IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CLINTON CLARK, Defendant and Appellant.	No. S066940 (Orange County Superior Court No. 94CF0821)

APPELLANT'S SUPPLEMENTAL BRIEF

PETER GIANNINI
1015 Gayley Avenue, #1000
Los Angeles, California 90024
Telephone: (310) 474-9988
Fax: (310) 474-4442
email: p.giannini45@gmail.com

Attorney for Appellant
WILLIAM CLINTON CLARK

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Attorney for Appellant
WILLIAM CLINTON CLARK

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii
CLAIM 1 1
THERE WAS BATSON ERROR

CLAIM 2 12
EVIDENCE THAT APPELLANT ORDERED ANTOINETTE YANCEY TO KILL ARDELL WILLIAMS TO PREVENT HER FROM TESTIFYING WAS INSUFFICIENT AS A MATTER OF LAW, AND THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE STRUCK

TABLE OF AUTHORITIES

Federal Cases

Batson v. Kentucky (1986) 476 U.S. 79.....passim
Fernandez v. Roe (2002) 286 F.3d 1073.....8
Ford v. Norris (1995) 67 F.3d 162.....12
In re Winship (1970) 397 U.S. 358.....13, 16, 21
Jackson v. Virginia (1979) 443 U.S. 307.....14
Johnson v. California (2005) 545 U.S. 162.....passim
Paulino v. Castro (2004) 371 F. 3d 1083.....8
Ramseur v. Beyer (1992) 983 F.2d 1215.....12
Tankleff v. Senkowski (1998) 135 F.3d 235.....12
United States v. Battle (1987) 836 F.2d 1084.....11

State Cases

Dong Haw v. Superior Court (1947) 81 Cal.App.2d 15.....15
In re Sassounian (1995) 9 Cal.4th 535.....22
People v. Beeman (1984) 35 Cal.3d 547.....16
People v. Box (2000) 23 Cal.4th 115.....9
People v. Garrison (1989) 47 Cal.3d 746.....16
People v. Hall (1983) 35 Cal. 3d 161.....11
People v. Horn (1974) 12 Cal.3d 290.....17
People v. Horton (1995) 11 Cal.4th 1068.....22
People v. Howard (1992) 1 Cal.4th 1132.....8, 9
People v. Johnson (1980) 26 Cal.3d 557.....14
People v. Kunkin (1973) 9 Cal.3d 245.....15
People v. McGlothen (1987) 190 Cal.App.3d 1005.....8
People v. Morris (1988) 46 Cal.3d 1.....21
People v. Motton (1985) 39 Cal.3d 596.....11
People v. Ochoa (1999) 19 Cal.4th 353.....14, 21
People v. Osband (1996) 13 Cal.4th 622.....14
People v. Redmond (1969) 71 Cal.2d 745.....15
People v. Reynoso (2003) 31 Cal. 4th 903.....9
People v. Rowland (1992) 4 Cal.4th 238.....14
People v. Stanley (1995) 10 Cal.4th 764.....16
People v. Ward (2005) 36 Cal.4th 186.....7
People v. Wheeler (1979) 22 Cal.3d 258.....2, 3 ,6, 7

Statutes

California Penal Code Section 190.2.....13, 22
California Penal Code Section 187.....13

Other References

CALJIC 3.14.....17
CALJIC 6.10.....17

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Appellant's Supplemental Brief

CLAIM 1
THERE WAS *BATSON* ERROR

During jury selection, the prosecutor exercised a peremptory challenge to exclude a Native American from the jury. Defense counsel objected under *People* v. *Wheeler* (1979) 22 Cal.3d 258. (SC RT 7286, 7289.) In describing the struck juror, defense counsel stated, "I don't see anything in his questionnaire that would make him any different than other members that's on the jury. This is as vanilla as you can get, this juror." (SC RT 7286-7287.) In ruling that the defense had not made a prima facie case of discrimination, the court's stated standard was unconstitutionally high. The court required a defense showing of a pattern of prosecution peremptory challenges of striking *more than one* minority juror:

> Again, the court believes that there has been no prima facie showing of *pattern*. I agree that we are not at the point yet where the court can make a determination of a *pattern* of discrimination. This will be noted and of record, counsel, and we still have a long way to go on jury selection, and without prejudice to it being raised again and the court putting the people to proof, I'm making the finding right now that there is inadequate showing at this time of a prima facie showing of discrimination. *And if it pops up elsewhere in these proceedings*, other peremptories that fall into the same category, then of course, that will be highly suggestive of a prima facie case requiring [the prosecutor] to state the reasons why it was made. (SC RT 7294, emphasis added.)

