IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. ALBERT JONES Defendant and Appellant	Case No. S056364 Riverside County Superior Court No. CR-53009

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

The Honorable Judge Gordon R. Burkhart

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	**No. S056364**
	)	
Plaintiff and Respondent,	)	**Riverside County**
	)	**Superior Court**
	)	**No. CR-53009**
v.	)	
	)	
ALBERT JONES,	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

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

* * * *

I.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY

A. Introduction

Appellant, an African-American, was charged with the murder of a white couple. During jury selection, the prosecutor used peremptory challenges to strike nearly twice the number of black jurors than he used to strike white jurors. (See Appendix to AOB.) Although there was one African-American on the jury that convicted and sentenced appellant to death (and one African-American alternate), the prosecutor exercised peremptory challenges against three other African-American prospective jurors for reasons that were either based on racial stereotypes and/or bias, or that, after a sincere and reasoned evaluation, can only be seen as pretexts for impermissible group bias. Under these circumstances, the prosecutor's willingness to accept one or two African-Americans on appellant's jury is insufficient to overcome the strong evidence that he acted with discriminatory intent striking one or more of the other African-Americans. As this Court has recognized, even a single peremptory challenge made because of a prospective juror's race results in an error of constitutional magnitude and requires reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Respondent argues that the prosecutor did not violate principles of equal protection when he exercised three peremptory

challenges to dismiss African American prospective jurors. Specifically, respondent argues that the three challenged strikes were "genuinely race neutral and were based on the record." It also argues that this Court must defer to the trial court's findings in denying appellant's *Batson/Wheeler* motion. Respondent's arguments are based on erroneous interpretations of the decisions of both this Court and the United States Supreme Court and more importantly, are not supported by the trial court record.

B. This Court Should Not Defer to the Trial Court's Denial of Appellant's Wheeler/Batson Motion

Respondent argues that this Court must defer to the trial court's findings that the prosecutor's challenges to prospective jurors Gaither, Culpepper and Ladd were race neutral. (Respondent's Brief, hereafter "RB", at 51.) Tellingly, respondent does not quote or even cite the trial court's findings to which it asks this Court to defer. After finding a prima facie showing of group bias, the only ruling made by the trial court on appellant's motion came at the end of its inquiry into the prosecutor's reasons for striking the black jurors, and constituted the type of "global finding" this Court has previously condemned. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

The procedures and standards for a trial court's consideration of a *Batson/Wheeler* motion are well-established and not in dispute here. "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race [;s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine

whether the defendant has shown purposeful discrimination.' [Citation.]" (*People v.Hamilton* (2009) 45 Cal.4th 863, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 477.)

Both this Court and the United States Supreme Court have held that a reviewing court must give deference to a trial court's ruling on a *Batson* challenge, but only when certain conditions are met. Accordingly, the trial court's ruling is generally sustained if it is supported by "substantial evidence."[1] However, this Court has repeatedly stated that deference is only required when the trial court "has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror." (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105, citing *People v. McDermott* (2002) 28 Cal.4th 946, 971.) The United States Supreme Court has

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[1] As this Court has explained:

> The United States Supreme Court recently indicated that "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is *clearly erroneous* " (*Snyder v. Louisiana, supra,* 552 U.S. at ----, 128 S.Ct. at p. 1207 italics added, citing *Hernandez v. New York* (1991) 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 [*Batson's* treatment of intent to discriminate is a pure issue of fact, subject to review under the "clearly erroneous" deferential standard]). We have held that our "substantial evidence" standard for review of pure issues of fact is equivalent to the federal "clearly erroneous" standard. (*People v. Mickey* (1991) 54 Cal.3d 612, 649, 286 Cal.Rptr. 801, 818 P.2d 84; *People v. Louis* (1986) 42 Cal.3d 969, 984-988, 232 Cal.Rptr. 110, 728 P.2d 180.)

(People v. Hamilton, supra, 45 Cal.4th at p. 901, fn 11.)

held that "a trial court's ruling on the issue of *discriminatory intent* must be sustained unless it is clearly erroneous." *(Snyder* v. *Louisiana*, *supra*, 552 U.S. at p. 477, emphasis added.) It follows, therefore, that where the trial court does not make a ruling on discriminatory intent, or where the court does not engage in a sincere and reasoned evaluation of the prosecutor's intent, no deference is required.

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

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

(*Id.* at p. 485.) As the Supreme Court recognized, "'in the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. '" (*Ibid.*, quoting *Hernandez v. New York* (1991) 500 U.S. 532, 352.)

In this case, the trial court did not reach the decisive question. After hearing the prosecutor's explanation for his strikes of the three

African-American prospective jurors, the trial judge stated:

> [N]ow having heard from the prosecution, it appears that the reasons that these persons were excluded from the jury was for nonracial purposes and racially neutral purposes. Therefore, the Court feels that the motion pursuant to *Wheeler*, in [sic] its progeny, should be denied.

(10RT 1731.) This statement only addressed the second step of the *Batson* inquiry, which is whether the prosecutor has stated facially race-neutral reasons for dismissing the questioned jurors. The trial court's finding that the prosecutor's asserted reasons and purposes were racially neutral is not the equivalent of the step three finding that the prosecutor acted without discriminatory intent, a finding that must be made *after* the prosecutor makes a sufficient showing at step two by articulating non-racial reasons for striking the juror.

In *People v. Lenix*, this Court described what should be included in a trial court's *Batson/Wheeler* ruling:

> It should be discernable from the record that 1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. *The record must reflect the trial court's determination on this*

> *point (see Snyder, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible.*

(*People v. Lenix* (2008) 44 Cal.4th 602, 625-626, emphasis added.) The record in the present case fails to satisfy any of these criteria.

Contrary to respondent's contention, the trial court's ruling in this case is not comparable to the ruling deemed sufficient in *People v. Cummings* (1993) 4 Cal.4th 1233, 1282, where the trial court stated that there had been an "effective showing of why the peremptories were utilized in this case, and there has been no showing of group bias" thereby making the requisite step three finding. And unlike other cases where this Court has found the trial court did satisfy the requirements of *Batson's* third step, in the present case the trial court did not ask any significant questions of the prosecutor during his statement of reasons for the challenges,[2] did not engage in a discussion concerning its own observations of the juror or the prosecutor, did not indicate it had reviewed either the daily transcripts of voir dire, the jury questionnaires or its own notes to see if the record supported the prosecutor's assertions, and did not state which, if any of the reasons offered, it found to be credible. (See e.g. *People v. Lomax* (2010) 49 Cal.4th 530, __ [trial court reviewed its own notes of voir dire]; *People v. Huggins* (2006) 38 Cal.4th 175, 231 [trial court found the prosecutor's reasons to be genuine, candid and not pretextual, and recited in detail its reasons

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[2] The trial court asked only one question of the prosecutor regarding one juror during the *Batson* inquiry, and that question went only to the basis for the strike and not the credibility of the prosecutor's assertions. (10RT 1727.)

for so finding]; *People v. McDermott, supra,* 28 Cal.4th at p. 980 [trial court reviewed questionnaires of dismissed jurors]; *People v. Williams* (1997) 16 Cal.4th 153,189 [trial court asked questions of prosecutor and stated it accepted his reasons]. Unlike in these cases, there is absolutely no indication on the record here that the trial court performed the pivotal step three role of determining whether the prosecutor's asserted race-neutral reasons were credible, and as will be shown below, there is ample evidence that he did not.

While recognizing the usefulness of further inquiry and specific, detailed findings on each individual assertion the prosecutor makes to support his peremptory challenges to minority jurors, this Court has not actually required the trial court to make such findings in all cases. This Court has held that the trial court need not question the prosecutor or make detailed findings unless "the prosecutor's stated reasons are either unsupported by the record, inherently implausible or both." (*People v. Silva, supra,* 25 Cal.4th at p. 386.) In such a situation, however, "more is required of the trial court than a global finding that the reasons appear sufficient." *(Ibid.)* As shown in Appellant's Opening Brief and additionally below, had the trial court engaged in the analysis required at step three of *Batson*, it would not and could not have accepted the prosecutor's explanations or found them credible because so many of them were unsupported by the record or otherwise pretextual. As in *Silva*, "there is nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap[s] between the prosecutor's claimed reasons for exercising a peremptory challenge [against the juror] and the facts as disclosed by the transcripts of [the

juror's] voir dire responses." (*Id.* at p. 385.) For this reason, *People v. Lewis* (2008) 43 Cal.4th 415, cited by respondent (RB at 51) is distinguishable. In *Lewis,* at p. 471, this court deferred to the trial court's bare denial of a *Batson* motion, despite the absence of any findings or on the record analysis by the trial judge, where the prosecutor's reasons were neither inherently implausible nor unsupported by the record. In contrast, in this case, where the prosecutor's reasons largely were not supported in the record and/or implausible, this Court cannot conclude the trial court met its obligations to conduct a sincere and reasoned step three evaluation.

Even, assuming *arguendo,* that this Court finds that the trial court did conduct a proper step three evaluation, the Supreme Court has placed a significant limitation on the usual deference afforded to the trial court in those cases where, at step two, the prosecutor relies in part on a juror's demeanor to justify a peremptory challenge. Although deference is "especially appropriate" where the trial court "has made a finding" that the prosecutor's reliance on a juror's demeanor is credible, in *Snyder,* the Supreme Court held that such deference is not warranted where the record does not contain such a specific finding or otherwise demonstrate that the trial court actually credited the prosecutor's assertion about a juror's demeanor. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.) Under *Snyder,* in the absence of an express trial court finding on demeanor, a reviewing court cannot presume the trial court made such a finding, unless the prosecutor relies on demeanor as the sole reason for a peremptory strike or there is other affirmative evidence in the record to show the trial court specifically found the demeanor justification to be credible. (*Ibid.*) Thus, to the extent this Court has held that a trial

court *need not* make specific findings on the record, particularly "where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom" (*People v. Reynoso* (2003) 31 Cal.4th 903, 919) that ruling is plainly in conflict with, and must be reconsidered in light of *Snyder.*

In the present case, the prosecutor relied in part on the purported demeanor of several of the dismissed jurors as race-neutral reasons for dismissing them. The trial court made no findings that the demeanor based reasons were credible nor does the record otherwise indicated it so found. Thus, in evaluating whether the prosecutor improperly relied on race in exercising his peremptory challenges, this Court may not assume that the demeanor based reasons were credited by the trial court, and pursuant to *Snyder,* should not rely on those reasons to uphold the trial court's ruling.

Respondent incorrectly argues that, if the trial court's ruling is not entitled to deference, this Court must "resolve the legal question whether record supports an inference that the prosecutor excused a juror on the basis of race." To support this argument, respondent cites *People v. Lancaster* (2007) 41 Cal.4th 50, 75; *People v. Avila* (2006) 38 Cal.4th 491, 554; *People v. Guerra* (2006) 37 Cal.4th 1067, 1101 and *People v. Cornwell* (2005) 37 Cal.4th 50, 73. (RB at 52.) The quoted language from these cases only applies to the role of the reviewing court when the trial court failed to reach or apply the proper standard for a step one determination of whether the movant made a prima facie showing of race-based jury selection. As such they are irrelevant to the issue currently before this Court, which is

whether the prosecutor dismissed any jurors with a "discriminatory intent."[3]

Finally, even should this Court determine that the trial court's ruling is entitled to deference, it still must review the record for "substantial evidence" to support the trial court's unspoken ruling that there was no discriminatory intent. As the record below demonstrates, there was no such evidence before the court. Thus, even with deference, the trial court's ruling cannot be sustained.

C. The Prosecutor's Reasons for the Dismissal of Deborah Ladd, Gary Gaither and Norman Culpepper Were Neither Race-Neutral Nor Genuine

With the above principles in mind, appellant now turns to the dispositive question of whether the prosecutor acted with discriminatory intent when dismissing prospective jurors Ladd, Gaither or Culpepper.

1. Prospective Juror Deborah Ladd

As he did with each of the three dismissed jurors, the prosecutor listed multiple reasons for his peremptory strike of potential alternate juror, Deborah Ladd.[4] Because respondent

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[3] The trial court in this case made an express finding that a prima facie showing had been made, and respondent does not dispute that finding. Accordingly, this Court must focus on the second and third *Batson/Wheeler* steps and examine whether the African-American panelists were actually excused due to intentional discrimination. (*People v. Lomax, supra*, 49 Cal.4th 530, at p. __.)

[4] Although she was only a prospective alternate juror, because an alternate juror did ultimately sit on the actual jury in this case (30RT 4686-4687; 31RT 4702) , Ms. Ladd's dismissal cannot

repeatedly mischaracterizes the prosecutor's explanation for dismissing Ms. Ladd, appellant again quotes the prosecutor directly as he attempted to justify the strike:

> Ms. Ladd had some very, very positive aspects. There were a couple of things that alerted me right away. She left question No. 20 blank. Again, that is the question about "Do you know or have known anybody in your family that's been accused?" It was left blank. I was real concerned about her leaving that particular question blank.
>
> She answered another question that concerned me. And again, it wasn't a final thing. It was an additional thing. She mentioned her church was A.M.E., and I assume that it's the A.M.E. church up in L.A. I constantly see A.M.E. on television. They are constantly controversial, and I don't particularly want anybody that's controversial on my jury panel.
>
> Another thing that I responded to was, when she was asked about being falsely accused, she almost had a defensive, combined with an overbearing manner. And two things occurred to me: One, she was buying into some of this "falsely accused" business.... I had the feeling she was buying into it. But also, at the same time, I have many witnesses. The witnesses are *black* kids, and they are just kind of rough. And I had the feeling that she would look down upon those kids, and I can't have a juror that does that.
>
> So those were the things that – things that I considered, weighing Ms. Ladd. And also, at the same time, that Ms. Ladd came up – I think that was in the final six-pack...I had three of my best jurors that I liked best in that same six-pack. And when I saw the defense used up all of [their peremptory challenges], I figured I could gain my best jurors by kicking some of these other jurors who, by the way, I thought were pretty good jurors. Because I was down, I think, six to one,

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be deemed harmless. (Cf. *People v. Turner* (1994) 8 Cal.4th 137, 172.)

