was . . . was what was going through the brain of Lester Virgil at that time." (V21, RT 3226-3227.) According to the

prosecutor, Ms. Lao killed Ms. Lao and took her money to support his cocaine habit. (V21, RT 3227.) The prosecutor then concluded the jury had to infer Mr. Virgil's intent from his actions and inferred that it was to steal money and use it to buy cocaine. (V21, RT 3227.)

As established above, the prosecutor's argument blurred the distinction between the theft/taking element of robbery that must exist before robbery can be committed and the special circumstance can be found true with motive that he argued had to exist before the actual killing took place. (V21, RT 3119-3227.) Under the circumstances, Respondent is mistaken by concluding Mr. Virgil misconstrued the prosecutor's argument and the inquiry must turn to prejudice.

D. The Error In Giving CALJIC No. 2.51 Is Not Harmless Beyond A Reasonable Doubt And Requires That The Judgment Be Reversed

Beyond the identity of the man who killed Ms. Lao, the crucial inquiry concerning the crimes against Ms. Lao was whether she was killed during the commission of a robbery. Because the defense hotly contested the prosecution's theory of felony murder based on robbery, Mr. Virgil's mental state during the commission of the crimes against Ms. Lao was very much at issue. (V21, RT 3277-3290.)

The inappropriateness of instructing the jury with CALJIC 2.51 was highlighted, and the prejudicial effect of the improper instruction exacerbated, by the prosecutor's argument conflating motive and mental state in a way which, in combination with the instruction, almost assuredly led the jury to make the same mistake.

Because there is a "reasonable likelihood" that CALJIC No. 2.51 had the effect of withdrawing the intent [mens rea] element that went to the heart of the prosecution's entire murder case, the error in giving that instruction is not harmless beyond a reasonable doubt and requires the

reversal of the entire judgment for the crimes against Ms. Lao. (*Yates v. Evatt* (1991) 500 U.S. 391, overruled on other grounds in *Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4; *Boyde v. California, supra,* 494 U.S. at p. 380; *Chapman v. California, supra,* 386 U.S. at p. 24.)

IX.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY WITH CALJIC NO. 2.22 REGARDING THE WEIGHING OF CONFLICTING TESTIMONY REQUIRES THE REVERSAL OF THE ENTIRE JUDGMENT

A. Respondent's Contention

"THE TRIAL COURT'S OMISSION OF CALJIC NO. 2.22 WAS HARMLESS BASED ON THE OTHER PROPERLY ISSUED INSTRUCTIONS." (RB 73.)

B. The Trial Court's Error In Failing To Instruct The Jury Sua Sponte With CALJIC No. 2.22 Is Not Harmless Beyond A Reasonable Doubt

Respondent properly concedes the trial court erred in failing to instruct the jury with CALJIC No. 2.22 because there was conflicting evidence regarding Mr. Virgil's identification as the man who committed the crimes against Ms. Lao, but contends the error was harmless under both the state standard of review from *People v. Watson, supra,* 46 Cal.2d at p. 836 (RB 75) and the federal standard of review from *Chapman v. California, supra,* 386 U.S. 368 U.S. at p. 24.) [40]

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[40] Respondent also cites *People v. Carter* (2003) 30 Cal.4th 1166, 1220-1222, as support for its argument that the omission of CALJIC No. 2.22 was harmless beyond a reasonable doubt. (RB 75.) Respondent's reliance is misplaced because the cited portion of *Carter* refers only to the failure to reinstruct the jury with evidentiary instructions during the penalty phase.

Respondent cites *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097-1098, a noncapital decision, in support of its conclusion there is no reasonable likelihood the omission of CALJIC No. 2.22 "hindered the jury in its ability to properly evaluate the evidence. (RB 74-75.)

Snead is inapposite, however, because it did not involve fundamental, conflicting evidence about the identity of the man who committed the crimes at issue, and because it was not a capital case. Capital trials are fundamentally different from general criminal trials because they require heightened standards of reliability at all stages of the proceedings. (*Furman v. Georgia, supra*, 408 U.S. 238, 306, (conc. opn. of Stewart, J.); *Gardner v. Florida, supra*, 430 U.S. 349, 357; *Woodson v. North Carolina, supra*, 428 U.S. 280, 305, *Beck v. Alabama, supra*, (1980) 447 U.S. 625, and *Schiro v. Farley*, supra (1994) 510 U.S. 222, 238 (dis. opn. of Blackmun, J.).)

CALJIC No. 2.22 would have been a critical instruction in Mr. Virgil's case because it would have advised the jury to evaluate the evidence by looking at its "'convincing force'" rather than the "'relative number'" of testifying witnesses. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Rincon Pineda* (1975) 14 Cal.3d 864, 884-885.) In evaluating the effect of the trial court's omission of this mandatory and critical instruction, the Court considers whether there is a reasonable likelihood the failure to give CALJIC No. 2.22 so infected the entire trial that Mr. Virgil's resulting convictions and judgment of death violated his federal constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and their analogous California counterparts. (See *Estelle v. McGuire, supra,* 502 U.S. at p. 72, fn. 4; *Boyde v. California, supra,* 494 U.S. at p. 380; *Cupp v. Naughten* (1973) 414 U.S. 141, 147;

People v. Castillo (1997) 16 Cal.4th 1009, 1016; *People v. Price* (1991) 1 Cal.4th 324, 446; *People v. Garrison* (1989) 47 Cal.3d 746, 780.)

Respondent contends that the error in failing to give CALJIC No. 2.22 was harmless under the state or federal standards of review because "the jury was instructed with even more instructions than the jury received in *Snead* regarding the evaluation of the evidence." (RB 75.)

The jury was indeed given a number of CALJIC evidentiary instructions [CALJIC Nos. 2.13, 2.20, 2.21.1, 2.21.2, 2.27, 2.80, 2.81, 2.82 and 2.83] (V2, CT 291-295, 306-309.), but these instructions did not otherwise instruct the jury that where there is conflicting testimony, they were not to believe the side that had more witnesses simply because there were more witnesses telling that version. Because no other instruction imparted this critical information to the jury, the trial court's failure to give CALJIC No. 2.22 was not harmless.

For example, CALJIC Nos. 2.13 and 2.20 simply told the jury that they could use certain criteria for judging the credibility of witnesses. However this told them nothing about judging the relative believability as between two witnesses who gave conflicting testimony. CALJIC Nos. 2.21.1 and 2.21.2 just told the jury that it is not uncommon for different witnesses to have different memories of the same event, and simply because there were some conflicts did not necessarily mean that one witness was lying and the jury could discount the entire testimony of a witness that was willfully false. Further, CALJIC No. 2.27 informed the jury that they could give the testimony of a single witness whatever weight they deemed it deserved. Finally, CALJIC Nos. 2.80-2.83 instructed the jury about expert testimony and weighing conflicting expert testimony. Therefore, it appears that no other instruction took the place, either individually or in combination, of CALJIC No. 2.22. Consequently, the failure to give the jury an instruction warning the jury not to count the

number of witnesses was very likely to result in the jury favoring the prosecution since it had all of the witnesses on its side.

Moreover, the prosecutor's argument emphasized to the jury that they should find Mr. Virgil guilty based on the many witnesses called by the prosecution. The prosecutor said he called many witnesses, including five identification witnesses who positively identified Mr. Virgil and summarized their testimony. (V21, RT 3216-3217, 3229-3240.) The prosecutor emphasized that the case against Mr. Virgil was not circumstantial, but based on the prosecution calling "33 witnesses and [introducing] 100 exhibits." (V21, RT 3320.) According to the prosecutor, he called every conceivable witness that had relevant evidence against Mr. Virgil. (V21, RT 3320, 3321.) Finally, the prosecutor urged the jury to reject the defense case as specious because it was based on the "ghost that nobody saw" [a nonexistent person and there were no defense witnesses to support the theory]. (V21, RT 3322, 3323, 3324, 3328, 3328, 3337.)

The question about the identity of the man who committed the crimes alleged against Ms. Addo, Ms. Lao, and Mr. Draper and whether robbery was committed against Ms. Lao was a close question. (See Opening Brief at p. 259, fn. 165, referring to Arguments IV, VI, and XI, in support of this claim.) Further, the prosecution called many witnesses and put on an extensive guilt phase case whereas the defense called no witnesses during that portion of the trial. Under these circumstances, there is a reasonable likelihood that the failure to give CALJIC No. 2.22 sua sponte so infected the entire trial that Mr. Virgil's resulting convictions and penalty of death violated his federal and state constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Accordingly, the entire judgment against Mr. Virgil must be reversed.

X.

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT MR. VIRGIL'S CONVICTIONS FOR THE CRIMES AGAINST MS. LAO AND THE ENTIRE JUDGMENT INVOLVING THOSE CRIMES MUST BE REVERSED

A. Respondent's Contention

"THERE WAS MORE THAN SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR ROBBERY AND MURDER OF SOY LAO" (RB 76.)

B. There Is Not Substantial Evidence To Support Mr. Virgil's Convictions For The Crimes Against Ms. Lao

Respondent correctly recognizes the prosecution's case against Mr. Virgil for Ms. Lao's murder and robbery was based on eyewitness identifications and circumstantial evidence. (RB 78-80.) In the interest of brevity, Mr. Virgil will not repeat his arguments about the suspect nature of the eyewitnesses' identifications and the testimony from Lavette Gilmore and Ella Ford. Instead, he respectfully refers the Court to Arguments IV through IX in his Opening and Reply Brief in support for the instant claim that there is not substantial evidence to support Mr. Virgil's convictions for the crimes against Ms. Lao.

Respondent faults Mr. Virgil for misapplying the standard of review applicable to claims regarding the sufficiency of evidence. (RB 80.) Respondent ignores, however, the rationale for Mr. Virgil's argument and the decision upon which his claim is based.

In *People v. Morris* (1988) 46 Cal.3d 1, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, the Court discussed the law of robbery and the special circumstance of murder during the commission of robbery and considered whether there was substantial evidence to support the jury's finding the special circumstance was true.

The Court held that although there was legally sufficient evidence a theft occurred, there was not substantial evidence based on circumstantial evidence a robbery occurred. According to the Court, the evidence of whether the intent to steal arose before or during the application of force was based improperly on mere "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*Id.*, at p. 21.)

As in *Morris*, the jury's conclusion in Mr. Virgil's case that the intent to steal arose before the application of force was based on mere suspicion and conjecture alone. As detailed in Mr. Virgil's Opening Brief at pages 261 to 268, there is not substantial evidence to support the jury's finding regarding the crimes against Ms. Lao. This is especially so when the absence of substantial evidence argument is considered in light of the trial court's errors as identified in Arguments IV through IX.

According to Respondent, Mr. Virgil's case is analogous to the circumstances in *People v. Bolden* (2002) 29 Cal.4th 515, 553-554, and should be governed by that decision. (RB 80-81.) In *Bolden,* there was no serious question about the identity of the person who killed the victim and the circumstances of the crime reasonably established that a robbery occurred and the murder was committed to facilitate the commission of that crime.

In Mr. Virgil's case, however, the identity of the person who killed Ms. Lao was very much in doubt and Mr. Virgil's identification as the man in the donut shop and inferentially the man who killed Ms. Lao was based on questionable identification and forensic evidence. Further, the jury's finding about whether the man who killed Ms. Lao harbored the specific intent to steal before Ms. Lao was stabbed was based on speculation or conjecture under the circumstances of Mr. Virgil's case, especially in light of the trial court's failure to strike Lavette Gilmore's unresponsive testimony about her fear the man might rob her. (See Argument IV; *People*

v. Morris, supra, 46 Cal.3d at pp. 19-22.) Because the circumstances in *Bolden* are sufficiently different than Mr. Virgil's case, Respondent's reliance on that decision is misplaced.

In the absence of substantial evidence to support Mr. Virgil's convictions for the charged offenses against Ms. Lao, his convictions must be reversed for insufficiency of the evidence and retrial barred under principles of Double Jeopardy. (U.S. Const., Amend. V; Cal. Const., Art. I, §15; *Jackson v. Virginia* (1979) 443 U.S. 307, 318; *Burks v. United States* (1978) 437 U.S. 1, 18.)

XI.

THE TRIAL COURT'S CERTIFICATION OF THE RECORD ON APPEAL VIOLATED MR. VIRGIL'S RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY, COUNSEL, CONFRONTATION AND A RELIABLE PENALTY DETERMINATION

A. Respondent's Contention

"THE TRIAL COURT PROPERLY CERTIFIED THE RECORD ON APPEAL; ACCORDINGLY, APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED" (RB 81.)