The trial court erred in refusing to find that a prima facie case of discrimination had been shown under *Wheeler/Batson*. Thus, the issue is whether appellant had satisfied "the requirements of *Batson's* first step by producing evidence sufficient to permit the

[court] to draw an inference that discrimination ha[d] occurred." (*Johnson* v. *California* (2005) 545 U.S. 162, 170.) The trial court's refusal to find a prima facie case violated appellant's state and federal constitutional rights to trial by an impartial jury, equal protection, and due process of the law. *(People* v. *Wheeler*, *supra*, 22 Cal.3d 258; *Batson* v. *Kentucky* (1986) 476 U.S. 79.)

Factual Background

Mr. P. B. M., a Native American, was dismissed by the prosecutor with a peremptory challenge. (SC RT 7292-7293.) At the time of the defense challenge, there was one other minority on the panel, Mrs. R. (SC RT 7289.) According to the trial court, "only two non-caucasians have actually been called into the box. One excused by stipulation of the parties on his representation that he couldn't be fair to somebody." (SC RT 7292.) The defense articulated its challenge as follows: "My prima facie showing is there has been three, one by stipulation, one is remaining, and the only other one dismissed." (SC RT 7293.) The prosecutor argued that there was no prima facie showing and refused to state his reasons for striking Mr. M. Nor did the court require a statement of reasons. (SC RT 7294.)

In attempting to dissuade the defense from making a motion, the trial court recognized the necessity of comparative juror analysis: "But if you put this court in a position by a motion to make a hearing and to weigh and evaluate the reasons for [the prosecutor] dismissing this juror, and evaluating his stated reasons as against the answers,

and the reasons that other jurors have been excused, and I find he has not made an adequate showing, then my remedy, my sole remedy, is to discharge everybody here and start all over again." (SC RT 7288.)

As indicated above, the trial court found no prima facie showing, based on its unconstitutionally high requirement of more than one minority juror having been stricken by the prosecutor. (SC RT 7294.)

That the court should have found that the defense met its burden of a prima facie case is clearly demonstrated by a comparison of Mr. P. B. M.'s answers on the questionnaire and during voir dire with those of Caucasian prospective jurors who went unchallenged by the prosecutor. Such a comparison discloses that Mr. P. B. M. was more likely to impose the death penalty than the Caucasian jurors who were not challenged by the prosecutor. Nothing in Mr. P. B. M.'s questionnaire (Supp. CT 2368-2380) should have caused the prosecutor any alarm. Mr. P. B. M. was a retired shipping clerk; his wife a retired teachers' helper. (Supp. CT 2369.) He responded in the negative for every question designed to detect a bias. (Supp. CT 2374-2376.) He had served in the army in W.W. II. (Supp. CT 2377.) He owned a firearm. (Supp. CT 2378.)

While Mr. P. B. M. expressed some concern during voir dire about the length of the appellate process and how that might cause him to favor a life sentence (SC RT 5783, 5785), he quickly said that he would consider both penalties. (SC RT 5786.) Mr. P. B. M. was not philosophically opposed to the existence of the death penalty. (SC RT 5787.)

He repeatedly stated that he believed that he could impose a death sentence, including for an aider and abettor. (SC RT 5787-5788, 5790.) In response to the prosecutor's question, Mr. P. B. M. stated that he would vote for a death penalty law if it were on the ballot tomorrow. (SC RT 5789.) In response to the prosecutor's question concerning his tendency to favor a life verdict, Mr. P. B. M. stated, "Well, I think something like that would depend more or less on the particular crime. On the particular case, I mean. I couldn't say well, they should all be the same, because no two are alike. I'd have to judge more or less each individual case separately, judge the evidence and things like that." (SC RT 5790.) Clearly, Mr. P. B. M. was not even close to an auto-life juror. Instead, he repeatedly stated that he would return a death verdict if the evidence warranted it.