> which gave me a chance to pick up some very strong jurors, in my mind, such as David Stuck and Richard Capello.

(10RT 1729-1730, emphasis added.)

Despite the fact that the prosecutor gave a laundry list of reasons regarding Ladd and did not place particular importance on any one factor, respondent insists throughout its brief that the prosecutor's "primary," "principal," or "main" reason for dismissing Ladd was the very last reason provided, namely that there were better jurors who would be called after Ladd. (See RB at 35, 48, 49, 77.) As the above quote demonstrates however, if any of the reasons provided by the prosecutor can be considered "primary" it was Ms. Ladd's failure to answer one question on her jury questionnaire and the prosecutor's assumption that she was a member of the A.M.E. church in Los Angeles. (10RT 1729.) Both of those reasons "concerned" and "alerted" the prosecutor. The prospect of better jurors coming up after Ladd plainly was the *least* important reason and appears to be an afterthought, proffered after the prosecutor had already listed three other justifications and had concluded: "So those were the things that - things that I considered, weighing Ms. Ladd." His introduction of a fourth reason preceded by "And also" does not support a conclusion that that reason was the "main" motivation behind the strike. As will be shown below, after discussing the prosecutor's other reasons for dismissing Ms. Ladd, even if this Court were to assume the "main" reason for striking alternate juror Ladd was because the prosecutor favored other upcoming jurors better, the record does not support the prosecutor's assertion.

(a) Ms. Ladd's Failure to Answer Question 20 Is Not a Legitimate or Credible Justification for Her Dismissal and Thus Suggests Discriminatory Intent

Respondent contends that the prosecutor's asserted concern with Ms. Ladd's failure to answer one question on her questionnaire regarding her or her family's criminal history does not support an "inference" of group bias. (RB, at 80.) While respondent is correct that "an advocate *may* legitimately be concerned about a prospective juror who will not answer questions," that principle does not mean that the failure to answer a single question on an otherwise complete questionnaire must *always* be deemed a legitimate reason to strike a minority juror. Indeed, in the case cited by respondent, *People v. Howard* (2008) 42 Cal.4th 1000, 1019, this Court found a legitimate concern where the dismissed juror had "declined to fill out substantial portions of the jury questionnaire, marking 'confidential' on 'almost all of his answers." Unlike the dismissed juror in *Howard,* Ms. Ladd was not a juror who would not "answer questions," but simply neglected to answer *one question out of 92.* Her failure to do so cannot be credited as a sincere or plausible justification for her dismissal.

In response to appellant's argument that both this Court and the United States Supreme Court have held that the prosecutor's failure to engage in any meaningful voir dire on a subject about which it claims to be concerned is evidence suggesting the proffered explanation is a sham and pretext for discrimination, respondent simply asks this Court to engage in impermissible speculation that the prosecutor "could have been reasonably concerned" that Ms. Ladd didn't answer this one question. (RB at 78.) Respondent

concedes that, had Ms. Ladd answered this question in the positive, it "could have " a huge impact on the juror's view of the police, the courts or the criminal system as whole" (*ibid.*), but then does not even attempt to explain why the prosecutor did not ask Ms. Ladd to answer such an important question during voir dire. Significantly, during its discussion of another minority prospective juror, Mr. Gaither, respondent argues that the prosecutor's failure to ask him questions about one of the asserted reasons for his dismissal was "unremarkable" because the reason simply was not very important. (RB at 61.) In light of respondent's assertion of the "huge impact" the answer to Question 20 could have on the juror's views of the criminal justice system, the prosecutor's failure to inquire truly was "remarkable" and strongly suggests this reason was pretextual.

Respondent also argues that this Court should not infer anything from the prosecutor's reliance on a reason that he did not explore with the juror because it was only one of several reasons. Under that reasoning, all a prosecutor would have to do to survive a *Batson* challenge is to list multiple reasons, and declare all of them to be "additional" or "not the main thing." Where the prosecutor asserts a specific justification for dismissing a juror based on an ambiguous or incomplete answer, his failure to clarify the juror's answer strongly suggests that particular reason was pretextual, regardless of whatever other reasons were offered. *(Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) That is especially true here, where the prosecutor professed to have a "real concern" over this question.

Respondent's attempt to distinguish *People v. Turner*, (1986) 42 Cal.3d 711, borders on misrepresentation. In that case, the

prosecutor failed to ask any questions of the challenged juror. Respondent asserts that, in contrast to *Turner*, the prosecutor here "asked Ms. Ladd a number of questions during voir dire." (RB, p. 79.) Respondent neither quotes or describes these questions, and does not cite to the record where this "number of questions" is contained. A review of Ms. Ladd's voir dire reveals that the only questions the prosecutor posed to her were completely routine and indeed "desultory." (See e.g. 8RT 1354 [asking every juror in turn, including Ms. Ladd, to indicate which group they fell into based on their views of the death penalty]; 8RT 1362 [asking general questions to individual jurors and specifically asking Ms. Ladd the following: "Who do I represent?;" "Do you see I have to sit by myself?" and "Does it make sense that my client is the People?".] As established in *Turner*, the desolutory asking of a few random, generic questions to a minority juror does not defeat the inference of racial discrimination.

Finally, both the prosecutor's justification and respondent's argument are themselves predicated on an assumption that Ms. Ladd intentionally failed to answer this question because she would have had to answer it in the affirmative. (RB at 78.) Without anything else in her questionnaire or voir dire to indicate that she or a close family member her had a criminal history, this assumption appears to be predicated on the race-based stereotype that many African-Americans have criminal records. As such, it supports a finding of discriminatory intent.

Respondent also relies on its completely speculative and unsupported position that Ms. Ladd's failure to answer Question 20 was not the "principal" reason for her dismissal. This reason was

proffered first in a list of many by the prosecutor, suggesting it had primary importance. Moreover, as shown in the opening brief and below, none of the other reasons asserted by the prosecutor were race-neutral, credible or legitimate.

(b) Ms. Ladd's Affiliation with the African Methodist Episcopal Church Was Not a Race-Neutral Ground for Dismissal

Respondent fails to address the bulk of appellant's argument regarding the prosecutor's reliance on Ms. Ladd's "membership" in the African Methodist Episcopal Church [A.M.E.] as a race-based reason for her dismissal, and instead focuses on the argument that it was religion-based. Regardless of whether the prosecutor discriminated against Ms. Ladd due to her race *or* her religious affiliation, appellant's constitutional rights plainly were violated.

The prosecutor stated he believed Ms. Ladd belonged to the A.M.E. in Los Angeles, which he considered to be "controversial" because it appeared "constantly" on television. Because the prosecutor failed to inquire of Ms. Ladd which A.M.E. church she attended and there is nothing in the record to support his assertion Ms. Ladd specifically belonged to the Los Angeles A.M.E. this purported reason cannot be credited. Further, without any assertion regarding the nature of the "controversy" involving the A.M.E., and without anything in the record showing that Ms. Ladd herself held relevant "controversial" beliefs or even that she in fact belonged to the specifically named "controversial" church, the prosecutor's reliance on her A.M.E. affiliation is indicative of race-based bias.

The A.M.E. was founded as an African-American church, its membership is predominately African American, and thus, it is so closely associated with African-Americans that it is a surrogate for membership in the group. (*Cf. People v. Huggins, supra*, 38 Cal.4th at 641, n. 15 ["Absent evidence that being born in Berkeley or linked to dilapidated automobiles is so closely associated with a protected group that they are surrogates for membership in the group and thus arguably impermissible (citation), the reasons are neutral for *Batson-Wheeler* purposes . . . ."]) Nonetheless, respondent contends the prosecutor did not rely on a racial stereotype but based his dismissal "on the prospective juror's involvement in a controversial organization." (RB at 18.) It thus attempts to distinguish this case from *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, where an African-American juror was dismissed because she lived in a low income African American neighborhood and the prosecutor believed such people probably saw police activity as more intrusive than individuals who come from communities that are not so poor and violent.[5]

In *Bishop*, the Ninth Circuit found the prosecutor's reason did not satisfy step two of the *Batson* analysis because it was a proxy for race. Relying on the guidance of the United States Supreme Court in *Hernandez v. New York, supra*, 500 U.S. 352, the Ninth Circuit rejected the argument that the prosecutor could permissibly assume

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[5] Respondent erroneously states that, in contrast to this case, the prosecutor struck the juror in *Bishop* "solely" because of her residence in Compton. Just like the prosecutor in the present case, however the prosecutor in *Bishop* also relied on other factors, the juror's age and employment, as justifying her dismissal. (*Bishop v. United States, supra*, 959 F.2d 820, at 827.)

a juror held certain opinions solely because she lived in a poor, Black neighborhood. In *Hernandez*, the Supreme Court denied a *Batson* claim based on the prosecutor's dismissal of Spanish-speaking jurors because the prosecutor successfully established a nexus between the jurors' asserted characteristic and their possible approach to the specific trial, and did not rely on language ability alone. Instead, he asserted that the specific responses and the demeanor of the two Spanish-speaking individuals during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony. In explaining its decision, the Court noted:

> We would face a quite different case if the prosecutor had justified his peremptory challenge with the explanation that he did not want Spanish-speaking jurors.... [A]s we make clear, a policy of striking all who speak a given language *without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.*

(Hernandez v. New York, supra, 500 U.S. at pp. 371-372, emphasis added.*)*

The prosecutor in the present case struck Ms. Ladd due to her A.M.E. membership "without regard to the particular circumstances of the trial or her individual responses." He did not explain in what way the A.M.E. was controversial or assert any trial-related circumstances why he did not want a "controversial" juror on the jury and did not refer to any specific facts, responses or demeanor exhibited by Ms. Ladd that caused him to believe that she herself would be "controversial" beyond her the mere fact of her membership in A.M.E. As in the *Bishop* case, where the prosecutor

could point to nothing in the juror's responses that indicated she herself held the views the he associated with all people who live in Compton, the prosecutor here pointed to nothing that indicated Ms. Ladd adhered to any of the purported controversial beliefs the prosecutor associated with all A.M.E. members.[6]

The prosecutor simply assumed that *any* member of the A.M.E. would be "controversial" and thus would not be a desirable juror, thereby relying on an impermissible group stereotype. Without providing any reasonable explanation of the controversy or how it would relate to the case, the prosecutor's use of the term "controversial" also appears to have been a proxy for "black." Because the prosecutor's justification was just a surrogate for a race-based motive, this reason for dismissing Ms. Ladd does not even survive step two of *Batson* and regardless of the validity of any of the other proffered justifications, should be considered as strong evidence of discriminatory intent.

(c) The Demeanor-Based Justifications for the Dismissal of Ms. Ladd Cannot Be Deemed Credible

The prosecutor asserted two different reasons for dismissing

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[6] Seated as jurors on this case were a Buddhist and a Catholic. (1CST 150; 1CST 92.) Had he dismissed the Catholic, the prosecutor could have just as "reasonably" asserted, particularly today when the Catholic Church has been involved in a very public scandal regarding sexual abuse, that he dismissed the Catholic juror because he "constantly" saw the Catholic Church on television and it is "constantly controversial." It is extremely unlikely that any court would find that reason, without more, not to be based on impermissible group bias or stereotype.

Ms. Ladd that were solely based on her demeanor during defense questioning. First, he asserted that Ms. Ladd "almost had a defensive, combined with an overbearing manner" when "she was asked about being falsely accused." He took this to mean she might be buying into the defense suggestion that appellant was falsely accused. He also had "a feeling," not based on any specific responses by Ms. Ladd, that Ms Ladd would look down on some of his witnesses, who he characterized as "Black kids, who are just kind of rough." As the Supreme Court has made clear, in the absence of an express trial court finding crediting a prosecutor's demeanor-based justification for striking a juror, a reviewing court cannot presume the trial court made such a finding, unless demeanor was the sole reason proffered to support a peremptory strike or there is other affirmative evidence that the court specifically accepted the demeanor based justification. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.) When, as here, the record contains no indication that the trial court accepted or specifically found the demeanor-based reason to be credible, and that reason is but one of many, the reviewing court cannot presume the trial court gave any weight to that reason.

Further, there is nothing in the record to show these demeanor-based justifications were genuine. As discussed in the opening brief, Ms. Ladd was never asked about being "falsely accused," but was asked if she had ever experienced being a "scapegoat," which she herself defined as someone taking responsibility for something they were not actually responsible for. She explained that: "I manage a number of people. And if they do something wrong, I have to take the fall for it." (8RT 1341.) There is absolutely nothing in this answer to suggest a defensive or an

"overbearing" manner, and without the trial court's agreement or acceptance of this assertion, this Court cannot assume the juror acted in this manner when responding.

The same is true of the prosecutor's assertion that Ms. Ladd gave him the feeling that she would look down on rough, black kids. Neither the prosecutor nor respondent pointed to anything in the record that supported the "feeling," and the trial court made no finding on this point. Further, even if deemed "sincere," this factor itself strongly suggests impermissible group bias. It appears the prosecutor's "feeling" was based on the fact that Ms. Ladd was an educated, intelligent African American. In assuming that such a person would "look down" on his witnesses, the prosecutor relied on a race-based stereotype– that an educated, middle-class black person would look down on "rough," lower-class Black young people. If Ms. Ladd had not been African-American, the prosecutor would not have made this assumption. Thus, this "reason," like Ms. Ladd's membership in the A.M.E. was not race-neutral and should not have survived step two of the *Batson* inquiry.

(d) Comparison with Later-Seated Alternate Jurors

As discussed above, respondent asserts that the "main" reason for striking alternate juror Ladd was because the prosecutor favored other upcoming jurors better. Although respondent goes to great lengths to present a glowing picture of the other alternate jurors, conducting its own comparative analysis of Ms. Ladd with all the other alternates who ultimately sat on the jury, respondent's analysis is fatally flawed in several respects.