B. The Trial Court's Certification Of The Record On Appeal Violated Mr. Virgil's Federal and State Constitutional Rights

Respondent spends much time detailing the minutiae of the record correction proceedings, but omits any significant discussion of the issues presented. As established in his Opening Brief and below, the trial court violated Mr. Virgil's federal and state constitutional rights to due process, a fair and impartial jury, counsel, confrontation and a reliable penalty determination during record settlement and this requires the reversal of the entire judgment against him

In the seminal case of *Marks v. Superior Court (Alameda)* (2002) 27 Cal.4th 176, this Court emphasized the need for strict adherence to the

mandated procedures for settling the record on appeal in capital cases. In *Marks*, this Court clarified that although the trial court has full power over record settlement, the court must not act arbitrarily and its role is limited to settling proposed statements, not making them. (*Id.*, at p. 195.) Finally, this Court clarified that a trial court may decline to settle a statement, but only after resorting to all aids, including the court's memory and those of counsel, and being affirmatively convinced of its inability to settle the record. (*Id.*, at p. 196.) Here, the trial court violated these well-settled procedures by arbitrarily refusing to allow the parties to settle the record regarding the chalkboard diagram drawn by the prosecution's serology and blood spatter expert in open court and then settling the record on its own regarding the dismissal of 60 jurors.

1. The Chalkboard Diagram Drawn By The Prosecution's Serology/Blood Spatter Expert Was Evidence And A Proper Subject For Record Settlement

According to the trial prosecutor, Deputy District Attorney Marc Chomel, his expert witness, Elizabeth Devine, went to the blackboard and made

> "basic marks . . . to indicate blood spatter in a directional way that went from up to down. [¶] I can't say anything more than that. I don't have any recollection, although I think if counsel consults with her, it may be a standard demonstration that she does in these kinds of cases. For that reason, she might recall more specifically what it was that she drew."

(RT 10/15/2002, 5.) [41]

As Respondent correctly notes, defense counsel, Michael Clark, recalled the diagram drawn by Ms. Devine and believed it would be in her

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[41] During her testimony, Ms. Devine asked to demonstrate her testimony about a blood droplet's direction of travel on a "blackboard" because that "would be easier than a bunch of words." (V15, RT 2242-2344.)

files. (RB 84.) Notably, Respondent never avers the parties could not reach agreement on the diagram, and, in fact, nothing in the record suggests that the parties had reached an impasse about the contents of the diagram. Instead, Respondent's claim is based on its conclusion the trial court acted properly by deciding the parties could not agree on the content of the diagram. (RB 84.) Because the parties never indicated they could not agree on Ms. Devine's diagram, the trial court's decision not to allow settlement was arbitrary and violated the procedures and duties of the trial court in record settlement established in *Marks*.

Respondent also repeats that it objected to record settlement about the diagram because it was not an oral proceeding or a document [evidence] lodged or filed in the trial court. (RB 81, 87.) Respondent's argument is meritless.

Evidence Code section 140 provides that

> "'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

Further, Evidence Code section 210 provides that

> "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Given the above definitions, Ms. Devine's diagram was evidence because it was "presented to the senses" and offered to prove the expert's testimony about blood spatter and the trial court was obligated to allow settlement. (See *People v. Osband* (1996) 13 Cal.4th 622, 662-663.)

In *United States v. Woods* (9th Cir. 1991) 943 F.2d 1048, 1053-1054, the United States Court of Appeals for the Ninth Circuit considered the difference between charts or summaries used as evidence and charts and summaries used as "pedagogical devices." According to the Court of

Appeals, charts or summaries used as evidence should be admitted into evidence, but charts or summaries that merely summarize other material admitted into evidence are aids and should not be admitted. [42] Given Ms. Devine's use of the diagram to illustrate to the jury the direction of travel of the blood droplets in Mr. Virgil's case as "easier than a bunch of words," the drawing on the blackboard was offered by the prosecution as evidence and not a mere pedagogical device. Under the circumstances, Respondent is mistaken by arguing the diagram was not a proper subject for record settlement.

Further, in *St. George v. Superior Court (San Mateo County)* (1949) 93 Cal.App.2d 815, a civil action was tried before the court without a jury and resulted in a judgment for the plaintiffs. The defendants appealed and a reporter's transcript was prepared for all but the last day of trial – no reporter was present. The defendants objected to the filing of the transcript without the last day's testimony and the trial court ordered them to prepare a proposed settled statement of the missing portion of the proceedings that also included a certain plat or diagram used by a witness to explain his testimony.

The settled statement prepared by defendants did not include the plat or diagram and the plaintiffs objected to the settled statement as prepared. After a hearing, the trial court ruled that the proposed settled statement was incomplete because it omitted the "'map or plat used by defendants in the examination thereby of Ellis Anderson, a witness called by defendants, which said map or plat said defendants failed and refused to have placed in evidence.'" (*St. George v. Superior Court, supra,* 93 Cal.App.2d at p. 816.)

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[42] The Court of Appeals in *Woods* was dealing with Federal Rule of Evidence 1006. For purposes of Mr. Virgil's present argument, there is no meaningful difference between Rule 1006 and California Evidence Code section 250 which defines writings.

In their petition for writ of mandate, the defendants argued that the map or plat at issue should not be part of the record on appeal because it was not introduced into evidence.

The Court of Appeal denied the writ and held

> "The basic premise of petitioners [defendants at trial] that a map or plat used in conjunction with the examination of a witness, but not introduced into evidence, is not properly part of the record on appeal, is unsound. Such a map or plat is an integral part of the witness' testimony. It is as much a part of the witness' testimony as his oral statements. As stated by 3 Wigmore (Evidence, 3d ed.) § 790, at p. 175), such a document 'takes an evidential place simply as a non-verbal mode of expressing a witness' testimony.'"

(*St. George v. Superior Court, supra,* 93 Cal.App.2d at p. 816.)

In *People v. Ham* (1970) 7 Cal.App.3d 768, 780, overruled on other grounds in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3, the Court of Appeal cited *People v. Kynette* (1940) 15 Cal.2d 731, and *St. George* for the proposition that "[i]t is well settled that demonstrative evidence is admissible for the purpose of illustrating and clarifying a witness' testimony. [Citations.]" The prosecutor in *Ham* showed a .22 caliber pistol to three witnesses to determine if it looked similar to the weapon used by the robber. Defendant claimed on appeal that showing the gun to these witnesses was prejudicial error, but the Court of Appeal disagreed because the gun was properly used for the limited purpose of illustrating the witnesses' testimony.

Similarly, in *People v. Kynette* (1940) 15 Cal.2d 731, overruled on other grounds *People v. Bonelli* (1958) 50 Cal.2d 190, 197, the prosecution's experts testified at great length about the fragments of a bomb found at the crime scene. Based on their examination and study of the crime scene, the witnesses expressed an expert opinion about the kind of bomb that had been detonated. At trial, the experts identified a model bomb that they built or was built under their supervision and testified that it

represented "substantially and approximately the type of bomb that had been used" at the scene. (*People v. Kynette, supra,* 15 Cal.2d at p. 755.) This Court held that the trial court properly ruled to allow the experts to testify about the model bomb because it

> ""picturizes" what the expert then on the stand "has already described". The use of maps, models, diagrams, and photographs as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method. [Citations.]"

(*Id.,* at pp. 755-756.)

Respondent primarily relies on *People v. Tuilaepa (*1992) 4 Cal.4th 569, 585-586, as authority for its narrow view of what can be settled. Respondent's reliance is misplaced.

In *Tuilaepa*, appellate counsel for defendant tried to use record settlement to add information to the record about shackling, i.e., photographs of the courtroom and juror questionnaires about shackling. Because there were no motions or oral proceedings about shackling in the trial court, the Court held that the parties had nothing to settle. Because Ms. Devine, the prosecution's expert, drew the diagram at issue to describe and "picturize[]" what she said on the stand "instead of or in addition to some other method" of communicating to the jury, Respondent's reliance on *Tuilaepa* is misplaced.

Trial and appellate courts in California and commentators like Wigmore [see 3 Wigmore on Evidence, 3d Ed., 173, § 790] have long recognized that maps, models, and diagrams that represent pictorial communications of a qualified witness who communicates to the jury through these materials instead of or in addition to some other method are part of the evidence and record at trial. As such, California courts have long held that this type of communication is properly part of the appellate

record, regardless of whether the item at issue was formally introduced into evidence. (*St. George v. Superior Court, supra,* 93 Cal.App.2d at p. 816; *People v. Kynette, supra,* 15 Cal.2d at pp. 755-756.) For these reasons, Respondent's view of what can be settled must be rejected as contrary to well settled authority and reason.

2. The Trial Court Abused Its Discretion By Refusing To Order The Reporter To Check Her Notes About Any Unreported Proceeding On And Exceeded The Scope Of Its Duties During Governing Record Settlement By Settled Statement About The 60 Jurors Excused For Financial Hardship On The Basis Of Their Hardship Questionnaires

Respondent also contends the trial court acted properly in settling the record regarding the 60 jurors excused for financial hardship on the basis of their questionnaires. (RB 88.) Further, Respondent claims without citation to authority that the present issue is waived because defense counsel failed to object to the procedures used by the trial court to excuse the prospective jurors at issue. RB 91, fn. 15.) Respondent is mistaken.

In *People v. Holt* (1997) 15 Cal.4th 619, 658, the Court held that an objection to a juror excused on non-*Witherspoon–Witt* grounds was necessary to preserve the issue for appellate review. The Court made clear, however, that an objection was not required to preserve such claims for appellate review for trials conducted before *Holt* was decided in 1997. (*Ibid.*) Because Mr. Virgil's trial ended in 1995, Respondent is mistaken by concluding that defense counsel's failure to object waives the instant claim on appeal. (RB 91, fn 15.)

Respondent also ignores the command from *Marks* that trial courts have the duty to settle the record by ruling on statements proposed by the parties, but they are cautioned not to make their own settled statements. (*Marks v. Superior Court, supra,* 27 Cal.4th at p. 195, citing *Stevens v. Superior Court* (1958) 160 Cal.App.2d 264, 269.) Here, the prosecutor said

he had no recollection of the proceedings [on January 30, 1995] regarding the dismissal of 60 jurors for financial hardship and defense counsel recalled only that the trial court liberally granted hardship requests at a reported hearing. (Supplemental Clerks, Transcript IV, at 103-104.) The trial court, however, made its own settled statement by adding that both counsel saw the questionnaires and then stipulated to excused the 60 prospective jurors at issue. (V1, RT 12/16/2002, 6-7.)

Mr. Virgil attempted to settle the record about whether a hearing on the hardship voir dire was conducted on January 30, 1995, by asking permission to send juror hardship questionnaires to both trial counsel and asking the trial court to order the court reporter to check her notes for any unreported proceedings on that day. (RB 89.) The trial court granted the former request, but denied the latter by ruling that all proceedings regarding jury selection on January 30 had been transcribed and included in the record on appeal. (RB 89.) Given the prosecutor's failure to recall any details about the matter at issue and defense counsel's recollection about the court's liberal excusal policy at a reported hearing, the trial court abused its discretion by failing to order the reporter to check her notes for a previously unreported hearing and exceeded the scope of its duties under *Marks* by making its own settled statement that both trial counsel viewed the questionnaires and thereafter the 60 jurors at issue were excused by stipulation. (*Marks v. Superior Court, supra,* 27 Cal.4th at p. 195-197.)

Also, Respondent is mistaken by contending that Mr. Virgil failed to avail himself of settlement under the Rules of Court. (RB 88.) After the trial court refused to order the court reporter to check her notes and settled the record on its own about the excusal of the 60 jurors at issue over objection, the court directed appellate counsel to prepare an engrossed settled statement that included the court's statement about the excusal of these jurors for hardship. (RB 89.) Under the circumstances, it would have

been futile for Mr. Virgil to make any further request regarding this matter. (See *People v. Hill, supra,* 17 Cal.4th at p. 820-821 [counsel has no duty to engage in futile conduct to preserve an issue for appellate review].)

As acknowledged in Mr. Virgil's Opening Brief, this Court has consistently held a trial court's liberal policy of excusing jurors for financial hardship does not deprive a defendant of his right to a fair and impartial jury. (Opening Brief at p. 280, citing *People v. Burgener* (2003) 29 Cal.4th 833, 862.) Regardless of that holding, this Court has also held that excusing jurors for hardship is highly discretionary and reviewing courts must be alert to abuses that could negatively affect a defendant's right to a jury drawn from a fair cross section of the community. (See *People v. Wheeler* (1978) 22 Cal.3d 258, 273.) Finally, this Court has recognized that an adequate record of the proceedings involving the excusal of jurors for hardship is necessary in death penalty cases to identify the nature of the court's rulings excusing jurors for hardship. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 44, fn. 15.)

In *People v. Rogers* (2006) 39 Cal.4th 826, defendant claimed the trial court violated his rights under Penal Code section 190.9 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to a record adequate to permit meaningful appellate review by refusing to order that the in-chambers discussions regarding juror hardship be reported. The Court rejected the claim because defense counsel had suggested that the in-chambers conference not be reported and the record was adequate to satisfy the defendant's statutory and federal constitutional rights to a meaningful record on appeal. According to the Court, the record allowed for meaningful appellate because it reflected that defense counsel stipulated or agreed to all but one of the 133 excusals.

In *United States v. Bonas* (9th Cir. 2003) 344 F.3d 945, the United States Court of Appeals for the Ninth Circuit considered defendant's claim

the district court erred by granting a motion for mistrial based on the excusal of four jurors for financial hardship. The Court of Appeals recognized the well-settled rule that district [trial] courts are particularly well suited to decide if a juror should be excused for financial hardship, but also recognized a claim of financial hardship does not always justify the excusal from jury service. (*United States v. Bonas, supra,* 344 F.3d at p. 950, fn. 6, citing *United States v. Echavarria-Olarte* (9th Cir. 1990), 904 F.2d 1391, 1395.) Because jury service is a public duty and a claim of financial hardship does not always mean a person cannot perform his or her duty as a juror, the Court held that district courts should make a complete record of the proceedings to allow for appellate review of the lower court's exercise of discretion. (*Id.,* at pp. 950-951.)

Very recently in *Uttecht v. Brown, supra,* 127 S.Ct. 2218. the Supreme Court considered whether the trial court's removal of one juror for cause violated the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. Though the decision in *Brown* involved the *Witherspoon-Witt* rule governing the death-qualification of the jury, the high court's discussion of the issue establishes the importance of a complete and accurate appellate record of the jury voir dire. (See *Uttecht v. Brown, supra,* 127 S.Ct. at pp. 2231-2238, detailing the voir dire examination of the juror at issue and the court's decision based "on this record.") Under the circumstances, the trial court abused its discretion by refusing to allow further settlement efforts and exceeded the scope of its authority by adopting its own settled statement.

3. The Trial Court's Rulings Deprived Mr. Virgil Of His Federal And State Constitutional Rights

Under the circumstances, the trial court's decisions not to allow record settlement and making its own settled statement violated Mr. Virgil's federal and state constitutional rights to due process, counsel, confrontation,

a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Because the rights at issue are fundamental and affected the trial mechanism in Mr. Virgil's case, the error cannot be harmless beyond a reasonable doubt and the reversal of the entire judgment is required. (*Chessman v. Teets* (1957) 354 U.S. 156, 164; *Parker v. Dugger* (1991) 498 U.S. 308, 321; *Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Hawthorne* (1992) 4 Cal.4th 43, 63.)

PENALTY PHASE

XII.

THE ERROR IN GIVING CALJIC NO. 8.84.1 COUPLED WITH THE FAILURE TO GIVE OTHER RELEVANT INSTRUCTIONS REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. Respondent's Contention

"THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE." (RB 92.)

B. The Recent Decision In Cunningham v. California Establishes That Blakely v. Washington, Ring v. Arizona, And Apprendi v. New Jersey Apply To California's Death Penalty Scheme And Render It Unconstitutional Because It Fails To Require That The Trier Of Fact Unanimously Find Every Fact[or] Used To Select The Death Penalty Beyond A Reasonable Doubt

Respondent contends this Court's decisions in *People v. Ward* (2005) 36 Cal.4th 186, 221-222, *People v. Morrison* (2004) 34 Cal.4th 698, 730, and *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 275, are correct in holding that the United States Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, do not apply to California's

death penalty scheme. (RB 93.) [43] Respondent also contends that Mr. Virgil's attempt to distinguish his "'exact claim'" from "*Morrison* (and its progeny)" must fail because he offered no new argument on this claim. (RB 93, fn 17.) [44] On those bases, Respondent concludes the trial court did not err by failing to instruct Mr. Virgil's penalty jury with CALJIC No. 2.90 concerning the presumption of innocence, the beyond a reasonable doubt standard, and the prosecution's burden of proof. (RB 93.)

In *People v. Morrison, supra,* 34 Cal.4th at p. 730, the Court repeated its holding that nothing in *Apprendi, and Ring* affects California death penalty law. But, the decision in *Morrison* (and its progeny) does not address Mr. Virgil's instant claim that is based on the effect of instructing Mr. Virgil's penalty jury with CALJIC No. 8.84.1 to ignore all prior instructions and then failing to instruct correctly regarding the presumption of innocence, the definition of beyond a reasonable doubt, and the prosecution's burden at the penalty phase. For that reason, *Morrison* (and its progeny) are inapposite

In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], the high court held that California's determinate sentencing scheme ["DSL"]

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[43] For convenience, the decisions in *Blakely, Ring,* and *Apprendi* will be referred to as *Apprendi* (and its progeny) and this Court's decisions holding that these Supreme Court case do not apply to California's death penalty scheme as *Morrison* (and its progeny).

[44] In his Opening Brief, Mr. Virgil argued the trial court's instruction with CALJIC No. 8.84.1, coupled with its failure to instruct with CALJIC No. 2.90 concerning the presumption of innocence, the beyond a reasonable doubt standard, and the prosecution's burden of proof, invalidates his judgment of death because there is a reasonable likelihood the jury's verdict was based on proof insufficient to satisfy the standard from *In re Winship* (1970) 397 U.S. 358. (Opening Brief at pp. 301-303.) Respondent's response to this argument is limited to citing to *Morrison* and its progeny. (RB 93 and fn. 17.)

is unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution because it allowed trial judges to impose the upper term of imprisonment based on findings not submitted to the jury and found true beyond a reasonable doubt. In major part, the decision in *Cunningham* was based on the high court's holding that this Court erroneously defined the term "statutory maximum" in *People v. Black* (2005) 35 Cal.4th 1238., 1254. (*Cunningham v. California, supra,* 127 S.Ct. at p. 868.) Given the high court's rejection of this Court's analysis and definition of the term "statutory maximum" in *Black* and the virtually identical analysis and definition of that term in this Court's cases rejecting the application of *Apprendi* (and its progeny) to California's death penalty scheme, Respondent is mistaken by concluding that *Apprendi* (and its progeny) do not apply to California's death penalty scheme. [45]

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[45] In *People v. Bell* (2007) 40 Cal.4th 582, 620, this Court repeated its analysis from *Morrison* (and its progeny) and rejected the defendant's claim that *Apprendi* (and its progeny) apply to California's death penalty scheme Though *Bell* breaks no new ground in its analysis of the defendant's claim, the case is noteworthy because it recognizes that "facts" are at the heart of the decision about whether death is the appropriate punishment. (*Id.,* at p. 620.) As such, *Bell* supports Mr. Virgil's claim that California's death penalty scheme is flawed for the same reasons that led the Supreme Court to invalidate California's DSL scheme.

In *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, defendant filed a letter brief at oral argument citing *Cunningham* in support of his challenge to California death penalty scheme. This Court concluded that *Cunningham* "has no apparent application to the state's capital sentencing scheme."

In *People v. Carey* (2007) 41 Cal.4th 109, 136, fn. 6], the Court cited *Prince* and noted in passing that *Cunningham's* application to California Determinate Sentencing Law is not implicated by the penalty determination in *Carey*. Unlike those cases, Mr. Virgil argues that *Cunningham* is implicated by Mr. Virgil's penalty determination because this Court's views about the application of *Apprendi* (and its progeny) to California's death penalty scheme are based on its definition of the term "statutory maximum"

In *Cunningham*, the high court correctly recognized that California's DSL scheme mandates the imposition of the middle term of imprisonment, unless additional facts are found that justify the imposition of the upper or aggravated term of imprisonment. (*Id.,* at pp. 862, 869.) In *People v. Black* (*Black* I) (2005) 35 Cal.4th 1238, this Court rejected the high court's definition of the term "'statutory maximum'" from *Blakely* [542 U.S. at p. 303] by finding

> """the upper term [under California's DSL] is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*."

(*People v. Black, supra,* 35 Cal.4th at p. 1254.) The high court's decision in *Cunningham* rejected this Court's analysis that was based on its misunderstanding of the term "statutory maximum" from *Apprendi*. Because this Court's rationale for not applying the decisions in *Apprendi*, *Ring*, and *Blakely* to California's capital sentencing scheme is based on essentially the same analysis rejected by the high court in *Cunningham*, California's capital scheme must suffer the same fate as its DSL scheme.

As recognized in Mr. Virgil's Opening Brief at pages 295-298, the Court's decision in *People v. Prieto, supra*, 30 Cal.4th at p. 262, concluded that once a defendant in California is convicted of first degree murder and one or more special circumstances are found true, the defendant may only

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that was rejected by the high court in *Cunningham*. (See *People v. Prince, supra*, 40 Cal.4th at pp. 1297-1298.)

Very recently in *People v. Black* (*Black II*) (2007) __ Cal.4th __ [62 Cal.Rptr.3d 569], and *People v. Sandoval* (2007) __ Cal.4th __ [62 Cal.Rptr.3d 588], this Court recognized the binding nature and effect of the high court's definition of the term "statutory maximum" on California's DSL. This Court has yet to decide, however, the binding nature and effect of the high court's definition of the term "statutory maximum" on California's death penalty scheme.

be sentenced to "the prescribed statutory maximum for the offense" – either death or life without possibility of parole. (*Id.,* at p. 263.)

In his Opening Brief, Mr. Virgil argued this Court's conclusion in *Prieto* and other such cases is wrong for two reasons. First, it is well-settled in California that death is a greater and harsher punishment than life without possibility of parole. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 478-479, citing *People v. Memro* (1995) 11 Cal.4th 786, 879-880, opn. mod. 12 Cal.4th 783d, and *People v. Hill* (1992) 3 Cal.4th 959, 1016, death "is the worse punishment as a matter of law.") Second, a defendant in California can be sentenced to death only if the trier of fact makes two additional findings beyond its verdict of guilty for first degree murder and the truth of the special circumstance[s] – the existence of aggravating circumstance[s] and the totality of those circumstance[s] outweighs the totality of the circumstance[s] in mitigation. (Pen. Code § 190.3.) ***46***

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46 Mr. Virgil also argued in his Opening Brief that factors in aggravation in California operate to narrow the class of defendants eligible for the death penalty and thereby operate like the aggravating factors at issue in *Ring v. Arizona, supra,* 536 U.S. 584. (Opening Brief at pp. 299-300.) As such, they are no different than elements of the offense that are subject to the procedural requirements the Constitution attaches to trial of elements of the offense. (See *Schriro v. Summerlin* (2004) 542 U.S. 348, 354-355; *Blakely v. Washington, supra*, 542 U.S. at p. 303; *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 110-111.)

In his Opening Brief at page 296, fn. 188, Mr. Virgil noted this Court's holding in *People v. Ochoa* (2001) 26 Cal.4th 398, 453, that aggravating factors in California are akin to aggravating factors in Arizona, but that it later changed its opinion based on the Supreme Court's concession in *Ring v. Arizona, supra,* 536 U.S. at p. 603, that the majority in *Apprendi v. New Jersey, supra,* 530 U.S. at p. 496, misunderstood Arizona's death penalty scheme. (See *People v. Prieto, supra,* 30 Cal.4th at p. 263, fn. 14) As argued in Mr. Virgil's Opening Brief, this Court's rationale for retreating from its holding in *Ochoa* about aggravating factors in California and Arizona is flawed because the Supreme Court said in *Schriro v. Summerlin* (2004) 542 U.S. 348, 355, fn. 5, that regardless of whether its

In *Cunningham*, the Supreme Court held that the crucial inquiry in deciding whether *Apprendi* (and its progeny) apply to a state's sentencing scheme depends on the meaning of the term "statutory maximum." (*Cunningham v. California, supra,* 127 S.Ct. at p. 860.) Contrary to this Court's definition that "statutory maximum" refers only to the "prescribed statutory maximum for an offense" [*Black* I – the upper term of imprisonment and *Prieto* – the death penalty], the Supreme Court's controlling and constitutionally-mandated definition is as follows:

> "'[T]he relevant 'statutory maximum,'' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.' [Citation.]'

(*Cunningham v. California, supra,* 127 S.Ct. at pp. 860.)

There is no dispute that once the trier of fact in California finds a defendant facing capital punishment guilty of first degree murder and the related special circumstance[s] true, the defendant faces two possible punishments – life without possibility of parole or death. Under Penal Code section 190.3, the sentence of life without possibility of parole [like the middle term of imprisonment for a crime subject to the DSL] must be imposed, unless the trier of fact makes two additional findings [the existence of factors in aggravation and that those factors outweigh any factors in mitigation]. Though this determination involves a normative weighing process with no one factor controlling, it remains that a defendant may not be sentenced to death under California's death penalty scheme unless the tier of fact makes findings beyond the verdicts necessary to expose a defendant to the possibility of a death penalty.

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understanding of Arizona law changed, the actual content of that state's law did not change.

Given the reality of California's death penalty scheme, the Supreme Court's definition of "statutory maximum" and the rejection of this Court's definition of that term in *Cunningham*, this Court's conclusion in *Morrison* (and its progeny) that *Apprendi* (and its progeny) do not apply to California's death penalty scheme is wrong. For the same reasons the Supreme Court used to invalidate California's DSL scheme [erroneous and unconstitutional definition of the term "statutory maximum" and the need to find additional facts to impose the upper term of imprisonment beyond a reasonable doubt], California's death penalty scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by not requiring the jury to unanimously find every fact[or] necessary to support a verdict of death beyond a reasonable doubt. (*Cunningham v. California, supra,* 127 S.Ct. at p. 860.)

C. The Error In Giving CALJIC No. 8.84.1 And Not Instructing The Jury With The Presumption Of Innocence, The Beyond A Reasonable Doubt Standard, And The Prosecution's Burden Of Proof Requires The Reversal Of Mr. Virgil's Penalty Judgment

As noted above, Respondent contends there is no merit to Mr. Virgil's claim the trial court erred by giving CALJIC No. 8.84.1 and failing to instruct the jury with the presumption of innocence, the beyond a reasonable doubt standard, and the prosecution's burden at the penalty phase and so does not address Mr. Virgil's arguments about the prejudicial effect of these undisputed errors. As detailed above, Respondent is mistaken and the trial court erred by instructing the jury as it did. For the reasons discussed in his Opening Brief at pages 301-303, the trial court's error permeated the entire penalty phase and constituted structural error that requires the reversal of Mr. Virgil's penalty judgment. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

D. The Failure To Instruct The Penalty Jury With All General Principles Of Law That Were Closely And Openly Connected To The Facts And Necessary To The Jury's Understanding Of The Case Requires The Reversal Of Mr. Virgil's Penalty Of Death

Respondent assumes for purposes of argument that if the trial court erred by failing to instruct the jury with all general principles of law relevant to the evidence, the error was harmless under any standard. (RB 94.) According to Respondent, this is because Mr. Virgil has failed to show there was a reasonable likelihood the error precluded the jury from considering any constitutionally relevant mitigating evidence. (RB 94.) Respondent wisely concedes error, but is mistaken about whether the error was prejudicial in Mr. Virgil's case.

Since at least 1988, this Court has required trial courts to instruct penalty juries with the instructions previously given that continue to apply at the penalty phase because of the requirement that juries be instructed with all general principles of law closely and openly connected to the facts and are necessary for the jury's understanding of the case. (See *People v. Babbitt* (1988) 45 Cal.3d. 660, 718, fn 26; *People v. Carter* (2003) 30 Cal.4th 1166, 1222.) Further, this advisement is included in the "Use Note" to CALJIC No. 8.84.1 to insure that trial courts understand their responsibility to properly instruct penalty juries. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1255-1256.)

Respondent acknowledges the decisions in *Carter* and *Babbitt*, but relies on a series of cases [*People v. Moon* (2005) 37 Cal.4th 1, 39-40; *People v. Williams* (1988) 45 Cal.3d 1268, 1320; *United States v. Scheffer* (1998) 523 U.S. 303, 312-313; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253, and *People v. Melton* (1988) 44 Cal.3d 713, 758,] to support its claim the trial court's error in Mr. Virgil's case was harmless beyond a reasonable doubt. (RB 94-95.)

Respondent's reliance is misplaced because those cases are each distinguishable, in that the evidence at the penalty phase was straightforward [*Moon*]; [47] the jury was given relevant and standard instructions about the beyond a reasonable doubt and the presumption of innocence [*Williams*]; the military court did not violate defendant's right to present a defense by excluding unreliable polygraph evidence [*Scheffer*]; jurors are intelligent and capable of applying the facts to the instructions given [*Early*]; or jurors were not instructed that guilt phase instructions were limited to that portion of the capital trial and were instructed with the beyond a reasonable doubt standard [*Melton*].

The penalty phase in Mr. Virgil's case was not straightforward and

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[47] In *People v. Moon, supra,* 37 Cal.4th at p. 39, the Court concluded that proper instruction with the applicable guilt phase instructions was harmless, in part because "the penalty phase evidence was entirely straightforward." This view is contrary to the well settled importance of jury instructions as guiding the jury's exercise of sentencing discretion. Further, it is unreasonable and has great implications under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") where federal courts review state court decisions to determine if they are

> "'contrary to' clearly established federal law if it reaches a conclusion opposite to one reached by the Supreme Court on a question of law or decides the case differently than the Supreme Court has decided a case with a materially indistinguishable set of facts. [Citation.] A state court decision involves an 'unreasonable application' of clearly established federal law if, in the federal court's independent judgment 'the relevant state-court decision [not only] applied clearly established federal law erroneously or incorrectly[, but also did so] ... unreasonabl[y].' [Citation.] AEDPA requires federal courts to presume that state court factual findings are correct, and it places the burden on [defendant-petitioner] to rebut that presumption by clear and convincing evidence. [Citation.]"

(*Nicklasson v. Roper* (8th Cir. 2007) ___ F.3d ___ [2007 WL 1774516], citing *Williams v. Taylor* (2000) 529 U.S. 362, 402-403, 405, 410-411.)

familiar, the jury was not adequately instructed about how to handle expert and conflicting testimony, and the jury was told to ignore all earlier instructions, including the presumption of innocence, the beyond a reasonable doubt standard, and the prosecution's burden at the penalty phase. As detailed and established in Mr. Virgil's Opening Brief at pages 304-309, the failure to instruct the jury with all general principles of law closely and openly connected to the facts and are necessary for the jury's understanding of the case requires the reversal of Mr. Virgil's penalty judgment under the federal and state standards of review.

XIII.

THE TRIAL COURT'S INSTRUCTION TO THE JURY IN RESPONSE TO THEIR QUESTIONS ABOUT THE CONSEQUENCES OF NOT REACHING A UNANIMOUS PENALTY DECISION RESULTED IN A COERCED PENALTY VERDICT AND REQUIRES THE REVERSAL OF MR. VIRGIL'S JUDGMENT OF DEATH

A. Respondent's Contention

"THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION REGARDING THE RESULT IF IT FAILED TO REACH A UNANIMOUS VERDICT." (RB 96.)

B. The Possibility That The Trial Court's Instruction To Reach A Unanimous Verdict Coupled With The Failure To Give CALJIC No. 17.40 Misled The Jury Regarding Its Sentencing Responsibility Requires The Reversal Of Mr. Virgil's Penalty Judgment

Respondent's argument that no error occurred is two-fold. First, Respondent argues that since Mr. Virgil "has not provided a sufficient reason for this Court to re-examine, much less overturn its prior decisions on this issue (AOB 315-325), his claim is meritless." (RB 98.) Second, Respondent argues that Mr. Virgil seeks to avoid the applicable law by

attempting to bootstrap an allegation that the jury foreperson [Juror Mosby] committed misconduct to support his claim the trial court erred by responding to the jury's note. (RB 98.) Respondent is mistaken.

Contending that Mr. Virgil has not provided sufficient reason for this Court to re-examine its prior decisions that trial courts need not instruct capital sentencing juries about the consequences of failing to reach a unanimous penalty decision, Respondent fails to consider Mr. Virgil's argument [Opening Brief at p. 321] that this Court should address the passage at issue from *People v. Wader* (1993) 5 Cal.4th 610, 664, which provides

> "[i]t follows that there is no duty to instruct a jury regarding its possible failure to reach a verdict *in the absence of a request by the jury for an explanation.*" **48**

(*Ibid.* (Emphasis added.).)

During the proceedings on how the trial court should respond to the jury's note about the effect of being unable to reach a unanimous penalty decision, defense counsel argued that the quoted passage from *Wader* supported his request the jury's note be answered as he requested. (V27, RT 3918-3924.) **49** Under the plain language of this passage and the Court's failure to clarify that this passage means anything other than what defense counsel argued it meant, this Court should find that the trial court

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48 As noted in Mr. Virgil's Opening Brief at pages 316-318 and fn. 204, this Court has never explained what it meant by this passage in *Wader*.

49 Defense counsel initially asked the jury be instructed as follows: "'If the trier of fact is a jury and has been unable to reach an 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.'" (V27, RT 3918.)

erred under *Wader* by not instructing the jury regarding its possible failure to reach a verdict in light of the jury's request jury for an explanation. [50]

Respondent's second argument is based on its incorrect premise that Mr. Virgil is attempting avoid the law by bootstrapping his claim of juror misconduct into the instant claim. In his Opening Brief, Mr. Virgil detailed the proceedings in the trial court that involved discussions about the jury's note and the proposed responses, defense counsel's concerns about the jury's deliberations and possible misconduct by the Foreperson [Juror Mosby], the trial court's limited inquiry about Mosby's conduct of studying law books during deliberation, and the jury's penalty decision on March 20, 1995. (Opening Brief at pp. 315-321.) As this Court will note, Mr. Virgil's instant claim has nothing to do with defense counsel's concerns about Juror Mosby or juror misconduct. (Opening Brief at pp. 321-325.) Instead, Mr. Virgil's claim is whether defense counsel was correct about his interpretation of the passage at issue from *Wader* and whether the trial court's response to the jury's note was coercive. (Opening Brief at pp. 321-325.) As such, Respondent's attempt to shift the focus of Mr. Virgil's argument and this Court's analysis should fail.

Consistent with its failure to address the argument about the passage from *Wader*, Respondent also fails to address Mr. Virgil's claim that the trial court erred by failing to instruct the jury in the same fashion this Court deemed 'commendabl[e]" in *People v. Belmontes* (1988) 45 Cal.3d 744, 813-814. (Opening Brief at pp. 321-323.)

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[50] Consistent with the decision in *People v. Thomas* (1992) 2 Cal.4th 489, the trial court instructed the jury " . . . that subject [the jury's failure to reach a unanimous verdict] is not for the jury to consider or to concern itself with. You must make every effort to reach an unanimous decision if at all possible." (V27, RT 3920-3922, 3926, 3928.)

After the trial court denied defense counsel's initial request to instruct the jury about the consequences of its failure to reach a unanimous decision, defense counsel asked the trial court to instruct the jury that "[y]ou have received all the law and the evidence. You may not speculate as to the consequences of your failure to agree." (V27, RT 3919) The trial court refused this request and said it would instruct the jury in the language from *Thomas*. Because defense counsel's alternative instruction was consistent in all regards with what this Court held was "commendabl[e]" in *Belmontes* [the rereading of former CALJIC No. 8.84.2 – 45 Cal.3d at p. 814] , the trial court erred by refusing to defense counsel's first alternative instruction.

Respondent also does not address Mr. Virgil's argument that the trial court erred by failing to instruct the jury with CALJIC No. 17.40, instead of instructing the jury in the language from *Thomas*. (Opening Brief at pp. 322-325.)

In his Opening Brief, Mr. Virgil argued the trial court erred by instructing the jury in the language from *Thomas* and refusing defense counsel's' request to instruct with CALJIC No. 17.40 because that would have avoided affirmatively misleading jurors about their roles in the sentencing process. (Opening Brief at pp. 323-325.) Because the trial court's instruction had the effect of telling jurors it was more important to reach a unanimous decision than it was for them to make an individualized sentencing decision as the conscience of the community, the trial court's instruction affirmatively misled jurors about their sentencing responsibility in violation of Mr. Virgil's rights to due process, trial by a fair and impartial jury, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-238; *Jenkins v. United States* (1965) 380 U.S. 445, 446; *Jones v. United States* (1999) 527 U.S.

373, 381-382; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; *Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614; *Kubat v. Thieret* (7th Cir.1989) 867 F.2d 351.) As argued Mr. Virgil's Opening Brief at page 325, the trial court's error requires the reversal of the jury's penalty decision regardless of whether the error is deemed structural.

XIV.

THE TRIAL COURT'S EXCLUSION AND MODIFICATION OF DEFENSE EXHIBITS DURING THE PENALTY PHASE REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. Respondent's Contention

"THE TRIAL COURT'S EXCLUSION AND MODIFICATION OF CERTAIN DEFENSE PENALTY PHASE EXHIBITS DOES NOT REQUIRE REVERSAL OF THE PENALTY DETERMINATION" (RB 100.)

B. The Trial Court's Exclusion Of The Defense Exhibits And Forced Modification Of Those Admitted Into Evidence Deprived Mr. Virgil Of His Federal And State Constitutional Rights To Have The Jury Consider All Relevant Mitigating Evidence And Requires The Reversal Of His Penalty Judgment

Respondent first argues that Mr. Virgil waived his constitutional claims to the exclusion of the photographic exhibits by not raising them in the trial court. (RB 100.) Although Respondent correctly cites to *People v. Brown* (2003) 31 Cal.4th 518, 546, *People v. Gurule* (2002) 28 Cal.4th 557, 632, and *People v. Sanders* (1995) 11 Cal.4th 457, 539, fn. 27, as support for its waiver argument, this Court's more recent decisions in *People v. Partida, supra,* 37 Cal.4th at pp. 433-439, and *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22, hold that under circumstances like those in this case, counsel's objection on state court grounds adequately preserves the constitutional claims on appeal.

Defense counsel objected to the prosecutor's argument and the trial court's planned decision to exclude the proffered exhibits offered in mitigation as necessary to level the playing field and humanize Mr. Virgil to the jury after the prosecutor introduced many graphic photographs about the criminal acts committed against Ms. Lao and Ms. Rodriguez. (V24, RT 3830.) Because defense counsel made a timely objection to the prosecutor's motion to exclude the photographs, explained why the evidence should be admitted and stated the reasons for his objection, defense counsel preserved the issue for appellate review and Mr. Virgil is free to argue the trial court's error excluding the evidence violated his federal and state rights to due process, trial before a fair and impartial jury, and a reliable penalty determination. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.)

In arguing that the trial court did not err by excluding and/or modifying the defense exhibits in question, Respondent correctly recognizes that a capital sentencing jury may not be precluded from considering any relevant mitigating evidence proffered by a defendant as a basis for a sentence less than death. (RB 100.) Though Respondent is also correct that trial courts retain authority to exclude irrelevant evidence proffered in mitigation, that rule does not apply in this case because the photographs and the writing on them were, in fact, relevant. The trial court in Mr. Virgil's case abused its discretion by excluding evidence that Mr. Virgil proffered to establish the nature, depth and strength of the relationship between Mr. Virgil, Annie Antoine, and their son, Nigel. (V25, RT 3830.)

Respondent's argument is that the evidence admitted by the trial court [five of nine proffered photographs] sufficed to establish the defense's goal of showing communication between Mr. Virgil and Ms. Antoine about their son. (RB 102.) Consistent with the argument, Respondent concludes

the excluded evidence must be irrelevant and any error harmless because the defense was able to introduce some evidence in mitigation but the jury sentenced Mr. Virgil to death anyway. (RB 102-103.) Respondent is mistaken.

Defense counsel argued that the prosecution was allowed to introduce graphic photographs of the injuries inflicted on Benita Rodriguez and Ms. Lao to humanize these victims to the jury, but now unfairly sought an advantage at trial by seeking to exclude photographs and writings that would have humanized Mr. Virgil and thereby make it more difficult for the jury to sentence him to death. (V25, RT 3830-3831.) As evidenced by the trial court's statement, its real concern was not with the photographs it planned to exclude, but with the "messages" on the back of the photographs and who wrote them. (V25, RT 3830.) As such, the trial court and prosecutor were of the same mind that Mr. Virgil's penalty jury should not be allowed to consider all of the evidence proffered by the defense to establish the ongoing nature, depth and strength of the relationship between Mr. Virgil's, Ms. Antoine and Nigel.

In his Opening Brief, Mr. Virgil summarized the prosecutor's closing argument at the penalty phase. (Opening Brief at pp. 333-335.) The prosecutor exploited Mr. Virgil's relationship with Ms. Antoine and Nigel by arguing the jury saw that Ms. Antoine loved Mr. Virgil, but that Mr. Virgil could not be a father to Nigel by his own fault, because of his criminal conduct. The prosecutor argued that Nigel deserved sympathy because of Mr. Virgil's actions, but that the jury should have no sympathy for Mr. Virgil simply because of his relationship with Ms. Antoine. (V25, RT 3868-3869.)

Under the totality of the circumstances, the trial court's limitation of Mr. Virgil's mitigating evidence violated his rights under *Lockett* [*Lockett v. Ohio* (1978) 438 U.S. 586, 604], *Eddings* [*Eddings v. Oklahoma* (1982)

455 U.S. 104], and *Skipper* [*Skipper v. South Carolina* (1986) 476 U.S. 1], to present his penalty jury with all relevant mitigating evidence that he proffered as a basis for a sentence less than death.

Contrary to Respondent's contention that the photographs and writings were mere surplusage, these materials were contemporaneous expressions of the nature, depth and strength of the loving and family commitment between Mr. Virgil, Ms. Antoine, and Nigel that existed from the time the photographs were taken and the writings made. As such, they were not mere expression of love and caring professed merely at the time of trial.

Given the prosecutor's exploitive argument urging the jury not to give mitigating effect to Mr. Virgil's ongoing relationship with Ms. Antoine and Nigel and the importance of the excluded material to establish the extent of love and commitment between Mr. Virgil and these important people in his life, the trial court's error was not harmless under the federal or state constitutional standards. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 824.)

XV.

THE COMBINATION OF THE TRIAL COURT'S ERROR ADMITTING TESTIMONY ABOUT MS. LAO'S LIFE HISTORY BEGINNING WITH HER LIFE AND ESCAPE FROM CAMBODIA THROUGH HER ATTENDANCE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA AND THE PROSECUTOR'S ARGUMENT EXPLOITING THAT TESTIMONY REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. Respondent's Contention

"LYNN NGOV'S VICTIM IMPACT TESTIMONY REGARDING THE LIFE OF HER SISTER SOY LAO WAS PROPERLY ADMITTED AND THUS THE PROSECUTOR'S ARGUMENT REGARDING THE TESTIMONY WAS PROPER" (RB 103.)

B. The Trial Court's Ruling Allowing The Prosecutor To Introduce Evidence Of Ms. Lao's Life History And The Prosecutor's Argument Exploiting That Evidence Requires The Reversal Of Mr. Virgil's Judgment Of Death

1. Defense Counsel's Timely And Specific Objection To The Testimony At Issue And Argument Based On The Decisions In Payne v. Tennessee And People v. Edwards Preserved The Issue For Appellate Review

Respondent begins its argument by claiming that Mr. Virgil waived his claim regarding the admission of the victim impact evidence because he failed to make a specific and timely objection below and ask the court to admonish the jury about any impropriety. (RB 107.) Respondent is mistaken.

On the first day of the penalty phase trial [Friday, March 10, 1995] and before the testimony at issue [victim impact testimony from Lynne Ngov, Ms. Lao's sister], the parties discussed victim impact evidence and defense counsel asked for a summary of the proposed testimony from Ms. Ngov. (V23, RT 3428, 3429.) The prosecutor replied by saying he planned to elicit testimony from Ms. Ngov about the family's flight from Cambodia to escape the violent regime there, the circumstances of their arrival in the United States, Ms. Lao's attendance at and graduation from USC, Ms. Lao's goals and friends, and the effect of Ms. Lao's death on Ms. Ngov and her family. (V23, RT 3430.)

Defense counsel objected to the proposed evidence by arguing it would exceed the permissible scope of victim impact evidence by "trying to paint a live history of the victim . . . under the guise of victim impact." (V23, RT 3430.) In support of his objection, defense counsel cited the United States Supreme Court's decision in *Payne v. Tennessee* (1991) 501 U.S. 808, 825, where the high court held that victim impact evidence was generally relevant and admissible evidence, but the admission of such

evidence was subject to the constitutional protections afforded capital defendants by the Eighth and Fourteenth Amendments to the United States Constitution. (V23, RT 3430-3431.)

Further, defense counsel argued that the proposed evidence would violate this Court's decision in *People v. Edwards* (1991) 54 Cal.3d 787, 835, where the Court held that the evidence must comport with the protections afforded capital defendants by the Due Process Clause of the Fourteenth Amendment. More specifically, defense counsel argued that the admission of Ms. Ngov's testimony about the family's flight from Cambodia and Ms. Lao's education and accomplishments at USC would exceed the scope of permissible victim impact evidence under *Payne* and *Edwards* and be prejudicial under the circumstances of Mr. Virgil's case. (V23, RT 3433.) This was especially so because of the pretrial publicity associated with Mr. Virgil's case and the prosecution's expected argument that Ms. Lao died in the "killing fields" of Los Angeles after escaping from the "killing fields" in Cambodia. (V23, RT 3437, 3440.)

At the next hearing [Friday, March 13], defense counsel argued that Ms. Ngov's testimony about the effects on her and her family from Ms. Lao's death was proper victim impact evidence, but the evidence of Ms. Lao's life history and escape from the "killing fields" in Cambodia was inadmissible because it "could inflame the jury." (V23, RT 3597-3605.) The trial court disagreed and ruled it would allow the prosecutor to introduce the evidence at issue, based on the court's personally held belief that the death of a family member who fled a location and was killed at a new location would have a greater effect on the person's family. (V23, RT 3605.) Given defense counsel's reliance on *Payne* and *Edwards* that held the admission of victim impact evidence is subject to the federal constitutional protections afforded by the Eighth and Fourteenth Amendments to the United States Constitution and the trial court's ruling

that made any further objection futile [*People v. Hill, supra,* 17 Cal.4th at pp. 820-821], Respondent is mistaken that defense counsel waived the instant claim. Further, Mr. Virgil did not waive this claim because defense counsel raised a timely and specific objection to the challenged testimony and he is free to argue that the trial court's error violated his constitutional rights. (*People v. Partida, supra,* 37 Cal.4th 428, 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.)

2. The Victim Impact Evidence About Ms. Lao's Life History And The Prosecutor's Argument Exploiting That Evidence Was Prejudicial And Requires The Reversal Of Mr. Virgil's Penalty Judgment

Respondent next argues that the victim impact evidence elicited from Ms. Ngov was properly admitted and there was no error in the prosecutor's argument using that evidence. (RB 107-108.) Finally, Respondent claims that even if the trial court erred by admitting Ms. Ngov's testimony, the error was harmless beyond a reasonable doubt. (RB 109-110.)

Respondent relies primarily on the decision in *People v. Boyette, supra,* 29 Cal.4th at p. 444, as support for its claim that the evidence from Ms. Ngov was properly admitted and the prosecutor's argument was proper. (RB 107-108.) [51] Respondent is mistaken.

In *Boyette*, family members testified about their love of the victims and how they missed them and the prosecutor also introduced photographs of the victims while still alive. During her penalty argument, the prosecutor emphasized this victim impact evidence, but also argued the facts of the

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[51] Respondent cites to *Marks v. Superior Court, supra,* 27 Cal.4th 176, in support of its argument. (RB 107.) The decision in *Marks*, however, is inapposite because that case involves only record correction and settlement matters.

crime and defendant's background as being relevant to why the jury should impose the death penalty. After reviewing the family members' testimony and the prosecutor's argument, this Court concluded the testimony was relevant to show how the killings affected them and the prosecutor's argument was appropriate.

In Mr. Virgil's case, defense counsel conceded that Ms. Ngov's testimony about how much she loved Ms. Lao and the extent of her grief and sense of loss was properly admitted under the applicable federal and state authorities. (V23, RT 3433.) The problem, however, is that the victim impact evidence about Ms. Lao's flight from Cambodia and schooling in the United States surpassed constitutional limits because it was not limited to the effects of the killing on Ms. Lao's family members. Instead, it invited the jury to render a penalty verdict based on an irrational and emotional response untethered to the facts of the case. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *People v. Edwards, supra,* 54 Cal.3d at p. 835; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172.)

The prosecutor understood as much and urged the jury to give effect to their emotions by sentencing Mr. Virgil to death. Though some of the prosecutor's argument addressed the facts of the crimes against Ms. Lao and Ms. Rodriguez and Mr. Virgil's background (V25, RT 3857-3874), the prosecutor inflamed the jury's passions against Mr. Virgil by comparing Ms. Lao's "good life" (V25, RT 3875) against "the work of Lester Virgil." (V25, RT 3874-3876.) Consistent with his intent to inflame the jury's passions and evoke an irrational response, the prosecutor argued Ms. Lao would never get her business degree and improve her life as she tried to do by fleeing the violent and repressive political regime in Cambodia because she "found her killing fields at the corner of El Segundo and Van Ness [the location of the Donut King]." (V25, RT 3875-3876.) Further, the trial court's ruling wrongly encouraged the prosecutor to invite the jury's

irrational response because its ruling to admit the evidence was based on its mistaken belief that Ms. Lao's life was more valuable than an average person or even Mr. Virgil's because of her experience in fleeing Cambodia and coming to the United States where she was killed. (*Payne v. Tennessee, supra,* 501 U.S. at p. 823; *Humphries v. Ozmint* (4th Cir.2005) 397 F.3d 206, 218, 219.)

Notably, Respondent does not address the details of the prosecutor's argument or the trial court's fallacious belief that Ms. Lao's life was more valuable and her death had a greater effect on her family because of the flight from Cambodia. Instead, Respondent concludes that the prosecutor's argument in Mr. Virgil's case was no different than the argument in *Boyette*. (RB 108.) Because the facts of Mr. Virgil's case are demonstrably different than *Boyette* and the prosecutor here did exactly what defense counsel argued would be extremely inflammatory by urging the jury to sentence Mr. Virgil to death by analogizing to the "killing fields," the trial court erred by admitting the evidence at issue.

Under the circumstances, the trial court's ruling and the prosecutor's argument exploiting the evidence admitted pursuant to that ruling violated Mr. Virgil's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 823, 825, 830, fn. 2, and 831 (conc. opn., O'Connor, J.); see also *Greer v. Miller* (1987) 483 U.S. 756. 765; *People v. Edwards, supra*, 54 Cal.3d at p. 836.) Because the error is not harmless

beyond a reasonable doubt, Mr. Virgil's penalty judgment must be reversed. (*Chapman v, California, supra*, 386 U.S. at p. 24.) [52]

XVI.

THE TRIAL COURT ERRED BY FAILING TO LIMIT THE SCOPE OF VICTIM IMPACT EVIDENCE TO THE CAPITAL OFFENSE AGAINST MS. LAO AND THIS ERROR REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. Respondent's Contention

"APPELLANT HAS WAIVED HIS CLAIM THAT BENITA RODRIGUEZ'S VICTIM IMPACT TESTIMONY WAS IMPROPERLY ADMITTED; IN ANY EVENT, THE TESTIMONY WAS ADMISSIBLE UNDER SECTION 190.3, FACTOR (b)" (RB 110.)

B. Mr. Virgil Submits This Claim On The Basis Of His Argument From His Opening Brief

As Respondent argues (RB 110-111) and as Mr. Virgil recognized in his Opening Brief at pages 353-355, this Court has long held that the prosecution may present evidence regarding not only the physical and emotional effects of the capital offense being tried under factor (a) of Penal Code section 190.3, but also the effects of a defendant's violent criminal activity under factor (b) of section 190.3 on victims and survivors of that activity. Instead, Mr. Virgil respectfully requests the Court adopt the persuasive rationale from the Supreme Courts of Illinois, Nevada, and Tennessee limiting victim impact evidence to the capital offense being tried and find that the victim impact evidence regarding the collateral and unrelated criminal activity against Ms. Rodriguez was irrelevant and its

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[52] In Argument XVII, Mr. Virgil challenges the trial court's error in refusing to give Defense Special Instruction No. 8 that was intended to limit the prejudice from the prosecution's victim impact evidence.

admission violated Mr. Virgil's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. (Opening Brief at pp. 355-360.)

Respondent also correctly argues that Mr. Virgil's defense counsel failed to make this argument in the trial court and that failure normally operates to waive a claim on appeal. (RB 110-111.) In his Opening Brief at pages 360-361, however, Mr. Virgil acknowledged defense counsel's failure to object to this evidence. Instead, he urged this Court to consider this claim on appeal under the rationale from *People v. Harris* (2002) 206 Ill.2d 276 [794 N.E.2d 314, 349-351], because there was a strong possibility that such an objection would have futile, the issue involves a pure claim of law, and the error affects Mr. Virgil's fundamental federal and state constitutional rights to due process, a fair and impartial jury, and a reliable penalty determination. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

XVII.

THE TRIAL COURT'S REFUSAL TO GIVE DEFENSE SPECIAL INSTRUCTION NOS. 1, 2 AND 8 REGARDING THE CONSIDERATION OF CIRCUMSTANCES IN MITIGATION AND VICTIM IMPACT EVIDENCE REQUIRES THE REVERSAL OF MR. VIRGIL'S PENALTY JUDGMENT

A. Respondent's Contention

"THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH DEFENSE SPECIAL INSTRUCTIONS 1, 2 AND 8 BECAUSE THEY WERE ARGUMENTATIVE AND DUPLICATIVE" (RB 111.)

B. The Trial Court's Erroneous Rulings Refusing To Give The Requested Instructions Violated Mr. Virgil's Rights To Due Process, A Fair And Impartial Jury, And A Reliable Penalty Determination Under The United States Constitution And Its Analogous California Counterparts

Beyond its waiver argument, Respondent argues that the trial court properly refused the requested instructions as argumentative and duplicative. (RB 113.) In the alternative, Respondent argues that if the trial court erred by refusing the instructions, any error was harmless. (RB 113-114.) Respondent is mistaken.

The basis for Respondent's waiver argument is unclear, except perhaps as a reflexive response or a shot in the dark in the hope of deflecting a ruling on the substance of a meritorious claim, since the issue at hand involves a request by the defense for certain jury instructions. Moreover, as noted repeatedly above, Mr. Virgil may argue on appeal that a trial court's error had the effect of violating his constitutional rights to a fair and reliable trial. (See *People v. Partida, supra,* 37 Cal.4th 428, 433-439; *People v. Avila, supra,* 38 Cal.4th at p. 527, fn. 22.) This is especially so with the instant claim because it required no action by the defendant in the trial court to preserve the instructional claim and the claim does not involve facts or legal standards different from those the trial court was asked to apply. (*Ibid.*; Pen. Code § 1259.)

1. Defense Special Instructions Nos. 1 and 2

In concluding that Defense Special Instruction Nos. 1 and 2 were argumentative, Respondent ignores Mr. Virgil's argument from his Opening Brief at pages 369-370 that the instructions at issue were virtually identical to the instruction in *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23, which this Court held was "consistent with Eighth Amendment guarantees" because it allowed the jury to consider mitigating circumstances.

Further, Respondent ignores Mr. Virgil's argument in his Opening Brief at pages 369-370 that the instructions were not argumentative because they did not mention any specific items of evidence, but merely illuminated the correct legal standards by telling the jury that mitigating circumstances did not have to be proved beyond a reasonable doubt. In other words, Respondent's argument must fail because of its misunderstanding of the term "argumentative" that this Court defined as an instruction that "merely highlight[s] certain aspects of the evidence without further illuminating the legal standards at issue [Citations.]. (*People v. Fauber* (1992) 2 Cal.4th 792, 865-866.)

Respondent notes that this Court rejected similar claims in *People v. Carter, supra,* 30 Cal.4th at p. 1225, and *People v. Mickey* (1991) 54 Cal.3d 612, 697, (RB 114) and that this Court held in *People v. Kraft* (2000) 23 Cal.4th 978, that trial courts are not required to instruct that mitigating circumstances need not be proved beyond a reasonable doubt. (RB 114.) Regardless of those decisions, Mr. Virgil's argument is that Defense Special Instruction Nos. 1 and 2 were correct statements of the law and not argumentative because they did not refer to specific items of defense evidence and were in any event "consistent with Eighth Amendment guarantees," as interpreted by this Court in *People v. Wharton, supra,* 53 Cal.3d at p. 600, fn. 23. (See also *Mills v. Maryland* (1988) 486 U.S. 367, 374.)

Respondent also claims these instructions were duplicative because Defense Special Instruction No. 2 duplicated Defense Special Instruction No. 1. (RB 114-115.) Aside from the obvious point that, if true, this might have warranted refusal of one or the other instruction, but not both, Mr. Virgil respectfully directs the Court's attention to his Opening Brief where he argued the instructions were not duplicative because the other instructions given in Mr. Virgil's case did not otherwise advise the jury that

factors in mitigation, unlike those in aggravation, did not have to be proved beyond a reasonable doubt and could be found on the basis of any evidence, regardless of the strength of that evidence. (Opening Brief at p. 370.)

Respondent also cites *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418, and *People v. Kraft, supra,* 23 Cal.4th at p. 1077, in support of its argument that the trial court had no obligation to give these instructions. (RB 114-115.) Though Respondent's citations are correct, these cases conflict with the defendant's right to an instruction that "pinpoints" the defense theory of the case [*People v. Sears* (1970) 2 Cal.3d 180, 189-190] and the controlling principles under the Eighth Amendment that demand the need for heightened reliability when the penalty judgment is death. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1196 (conc. opn. Baxter, J.)

In *Carpenter,* the instructions at issue told the jury that they could consider aggravating and mitigating circumstances [aside from aggravating circumstances involving other crimes evidence] only if the jury found these circumstances true "'by a preponderance of the evidence.'" The Court held that instructing the jury about the standard of proof for such evidence is unnecessary at the penalty phase because of the "'moral and normative'" nature of the jury's decisionmaking process and there was no prejudice to the defendant.

In *Kraft*, the trial court refused to give the defense special instruction that a mitigating circumstance need not be proved beyond a reasonable doubt because it might have confused the jury. According to the Court, no error occurred because there was no reason on the basis of the record to conclude the jury misunderstood its ability to consider mitigating circumstances.

These case do not consider Mr. Virgil's argument that he was entitled to the instructions at issue based on his right to have the jury instructed with the "pinpoint" theory of his defense [the jury's finding of

mitigating circumstances should be guided by mercy or sympathy and mitigating circumstances were not subject to the beyond a reasonable doubt standard] and the need for heightened standards of reliability when death is the penalty. As such, *Carpenter* and *Kraft* do not control the instant claim.

2. Defense Special Instruction No. 8

Respondent concludes the trial court properly refused Defense Special Instruction 8 because it too was argumentative and duplicative. (RB 115.) Again, Respondent is mistaken.

As argued above, the instruction was not argumentative because it did not highlight specific items of evidence. Further, the instruction paraphrased the express language and well reasoned guidance from this Court in *People v. Haskett* (1982) 30 Cal.3d 841, 864, and the United States Supreme Court in *Payne v. Tennessee, supra*, 501 U.S. at p. 824-825, that penalty juries should approach their decisionmaking objectively, soberly and rationally and not make a decision on the basis of a purely subjective response to highly emotional evidence and argument. Finally, the instruction was not duplicative because the jury was not otherwise fully instructed that it was not to be swayed by highly emotional evidence and argument.

Respondent also contends that if the trial court erred by refusing Defense Special Instruction 8, any error was harmless because there was no reasonable possibility the jury would have rendered a different verdict absent the error. (RB 115.) Respondent's argument fails because it ignores the dramatic and emotional evidence and argument about Ms. Lao's harrowing flight from the "killing fields" in Cambodia and Benita Rodriguez's testimony about Mr. Virgil's attack on her and her injuries. Because the prosecutor objected to the defense instruction and thereafter urged the jury to reach a penalty decision on the basis of high emotion during his closing argument (Opening Brief at pp. 372-374), Respondent is

mistaken that any error in excluding Defense Special Instruction No. 8 was harmless.

Finally, Respondent argues in a footnote that Mr. Virgil waived his claim regarding the prosecutor's closing argument that urged the jury to decide his penalty on the basis of high emotion by failing to object. (RB 116, fn. 20.) Contrary to Respondent's suggestion, Mr. Virgil has not raised a claim that that the prosecutor committed misconduct during his argument. (Opening Brief at pp. 372-374.) Instead, Mr. Virgil cited the prosecutor's closing argument in support of his argument that the effect of the trial court's ruling denying the defense request for proper instruction to the jury was prejudicial under the circumstances of his case because it allowed the prosecutor's argument to go unchecked by proper instruction to the jury.

Because there is a reasonable probability that the trial court's errors refusing Defense Special Instruction Nos. 1, 2, and 8 affected Mr. Virgil's penalty verdict, the errors were not harmless beyond a reasonable doubt and his penalty judgment must be reversed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 447; *People v. Carter, supra*, 30 Cal.4th at pp. 1221-1222.)

XVIII.

BECAUSE THE JURY FOREPERSON PROFESSED SPECIAL KNOWLEDGE AS A LAW STUDENT, AND THE JURY EVIDENCED CONFUSION DURING THE PENALTY PHASE, THE FAILURE TO CONDUCT AN EVIDENTIARY HEARING ON THE QUESTION OF JUROR MISCONDUCT VIOLATED MR. VIRGIL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES THE REVERSAL OF HIS PENALTY JUDGMENT

A. Respondent's Contention

"BECAUSE THERE WAS NO EVIDENCE OF THE JURY FOREPERSON COMMITTING ANY MISCONDUCT, THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING" (RB 116.)

B. The Instant Claim Is Not Waived Because The Burden Was On The Trial Court To Conduct An Adequate Inquiry After Defense Counsel Raised The Possibility Of Juror Misconduct

Respondent begins its argument by claiming defense counsel waived the issue by failing to request a full evidentiary hearing. (RB 119.) Respondent's waiver argument is meritless.

During the jury's penalty deliberations, defense counsel expressed concern to the trial court that the jury foreperson, Juror Mosby, was studying law book and that created the possibility juror misconduct might be occurring. (V28, RT 3929-3930, 3937-3937.) After the jury's note, inter alia, about the consequences of the jury being unable to reach a unanimous penalty decision, defense counsel observed that the jury's note was framed in terms of California's 1977 death penalty law and that suggested the possibility the jury foreperson had conducted some legal research. (V28, RT 3930.) Later, defense counsel expressed additional concern about the jury's deliberations and his belief that something untoward was happening in the jury room. (V28, RT 3930, 3934.)

The trial court concluded there was no evidentiary basis for defense counsel's concerns and not only dismissed those concerns, but made its own record in a way that impugned defense counsel's veracity. (V28, RT 3934-3935.) Although defense counsel later referred the court to the note from Juror Clay as support for his belief that something was amiss with the jury's deliberations, the trial court rejected defense counsel's interpretation of the note and again made its own record that defense counsel's concerns were groundless. (V28, RT 3938.) After defense counsel expressed additional concerns about the jury foreperson studying law books and possibly restricting his fellow jurors' communication with the court, the trial court had the foreperson brought into court and questioned him informally about studying law books, reading about criminal law, and talking with jurors about criminal law. (V28, RT 3939-3940.)

In advancing its waiver argument, Respondent ignores the record and Mr. Virgil's argument based on statutory and federal and state case law that imposes a

> "duty [on the trial court] to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. [Citations.]"

(*People v. Cleveland* (2001) 25 Cal.4th 466, 477, citing *People v. Burgener* (1986) 41 Cal.3d 505, 520.) Though the decision about whether to investigate the possibility of jury misconduct "rests within the sound discretion of the trial court," the trial court abuses that discretion when it conducts a hearing that is inadequate to ascertain the matter at issue. (*People v. Cleveland, supra,* 25 Cal.4th at p. 477, citing *People v. Burgener, supra,* 41 Cal.3d at pp. 518, 520.)

Instead of citing this relevant authority, Respondent cites *United States v. Olano* (1993) 507 U.S. 725, 731, that involves the presence of alternate jurors during deliberations and the federal standard of "'plain

error'" under Federal Rule of Criminal Procedure 52(b). (RB 119.) Respondent's quote from *Olano* is correct, but its reliance on that case is misplaced.

In *Olano,* one defense counsel spoke for the other defense counsel and said there was no objection to having alternate jurors be present during the regular jurors' deliberations. Because *Olano* is different than Mr. Virgil's case where defense counsel repeatedly expressed concerns about the jury's deliberations and the foreperson's role in those deliberations and the trial court conducted an inquiry (though an inadequate one) in response, *Olano* is distinguishable and provides no assistance to Respondent. Under the circumstances, the proper inquiry on appeal is whether the trial court's inquiry was adequate under *Burgener* and *Remmer v. United States* (1954) 347 U.S. 227, 230.

C. The Court Abused Its Discretion By Failing To Conduct An Evidentiary Hearing And This Requires The Reversal Of Mr. Virgil Penalty Judgment

As argued in Mr. Virgil's Opening Brief, the jury foreperson's unsworn responses during the trial court's cursory inquiry and his nervous and evasive demeanor imposed an obligation on the trial court to conduct an evidentiary hearing where the foreperson's responses were under oath and the parties could question him about the matter of juror misconduct and determine the truth. (Opening Brief at pp. 385-389.) In other words, Mr. Virgil had a federal constitutional right to ensure that when the trial court called the jury foreperson as a witness regarding the allegation of possible jury misconduct, the witness

> "will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the [the court as the trier

> of fact] . . . to observe the demeanor of the witness in making his statement, thus aiding the [court] . . .in assessing his credibility." [Citation.]"

(*Maryland v. Craig* (1990) 497 U.S. 836, 845-846, citing *California v. Green* (1970) 399 U.S. 149, 158.)

Respondent also contends that defense counsel's concerns about the foreperson and the jury's deliberations were unfounded and unsupported by the record on appeal. (RB 119.) Respondent's argument is unsound and ignores the record because the trial court, in fact, conducted an inquiry in response to defense counsel's concerns. (V28, RT 3939; see *People v. Ray* (1996) 13 Cal.4th 313, 343-344.)

The trial court's decision to hold a hearing suggests defense counsel made a sufficient showing to require a hearing under *Ray*. For that reason, the trial court abused its discretion by conducting a hearing that was inadequate to satisfy the requirements of Penal Code section 1120, the applicable case law, and Mr. Virgil's federal and state constitutional rights. Because the trial court's error violated Mr. Virgil's fundamental federal and analogous state constitutional rights to confrontation, trial before a fair and impartial jury, and the need for heightened reliability in his capital sentencing proceeding, the error requires the reversal of his penalty judgment. (*In re Carpenter* (1995) 9 Cal.4th 634, 654; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *Chapman v. California, supra,* 368 U.S. 18, 24.)

XIX.

THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING THAT MR. VIRGIL WEAR A REACT STUN BELT DURING THE PENALTY PHASE AND THAT ERROR REQUIRES THE REVERSAL OF HIS PENALTY JUDGMENT

A. Respondent's Contention

"THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REQUIRING APPELLANT TO WEAR A REACT STUN BELT BASED ON HIS ATTEMPT TO ESCAPE AND/OR HELP ANOTHER INMATE ESCAPE BY ATTEMPTING TO UNLOCK THE HANDCUFF OF THE OTHER INMATE" (RB 121.)

B. Because The Need For Increased Security Was Not Sufficiently Demonstrated, The Court Abused Its Discretion By Ordering Mr. Virgil To Wear The Stun Belt

Respondent and Mr. Virgil agree that a defendant may not be physically restrained in the jury's presence, absent a showing of "manifest need." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291, 292, fn. 11.) According to this Court, a defendant "may be restrained, for instance on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means" and the trial court in its "sound discretion" decides "such restraints are necessary." (*Id.*, at p. 292, fn. 11; RB 123-124.) Finally, Mr. Virgil agrees that the determination of "necessity" is made on a case-by-case basis and must be based on facts appearing on the record. (*People v. Mar* (2002) 28 Cal.4th 1201., 1217-1218.) Contrary to Respondent's conclusion, there was no "manifest need" to restrain Mr. Virgil with a react belt and the trial court abused its discretion by restraining Mr. Virgil in that manner.

Respondent's begins its analysis by referring to Mr. Virgil's case status – he had been convicted in the guilt phase of a violent crime [Ms. Lao's murder] and had previously been convicted of a violent crime [assault with a deadly weapon against Ms. Rodriguez]. (RB 125-126.) [53] As established by *Duran* and its progeny, Mr. Virgil's mere commission of violent crimes and status as a capital defendant do not, on their own, justify the application of physical restraints. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran, supra,* 16 Cal.3d at pp. 291-292.)

Respondent continues that Mr. Virgil was seen attempting to unhandcuff a fellow prisoner facing murder charges and "inferentially, he could then be released from his own handcuffs and chains in order to escape." (RB 126.) As evidenced by Respondent's argument, Mr. Virgil's alleged attempt to escape is based on a mere inference and assumption that is unsupported by the facts and Mr. Virgil's conduct in court. (V23, RT 3497.) The guilt verdicts had not been announced at the time of the reported staple incident so Mr. Virgil would not have had the incentive to escape after a judgment exposing him either to a judgment of death or life without possibility of parole. (V23, RT 3499.)

Long before the verdicts in the guilt phase and the start of the penalty phase, defense counsel advised the court that Mr. Virgil had been attacked and stabbed repeatedly by another inmate while handcuffed. (V5, RT 582-585.) In addition, based on the facts before the trial court, an inmate's ability to pick handcuffs with a staple and remove them was "very rare" [only four times over a 10-year period in jail] and never in the

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[53] Though the prosecutor did argue the staple incident [alleged escape attempt] justified the application of the stun belt, his argument seemed based primarily on Mr. Virgil's status as a prior felon and someone facing punishment of either life without possibility of parole or death. (V23, RT 3499.)

courthouse [in the past five years]. (V23, RT 3488-3489.) Further, the deputies who testified about the handcuff incident treated the incident casually by not bothering to check if Mr. Virgil's handcuffs remained locked and the court's bailiff testified he had no concerns about Mr. Virgil and security in the courtroom. (V23, RT 3470, 3493-3497.) Given the equivocal nature of the staple incident, Mr. Virgil's history of being attacked while handcuffed and his calm, nonthreatening demeanor throughout the proceedings (see V23, RT 3503), the trial court abused its discretion by ordering Mr. Virgil restrained on the basis of mere inference and assumption about a threat or attempt to escape.

C. Mr. Virgil Was Prejudiced By The Application Of The Stun Belt And That Requires His Penalty Be Reversed

In arguing there was no prejudice to Mr. Virgil because of the trial court's order to apply the stun belt, Respondent observes that "[w]here the physical restraints of a defendant are visible to the jury, any error must be harmless beyond a reasonable doubt," but also noted that the Court of Appeal in *People v. Mar, supra*, did not decide whether the erroneous use of a stun belt when it was not visible to the jurors constituted error under the *Chapman* or *Watson* standard. (RB 126.) [54]

Regardless of Respondent's belief, this Court held in *People v. Mar, supra,* 28 Cal.4th at p. 1219, that the question of prejudice is not determined solely by whether or not the jury saw or could see the restraints in question. Instead, the "manifest need" for physical restraints must be balanced against their well-accepted, potential adverse effect on the defendant. (*Ibid.*) It is for this reason that the United States Supreme Court held in *Illinois v. Allen* (1970) 397 U.S. 337, 344, that due process requires physical restraints [shackles in that case] "be used only as a 'last resort.'"

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[54] Presumably, Respondent meant to say "are not visible to the jury."

(*Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 900, quoting *Illinois v. Allen, supra,* 397 U.S. at p. 344.)

The *Mar* court did not decide whether an error in shackling a defendant involves federal constitutional error [*Chapman* error – reversal required unless the prosecution can show the error was harmless beyond a reasonable doubt] or state constitutional error [*Watson* – reversal required if defendant can show there was a reasonable probability the error affected the outcome of the trial]. (*Id.,* at pp. 1225, fn. 7.) Based on the United States Supreme Court's decision in *Illinois v. Allen* holding that improper shackling implicates a defendant's right to due process, the appropriate standard should be under *Chapman*, Because Mr. Virgil was prejudiced by the application of the stun belt, he is entitled to the reversal of his penalty judgment regardless of the standard adopted by the Court.

Respondent argues Mr. Virgil's case is distinguishable from *Mar* because Mr. Virgil, unlike the defendant in *Mar* did not testify. (RB 126-127.) Contrary to Respondent's argument, the *Mar* court emphasized that defendant need not show "with any degree of precision what effect the presence of the stun belt" had on his testimony or demeanor when testifying. (*People v. Mar, supra,* 28 Cal.4th at p. 1224.) Though the *Mar* court discussed prejudice in light of the fact defendant testified while wearing the stun belt, it noted also that nervousness while testifying is not unique to a defendant. (*Ibid.*) Further, the Court noted in a footnote that "the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury." (*Id.,* at p. 1225, fn. 7.) Taken together, these passages from *Mar* contemplate that prejudice is not limited to circumstances where the defendant testifies while wearing a stun belt. Instead, prejudice may arise because the restraints were visible to the jury or affected the defendant's ability to be present and meaningfully participate in his defense.

In *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, the Court of Appeals found the trial court abused its discretion by ordering the defendant to wear a stun belt during his entire trial. In deciding whether the error was prejudicial, the Court of Appeals held that a defendant's right to be present and participate in his own defense is implicated by the erroneous application of a stun belt and reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. Because the defendant's ability to participate meaningfully throughout his trial was hampered by the use of the stun belt, the Court found the error was not harmless beyond a reasonable doubt.

Defense counsel in Mr. Virgil's case made a similar argument by reminding the court of the risks to Mr. Virgil from the stun belt's activation if he did anything deemed unusual by the deputy, the great prejudice to Mr. Virgil if the device was activated unnecessarily based on the deputy's mere "panic," and lesser alternatives were readily available. (V23, RT 3500-3502.) Further, defense counsel made a record that the jury could obviously see that Mr. Virgil was restrained with a stun belt because it was "quite bulky and it's going to be visible in front of the jury." (V23, RT 3500.)

Finally, the evidence about whether death was the appropriate punishment for Mr. Virgil was close. Although the circumstances of the crimes against Ms. Lao and violent conduct against Ms. Rodriguez were serious and compelling, Mr. Virgil's case in mitigation was also compelling and thereby presented the jury with a close question. Under the circumstances where the device had an affect on Mr. Virgil, there were lesser alternatives available, and the device would be visible to the jury, the application of the stun belt was prejudicial under any standard of review and Mr. Virgil's penalty judgment must be reversed. (*People v. Mar, supra,* 28 Cal.4th at p. 1230; *United States v. Durham, supra,* 287 F.3d 1297,

XX.

THE TRIAL COURT'S RULING THAT DEFENSE COUNSEL COULD NOT COMPARE MR. VIRGIL'S CASE TO OTHER, MORE EGREGIOUS CASES WHERE THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE DID NOT SEEK THE DEATH PENALTY VIOLATED MR. VIRGIL'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS TO HAVE THE JURY FULLY AND ADEQUATELY CONSIDER THE GRAVITY OF HIS OFFENSE IN DECIDING PENALTY

A. Respondent's Contention

"THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AND PRECLUDED DEFENSE COUNSEL FROM ARGUING ABOUT OTHER SPECIFIC MURDER CASES WHEREIN THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE HAD NOT SOUGHT THE DEATH PENALTY AND CASES FROM OTHER STATES WHEREIN DEATH WAS NOT IMPOSED AND/OR WAS NOT A PENALTY OPTION FOR THOSE JURIES" (RB 127.)

B. The Trial Court's Limitation On Defense Counsel's Closing Argument Requires The Reversal Of Mr. Virgil's Judgment Of Death

In concluding that the trial court properly limited defense counsel's closing argument by preventing any mention of the O.J. Simpson and other high profile cases where the Los Angeles County District Attorney's Office elected not to seek the death penalty, Respondent bases its argument on the fact that intercase proportionality is not required under the Federal or California Constitutions. (RB 131.)

Mr. Virgil recognized the absence of this requirement in his Opening Brief (Opening Brief at p. 404, and fn. 234), but argued that intercase proportionality is required based on the evolving standards of decency and the dignity of man that underlie the Eighth Amendment to the United States Constitution. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 311-312; *Roper v.*

Simons (2005) 543 U.S. 551, 559-560.) Because the majority of states with the death penalty require intercase proportionality and review to insure against the arbitrary and capricious imposition of the death penalty (see *Pulley v. Harris* (1984) 465 U.S. 37, 71), Mr. Virgil respectfully asks this Court to join these states by requiring such argument and review as a way to avoid arbitrary and capricious sentences of death. Absent such argument and review, Mr. Virgil's sentence of death violates his rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts and requires the reversal of his penalty judgment of death.

Respondent also argues that Mr. Virgil either waived this claim by failing to object to the prosecutor's argument about the murder of Kitty Genovese or any error was harmless because defense counsel was allowed to argue his "principal point" that the death penalty should be reserved for some cases only. (RB 131-132.) Respondent is mistaken.

In arguing waiver, Respondent attempts to characterize Mr. Virgil's argument about Kitty Genovese's murder as one involving prosecutorial misconduct. (See RB 132, citing *People v. Prieto, supra,* 30 Cal.4th at pp. 259-260, requiring an objection on the grounds of prosecutorial misconduct before this claim can be raised on appeal.) In this appeal (since defense counsel did not object to that argument), Mr. Virgil relies on the prosecutor's argument only to show prejudice because the prosecutor was able to argue intercase proportionality but the defense was not.

Defense counsel also argued that preventing him from using "comparisons" would "cut out" the "heart of my argument." (V24, RT 3683-3684.) In other words, counsel argued it was necessary to Mr. Virgil's defense that he be allowed to argue the decision not to seek the death penalty against Mr. Simpson was based purely on political

considerations [his financial and celebrity status] and it would be "arbitrary and capricious" to sentence Mr. Virgil to death under a scheme where capital charging decisions are based on such considerations. (V24, RT 3684.) Though defense counsel was able to argue that the death penalty should be imposed on only some defendants, he was unable to mount a defense based the failure to charge Mr. Simpson with death. Because this defense had been used successfully in Florida, defense counsel's ability to raise a defense successfully used in that other case should be deemed per se prejudicial. (V25, RT 3847-3848.) **55** This is especially so because defense counsel's argument would have allowed the jury to more "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, citing *Spaziano v. Florida* (1984) 498 U.S. 447, 460.) **56**

In Mr. Virgil's case, the prosecutor argued his own form of intercase proportionality in two instances. The first by arguing that if the death penalty was not appropriate for Mr. Virgil, it would not be for anyone and the second by arguing that Mr. Virgil's case should be guided by the facts of Kitty Genovese's murder some 20 years before in New York City that

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55 The trial court believed it was bound by this Court's decision in *People v. Mincey* (1992) 2 Cal.4th 408, 480, which distinguished Florida cases on the ground that Florida allows for intercase proportionality review in cases like the one cited by defense counsel, but California does not. (V25, RT 3848.)

56 This Court also held in *Mincey* that nothing in *Parker v. Dugger* requires California to adopt Florida's rule allowing intercase proportionality review. (*People v. Mincey, supra,* 2 Cal.4th at p. 480.) Regardless of that decision, Mr. Virgil argues that the evolving standards of decency and the dignity of man that underlie the Eighth Amendment to the United States Constitution require this Court to reconsider its decision in *Mincey* and other such cases holding that intercase proportionality review is not constitutionally required.

"cries out" for Mr. Virgil's "death" as "justice." (V25, RT 3855, 3876) Under the circumstances, the trial court's limitation on defense counsel's argument cannot be harmless beyond a reasonable doubt and Mr. Virgil's penalty judgment must be reversed. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

XXI.

MR. VIRGIL RESPECTFULLY INVOKES HIS RIGHT TO INTRACASE PROPORTIONALITY REVIEW BECAUSE HIS JUDGMENT OF DEATH IS DISPROPORTIONATE TO HIS PERSONAL CULPABILITY AND VIOLATES HIS RIGHTS UNDER THE EIGHTH AMENDMENT AND ITS STATE ANALOGUE

A. Respondent's Contention

"THE DEATH SENTENCE IS PROPORTIONATE TO APPELLANT AND THE CRIME HE COMMITTED" (RB 132.)

B. Mr. Virgil's Personal Culpability Is Disproportionate To His Sentence Of Death And Requires The Reversal Of His Sentence

Respondent rightly concludes that intracase proportionality is allowed in California on defendant's request, but wrongly concludes that such review warrants Mr. Virgil's sentence of death. (RB 132-134.) Respondent's contention that there was no evidence in the record supporting Mr. Virgil's argument that his crimes were the result of his drug addiction is simply untrue. The trial testimony included evidence that Mr. Virgil was addicted to cocaine, including the testimony of Annie Antoine and Deputy Everett, who claimed to have found cocaine and a crack pipe on Mr. Virgil during a detention not long before the crimes. In addition, Respondent's reference to Mr. Virgil's "violent, criminal lifestyle" is a thorough mischaracterization of his life, which the record reflects had been free of violent behavior until the few weeks around the time Ms. Lao was killed.

XXII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. VIRGIL'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

A. Respondent's Contention

"CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL" (RB 134.)

B. California's Death Penalty Statute Violates The United States Constitution

Because this issue has been fully briefed by the parties [Respondent's Brief at pp. 134-138; Opening Brief at pp. 429-490], Mr. Virgil submits this claim on the basis of the argument from his Opening Brief.

XXIII.

MR. VIRGIL'S SENTENCE MUST BE REVERSED BECAUSE POLITICAL CONSIDERATIONS DOMINATE THE DEATH PENALTY REVIEW PROCESS IN CALIFORNIA

A. Respondent's Contention

"ANY ALLEGED POLITICAL CONSIDERATIONS IN THE DEATH PENALTY REVIEW PROCESS DO NOT WARRANT REVERSAL OF APPELLANT'S DEATH SENTENCE" (RB 138.)

B. The Political Considerations Dominating The Review Of Death Penalty Sentences In California Require The Reversal Of Mr. Virgil's Penalty Judgment

Because this issue has been fully briefed by the parties [Respondent's Brief at pp. 138-139; Opening Brief at pp. 491-510], Mr. Virgil submits this claim on the basis of the argument from his Opening Brief.

XXIV.

THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND MR. VIRGIL'S CONVICTIONS AND PENALTY MUST BE SET ASIDE

A. Respondent's Contention

"INTERNATIONAL LAW DOES NOT REQUIRE REVERSAL OF APPELLANT'S DEATH SENTENCE" (RB 139.)

B. The Violations Of State And Federal Law In Mr. Virgil's Case Violate International Law And Require The Reversal Of His Sentence Of Death

Because this issue has been fully briefed by the parties [Respondent's Brief at p. 139; Opening Brief at pp. 510-528], Mr. Virgil submits this claim on the basis of the argument from his Opening Brief.

XXV

CUMULATIVE ERROR

A. Respondent's Contention

"NO CUMULATIVE ERROR RESULTED" (REVIEW BE GRANTED TO SECURE UNIFORMITY OF DECISION" (RB 139.)

B. The Cumulative Error In Mr. Virgil's Case Requires The Reversal Of The Entire Judgment Against Him

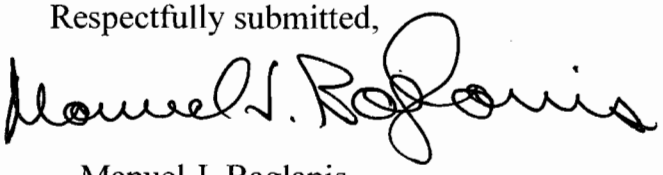
Because this issue has been fully briefed by the parties [Respondent's Brief at p. 139; Opening Brief at p. 528], Mr. Virgil submits this claim on the basis of the argument from his Opening Brief.

CONCLUSION

For all the above reasons, Mr. Virgil's convictions and judgment of death must be reversed.

Dated: August 16, 2007

Respectfully submitted,



Manuel J. Baglanis
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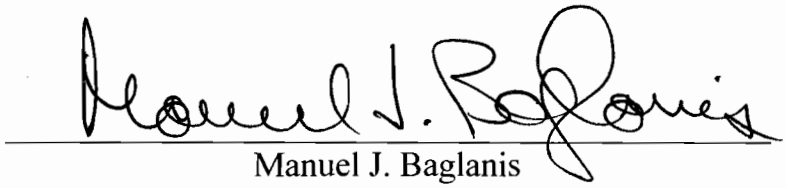
LESTER WAYNE VIRGIL

CERTIFICATE OF COMPLIANCE

CALIFORNIA RULES OF COURT, RULE 8.630(b)(1(B)

I, Manuel J. Baglanis, hereby declare that the total number of words in the appellant's Reply Brief accompanying this Certificate of Compliance, is 50,084 words.

Dated: August 16, 2007



Manuel J. Baglanis

DECLARATION OF SERVICE

I, Manuel J. Baglanis, declare that I am over 18 years of age, and not a party to the within cause; my business mailing address is P.O. Box 700035 San Jose, CA 95170-0035. A true copy of the attached: APPELLANT'S REPLY BRIEF

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

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Each said envelope was then, on August 17, 2007, sealed and deposited in the United States Mail at San Jose, California, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed on August 17, 2007, at San Jose, California.

DECLARANT