That the prosecutor unconstitutionally used a peremptory challenge to excuse Mr. P. B. M. is made clear by the prosecutor's treatment of Caucasian jurors. Other non-minority jurors were more likely than Mr. P. B. M. to have voted for a life sentence, but the prosecutor did not use a challenge to excuse such jurors. For instance, Mr. R. B. R., who was Caucasian (Supp. CT 3124) and was placed among the 12 other prospective jurors (SC RT 7098), stated during voir dire that the death penalty should only be used in "extreme cases." He elaborated, "There is always extenuating circumstances for which it's needed, in my opinion. It shouldn't be used for loss of property or anything like that, it should be for more than that loss." (SC RT 3716.) When asked by the prosecutor to

further elaborate, he stated, "If someone should be a convicted criminal, in other words, if the person has been found guilty beyond a reasonable doubt by a jury, that in that case if there were circumstances that this person could control to remove himself or herself from the situation, and they did not take that, and then they took another person's life, when doing so not only took that other person's life but endangered others, I think that somebody who considers taking somebody's life, that which cannot be replaced, and does it willingly and with contempt for knowing the rules of being a civilized person, I think that is a circumstance." (SC RT 3723-3724.) Regarding whether he could weigh the aggravating and mitigating evidence, Mr. R. B. R. indicated his pro-life stance when he stated, "I would have to look at it and actually stand back and check my values at that point, because you only get one shot at life, and I can't see me taking another person's life unless it is deserved, and that would be that part." (SC RT 3718.)

Clearly, Mr. R. B. R. was more likely to impose a life sentence than Mr. P. B. M. Yet the prosecutor did not use a peremptory challenge to strike Mr. R. B. R.

Applicable Legal Standards

Under both the California Constitution and the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, a prosecutor is prohibited from using peremptory challenges to exclude jurors because of group bias. (*People* v. *Wheeler*, *supra*, 22 Cal.3d 258 at pp. 276-277; *Batson* v. *Kentucky*, *supra*, 476 U.S. 79 at p. 97.) Both *Batson* and *Wheeler* require the trial court to conduct a three-step analysis. In step

one, the defendant bears the initial burden to make a prima facie showing that the prosecutor challenged the prospective jurors at issue based on group bias. If the trial court finds that a prima facie case has been shown, the burden shifts to the prosecutor in step two to provide race-neutral explanations for striking those jurors, and in step three the court must determine whether the proffered reasons are genuine. (*Batson* v. *Kentucky*, *supra*, 476 U.S. 79 at pp. 9698; *People* v. *Wheeler*, *supra*, 22 Cal.3d 258 at pp. 280282; *People* v. *Ward* (2005) 36 Cal.4th 186, 200.)

A defendant satisfies his or her burden at the first step of the *Wheeler/Batson* analysis by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson* v. *California*, *supra*, 545 U.S. 162, 169-172; *People* v. *Gray*, *supra*, 37 Cal.4th at p.186.) Had the trial court used the proper standard, the "totality of the relevant facts" supporting a prima facie case of discrimination in this case was more than "sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred." (*Johnson v. California*, *supra*, 545 U.S. 162, 170.)

This Court Must Review The Denial Of Appellant's *Wheeler/Batson* Motion *De Novo*

The trial court erred in finding that appellant had not set forth a prima facie case of discrimination in support of his *Wheeler/Batson* motion because the trial court explicitly used an unconstitutionally high standard, requiring that the prosecutor have used more than one peremptory challenge against minority jurors. (SC RT 7294.) Because the trial court applied the incorrect standard in denying appellant's motion, this Court must review

its ruling *de novo*, rather than deferentially. (See *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1015 [a ruling that is erroneous as a matter of law is not entitled to deference]; see also *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077 [on federal habeas, appellate court reviews a trial court's finding of no *Wheeler/Batson* prima facie case *de novo* where the court applied the improper "strong likelihood" standard]; *Paulino v. Castro* (2004) 371 F.3d 1083, 1090 [same].)