First, the prosecutor only named two upcoming prospective alternate jurors whom he preferred over Ms. Ladd, alternate juror 5 David Stuck and alternate juror 6 Richard Capello. The Supreme Court has made it abundantly clear that the legitimacy of a strike is to be judged solely on the reasons actually stated by the prosecutor at the time issue is raised in the trial court. "But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *(Miller-El v. Dretke* (2005) 545 U.S. 231, 252.) Reviewing courts are not to think up reasons that might support a strike, but are limited to consideration of the actual statements made by the prosecutor. (*Ibid.*)

Thus, that there may have been *other* jurors who now appear more favorable to counsel for respondent is irrelevant to the issue of the credibility or sincerity of the trial prosecutor's statement that he dismissed Ms. Ladd to secure the presence of Mr. Stuck and Mr. Capello. The only issue here is whether the record supports the prosecutor's asserted determination that Stuck and Capello would have been better for the prosecution than Ms. Ladd. Accordingly, appellant will not address whether any other alternate jurors besides Stuck and Capello might have been preferable to Ms. Ladd.[7]

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[7] Another flaw in respondent's analysis is that it includes a comparison of Ms. Ladd with three alternate jurors who were already called as alternates at the time Ms. Ladd was dismissed, alternate jurors James Powell, Trudy Lichtenberg, and Steve Esquivel. (10RT 1710-1713.) Because the prosecutor did not need to dismiss Ms. Ladd in order to secure the presence of Powell, Lichtenberg and Esquivel, that these others may have been preferable to Ms. Ladd is not a plausible explanation for his use of a peremptory challenge to dismiss her.

A review of the record shows that neither alternate jurors Stuck nor Capello were comparatively superior, from a prosecution perspective, to Ms. Ladd, absent improper race-based reasons. Both Mr. Stuck and Mr. Capello listed their race as "Caucasian" on their questionnaires. In comparing the questionnaires and voir dire responses of these three jurors, respondent relies on factors other than those given by the prosecutor for dismissing Ms. Ladd. Such an approach is inconsistent with the notion that a reviewing court can only consider the statements made by the prosecutor to justify a strike. Here, the prosecutor did not explain why he liked alternate jurors Capello and Stuck better than Ms. Ladd, the trial court did not ask for an explanation, and this Court may not speculate beyond what the prosecutor said. The prosecutor listed many reasons for not liking Ms. Ladd based on her answers in her questionnaire and on voir dire, and this Court should only compare the retained alternate jurors' answers to the same questions to see if the prosecutor's "reasons" for striking Ladd were credible and plausible. *(Miller-El v. Dretke*, 545 U.S. at p. 252.)

Looking to the reasons the prosecutor asserted for dismissing Ms. Ladd there are very few credible differences between her and the other two named alternates. While it is true that Ms. Ladd did not answer question 20, and both Mr. Capello and Mr. Stuck did, the prosecutor's failure to ask Ms. Ladd about this question on voir dire belies the sincerity of his reason. (*Id.* at pp. 246, 250 fn. 8). Moreover, unlike Ms. Ladd, Mr. Stuck left a large number of other questions, unanswered, which apparently did not trouble the prosecutor at all. (See Questions 3A, 38, 40, 42, and 77, 2SCT 315-337.)

With regard to Ms. Ladd's purported membership in "a controversial church," as shown above, this factor was not supported by the record. But even assuming that it was, alternate juror Capello listed "Christian" in answer to the "optional" question as to his religious preference and stated he considered himself to be "a religious person" (2SCT346.) The prosecutor did not inquire what church or Christian sect he belonged to, and thus had no basis to conclude it was not "controversial," if being controversial truly was a concern. Moreover, when asked specifically what the view of his "religious organization" was about the death penalty, Mr. Capello gave an answer so striking that it should have caused enormous concern for the prosecution, yet apparently did not even motivate the prosecutor to question him about it during voir dire: Mr. Capello believed "Only God should judge." (2SCT 356.) In the context of a capital case, that is an extremely "controversial" view and one that could have required the juror's disqualification for cause.

Another of the prosecutor's asserted reasons for dismissing Ms. Ladd was based solely on her demeanor when responding to defense questions regarding "scapegoats." Because the trial court made no findings that he accepted this reason, and it is not supported by anything in the record, this Court should not consider it in determining whether there were legitimate, race- neutral and record-based reasons for Ms. Ladd's dismissal. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.) However, even considering this factor, juror Capello's responses on voir dire to this line of questions were no different from Ms. Ladd's. Capello stated he had been "falsely accused" of being the last person to work on a piece of equipment that broke down at work, but it didn't bother him. (7RT

1075.) Ms. Ladd was asked if she had ever experienced being a "scapegoat," or someone taking responsibility for something they were not actually responsible for. She responded affirmatively, and like Mr. Capello, gave an example from her work place: "I manage a number of people. And if they do something wrong, I have to take the fall for it." (8RT 1341.)

Finally, this Court also cannot credit the prosecutor's other demeanor-based justification for dismissing Ms. Ladd, that he felt she would look down on his "rough," "black" witnesses," because the trial court made no findings that it accepted this reason as credible. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.) Excluding for purposes of the present discussion, the strong inference, discussed above, that this was not a race-neutral reason at all, alternate juror Capello actually had a much higher education than Ms Ladd, as he completed both college and law school and even had received a J.D. (2SCT 344.) He was employed as a technician in Air Force Reserve and was a hazardous waste site manager. In comparison, Ms. Ladd was a senior insurance rate analyst, also attended college and was a certified legal assistant, but had not attended any professional school or obtained any professional degrees.

In sum, there were so few record-based differences between Ms. Ladd, Mr. Stuck and Mr. Capello with regard to the prosecutor's other asserted justifications for the strike that his added-on last "justification" is neither credible nor plausible. Other than their racial differences, there is nothing in the record that would support a legitimate conclusion that alternate jurors Stuck and Capello were more prosecution-oriented than Ladd in the areas identified by the trial prosecutor. But even expanding the comparison to include

factors *not* mentioned by the prosecutor to support the dismissal of Ladd,[8] as urged by respondent, it appears that neither Mr. Stuck nor Mr. Capello were stronger prosecution jurors than Ms. Ladd.

Like alternate jurors Capello and Stuck, Ms. Ladd had close relatives who had been burglarized, but unlike the two purportedly "better" jurors, Ms. Ladd's sister had actually been the victim of a violent crime– rape. (15SCT 4190.) She had once considered moving because she thought crime in her neighborhood was a problem (15SCT 4194), while alternate jurors Stuck and Capello had not. (2SCT 323, 351.) Ms. Ladd stated that she would consider the possibility that her verdict in this case could send a message to the community, as did Mr. Stuck.[9] Mr. Capello however, would not consider that possibility. (2SCT 351.) In answer to the question whether she would consider the possibility that her verdict could in some way compensate the victims, she wrote: "They may feel justice has been rendered." (15SCT 4194.) Mr. Capello similarly answered: "The victims in this case may never be completely compensated for the death of their loved ones, but the verdict may relieve heavy hearts on the road to recovery. (2SCT 351.)

Ms. Ladd was moderately in favor of the death penalty because "a clear message should be sent to prospective criminals,"

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[8]. Comparative juror analysis should be limited to the a comparison of "shared characteristics" of the retained and the dismissed jurors. (*Snyder v. Louisiana, supra,* 552 U.S. at p. 483.) See discussion in text at pages 34-35 and footnote 13, *infra.*

[9] Mr. Stuck described that message as follows: "That if you do the crime you will pay for it." (2SCT 323.) Ms. Ladd did not elaborate on the message.

(15SCT 4195) and she believed the purpose of the death penalty is to deter crime. (15SCT 4197.) In answer to the question asking what purpose the death penalty serves, Mr. Stuck wrote that "The [sic] defendant is found guilty of taking a life, then his life should end" and that the death penalty should be imposed in "murder" cases. (2SCT 326.) Ms. Ladd elaborated more and wrote that she felt that the death penalty should be imposed in cases of premeditated murder, "gruesome murder (with malicious intentions)" and multiple murders (15SCT 1497). All of these factors were likely to, and did, in fact, arise in the case against appellant.

Ms. Ladd wrote that she did "not know" whether she felt the death penalty was imposed too often, too seldom, randomly or about right. (15SCT 4198). Both Mr. Capello and Mr. Stuck indicated that the death penalty is imposed "about right." Mr. Stuck explained incomprehensibly: "if the defendant is strangly [sic] accused." (2SCT 327). Mr. Stuck also stated that he agreed "strongly" with the statement that "anyone who kills another should always get the death penalty, while Ms. Ladd disagreed somewhat with the statement because it "depends on the facts." Mr. Stuck's answers to questions about his views on the death penalty, however were inconsistent. For example, despite stating that he strongly agreed someone should always get the death penalty for killing another person, in response to question 43, he affirmed that he would *not* "always" vote for death if the crime and special circumstances were proven. (2SCT 325.)

Although Juror Capello did indicate he was strongly in favor of the death penalty, a review of his questionnaire and voir dire answers shows that his views about it were no stronger, and were

possibly even weaker, than Ms. Ladd's. He felt the death penalty should be imposed for murder of a government official, of a child where there was intentional physical or sexual abuse, or for an intentional murder without mitigating circumstances, meant to cover up a crime. (2SCT 354.) Only the third situation listed by Capello was suggested by the facts of appellant's case, while Ms. Ladd's answer to this same question covered many circumstances that arose in the case. Further, unlike Ms. Ladd, Mr. Capello "strongly" disagreed with the statement that a person who kills another should always receive the death penalty. He explained that he believed that "a person's state of mind develops based on his childhood and moral values learned. There may also be legitimate mitigating circumstances that should shelter someone from receiving the death sentence." (2CT 357.) During voir dire, he reiterated his views that not everyone charged with a double homicide with special circumstances should receive the death penalty, and that he would want to hear mitigating circumstances also. (7RT 1092.)

In response to the question of whether she believed background information about the defendant was relevant to the jury's penalty consideration, Ms. Ladd circled "possibly" and explained by stating that it's "not always conclusive" and it "may just be indicative of propensity for certain actions." (Ibid.) Mr. Stuck also circled "possibly" and explained by stating "the defendant might have had a bad childhood" (2SCT 326), an answer that showed more sympathy for the defense than Ms. Ladd's answer. Mr. Capello's answer was even more sympathetic to the defense than Mr. Stuck's or Ms.Ladd's. He wrote he "probably" believed a defendant's background was relevant and explained: "One who acts in a such a

way due to an abusive childhood may assert his/her background has left a scar deep enough in his heart or mind to cause his act or aggression." (2SCT 354.)

For all these reasons, neither Mr. Suck nor Mr. Capello were more prosecution-oriented than Ms. Ladd and the prosecutor's last reason for striking Ms. Ladd is neither supported by the record, nor credible.

(e) The Prosecutor's Dismissal of Prospective Juror Ladd Was Substantially Motivated by Discriminatory Intent

At the third step of the *Batson* inquiry, the ultimate issue is whether the prosecutor exercised any peremptory strike with discriminatory intent. All circumstances that bear on the issue of racial bias must be considered (*Snyder v. Lousiana*, *supra*, 522 U.S. at p. 478.) The reviewing court considers the prosecutor's credibility, by considering, inter alia, how reasonable or improbable the proffered explanations, are, and whether the proffered explanation has some basis in accepted trial strategy. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 325.) If any one of the proffered reasons are found to be pretextual, i.e. based on unsupported or implausible or fantastic reasons, there is an inference of discriminatory intent. (*Snyder v. Louisiana, supra*, 522 U.S. at p. 485.) Another tool for the reviewing court to assess discriminatory intent is a comparative analysis of the stricken juror with the seated jurors. (*Id.* at p. 483.) While this analysis is made more difficult on a cold appellate record, it is still an important aspect of the step three inquiry. The implausibility of a given reason is reinforced where white jurors who

gave identical or similar answers regarding the asserted justification were not dismissed. (*Ibid.*)

Applying these factors to the prosecutor's reasons for dismissing Ms. Ladd leads to the inescapable conclusion that her dismissal was largely, if not entirely, motivated by discriminatory intent.[10] First, two of the prosecutor's asserted reasons were based on group stereotypes and are evidence of discrimination. To the extent that these two reasons were demeanor-based, this Court cannot conclude they were credible without any credibility finding by the trial court.

Second, there was no support in the record for the majority of the prosecutor's assertions. The record does not reflect that Ms. Ladd belonged to the Los Angeles A.M.E., and no support in the record that Ms. Ladd was "controversial." There also was no support in the record for the prosecutor's "feeling" that Ms. Ladd would look down on his witnesses. As discussed in detail above, based on the questionnaires and voir dire, alternate jurors Stuck and Capello were not more favorable for the prosecution. Thus, the asserted "main" reason for striking Ladd also was not credible. Since discriminatory intent must be inferred where even one reason lacks support in the record, *Snyder v. Louisiana,* supra, 522 U.S. at p. 485., the inference is even greater, where as here, most of the reasons given by the prosecutor lacked any support in the record. Thus, even if not inherently discriminatory, the prosecutor's A.M.E. justification, his "feeling" Ms. Ladd would look down on his black witnesses, and his

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[10] Even if this Court "defers" to the trial court's "ruling" that Ms. Ladd was not improperly dismissed, for all the reasons stated in this brief that ruling plainly is not supported by substantial evidence.

assertion that he struck Ladd to secure the presence of alternate jurors Stuck and Capello were not credible and are pretextual bases for dismissal.

Third, the prosecutor did not ask any significant questions of Ms. Ladd before making his decision to strike her. The failure to engage a prospective juror in meaningful voir dire before making a negative assumption about a reason supporting dismissal also strongly suggests the reason is a sham and pretext for discrimination. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 246, 250 fn.8.)