De novo review is required for another reason, as well. Since the trial court is presumed to have applied controlling California law, the court must have applied the improper "strong likelihood" standard then used by California courts, which *Johnson v. California*, *supra*, 545 U.S. at pp. 167-170, rejected as imposing too heavy a burden on the moving party. Because the trial court both explicitly and implicitly applied the incorrect standard in denying appellant's motion, this Court must review its ruling *de novo*, rather than deferentially.

While *Batson* and *Wheeler* both place the initial burden of making a prima facie showing of discrimination on the defendant, for many years this Court applied a standard for determining whether that step-one burden had been satisfied that differed significantly from the standard set by the United States Supreme Court. This Court long held that a prima facie case under *Wheeler* required evidence showing a "strong likelihood" that the prosecutor's use of peremptory challenges was motivated by improper group bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154, quoting *Wheeler*, *supra*, 22 Cal.3d 258,

280 [evidence showing a "strong likelihood" of discrimination required]; *People v. Reynoso* (2003) 31 Cal. 4th 903, 924 [same].) Under *Batson*, on the other hand, the defendant is only required to demonstrate a "reasonable inference" of bias to make out a prima facie case. (*Batson v. Kentucky*, *supra*, 476 U.S. 79 at p. 94.) In *People v. Box* (2000) 23 Cal.4th 1153, this Court attempted to reconcile those disparate standards by holding that a "'strong likelihood' means a 'reasonable inference.'" (*Id.* at p. 1188, fn.7.)

In *Johnson* v. *California* (2004) 545 U.S. 162,, the United States Supreme Court held that those two standards are different. Rejecting the holding in *Box* that the "strong likelihood" and "reasonable inference" standards are identical (*Johnson* v. *California*, *supra*, 545 U.S. 162, 166, fn. 2), the high court ruled that California's standard was "at odds" with the proper "reasonable inference" standard used under *Batson.* (*Id.* at p. 173.) The Court further held that the California standard is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case" for equal protection purposes. (*Id.* at p. 168.) In *People v. Gray*, *supra*, 37 Cal.4th at pp. 186-188, this Court acknowledged *Johnson*'s "reject[ion]" of its view that the "reasonable inference" and "strong likelihood" standards are the same. (See also *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 66-67.) Accordingly, this Court held that under *Wheeler*, as under *Batson*, the movant need only set forth facts supporting an "'inference of discriminatory purpose'" to make a prima facie showing. (*Gray*, *supra*, 37 Cal.4th at p. 186, quoting *Johnson*, *supra*, 545 U.S. 162, 168.)

Here, the trial court summarily denied appellant's motion, without asking the prosecutor to state race-neutral reasons for his challenges. The trial court's ruling amounted to an implicit finding that appellant had not established a prima facie case. (See *People v. Howard, supra*, 1 Cal.4th 1132, 1154 [when the trial court "denied the motion without asking the prosecutor to explain his challenges" it ruled "in effect that defendant had failed to establish a prima facie case" under *Wheeler*].)

The trial court used an unconstitutionally high yard stick to measure the defense's prima facie showing. Specifically, the trial court required a defense showing of a pattern of prosecution peremptory challenges of *striking more than one* minority juror. (See quote on pg 2 of this brief. (SC RT 7294.))

Yet a pattern is not required. Even "a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." (*Johnson, supra*, 545 U.S. 162, 169, fn. 5, quoting *Batson, supra*, 476 U.S., at p. 95 (internal quotations omitted).) Because the trial court unconstitutionally required a defense showing of more than one racially motivated strike, it did not even consider whether the defense had presented a reasonable inference of discrimination.[1] Had it done so by comparing the questionnaires and voir dire of the

[1] Given the trial court's requirement of a showing of a pattern of discrimination, it would have been virtually impossible for the defense to have *ever* made this showing, since there was only one other minority in the jury box. (SC RT 7292.)

struck juror, Mr. P. B. M, with the Caucasian juror who was also in the jury box but who was not struck by the prosecutor, the trial court would have concluded that the defense had met its step one burden. Clearly, Mr. R. B. R. was more likely to impose a life sentence than Mr. P. B. M. Yet the prosecutor did not use a peremptory challenge to strike Mr. R. B. R.

Reversal Is Required

This Court has unanimously held that a trial court's "error in finding that no prima facie case had been established [under *Wheeler/Batson*], and in failing to require the prosecutor to justify his challenges . . . is reversible per se." (*People v. Motton* (1985)39 Cal.3d 596, 608; *People v. Hall* (1983) 35 Cal.3d 161, 171 [three years after the trial it was "unrealistic" to think that on remand the prosecutor could recall his reasons for challenging minority jurors, or that the court could "assess those reasons"].) Thus, reversal of the convictions and death sentence is required here, because the record below demonstrates that appellant established a reasonable inference that the prosecutor engaged in the discriminatory exercise of peremptory challenges.

Moreover, when the trial court fails to conduct a proper analysis of a claim brought under *Wheeler* and *Batson*, a reviewing court cannot foreclose the possibility of discrimination. (See *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1086 [when trial court improperly found no prima facie case, reviewing court cannot determine if nondiscriminatory reasons existed for the challenges].) Accordingly, the failure to

consider *Batson* claims has been found to be "structural," and not subject to harmless-error review. (*Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 248; *Ford v. Norris* (8th Cir.1995) 67 F.3d 162, 171; *Ramseur v. Beyer* (3d Cir. 1992) 983 F.2d 1215, 1225, fn. 6 (en banc). Accordingly, appellant's convictions, special circumstance findings, and death sentence must be reversed.

CLAIM 2
EVIDENCE THAT APPELLANT ORDERED ANTOINETTE YANCEY TO KILL ARDELL WILLIAMS TO PREVENT HER FROM TESTIFYING WAS INSUFFICIENT AS A MATTER OF LAW, AND THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE STRUCK

Summary of argument.

The information in this case alleged inter alia that Ardell Williams "was a witness to a crime who was intentionally killed in retaliation for...her testimony in a criminal proceeding, but that said killing was not committed during the commission and attempted commission of the crime to which...she was a witness...." (7 CT 2470.) The complaint therefore alleged that Ardell Williams' murder qualified as a special circumstance within

the meaning of Penal Code section 190.2, subdivision (a)(10), the "witness-killing" special circumstance. (7 CT 2770.)

This allegation was attached to an allegation that, "[o]n or about and between May 23, 1993 and March 17, 1994," appellant and Antoinette Yancey "did...willfully and unlawfully conspire together to commit the crime of murder, in violation of Section 187(a)." (7 CT 2468.) The information also alleged that "[o]n or about March 13, 1994," appellant and Antoinette Yancey "did willfully and unlawfully and with malice aforethought kill Ardell Williams..." (7 CT 2468.)

However, the evidence adduced at trial did not show that appellant had intent to kill Ardell Williams. The entirety of the evidence in support of these allegations was circumstantial. The overwhelming majority of that evidence addressed the actions that Antoinette Yancey took toward planning and carrying out of the murder. The rest of the evidence only showed that Antoinette Yancey and appellant had a close dating relationship, and that appellant may have had motive to commit the murder. No evidence adduced showed, as the prosecution argued, that appellant intended to have that murder committed on his behalf.

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits conviction in criminal cases unless the prosecution has proved every element of the offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.) The same standard applies in proving special circumstance allegations.

(*People v. Ochoa* (1999) 19 Cal.4th 353, 444.) Because the evidence of this special circumstance fell below the requirements of the applicable federal constitutional standard, appellant respectfully submits that this special circumstance must be struck and the penalty of death reversed.

A more detailed discussion follows.

THE EVIDENCE DID NOT SHOW THAT APPELLANT HAD THE INTENT TO HAVE ARDELL WILLIAMS MURDERED

In reviewing a claim of insufficiency of the evidence in the context of special circumstance allegations, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*People v. Ochoa, supra,* 19 Cal.4th 353, 444; *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Rowland* (1992) 4 Cal.4th 238, 271.) This standard was derived from the basic substantial evidence tests set forth in *People v. Johnson* (1980) 26 Cal.3d 557, 576, and *Jackson v. Virginia* (1979) 443 U.S. 307, 319.