Fourth, and finally, a comparison of Ms. Ladd to white jurors who were accepted by the prosecutor demonstrates the prosecutor's reasons, to the extent that they were race neutral, were in fact, a pretext for discrimination. Initially, respondent argues that this Court cannot conduct a comparision of Ms. Ladd, who was a prospective alternate juror, with white jurors, unless they were also alternate jurors "available at the time" Ms. Ladd was challenged. (RB at p. 87.) Respondent cites no authority for this novel argument, and appellant has not discovered any support for it. Indeed, this Court, in conducting comparative juror analysis, has frequently compared sitting jurors with alternates, and vice versa. (See e.g. *People v. Mills* (2010) 48 Cal.4th 158, 181-184; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 904; *People v. Salcido* (2008) 44 Cal.4th 93, 141-143.)[11]

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[11] In the event this Court limits its comparative analysis of Ms. Ladd only to other white *alternate* jurors, as discussed at length above alternate juror Capello was on very equal footing with Ms. Ladd in terms of his education and socio-economic status and thus the prosecutor should have been concerned he would look down on the rough, black witnesses just as much as Ms. Ladd. Mr. Capello

Respondent argues that, even considering a comparison with seated jurors Huey and Fawcett, the views of the those two white jurors about the death penalty show they were not similar to Ms. Ladd. In making this argument, respondent ignores the similarities between Huey, Fawcett and Ladd on the points asserted by the prosecutor, and argues only that they were dissimilar regarding the death penalty. (RB, at p. 87.) The prosecutor, however, did not dismiss Ms. Ladd because of her views on the death penalty, which she "moderately" supported, and which in fact were similar to any number of seated jurors. (See e.g. Jurors Black, 1CST 72; Fisher, 10CST 2598; Huey, 1CST 156; Jordan, 10CST 2642; Lopiccolo, 10CST 2626, all indicating "moderate" support; and Jurors Vanverst, 9CST 2486; Santos, 1CST 212; and Henry, 1CST 128, all indicating they were "neutral" on death penalty.) Indeed, viewing the voir dire as a whole, the prosecutor did not seem especially concerned about the jurors' death penalty views in general. In justifying his peremptory strikes on the black jurors, not once did the prosecutor even mention the prospective jurors' opinions about the death penalty. Under these circumstances, this Court cannot speculate that the reason the prosecutor did not dismiss jurors Huey and Fawcett, but did dismiss Ms. Ladd, was because of Ms. Ladd's arguably more moderate views on the death penalty.

Respondent argues the distinction in views on the death penalty between Ms. Ladd and the others "alone makes any

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also had been falsely accused. His religious beliefs actually precluded him from judging another person. Alternate juror Stuck failed to answer any number of questions on the questionnaire, while Ms. Ladd only neglected to answer one.

comparison . . . irrelevant." (RB. at 87.) Respondent thus contends that a comparative analysis will not be sustained unless the compared jurors are similar in all respects, and not just similar with regard to matters offered in the prosecutor's justifications. The Supreme Court has expressly rejected this contention. *(Miller-El v. Dretke*, 545 U.S. at p. 247, n.6.)[12] In *Miller-El v. Dretke*, the

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[12] This Court has recognized this holding of *Miller-El:*

> In undertaking this inquiry, we note that the question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly believed them not to be similarly situated in legitimate respects. As we have observed, *Miller-El* teaches that if a "stated reason does not hold up, its pretextual significance does not fade because ... an appeals court, can imagine a reason that might not have been shown up as false." (*Miller-El, supra,* 545 U.S. 231, 252, 125 S.Ct. 2317, 2332.) Accordingly, we confine our inquiry to whether the prosecutor here honestly found pertinent and legitimate dissimilarities between members of the group he challenged and the group he accepted.

(*People v. Huggins*, *supra*, 38 Cal.4th at 233, emphasis added.) In *Huggins*, the prosecutor listed numerous justifications for dismissing minority jurors, including their views on the death penalty. This Court found that, while some of the dismissed jurors shared "isolated and discrete similarities" with the seated jurors on other points, "in each case, the prosecutor justified the excusals by [showing] that he believed the prospective jurors he challenged were dissimilar to those he accepted because members of the former group were at least unlikely-and in some cases would be unwilling-to impose the death penalty." (Id. at p. 235.) *Huggins* is thus distinguishable from this case, where despite dissimilarities between the seated and dismissed jurors, the prosecutor did not rely on any dissimilar points to justify dismissal.

prosecutor pointed to the jurors' views about the death penalty as a race-neutral reason for their dismissal. The Supreme Court thus only compared the stricken jurors with the treatment of other jurors who "expressed similar views" about the death penalty and found the similarities supported a conclusion that race was a significant motivation for the prosecutor, without considering whether the jurors were different in other ways. (*Id.* at p. 252. See *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 376, citing *Miller-El v. Dretke* ["If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even though the two jurors are dissimilar in other respects."] In *Snyder*, the high court also limited its comparison between seated jurors and the dismissed juror to the "shared characteristic," which was the prosecutor's justification for the strike. (*Snyder v. Louisiana, supra,* 552 U.S. at p. 483.) Because respondent has not shown that jurors Huey or Fawcett were dissimilar to Ms. Ladd on any ground other than a slight difference in views on the death penalty, and these views did not form the basis for Ms. Ladd's dismissal, the prosecutor's retention of Huey and Fawcett further points to intentional discrimination.

In combination with the prosecutor's proffer of two race-based reasons, the lack of support in the record for arguably race-neutral reasons, his failure to ask questions on assertedly determinative points, the implausibility of his reasons and his failure to strike similar white jurors establish that the prosecutor's dismissal of Ms. Ladd was motivated by discriminatory intent.

For these reasons, her dismissal violated appellant's rights to equal protection. However, even if this Court finds one or more of the prosecutor's justifications to be race-neutral and credible, appellant's rights were still violated.

The United States Supreme Court has not yet established whether there is an additional step in the *Batson* inquiry after it has been shown that discriminatory intent was a substantial motivating factor behind a peremptory strike. In *Snyder*, the Court stated that in other discrimination cases, after a showing of discriminatory motive, the burden would then shift to the state actor to show that the discriminatory factor was not "determinative," but the Court then found it unnecessary to decide whether that same burden would apply to a *Batson* claim because, even applying that standard to the case before it, the record did not show the prosecutor would have challenged the juror based on race-neutral factors alone. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 485-486.)[13] The same is true in the present case.

Assuming *arguendo* that respondent could prevail by showing that Ms. Ladd would have been dismissed even in the absence of race-based factors, he has not even attempted to meet that burden here. As discussed above, respondent's *post hoc* categorization of the prosecutor's last reason (that he liked upcoming jurors Stuck and Capello better) as the "primary" basis for the strike is flatly refuted by the record. Even if it were the "primary basis," without which Ms.

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[13] This Court also has not yet decided what standard should apply in a *Batson* case where the prosecutor has "mixed motives" for exercising a peremptory challenge. (*People v. Hamilton, supra*, 45 Cal.4th at p. 909, fn. 14.)

Ladd would not have been dismissed, appellant has shown that it was not credible because nothing on the record shows that these two jurors were better for the prosecution than Ms. Ladd.

For all these reasons, this Court should find that the prosecutor's motive in striking Ms. Ladd was impermissibly based on race and the strike was exercised with a discriminatory intent.

2. Prospective Juror Gary Gaither

The prosecutor also listed multiple reasons for his peremptory strike of prospective juror Gary Gaither. First, the prosecutor stated that one concern was that Mr. Gaither had adult children who were unemployed. The prosecutor asserted he was generally looking to see what adult children of the prospective jurors were doing. He also pointed to being "real concerned" because Mr. Gaither was a bus driver in the area where the crime occurred and he anticipated a dispute over timing and lighting conditions. The prosecutor represented that he had a concern not only about Mr. Gaither, but "the other bus drivers." The prosecutor made clear that the determinative factor, however, was Mr. Gaither's response to defense questioning about scapegoats. The prosecutor stated that "at first it appeared to me that this was response was, 'Yes, this case could be about a scapegoat,' even though there had been no evidence at all." The prosecutor assumed from this purported response that Mr. Gaither was "buying into" the defense theory without hearing any evidence.

(a) The Record Does Not Support the Prosecutor's Asserted Concern That Mr. Gaither Bought Into the Defense Theory

Although respondent attempts to cast the prosecutor's primary justification as one based on Mr. Gaither's nonverbal "reaction and demeanor" (RB at 58-59), the prosecutor did not say anything about the prospective juror's demeanor or reaction. Instead, the prosecutor expressly relied only Mr. Gaither's answer, which he paraphrased as "Yes, this case could be about a scapegoat." The prosecutor must stand or fall by his answers at the time of trial, even if counsel for respondent can now come up with a more reasonable explanation. Thus, this Court cannot speculate that the prosecutor was relying on anything beyond Mr. Gaither's verbal response.[14]

Respondent also argues that the record reflects that the prosecutor had "real concerns" about Mr. Gaither with regard to scapegoating. Regardless of whether or not that is true, those concerns are not supported by the record. Mr. Gaither never said anything that could have been reasonably interpreted as "buying into the defense theory" of scapegoating. The relevant colloquy, which respondent does not even cite, is as follows:

> Mr. Bentley: Defense counsel threw the word out, "scapegoat." I am not sure where that is going. I don't know what kind of evidence. But the question in my mind is, since you heard it – and I can't count them– maybe 100 times or 50 times or something. Does anybody believe there is going to be evidence of a

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[14] Even if this Court considers the prosecutor's justification to be based on Mr. Gaither's "demeanor," as *Snyder* teaches, that justification cannot be deemed credible because the trial court made no finding that it accepted the justification.

scapegoat in this case? Mr. Gaither? You are giving me a blank look, sir.

Prospective Juror Gary Gaither: No.

Mr. Bentley: Is that an I-don't-know "No" or is that a "No" "No"?

Prospective Juror Gary Gaither: I don't know "No."

(8RT 1370-1371.) After questioning another juror, the prosecutor returned to Mr. Gaither:

Mr. Bentley: Just like at this moment there is no evidence that two elderly people have been killed, until I call a witness to prove it. Would you agree with that Mr. Gaither?

Mr. Gaither: Yes.

Mr. Bentley: Mr. Gaither, you not going to be sitting there saying, "They mentioned it so many times, there's got to be something there"? You wouldn't do that, would you?

Mr. Gaither: No.

Mr. Bentley: You'd sit there and listen to what the witnesses have to say?

Mr. Gaither: Yes.

(8RT1371-1372.)

As the record clearly shows, Mr. Gaither was never asked whether the case could be "about" a scapegoat, but only whether he "believed there is going to be evidence of a scapegoat in this case." And more importantly, his initial answer was not "Yes" as asserted by the prosecutor, but "No." Whatever doubt the prosecutor might have had about Gaither's unambiguous answer should have been completely dispelled by Gaither's answers to the prosecutor's follow-up questions. Indeed, his answer that he didn't know what the

evidence would be was proper and showed the correct state of mind for a juror before the presentation of any evidence.

(b) The Prosecutor's Concern That Mr. Gaither Worked for the Bus Company Was Not Credible

The prosecutor also expressed "concern" that Mr. Gaither was a bus driver who worked in the area of the crime, and might have opinions about certain routes that might be presented in the case, and also about lighting at the time of the crime. In the opening brief, appellant demonstrated that two white jurors, Ms. Fawcett and Ms. Smith, also were bus drivers. Respondent argues that appellant's comparisons of these two white jurors with Mr. Gaither do not demonstrate racial bias because Ms. Fawcett and Ms. Smith were not sufficiently similar to Mr. Gaither to warrant their dismissal.

Initially, it is significant that the prosecutor himself invited this comparison, by expressly claiming a concern not only with Mr. Gaither, but with "other bus drivers, in this particular business" (10RT 1728.) Although he represented to the court that this concern did not just apply to the African-American bus driver but to the others also, he did not dismiss the other two bus drivers, who happened to be white. For that reason alone, the prosecutor's assertion was not credible.

While Ms. Smith, unlike Mr. Gaither, stated she could probably avoid the area of the crime during trial, as respondent concedes, Ms. Fawcett also stated she could not avoid the area. She was thus no different from Mr. Gaither in this regard. Because of this, respondent attempts to distinguish Ms. Fawcett from Mr. Gaither due to their

differing views on the death penalty. However, this Court must only look to the juror's "shared characteristic" in conducting its comparative analysis. (*Snyder v. Louisiana, supra,* 552 U.S. at p. 483.) Because the prosecutor did not mention Mr. Gaither's views about the death penalty to justify his dismissal, this Court cannot speculate that he actually considered those views in exercising the strike.

Moreover, even comparing Mr. Gaither's views on the death penalty with Ms. Fawcett's shows no actual difference, other than their own subjective assessments of whether they were "strongly" or only "moderately" in favor of the death penalty. For example, Mr. Gaither indicated on his questionnaire that the death penalty should be imposed in cases of "murder, multiple death, special circumstances" (10CST 2124); while Ms. Fawcett similarly answered "murder." (1CST 186.) Both Mr. Gaither and Ms. Fawcett answered question 47, whether the defendant's background is relevant to the penalty, "possibly." Mr. Gaither felt a sentence of life without the possibility of parole meant "Some way they maybe free" (1CST 2125), while Ms. Fawcett answered "They are being punished for a crime." Perhaps most importantly to the prosecution, Mr. Gaither thought the death penalty is imposed "too seldom" and explained "too much time on death row" (1CST 2125), while Ms. Fawcett felt death is imposed "about right." If the prosecutor in fact did conclude that Ms. Fawcett's death penalty views were more favorable to his case than Mr. Gaither's, that conclusion is not supported by the record.