In passing on a claim of insufficient evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-- that is, evidence which is reasonable, credible and of solid value-- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d 557, at p. 578.)

However, the "substantial evidence" standard does not mean that *any*

evidence will be sufficient to support a verdict. To be "substantial," evidence must be "reasonable, credible, and of solid value." (*Ibid.*) The evidence must be "valid evidence, not evidence of no probative value." (*Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153.)

When the evidence on a particular issue is circumstantial, the court must scrutinize that evidence even more closely to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Kunkin, supra,* at 250.)

Although the court must review the record in the light most favorable to the judgment, it may not ignore evidence merely because it is favorable to the defense. Instead, the court must examine the whole record. "When the only testimony bearing on the issue is uncontradicted and negates guilty knowledge, even though it is the testimony of the defendant, a conviction...must be reversed for insufficiency of the evidence." (*People v. Kunkin, supra*, 9 Cal.3d 245, at 254.)

Moreover, if evidence is to be held legally "substantial," it must be sufficient to prove the special circumstance beyond a reasonable doubt. As the United States Supreme Court has held, "the Due Process Clause protects the accused against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.)

Tested under the foregoing standard, the evidence adduced at appellant's trial was manifestly insufficient to support the finding on the witness-killing special circumstance. This court has held that the language of the witness killing special circumstances section "contemplates the following elements: (1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed." (*People v. Garrison* (1989) 47 Cal.3d 746, 792; *People v. Stanley* (1995) 10 Cal.4th 764, 801.)

With regard to the second element, the evidence did not support a finding that appellant intended to have Ardell Williams murdered. Because appellant was in custody at the time of the murder, the prosecution argued that appellant was an accomplice with Antoinette Yancey, through either an aiding and abetting theory, or through a conspiracy theory. (1 CT 274-275 [Amended Information]; SC RT 10822-10823.) The prosecution argued that the intent element was met through appellant's aiding and abetting or entering into an conspiracy to commit murder, with Yancey. (SC RT 10823.)

Aiding and abetting a specific intent crime requires that "the aider and abettor must share the specific intent of the perpetrator." (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [finding CALJIC No. 3.01 inadequately defined aiding and abetting because it

failed to insure the aider and abettor would be found to have the required mental state.] The aider and abettor will "'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid.*) "Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging, or facilitating the commission of the crime is not criminal. Thus a person who assents to, aids, or assists in the commission of a crime without such knowledge and without such intent is not an accomplice in the commission of the crime." (CALJIC 3.14.)

A conspiracy requires an agreement between two or more persons with specific intent to commit a crime. (CALJIC 6.10.) The prosecution must show two specific intents: intent to agree, and intent to commit elements of the offense. (*People v. Horn* (1974) 12 Cal.3d 290, 296-298.)

Not a single piece of evidence directly supported a finding that appellant exhibited intent to commit murder, whether viewed through an aiding or abetting theory, or through entering into a conspiracy. Instead, the entirety of the evidence was circumstantial. Moreover, the overwhelming majority of the evidence did not relate to the issue of intent, but instead related to the prosecution's claims that (1) *Antoinette Yancey* (and not appellant) planned and carried out the murder of Ardell Williams (SC RT 10877-10881);

(2) Antoinette Yancey and William Clark had a close, personal relationship (SC RT 10871-10873); and (3) appellant may have had motive to want Ardell Williams murdered, because he knew she was going to testify against him at his trial. (SC RT 10834-10866; 10869.) .

The prosecution presented testimony of Alonzo Garrett, who was in custody at the same jail as appellant. Alonzo Garrett testified that Alonzo showed appellant an outline that Alonzo had made for his own case to appellant. (SC RT 9701.) Appellant "liked the way it looked and was wondering if I could do something like that for him." (SC RT 9701.) Therefore, Alonzo testified, appellant brought a transcript from his own case, and stated, "This right here is what I was talking about. This is what's keeping me here." (SC RT 9701.) The prosecution sought to portray appellant's actions as a statement about Ardell in particular, by pointing to a recorded conversation that Alonzo Garrett had with his friend, Melissa, in which Alonzo told her that appellant had stated, "This is the woman right here that could put me away." Yet Alonzo Garrett's sworn testimony was that appellant had *not* made the latter statement to Garrett, and that Garrett had not given an accurate account when speaking to his friend Melissa. Even if appellant *had* been referring specifically to Ardell Williams, this statement did *not* suggest an intent to harm Ardell Williams. At worst, it was complaint about the fact that Ardell Williams was testifying in his case, with no reference to any future harm.

The prosecution also attempted to convey intent by pointing to phone calls that

Alonzo Garrett made to Nina Williams, Ardell Williams' sister. Nina testified that Alonzo stated: "You know you guys are like family to me, and I want to warn you about this guy Bill...He said she is going to testify in this case. You need to warn her about how serious this is." (SC RT 9400.) Alonzo testified that he simply told Nina that he wanted to speak to Ardell. (SC RT 9500.) Regardless if which testimony is more accurate, neither scenario showed that *appellant* had the intent to do harm. The prosecution had no evidence that appellant told Alonzo that he intended to harm Ardell Williams. If anything, the conversation reflected Alonzo Garrett's speculation about the situation.

The prosecution also attempted to prove intent by referring to a letter from appellant to Yancey, dated a few days before Ardell's death, in which appellant stated, "Baby, I will be in bed with you in a few weeks. Stay strong and be careful." (SC RT 10885.) As defense counsel noted in closing arguments, this statement made no reference whatsoever to Ardell Williams. (SC RT 10992.) Nor does it make any reference to appellant's case. (See Exhibit No. 139.) While the prosecution suggests that this statement means that appellant thought he would be released due to the murder of Ardell Williams, there is no way that this could actually have occurred. (SC RT 10992.) The entire letter was clearly a love letter. In the context of the context of the whole letter, this passage more likely expressed appellant's hopes for their future together.

The prosecution also referred to a "note" found on Yancey's person on June 24,

1994, in which appellant suggested to Yancey that she have Norm testify that she deliver flowers because she was having a hard time finding Williams; that she explain the checklists that were found by saying she is an exotic dancer; and that she ask La Shawna to come forward as her alibi. (SC RT 10886.) This, the prosecution argues, showed "consciousness of guilt of William Clark for the murder of Ardell Williams" (SC RT 10889) and that "Clark solicited Yancey to fabricate evidence within...months of the murder of Ardell Williams." (SC RT 10894.) This evidence fails to demonstrate that Clark had intent to commit murder of Ardell Williams either as an aider and abettor, or as a co-conspirator. While it may show that appellant intended to help Yancey evade punishment for any actions she may have taken, it does not demonstrate that he intended to have Ardell Williams killed.

Finally, the prosecution pointed to a letter to Alonzo Garrett, found in appellant's jail cell, which the prosecution characterized as a "death threat." (The plain language of the letter, however, did not actually convey a threat. Instead, it was a series of disparaging remarks, with no mention of any future harm to Alonzo Garrett. (*See* Claim 61(E), in this brief, for a fuller discussion.) The prosecution suggested this conveyed a "consciousness of guilt." While it may have demonstrated concern that Alonzo might testify, it did not make any reference to the Ardell Williams murder. Garrett was acquainted with appellant's prior case stemming from the Comp U.S.A. robbery; as described above, Garrett and appellant compared notes on their cases. Moreover, as is

evident from the above review of the prosecution's evidence, there is no evidence which suggests that Garrett knew that appellant planned the murder of Ardell Williams. Thus, the letter to Garrett also fails to demonstrate that appellant had the intent to have Ardell Williams murdered.

The foregoing is the sum total of all circumstantial evidence pertaining to appellant's alleged intent to kill Ardell Williams. The evidence therefore does not establish that appellant had the requisite intent, either under an aiding and abetting theory or under a conspiracy theory. Without that intent, the prosecution failed to prove beyond a reasonable doubt that the special circumstance of murder of a witness occurred; and the special circumstance must be set aside.

AT A MINIMUM, THE DEATH JUDGMENT MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY TRIAL

As previously noted, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* " (1970) 397 U.S. 358, 364.) The same standard applies in proving special circumstance allegations. (*People v. Ochoa* (1999) 19 Cal.4th 353,444.) Thus, when there is insufficient evidence to support a special circumstance finding, due process principles require that the special circumstance be set aside and further proceedings on that special circumstance are barred by the double jeopardy clause. (*People v. Morris* (1988) 46 Cal.3d 1, 22, disapproved on another point, *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.) When this court determines that a

special circumstance must be set aside, the death penalty verdict must also be set aside and the case remanded for a new penalty phase trial if there remains at least one valid special circumstance and "there exists a reasonable possibility the jury would have returned a verdict of life imprisonment without possibility of parole, instead of death, absent the special-circumstance finding." (*People v. Horton* (1995) 11 Cal.4th 1068, 1140.)

Here, for reasons argued in more detail elsewhere in the AOB and ARB, appellant submits that the entire judgment must be reversed on numerous other grounds. However, even if the entire judgment did not require reversal, appellant submits that there are no valid special circumstances at all. The invalidation of the witness-killing special circumstance compels a remand for a new penalty phase trial because there is at least a reasonable possibility that the jury would have returned a life without parole verdict without the witness-killing special circumstance.

Moreover, as argued in Claims 52 and 53, there was insufficient evidence to support findings for robbery-murder, burglary-murder, multiple-murder, and lying-in-wait special circumstances. In the absence of these special circumstance findings, the jury could not have considered death as a penalty. (Pen. Code § 190.2)

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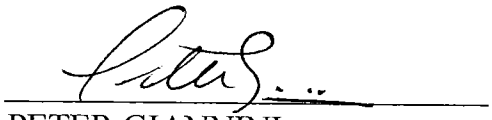
Under these circumstances, the elimination of the witness-killing special circumstance requires at a minimum a reversal of the death judgment and a remand for a new penalty phase trial.

Dated: March 24, 2010

Respectfully submitted,



PETER GIANNINI

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1015 Gayley Avenue, #1000, Los Angeles, California 90024.

On March 24, 2010, I served the foregoing document described as APPELLANT'S SUPPLEMENTAL BRIEF on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Daniel Rogers
Deputy Attorney General
110 West "A" Street, #1100
San Diego, CA 92101

Michael Lasher
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

William Clinton Clark
P.O. Box K-80703
San Quentin, CA 94974

Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92702

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Executed on March 24, 2010 at Los Angeles, California.

[X] (State)I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Peter Giannini
TYPE OR PRINT NAME


SIGNATURE

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CLINTON CLARK, Defendant and Appellant.	No. S066940 (Orange County Superior Court No. 94CF0821)

CERTIFICATION OF SUPPLEMENTAL BRIEF WORD COUNT

PETER GIANNINI
1015 Gayley Avenue, #1000
Los Angeles, California 90024
Telephone: (310) 474-9988
Fax: (310) 474-4442
email: p.giannini45@gmail.com

DEATH PENALTY

CERTIFICATION OF SUPPLEMENTAL BRIEF WORD COUNT

I certify that the Supplemental Brief received by the court on March 26, 2010 uses a 13 point Times New Roman font. According to the Microsoft Word word count function, the supplemental brief contains 5, 408 words.

Dated: March 28, 2010

Respectfully submitted,

PETER GIANNINI

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I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1015 Gayley Avenue, #1000, Los Angeles, California 90024.

On March 28, 2010, I served the foregoing document described as CERTIFICATION OF SUPPLEMENTAL BRIEF WORD COUNT on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Daniel Rogers
Deputy Attorney General
110 West "A" Street, #1100
San Diego, CA 92101

Michael Lasher
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

William Clinton Clark
P.O. Box K-80703
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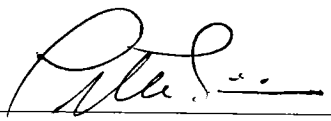
Executed on March 28, 2010 at Los Angeles, California.

[X] (State)I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Peter Giannini
TYPE OR PRINT NAME



SIGNATURE