(c) That Mr. Gaither Had Unemployed Adult Children Was a Pretext

Respondent claims that the prosecutor's assertion that he dismissed Mr. Gaither, in part, because he had unemployed adult children was not pretextual because that was not the "principal" basis for dismissing him, and that it was "not remarkable" that the prosecutor did not inquire why his children were unemployed. This Court is required to evaluate *each* of the prosecutor's asserted reasons, regardless of whether they were the sole, primary, or just one of many reasons proffered. The prosecutor relied on the status of Mr. Gaither's children as one reason for his dismissal and thus put the credibility of that reason squarely before the court. If his purported concern about Mr. Gaither's children factored into the decision to dismiss him, and that concern was not sincere, then it was a pretext and adds to all the other circumstances showing discriminatory intent.

In fact, while the record shows that Mr. Gaither's two daughters were unemployed, one was 21 years old and the other was just 18 and still living at home. It is implausible that any case related negative inference could be drawn from this information, without further questioning. Perhaps Mr. Gaither's 21 year old daughter had young children herself, had a disability precluding employment, or was looking for work. As for the 18 year old, it is likely she was still being supported by her parents and thus her employment status would be meaningless. The failure to ask Mr. Gaither any questions about his children shows that this concern was not genuine and thus was also just a pretext for race-based bias.

(d) The Prosecutor's Dismissal of Prospective Juror Gaither Was Substantially Motivated by Discriminatory Intent

As discussed above in connection with Ms. Ladd, the United States Supreme Court has not yet established whether there is an additional step in the *Batson* inquiry after appellant has shown that discriminatory intent was a motivating factor behind a peremptory strike. However assuming that appellant must prevail unless respondent can show that a race-based factor was not determinative, respondent has not attempted to meet that burden here.

Among the multiple reasons given by the prosecutor for this strike, he made it clear that the determinative factor was Mr. Gaither's response to defense questioning about a scapegoat. He told the court that "at that point it was when I finally made up my mind" and "Before that time, I would say he was, in my opinion . . . he did have some very strong, sound things that I did like." (10RT 1729.) As shown above, there was no support in the record for the prosecutor's assumption that Mr. Gaither was buying into the defense theory about scapegoating before he had heard any evidence. As such, this reason is not a credible, race-neutral justification on which the prosecutor could permissibly rely.

For all these reasons, this Court should find that the prosecutor's motive in striking Mr. Gaither was impermissibly based on race and the strike was exercised with a discriminatory intent.[15]

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[15] Even if this Court "defers" to the trial court's "ruling" that Mr. Gaither was not improperly dismissed, for all the reasons stated in

3. Prospective Juror Norman Culpepper

(a) The Prosecutor's Dismissal Was Based on the Pretext That Mr. Culpepper's Son Had Been Accused of a Serious Crime

Respondent repeatedly misstates "the main thing" the prosecutor asserted as a basis for dismissing Mr. Culpepper. The entire colloquy between the trial court and the prosecutor regarding Gaither was as follows:

> Mr. Culpepper, in my mind, would never have been a proper juror for the People in this case. There was a question that the People looked at very, very closely, and that was the question regarding, "You or a close friend or somebody in your family ever been accused?" That was question No. 20.
>
> In Question No. 20, he mentions his son's name, Ricardo Culpepper, that had been accused. I think it was attempt (sic) murder or murder.
>
> That was the one thing that really impressed upon the people that this could be a problem. When defense counsel kept talking about being falsely accused, I watched him, and his responses troubled me on that. And I took that in conjunction to Ricardo Culpepper, which I believed to be his son.
>
> Finally, when the defense attorney asked him – Mr. Culpepper if he could help Albert, I saw a pause – a gigantic pause. I could have counted to 25, I think, before he answered that question. And when he finally answered it, I didn't remember what the answer was, but at that point I was sure that it was something that he mulled over. And he mulled over it so seriously that he could not be a juror on this case.

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this brief that ruling plainly is not supported by substantial evidence.

> And then I thought it would be a proper perempt. So that was Mr. Culpepper.
>
> The Court: So your primary concern there is because a family member had been charged with a serious felony?
>
> Mr. Bentley: Had been accused. I think it's Question 20. The name was Ricardo Culpepper. But in conjunction with the other things was what– you know, the other things pushed him on over the scale. That was one that would put him on the negative side, as far as I was concerned.

(10RT 1727.)

As discussed in the opening brief and below, there was nothing in the record to support the prosecutor's assertion that Mr. Culpepper's son had been accused of murder or attempted murder, or any serious offense, but respondent now further misrepresents the facts. As the above quote shows neither Mr. Culpepper, appellant nor the prosecutor ever claimed that Culpepper's son was "falsely accused." (See also Mr. Culpepper's questionnaire, 15SCT 4135).

Moreover, the justification that apparently *was* considered by the trial court was that a family member had been charged with "a *serious* felony." If the trial court was incorrect about the prosecutor's "primary basis" for the strike, the prosecutor was given an opportunity to correct it, but he did not. Respondent concedes that the asserted fact– i.e. that Ricardo Culpepper was accused of a serious crime like murder or attempted is not supported by the record– but argues this was just an "isolated mistake or misstatement," (RB 66), and thus it should not be considered as pretextual. Respondent's argument must be rejected because the prosecutor's mistake was not isolated. The prosecutor misstated the record repeatedly during his explanation of his strikes. By

characterizing this misrepresentation as a "mistake" respondent attempts to negate the prosecutor's obligation to "stand or fall" by the reasons proffered to the trial court.

Moreover, while respondent suggests this may have been a mere memory lapse due to the passage of time between voir dire and the prosecutor's representation to the court (RB at 66, fn 11), the information about Mr. Culpepper's son was not discussed during voir dire but was only gleaned from his questionnaire. Before presenting his justifications to the trial court, the prosecutor expressly asked for time to review his "notes," and, presumably, the jury questionnaires themselves. The matter was not taken up until the following day, giving the prosecutor an entire evening to review his notes, the questionnaires and the daily transcripts of the voir dire. There is no reasonable explanation for his "mistake."

Indeed, this specific misrepresentation by the prosecutor, even if it was a "mistake," is particularly indicative of racial bias. The prosecutor assumed, without any additional inquiry, that Mr. Culpepper's son had been accused of murder or attempted murder. There was absolutely no reason, other than blatant racial profiling, for the prosecutor to assume that, if an African-American was accused of a crime, it necessarily would be the most serious violent felony and not a minor crime. Given these facts, his "mistake" was not in good faith and should be considered pretextual.

The trial court not only failed to correct, but, in fact, reiterated the prosecutor's unsupported assertion that Mr. Culpepper's son was accused of a "serious" crime. That fact alone overcomes the presumption that the trial court attempted "to distinguish bona fide reasons from sham excuses." [Citation.] " (*People v. Burgener* (2003)

29 Cal.4th 833, 864, 129 Cal.Rptr.2d 747, 62 P.3d 1.) Under such circumstances, this Court should not defer to the trial court's ruling.

Respondent attempts to distinguish *Silva*, a case in which this Court did not defer to the trial court, by urging that *Silva* is limited to cases where "the record shows no support whatsoever for the prosecutor's stated non-discriminatory reasons . . . . " (RB at 67.) Respondent points to the fact that the record does show that Mr. Culpepper's son was accused of a crime, and then claims that it "was the fact he was accused of committing a crime rather than the nature of the crime . . . that was the basis for the challenge . . . ." (RB at 69.) Respondent's claim, like the prosecutor's reason for dismissing Mr. Culpepper, is contradicted by the record. The prosecutor initially stated his reason for the strike was because he thought Mr. Culpepper had written in his questionnaire that his son had been accused of "murder" or "attempt [sic] murder," not that he had simply been accused of any crime. Subsequently the trial court asked the prosecutor whether the primary basis for the strike was because Mr. Culpepper's son was charged with "a *serious* crime." The prosecutor did not tell the court it was mistaken in its characterization of his reasons nor that the nature of the crime was immaterial to him. (10RT 1027.) [16] There is no support in the record whatsoever for the actual asserted basis for this strike and thus this case is indistinguishable from *Silva*.

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[16] If the mere accusation of any crime against a close relative had been the "most significant fact" supporting the challenge of Mr. Culpepper (RB 68), then there is no plausible race-neutral explanation why sitting juror Michael Fisher, whose sister-in-law had been arrested for drugs (10CST 2060) would have been accepted by the prosecutor, but not Mr. Culpepper.

As appellant established in his opening brief, another indication that this purported justification for the dismissal of Mr. Culpepper was race-based, was the prosecutor's failure to dismiss juror number 8, Sherry Huey. Ms. Huey stated in her questionnaire that her brother had not only been accused, but convicted of assault while on drugs, and that the victim had subsequently died from the injuries. (10CSCT 152, 156.)[17] Relying solely on her questionnaire answers, respondent attempts to defeat appellant's comparison of Mr. Culpepper to juror Huey by asserting that it was really their differing views on the death penalty that made the determinative difference to the prosecutor. As stated before, this Court must only look to the juror's "shared characteristic" in conducting its comparative analysis. (*Snyder v. Louisiana, supra,* 552 U.S. at p. 483.) Because the prosecutor did not mention Mr. Culpepper's views about the death penalty to justify his dismissal, this Court cannot speculate that he actually considered those views in exercising the strike.

Moreover, even comparing Mr. Culpepper's views on the death penalty with Ms. Huey's shows that Ms. Huey was actually much more hesitant about the death penalty than Mr. Culpepper. In fact, she volunteered her hesitation during voir dire after the court generally asked if anyone had emotional, moral or religious

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[17] Respondent claims it could not find all these facts at 10CST 152, but in the opening brief at page 70, appellant also cited to 10CST 156, where Ms. Huey discussed her brother's case in detail Remarkably, respondent itself cites to this very page of Ms. Huey's questionnaire on the same page of its brief (RB at 69) where it professes to have been unable to locate the cited details in Ms. Huey's questionnaire. (RB at 69, fn. 12),

reservations about serving as a juror in a capital case. Ms Huey [Juror 8] raised her hand and told the court she didn't know if "even if [she] had that evidence [she] could determine, you know, the death penalty for someone." (9RT 1560-1561.) She continued: "I mean I can say I am for it, but if it was my responsibility, I don't know if I could." (*Id.*) On further questioning by both the court and again later by the prosecutor, she repeatedly stated that it would be very difficult for her to impose a death sentence, even though she considered herself pro death penalty. (9RT 1561, 9RT 1633, 1634.) When the trial court questioned whether anyone on the jury would automatically vote for life as opposed to the death penalty it even singled her out and commented that "Juror [Huey] is pretty close to that." (9RT1562.) Given the trial court's finding that juror Huey's doubts about her ability to impose the death penalty were close to justifying her dismissal for cause, respondent's argument that her views on the death penalty made her a better prosecution juror than Mr. Culpepper wholly implausible.

(b) The Prosecutor's Assertion Regarding Mr. Culpepper's Hesitation in Answering a Question Is Not Credible or Supported by the Record

Respondent concedes the prosecutor's assertion that Mr. Culpepper seemed like he would favor African-Americans because he too was African-American was based on a "misunderstanding" and that Mr. Culpepper's answers to follow-up questions cleared up that misunderstanding. (RB at 72.) Nonetheless he argues the trial court's decision should be upheld because "regardless of what Mr. Culpepper meant to say, there was clearly support in the record for

the prosecutor's race-neutral concern that Mr. Culpepper might not be an ideal juror." Because of this, it argues that "the trial court properly concluded the prosecutor stated race-neutral reasons for challenging Mr. Culpepper." (*Id.*)

In so arguing, respondent apparently acknowledges that the trial court did not reach step three of the Batson inquiry but only concluded that step two, i.e. the stating of facially race-neutral reasons for the strike, had been satisfied. Respondent does not counter in any way appellant's assertion that, because of the lack of support in the record for the prosecutor's stated concern that Mr. Culpepper "would help Albert," this reason was not genuine.

Respondent's argument does not make sense on this record. The prosecutor's stated reason was not predicated on anything Mr. Culpepper said, but on the fact that he took a "gigantic pause" before answering a defense question. The prosecutor stated that the question which caused the pause was whether Mr. Culpepper "could help Albert." (10RT 1727.) He told the court he did not even remember Mr. Culpepper's answer, but decided that Mr. Culpepper had "mulled over it so seriously that he could not be a juror in this case." (*Ibid.*) The record shows that the prosecutor's justification was not plausible or credible. [18]

In its brief, respondent omits the beginning of defense counsel's questioning which prompted Mr. Culpepper's hesitation. (RB at 62.) The omitted language is crucial to understand why Mr.

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[18] To the extent this justification was based on Mr. Culpepper's demeanor, this Court cannot presume it was credible or that the trial court accepted this as a legitimate basis for the strike. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.)

Culpepper paused, and why he answered "yes" to defense counsel. Before turning to Mr. Culpepper, defense counsel was asking the jurors about first impressions, and whether they ever "had seen someone for the first time and . . . didn't like that person or did . . . like that person." (6RT 824.) He then asked appellant to stand up and explained the reason for his questions about forming impressions based on appearances. He stated:

> – let's take his hair style first. You know during the '60s, late '60s, early '70s if you saw American– Afro-American or black at that time wear an afro, some people thought that was a militant look. Some people thought it was militant. Okay.
>
> The question is this: Does that affect you in terms of attempting to make a decision in this case? Will you look at his hair and say, Oh, I wouldn't like to meet him in a dark alley and all of a sudden jump from there and say he's guilty of murder?

(6RT 826.)

After asking this question of several jurors defense counsel asked Mr. Culpepper the question quoted by respondent, whether Mr. Culpepper would have a tendency to try to protect appellant because they are both black. (6 RT 827.) If in fact Mr. Culpepper paused before he answered the question, the reason for his pause became apparent seconds later when he stated he felt that people who talked about appellant's hairstyle were being racist. It was obvious he had not really focused on the question asked of him by defense counsel and was thinking about the prior series of questions. In fact, the prosecutor even questioned him about the long pause and Mr. Culpepper explained that he was saying he

didn't look at appellant as a militant and that his hesitation was because he was "trying to get it right." It "was no reflection that [he] couldn't be fair to the People." (6RT 872-873.) The record therefore does not support the prosecutor's assertion that Mr. Culpepper "mulled over" the question of whether "he could help Albert," but rather mulled over his opinions about judging someone because they have an "afro" hairstyle. Nonetheless, the prosecutor did assert that he based his strike on Mr. Culpepper's statements or reactions regarding "afro" hairstyles.

Moreover, even if the record did support the prosecutor's justification, its sincerity must be doubted because Mr. Culpepper completely negated any notion that he would "help Albert" during follow-up questioning. He repeatedly and unequivocally denied that he would try to protect appellant because they were both African-American.[19]

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[19] Respondent ignores the prosecutor's statement that he did not even remember Mr. Culpepper's actual answer to the question, but only challenged him because he paused before answering, and thus it is unnecessary for this Court to compare Mr. Culpepper's answer with the answers of other jurors to similar questions. (RB at 73, fn. 13.) Further, as shown in the text, Mr. Culpepper made clear during follow-up questioning that his view was exactly the same as the answers by others cited by respondent. Interestingly, all but one of the individuals who respondent asserts gave more favorable answers were dismissed. Two, Ms. Ladd and Mr. Gaither were dismissed by prosecution peremptory challenges, and the third, Syndor, was dismissed for cause.

(c) The Prosecutor's Assertion That He Was Troubled by Mr. Culpepper's "Response" to Defense Voir Dire "About Being Falsely Accused" Was Not Credible

As another reason for dismissing Mr. Culpepper the prosecutor stated that he was troubled by Mr. Culpepper's body language and responses while defense counsel "kept talking about being falsely accused." The prosecutor "took" the undescribed responses and body language "in conjunction to Ricardo Culpepper," the prospective juror's son. (10RT 1727.)

Initially, because this justification was based on Mr. Culpepper's demeanor, about which the trial court made no finding, this Court cannot presume it was credible or that the trial court accepted this as a legitimate basis for the strike. (*Snyder v. Louisiana, supra,* 522 U.S. at p. 479.) It should thus not be considered by this Court.

Moreover, an examination of the record suggests the pretextual nature of this justification. The prosecutor made it sound like there was extensive questioning about false accusations during the defense voir dire of the group of prospective jurors which included Mr. Culpepper. In fact, unlike with other groups, defense questioning on this topic was minimal. Defense counsel asked Mr. Preslar, "have you ever been falsely accused of something?" (6RT 839.) When Mr. Preslar responded "No," counsel asked if he thought "it's possible it can happen?" Defense counsel then asked prospective jurors Young, Meis, Phillips, Zundel and Murray "how about you?" or "have you ever experienced that personally." That was the extent of the defense questioning. No one gave an

extensive or inflammatory or controversial answer and the entire voir dire on this topic takes up less than two full pages of the reporter's transcript. (6T 839-841.)

Further, the prosecutor stated that he interpreted Mr. Culpepper's "responses" to have something to do with his son, who had been accused of an unidentified crime. However, defense counsel's question was whether the jurors themselves had ever been falsely accused, not whether someone they knew had been falsely accused. Thus, even should this Court consider this demeanor-based reason, it was not reasonable for the prosecutor to assume that Mr. Culpepper's "responses" had anything to do with the juror's son. Accordingly the prosecutor's assertion was not supported by the record thus should be considered pretextual.

(d) The Prosecutor's Dismissal of Prospective Juror Culpepper Was Substantially Motivated by Discriminatory Intent

As discussed above, the United States Supreme Court has not yet established whether there is an additional step in the *Batson* inquiry after appellant has shown that discriminatory intent was a motivating factor behind a peremptory strike. However, assuming that appellant must prevail unless respondent can show that a race-based factor was not determinative, respondent has not attempted to meet that burden here.

It is clear from the record that the trial court viewed the prosecutor's "primary" concern about Culpepper to be that he had a family member who had been accused of a serious felony, a view to which the prosecutor acceded. In light of the fact that there was no support in the record for his primary concern and that the prosecutor

failed to inquire of Mr. Culpepper about it, and as shown above, this concern was really based on race based assumptions regarding the criminality of young black males it cannot overcome appellant's showing that the strike of Mr. Culpepper was racially motivated.

For all these reasons, this Court should find that the prosecutor's motive in striking Mr. Culpepper was impermissibly based on race and the strike was exercised with a discriminatory intent.[20]

4. Considered as Whole, the Prosecutor Exercised the Peremptory Challenges Against African-Americans with Discriminatory Intent

Appellant has shown that each individual challenge of the three African American prospective jurors was substantially motivated by racial bias and respondent has not countered that showing. However, even if this Court fails to find evidence of discriminatory intent behind any one individual strike, the record in its entirety establishes such intent.

Appellant is mindful that the record in this direct appeal case is not developed to the extent of the record in *Miller-El v. Dretke*, a case that came before the United States Supreme Court on habeas corpus and after federal discovery and record expansion procedures. The evidence presented in post-conviction proceedings in *Miller-El* was dramatic and compelling. Nonetheless, the Supreme Court subsequently made clear that a showing of discriminatory intent can be made even on a cold appellate record, and even where there is

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[20] Even if this Court "defers" to the trial court's "ruling" that Mr. Culpepper was not improperly dismissed, for all the reasons stated in this brief that ruling plainly is not supported by substantial evidence.

no evidence whatsoever of institutional racial animus, no evidence of systemic exclusion of minority jurors, and no direct evidence that a particular prosecutor was a racist or racially prejudiced. In *Snyder v. Louisiana*, the Supreme Court found a *Batson* violation based on the strike of just one African-American juror for racial reasons, without any evidence other than the precise type of evidence present in this case, i.e. that the prosecutor's asserted reasons were not supported by the record, that he failed to make a sufficient inquiry of the jurors, that the reasons were not credible in light of the prosecutor's failure to dismiss other white jurors with the same characteristic, and the remaining demeanor-based factors were not found to be credible or accepted by the trial court. (*Snyder v. Louisiana*, *supra*, 552 U.S. 472.)

The record of discriminatory intent in the present case is even more extensive than in *Snyder*. Whereas in *Snyder*, the prosecutor offered two reasons for dismissing the challenged juror, and one was found to be race-neutral but pretextual, here the prosecutor dismissed the prospective jurors based on several factors that were not even facially race-neutral: Ms. Ladd's membership in an African American Church and her supposed disdain for lower-class black young people. He also relied on several grounds that although facially sound, were nonetheless based on group bias: that if Mr. Culpepper's son had been accused of a crime, it was murder or attempted murder, and that Mr. Gaither's unemployed daughters did not have legitimate reasons for being unemployed. He misstated or misrepresented the record to justify his challenges on numerous occasions, too often to be deemed isolated mistakes.

Considering the prosecutor's treatment of the challenged jurors together, his readiness to dismiss the African-American jurors for multiple unsupported and implausible reasons demonstrates discriminatory intent. As the Ninth Circuit has found, the cumulation of numerous faulty or weak reasons proffered by a prosecutor together with a paucity of adequate reasons can "undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge." *Lewis v. Lewis* (9th Cir.2003) 321 F.3d 824, 831; see also *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174; *Kesser v. Cambra* (2005) 465 F.3d 351, 369 [("The prosecutor's willingness to make up nonracial reasons for striking [three minority jurors] makes it even harder to believe that his reasons for striking [a fourth juror] were race-neutral."]) Just like the prosecutor in *Kesser*, the prosecutor here appears to have made up multiple nonracial reasons for striking each of the jurors, and thus his justifications appear designed to mask race-based motives.

Respondent only attempts to refute appellant's showing of discriminatory intent generally, and not in regard to any individual challenge. It makes only two points: that the prosecutor accepted a jury with one African-American juror, and one African-American alternate; and that the prosecutor attempted, unsuccessfully, to rehabilitate another African-American, Ms. Sydnor, who was dismissed for cause because she would have automatically voted for a death sentence following a murder conviction. Although certainly a relevant factor, the presence of other African-Americans on the jury accepted by the prosecutor, by itself, does not defeat a showing of

discriminatory intent.[21] Indeed, in the cases cited by respondent where this Court has relied on the existence of other minority jurors to reject a *Batson* challenge, there were more than just two minority jurors who were accepted by the prosecutor. (*See e.g. People v. Lewis, supra*, 43 Cal.4th at p. 480 [noting the prosecutor accepted three African Americans on the panel before the selection of the alternates]; *People v. Huggins, supra*, 38 Cal.4th at p. 236 [three African Americans were accepted by the prosecutor]; *People v. Ward* (2005) 36 Cal.4th 186, 203 [five sitting jurors were African-American].[22]

With regard to prospective juror Sydnor, the prosecutor's attempt to rehabilitate a juror who was so extremely pro-death penalty that she would not have considered any mitigating evidence at all, but happened to also be African-American, does not in any way contradict appellant's showing of discriminatory intent in dismissing any of the other jurors. This is not a case where appellant is relying solely on a comparative analysis, or where the other African-American jurors were dismissed because of lenient views about the death penalty.

In light of the record, respondent has wholly failed to overcome appellant's showing that the prosecutor acted with

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[21] Just because some African-Americans were so prosecution-oriented that the prosecutor was willing to overlook their race during jury selection, does not mean that racial bias did not substantially or entirely motivate his dismissal of other jurors.

[22] Respondent also cites *People v. Avila, supra*, 38 Cal.4th at p. 555, but that opinion does not state the number of minority jurors who actually sat on the jury, or who were accepted by the prosecutor.

discriminatory intent in dismissing one or more of the three challenged jurors. For this, and all the reasons stated above and in appellant's opening brief, this Court should find the trial court committed clear error in denying appellant's *Batson/Wheeler* motion and his conviction and sentence must be overturned.

II.

ADMISSION OF THE VERNON ROBBERY EVIDENCE WAS IMPROPER AND HIGHLY PREJUDICIAL

A. Introduction

In his opening brief, appellant argued that the trial court abused its discretion when, over strenuous defense objection, it allowed the prosecution to present evidence of a prior robbery (hereinafter "Vernon robbery") committed by appellant eight years before the robbery and murder of the Florvilles. (AOB 81-105.) The trial court ruled that the evidence was admissible to establish appellant's intent to rob the Florvilles, a required element of both the offense and the robbery special circumstance. Appellant argued that the crimes were too dissimilar to establish appellant's intent, and that the evidence therefore constituted improper character evidence under Evidence Code section 1101, subd. (a), which should have been excluded. Appellant further argued that the court abused its discretion under Evidence Code section 352, because the probative value of the evidence was substantially outweighed by the prejudice engendered by its admission, and that the error was so prejudicial that it violated appellant's constitutional rights to a fair trial and reliable verdict.

Respondent contends that the Vernon robbery evidence was properly admitted under Evidence Code section 1101 subd. (b), because the two crimes were sufficiently similar to "tend to prove Jones intended to steal from the Florvilles prior to entering their residence and was motivated to enter the Florville's home and kill them in order to steal their money and/or valuables." (RB 100.) Respondent lists a number of "similarities," but fails to explain how

they "support the inference" that appellant (assuming he robbed and murdered the Florvilles), entered the Florvilles' residence with the intent to steal from them. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Respondent further contends that the trial court did not abuse its discretion under Evidence Code section 352 (RB 103-104), but fails to explain how the evidence was probative of any "disputed material issue" in the case. (*People v. Gallego* (1990) 52 Cal.3d 115; 171 [other crimes evidence probative when it has a tendency to prove intent or motive and the latter are disputed issues]; *People v. Ewoldt*, *supra,* at p. 406 [probative value of other crimes evidence to prove intent diminished when intent is not disputed].)

Respondent has thus failed to refute appellant's claim of error, and as demonstrated below, has failed to show that the error was harmless.

B. The Facts of the Vernon Robbery Were So Dissimilar From the Facts of the Florville Murders That the Only Inference the Jury Could Draw From the Vernon Robbery Evidence Was That Appellant Had a Propensity to Commit Robberies

Respondent contends that the similarities between the Vernon robbery and the Florville murders support the trial court's admission of the Vernon robbery evidence based on its finding that "the Vernon incident is sufficient under [*People v.*] *Ewoldt* and [Penal Code section] 1101 [subd.] (b) to be permitted to be used by the prosecution . . . for purposes of intent." (3RT 348; RB 99-100.) The "similarities" cited by respondent are as follows:

In both offenses Jones was the aggressor and carried the weapon. In both offenses Jones rode to where the victims were located in a car, committed the offense with companions and drove away in a car. In both cases, despite the cooperation of the victims, Jones imposed unnecessary violence upon the victims. Finally, in both cases Jones employed the services of persons close to him, in the present case the nephew of his girlfriend, Alon Johnson; in the robbery, his three cousins."

(RB 100.)

First, respondent has misrepresented the facts of the respective crimes. With respect to the Vernon robbery, the testimony was that appellant's accomplice – not appellant – struck one of the witnesses with his fist, after the victim refused to hand over his wallet. (11RT 1848-1849.) Also, there was absolutely *no* evidence that appellant was the ringleader of the Vernon. robbery.[23] The testimony was that appellant and another man held up the victims. (11RT 1842, 1847.) There was no evidence whatsoever concerning the planning of the crime.

With respect to the Florville murders, there was no evidence establishing that Jones was the "aggressor," or that he "carried the weapon." Neither was there any evidence that he, himself, perpetrated the violence upon the Florvilles, or even that they had been "cooperative."

Second, and more importantly, respondent's purported "similarities" – to wit: the use of a weapon and a car in both crimes, the perpetration of gratuitous violence, and the fact that each of the

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[23] There was also no evidence that appellant had "employed the services" of his cousins. The investigating detective, William Waxman testified that there were three other defendants, who were appellant's cousins. (13RT 2108.)

crimes was committed by more than one person – are generic characteristics attributable to virtually hundreds, if not thousands, of robberies. The "similarities" listed by the trial court when it denied appellant's motion for a new trial were equally generic:

> Certainly one of the issues is whether or not there' sufficient similarities. And I believe that there are sufficient similarities to where it is appropriate evidence. *Those similarities being, among other things, that on each occasion Mr. Jones utilized an accomplice. On each occasion some kind of arming was involved, although different types of arming. On each occasion there was money taken and escape with money. And on each occasion a vehicle was utilized to effectuate that escape.* And there are other similarities as well, which I won't go into. But I think that's sufficient to indicate that -- that there are sufficient similarities to where the 1101 (b) evidence, specifically the Vernon robbery, is appropriate evidence to have had heard by this trier of fact. So the motion for new trial is denied.

(34RT 5020-5021, emphasis added.)

Other than that both crimes involved the theft of property by force or fear (the basic elements of a robbery), they bore no similarity to each other. The Vernon robbery was conducted in the early afternoon, on a public street, in broad daylight. The victims were men who had just gotten off from work. The Florville crime took place in the victims' home, sometime before dawn, and the victims were an elderly couple. In the Vernon robbery, the victims were held up at gunpoint. In the instant case, the victims were hog-tied with wire and stabbed to death with a knife. In short, the *only* thing the two crimes had in common is that they both involved robberies, and nothing about the manner in which the earlier crime was committed shed light on appellant's intent in the instant case, other than to

improperly suggest that appellant had a propensity to commit armed robberies. (*People v. Daniels* (1991) 52 Cal.3d 815, 856 [evidence of other crimes is admissible only if relevant to prove a material fact at issue, separate from criminal propensity].)

The instant case is therefore distinguishable from the cases respondent relies upon. In those cases, unlike the instant one, the prior criminal conduct involved behavior very similar to the defendant's behavior in committing the charged offense. For example, in *People v. Lindberg*, (2008) 45 Cal.4th 1, this Court held that evidence concerning the defendant's prior robberies was admissible to show the defendant's intent to steal from the victim in that case, because the defendant's prior robberies "*shared substantial similarities*" with the crime for which he was on trial:

> The evidence of defendant's involvement in the Reyes-Martinez and Tillman robberies tends to prove this material fact [intent to rob]. Defendant's attack on Ly in this case *shares numerous distinctive common features* with those robberies. Defendant brought a companion to assist him in each crime: Christopher assisted defendant in the attack on Ly, and Harp and Ellis aided defendant in the prior robberies of Reyes-Martinez and Tillman, respectively. In each crime, defendant assaulted his victims and was the aggressor of the two assailants: Defendant knocked Ly to the ground before demanding to know if Ly had a car and put a knife to Ly's throat when he said he had none; defendant hit, chased, and kicked Reyes-Martinez before he and Harp stole the victim's money; and defendant punched the elderly Tillman in the face as he and Ellis left her home after stealing her money. Defendant did not know any of the victims. Each victim was vulnerable (alone, elderly, or outnumbered), did not fight back, and was assaulted whether or not he or she cooperated. . .Defendant's brutal acts of violence towards the victims in the Reyes-Martinez and Tillman

> robberies were part and parcel of those robberies and, as stated above, *shared substantial similarities* with his conduct towards Ly in this case.

(*Id.* at pp. 24-25, emphasis added.)

Respondent further cites *People v. Roldan* (2005) 35 Cal.4th 646, in which the defendant's prior robbery was remarkably similar to the capital crime in that case. In upholding the admission of evidence regarding the defendant's prior robbery in *Roldan*, this Court listed the significant similarities between the prior robbery and the capital crime as follows:

> Here, defendant and his cohorts victimized the owners or proprietors of swap meets, an unusual venue for such crimes. We disagree with defendant's characterization of a swap meet as just another generic location where money can be found by those willing to transgress the larceny laws. Swap meets are distinctive in that they are large sprawling affairs with less security over cash receipts than might be found in a permanent brick and mortar establishment. Moreover, the crimes here were committed in a distinctive manner. One robber grabbed the cash, not merchandise, while a second stood behind him with an Uzi or machine gun partially obscured by clothing. The third member of the group waited in a car to facilitate a rapid departure. In light of the distinctiveness and unusual nature of these shared characteristics, we conclude the trial court did not abuse its discretion in ruling evidence of the Sun Valley offense would support the inference the same person committed the San Fernando offense.
>
> *We reach the same conclusion as to the issue of intent.* " 'We have long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts;

> instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.' " (*People v. Gallego* (1990) 52 Cal.3d 115, 171, 276 Cal.Rptr. 679, 802 P.2d 169.) In other words, if defendant intended permanently to deprive the victim of the Sun Valley crime of his money, the jury legitimately could infer he harbored the same intent with regard to his actions toward Pipkin.

(*Id.* at pp. 706-707, emphasis added.)

In each of these cases, the prior robberies committed by the respective defendants involved specific conduct that was, if not identical, at least similar enough to the charged offense "to support the inference that the defendant probably acted with the same intent in each instance.'" (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 23.)

Appellant's case is not only distinguishable in this respect from *People v.Lindberg*, *supra*, and *People v. Roldan supra*, but it is also distinguishable for the same reason from other cases holding evidence of prior crimes admissible on the issue of intent. For example, in *People v. Gallego* (1990) 52 Cal.3d 115, this Court upheld the admission of evidence of a prior rape and murder introduced to prove the defendant's intent to rape the victim in the case for which he was being tried. In *Gallego*, the defendant denied having raped the victim, and though he admitted killing her, claimed that his sole intent had been to rob her. Thus, in contrast to the instant case, the defendant's intent and motive were "disputed material issues." (*Id.* at p. 171.) This Court held that the evidence amply supported the conclusion that the prior crime, "tended logically, naturally and by logical inference to prove the defendant's intent in the charged crime." (*Id.* at p. 172.) The evidence showed

that in both crimes, the defendant (1) forced his wife to drive to a mall to "hunt" for young women and lure them to his vehicle; (2) tied the victims' hands behind their backs; (3) took the victims to rural locations, removed them from his wife's presence and took them to a separate spot for execution; (4) shot each victim in the head at point blank range; and (5) and threw the murder weapon into the Sacramento river the next day. (*Ibid.*)

Similarly, in *People v. Demetrulias*, (2006) 39 Cal.4th 1, in which the defendant claimed he had killed the victim in self-defense and had not intended to rob him, this Court held evidence that the defendant assaulted and robbed another man that same day, was relevant and admissible under Evidence Code section 1101, subd. (b), to establish the defendant's motive and intent to rob the victim of the charged crime. The Court explained as follows, that:

> Twice in one evening, defendant entered an older man's home, confronted the man alone, and stabbed the man several times hard enough to inflict very serious wounds, including in both cases stab wounds to the chest. Both times he claimed that the other man attacked or threatened him first and that he acted in self-defense. As we have previously explained, quoting from Wigmore: " ' [T] recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence *or self defense* or good faith or other innocent mental state, and tends to establish (provisionally at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such act. . ..

(*Id.* at p. 16.) The Court accordingly concluded that:

> As explained above, the closeness of time between the incidents – here a matter of minutes, rather than days or months – provides, together with the other similarities already noted, a significant basis for an inference that

> defendant acted with the same criminal intent in the two incidents.

(*Id.* at p. 17.)

In both *Gallego* and *Demetrulias, supra*, as well as in *Lindberg* and *Roldan,* there was a "direct logical nexus" between the charged offense and the prior (uncharged or charged) offense being offered into evidence by the prosecution, (*People v Demetrulias*, *supra*, 39 Cal.4th at p. 15); in other words, the charged crime and uncharged crime involved "substantially similar circumstances," giving rise to a "logical inference" that the defendant possessed the same intent on both occasions. (*Id.* at pp. 16-17.)[24]

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[24] See also *People v. Kipp* (1998) 18 Cal.4th 349, 370 [in both instances perpetrator strangled a 19 year old woman in one location, carried the victim's body to an enclosed area belonging to the victim and covered the body with bedding]; *People v. Daniels* (2009) 176 Cal.App.4th 304, 312-313 [in both instances rape victims were young women in their twenties; the defendant followed them home from a bar in downtown Palo Alto and initially led them to believe they would not be harmed; the victims were isolated on a bed in a bedroom; and both crimes occurred in the early morning hours on a weekend]; *People v. Wilson* (1991) 227 Cal.App.3d 1210; 1214-1215 [prior crime tended to refute defendant's claim that he had not entered victim's home with intent to steal; in both instances defendant entered the home of a woman he knew was not home, claimed he was going to wait for her, and also that he was intoxicated on drugs and alcohol]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1046, 1049 [where defendant's intent to rob kidnap victim was ambiguous, evidence of prior robberies shed light on his intent. Prior offenses and charged offense all involved abductions of women in parking lots. In each instance, defendant got into victim's car and ordered the victim to move to the passenger side of the car. He also approached each victim with a weapon (knife or gun), and then held it to the victim's ribs. Prior and current crimes also similar in that defendant demanded money only after driving victim's car for a while]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1021-1023 [prior

In contrast, the Vernon and Florville crimes in the instant case had nothing in common with each other than that they both involved armed robberies. Neither were they temporally proximate. Under the circumstances, the Vernon robbery provided no circumstantial evidence of appellant's intent (or motive)[25] in the instant case. Given its lack of relevance to establish appellant's intent and/or motive with respect to the capital crime, the evidence was inadmissible under Evidence Code sections 1101, subds. (a) and (b), and therefore should have been excluded. To uphold its admission would not only be inconsistent with prior precedent, but it would effectively sanction the admission of irrelevant character evidence in violation of Penal Code section 1101, subd. (a), which bars evidence of specific instances of conduct to prove conduct on a specified occasion.

C. The Evidence Should Have Been Excluded Because It Was not Probative of Any Disputed Material Issue, and Therefore Any Probative Value it Might Have Had Was Substantially Outweighed by its Prejudicial Effect

Respondent contends that the Vernon robbery was properly admitted under Evidence Code section 352, but does not specifically address appellant's claim that the evidence had no probative value and should have been excluded. Respondent's argument merely

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robbery relevant to prove defendant's intent to rob, where both crimes involved stealing money and car from victims after hitting them on the head and both times appellant expressed desire to get money and a car to drive to Colorado to meet girls].

[25] Respondent also contends that evidence of the Vernon robbery was relevant circumstantial evidence of appellant's motive in the instant case. (RB 96, 100.) However, the evidence was not offered for that purpose at trial.

asserts that the evidence was not unfairly prejudicial, and says nothing at all about its probative value. (See RB 103-104.) As will be discussed below, the probative *value* of the evidence is not merely assessed by its relevance to prove a particular fact, it also depends on whether the fact that it is offered to prove is actually in dispute.

This Court declared in *People v. Ewoldt*, *supra*, that other crimes evidence "is so prejudicial that its admission requires extremely careful analysis . . .Since substantial prejudicial effect [is] inherent in [such] evidence, [other] offenses are admissible only if they have *substantial* probative value." (7 Cal.4th p. 404, emphasis in original.)

In *Ewoldt,* the Court held that evidence of prior lewd acts upon the victim and her sister was inadmissible to prove the defendant's intent to molest the victim, because the defendant's intent was not in dispute, and therefore the probative *value* of the evidence was outweighed by its prejudicial effect. (7 Cal.4th at p. 406.) The Court made clear that if the defendant's intent is not disputed or reasonably subject to dispute, as is the case herein, evidence of prior conduct to prove intent "would be merely cumulative and the prejudicial effect of the evidence . . . would outweigh its probative value," and therefore be inadmissible under Evidence Code section 352. (*Ibid.*)

Other cases upholding the denial of a motion to exclude other crimes evidence under Evidence Code section 352, have consistently involved evidence that was probative of a *contested* material issue. For instance, in *People v. Gallego*, *supra*, discussed above, the evidence was held to be highly probative because the defendant had denied having the intent to kill and presented a

diminished capacity defense. Evidence that the defendant had committed very similar offenses therefore tended to refute his claim. (52 Cal.3d at p. 172.)

Similarly, in *People v. Daniels, supra*, whether the defendant intended to take the victim to a motel to rape her was the primary contested issue at trial; therefore his commission of a very similar offense was found to be highly probative to refute the defendant's claim. (176 Cal.App.4th at p. 316.)

In *People v. Demetrulias*, *supra*, evidence that the defendant had committed a very similar crime the *same night* as the murder for which he was on trial, was found by this Court to be "strongly probative on the central issue at trial," which was whether the defendant had stabbed the murder victim in self-defense or with the intent of robbing him. (39 Cal.4th, at pp. 18-19.)

In *People v. Lindberg*, *supra*, the defendant denied having assaulted the victim with the intent to rob him, and therefore his commission of other similar types of assaults and robberies was held probative of his intent to rob the victim – a disputed issue in that case. (45 Cal.4th, at pp. 24-25.)

The cases cited by respondent provide no support for the trial court's finding in *this* case that the probative value of the Vernon robbery evidence outweighed its prejudicial effect. Some of respondent's cases do not even involve admission of other crimes evidence. (See *People v. Cox* (2003) 30 Cal.4th 916; *People v. Bolin* (1998) 8 Cal.4th 297; and *People v. Coddington* (2000) 23 Cal.4th 529, 588.) In the remaining cases cited by respondent, the other crimes evidence introduced – unlike that admitted in the instant case -- was substantially probative of a disputed material issue.

In *People v.Hovarter* (2008) 44 Cal.4th 983, 1004, a capital case in which the defendant was alleged to have kidnapped, raped and murdered a young woman, evidence of the defendant's conviction for rape, kidnapping and attempted murder of another woman was held admissible on the disputed issue of identity. In finding that the trial court did not abuse its discretion under Evidence Code section 352, this Court noted that the trial court "carefully excluded evidence of defendant's rape, kidnapping, and attempt to murder A.L. on the issues of motive and common plan, *correctly deciding that neither issue was truly disputed by the parties.*" (*Id.* at p. 1005, emphasis added.)

In *People v. Walker* (2006) 139 Cal.App.4th 782, 806-807, evidence that the defendant had previously raped and viciously beaten two prostitutes was found to have substantial probative value to prove his identity as the rapist and murderer (by beating) of a third prostitute and his intent to kill her, both of which were contested issues.

People v. Steele (2002) 27 Cal.4th 1230, 1243-1245, is also significantly distinguishable from the instant case. In that case, the defendant stabbed a woman to death, but claimed that he had "just snapped," upon hearing a "chopper blade," as a result of Vietnam combat posttraumatic stress disorder. Although he admitted intent to kill, he claimed there was no premeditation or deliberation. This Court held that because the defendant's mental state was in dispute, evidence that he had previously killed another woman in much the same manner – claiming that he had been under the influence of alcohol and drugs – was highly probative of his mental state. The Court's decision in *Steele* does not compel the same result in the

instant case, where (1) appellant's mental state was not in dispute, and (2) the prior robbery was so dissimilar to the crime in the instant case that it could not have been probative of appellant's intent, assuming he was the perpetrator.

Respondent has also cited *People v. Balcom* (1994) 7 Cal.4th 414, which is analogous to the instant case and supports appellant's – rather than respondent's -- position. In *Balcom*, a rape case decided by this Court the same day as *People v. Ewoldt,* the issue in dispute at trial was whether the defendant had forced the victim to engage in sexual intercourse, or whether she had voluntarily consented. The Court noted that because the defendant's not guilty plea put in issue all the elements of the offense, evidence that the defendant committed uncharged similar offenses would have some relevance regarding the defendant's intent in that case. Nevertheless, the Court held that if the jury found that the defendant had put a gun to the victim's head, his intent to rape her could not reasonably be disputed, and thus evidence that the defendant had raped another woman at gunpoint would have limited probative value, which would be substantially outweighed by its prejudicial effect. *(Id.* at pp. 422-423.)

In the instant case there was not, nor could there reasonably have been, any dispute concerning the motive or intent of the perpetrator(s) when he/they entered the Florvilles' home. The sole contested issue was the identity (or identities) of that person (or those people). Accordingly, the fact that appellant had eight years before robbed some men on the street, in broad daylight, at gunpoint, lacked any probative value in this case, and therefore should have been excluded under Evidence Code section 352.

Respondent has failed to show otherwise.

D. The Vernon Robbery Evidence Was Extremely Prejudicial Because It Suggested That Appellant Had a Propensity to Rob People

Respondent contends that admission of the Vernon robbery evidence was not prejudicial because (1) appellant had received a conviction for that offense, so that the jury was less likely to punish him for it; (2) the prior robbery was a "standard armed robbery" in which there were no significant injuries to the victims, and therefore was far less "inflammatory" than the Florville murders; and (3) the jury was instructed that it could only consider the Vernon robbery evidence for the purpose of determining whether appellant had the requisite intent to rob the Florvilles. (RB 104-105).

Respondent fails to address the argument in appellant's opening brief that appellant was severely prejudiced by the improper admission of the Vernon robbery evidence, not only because evidence of other crimes is inherently prejudicial, but because of the substantial likelihood that, in this case, the jury improperly considered the evidence on the issue of identity.

There was no physical evidence tying appellant to the Florville murders. The only evidence establishing his identity as a perpetrator of that crime was the testimony of several teenagers, whose credibility could easily have been questioned for numerous reasons. The prosecutor chose to open his case-in-chief with the testimony of the Vernon robbery victims, so that the jury knew appellant had a history of committing armed robberies, before they heard any of the evidence regarding the Florville murders. In addition, the jury was not admonished regarding the limited purpose for which they could

consider the Vernon robbery evidence until the very end of the guilt phase, *after* they had hear all of the evidence and argument. (28RT 4327-4328.) Even though juries are generally presumed to have followed the court's instructions (*People v. Young* (2005) 34 Cal.4th 1149, 1214), under the circumstances of *this* case, it would be completely unrealistic and therefore unreasonable to presume that the jurors were not improperly influenced by the Vernon robbery evidence in evaluating the testimony of the teenage witnesses on the issue of identity.[26] (Compare *People v. Daniels*, *supra*, 52 Cal.3d at p. 858 [prejudicial impact of evidence of defendant's prior bank robbery sufficiently mitigated by limiting instruction given *before* evidence received by jury].)

Respondent further argues that even if the admission of the Vernon robbery evidence constituted prejudicial error, the error did not deprive appellant of his constitutional rights to a fair trial and reliable verdicts. (RB 108-110.) Respondent relies upon this Court's opinion in *People v. Catlin* (2001) 26 Cal.4th 81. 123. However, that case is in apposite here.

In *Catlin*, the Court held, based upon federal authority, that the admission of other crimes evidence in that case did not give rise to a due process violation because the evidence was "material to issues of identity and common scheme or plan and was admissible under Evidence Code section 1101." The Court stated as follows:

[Catlin] does not provide authority establishing that a state

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[26] Appellant quoted the Fifth Circuit Court of Appeals in his opening brief to illustrate this point: "[I]f you throw a skunk in the jury box, you can't instruct the jury not to smell it." (*Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 887.)

> law permitting the admission of evidence of uncharged crimes violates a defendant's right to a fair trial. Reference to two federal cases discussing due process limitations on the admission of irrelevant character or criminal propensity evidence is unpersuasive; in both instances, the federal court determined that the disputed evidence was not material to any legitimate issue. (See *Henry v. Estelle* (9th Cir. 1994) 33 F.3d 1037, 1042, revd. on another point in *Duncan v. Henry* (1995) 513 U.S. 364 [parallel citations omitted]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1385; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913-914 [parallel citations omitted].) By contrast, we have determined that the disputed evidence in the present case was material to issues of identity and common scheme or plan and was admissible under Evidence Code section 1101.

(*Ibid.*)

Because the Vernon robbery evidence was not material to any legitimate issue in *this* case, and because its admission created a substantial risk that the jury would consider it for an illegitimate purpose, the federal authority cited above and in appellant's opening brief, compels the conclusion that appellant's 8th and 14th Amendment rights were violated. Reversal is required because respondent has not established and cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Moreover, reversal is compelled under state law, because it is reasonably probable that the jury would have discredited the teenage witnesses and acquitted appellant had the Vernon robbery evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836)

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III.

EXCLUSION OF THE DEFENSE VIDEOTAPE AND DENIAL OF APPELLANT'S MOTION TO HAVE THE JURY VIEW THE CRIME SCENE UNFAIRLY DEPRIVED APPELLANT OF HIS ABILITY TO SUCCESSFULLY IMPEACH PROSECUTION WITNESS DORRELL ARROYO

Appellant argued in his opening brief that two rulings by the trial court severely undermined his ability to impeach the testimony of Dorrell Arroyo, the prosecution witness who claimed to have watched appellant and Alon Johnson enter and subsequently depart the Florville's property sometime between 5:00 and 6:00 a.m. on December 13, 1993. The first ruling was the exclusion of a defense videotape offered to impeach Arroyo's testimony that he had been able observe appellant and Johnson because it was already daylight. The second ruling was the denial of appellant's motion to have the jury view the crime scene to show how the substantial distance between where Arroyo claimed to have made his observations and the Florville's property would have been impossible to see what Arroyo said he saw. (AOB 106-117.)

Respondent argues that the trial court did not abuse its discretion in making the above-described rulings. Respondent contends that the videotape evidence was irrelevant and misleading because the defense could not demonstrate that the lighting conditions depicted by the tape were the same as those at the time of the crime. (RB 120.) However, appellant was not using the tape to show the precise lighting conditions on the night of the crime; his only purpose to show that contrary to Arroyo's testimony there was no daylight during the period of time at issue. When cross-examined

about his statement that the lighting was good, Arroyo testified that "it was just, you know, just the crack or morning. It was just morning time. The sun ain't up, but it's clear enough so that you can see, and everything." (14RT 2290.) Had appellant been permitted to play the videotape he would have been able to show that there was not enough natural light to see any detail until approximately 6:17. (21RT 3282.) Because the purpose for which appellant sought to play the videotape was to impeach Arroyo on this narrow point, the cases respondent relies upon, *People v. Gonzalez* (2006)38 Cal.4th 932, 952-953, and *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-566, are not on point. In both of these cases the videotape evidence was being offered to replicate the precise lighting conditions at the time of the crime, which is not what the evidence was offered for in appellant's case.

Respondent further contends that transporting the jury to the crime scene was unnecessary, and therefore the court did not abuse its discretion in denying appellant's motion. (RB 126-127.) Respondent misses the point. Although there was testimony that the distance between where Arroyo claimed to have been standing and the Florville's gate was 127 feet, and the distance to their front door was over 166 feet (24RT 3661-3662, 3666), and the prosecution presented aerial photographs, the jurors could not get an accurate sense of what could actually be seen from that distance without actually observing it themselves. Like the videotape evidence, this would have demonstrated that Arroyo could not have been telling the truth.

Again, appellant sought to have the jury transported to the crime scene for a narrow, but critical purpose, and therefore the

cases cited by respondent are distinguishable. In *People v. Price* (1991) 324, 421-422, the defense sought a jury view between midnight and 1:00 a.m. to replicate the conditions in effect on th night of the crime. Appellant made no such request herein.

Furthermore, in *People v. Kraft* (2000) 23 Cal.4th 978, 1052-1053, a jury view of the scene where the victim's body was found was requested by the defense in order to show the rugged terrain, so that the jury could appreciate both the difficulty of the defendant's disposing of the body in that location and the dissimilarity of the method of that murder to others with which the defendant was charged. In that case, the court found that photographs and the testimony of witnesses describing the remote and rugged nature of the terrain would suffice to allow the jury to draw its own inferences. By contrast, appellant herein was seeking to establish the degree of visibility from a particular distance – something that could only be reliably gauged in person.

The trial court's rulings with respect to the videotape and the jury view arbitrarily crippled appellant's ability to impeach the credibility of the prosecution's main witness. Without his testimony, the prosecution would have been unlikely to obtain a conviction. The court's abuse of discretion thus deprived appellant of his constitutional rights to present his defense, to a fair trial and to a reliable verdict. Because espondent has not established, and cannot establish, that these violations were harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California*, *supra*, at p.24.)

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IV.

EVIDENCE THAT ALON JOHNSON TRIED TO STEAL LATEX GLOVES A MONTH BEFORE THE CRIME WAS IRRELEVANT AND ITS ADMISSION DEPRIVED APPELLANT OF A FAIR TRIAL AND RELIABLE VERDICT

Appellant argued in his opening brief that the trial court abused its discretion and violated appellant's rights to a fair trial and reliable verdict by allowing the prosecution to introduce irrelevant testimony that Alon Johnson had unsuccessfully attempted to steal latex gloves approximately a month before the crime. (AOB 121-123.) Respondent concedes that irrelevant evidence is inadmissible, but argues that the trial court did not abuse its discretion in allowing the prosecution to present the glove evidence because it was relevant to show that appellant had "access to latex gloves" and that Alon Johnson " was interested in obtaining latex gloves as part of a plan to rob and burglarize the victims in this case or in preparation for a similar crime." (RB 135-136.)

While it is true that there was evidence of latex gloves having been worn by the perpetrator or perpetrators of the crime, it is beyond dispute that the latex gloves Alon attempted to steal were *not* the ones that were used. As appellant pointed out in his opening brief, latex gloves are readily available commodities, so having "access" to them was not in any way significant or unique.

Moreover, although Jack Purnell testified that the *day before the murders* appellant talked about using gloves to avoid leaving fingerprints (15RT 2436-2437), the jury could not have reasonably inferred appellant's guilt from the fact that a *month before* the crime Alon tried to steal latex gloves at school.

Because the evidence "had no tendency in reason to prove. . .a disputed fact that [was] of consequence to the determination of the action" (Evidence Code section 210), it was irrelevant and its admission by the trial court constituted an abuse of its discretion,

Respondent further contends that even if admission of the evidence was error, it was harmless. Respondent claims that it was "merely a minor part of the puzzle." (RB 141.) However, given the complete absence of incriminating physical evidence, the prosecution was allowed to use the glove incident to unfairly shore up its case against appellant and bolster the credibility of its witnesses, by arguing that the incident was evidence of appellant's "plan to use latex gloves" in committing the crime, (27RT 4151-4152.) Under the circumstances, the error was not inconsequential, as respondent contends, but in combination with the errors discussed in Arguments II and III, deprived appellant of a fair trial and undermines confidence in the verdict. (*Acala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 894-896.) Reversal is thus required.

****

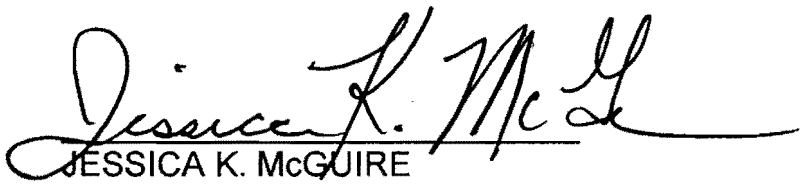
CONCLUSION

For all of the above-stated reasons and those stated in appellant's opening brief, appellants conviction and death sentence must be reversed.

Dated: August 16, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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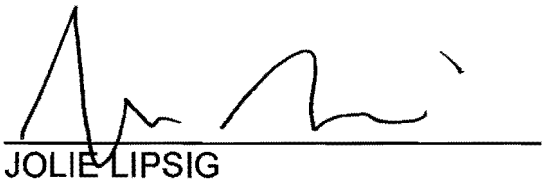

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.360(b)(1))

I, Jessica McGuire, am the Assistant State Public Defender assigned to represent appellant Albert Jones in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 22, 257 words in length.

Dated: August 16, 2010

JESSICA McGUIRE
Assistant State Public Defender
Attorney for Appellant Albert Jones

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Albert Jones***
Case Number: **Superior Court No. CR-53009**
Supreme Court No. S056364

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **August 16, 2010,** as follows:

Albert Jones
Post Office Box K-23800
San Quentin State Prison
San Quentin, CA 94974

Scott C. Taylor
Deputy Attorney General
300 South Spring Street,
110 W. A Street, Suite 1100
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **August 16, 2010**, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez