IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JAMELLE EDWARD ARMSTRONG, Defendant/Appellant	)	S126560 Los Angeles County Superior Court NA051938-01

APPELLANT'S REPLY BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Judge Thomson Ong, Presiding

Glen Niemy, Esq
Attorney for Appellant
P.O. Box 764
Bridgton, ME 04009
207-647-2600
State Bar # 73646
gniemy@yahoo.com
fax 207-647-2322

DEATH PENALTY

TABLE OF CONTENTS

GUILT PHASE ISSUES

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION:

CALIFORNIA CONSTITUTION

CASE AUTHORITY

UNITED STATES SUPREME COURT:

OTHER CASE AUTHORITY:

STATUTORY AUTHORITY:

OTHER AUTHORITY:

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JAMELLE EDWARD ARMSTRONG, Defendant/Appellant	)	S126560 Los Angeles County Superior Court NA051938-01

APPELLANT'S REPLY BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Judge Thomson Ong, Presiding

I. THE TRIAL COURT COMMITTED FUNDAMENTAL CONSTITUTIONAL ERROR UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY EXCLUDING QUALIFIED POTENTIAL JURORS FROM PARTICIPATION IN THE PENALTY PHASE

A. SUMMARY OF APPELLANT'S ARGUMENT

Appellant argued both in his opening brief and supplemental brief that the trial court improperly granted the prosecutor's cause challenges to *nine* separate prospective jurors on the ground these prospective jurors had

personal views about the death penalty that would prevent or substantially impair the performance of their duties as jurors under in accordance with the trial court's instructions and the juror's oath. (AOB 41; *Wainwright v. Witt* (1985) 469 U.S. 412, 420.)

Regarding the burden of proof for such an excusal, in *People v. Stewart* (2004) 33 Cal.4th 425, 445, citing to *Witt*, this Court stated the prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors. Relying on the rulings of the United States Supreme Court, this Court has held that a trial court's error in excluding even a single juror who was not "substantially impaired" pursuant to the above law requires reversal of the death penalty, "without inquiry into prejudice." (*People v. Stewart, supra,* 33 Cal.4th at p. 454, citing to *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.) Hence, any such error mandates reversal of the death judgment.

B. SUMMARY OF RESPONDENT'S ARGUMENTS

Respondent argued that the record supported the trial court's granting of the challenges, hence the rulings of the trial court should not be disturbed upon appeal. (RB 31.) This argument was largely based upon the principle that if a juror gives conflicting or ambiguous answers as to questions about his views on the death penalty, the trial court is in the best

position to evaluate the juror's responses, so its determination as to the juror's true state of mind is binding on the appellate court. (RB 31.)

C. APPELLANT'S REPLY ARGUMENT

Appellant discussed the state of the law as it existed at the time of the filing of the opening brief. On July 12, 2012, appellant filed his supplemental brief[1], which discussed the implications of this Court's *Witt*-related reversal of the death penalty of appellant's co-defendant in *People v. Pearson* (2012) 53 Cal.4th 306.

Since the *Pearson* decision, there have been over a dozen cases decided by this Court on this very issue. Appellant undertakes a review of these decisions to unambiguously and unequivocally prove that the trial court exceeded its constitutional authority in granting eight of these challenges for cause.[2] While these improper challenges somewhat differed from one another in their facts, there was a single thread that held them together. Respondent urged that the voir dire responses of the jurors in question indicated equivocation or ambiguity as to the juror's personal capacity to impose the death penalty, hence mandating this Court to defer to the trial court's judgment. (RB 31.)

In reality, there was no such ambiguity or equivocation. The first eight of these nine jurors each made it perfectly clear that he or she could

[1] Hereinafter known as "ASB."
[2] After further analysis, appellant is not currently pursuing this argument as to the final juror, Ms. Clark. (AOB 131.)

and would vote for the death penalty in the appropriate case and held no personal beliefs that would impair them from doing so. The cases cited by respondent to stand for the proposition that the trial court's judgment is due deference by this Court are factually off-point for this very reason. (RB 31.)

In *People v. Phillips* (2000) 22 Cal.4th 226, 234 (RB 31), the juror in question stated she could never put anyone to death, and that it would be very hard to personally cast her vote for that penalty. Despite the fact the juror made some statements she could impose death, due to the ambiguity and equivocation of this juror, this Court supported the trial court's finding that she was substantially impaired. The same result occurred in *People v. Garcia* (2011) 52 Cal.4th 706, 743 (RB 31), where the juror gave conflicting answers about her ability to impose death, including a reference she did not "believe" in it. This Court held that due to the ambiguous nature of the statements, the trial court's decision to uphold the prosecutor's strike was supported by "substantial evidence." (See also *People v. Duenas* (2012) 55 Cal.4th 1, 10.)

Respondent also cited to *People v. Roybal* (1998) 19 Cal.4th 481, 519; (RB 31). However, as with the other cited cases, in *Roybal* the juror in question stated repeatedly that she did not believe in the death penalty, which created an equivocation in the mind of the trial judge.[3] None of the

[3] Respondent also cited to *People v. Howard* (1988) 44 Cal.3d 375, 417-418 and *People v. Heard* (2003) 31 Cal.4th 946, 958-959. In both such cases, the trial court granted the

eight prospective jurors so challenged by the prosecutor made any such statements in his or her voir dire.

These eight jurors did not even express this acceptable general preference of life over death. In fact, all of them fully recognized and personally agreed with the place that the death penalty occupies in our criminal justice system. They each recognized the death penalty served a societal function in the appropriate case and were willing to vote for it if the aggravating circumstances substantially outweighed the mitigating. The excusals of these jurors were based upon distortions of their voir dire answers and a misapplication of the law. (AOB 38 et seq.)

As discussed in the opening and supplemental briefs and below in the review of the latest cases of this Court, this Court has sharply differentiated between prospective jurors who might be generally opposed to the death penalty, yet could temporarily set aside their beliefs and follow the law, and those whose sets of moral values would prevent or substantially impair them from voting for death. The difference is plain; those who fall into the former category cannot be excused for cause due to their preference for the life penalty.

Since the *Pearson* decision in early 2012, this Court has had multiple occasions to differentiate exactly what constitutes substantial

---

prosecutor's *Witt* challenge because the prospective jurors made clear that either they could not vote for death (*Howard*) or could not consider certain statutory factors. (*Heard.*)

impairment as opposed to a simple preference of one penalty over another. While none of the post-*Pearson* decisions represented a departure from the longstanding law of *Witt*, the myriad of voir dire responses in these cases and this Court's rulings thereon, may be considered to provide a pathway to the resolution of the challenges in the instant case.

These recent cases clearly distinguish situations where the trial judge's interpretations of the juror's *conflicting* and/or *equivocal* voir dire answers must be given deference in this Court and those cases where the juror may have expressed an unequivocal personal preference for one penalty or the other, but also unequivocally expressed an ability to temporarily set aside his or her personal beliefs in deference to the law.

When the prospective juror's answers on voir dire are conflicting and equivocal, the trial court's finding as to the prospective juror's state of mind is binding on the appellate court *if supported by substantial evidence.* (*People v. Duenas*, *supra,* 55 Cal.4th, at p. 10, (emphasis provided). In *People v. Williams* (*Corey*) (2013) 56 Cal.4th 168, 182, this Court stated that "a juror's conflicting or ambiguous answers may indeed give rise to the (trial) court's definite impression about the juror's qualifications and its decision to excuse the juror deserves deference on appeal." (See *People v. Jones* (2012) 54 Cal.4th 1, 41.) Most recently, in *People v. Williams* (*George*) (2013) 56 Cal.4th 630, 664, this Court succinctly stated that "[a] prospective juror is properly excluded if he or she is unable to

conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations omitted.]" In addition, this Court stated " [o]n appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. [Citations omitted.] " (*Ibid.*; see *People v. Sousa* (2012) 54 Cal.4th 90, 123.)

On the other hand, in *People v. Watkins* (2012) 55 Cal.4th 999, 1014, this Court stated that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled—indeed, duty bound—to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." Moreover,

> the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror'.... A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt.*" (*Ibid.*; citing to *People v. Stewart, supra,* 33 Cal.4th at p. 446; *People v. Riccardi* (2012) 54 Cal.4th 758, 782 (this Court clearly distinguished a juror who would find that sitting on a capital jury would be difficult or uncomfortable from a juror who could not impose the death penalty, even if the law and evidence warranted its application.)
> (*People v. Watkins*, *supra,* 55 Cal.4th at p. 1014.)

People v. Jones, supra, 54 Cal.4th at p. 42 , citing to *Lockhart v. McCree* (1986) 476 U.S. 162, 172, stated that a prospective juror "who firmly opposes the death penalty is not necessarily disqualified from serving as long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." In *People v. Rountree* (2013) 56 Cal.4th 823, 843-844, this Court demonstrated exactly how seriously it took its above pronouncement in *Jones*. *Rountree* involved a claim by the defendant that the trial court erred in disallowing its cause challenge to a prospective juror who said he was "95% leaning toward death." However, the juror also stated that he could listen to all of the evidence and decide the case based upon the evidence and the law. The court determined this statement was sufficient to qualify the juror to sit. (*Id.* at p. 843.)

With due, logical, and rational consideration of the above law, appellant will further demonstrate based on the arguments in the opening brief, the trial court committed multiple errors in granting the prosecutor's challenges for cause for *Witt* reasons.

Prospective Juror Gerard Pfefer-Juror # 2645

Respondent argued there was substantial evidence that supported the trial court's exclusion of this juror for cause by claiming Mr. Pfefer said LWOP would be an "appropriate penalty" for an aider and abettor who "maybe...(was) standing over someplace and watching the crime take

place," adding that "maybe they don't deserve the death penalty." (RB 42; 7 RT 1432.) Respondent argued these were disqualifying remarks because the prosecutor never claimed that appellant was the actual killer in this case. (*Ibid.*) Respondent also stated appellant himself claimed that in essence he was less culpable, admitting only that his involvement was "just holding (the victim) down and stomping her a couple of times while Pearson raped her." (RB 42.)

In addition to the above, respondent claimed this prospective juror "expressed views on the death penalty that could substantially impair his performance as a juror." (RB 43.) These "disqualifying" views were that "LWOP can be a replacement for the death penalty" (26 CT 7411), that Mr. Pfefer repeatedly stated the death penalty was not a deterrent to crime and that "LWOP served the same purpose" (26 CT 7417; 7 RT 1429-1431), and that he was "torn" between the two penalties. (26 CT 7417.)

Respondent also stated this case was distinguishable from *Pearson* as Mr. Pfefer's views were equivocal in that he could reject death and vote for LWOP "[i]f the facts do not meet my ideas as to the use of the death penalty." (RB 44; 26 CT 7414.)

As demonstrated throughout the opening brief and herein, neither the prosecutor nor respondent has been able to distinguish between what they wished a prospective juror said in order to support the state's argument and what the prospective juror *actually* did say. Respondent took the same

approach as the prosecutor, either misrepresenting the comments of a challenged prospective juror or completely ignoring those aspects of the voir dire that that would ultimately defeat its argument.

In addition, respondent also was unable to reconcile its *own* Statement of Facts from its factual claims made in this argument. The argument that the prosecutor viewed appellant as a minor aider and abettor was in direct contrast with respondent's own Statement of Facts and simply an artifice to convince this Court that Mr. Pfefer's so-called "equivocal" statements about the application of the death penalty were disqualifying. (See *infra*.) However, the prosecutor knew full well the theory of her case was that appellant was an active participant in the crimes. According to respondent, Pearson stated to a third party in the presence of appellant that the three co-defendants set out that night looking for a girl. (RB 5.) The three of them found Ms. Keptra, and respondent argued appellant held her down so Pearson could rape her at will and appellant subsequently beat "the shit out of her." (RB 6.)

Further, Mr. Pearson made it clear to his confederates that he was "fixing to BKC this bitch," a rap term signifying that at the very least the victim was in for a terrible beating. (RB 7.) Respondent claimed while appellant was holding the victim's arms for Pearson, she screamed and resisted to which Pearson responded "let's kill this bitch," at which point appellant kept control over the victim and even "kicked her two or three

times in the abdomen." (RB 8; 22 RT 4781, 4794-4795.) Further, after the victim had been killed, the prosecutor maintained that appellant helped hide both her body and evidence of the crime. (*Ibid.*)

In addition, in the prosecutor's guilt phase argument to the jury she stated that appellant participated in all of the crimes (24 RT 5390) and warned the jury not to allow appellant to lay the blame on Pearson. (24 RT 5391.) She further argued the intention of all three men, from the very outset, was to get "sex" and rob the victim. (24 RT 5305.)

The entire thrust of the prosecutor's case was that appellant was equally responsible for and participated in all of the crimes committed. However, respondent now wants this Court to believe that Mr. Pfefer's comment that he might be more favorable toward LWOP if it was found that appellant was just "standing over some place and watching the crime take place," somehow rendered equivocal his ability to impose the death penalty on appellant. (7 RT 1432.)

The facts of the charged crime have nothing at all to do with the factual situation described by Mr. Pfefer in the paragraph above. Under no stretch of the imagination was the instant case a situation where the prosecutor alleged that an aiding and abetting defendant was just "standing around" caught in the wrong place at the wrong time. This was not a situation, such as discussed in *People v. Tully* (2012) 54 Cal.4th 952, 997-998, in which a prospective juror was properly excused when he stated that

he could never impose the death penalty in the very same type of case to which he was summoned to serve.

However, even more importantly, Mr. Pfefer *never* said or suggested that he could not impose the death penalty in any sort of aiding and abetting case, let alone *this* type of case where appellant was accused by the prosecutor of violent, hands-on brutality. Respondent claimed that Question 210 of Mr. Pfefer's questionnaire indicated this to be the case. (RB 42.) Read in conjunction with Question 209 (26 CT 7414), all that Mr. Pfefer indicated was he would not reject the imposition of either penalty and he gave the general type of case in which each respective penalty may be appropriate. (*Ibid.*) He never stated or even insinuated that he could not impose either penalty under the appropriate circumstances.

The most that the prosecutor was able to get Mr. Pfefer to say was in an aiding and abetting case where a defendant had minimal contact with the crime, he would "probably" impose LWOP. (RB 42; 7 RT 1433.) As discussed above, the instant case was not that sort of case. However, even if it was, the law is clear that a prospective juror who leans against the imposition of the death penalty does not disqualify him from service as long as he could follow the law and his oath. (AOB 42-44.)

The truth is Mr. Pfefer never gave any indication, equivocal or otherwise, that he could not impose the death penalty under the law. His pertinent answers to the questionnaire and his oral responses to the voir dire

questions are completely set forth in Argument I. (AOB 45-60.) There is nothing in the record that indicated any equivocation or ambiguity in his answers. On any number of occasions he indicated that he could do his duty and follow the law. (26 CT 7417, QQ 228, 231; 26 CT 7412-7417, QQ 198, 200, 203; 7 RT 1415-1417, 1423, 1424, 1427, 1428-1429, 1430, 1431, 1433; AOB 47-58.)

At no time did Mr. Pfefer make any equivocal statements about his *ability* to follow the law and impose the death penalty in a case where he personally believed that the aggravating circumstances substantially outweighed the mitigating. A review of the recent cases in which this Court upheld a challenge for cause reveals the excused prospective jurors made statements that clearly showed some sort of moral conflict in imposing the death penalty in any situation or at least an equivocation or ambiguity that was properly resolved by the trial court in favor of the prosecution.

In *People v. Duenas*, *supra,* 55 Cal.4th at p.10, a prospective juror indicated that she was not sure she could vote for the death penalty and had conscientious objections to its use. She further indicated that for the rest of her life she would question her decision to impose death. Another excused juror said on his questionnaire that he would always refuse to vote for death and did not know if he could set aside his personal views. (*Id.* at p. 13.) On his oral voir dire, the prospective juror made several self-conflicting remarks about his feelings about the death penalty. Among these statements

were that he couldn't pull the switch. (*Id.* at p. 14.) Yet a third juror appeared to be nervous and unsure in his answers, unable to settle upon his true beliefs as to the death penalty. (*Id.* at pp. 16-17.)

In *People v. Williams* (*Corey*), *supra,* 56 Cal.4th at pp.181-182, the prospective juror repeatedly expressed discomfort with imposing the death penalty and stated that even though she voted for it, she "would have to pass" if personally called to carry it out. While in her other answers the juror suggested she might be able to impose the death penalty, this Court ruled that "the juror's conflicting or ambiguous answers may indeed give rise to the (trial) court's definite impression about the juror's qualifications and its decision to excuse the juror deserves deference..." (*Id.* at p. 182; see *People v. Tate* (2010) 49 Cal.4th 635, 674, fn 22.)

In *People v. Williams* (*George*), *supra,* 56 Cal.4th 630, the trial court properly excused a juror who indicated her inability to "consciously consider" both possibly penalties. (*Id.* at p. 664.) This juror stated that she did not believe in the death penalty and if it was up to her she would not impose it. (*Ibid.*) Further, despite stating she could "go" with the "appropriate penalty," she could not think of any circumstances under which she would impose the death penalty. (*Ibid.*) After giving a series of conflicting answers, the juror said she probably should not be on the jury and began to cry. (*Id.* at p. 666.)

In *People v. Watkins, supra,* 55 Cal.4th at p. 1014, the properly excused prospective juror could not come up with any type of case for which she would impose the death penalty. She also stated that she would carry the guilt of killing someone with her and was "scared" to have to make the decision. She also stated that she could not make the decision with a clear conscience. This Court made clear that this situation was differentiated from *Stewart* in two "key respects" whereas in *Watkins*, the juror stated she was actually "scared" at the prospect of imposing the death penalty, and stated she could not impose it with a clear conscience. (*Watkins*, *supra,* 55 Cal.4th at p. 1017.)

There was absolutely nothing in Mr. Pfefer's voir dire answers that even remotely approached the disqualifying answers or ambiguous attitudes demonstrated by the properly excused prospective jurors in the above discussed recent cases. There was nothing that vaguely hinted at an "unalterable preference" against the death penalty, the standard propounded by the High Court in *Morgan v. Illinois* (1992) 504 U.S. 719, 734-736. As demonstrated in the opening brief and herein, Mr. Pfefer was not at all ambiguous about his beliefs. He never hinted at a personal belief that would keep him from following the law. As there was no ambiguous or equivocal answer given by Mr. Pfefer for the trial court to resolve, no deference was owed to the trial court's "resolution."

The cases cited by respondent in its brief are completely off-point because of profound factual differences from the instant case. In *People v. Ervin* (2000) 22 Cal.4th 48, 69-71 (RB 31), this Court upheld the excusal of a prospective jurors in a murder for hire case because they stated they could not vote for death for a defendant who did not actually commit the murder. Citing to *People v Pinholster* (1992) 1 Cal.4th 865, 916-917, this Court held "[e]ach juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." (*Ervin, supra,* 22 Cal.4th at p. 70.) As such *Ervin* had absolutely nothing to do with the instant case in which Mr. Pfefer made it clear that he could impose the death penalty in an aider and abettor case.

Respondent's citations to *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, also pertains to a fact situation completely dissimilar to the instant case. This case stands for the proposition that

> A prospective juror who would invariably vote for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause whether or not the circumstance that would have been determinative for that juror has been alleged in the charging document." (RB 43-44.)

Kirkpatrick fails to aid respondent's cause for a number of reasons. Mr. Pfefer never stated he would invariably vote for either penalty. He

stated that he would carefully consider and weigh all of the aggravating and mitigating circumstances. (26 CT 7412-7417, QQ 198, 200, 203; 26 CT 7417, QQ 228, 231; 7 RT 1415-1417; 1423, 1424, 1427, 1428-1429, 1430, 1431, 1433; AOB 47-58.) Finally, at least as it pertains to the bank robbery hypothetical, these circumstances would not be present at appellant's trial.

The reasons the trial court gave in granting the challenge for cause to Mr. Pfefer can almost stand alone to show that the judge had a completely mistaken concept of the law or harbored some inexplicable bias. (See AOB 59-60; 7 RT 1438-1439.) This was fully discussed in the opening brief, but bear reiteration. (See AOB 64.) The trial court's holding that Mr. Pfefer was attempting to use this trial as a "some sort of laboratory" was so utterly unsupported by any facts that it is impossible to even ascertain the thought process of the court. The accusation that Mr. Pfefer was practicing "intellectual sophistry" was similarly devoid of any rational logic. (7 RT 1438-1439.)

Further, the trial court's statement that Mr. Pfefer "flat out" stated he could not impose the death penalty on the hypothetical driver in the hypothetical get-away car in the "bank-robbery hypothetical" was simply false. Mr. Pfefer never said he could not. He simply stated that he would lean against it. (7 RT 1423, 1427-1428.) Perhaps this distinction was lost on the trial court. However, as the above discussed law indicated, it

certainly was never lost on this Court. [4] (See *People v. Stewart, supra,* 33 Cal.4th at p. 446, stating that even jurors who would find it very difficult to impose the death penalty are qualified to sit unless their personal views would prevent or substantially impair them from following the law.)

Respondent also referred to Mr. Pfefer's statements regarding how LWOP could be a replacement for the death penalty (26 CT 7411, Q 193.) and his answers indicated an equivocal response whether he could impose the death penalty. It is hard to categorize this as anything but desperate reaching by respondent. The juror never stated that one penalty is the same as the other. It is clear from the context of the questionnaire and the oral voir dire that Mr. Pfefer was simply stating he was open to either penalty depending on the circumstances.

Respondent also argued Mr. Pfefer did not feel the death penalty to be an effective deterrent and his answer indicated evidence of substantial impairment. (RB 43.) Once again, this argument has no merit based on the facts of this voir dire. Mr. Pfefer made it perfectly clear on oral voir dire that his personal beliefs as to the deterrent value would in no way affect his judgment. (7 RT 1430.) He also stated that his statements as to deterrence were based upon the state's failure to expeditiously carry out the death penalty, not upon any reluctance he had to follow the law. (*Ibid.*)

---

[4] In any event, as argued above, the difference between a completely ignorant "wheelman" in such a hypothetical and the type of conduct in which appellant engaged is so vast it rendered this hypothetical irrelevant.

However, perhaps the most strained argument made by respondent was that Mr. Pfefer should be excused because he said he would vote for LWOP "if the facts do not meet my ideas of the use of the death penalty." (RB 44; 26 CT 7414.) As stated above, Mr. Pfefer made it clear that he would follow the law and impose the death penalty if the aggravating factors outweighed the mitigating. The *only* way this can be done would be for Mr. Pfefer, or any other juror, to use his *own* judgment as to whether the death penalty should be imposed. This individual judgment of each juror, based upon the jurors' individual weighing of each factor according to his or her own internal scale, is exactly how the system is intended to work.

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
> (CALJIC No. 8.88.)

The excusal of Mr. Pfefer was based on a misrepresentation of the facts and ignorance or deliberate misstatement of the law by the prosecutor and the trial court. Mr. Pfefer's statements were either ignored or twisted beyond recognition. Even his motivations for sitting on the jury were

attacked. An honest man who served his community by obeying his summons to appear was somehow transformed into a devious, dishonest, "intellectual sophist."

There can be no doubt that respondent failed to prove this challenge was constitutionally valid. The totality of the record plainly contradicts respondent's claim that Mr. Pfefer's true state of mind was that he could not follow the law. (RB 45; *People v. Griffen* (2004) 33 Cal.4th 536, 558-561.) This alone requires reversal of the death judgment in this case.

Prospective Juror Sam Rutigliano-Juror # 3489

Mr. Rutigliano's answers were factually very similar to Mr. Pfefer. He indicated that California should continue to have the death penalty and it should be imposed in "very cruel cases." (AOB 80; 40 CT 11670.) In addition, Mr. Rutigliano stated that he could set aside his personal beliefs and decide the case on the facts and the law. (*Ibid.*) He also stated that he believed death to be the worst penalty and he could find for death in cases like those that involved torture and mutilation. (*Ibid.*) He further informed the court he completely understood and agreed with the process of determining the penalty and would be comfortable participating in this process. (AOB 81; 8 RT 1562-1565.) He further said he could impose the death penalty if a defendant was found guilty of a felony-murder robbery case because that would be the court's instruction allowing such a verdict. (8 RT 1569.)

However, respondent claimed that there was substantial evidence to support the trial court's granting of the challenge. Once again, respondent relied upon the juror's opinions in a hypothetical case where the defendant served only as a lookout or driver of a get-away car. (RB 58.) This hypothetical also included the "fact" that neither the lookout nor the driver knew the man in the bank had any intention of shooting anyone. (8 RT 1578.) Mr. Rutigliano answered that he "probably would not" impose the death penalty under these very limited circumstances. (8 RT 1579.)

It cannot be over-emphasized the prosecutor's challenges to these eight improperly challenged jurors rested not upon the jurors' moral hesitancy to impose the death penalty in general or in a case such as the instant case. It rested upon an alleged hesitancy in a case in which the hypothetical "wheelman" defendant who did not commit an act of violence himself, and did not even believe that such an act would be committed by the hypothetical man in the bank. In short, respondent seeks to change the entire paradigm of *Witt* and its progeny by requesting that this Court hold if a prospective juror cannot impose the death penalty in *every conceivable case* that the law allows, he or she is disqualified from serving on *any* capital jury. Needless to say, there are no cases that even hint such a rule would be constitutional.

Mr. Rutigliano was not summoned by the court to sit on a *hypothetical* jury, judging a *hypothetical* defendant who committed a

hypothetical crime. He was summoned to sit on the case of *People v. Jamelle Edward Armstrong*. In this case, the prosecutor had accused appellant of committing numerous acts of personal violence against the victim which directly led to her death. Mr. Rutigliano had made it clear that in "very cruel" cases he could impose the death penalty. (40 CT 11670, Q 186.) The prosecutor spent the greater part of the trial, including her argument, convincing the jury how cruel this case was. Therefore, it is an act of supreme cynicism for the prosecutor to now claim if Mr. Rutigliano "probably" could not impose the death penalty in such a morally ambiguous hypothetical case, he probably could not do so in the instant case.

Further, as stated above, even if this hypothetical had any relevance at all, Mr. Rutigliano only stated that he "probably" could not impose the death penalty. The fact that he did not favor the death penalty did not disqualify him from serving. (*People v. Stewart, supra,* 33 Cal.4th at p. 446; *People v. Riccardi* (2012) 54 Cal.4th 758, 782.)

In addition, respondent claimed that Mr. Rutigliano could not "see a death sentence" where robbery was the only special circumstance found true. (RB 58.) This is simply not accurate. After yet another series of confusing questions by the prosecutor, the juror stated that he could not impose the death penalty for a "robbery" and admitted he was confused. (8 RT 1582.) However, from the context of the entire voir dire, it was very

clear that Mr. Rutigliano meant he could not impose the death penalty for the sole crime of robbery. (*Ibid.*) When it was made clear that the prosecutor meant a felony-*murder* robbery, the juror stated that he was not sure if he would find for death, but that he could. (*Ibid.*)

What was of note in this exchange was that the juror specifically asked the prosecutor whether the question was "would" he impose the death penalty for felony-murder robbery or "could he." (7 RT 1582.) The prosecutor specifically stated she wanted to know if he "would." This was the wrong question. As stated above, the relevant inquiry was whether a juror could impose the death penalty or whether his personal beliefs would prevent or substantially impair him from doing so. Throughout his voir dire, Mr. Rutigliano made it clear whether he "would" impose the death penalty depended on the facts and the law. (AOB 81-86.) Therefore, his only logical answer at this point was the answer he gave that he was not sure. As stated above, *People v. Pearson*, *supra,* 53 Cal.4th at pp. 330-333 made it clear that not knowing in advance whether one would impose the death penalty is not a disqualifying factor. (ASB 4-6.)

Respondent also suggested the fact that Mr. Rutigliano felt the hypothetical person who held a victim's arms in an assault was not "equally guilty" as the person who beat the victim. (15 RT 1577.) This fallacy of the whole "equally guilty"scenario was discussed fully in the opening brief, as applied to Juror Bijelic. (AOB 77 et seq.) Whether the "holder" would be

guilty of murder in such a scenario cannot be ascertained from the hypothetical. The guilt, of course, would depend the facts and evidence of his intent.

In summary, Mr. Rutigliano *never* indicated he had any moral compunctions against the death penalty that would present or substantially impair him from carrying out his duty under the law and his oath. The improper excusal of even one prospective juror who was not substantially impaired in his or her ability to impose the death penalty is grounds for reversal without a showing of any additional prejudice. (*People v. Stewart, supra,* 33 Cal.4th at p. 454.) Therefore, as to this juror, respondent's cite to *People v. Roybal, supra,* 19 Cal.4th at p. 519 (RB 58) is again unavailing as there was no ambiguity or hesitation regarding Mr. Rutigliano's ability to impose death.

The prosecutor's challenges against Mr. Rutigliano were improperly sustained and for this reason alone, the death judgment must be reversed.

Prospective Juror Orlando Salazar- Juror # 5849

As indicated in the Opening Brief, Mr. Salazar instinctively understood his duty in this case was "to follow the law." (AOB 102; 20 CT 5962, Q 178.) He also made clear that this was more than an opinion he had as to the nature of his function as a juror. He stated, "I have a duty to my country and community. I have the time now and I will do my best to be fair and help bring a fair trial." (AOB 102; 20 CT 5964, Q 198.) There was

absolutely no equivocation as to the answer to the only relevant inquiry in the *Witt* paradigm. Not only did Mr. Salazar believe he could follow the law, he felt, as matter of personal honor, that he "*must*" follow it. (AOB 102; 20 CT 5964-5965, Q 231.)

As indicated in the Opening Brief, the prosecutor again did her best to separate Mr. Salazar from his honor-bound duty through various misrepresentations of this juror's answers to the trial court. (AOB 102-105.) She was guilty of prevarications when she stated that Mr. Salazar stated he needed to have a hatred of a defendant before he could impose the death penalty, that he would follow the doctrines of the Catholic Church, and that the death penalty was too ugly to ever think about. (AOB 106.) Every one of these statements of Mr. Salazar's so-called stated beliefs was untrue. (AOB 107-108.)

Mr. Salazar directly, unequivocally and unambiguously stated that any personal beliefs that death may be the worse penalty for himself would in no way prevent him from doing his duty. (6 RT 1223-1226.) He also made it unmistakably clear that regardless of what his Church may espouse, it was "his duty to follow the law." (6 RT 1214-1215.) In addition, Mr. Salazar never said that he had to hate a defendant before he could impose the death penalty upon him. Again, the state took yet another juror's statement completely out of context. Mr. Salazar simply stated that prior to hearing the evidence he had no ill-feelings against anyone and whether he

would impose the death penalty depended solely upon the evidence. (6 RT 1214-1216.)

Further, respondent claimed Mr. Salazar gave conflicting answers and that he could not state whether he could impose the death penalty until after he heard the facts of the case. (RB 70-72.) In addition, respondent indicated that the law required Mr. Salazar to be excused because he equivocated about his opinion regarding the death penalty by stating a personal thought that "death is quick, life is long, prison is hell." (RB 71.)

Respondent ventured that the above statement by Mr. Salazar differentiated his beliefs from the unequivocal beliefs of the improperly excused juror C.O. in the *Pearson* case. (RB 71, citing to *People v. Kaurish* (1990) 52 Cal.3d 648, 698-699.) *Kaurish* does not support respondent's position in that, as with the other seven jurors excused for cause, Mr. Salazar never equivocated his position on the death penalty. In reality, Mr. Salazar was even more definite about his ability to follow the law than was the *Pearson* juror. It also must be remembered that it was the very *same* prosecutor, the very *same* judge, and the very *same* factual case in *Pearson* as in the instant case. In appellant's supplemental brief, the holding of *Pearson* is discussed as it related to this case. In *Pearson*, this Court held the fact that a juror may be uncertain as to how she "feels" about the death penalty does not require disqualification as long as the juror makes clear she can follow the law.

The *Pearson* Court made it clear that the law

> Does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the High Court recently reminded us, "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Personal opposition to the death penalty is not in and of itself disqualifying, since [a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. It follows the mere absence of strong, definite views about the death penalty is not itself disqualifying, since a person without strong views may also be capable of following his or her oath and the law." [Citations omitted.]
> (*People v. Pearson, supra,* 53 Cal.4th at p. 331.)

In summary, this Court held

> To exclude from a capital jury all of those who will not promise to embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously considering all of the sentencing alternatives, including the death penalty where appropriate," the juror is not disqualified by his or her failure to enthusiastically support capital punishment.
> (*Ibid.*)

This is precisely what the prosecutor believed she deserved in this case, a jury who could *guarantee* her it would so enthusiastically embrace death it could assure her it would vote for death without having heard any evidence, whatsoever. She wanted a jury to swear to her it could embrace

death as the penalty for a hypothetical "wheelman," who may or may not have even qualified for the death penalty under the law. (AOB 66-67.) She wanted a jury who could impose the death penalty on the "holder" in the assault hypothetical without even bothering to inquire into his intent. (AOB 77-78.) She wanted a jury so predisposed to death it would all but assure her it would impose death on *every conceivable death-eligible defendant* without even considering the underlying facts.

However, the most disturbing comments in regard to Mr. Salazar did not come out of the mouth of the prosecutor. The trial judge's misstatement of one of Mr. Salazar's statements was so blatant and so preposterous as to again raise the question of bias. In giving its ruling granting the challenge, the trial judge stated he personally observed Mr. Salazar emotionally waving his right fist and "emphatically" proclaiming, "I'm not for death, death, death." (6 RT 1232-1233.) As discussed in the opening brief, what Mr. Salazar *really* said was that he was not going to tell the court that he is for "death, death, death," regardless of the factors. He could not say this because he was not for death; he was "for justice." (AOB 108-109; 6 RT 1224-1225.) Mr. Salazar stated it was only after hearing all of the evidence that he could determine whether death was the appropriate punishment. (*Ibid.*)

It is hard to imagine a scenario under which the trial court could have innocently misconstrued Mr. Salazar's mature, thoughtful answer with

the screed the court ascribed to him. The trial court seemingly went out of its way to demonize Mr. Salazar as an emotional radical, just as it went out of its way to paint Mr. Pfefer as an "intellectual sophist."

The trial court's conduct with both of these jurors cannot but raise serious questions about the trial court's fairness throughout the jury selection process and, indeed, throughout the trial. These type of mischaracterizations continued with the other jurors excused for *Witt* reasons, as well as the four African-American jurors improperly excused despite valid *Batson* objections. (See Argument II, *infra.*)

The excusal of Mr. Salazar for cause was a clear violation of appellant's constitutional rights. In and of itself, this violation merits reversal of the death judgment.

Prospective Juror Maxine Morales- Juror #2442

Respondent claimed there was substantial evidence to support the challenge of Ms. Morales after she stated that she could not impose the death penalty on the hypothetical "wheelman." Respondent argued her responses were equivocal to her other answers and that her beliefs would substantially impair or prevent her from following the law. (RB 62.)

Respondent did not take up the prosecutor's argument that the juror could not possibly impose the death penalty because she did not know how she "felt" about the death penalty. (RB 59-62.) Perhaps this was because

respondent understood that *Pearson* made it clear that such a juror cannot be excused for this reason alone.

In any event, appellant has fully discussed why the use of the "bank robbery" hypothetical was ineffective in proving that a juror could not impose the death penalty. This Court has stated that the trial court's obligation in voir dire was to "probe prospective juror's death penalty views as to the general facts of the case." (*People v.Butler* (2009) 46 Cal.4th 847, 860; AOB 67-69.) The inquiry may not be so abstract "that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties *in the case being tried.*" (*Butler, Id.* at p. 860, emphasis provided; see also *People v. Tully* (2012) 54 Cal.4th 952, 997-998 [the trial court properly considered a hypothetical factual situation very similar to the factual situation being tried.] To refer to the bank-robbery hypothetical as "abstract," would be extremely generous.

Yet a *fourth* constitutionally-qualified juror was unconstitutionally barred from the jury panel by an improper cause challenge. This error was three more than was necessary to secure a reversal of the death judgment.

Prospective Juror Mila Hanson – Juror #9961

Respondent claimed the challenge against Ms. Hanson was properly granted by the trial court because she gave conflicting answers as to whether she could impose the death penalty on the man "holding" the victim. (RB 78.) In addition, it was argued that Ms. Hanson would only

impose the death penalty on a "bad person."(*Ibid.*) Respondent also argued the fact that Ms. Hanson was speaking in a low voice indicated that she was being evasive. (*Ibid.*)

Once again, respondent misstates this juror's position. Respondent argued before the juror could impose death, the defendant must have a criminal record. (RB 78; 6 RT 1265.) However, there was no such reference to this remark in the record. In reality, Ms. Hanson stated she would only impose the death penalty on a "bad person." (6 RT 1265-1266.) Respondent failed to mention that Ms. Hanson made it very clear once a defendant was convicted in the guilt phase, he becomes a "bad person," according to her ethos. (6 RT 1267.)

This entire line of questioning was patently absurd. Basically, the prosecutor asked for the juror to be excused because she could not execute "good people." She seemed to be bothered by the fact that Ms. Hanson would first have to see appellant convicted, hence becoming a "bad person" before she could impose death. To explain the degree to which the prosecutor twisted our death penalty law to justify her challenge would be an insult to this Court's collective intelligence.

Respondent's claim the juror equivocated as to her feeling about imposing the death penalty on the holder is also based on a twisting of the juror's comments. Respondent argued Ms. Hanson stated she could not impose the death penalty on this hypothetical individual. (6 RT 1261-1262.)

Once again, that is not what Ms. Hanson said. She was asked whether or not she could impose the death penalty on the holder of the hypothetical victim. Ms. Hanson stated "[i]t should be more to it than just holding." (*Ibid.*) It was at this point the prosecutor once again told her she must answer based on the information given in the hypothetical only, stating that was all the evidence she had. (6 RT 1262.) It was only at this point that the juror said she could not impose the death penalty.

Ms. Hanson was quite correct. A lot more was needed, namely the holder's intent and the surrounding facts. If one does not know the holder's intent, the holder cannot even be found guilty of first degree murder, let alone sentenced to death. (AOB 77-78.) Throughout the voir dire of these jurors, the prosecutor's insistence that the juror need have no other information than given in the hypothetical misused the process. As stated above, both the bank robbery and assault hypotheticals were legally inadequate because there were threshold questions that needed to be addressed before any such hypothetical person could be convicted of capital murder.

Appellant also wants to draw this Court's attention to the exchange between the prosecutor and Ms. Hanson. (6 RT 1263-1266.) Ms. Hanson told the prosecutor that she could impose the death penalty on the hypothetical holder. The prosecutor pursued her with what only can be described as vigorous cross-examination, reminding her that earlier in the

voir dire she said she could not. First, as stated above, she never said she could not. The prosecutor had kept from her the additional information she needed to make such a decision. Once she got her legs under her and realized what was really on going, she informed the court on multiple occasions she could impose the death penalty on this person. Her answer was not an equivocation. It was the result of prosecutorial questions that from all appearance seemed to be framed to confuse lay jurors.

Respondent's final claim is the trial court knew from Ms. Hanson's soft voice that she was equivocating or trying to hide her "true" feelings. No record was made as to any equivocation or alleged fraud on the part of Ms. Hanson. The court actually ascribed the low voice to "shyness." (6 RT 1250.) The second time the judge asked the juror to speak up was to remind her that the court reporter needed to take down what she said and the reporter was on the other side of the courtroom. (6 RT 1260.) The reference that the prosecutor made at 6 RT 1263 involved the court reporter who did not hear the answer to one question. The final reference did indicate a bit more of a problem with the juror keeping her voice up, but there was nothing on the record to indicate a lack of honesty as opposed to a lack of volume. (6 RT 1266-1268.)

From a juror's natural shyness and low voice, the prosecutor contrived a reason to excuse her. There is nothing in the record to indicate that anyone thought this juror was anything more than a quiet woman set

upon by an ambitious prosecutor who made it a point to confuse the juror. There was not a single answer by this juror to support a claim her quietness was anything that indicated equivocation.

Nowhere in California or federal law exists a case that hints a juror's voice level justifies an excusal. The ascribing of any nefarious motivation to Ms. Hanson's quietness was simply business as usual in this voir dire; a voir dire replete with misrepresentations of a juror's beliefs, misuse of the law, and the refusal to give the jurors enough information to allow informed answers to the prosecutor's questioning. It cannot be forgotten the defense virtually begged the judge to clear up the law for the jurors so they could give informed answers to the prosecutor's questions. (See 8 RT 1527 et seq.; AOB 87 et seq.) The trial court refused to do so. As such, this entire voir dire became an exercise in exposing lay people's misapprehension of the law. The jurors who saw through this tactic were accused of being "too smart" or "sophists."

Throughout the entire jury selection process, the prosecutor conducted voir dire that had nothing at all to do with the case at hand. It was as if Mr. Armstrong had been accused of being the driver of a robbery get-away car, or engaged in a fight. Perhaps the prosecutor would have had better arguments for excusing some of these jurors if this were the case. However, it was not. In order to groom and ready the death penalty jury, the prosecutor was allowed to simply voir dire on a make-believe case,

using whatever misconceptions jurors may have about the law to stand uncorrected.

Nothing constitutionally adequate could come of this and nothing did. The entire voir dire process was hopelessly infected with make believe-facts, make believe-law, misstatements of the juror's plain spoken answers, and inexplicable personal judgments passed upon some of the excused jurors by the trial court.

The death judgment cannot be allowed to stand.

Prospective Juror Kibbi Green- Juror #3554

The challenge against Ms. Green was made on the sole basis that she believed it was the defense attorney's job to prove the defendant "innocent." (11 RT 2254-2255.) The trial court granted the prosecutor's challenge on this sole ground. (11 RT 2262-2263.)

Respondent stated the fact that Ms. Green said she could not impose the death penalty on the hypothetical defendant driving the hypothetical car, also indicated that she was unfit to serve as a juror on a death penalty case. (RB 92-93.) This argument is wrong. Regarding the issue as to the juror's inability to impose the death penalty on aiders and abettors, Ms Green never said she could not impose the death penalty on the "man in the car." (11 RT 2251-2252.) While she seemed initially confused by the nature of the questioning, she finally understood the questioning enough to say that she would "probably" impose the death penalty on this hypothetical man.

(11 RT 2252.) In addition, as stated above, the entire hypothetical was both factually irrelevant and legally flawed.

The excusal of Ms. Green because she believed defense counsel's job was to prove the defendant's innocence was portrayed by both the prosecutor and the trial court as protecting appellant from his own attorney. In reality, the use of this answer to excuse the juror was yet another exercise in cynicism and provided the prosecution with a tribunal stacked in favor of the death penalty. As stated in the opening brief, there was nothing in Ms. Green's voir dire that even hinted that she could not follow the law of presumption of innocence. (AOB 129 et seq.)

What was most disturbing was that the trial court would not allow trial counsel to reopen the voir dire to ask the juror about her answer. (11 RT 2260.) The trial court never explained the refusal to allow this perfectly legal and natural request. (11 RT 2260-2262.) Instead, for appellant's "own good," the court, over objection of appellant's counsel, excused Ms. Green.

In Argument II, *infra,* appellant discussed in great detail the prosecutor's use of her peremptory challenges in such a way to remove all black males from the jury. While Ms. Green was not male, she was a young black person. Appellant has demonstrated the prosecutor's questions about the presumption of innocence were merely a pretext to rid the jury of yet another African-American. (See generally, AOB, Arg. II.)

Prospective Juror Leonardo Bijelic- Juror # 6179

Once again, the challenge of this otherwise qualified juror was made and upheld on the ground that Mr. Bijelic could not impose the death penalty on the make-believe people in the prosecutor's legally incomplete and factually dissimilar "hypotheticals." Once again, the juror was denied the opportunity to serve on the theory that if he could not impose the death penalty in every conceivable case in which it was legally allowed, he could not impose the death penalty in any case.

Respondent claimed Mr. Bijelic was substantially impaired in that he stated he could not impose the death penalty on the hypothetical person who held the hypothetical assault victim. (RB 49.) This was not what Mr. Bijelic said. He clearly stated that he was assuming that the "holder probably did not know that (the victim) was going to be severely beaten." (11 RT 2124.) In other words, Mr. Bijelic stated that he would be "kind of undecided" in a case where he did not know the holder's intent. (*Ibid.*)

Once again, the incomplete nature of this hypothetical made it hopelessly confusing. As fully discussed in the opening brief, before the so-called "holder" could even become *eligible* for the death penalty, he must share the intent of the person committing the attack. This hypothetical does not involve a felony-murder as the crime of assault is not a predicate felony. (AOB 77-78.) As stated in the opening brief **(AOB)** the trial judge was quite correct in calling Mr. Bijelic "very smart." (11 RT 2127.) At the

very least he was too smart to fall into the prosecutor's trap of answering irrelevant and incomplete hypotheticals.

The now all too familiar "bank-robbery" hypothetical was once again misused with this juror. As stated above, the "bank-robbery" hypothetical was as flawed as the "assault" hypothetical. Mr. Bijelic never stated that he could not impose the death penalty in an aider and abettor situation. He stated that in the make-believe robbery hypothetical, he *could* impose the death penalty on the wheelman after weighing all of the aggravating and mitigating circumstances (11 CT 2126), and that whether this wheelman knew the shooter had a gun would be one of those circumstances.

However, leaving behind the prosecutor's hypothetical world and returning to reality, there was no remote, detached, ignorant, get-away driver in the real world. The trial judge, contrary to *People v. Butler*, *supra,* 46 Cal.4th at p. 860; *People v. Earp* (1999) 20 Cal.4th 826, 853, and other decisions of this Court (AOB 68), allowed the entire voir dire process to be hijacked by fictional characters. The hypothetical was just a ploy to get the unwanted jurors to say that there might be a death-eligible defendant, somewhere in the legal universe, upon which they could not impose the death penalty.

Further, respondent was completely wrong in stating that Mr. Bijelic's voir dire was clearly distinguishable from the voir dire of the

Pearson juror in that Mr. Bijelic repeatedly stated he could not impose the death penalty. (RB 46 et seq.) This juror *never* indicated he had any generalized opposition to the death penalty. In fact, he made it clear that he was "for it," and felt it was used "too seldom." (AOB 72.) He also made it clear that he had no personal beliefs that would prevent him from imposing the death penalty based upon the facts and the law. (AOB 73.) In fact his only concern was that LWOP prisoners may eventually be released under a change of law. (AOB 73-74.) As such, respondent's cite to *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116 (RB 50), as it pertained to this juror, was unavailing

The only thing that Mr. Bijelic could not do was answer the prosecutor's factually and legally fatally flawed hypotheticals, hypotheticals created for the purpose of confusing potential jurors and eliminating neutral jurors in order to create a jury panel that would impose death upon every conceivable eligible defendant. In short, these hypotheticals were intended to derail the entire purpose of a *Hovey* voir dire; i.e., determining whether a potential juror would be substantially impaired in imposing the death penalty in a case similar to the one he or she would be hearing. (*People v. Butler*, *supra,* 46 Cal.4th at pp. 853-859.)

Prospective Juror Lorraine Mendoza- Juror # 3058

Appellant respectfully relies upon the argument in the Opening Brief. (AOB 121-125.)

Prospective Juror Christina Clark – Juror # 9432

Appellant withdraws the argument based on the excusal of this juror.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S *WHEELER/BATSON* MOTIONS AND MOTION FOR A MISTRIAL VIOLATED STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL OF THE ENTIRE JUDGMENT

A. CONSTITUTIONAL UNDERPINNINGS

The Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit a state prosecutor from discriminatorily exercising peremptory challenges on the basis of a juror's race or membership in an otherwise "cognizable group," such as religion or national origin. (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-87; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238.) In addition, this prohibition also rests upon a defendant's state and Sixth Amendment federal constitutional right to an impartial jury drawn from a representative cross-section of the community. (*Batson, supra,* 476 U.S. at p. 89; ***People v.*** *Wheeler* (1978) 22 Cal.3d 258, 265-273; *People v. Lenix* (2008) 44 Cal.4th 602, 612; Calif. Const., art I sec. 16; U.S. Const. Amend. VI.)

It is clear that the prosecutor has the right to peremptorily challenge any prospective juror for non-discriminatory purposes. The differentiation

of the discriminatory use of peremptory challenge and a "race-neutral" challenge has been the pivotal question that has occupied both this Court and the United States Supreme Court when deciding "*Batson/Wheeler*" cases.

To this end, a three-part inquiry has been developed by the High Court. First, the defendant is initially burdened with establishing a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 162, 168, citing to *Batson, supra,* 476 U.S. at pp. 93-94.)

Secondly, "once the defendant has made to a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justification for the strikes." (*Johnson, supra,* 545 U.S. at p. 168, citing to *Batson, supra*, 476 U.S. at p. 94.)

Finally, "[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination," by a preponderance of evidence. (*Johnson, supra*, 545 U.S. at p. 168.)

Often, one of the most indispensable tools for determining the true reason for the prosecutor's peremptory strikes is the use of a comparative analysis consisting of "side-by-side" comparisons of the members of the cognizable group with other prospective jurors who were allowed by the

prosecutor to serve. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241.) As stated in *Miller-El,* "If a prosecutor's proffered reason for striking a black panelist applied just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Ibid.*; *People v. Lenix* (2008) 44 Cal.4th 602, 621.)

Further, "a per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable: potential jurors are not products of a set of cookie cutters." (*Miller-El, supra,* 545 U.S. at p. 247, n.6.) To truly isolate whether or not race was the reason for the prosecutor's challenge, the jurors compared must be comparable in all respects that the prosecutor proffered in his or her explanation for the challenge. (*Miller-El, supra,* at p. 247.)

Ultimately, "[i]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters are the real reasons why they were struck." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

In the instant case, the strikes to all four African-American males were made with discriminatory intent. As such, the entire judgment must be reversed.

As demonstrated in Argument I, *supra,* appellant was unconstitutionally deprived of his right to a properly constituted penalty

phase jury pursuant to *Wainwright v. Witt, supra,* 460 U.S. 412, and *People v. Stewart, supra,* 33 Cal.4th 425. However, in addition to the trial court's eightfold error in misapplying the death-qualifying standards of *Witt* and *Stewart,* a pattern arose as to the race and national origin of the potential jurors challenged for cause by the prosecutor. Of the eight prospective jurors improperly excused in the *Hovey* phase of the voir dire, six were African-American, Jewish, or Hispanic. The two others were nationalized citizens, born outside this country. Further, the reasons for some of these excusals were not simply wrong, they were patently absurd.

The prosecutor's plan to create a jury virtually devoid of any minority groups would fully reveal itself in her peremptory striking of *all* male African-American jurors from the jury panel. A total of six black prospective jurors, four of them male, survived the death-qualifying process. Of these, all four African-American males were peremptorily stricken by the prosecution.

Considering the racially charged nature of this case, there can be no question that it was in the prosecutor's strategic interests to remove all African-American male jurors from the jury.

Respondent argued that the prosecutor's exercise of her peremptory challenges was not unconstitutional. Her arguments were contrary to the facts of this case and the law as promulgated by the United States Supreme Court and this Court. Her individual arguments are addressed, below.

B. BLACK MALES ARE A "COGNIZABLE GROUP" PURSUANT TO *PEOPLE V. WHEELER*

This Court in *People v. Wheeler, supra,* 22 Cal.3d at pp. 266-267 set forth why and how a "cognizable group" is defined.

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it can be drawn from "a representative cross-section of the community." The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

Respondent argued that "neither the [United States] Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males' may establish a cognizable group for *Batson* purposes." (RB 129; citing to *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812, overruled other ground by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.)

Respondent's claim black males do not represent a "cognizable group" under the law is without either legal authority or logic. Firstly, this

Court has recognized that "black women" constitute a cognizable group for *Batson/Wheeler* purposes. (*People v. Motton* (1985) 39 Cal.3d 596, 605-606; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 735).

> Black women constitute a "cognizable group." A group to be cognizable...must have a definite composition...there must be some factor which defines and limits the group...A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. There must be a common thread which runs through the group, a basic similarity in attitudes, ideas or experience...[citations omitted] Where Blacks comprise a significant portion of the population - particularly in Alameda County where blacks comprise the majority population in some areas - black women are a vital part of that 'ideal cross-section of the community' that should be represented on jury panel [citation omitted]. They share 'a common perspective arising from their life experience' and their participation on a jury '... enhance[s] the likelihood that the jury will be representative of significant community attitudes. [citation omitted]
>
> This Court further stated,
>
> the 'concurrence of racial and sexual identity,' (as aptly phrased by defense counsel) which informs the attitudes of this group. This is of special import when we consider the fact that black women face discrimination on two major counts - both race and gender - and their lives are uniquely marked by this combination. When the court asked: 'What function does a black woman fulfill that the white woman doesn't [on a jury]?' the entire thrust of *Wheeler* was overlooked. It is not a question of the merits of one group in contrast to another. At the very core of *Wheeler* is the notion that diversity '[in] beliefs and values [that] jurors bring from their group experiences' must be encouraged in order '... to achieve an overall impartiality' in their decision-making processes [citations omitted].
> (*People v.Motton, supra,* 39 Cal.3d at p. 606.)

Citing to the United States Supreme Court decision in *Peters v. Kiff* (1972) 407 U.S. 493, 504, this Court further stated,

> [t]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases ... *when any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.* It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.
> (*Motton, supra,* 39 Cal.3d at p. 606 Italics in original.)

Therefore, contrary to respondent's argument, the law of the State of California, under the right circumstances, allows for the "combination" of gender and race for a cognizable group for *Wheeler* purposes.

Further, even if only all African-Americans, regardless of sex, could constitute a "cognizable group," the systematic exclusion of African-Americans of one sex would inevitably result in a disproportionate underrepresentation of African-Americans generally on the jury. (*Motton, supra,* 39 Cal.3d at p. 606, fn 2.) In the instant case, the systematic exclusion of African-American males reduced the number of African-Americans on this jury from five to one.

Respondent's suggestion that the federal law as to what constitutes a "cognizable group" is somehow different than the law of California and

should therefore trump the law promulgated by this Court has no merit. (RB 129.) Respondent relied on *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812, to stand for the proposition that the Ninth Circuit has ruled "gender and race cannot be joined to form a cognizable group for *Batson* purposes." (RB 129.) However, this not what *Turner* said. The court in *Turner* indicated that "[a]lthough the issue of whether African-American males could constitute a *Batson* class likely is worth consideration in light of recent holdings that gender as well as race is an impermissible basis for peremptory challenges [citations omitted]," the *Turner* court declined to consider the issue because of a federal procedural bar.

In any event, *Motton* is the law of this state. Respondent's citation to Justice Brown's concurring opinion in *People v. Young* (2005) 34 Cal.4th 1149, 1235-1238 to support its contention is completely unavailing. While the logic of Justice Brown's analysis of cognizable groups has general merit, it simply does not apply to African-American males.

The chief concern of Justice Brown was that *Motton* might be interpreted to have expanded the *Wheeler* definition to the extent that it could cause "an endless proliferation" of cognizable groups. (*Young, supra,* 34 Cal.4th at p. 1236.) Justice Brown's concern, well-stated as it was, simply has not come to fruition in California. There has been no proliferation, endless or otherwise, of "cognizable groups" for *Wheeler* purposes.

Justice Brown's analysis used the definition of "cognizable group" as set forth by the First Circuit Court of Appeals in *Murchu v. United States* (1st Cir. 1991) 926 F.2d 50, 54. Appellant fully embraces this definition as being consistent and representative of the various definitions promulgated by other courts. (*People v. Wheeler*, *supra,* 22 Cal.3d at pp. 266-267; *Duran v. Missouri* (1979) 439 U.S. 357, 364; *People v. Harris* (1989) 47 Cal.3d 1047, 1077.)

> To establish membership in a 'cognizable group' for *Batson* purposes, a defendant must show that (1) "the group is definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. A further ingredient of cognizability is that the group be one the members of which are experiencing unequal, *i.e.* discriminatory, treatment, and needs protection from community prejudices.
> (*Murchu, supra,* 926 F.2d at p. 54.)

Under the above law, there can be no doubt that African-American males constitute a cognizable group. African-American males are a definable group that has a common thread of attitudes and experiences, especially concerning their treatment at the hands of law enforcement. Whether it be the Ramparts police scandal at the turn of the century, the beating of Rodney King in 1991, the O.J. Simpson highly-charged murder case a few years later, the devastating Watts riots, or countless other incidents of interactions between African-Americans males and the police,

there can be no doubt that the African-American male community share a "common perspective arising from their life experience." (See *Motton, supra,* 39 Cal.3d at pp. 605-606.) While some of this life experience is shared with black women, much of it is unique to African-American males, due to sociological, political, and economic forces unique to the former slave culture.

The African-American male community's interest and voice cannot be heard in any other way but through its own inclusion on the jury. This is a group that has historically suffered the status of second-rate citizenship from their shackled arrival on our shores. The history of the African-American male has often been one of humiliations, indignities, denied opportunities, often at the hands of government authority.

Due to their status in the community that often results in frequent contact with the police and the criminal justice system, African-American males have a unique perspective of police-citizen interaction that is simply not shared by any other group of people. In a case such as this one, laden with profound racial implications and testimony of police witnesses, the elimination of the African-American voice from the jury is constitutionally impermissible. The Court of Appeal in *People v. Gray* (2001) 87 Cal.App.4th 781, 790 supported this analysis and made it clear that African-American males constitute a "cognizable group" for *Wheeler* purposes.

Further, at trial, the prosecutor failed to object to the characterization of African-Americans as a cognizable group for *Batson/Wheeler* purposes. *People v. McKinnon* (2011) 52 Cal.4th 610, 619-620 established the requirement that in order to raise on appeal regarding unconstitutional selection of a jury, the argument must be first raised at trial.

C. APPELLANT CLEARLY SHOWED A PRIMA FACIE CASE OF DISCRIMINATION AS TO PROSPECTIVE JURORS SHAWN LEONARD AND ROSCOE COOK

Respondent claimed "the record supported the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose" as to the peremptory challenge of Shawn Leonard and Roscoe Cook. (RB 131, 134.) Respondent stated that Mr. Leonard and Mr. Cook were the first two black male jurors to be excused by the prosecutor and there were four other black jurors in the venire at the time of the challenge. (*Ibid.*) As such, respondent claimed there was "no 'pattern' of striking these two jurors of a specific race, and appellant failed to prove a prima facie case of discrimination." (*Ibid.*) Respondent further argued that there need be no further analysis of the prosecutor's reasons for its excusal of these two jurors because appellant failed to prove a prima facie case of discrimination. (RB 129 et seq.)

The "logic" behind this argument appeared to be that since these jurors were the first two African-American male jurors to be challenged, no

"pattern" of discriminatory conduct could have possibly existed at the time of the challenges. There are any number of legal reasons why this argument is fatally flawed. Respondent's argument lacks basis in simple common sense. Respondent essentially argued that in any scenario involving a series of racially discriminatory challenges, the first several of these illegal challenges cannot be reviewed by the trial court under steps 2 and 3 of the three-step analysis of *Batson* because at the time they were made they did not yet represent a "pattern" of discriminatory behavior. Under this rationale, even the most outrageous prosecutorial act of racial discrimination in jury selection cannot be remedied by the trial court as long as these challenges took place before additional discriminatory challenges showed an incontrovertible blatant pattern.

There is no legal precedent that even hints of such an interpretation of *Batson/Wheeler* law. *Batson* made it clear the first task of the trial court is to determine whether a defendant had "made out a prima facie, case of purposeful discrimination by showing that the *totality* of their relevant facts give rise to an inference of discriminatory purpose." (*Batson, supra,* at pp. 93-94; see *Paulino v. Castro*, *supra,* 371 F.3d at p. 1089.) In order to make this *prima* facie case, all appellant need do is "proffer enough evidence to support an 'inference' of discrimination." (*Johnson v. California*, *supra,* 545 U.S. at p. 166.) Four African-American males were seated and all excused. It is difficult to imagine a more direct inference because no other

group or ethnicity was excused in this fashion. However, under respondent's argument, the prosecutor would be awarded the first of any such illegal challenges "on the house."

In addition, in *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, the Ninth Circuit Court of Appeals made it clear even a single peremptory challenge of a member of a cognizable group may satisfy the *Batson* requirement that the challenging party establish a *prima facie* case of discrimination against a member of a cognizable group. (*Id.* at p. 950.) The reasons for this rule, originally set forth in *Batson* (*Batson, supra,* at pp. 95-96), is perhaps stated best by the Ninth Circuit.

> So important is the need to avoid intentional racial discrimination in the selection of a jury, and so important is the need for procedures conducive to the forming of a jury that can be expected-so far as feasible- to act without racial bias, that a prosecutor cannot use a single peremptory strike to excuse a juror on the basis of an impermissible motive such as race.
> (*Gonzalez v. Brown* (9th Cir 2009) 585 F.3d 1202, 1206; see *Snyder v. Louisiana* (2008) 552 U.S. 472, 478.)

If the improper single challenge is enough to establish a *Batson* violation, then said challenge necessarily can establish a prima facie case.

Respondent's cite to *People v. Bell* (2007) 40 Cal.4th 582, 597 (RB 131 et seq) was unavailing to prove a lack of pattern in this case. In *Bell*, two of three African-American females were excused, and this Court stated this did not constitute a "pattern" under step 1 of the *Batson* test. However,

in examining the totality of the circumstances that resulted in this holding, this Court pointed out that defendant was an African-American man charged with killing his African-American girlfriend's son and the prosecutor did not exercise any challenges on appellant's "parallel group" of African- American males. Three African-American males ultimately served on the jury. (*People v. Bell, supra,* 40 Cal.4th at p. 597.)

In addition, respondent's cite to *People v. Davis* (2009) 46 Cal.4th 539, 583; RB 131) was similarly misplaced. In *Davis,* this Court upheld the trial court's failure to find a prima facie case even when the prosecutor challenged five jurors with "Hispanic surnames." However, both the trial court and this Court based their holdings on the fact that three of these prospective jurors were unequivocally identified by the record as being "Caucasian" by respondent. (*People v. Davis*, *supra,* 46 Cal.4th at p. 584.)

However, *Davis* did have precedential value for the *appellant's* argument in that it held "relevant evidence to make a prima facie showing of discriminatory exercise of peremptory challenges includes a showing that the opponent has struck most or all of the members of the identified group from the venire." (*Davis, supra,* 46 Cal.4th at p. 583.) That is exactly what occurred in this case. All four African-American males were stricken. This, in and of itself, is enough to establish a prima facie case of racial discrimination. (*Johnson v. Finn* (9th Cir. 2012) 665 F.3d 1063-1070; see *Miller-El v. Cockrell* (2003) 537 U.S. 322, 342.)

Respondent also unavailingly cited *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 to stand for its proposition that no prima facie case was established in this case. However, in *Box* (*ibid*), the prosecutor only excused one black juror and one who "might have been" black. In addition, there were very clear indications of "race-neutral" reasons for their challenges, such as plain and unambiguous bias of these two jurors against the San Diego police that would have almost certainly affected their judgment. (*Id.* at p. 1189.) This Court did not find *any* reason, either through comparative analysis or other analytical means, that would suggest to the trial court a race-based reason for the challenges. (*Ibid.*)

In addition, respondent completely ignored the impact of race in the instant case. In *Bell* and *Box*, race had virtually nothing to do with the jury dynamic. All central parties were African-American. In *Bell,* a full third of the jury was African-American. Defendant had a full cross-section of the jury, the African-American voice, male and female were fully represented and heard inside the jury deliberation room. As such, the nature of the case weighed heavily against the finding of a pattern of discriminatory behavior.

Unlike *Bell* and *Box,* the instant case had everything to do with race and gender. As stated above, the basis of the charges brought by the prosecution was that appellant was part of a black "wolf-pack" that actively sought a woman to rape. The victim was not only white, but, according to

appellant, she directed the crudest of racial epithets at the three young black men.

Finally, the plurality opinion of the High Court in *Hernandez v. New York* (1991) 500 U.S. 352, 359, held that "once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." This opinion was adopted by the Ninth Circuit in *United States v. Cruz-Soto* (9th Cir. 2007) 476 F.3d 1081, 1089 and *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 381.)

Therefore, not only is there no doubt under the law that African-American males are a cognizable group, there is similarly no doubt a prima facie case has been made as to the exercise of discriminatory challenges against all four African-American prospective jurors in question. Comparative analysis can be used to prove the first step and, as stated in the opening brief and below, its use clearly indicated discriminatory intent. (*Boyd v. Newland* (2006) 467 F.3d 1139, 1149.)

The next step in the analysis is to carefully examine the prosecutor's offered "race-neutral justification for the strikes." (*Johnson, supra*, 545 U.S. at p. 168, citing to *Batson, supra*, 476 U.S. at p. 94.) Such a careful and thorough examination will lead to the inescapable conclusion these "race-neutral" explanations were a pretextual sham.

D. THE PEREMPTORY CHALLENGES OF EACH OF THE AFRICAN-AMERICAN VENIREMEN WERE RACIALLY MOTIVATED

1. Introduction

Once the defendant makes a prima facie case of discriminatory intent, the law "provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing upon it." (*Batson, supra,* 476 U.S. at pp. 96-97; *Miller-El v. Dretke*, *supra,* 545 U.S. at pp. 251-252.)

Recently, the Ninth Circuit Court of Appeal in *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174 very succinctly described the function of the trial court in terms of its determination as to whether or not the prosecutor's reasons for the challenge were "logically plausible." If they were not, the trial court is "compelled to conclude that the prosecutor's actual and only reason for striking" was the juror's race. (*Id.* at p. 1182.)

It cannot be over-emphasized the inquiry as to whether or not a discriminatory challenge has been made *does not* rest upon the fertility of the prosecutor's imagination. The fact that a prosecutor can state a rational reason for the challenge of a member of a cognizable group does not end the inquiry. As stated by the United States Supreme Court, "[a] Batson challenge does not call for a mere exercise in thinking up any rational basis (for the challenge). If the stated reason does not hold up, the pretextual

significance does not fade because a trial judge, or appeals court, can imagine a reason that might not have shown up to be false." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 252.) Further, once the prima facie case of discriminatory conduct has been made, the prosecutor must "state his (race-neutral) reasons the best he can and stand or fall on the plausibility of the reasons he gives." (*Ibid.*)

Therefore, the critical question to be answered is not whether there was a conceivable, or even rational, individual "race-neutral" explanation for the excusal of each of these four men, but rather what were the actual reasons for the prosecutor's challenges. (*Johnson v. California, supra,* 545 U.S. at p. 172.)

> When conducting the analysis at the third (*Batson*) step, the trial court must decide not only whether the reasons (stated by the prosecutor) are race-neutral, but whether they are relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike, rather than pretexts invented to hide purposeful discrimination.
> (*Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030 citing to *Batson, supra,* 476 U.S. at pp. 93, 95.)

No court is omniscient. It cannot read the prosecutor's mind. Members of cognizable groups can be excused for reasons, such as their opinions as to the death penalty. (*People v. Booker* (2011) 51 Cal.4th 141, 167; RB 132.) As stated by respondent, "an advocate may legitimately be concerned about a prospective juror who will not answer questions." (RB

134; see *People v. Howard, supra,* 44 Cal.3d at p. 1019.) However, these citations by respondent are general statements that do not apply to the facts of this case. Fortunately, the law provides the paradigm to evaluate the prosecutor's intent. That paradigm is a review of the totality of all of the circumstances surrounding not only the voir dire but the case itself. (*Johnson v. California, supra,* 545 U.S. at p. 167.) As in the case of determining whether a prima facie case had been made, one of the circumstances is whether there any racial overtones to the facts of the case. The High Court in *Johnson,* cited favorably to the trial court's finding of facts holding the challenge of all three African-American jurors from the panel "certainly looks suspicious" in light of the fact that defendant was African-American and the victim was "his white girlfriend's child." (*Ibid.*)

As stated previously, the race of the three young men and that of the victim established a race-based dynamic. Further, the guilt phase evidence against appellant consisted of confessions to the Long Beach Police Department, members of a southern California law enforcement community that African-American males have long held in great suspicion due to the police's well-document prejudice.

Four black men came to court to do their duty as citizens. Four black men were sent home. Appellant urges that after a review of all of the facts in their totality, this Court finds that on four separate occasions the

prosecutor used her peremptory challenges in such a way as to deprive appellant of his rights under the United States and California Constitutions.

The peremptory challenges to each of the four stricken African-American jurors will be discussed, individually, below. However, the fact that *all* of them were challenged must be kept in mind when evaluating the prosecutor's true reasons for exercising these challenges. (*People v. Bell, supra,* 40 Cal.3d at p. 597.) Therefore, even before the individual juror analysis begins, the inconvenient truth for respondent was that all of the black male jurors had been stricken and only one female black juror remained out of eighteen jurors and alternates.

2. Challenge of Shawn Leonard

Respondent claimed Mr. Leonard's inability to impose the death penalty was an "obvious race-neutral" reason for the prosecutor's strike. (RB 132; 15 RT 3224.) It is further claimed this was demonstrated on his questionnaire where he wrote that life was a worse punishment than death. (RB 132; 6 CT 1485 [Q227.] In addition, he stated that he would consider whether a person "had a history of hateful decisions" before deciding the penalty in this case. (RB 132; 9 RT 1732-1733, 1735.) The prosecutor also stated, as a "race-neutral" reason Mr. Leonard stated if there was no evidence that appellant would commit similar crimes "even in prison," Mr. Leonard would "probably vote for LWOP." (RB 132; 9 RT 1745; 6 CT 1482, [Q 209.])

Appellant readily acknowledges the law holds this Court's review of the denial of a *Wheeler/Batson* motion must be "deferential" to the trial court's decision "examining only whether substantial evidence supports (the trial court's) conclusion." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341-342; *People v. Lenix*, *supra,* 44 Cal.4th at p.613.) However, respondent's citations to these cases are unavailing to its argument (RB 130), as this deference is properly given only "so long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Not a single one of the prosecutor's challenges to the four male African-American prospective jurors was entitled to this deference as the trial judge discounted the obvious sham nature of the prosecutor's explanations. Even without a comparative analysis of these answers to those of sitting white jurors, the prosecutor's "race-neutral" reasons are very suspicious. The prosecutor's explanation that Mr. Leonard was unable to impose the death penalty was simply false. (RB 131-132.) As stated in the opening brief, Mr. Leonard's written questionnaire was replete with unambiguous indications that he had no compunction against voting for the death penalty where warranted by the law. (AOB 146-150; 6 CT 1478, Q 178-179; 6 CT 1480, Q 196; 6 CT 1482, Q 209; 6 CT 1483, Q 214-215; 6 CT 1484, Q 223.)

During the *Hovey* voir dire, Mr. Leonard again stated his general approval of the death penalty. He stated that he could indeed impose the death penalty after considering all of the evidence of the crime and appellant's background. (9 RT 1728-1730.) In fact, he went so far as to state the *only* conditions under which he would vote for life were if he felt a defendant could be "rehabilitated" in prison. (9 RT 1730.) Further, Mr. Leonard indicated that he could impose death under all of the prosecutor's bank robbery hypotheticals, even upon the hypothetical defendant who sat in the get-away car removed from the scene of the crime. (9 RT 1733-1735.)

However, respondent argued that for several reasons, the challenge to Mr. Leonard was based on "race-neutral" reasons. As will be seen below, none of these arguments bear up under scrutiny.

Regarding Mr. Leonard's statement that life was the "worse" of the two penalties was somehow disqualifying, respondent's recitation of the facts was selective, at best. (RB 132.) The whole truth is that upon detailed questioning at voir dire, Mr. Leonard made clear what he fully meant by this statement on his questionnaire. He *unambiguously* stated he was talking about *himself* and the fact that he would find life worse because, as a person of conscience, he would have to think about his crime every day. (AOB 201; 9 RT 1732.) However, for those who lacked such a conscience

as to their crime, Mr. Leonard would use the "good vs. bad" standard as given by the trial court. (AOB 201.)

There was nothing in Mr. Leonard's voir dire, written or oral, that would suggest to a logical and unbiased mind that he could not "impose the death penalty." The entire "which penalty is worse" question, without follow-up questioning, is so easily misconstrued as to make it virtually useless in any *Hovey* inquiry. As the prospective juror has no idea of the nature of the conditions in a Level IV prison, he or she is essentially asked to take a very uneducated guess about whether it would be less pleasant for another person he or she doesn't even know to be dead or be in a highly restrictive prison for the rest of one's entire life.

That the prosecutor would rely so heavily on such an ambiguous "either-or" question was completely unwarranted. To continue to rely on such a statement after Mr. Leonard stated exactly what he meant smacks of a desperate attempt to find any excuse to give her challenge of Mr. Leonard an appearance of a non-racial basis.

Further, it should be noted that Mr. Leonard stated in the time period between the *Hovey* voir dire and the date of the exercise of the peremptory challenges, he had revaluated his feelings and was actually *more in favor* of the death penalty during the jury selection phase than he was in the *Hovey* phase. (15 RT 3183.) This is yet another piece of the "totality" that strongly

weighs against the prosecutor's "race-neutral" explanation that Mr. Leonard cannot impose the death penalty.

There was never an indication from Mr. Leonard, whether on his questionnaire or in his oral voir dire, that he would have the slightest hesitancy to impose the death penalty where warranted under California law. In fact, unlike many of the sitting white jurors, Mr. Leonard indicated that he would have no compunction against imposing the death penalty on any of the hypothetical defendants in the prosecution's strained hypotheticals (see Argument I) even the "get-away-driver," who did not even know that a murder was being committed. (9 RT 1735.)

According to the prosecutor, the belief that life was a worse penalty than death merited an automatic challenge of a juror. (17 RT 3478.) The comparative analysis with sitting white jurors shows this was an outright prevarication. Respondent was completely incorrect in attempting to justify the prosecutor's position that none of the other sitting jurors indicated in their questionnaires that life was a "worse penalty." (RB 134.) Sitting white Juror # 4 answered question 198 by circling "life without the possibility of parole" as the worse punishment and writing in 'I can only base this on my own personal choice and I value freedom." (7 CT 1927.) On question 227, Juror #4 gave a conflicting answer as to what was the worse penalty, stating that death was worse. (7 CT 1932.) From all of this it was clear that at very

least, Juror #4 was conflicted as to her views on the relative severity of the penalties.

What is even more significant is that the prosecutor didn't ask Juror #4, a white woman, a *single question* on voir dire about her conflicting answers to questionnaire question #198 and #227. What was so critical a sticking point for Mr. Leonard was completely ignored regarding the white sitting juror. (See AOB 203-204; *Miller-El, supra,* 545 U.S. at p. 246.)

The same scenario existed for white sitting juror #5 who also gave conflicting answers to these same questions. (7 CT 1976 Q 198; 7 CT 1981, Q 227.) Once again, the prosecutor made no attempt to clarify this. (15 RT 3149.) In fact, the prosecutor's voir dire of this conflicted juror was perfunctory at best. She did not find it necessary to ask the "bank robbery" hypothetical and, as with all of the jurors except for the black female juror #3, did not ask any questions about the special circumstances.

White sitting Juror #10's answers to the questionnaire should have also posed a problem for the prosecutor. She stated the question as to the worse of the two penalties was "Too tough to answer!" (7 CT 2225.) She continued to vacillate on her questionnaire first stating that life "appears to be the more appropriate sentence." (7 CT 2229, Q 224) and then contradicting herself by stating death is the most severe sentence. (7 CT 2230, Q 227.) She then stated in oral voir dire that she would require "overwhelming" evidence to impose the death penalty. (12 RT 2604.)

However, none of this compelled the prosecutor to make further inquiry as to what the juror really believed was the worse punishment. (12 RT 2591 et seq.) Again, if this truly constituted a "race-neutral reason" for Mr. Leonard, the prosecutor could logically have been expected to clear up the ambiguity of Juror #10's conflicting answers.

In addition, Juror #10 made it unmistakably clear that he would not be able to vote for death for the get-away-driver in the bank robbery example. (12 RT 2613 et seq.) Considering this was a felony murder case with appellant allegedly playing more of an accomplice role than the other two participants, according to the prosecutor's alleged "theory," this answer alone should have been enough to eliminate Juror #10 from the prosecutor's consideration. Therefore, any logical analysis would have arrived at the conclusion that Mr. Leonard was a much better death juror for the prosecutor than sitting Juror #10. Yet it was Mr. Leonard who was stricken, allegedly because of his attitude toward the death penalty.

The answers of white sitting Juror #9 are also very indicative of the falseness and cynicism of the prosecutor's stated concern about Mr. Leonard's attitudes regarding the death penalty. (See AOB 203-204.) In response to Juror #9's conflicting attitudes toward the death penalty in the questionnaire (*ibid.*), the prosecutor finally questioned a white juror as to any such ambiguity. Juror #9 made it clear on oral voir dire that she felt life was the worse penalty because the defendant would have to live with the

remorse; essentially this was the identical response given by Mr. Leonard. (14 RT 3047.) The following exchange then occurred:

> Prosecutor: My concern is that you believe that life without possibility is the worse possible punishment to give a defendant.
> Juror: Yes.
> Prosecutor: So if you believe that, and you believe that this case deserves the worse possible punishment, how could you ever impose the death penalty?
> Juror: Well it was my understanding from the explanation from the judge, that there were several factors that have to be weighed here.
> (14 RT 3048-3049.)

This exchange reflected a juror who thought *identically* to Mr. Leonard concerning the difference between personal beliefs as to which was the worse penalty to her and her responsibility to the court to follow the law. It is hard to imagine two jurors more similarly situated than Juror #9 and Mr. Leonard. However, Juror #9 was seated with the blessing of the prosecutor while Mr. Leonard's voice was stricken from the deliberation room by the prosecutor's unconstitutional use of her peremptory challenges.

Alternate white Juror #5 was yet another juror who gave conflicting answers to Questions 198 (8 CT 2571) and Question 227 (8 CT 2576), the first answer being life was worse and the second being that death was more severe. However, once again, the prosecutor made no attempt whatsoever to clear up this ambiguity.

In addition, while stating that she believed the death penalty was worse, sitting white Juror #12's questionnaire made clear that when it came to the ultimate question of which penalty she would prefer, she would choose life in prison. (8 CT 2328, Q227.)[5]

The "hateful decisions" line of inquiry further reflects the prosecutor's strained attempt to provide "race-neutral" cover for her challenge and speaks to her lack of credibility as to the stated reasons for her challenges. Respondent dismissed the significance of this line of questioning, stating that it was only in response to Mr. Leonard's initial use of the phrase. (RB 132.) However, it is irrelevant as to who first used the phrase. The significance of this line of questioning is that the prosecutor relied upon it as a "race-neutral" explanation for the improper use of a peremptory challenge. (16 RT 3383.)

In a "race-neutral" context, it is impossible to ascertain what the prosecutor could find objectionable about Mr. Leonard's answers to the follow-up "hateful decisions" questions. He simply stated, in so many words, that it was important for him to know whether this was the first time appellant's behavior indicated a "hateful" view of the world and this would have an effect on his judgment as to whether or not to impose the death penalty. (9 RT 1723.)

---

[5] Prospective white Juror #7040 was on the jury panel when the prosecutor accepted the jury as satisfactory as constituted. 16 RT 3349.) He also believed that life was the worse penalty. 50 CT 14626.

One would hope that all jurors would feel as Mr. Leonard did as this is the very essence of the penalty phase determination process. The jurors are instructed they must weigh all of the factors, giving whatever weight they choose to a defendant's background and character. (CALJIC No. 8.88.) Mr. Leonard said nothing that would indicate he would not follow the law. The best the prosecutor was able to do was elicit Mr. Leonard's comment that if the murder was the first "hateful" thing appellant did, the juror would lean to a life punishment. (9 RT 1732.)

Further, the prosecutor knew full well she was in possession of evidence to show appellant was in a violent street gang and had used violence in the past, which confirms this line of questioning was just another means of setting up yet another sham "race-neutral" explanation for her challenge. This hypothetical "hate-free" defendant did not exist in this case. Therefore, to challenge this African-American male because he might favor life for such a completely fictional defendant is indicative of yet another desperate ploy to cull black men from this jury under the guise of strained, cynical reasoning.

Often, it is the nature of the questioning itself that reveals the prosecutor's true intent. If the prosecutor claims questioning of a stricken juror revealed a "race-neutral" explanation, logic would demand the same type of questioning be put to the sitting jurors to see whether this disqualifying explanation applied equally to them. The High Court has

plainly stated "[t]he State's failure to engage in a meaningful voir dire on a subject the state alleges it is concerned about is evidence suggesting that the (prosecutor's) explanation is sham and a pretext for discrimination." (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 246.)

Mr. Leonard was the only juror to have been questioned along these lines. No white jurors were subjected to this confusing "hateful thought" analysis. Not a single white juror was introduced to this hypothetical, non-existent "hate-free" defendant, who never did a wrong thing in his life and was then asked whether he or she could put him to death. This failure was not controverted by respondent. (RB 132.) If the answer to this question was as important to the prosecutor's race-neutral explanation as she indicated, it would be expected this hypothetical be proposed to many, if not all of the jurors. (*Miller-El, supra,* 545 U.S. at p.246.)

The prosecutor also put forth as a "race-neutral" reason for the striking of Mr. Leonard that the juror stated *twice* he would require her to prove all of the special circumstances. (16 RT 3384.) This statement was a complete prevarication. Mr. Leonard *never* stated once, let alone twice that he would require this from the prosecutor. In fact, after a long and intentionally confusing line of questions, Mr. Leonard made it clear he would only need one of the special circumstances to be proven to consider the death penalty. (9 RT 1739.) A prosecutor's misstatement of a prospective juror's voir dire statements is strong evidence of a

discriminatory intent. (*Miller-El v. Dretke, supra,* 455 U.S. at 245-247.) These misstatements dominated the prosecutor's misconduct throughout the voir dire.

Respondent conveniently avoided this clear misstatement of fact as to the number of special circumstances, a misstatement that the trial court also failed to consider. The only reference in the respondent's brief to this so-called "race-neutral explanation" was that the prosecutor's asked a similar question to other jurors. (RB 133.) Again, considering the fact that Mr. Leonard never made this statement about the number of special circumstances, this argument is irrelevant.

Further, as admitted by respondent, only *one* of the sitting jurors and *one* of the alternates were asked any questions at all regarding how many special circumstances would have to be proven before he or she could impose the death penalty. (RB 133.) The answers of Juror #3 (13 RT 2719-2721 and Alternate #4 (14 RT 2921) were indistinguishable from those of Mr. Leonard.

The prosecutor also urged upon the trial court to accept the "race-neutral" reason that Mr. Leonard stated if he knew a defendant "would never do it again," he would lean toward a life sentence. (9 RT 1745;16 RT 3383.) The prosecutor again misrepresented the comments of Mr. Leonard. His answer was in response to a long series of questions by the prosecutor

as to whether he would be likely to impose the death penalty on a defendant who never had a "hateful" thought. (9 RT 1733 et seq.)

Therefore, the only "bias" Mr. Leonard showed against the death penalty was if there was absolutely no evidence to suggest that appellant was a violent person incapable of a recurring act of violence, he would lean against the imposition of the death penalty. It is hard to conceive of any prospective juror, except one who was a staunch advocate for the death penalty, who would have answered differently. Further, it is hard to conceive of the existence of such a hypothetical defendant, pure of thought and mind, who just happened to find himself as a defendant in a capital murder case.

Not only was the context and content of this questioning so disingenuous as to serve as evidence of discriminatory intent, this sort of questioning was never employed with any of the sitting white jurors, further demonstrating the true nature of the strike. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246.

This discriminatory intent was again demonstrated when the prosecutor clumsily attempted to use Mr. Leonard's alleged failure to pay attention as a "race-neutral" explanation. (15 RT 3225.) In the midst of falsely informing the court that Mr. Leonard was "incapable" of imposing the death penalty, the prosecutor added the following remarks: "I just want to put on the record that I noticed that when I questioned the juror this

morning, he and I had eye contact; however, when both counsel are questioning other jurors, he is looking straight ahead." (*Ibid.*) The response of the trial judge was immediate and direct, informing the prosecutor that Mr. Leonard was looking at him. (15 RT 3225.) Undeterred in her attempt to fashion a "race-neutral" explanation out of thin air and unabashed by the court's dismissive response to her complaint, the prosecutor persisted, "and he's not...not participating in the cooperative sense that all of the other jurors are. They are watching counsel, they're listening to the questions, he's just looking straight ahead. I found that kind of unusual, because no one else is doing that out there." (*Ibid.*) Once again the trial judge dismissed this concern, telling the prosecutor that Mr. Johnson was looking at the court "all throughout the questioning of the remainder of (sic) counsel."

It is true that this and other courts have recognized the limited validity of counsel relying upon "feelings" or intuition in the employment of peremptory challenges. However, once a prosecutor gives his "race-neutral" explanation, the cause must "stand or fall" by the reasons he has given. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 252.) By any standard, the comments by the prosecutor can only lead to the conclusion that she would make any sort of unfounded statement to divert attention from the fact that she wanted all black men off of the jury.

First of all, her insinuation the juror was not paying attention was effectively proven to be false in that the trial judge noticed nothing unusual about Mr. Leonard's behavior. The United States Supreme Court has made it clear when a "race-neutral" explanation is tendered that pertains to a prospective juror's demeanor, including inattention, the trial court's "first-hand" observations of the prospective juror is of paramount importance and is to be given "great deference." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477, 479.) In this case, the unambiguous record demonstrates the prosecutor's "race-neutral" reason was a pretext.

In addition to the trial judge's clear refutation of the prosecutor's observations, it is of note that the prosecutor failed to ask Mr. Leonard any questions pertaining to his alleged "lack of participation." The Ninth Circuit in *United States v. Collins* (9th Cir 2009) 551 F.3d 914, 922, stated the failure of the prosecutor to ask the stricken juror questions relating to the so-called "race-neutral reasons" for the strike "suggest(s) that the explanation is a sham and a pretext for discrimination." (See *Miller-El v. Dretke, supra,* 545 U.S. at p. 244.)

However, just as important as the trial court's reaction to the prosecutor's comments are the comments themselves. The voir dire, while not sequestered as in *Hovey*, was individualized. The prospective jurors were questioned on an individual basis. Other than the juror being questioned at a particular moment, *none* of the other jurors were involved.

They were not requested to interrupt the questioning if they had something to say and none of them did. There is nothing in the record that suggests any of the prospective jurors was doing anything but sitting quietly while each of their fellow prospective jurors was eventually questioned.

From the record, it is impossible to divine what the prosecutor meant by her statement the other jurors were "participating" in the selection process when not being actively questioned. The prospective jurors were asked to truthfully reveal their own beliefs. They were not asked to mull over the beliefs of the other jurors and comment publicly upon them during the process. Again, none of them did this. Yet, the prosecutor asked the trial court to believe she knew simply by looking at Mr. Leonard that he would be unable to impose the death penalty.

The prosecutor's remark was more than merely absurd. It was redolent with desperation. In the prosecutor's grand scheme, Mr. Leonard had to be removed from the jury, as eventually did Mr. Cook, Mr. Walters and Mr. Payne. However, the prosecutor had to venture a reason to make it appear she was excusing him not because of the color of his skin but for the content of his actions and remarks.

The credibility of the prosecutor and her "race-neutral" explanations "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*People v.*

Williams, *supra,* 56 Cal.4th at p.658 citing to *Miller-El v. Cockrell*, *supra,* 537 U.S. at p. 339.)

The totality of circumstances clearly demonstrates that the prosecutor's race-neutral" reasons were completely implausible and clear evidence of the prosecutor's true intent in challenging the first of the African-American male jurors. (See *Snyder v. Louisiana*, *supra,* 552 U.S. at p. 477.)

The prosecutor cited Mr. Leonard's "belief" in rehabilitation as a "race-neutral" reason to strike him from the jury panel. (17 RT 3384.) In arguing this was a "race-neutral" reason for striking a juror, the prosecutor clearly stated in her opinion anyone who believed in "rehabilitation" would automatically vote for life. (17 RT 3478.)

Respondent made no mention of the prosecutor's "rehabilitation" argument as to Mr. Leonard and there is good reason for this. At the time of the *Hovey* questioning, the prosecutor showed no interest in Mr. Leonard's very fleeting comments about rehabilitation made during the oral voir dire conducted by appellant's counsel. (9 RT 1730.) If Mr. Leonard's feelings about "rehabilitation" and its relationship to the death penalty actually meant anything to the prosecutor at the time, it would have been logically expected that she would have questioned the juror more fully. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246.)

However, by the time the prosecutor was forced to justify her strikes of the only four African-American male jurors on the panel, belief in rehabilitation become a critical factor in her "racial-neutral" rationale. (17 RT 3478.) Given the above, the prosecutor's alleged concern for Mr. Leonard's feelings about rehabilitation "reeks of afterthought." (*Miller-El, supra,* 545 U.S. at p. 246.)

> The whole of the voir dire testimony subject to consideration casts the prosecutor's reason for striking in an implausible light, comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.
> (*Miller-El, supra,* 545 U.S. at p. 252.)

Further, a comparative analysis of Mr. Leonard's beliefs about "rehabilitation" to those of the sitting jurors yet again exposes another "race-neutral" reason as an outright sham. As indicated in the opening brief (AOB 207-209), several of the sitting white jurors clearly stated they believed in the concept of "rehabilitation." Juror # 4 stated life in prison would be an "appropriate punishment depending upon any potential (a defendant) may have left to contribute." (14 RT 2989.) In addition, she stated before imposing the penalty she would consider what positive contributions a defendant may be able to make while in prison. (*Ibid.*) In other words, she would consider rehabilitation.

In addition, Juror #11 stated the death penalty should be reserved for "irredeemable" people. (7 CT 2273, Q192; 7 CT 2276, Q 209; 4 RT 720.) She also stated her penalty decision would be partially based upon whether appellant can do something useful in prison. (7 CT 2273, Q 193.)

Any conceivable doubts about the sham nature of the "rehabilitation" argument are eradicated by an examination of the responses of Alternative Juror #6, who stated that the life sentence should be imposed "for a person who is truly sorry and can be rehabilitated to some usefulness and good." Therefore, the prosecutor accepted an alternate juror who affirmatively stated he would definitely vote for life if there is a chance for rehabilitation, yet struck Mr. Leonard because he said that he wouldn't even consider life unless a defendant could be rehabilitated in prison. (9 RT 1730.)

The acceptance of white Alternative Juror #6, alone, proves by far more than a preponderance of evidence the prosecutor's conduct was a sham and her real intent was to say whatever necessary to rid this jury of all black males.

If no other members of this cognizable group existed in the venire panel other than Mr. Leonard, the prosecutor's words and actions in the racially discriminatory striking of this thoughtful, unbiased juror would require a reversal of this judgment. One such unconstitutional strike is enough to require a reversal of the entire judgment. However, there were

three other members of Mr. Leonard's cognizable group on the panel that survived *Hovey* voir dire and all were stricken, some for the same reasons as Mr. Leonard and also for other reasons equally cynical and racially discriminatory. While the remaining three challenges will be analyzed independently from one another, it must not be forgotten that one of the key pieces of evidence of the prosecutor's discriminatory intent was that *all* of the male African-American jurors who were subject to peremptory challenge were excused.

3. The Peremptory Challenge of Roscoe Cook

Respondent claimed the prosecutor had "race-neutral" reasons for excusing the second African-American male juror, Roscoe Cook. Respondent essentially stated that Mr. Cook had refused to answer the prosecutor's questions and stated that he would not "set-aside" his personal belief system. (RB 134.) According to the prosecutor, this "belief system" was that Mr. Cook did not have personal opinions as to which penalty he preferred, therefore he could not impose the death penalty. (RB 135.)

Respondent further claimed that during the oral voir dire Mr. Cook had been "hostile" to the prosecutor, refusing to give her his true opinions on the death penalty and directing "hostile looks" toward her. (RB 135.) Respondent claimed any conflict between the Mr. Cook and the prosecutor was caused by Mr. Cook's sarcasm and lack of respect. (RB 135-136.)

Respondent's argument was nothing more than a restatement of the prosecutor's "race-neutral" explanations that were fully disproven in the opening brief. (AOB 215-227.) Respondent's claim the prosecutor properly struck this juror because of his "hostility" to her merits the strongest of responses.

Of all the mistruths that the prosecutor urged upon the trial court and respondent urges upon this Court, none can be worse than the baseless accusation the so-called "personality-conflict" was the result of some unexplained, pre-existing hostility on the part of Mr. Cook toward the prosecutor. As stated in the opening brief, there was absolutely nothing in Mr. Cook's questionnaire that would remotely hint at any hostility toward prosecutors in this or any other case. (AOB 150 et seq.) Mr. Cook strongly believed in our system of justice, blamed the criminal for the crime problem, and promised to do his best "no matter what." (AOB 151.) Further, his beliefs about the death penalty were as neutral as any reasonable prosecutor could have wanted in that he had no preference for either penalty, but could impose either one depending on the facts of the case. (AOB 151-152.)

Mr. Cook's initial oral voir dire responses were also completely free of any sort of prejudgment of either counsel or cause. He told the trial court that he was ready, willing, and able to follow the law as directed by the court and stated he could not possibly lean one way or the other about the

penalty until all of the evidence had been presented. (AOB 152-153; 11 RT 2265-2271.)

Respondent claimed the whole exchange between the prosecutor and Mr. Cook started at the outset of the prosecutor's oral voir dire when Mr. Cook "repeatedly asked the prosecutor whether he had interrupted her." (RB 135; 11 RT 2274-2276.) Respondent completely misrepresented what occurred at the outset of the prosecutor's questioning.

In truth, what happened had nothing to do with an "inability to communicate," as claimed by respondent. The prosecutor had started to ask Mr. Cook a question and he informed the prosecutor that she could "ask him anything." (11 RT 2274.) The prosecutor explained the necessity of creating a verbatim transcript required only one person speak at a time. (11 RT 2274-2275.) Mr. Cook expressed a concern that he may have unintentionally interrupted the prosecutor. (*Ibid.*)

There was absolutely no "hostility" or provocation on Mr. Cook's part and, at the time of this exchange, the prosecutor never claimed that any had taken place. Once making clear the concept that only one person can talk at a time, the questioning simply resumed. (11 RT 2275-2276.) As stated in the opening brief, no "hostility" would have arisen at all if not for the prosecutor's repeated and aggressive misstatements of Mr. Cook's opinions as to the death penalty. (AOB 216-217.)

Appellant fully set forth the intentionally aggressive, specious, and misleading nature of the prosecutor's questioning of Mr. Cook, which led to statements of exasperation and frustration by the juror. (AOB 218-222.) Mr. Cook was very clear that his lack of opinion as to the death penalty was because he was not a partisan of either penalty in the abstract, but that he could impose either penalty, depending upon the facts. (AOB 218-222.)

The prosecutor claimed as a "race-neutral" explanation that Mr. Cook felt the prosecutor was "coming at him." (11 RT 2281-2282.) In truth, the prosecutor gave Mr. Cook every reason to believe this. This line of aggressive questioning was not employed against *any* of the other jurors, sitting or otherwise. The prosecutor used this disingenuous, hair-splitting, intentionally confusing line of questioning to not only set up a "race-neutral" excuse that Mr. Cook was incapable of imposing the death penalty, but to artificially create a "personality conflict" by goading an otherwise perfectly capable and unbiased African-American juror into anger and frustration.

Respondent cited to *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 to stand for the proposition that a hostile look from a prospective juror could support a peremptory challenge. (RB 135.) In *Gutierrez,* the juror in question also had great antipathy toward one of the victims, was hostile toward serving, and was not willing to listen to the opinions of the other jurors. (*Ibid.*)

Gutierrez in no way controls the factual situation in this case. The prosecutor was not some sort of innocent victim of the juror's ire. As stated above, repeated prosecutorial misrepresentations of what a challenged juror said on voir dire is, in and of itself, circumstantial evidence of a prosecutor's racially-motivated intent. (*Miller-El v. Dretke, supra,* 545 U.S. at pp. 244-245.) The prosecutor blatantly misrepresented the truth when she argued Mr. Cook would not follow the law because he had his own "value system." (AOB 225.) Mr. Cook had made it very clear that his value system *was* to follow the law. (11 RT 2279.) Mr. Cook even stated he could impose death upon the imaginary "wheelman" in the prosecutor's "bank robbery" hypothetical (AOB 221; 11 RT 2297), and the hypothetical defendant who held the hypothetical assault victim's arms. (11 RT 2294-2295.)

If any doubt remained as to the real reason for this challenge, comparative analysis of Mr. Cook's answers about his "opinion" on the death penalty to other sitting white jurors erases any such doubt. Mr. Cook stated that while he had no personal "opinion" as to the application of either penalty, he could impose either penalty depending on the facts and application of the law. (AOB 221-224.) As previously stated, sitting white jurors #1, #4, #5, and #8 were similarly situated to Mr. Cook. (AOB 223-224.) However, *none* of these white jurors were even questioned about their lack of a deeply-held personal opinion as to the death penalty, let alone

subjected to the type of hostile and unprofessional questioning unleashed on Mr. Cook. (Juror #1- 6 RT 1157 et seq, 15 RT 3157 et seq; Juror # 4 -14 RT 2979 et seq, 16 RT 3442 et seq; Juror # 5 -7 RT 1309 et seq, 15 RT 3149; Juror # 8-5 RT 856, 15 RT 3178 et seq.)[6]

As in the case of Mr. Leonard, but in the case of none of the other sitting white jurors, the prosecutor was able to foist upon the trial court an entirely alien, and incorrect interpretation of the death penalty law that being unless the prospective juror had a firm "belief" in the death penalty and felt, *universally,* that death is the worse punishment for *everyone*, that juror was unable to impose the death penalty for *anyone*. (See *Miller-El v. Dretke, supra,* 545 U.S. at p. 251, fn 10.)

Attorneys are officers of the court. Prosecuting attorneys have the duty of seeing that justice be done. (*Berger v. United States* (1935) 295 U.S. 78, 88.) It is inexcusable that any prosecutor provokes a juror as happened in this case. However, once again, the trial court did not bring to bear the reasonable and sincere analysis the High Court demanded of it. In fact, the trial court made a joke of the whole matter, and even before the actual prosecutorial challenge, it called Mr. Cook the prosecutor's "favorite amazing friend." (16 RT 3306.)

Yet another African-American male juror was excused for sham

[6] Prospective white juror #3349 was on the jury panel when the prosecutor accepted the panel as then constituted. (16 RT 3418.) This prospective juror made it clear that he had no strong feelings one way or the other about the death penalty. (14 RT 2960.)

reasons. Through blatant misstatement of these jurors' opinions, and in the case of Mr. Cook, actual baiting of the prospective juror, the prosecutor was able to unconstitutionally rid herself of two of the four African-American males sitting on the jury panel. The prosecutor wasted no time in similarly removing the final two.

4. The Peremptory Challenge of Ethan Walters

Mr. Walters was the third African-American male challenged by the prosecutor. By this point, the court decided that the challenge of three out of three African-American male jurors did constitute a prima facie case of discriminatory use peremptory challenges. (AOB 174; 16 RT 3375.) As such, the prosecutor was compelled to set forth "race-neutral" reasons for her challenge.

The reasons set forth by the prosecutor were fully set forth in the opening brief. (See AOB 173-179.) The prosecutor argued to the trial court "what really bothered her" about Mr. Walters was that he thought a life sentence would be a more serious punishment than death. (16 RT 3375-3376.) She informed the court that another troubling thing about Mr. Walters was he was an engineer and because of his scientific training she could never prove her case to his satisfaction. (16 RT 3376.) Respondent repeated these two reasons as being "race-neutral" explanations and proof that the prosecutor, in spite of challenging *every* African-American male on

the jury, was not exercising her challenges in a discriminatory way. (RB 136-137.)

The prosecutor's death penalty-related reasons for the striking of Mr. Walters were yet again a misstatement of the juror's true feelings on the death penalty. Further, they were specious in that the prosecutor accepted a number of white jurors who felt the same way.

One of most persuasive pieces of the "totality of the evidence" was the prosecutor's comment about Mr. Walters being too demanding a juror because of his engineering background. This comment, along with the aforementioned comment about Mr. Leonard's not "paying attention" represented the desperate lengths the prosecutor would go to in order to exclude black males. The prosecutor also rendered the "race-neutral" explanation she was concerned that Mr. Walters had more information about the law than the other jurors because he seemed to understand the meaning of the terms "aider and abettor" and "intent." (16 RT 3378-3379.) In short, reaching as deep into her bag of sham excuses as humanly possible, the prosecutor essentially said she excused Mr. Walters because he was too educated.

Appellant does not know if this could ever be a conceivable race-neutral excuse. However, it certainly was not such an excuse in this case. First of all, there was no evidence Mr. Walters either was, or fancied himself to be, some sort of legal expert because he knew what "intent"

meant, or that he was acquainted with the very commonly used appellation of "aider and abettor." Both of these terms are used in everyday parlance, appearing frequently in mass media, such as television news.

Further, there is no proof the sitting jurors and alternatives did not understand these terms. All of the prospective jurors filled out a fifty-page questionnaire, consisting of 237 questions, many of which requiring at least a passing familiarity with the legal system. At no point during the examination of any other juror did the prosecutor concern herself with getting an assurance from *any* juror that he or she was sufficiently ignorant of any aspect of the law to allow his or her service. In any event, such an assurance would have been impossible to obtain because any prospective juror educated enough to read and answer the questionnaire certainly was educated enough to have heard of an "aider and abettor" or understand the basic meaning of the word "intent."

Further, a comparative analysis of Mr. Walters to white sitting Juror #11 fully disproved any prosecutorial race-neutral claims as to Mr. Walters. Juror #1 was *also* an engineer, in fact one who had the exacting task of overseeing plant operations at a Conoco/Phillips plant. (VI CT 2239.) One can assume that running a major oil plant is a job where anything less than extreme precision can lead to a major environmental disaster.

Yet the prosecutor did not question Juror #11 about whether and how his training as an engineer would affect his judgment. Juror #11 was

allowed to decide appellant's fate, despite having the same type of scientific background as Mr. Walters. It fact, even Mr. Walters *himself* was never questioned by the prosecutor as to whether he would require a more exacting standard of proof. If such was a real concern of the prosecutor, it would be expected that she would at least have broached the subject with the juror. However, she did not, providing yet additional evidence that the real reason why Mr. Walters *and* Mr. Cook *and* Mr. Leonard were excused was the fact they were black males.

Respondent claimed that Juror #11 and Mr. Walters were not similarly situated in that, although they were both engineers, only Mr. Walters felt that life in prison was a more severe penalty. (RB 141.) In support of this argument, respondent cited to *People v.* Gray (2005) 37 Cal.4th 168, 189. *Gray* is off-point and unavailing to respondent. Firstly, Mr. Walters never said that life in prison was "worse" as a general principle. He stated that while *for him* it was a worse penalty, for others who valued life more than freedom, it was not. (AOB 228-229; 12 RT 2399-2401.) Further, he indicated that this would not be a factor in his decision-making. (*Ibid.*)

Secondly, as discussed above in the discussion of the challenge to Mr. Leonard, the entire "life is worse" excuse was a sham as several white jurors who thought the same were allowed by the prosecutor to sit. As with the other two black jurors, this general topic was only of interest to the

prosecutor when the object of her attention was a black man. The comparative analysis of Mr. Leonard and sitting white jurors clearly showed the prosecutor's indifference to what these jurors thought about the "worse penalty."

Thirdly, the stated "race-neutral" reason by the prosecutor was that engineers would demand a higher burden of proof, which has nothing at all to do with which penalty may be worse.

Legally, *Gray* is off point in that it discusses a *Batson* challenge based on "bare statistics," alone. The *Gray* Court rejected such a challenge because "the prosecutor did not excuse an unusually high percentage of African–Americans from the venire, nor a particularly high number of African–Americans as compared to jurors of other races." In the instant case, the prosecutor challenged *all* members of the cognizable group, which in and of itself is a strong factor in this Court's decision as to whether the challenges were "race-neutral." (*Miller-El v. Dretke, supra,* 545 U.S. at pp. 240-241.)

Respondent cited several cases in an attempt to justify the prosecutor's challenge to Mr. Walters due to his "education." (RB 136-137.) None of these cases are on point. In *People v. Clark* (2011) 52 Cal.4th 856, 902, the juror in question had taken various psychology courses in college and opined that she thought anyone who commits murder "must have something wrong with them in their mind." Similarly, in *People v.*

Blacksher (2011) 52 Cal.4th 769, 802, this Court approved the excusal as race-neutral because the juror had an education in psychology and it might affect her judgment of defendant's mental illness. In *People v. Reynoso* (2003) 31 Cal.4th 903, 926, fn 6, this Court acknowledged that a situation might arise in which a prospective juror's high level of education might make him prejudiced against a prosecution witness.

None of these factual situations have anything to do with the instant case. Unlike in the above cases, there was no evidence whatsoever that Mr. Walters possessed the particular type of education that would give him a special insight into the facts of the instant case. Perhaps, the cases cited by respondent might be on point if the cause of death in the instant case had something to do with engineering. Obviously, engineering had nothing at all to do with the facts of the instant case just as Mr. Walter's "education" had nothing to do with his ability to fairly decide the case. Further, sitting white Juror #11 was just as "educated" as Mr. Walters and in the same profession yet the prosecutor did notquestion him about this, let alone challenge him.

Further, the prosecutor's claim that Mr. Walters could not impose the death penalty because he had no strong "feelings" for or against either penalty are as specious as the identical reason for the challenge to Mr. Cook. Further, *nine* of the white sitting jurors or alternates were in some way dissatisfied with how the death penalty was being enforced, that it was

used either "too randomly" or "too seldomly." (AOB 234-235.) However, in the case of these white jurors, the prosecutor had no interest that their concern may affect their ability to enforce the death penalty. If the prosecutor was truly concerned about how a juror felt about the general imposition of the death penalty, she would have certainly asked these other jurors what they meant by their answers.

Respondent attempted to refute the above argument by stating that these nine jurors did not answer the question about the enforcement of the death penalty exactly as Mr. Walters did, therefore, were not "similarly situated" for comparative analysis purposes. (RB 141-142 .) However, "a per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable: potential jurors are not products of a set of cookie cutters." (*Miller-El, supra,* 545 U.S. at p. 247, n. 6.) To truly isolate whether or not race was the reason for the prosecutor's challenge, the jurors compared must be comparable in all respects to what the prosecutor proffered in his or her explanation for the challenge. (*Id.* at p. 247.)

In the instant case, the fact that Mr. Walters stated the death penalty was used "too randomly" *and* "too seldomly" and most of the other white jurors used in the comparative analysis said it was used too randomly *or* too seldomly is irrelevant. The relevant point is that the prosecutor proposed as a race-neutral reason for Mr. Walter's unhappiness with the way the death

penalty was enforced. These sitting white jurors were also unhappy about the same thing; hence, they were similarly situated for comparative analysis purposes.

The prosecutor's further attempts to demonstrate to the court that Mr. Walters could not impose to the death penalty were nothing more than misstatements as to the juror's carefully stated beliefs. The prosecutor actually tried to convince the court the strike of this juror was justified because Mr. Walters felt the death penalty had to be "reformed, like affirmative action." (AOB 234; 12 RT 2412.) Despite the prosecutor's clumsy attempt to inject race into Mr. Walter's answer, a full reading of the juror's concerns with the death penalty dismisses any notion of bias against the death penalty.

Despite the prosecutor's spurious accusations that Mr. Walters opposed the death penalty, the truth was he was very much in favor of it. His only complaint about its imposition was it was not imposed *more often* and he was a proponent of rapid trial *and* execution where appropriate. (6 CT 1578: QQ 178-179, 183.) What this juror "believed" was that in order for the death penalty to have any deterrent effect, the sentence would have to be executed more often. (*Ibid.*) In any event, the juror made it perfectly clear that none of this would have any bearing on his ability to impose the sentence required by the facts and the law. (12 RT 2409-2410.)

Another "race-neutral " explanation proffered by the prosecutor was Mr. Walters had been "questionably" pulled over by the police on prior occasions. (16 RT 3377.) This claim was fully discussed in the opening brief. (AOB 236.) It should be noted that Mr. Walters assured the prosecutor none of this would affect his judgment in any way. (12 RT 2422.) After receiving that answer, the prosecutor did not question Mr. Walters any further as to this subject. She did not ask him to describe the circumstances, why he thought the police had been unfair, or whether he believed the police were racially-motivated. If she really believed that there was a possible bias on the part of Mr. Walters, she would have at least been obligated to draw out the "truth" by additional questions. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 245.) Her failure to do so was yet additional evidence of the sham nature of the prosecutor's "racially-neutral" reasons.

Throughout respondent's brief, this Court is urged to analyze the prosecutor's individual proffered "race-neutral" explanations in a vacuum, unrelated to the totality of circumstances of the voir dire. Standing alone, some of these prosecutorial explanations might have some element of truth in them.[7] However, the true intention of the prosecutor can be only revealed by a review of the "totality of the relevant facts" which will determine

[7] At RB 142, respondent claims that Mr. Walters' statement the death penalty is infrequently used in its current form it is "really useless" and maybe the State should just "let it go." However, looking at the totality of circumstances including the sham excuses, misstatements of facts, baseless accusations, and damning comparative analyses, these so called "race-neutral" explanations carry no weight.

"whether or not the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California, supra,* 545 U.S. at p. 168.)

The totality of the relevant facts in this voir dire revealed a prosecutor who was fully determined to remove all black males from the jury. This was once again seen in the challenge to the final African-American juror, Reginald Payne.

e. The Peremptory Challenge of Reginald Payne

Reginald Payne was the final male African-American to be seated in the jury box and the last chance to have the voice of black males heard in the jury room. However, once again, the prosecutor exercised a peremptory challenge. This time, even the trial judge, who had improperly allowed the prior three strikes, initially denied the prosecutor her challenge, stating that it was not for a "race-neutral" reason. (16 RT 3479-3480.)

It was with Mr. Payne the prosecutor's prevarications and baseless claims against the black male jurors sunk to a new nadir by the prosecutor making the absurd claim that all she ever considered about the jurors in making her peremptory challenges was their position on the death penalty and never considered anything else, which included race and age. (16 RT 3465-3466.) She stated in reviewing the jury questionnaires, she did not know the race of the respective prospective jurors, which is contained in the first page of every questionnaire. (*Ibid.*; 16 RT 3471-3472.) In essence, respondent is asking this Court to believe the prosecutor never reviewed the

personal information of the respective jurors while looking at their questionnaires that clearly identified the race of the juror.

Even if this was true, the prosecutor certainly knew the race and sex of the prospective jurors by the time they were seated in the jury box before the *Hovey* voir dire began. Appellant's extensive comparative analyses in the opening brief and herein made it abundantly clear that not only did the prosecutor consider these factors, she relied on them in making her strikes to *all* of the male African-American jurors.

The "race-neutral" challenge to Mr. Payne was, for good reason, initially rejected by the trial court because it contained many of the same spurious references used in the three other challenges to black males. The prosecutor stated Mr. Payne could not impose the death penalty because he thought that life in prison may be the worse of the two penalties because of the conditions in California prisons. (17 RT 3537-3538.) In fact, Mr. Payne made it clear to the prosecutor that life is not be worse for all people. (14 RT 2889.) Further, Mr. Payne made it very clear, on several occasions, that he would follow the instructions of the court because that was the law. (14 RT 2889, 2893, 2900; 16 RT 3461-3463.)

The prosecutor argued to the court that no one who believed life to be a more severe punishment than death could ever vote for death because such a juror believed that life in prison would be worse for them. (16 RT 3472.) As such, the prosecutor essentially stated all jurors who might

harbor such a belief would automatically vote for life. However, as stated in Argument I, *supra,* the law presumes a prospective juror is able to impose the death penalty as long as personal beliefs do not substantially impair the juror's ability to follow the law. (*Wainwright v. Witt, supra*, 469 U.S. at p. 420.) Therefore, even if a prospective juror truly believes that for everyone life is the worse penalty, the law does not equate this with an automatic disqualification, thereby negating the prosecutor's proposition.

In any event, in addition to Mr. Payne's clear and unequivocal statements that he could follow the law and impose the death penalty as per the court's instruction, the prosecutor's "race-neutral" explanation as to the "worse penalty" was again laid bare by the same comparative analysis applied to the other black male jurors. If the prosecutor truly believed *no* prospective juror believed life could or would be the worse penalty, she would have challenged several of the sitting white jurors and alternates, or at least questioned them more fully on this alleged disqualifying opinion. (See AOB 202-205 for comparative analysis of white sitting jurors regarding "life is worse" answers.)

Appellant is not stating that several members of a cognizable group cannot be stricken just because they are members of that group. In certain cases, there are truly race-neutral explanations that directly pertain to the facts of the case and stand up to a careful comparative analysis. This was observed in the recent case of *Briggs v. Ground* (9th Cir. 2012) 682 F.3d

1165, 1175. In *Briggs,* one of the reasons for excusing a black juror was that she stated she would hold the prosecutor to a higher standard than required by law. However, the prosecutor was able to show he excused non-black jurors for the very same reason. The facts of this particular case do not fall within the parameters of *Briggs*. In the instant case, comparative analysis uncontrovertibly proves the racial motivation of the prosecutor.

As stated, the trial court initially refused to allow this strike. (16 RT 3479.) It was at this point the prosecutor's desperation to rid the jury of the final African-American male reached a frenzy. She began with an attack on the integrity of the trial court, claiming that it just branded her a "racist," when the reality was the court did nothing of the kind. (16 RT 3479-3480.)[8] She then stated Mr. Payne "had indicated that he is not going to vote for the death penalty in this case," despite the fact the juror *never* said or insinuated such a thing. (16 RT 3487.) Immediately thereafter, the prosecutor made the baseless claim that Mr. Payne "will hang this jury," despite his multiple assurances that he could follow the law. (16 RT 3488.) This was also despite the fact that several of the sitting white jurors and alternates also either thought that the life penalty could be worse or was worse than the death penalty. Impressed by the prosecutor's "passion," the

[8] Even in her most stressful moments, the prosecutor never missed an opportunity to misstate and misinterpret. To prevail on a *Batson* claim, it is not necessary to prove that the prosecutor was racist in that she didn't like black men. It is sufficient to simply show she did not like them on this particular jury. In this trial, if the victim was black and the alleged assailants were members of a white supremacist gang, no doubt the prosecutor would have welcomed black prospective jurors as allies.

court allowed the prosecutor to continue her argument after the lunch break. (16 RT 3490.)

After the break, the prosecutor ramped up her hyperbole and stated that she sees Mr. Payne as ripe for the defense to try to get him to nullify the jury's "just verdict" (i.e; death.) She stated Mr. Payne has basically told the defense "if I am on the jury, come see me, because I'm going to be going over it, and over it in my mind, and maybe I'll find a reason to change my mind." (16 RT 3523.)

How she reached this remarkable conclusion does not appear on the record. It certainly cannot be found in the actual voir dire answers of this prospective juror. Maybe the prosecutor "reasoned" that as Mr. Payne was a black man, and appellant and his attorneys were black men, all would naturally conspire with one another to defeat justice. It appears she was desperate to remove Mr. Payne and this nonsense was the best she could think of at the time. In any event, these statements by the prosecutor were nothing less than the most thinly disguised admission that she did not trust black men to sit on Mr. Armstrong's jury.

There is *nothing* in the record supporting such an attack on Mr. Payne's integrity. Mr. Payne indicated from the outset that he could follow all of the court's instructions because that is what he was required to do. (6 CT 1624-1625, Q 170.) This general belief also extended to his imposition of the death penalty. (6 CT 1627, QQ 200, 209, 223.)

Mr. Payne also stated that at the present time our criminal justice system was "not prepared to operate without the death penalty." (See 6 CT 1629, QQ. 186-188.) In addition, he stated "In view of where we are as a nation, we as citizens must do what we can to make our system right and true." (6 CT 1635, Q 231.) From these statements, and others similar to them, the prosecutor came to the conclusion Mr. Payne definitely would nullify the jury. The only thing as disingenuous as such a claim was the trial court's refusal to recognize its pretextual nature.

The whole concept that Mr. Payne would "nullify this jury" (16 RT 3531) based upon his lack of full endorsement of the death penalty was a sham. As stated in the opening brief (AOB 243-244), many sitting white jurors and alternates expressed reservations and apprehensions about the death penalty because of its finality and gravity yet they were allowed to sit. The plausibility of the prosecutor's argument was "severely undercut by the prosecutor's failure to object to other panel members," who expressed views very much like the challenged African-American males. (See *Miller-El v. Dretke, supra,* 545 U.S. at p. 248.)

However, instead of questioning the prosecutor as to her utterly baseless statement that Mr. Payne would "nullify" the jury, the trial court praised her for her "passion" (16 RT 3489) and once again abdicated its responsibility under the law, allowing the prosecutor to remove the final African-American male from the jury for specious and racial reasons.

The prosecutor then followed up this nonsensical screed with the "race-neutral" reason that Mr. Payne will surely impose life without parole because he believes people could be rehabilitated. (16 RT 3460-3461.) The sham nature of this excuse was revealed by the comparative analysis to many white sitting jurors who had a similar attitude toward rehabilitation. (AOB 205 et seq.)

The prosecutor also stated that Mr. Payne would be prejudiced against the police because of the "incidents" between them and Mr. Payne's two sons. (16 RT 3457.) First of all, this was another misstatement of the facts. One of these "incidents" involved his son being the *victim* of a robbery and Mr. Payne clearly stated that he felt the police did a proper job in investigating the incident. (VI CT 1609, Q 92.) The other incident was where he felt the police harassed one of his sons because the young man was black. (VI CT 1606, Q 81; 14 RT 2877-2879.)

Concerning this second incident, Mr. Payne made it unmistakably clear that he held no animosity against the police. In fact, his relationship with the police was far more cordial than most because he had worked with them as part of the Neighborhood Watch Program. (14 RT 2879.) While "run-ins" with and hostility toward the police can certainly be "race-neutral" explanations, they are clearly not in this case. As in *Ali v. Hickman, supra,* 584 F.3rd at p.1189, Mr. Payne made it clear that despite feeling his son was unfairly treated, he most definitely held no animosity

against the police. (*Ibid.*) In fact, he had so much faith in the Long Beach Police Department he risked his own safety by partnering up with them to make his neighborhood safer. (*Ibid.*)

Two white sitting jurors also expressed the fact they had been dissatisfied with police conduct. Non-black Alternate # 5 stated on his questionnaire there was a negative experience with the police concerning his father. (IX CT 2547, Q 81.) The prosecutor never brought this up on voir dire. (18 RT 3871 et seq.)

Sitting female black Juror #3 also indicated she had negative experiences with the police. (VIII CT 2248, Q 81.) The prosecutor asked her about this and she indicated that on several occasions she had been subjected to an unpleasant traffic stop. (19 RT 4051-4052.) However, the prosecutor never pursued this line of questioning, never even asking her if she had a residual bias against the police.

The trial judge's remark about the prosecutor's "passion" demonstrated just how far off the rails this case had gone by the unconstitutional final strike to the last African-American male. Apparently, the trial court had come to believe that the hyperbole and desperation from the prosecutor had somehow reached the status of persuasive authority. It inexplicably reversed itself as to the challenge to Mr. Payne, thereby lending the court's stamp of approval to the prosecutor's strategy of

removing the voice of the African-American male and minimizing the voice of any black males in the deliberation room.

Respondent attempted to justify the prosecutor's overwhelmingly racially-biased conduct by parsing words and phrases to indicate that the comparative analysis made by appellant did not really apply to Mr. Payne. However, using the totality of circumstances paradigm, they clearly did.

D. THE TRIAL COURT'S GRANTING OF THE FOUR CHALLENGES DOES NOT WARRANT DEFERENCE BY THIS COURT

Appellant has presented, both in Argument II (AOB 137 et seq) and herein, dozens of prosecutorial misstatements of jurors' positions, misstatements of the law, the prosecutor's inconsistent conduct, different challenging schemes of black-male jurors, her outright aggression toward at least one of those jurors, incontrovertible and blatant failure to justify the challenges of black-male jurors under comparative analysis, challenges of *each and every* member of the cognizable group in question, and, in general, conduct that made it crystal clear no African-American males were welcome on this jury. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241 [bare statistical analysis is a relevant fact to be considered as part of the totality of circumstances.])

Review of a trial court's denial of a *Wheeler/Batson* motion has been said to be "deferential," with the reviewing court examining "only when substantial evidence supports its conclusions." (*People v. Lenix, supra,* 44

Cal.4th at p. 614.) It is clear from the totality of circumstances of all four strikes, looked at individually and as a whole, that there was no substantial evidence to support the trial court's denial of the four strikes. The judge accepted the prosecutor's misstatements of the positions of the four African-American male jurors without the slightest hesitation. The trial court completely ignored the fact that the prosecutor accepted, usually without any question at all, white jurors who had the *same* beliefs that "justified" the excusal of the four black male jurors. In and of itself, the comparative analysis by appellant revealed an utterly unmistakable pattern of discriminatory intent.

Further, the court could not point to any sitting jurors of this cognizable group to mitigate this argument of purposeful discrimination. (See *People v. Bell, supra,* 40 Cal.3d at pp. 597-599.)

The trial court did not conduct a "sincere and reasoned effort" to distinguish "race-neutral" reasons from sham excuses to allow for the excusal of all members of the cognizable group in question. (*People v. Burgenor* (2003) 29 Cal.4th 833, 864.) To determine whether such a "sincere and reasoned effort" was performed, the reviewing court must consider the totality of all the circumstances of the case and voir dire, as well as the comparative analysis of the struck members of the cognizable group and "similarly situated" white sitting jurors. (*Miller-El v. Dretke*

supra, 545 U.S. 241, fn 2; *Green v. LaMarque*, *supra,* 532 F.3d at p. 358.) The trial court did not do this.

As stated by the United States Supreme Court, "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 252.) In the instant case, the prosecutor's pretext does not stand up to any sort of sincere and reasoned analysis .On many occasions, throughout its brief, respondent attempted to rehabilitate the conduct of the prosecutor by either ignoring certain statements she made or by "imagining a reason that might not have shown up as false." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 252.) As stated in the cases cited in Argument II of the opening brief and herein, it is the *trial prosecutor's* statements and conduct that must be analyzed to determine whether the challenges were "race-neutral" or a pretext to remove members of a cognizable group.

In addition, the trial court, at times, did not seem to understand the law. Regarding Mr. Leonard, both the trial court and the prosecutor verbally confronted defense counsel for challenging Mr. Leonard because, under the law, a single challenge can never constitute racial discrimination. (15 RT 3223-3224.) This was not a true statement of the law, as from the time of *Batson,* the High Court made it perfectly clear that even a single

discriminatory challenge is constitutionally forbidden. (*Batson, supra,* 476 U.S. at pp. 95-96.)

There was nothing either reasonable or sincere about the trial court and the prosecutor teaming up to accuse defense counsel of misstating the law when the fact, was counsel was right. This type of casual, shallow review of the prosecutor's "reasons" dominated the court's acceptance of the prosecutor's reasoning for all of the prosecutor's challenges to the black male jurors.

As such, under its own case law, this Court owes no deference to the rulings of the trial court.

A few months ago, this Court decided *People v. Williams*, *supra,* 56 Cal.4th 630. An analysis of this Court's reasoning in *Williams* strongly supports appellant's position in the instant case. In *Williams*, defense counsel brought three separate *Batson* motions. The first was brought after three African-American women were challenged, prospective jurors H.R., T.C., and P.C. (*Williams, supra,* 56 Cal.4th at p. 650.) The trial court requested the prosecutor to justify his reasons for his challenges. The prosecutor stated he was using a subjective rating system, ranging from "1" for the least likely prospective juror to impose the death penalty to "5" being the most likely prospective juror to impose said penalty. (*Ibid.*)

At the time the *Batson* motion was made, forty jurors had been called to the box. Four of these were African-Americans, including three

African-American women. (*Williams, supra,* 56 Cal.4th at p. 650.) On the prosecutor's subjective scale, H.R. was rated a "1", T.C. a "3-", and P.C. a "2." A second *Batson* motion was made after the prosecutor's challenge to an African-American woman, R.P., whom the prosecutor rated a "1". (*Williams, supra,* 56 Cal. 4th at p. 651.) The third and final *Batson* motion was made after the challenge of another African-American woman, R.J. (*Id.* at pp. 651-652.) The final composition of the jury was seven white jurors and five African-American jurors, one of those being female. (*Ibid.*) This Court upheld these challenges, holding the prosecutor offered a plausible and factually accurate reason for all of his challenges.

Regarding H.R., this Court accepted as "race-neutral" the prosecutor's explanation that this prospective juror would only vote for death in cases that involved the burning of bodies and mutilation of body parts. (*Williams, supra,* 56 Cal.4th at p. 654.)

Regarding T.C., this Court pointed out that she gave equivocating answers as to which was the worse of the two penalties. (*Williams, supra,* at p. 655.) However, most importantly, she stated she "wouldn't want to put herself in the predicament to vote for the death penalty." (*Ibid.*) When defense counsel pointed out to T.C. that she would be in that very predicament should she be sworn as a juror, T.C. equivocated as to her feelings, but stated that she would not impose the death penalty under any

circumstances. (*Ibid.*) This Court held this to be a "race-neutral" reason to challenge the juror.

Prospective Juror P.C. stated she was not sure whether California should even have a death penalty, and could not say that if it came up for a vote which way she would cast her ballot. (*Williams, supra,* 56 Cal.4th at p. 656.) She "thought" she could impose death, but was not sure. (*Ibid.*) This Court held that together with the juror's comments that she was not sure that California should have the death penalty, this lack of conviction as to whether she could impose it constituted a "race-neutral" explanation. (*Ibid.*)

This Court's rulings on the above three jurors can easily be distinguished from all of the challenges in this case on the facts. All of the above jurors made clear they were significantly impaired in their ability to impose death because of their personal sense of morality. *None* of the four challenged jurors in the instant case ever indicated that they had any disability in imposing death based upon their personal beliefs. None had any concerns that sitting on a capital jury would cause a moral crisis in their lives, none had any doubts that California should have the death penalty, and none suggested that they could only impose death only if the prosecutor presented very specific facts.

Regarding juror R.P., the prospective juror repeatedly stated as she never thought about the death penalty, she had no idea what she would do when it came time to judge. (*Williams, supra,* 56 Cal.4th at pp. 656-657.)

In addition, the prosecutor stated that he believed that the juror's demeanor indicated that she would be substantially impaired in making the penalty decision. (*Id.* at p. 657.)

This Court upheld the challenge of R.P., citing her inability to state that she would impose the death penalty. In addition, citing to *Miller-El v. Cockrell, supra,* 532 U.S. at p. 339, this Court found the overall conduct of the prosecutor to be such so as to lend credibility to the prosecutor's own beliefs as to the juror's demeanor.

Again, this Court's rulings as to R.P. can easily be distinguished from all of the challenges in this case on the facts. Unlike in the instant case, R.P. did not simply state she had no personal preference as to which penalty to impose. Nor did she state that she could impose the death penalty even though she had no strong feelings one way or the other about its imposition. Instead, she stated she had no idea, whatsoever, whether she could impose the death penalty at all, which by any standard is a significant impairment.

Further, the *Williams* prosecutor did not spend the largest part of his voir dire asking legally incorrect and factually irrelevant hypothetical questions nor did he continually misstate prospective jurors' voir dire answers. The prosecutor's conduct in the instant trial, especially in voir dire, has been discussed extensively in Argument II of the opening brief

and herein. That conduct warrants no confidence in any statements appellant's prosecutor may have made about a juror's demeanor.

This Court's upholding of the race-neutral explanation to the challenge of prospective juror R.J. was largely based upon the fact that on three separate occasions, the prosecutor accepted the panel as satisfactory when R.J. was part of it. (*Williams, supra,* 56 Cal. 4th at pp. 659-659.) As this Court stated, "[a]lthough this is not a conclusive factor, we have stated that 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (*Id.* at p. 659 citing to *People v. Snow* (1987) 44 Cal.3d 216, 225.) Obviously, this did not happen in appellant's case. However, it does speak to the kind of factor that can be used to uphold a prosecutor's credibility. No such factors existed in the instant case.

The *Williams* Court also spoke to comparative juror analysis. (*Williams, supra,* 56 Cal.4th at pp. 662-663.) In *Williams*, defendant claimed that the prosecutor allowed white jurors to serve who were at least as reluctant to impose the death penalty as those who were challenged. All of the seated jurors stated that he or she could impose the death penalty in the appropriate circumstances. Therefore, none were similarly situated to the challenged jurors. (*Id.* at p. 663.)

Further, in *Williams, supra,* 56 Cal.4th at p. 663, this Court pointed out the fact that five African-Americans, including a black female, ultimately were included on the jury weighed in favor of the prosecutor's good faith. In the instant case, each and every member of the group discriminated against were struck, leaving a single black female juror in the total of eighteen seated or alternates jurors.

Therefore, this Court's holding in *Williams,* while upholding the trial court's granting of the prosecutor's challenges, strongly supports this appellant's contention he was deprived of a constitutionally impaneled jury.

On August 26, 2013, in *People v. Harris* 2013 WL 4516652 this Court ruled on the trial court's denial of defendant's *Batson/ Wheeler* motion. In *Harris*, three of the sixty-nine prospective jurors in the jury pool of Harris's re-trial were African-American. (*Harris* at p. 19.) The prosecutor exercised peremptory challenges against two of these African-American prospective jurors, H.C. and K.P. Defendant made a *Batson/Wheeler* motion based on the ground that African-Americans were underrepresented on the panel and that the lone hold-out juror in defendant's first trial was African-American.

The trial court denied the motion on the ground that defendant had failed to make a prima facie showing of discrimination under the three-prong test of *Johnson v. California, supra,* 545 U.S. at p. 168. (*Harris* at p.

19.) As such the prosecutor did not have the obligation to state his reasons for the challenges. (*Ibid.*)

This Court held that defendant's motion "primarily relied upon the relative dearth of African-American prospective jurors, and the fact that the prosecutor exercised peremptory challenges against the two who had been called to the jury box at the time he made his motion." (*Harris* at p. 20.) However, this Court held that "this numerical showing *alone*, however, falls short of a prima facie showing...because the small number of African-Americans in the jury pool makes drawing an inference of discrimination from this fact *alone* impossible." (*Ibid.*; emphasis provided.)

This Court never stated that such a prima facie case could not be established with such a small sample of prospective jurors. It only stated that standing alone these types of numbers will not sustain a claim of a prima facie case of discrimination under the *Johnson* test, without a showing that the totality of relevant facts raise an inference of discrimination. (*Harris* at p. 20.)

In *Harris,* this Court gave deference to the trial court's finding of there being no violation of the *Batson/Wheeler* doctrine. It found that Harris failed to "demonstrate that the totality of relevant facts give rise to an inference of discriminatory purpose as the record also shows apparent race-neutral explanations for the prosecutor's excusal of prospective jurors H.C. and K.P. (*Harris* at p. 20.)

This Court then elaborated on the possible race-neutral explanations. Prospective African-American juror H.C. was the head basketball coach at the university the rape-murder victim attended and knew many of the witnesses that testified at the original trial. This Court stated the trial court could have felt the prosecutor could be "legitimately concerned" that because of this close connection, H.C. may not be a fair juror. (*Harris* at p. 20.) This Court pointed out no other prospective juror had this sort of close connection to Mr. Harris's trial. (*Ibid.*) In addition, on his questionnaire , H.C. said that he or someone close to him had been discriminated against because of race. This Court stated that this also could have been a race neutral explanation in that the prosecutor may have thought that the H.C. could not be fair. (*Ibid.*) Moreover, H.C.'s answer on his questionnaire that because of his prominent place at the University "his path might have crossed" with that of the victim or defendant, who was also part of the University community, could also have amounted to a race-neutral explanation by the prosecutor. (*Ibid.*)

Regarding K.P., her brother was awaiting a felony trial for selling a controlled substance in the same county in which she had been called to serve as a juror. While she stated that this would not bias her, this Court felt that the prosecutor could have been concerned about the effect of this contemporaneous prosecution on K.P. (*Harris* at p. 20.) In addition, K.P. also indicated that jury service would force her to drop at least some of her

summer school classes, which she felt might interfere with her transfer to a four-year school. This Court held that the prosecutor might have felt that this concern could "impair her ability to focus on the case and serve as an impartial juror." (*Ibid.*)

Regarding a comparative analysis, this Court stated that when the trial court did not find a prima facie showing, and the prosecutor failed to state his or her "race neutral reasons" it was not incumbent on this Court to conduct said analysis. (*People v. Harris* at p. 21; *People v. Streeter* (2012) 54 Cal.4th 205, 226, fn 5.) However, this Court held that even if such an analysis had been performed it would be unavailing to defendant. (*Harris* at p. 21.)

Regarding challenged juror H.C., this Court stated the fact H.C. *personally* (emphasis provided) knew eight potential witnesses was "race-neutral" in it was far and away the greatest contact between any of the potential jurors and witnesses, therefore, no rational comparison could possibly be made, even if the Court wanted to do so. (*Harris* at p. 21.)

Regarding K.P., this Court also stated the fact her brother had a felony trial being prosecuted by the same prosecutor's office defied any comparison to any of the seated jurors. (*Harris* at p. 21.) In addition, K.P.'s concern that her service might have a serious effect on her education, also was a "race-neutral" reason that did not compare to any of the seated jurors. (*Id.* at p. 22.)

Harris is clearly distinguishable from the instant case. Firstly, the statistics were different. In the instant case *all four* of the cognizable group were excused by the prosecutor. In *Harris,* there were only two excused members of the cognizable group challenged. One was left to serve on the jury. (*Harris* at p. 19.) Further, in the instant case the trial court ultimately recognized the existence of a pattern and asked the prosecutor to give his "race-neutral" explanation as to all of these four jurors. Most importantly, as discussed in the AOB (Argument II) and herein, these race-neutral explanations were not facially race-neutral, which was fully confirmed by a comparative analysis.

On the same day *Harris* was decided, this Court also decided *People v. Mai* (2013) 2013 WL 4516654. As in *Harris*, this Court again denied a defendant's argument that the trial court improperly excused three prospective African-American jurors without a "race-neutral" reason.

In *Mai,* the prosecutor's challenges to all of the African-American prospective jurors were upheld by the trial court. (*Mai* at p. 41.) While the trial court "tentatively" held that a prima facie showing had been made (*ibid.*), it subsequently "backtracked from that finding." (*Id.* at p. 42.) According to this Court, the trial court suggested that it was necessary to find a "strong likelihood" of discrimination to find a prima facie case and felt that counsel could not meet that burden. (*Ibid.*) Citing to *Johnson v. California, supra,* 545 U.S. at p. 170, this Court held that "strong

likelihood" was not the proper standard to be used in the determining the existence of a prima facie case. (*Mai* at p. 44.) However, regardless of the standard used, as the prosecutor explained the reason for his challenges, it was possible to proceed to the third step of the *Johnson* three-step analysis and determine whether the trial court properly accepted the race-neutral explanations of the prosecutor. (*Ibid.*)

Regarding excused prospective juror M.H., the prosecutor stated she was the only prospective juror who was single and had no children. The prosecutor also proffered the juror "was younger than I prefer." (*Mai, supra,* at p. 42.) M.H. also stated that she felt the death penalty should be imposed only if there had been a pattern of violent conduct. (*Ibid.*) This Court also stated that M.H.'s answers as to the use of the death penalty "could give rise to a reasonable concern (by the prosecutor) that her willingness to impose the punishment might be influenced by her degree of interest in the case." (*Id.* at p. 44.)

Defense counsel argued that the prosecutor was incorrect when it stated that M.H. was the only under forty-year-old prospective juror who was both single and childless, pointing out Juror #12 was forty-three, single and had no children. (*Mai, supra* at p. 45.) This Court ruled that the record indicated a race-neutral reason and the comparative analysis to Juror 12 was unavailing as he did not have the same penalty phase attitudes as did

M.H. and it was the combination of her young, single status and her death penalty attitudes that established the "race-neutral" reason. (*Ibid.*)

Regarding potential juror P.F., the prosecutor also stated that she was too young and that she stated in the questionnaire that the death penalty should only be imposed where there has been a proven pattern of violent conduct. (*Mai* at p, 42.)

This Court ruled that P.F.'s remark about the violent pattern of conduct may create a legitimate prosecutorial concern that P.F. would be reluctant to impose the death penalty unless defendant was a person who committed similar violent acts in the past. (*Mai* at p. 46.)

The prosecutor's reasons for challenging prospective juror L.P. were the fact that she was a "social worker" and that L.P. stated that she could not vote for death unless there was proof beyond a shadow of a doubt, which would hold the prosecutor to a far too high burden in the penalty phase. (*Mai* at p. 42.) This Court held that the reasons given for the challenge were neutral and reasonable in that the prosecution often does not like social workers on their juries. Further, this particular prospective juror would force the prosecutor to prove his case by a standard not required by law. (*Id.* at pp. 46-47.) Hence, this Court ruled the prosecutor's reasons for excusal were both inherently plausible and supported by the record. (*Id.* at 47.)

The excusal of the *Mai* and *Harris* prospective jurors had nothing at all in common with the excusals of the four black male jurors in the instant case. Unlike in the instant case, the *Mai* and *Harris* excusals were based on logical assessments by the prosecutor, done without resorting to personal attacks, misstatement of positions, and misstatements of the law. As explained completely in the opening brief (AOB Argument II), and herein, the challenges in the instant case were thoroughly discredited by the actions of the prosecutor, whose statements and behaviors clearly showed her *need* to rid the jury of all African-American males.

Appellant has discussed all of these statements and behaviors in Argument II of the opening brief. However, in light of *Harris* and *Mai,* some of this deserves repeating. The instant prosecutor's claims of race neutrality were invalidated by the abundance of evidence that white jurors who felt the same as black jurors on issues vital to the prosecutor were allowed to sit. The similarly situated black male jurors were not. The prosecutor told the trial court a juror's belief that life was the worse penalty merited an automatic challenge. (9 RT 1735.) Yet, many of the sitting white jurors either felt otherwise or gave ambiguous answers to the question which was the worse penalty. (ARB 63-66.)

The prosecutor stated that belief in "rehabilitation" was also ground for automatic challenge. (17 RT 3384.) Yet, many sitting white jurors who expressed a positive or ambiguous attitude toward rehabilitation were

allowed to sit while similarly situated black male jurors were not. (ARB 74-78; AOB 207-209.)

The prosecutor further informed the trial court that she was excusing Mr. Cook, a black male juror because that had no personal opinion as to the application of either penalty and could impose either penalty depending on the facts. Yet there were several white jurors who felt the same way but were permitted to sit. (ARB 82-83.)

In addition, many of the grounds given for excusal of the black jurors were not only controverted by the fact, they were illogical to the point of absurdity. She claimed that Mr. Leonard should be excused because he was not "participating" in the voir dire when the other prospective jurors were being questioned. (AOB 196-197.) There was no suggestion as to what the prosecutor felt that Mr. Leonard should have been doing while the other jurors were being questioned, nor was there a reference to what other jurors were doing while that Mr. Leonard was not.

Against Mr. Cook, the prosecutor launched into a round of offensive and combative questioning unseen as to any other juror in order to get Mr. Cook to respond negatively to her. (AOB 215 et seq.) She claimed Mr. Walters was unfit to sit because as an engineer he would hold the prosecution to a higher burden, even though sitting white juror #11 was an engineer as well. (AOB 232-233.) Without any supporting facts, she vituperatively informed the trial court that she "knew" that Mr. Payne

would "hang" the jury. (AOB 240-241.) In addition, as stated in the opening brief and herein, the prosecutor's misstatements of prospective jurors' voir dire answers and misstatements of the law were prominently featured in the prosecutor's attempts to eliminate all African-American males from the jury. (AOB, Argument II.)

In summary, unlike in *Harris* and *Mai*, in the instant case there was a plethora of on record evidence, including but not limited to the elimination of all members of a cognizable group, that clearly demonstrated the prosecutor's racially biased motivations for exercising her challenges to each and every black male on the jury panel.

Justice Liu wrote concurring opinions in both *Harris* at p. 41 et seq and *Mai* at p. 51 et seq in which he wisely pointed out that in the past two decades, this Court has found *Batson/Wheeler* error in but one of over one hundred appeals in which the claim was raised. (*Harris* at p. 44.) In that case, the prosecutor actually admitted on the record that his goal was the removal of all Hispanic jurors as they would "not be favorable jurors for the prosecution." (*People v. Silva* (2001) 25 Cal.4th 345, 375.)

Justice Liu cited many reasons for this extraordinarily low rate of reversal, reasons that will hopefully one day result in the modification of some of this Court's rulings that make it so difficult to obtain relief. Justice Liu's primary concern was that "it is all too easy to comb the record and find some legitimate reason the prosecutor could have had for striking a

minority juror, dispelling an inference of discrimination otherwise from the totality of circumstances requires more than a determination that the record could have supported race-neutral reasons for the prosecutors use of his peremptory challenges." (*Harris* at p. 50.)

In this vein, Justice Liu expressed concern that in all too many cases, strikes are justified by both this Court and the trial court where the trial court has not done a complete analysis by demanding a detailed explanation by the prosecutor as to why the challenges were made. (*Mai* at p 52.) Before a challenge can be upheld, Justice Liu would require that the record must provide a basis for this Court to conclude the trial court made a *reasoned* effort to analyze the prosecutor's explanations for the strikes. (*Ibid.*)

Justice Liu concurred in the result of the majorities' holdings in both *Harris* and *Mai* because he felt he was compelled to follow existing Court precedents. (*Harris* at p. 42; *Mai* at p. 66.) While supportive of Justice Liu's concurring opinion, appellant also follows these Court precedents. In both the opening brief (Argument II) and herein, appellant has shown that a careful following of the precedents of this Court, as well as the High Court, reveals but one conclusion. The appellant has met his burden of proof by demonstrating that the challenges to all four of the African-American male jurors were racially based upon the on record statements and conduct of the prosecutor. The trial court's analysis of these statements and conduct were

neither reasoned nor sincere. Therefore, no deference is owed to the trial court's determinations.

F. CONCLUSION

The judicially sanctioned removal of all African-American male jurors, and the minimization of any African-American members of the jury was unconstitutional. It was based neither on the facts nor the law. The prosecutor had no hesitation to twist juror responses and ignore the positions of the white jurors she allowed to sit on the jury. The trial court abandoned its duty to do a sincere and reasoned analysis of the challenges. The trial court was quite correct that the actions of the prosecutor were full of "passion." Regrettably, this was not a passion for justice, but a passion to win, to convict, and to condemn, with little regard to the constitution that binds together this nation that proclaims us all to be equal under the law. Our society is replete with "passionate" people who loudly extol their cause without any regard to facts or logic. Fortunately, that is not the practice in the California courts. Law, facts and logic must and will prevail. While baseless, unsupported accusations may win the day on the streets, they can never be given any weight in our courts.

The law, facts, and logic all compel a reversal in this case. What the prosecutor has done in this case was not only deny Mr. Armstrong his constitutional rights, but effectively disenfranchise an entire people. Too much of national will has been directed to the cause of equality to allow

this to happen. Failure to reverse in this case would be a signal to overzealous prosecutors throughout this state that they are free to fashion whatever type of jury they want as long as they have the imagination to produce a "race-neutral" excuse, no matter how absurd.

This cannot be allowed to happen. Our system of justice has come too far to allow it to happen. We cannot, we must not, go back to the very bad old days where the color of a man's skin was his destiny.

Appellant respectfully requests reversal of Mr. Armstrong's conviction.

GUILT PHASE ISSUES

ARGUMENTS III-VI

Arguments III-VI all relate to the trial court's exclusion of evidence proffered by appellant that would have supported the heart of the defense; that appellant lacked the specific intent to commit the crimes in question and he did not, in fact, commit any sexual offenses against the victim, nor murder her. The court's errors cumulative error deprived appellant of his right to Due Process of Law in that he was not permitted to introduce evidence refuting the prosecutor's allegations.

Due to the intertwined nature of these four arguments, the argument against harmless error is set forth at the end of Argument VI.

III. BY DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S STATE OF INTOXICATION AT THE TIME OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, RIGHT TO DEFEND, EFFECTIVE REPRESENTATION OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

On January 27, 1994, at a pre-trial hearing, the prosecutor requested that evidence that the victim was intoxicated be excluded. (3 RT 250.) Appellant's trial counsel opposed this request in that the sobriety, or lack, thereof, of the victim was relevant to the believability of appellant's

statement to the police. In addition, it was relevant to the credibility of appellant's trial testimony that the victim provoked the assault by calling appellant and his companions "niggers." (3 RT 256-259.)

The trial court granted the prosecutor's request, indicating that the victim's sobriety was not relevant. (3 RT 263-264.)

In the opening brief, appellant argued the trial court committed reversible error in that the victim's lack of sobriety was relevant to prove she would not have had the inhibitions to prevent her from uttering the word "nigger" on more than one occasion. (AOB 254 et seq.) Further, the use of this offensive word prior to any attack was circumstantial evidence that the crime was not the result of a pre-planned hunt for an innocent victim, but rather was a reaction to hostility and provocation. (*Ibid.*) This evidence would have refuted the prosecutor's claim that appellant had the specific intent to commit the predicate felonies charged, which has a direct bearing on any felony-based conviction of murder. In addition, for the special circumstances charged in this case to be found true, the prosecution was required to prove appellant's specific intent to commit the underlying felony. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1299.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued the evidence of Ms. Keptra's intoxication, through the autopsy toxicology report, was irrelevant in that appellant's

claim was "purely speculative." (RB 146.) This argument was based on the claim there was no evidence how Ms. Keptra would personally acted if intoxicated, therefore her intoxication would have had "no tendency in reason" to support appellant's testimony that she initiated the incident by uttering racial slurs. (*Ibid.*)

Further, respondent claimed that this evidence would have had no bearing on appellant's state of mind. Respondent maintained that while it might have been relevant to prove Pearson's state of mind, it would not have been relevant to prove appellant's in that he claimed to be an "aider and abettor." (RB 147.)

Respondent also claimed that even if there was error in the suppression of this evidence, it was harmless. (RB 148.)

C. REPLY ARGUMENT

The prosecutor's theory of the case, as indicated in her argument to the jury, was that appellant and his two companions had left the apartment of Monte Gaur with the intention of rape and robbery and they had fortuitously happened upon Ms. Keptra. (24 RT 5305-5306.) As such, the prosecutor asked the jury to believe that, from the time appellant left the Gaur residence, he possessed the specific intent to rape *and* rob the victim, an intent the prosecutor had to prove to convict appellant under the felony-murder theory and to prove the felony-murder special circumstance.

This was fully discussed in the opening brief. (AOB 254 et seq.) Respondent's claim that Ms. Keptra's intoxicated condition was irrelevant to any legal or factual issue in this case is incorrect. (RB 146.) In fact, it was the prosecutor's argument to the jury that made clear the relevance of this evidence. In her final argument, the prosecutor, once again, told the jury that all three men had formed the intent to rape and rob before meeting up with Ms. Keptra. (24 RT 5385-5386.) She dismissed the notion that it might not have been the case by rhetorically asking the jury why a lone woman would make a racial slur to three men. (*Ibid.*)

By posing this "question" to the jury, the prosecutor made clear she fully understood the relevance of Ms. Keptra's intoxication. She knew that there was indeed a real answer to this rhetorical question, an answer that would have cast reasonable doubt on her theory. The answer was that intoxication causes people to say and do things that they would not otherwise say or do if they were sober.

There is nothing "speculative" about this. In fact, the prosecutor considered it so relevant that she pointed out to the jury that appellant must be lying because no one in Ms. Keptra's *apparent* situation would ever provoke three African-American males at midnight by calling them "niggers." However, an intoxicated person is far more likely to have lost her fear or inhibition than one who was sober. It is also a basic part of

human nature that consuming intoxicants often will embolden people to say what they ordinarily would not.

Respondent argued that not all people react to intoxication the same way and it would be "purely speculative" to contemplate that Ms. Keptra would have reacted by saying things she ordinarily would not have said. (RB 146.) However, respondent missed the point. Appellant need not show that *every* person would have reacted to intoxicants by uttering racial slurs. All appellant need have shown to create a reasonable doubt as to the prosecutor's theory was that there was a plausible answer as to why Ms. Keptra would have acted in a way consistent with appellant's testimony.

Respondent chiefly relied on *People v. Stitely* (2005) 35 Cal.4th 514 to support the argument that Ms. Keptra's intoxication was irrelevant in the instant case. (RB 146.) However, *Stitely* is distinguishable. In *Stitely,* the evidence showed that victim was brutally raped and strangled. The parties had already stipulated that the victim's blood alcohol content at the time of her rape and murder was 0.26%, but defense counsel wanted to call an *expert* to testify that such a high blood alcohol content lowered sexual inhibitions and would have made the victim more likely to engage in consensual sex. (*Id.* at p. 549.)

This Court ruled that it was speculation as to whether or not under the circumstances of the offense, intoxication would have made the victim more likely to have consensual sex. (*People v. Stitely, supra,* 35 Cal.4th at

p. 549.) This decision made perfect sense in light of the ravaged condition of the body which was found in the street, marked with various choke marks, bruises, and vaginal abrasions, all eliminating any possibility that the sexual encounter could have been consensual. (*Id.* at pp. 524-525.) The victim's condition and any evidence as to "lowering of inhibitions" due to alcohol was not relevant.

Respondent cited *People v. Kraft* (2000) 23 Cal.4th 978, 1035 and *People v. Edwards* (1991) 54 Cal.3d 787, 817 for the proposition that "evidence leading only to speculative inferences are irrelevant." (RB 146.) While that is indeed the law, in both *Kraft* and *Edwards*, this Court *upheld* the trial court's admission of \prosecution evidence over defense objection. Respondent also cited to *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, again upholding the *admission* of prosecution evidence over a defense Evidence Code 352 objection.

In the instant case counsel did not seek admission of expert testimony to speak to irrelevant evidence that would cause the jury to speculate. Counsel requested the trial court allow evidence that Ms. Keptra was intoxicated so the jury could decide for themselves what effect, if any, that intoxication would have on the *prosecutor's* theory that Ms. Keptra never would have precipitated an argument with three black men. To this end, the holdings of *Kraft, Edwards*, and *Rodrigues* actually *support,* appellant's argument.

Further, respondent's citation to *People v. Babbit* (1988) 45 Cal.3d 660, 681 was similarly unavailing. (RB 146.) In *Babbit,* defendant's defense to a murder was he was suffering from Post-Traumatic Stress Disorder which was exacerbated on the night of his crime by violent television programs that were being shown. This Court ruled that such evidence was speculative because there was no evidence that defendant ever saw these shows. In *People v. DeLaPlane* (1979) 88 Cal.App.3d 223, 244, the reviewing court ruled evidence that a co-defendant broke into defendant's home to be inadmissible in that there was no evidence to support defendant's contention the burglary was related to the defendant's consciousness of guilt of the crime charged.

In these cases, the proffer was speculative because there was no logical connection between the evidence sought to be admitted and the reason given for its admission. Hence, it was speculative. However, as stated above, the connection between intoxication and lack of inhibition is not speculative; it is a well-established fact.

The mental state of intoxication is relevant in California law. Both voluntary and involuntary intoxication can be used, in the appropriate circumstances, as defenses to crimes. (Penal Code sections 25, 26, and 29.4.) Clearly, a declarant's state of intoxication can be taken into consideration by a jury as to whether his or her declaration was true. (*People v. Navarette* (2003) 30 Cal.4th 458, 514.) Yet now, respondent

claims that Ms. Keptra's intoxication was not relevant to disprove a theory the prosecutor, herself, offered the jury in a capital murder case.

Respondent cited *People v. Cunningham* (2001) 25 Cal.4th 926, 999 for the principle that the exclusion of defense evidence on a minor or subsidiary point does not interfere with appellant's right to due process of law. (RB 149.) Here, however, the exclusion of the toxicology report on a *significant* point was more than just an error of law. It was an impairment of appellant's right to due process of a law; a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

As argued in the opening brief, the exclusion of this evidence was part of a pattern of exclusion that deprived appellant of his opportunity to present a defense. (AOB 249 et seq.) The following three Arguments address some of those additional instances.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S PROVOCATIVE RACIAL SLURS IMMEDIATELY PRIOR TO THE COMMISSION OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

On January 28, 2004, the prosecutor filed a "Motion to Exclude Self-Serving Hearsay." (3 CT 675 et seq.) In said Motion, the prosecutor

requested that the court redact from appellant's January 7, 1999, statement to the police the portion that referred to the racial slurs that Ms. Keptra uttered to appellant and his companions prior to the commission of any crime. (*Ibid.*) In said statement, appellant told the police what drew his attention to Ms. Keptra was someone yelling out something to the effect that "I hope–like I hope you all die niggers," "Niggers I hope you die" and "Fuck you, niggers," or "The niggers are going to die." (3 CT 676-677.)

The prosecutor claimed that these particular statements were "self-serving statements, to which there is no exception." (3 CT 677.) She further stated that these statements were irrelevant and did not relate to appellant's conduct. The trial court accepted the prosecutor's argument and redacted these statements from the tape of appellant's statement to the police that was subsequently played to the jury. (21 RT 4503-4509.)

Appellant argued that the trial court erred in ordering the redaction of these so called "self-serving" statements because it applied the wrong section of the Evidence Code to the analysis. The applicable statute has nothing to do with declarations against interests or statements as to state of mind. What the court had before it was an admission as defined by Evidence Code section 1220, that is an acknowledgment by a defendant which tends toward the ultimate proof of guilty. (AOB 264; *People v. Chan Chaun* (1940) 41 Cal.App.2d 586, 594.) Appellant further argued this Court has made it clear that "if a party's oral admissions have been

introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission ... in evidence.'" (*People v. Arias* (1996) 13 Cal.4th 92, 156; *People v. Breaux* (1991) 1 Cal.4th 281, 302: *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) This Court has recognized that to hold otherwise would allow the prosecutor to create a false impression as to the full import of a defendant's admission, by culling out those parts of the admission that could have added a context to the admission favorable to defendant. (*People v. Pride* (1992) 3 Cal.4th 195, 235; see AOB 264-265.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent did not attempt to contradict appellant vis-a-vis the above point of law. Instead, respondent claimed that the racial slurs were not admissible because they were not relevant. (RB 152-153.) Respondent pointed out the prosecutor claimed that "the exact nature of her (the victim's) utterances was irrelevant. Keptra's utterances alerted appellant and his cohorts that a woman was across the street and caused Hardy to cross the street to offer her $50.00 for oral sex." (*Id.* at p. 153.)

C. REPLY ARGUMENT

The relevance of the racial slurs is fully discussed herein, Argument III, and the opening brief, Arguments III and IV. Respondent cited *People v. Williamson* (1977) 71 Cal.App.3d 206 to stand for its argument the trial court was correct in excluding that portion of appellant's statement dealing with the racial slurs in that they were self-serving declarations. (RB 152.) This citation is unavailing because the *Williamson* case is factually distinguishable. In *Williamson*, the defense attempted to introduce a statement defendant made to a police officer to the effect that he was at the crime scene only because he was trying to be a good citizen by pushing a disabled car off of the street. (*Williamson, supra,* at pp. 213-214.)

This statement was not part of a larger statement by defendant. Its proffer was simply an attempt by the defense to introduce a denial of responsibility without defendant having to face cross-examination. This was the lesson of *Williamson*. (See also *People v. Gambos* (1970) 5 Cal.App.3d 187, 192; RB 152.)

In the instant case, the exclusion of appellant's statement about the racial slurs permitted the prosecutor to create an admission far more incriminating than the one *actually* spoken. The part of the admission excluded from Detective Lassiter's testimony was that appellant's attention was original drawn to Ms. Keptra because she was yelling something to the

effect "I hope-like I hope you all die niggers" and "Fuck you niggers" and/or "The niggers are going to die." (AOB 263.)

The improper exclusion of this part of the admission eliminated from the jury's consideration that appellant had no prior intent to rape, rob, or murder the victim. This improper exclusion not only made the admission more favorable to the prosecution, but severely damaged appellant's credibility and made it appear to the jury that appellant made one statement to the police and another at trial.

Respondent's citation to *People v. Harris* (2005) 37 Cal.4th 310, 335 availed only appellant. *Harris* stood for the principle that the jury is entitled to know the context in which an admission was made. (RB 153-155.) So was it in this case. Appellant's jury was entitled to know the entire context in which appellant's admission was made.

As stated in the opening brief, the controlling cases in a situation such as this are *People v. Arias* (1996) 13 Cal.4th 92, 156; *People v. Breaux* (1991) 1 Cal.4th 281, 302; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174; and *People v. Pride* (1992) 3 Cal.4th 195, 235. (AOB 265.) In these cases, this Court upheld appellant's argument made herein.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE AS TO AN ALTERNATE THEORY OF HOW APPELLANT'S SEMEN WAS DEPOSITED ON HIS SHIRT, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

The prosecution presented evidence that a black checkered, cream-colored shirt was recovered at appellant's mother's house during the January 7, 1999, execution of a search warrant. (20 RT 4322-4324; 22 RT 4758.) Subsequent DNA testing revealed that appellant deposited a semen stain on that shirt. (*Ibid.*) During the cross-examination of appellant's girlfriend, Jeanette Carter, counsel attempted to elicit the fact that when she and appellant had intercourse, he would sometimes put his shirt back on afterward. This answer was offered to explain to the jury a reason for the semen stain on the cream-colored shirt. (21 RT 4536; 4539-4341.)

The prosecutor objected to the admission of this evidence on relevance grounds, stating that appellant's sexual habits had nothing to do with this case so the proffer was not relevant. The trial court agreed and excluded the proffered evidence. (21 RT 4541.)

This evidence was relevant to disprove the prosecutor's theory that the semen was deposited on the shirt in question during the course of the attack. (AOB 269 et seq.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent claimed the fact that there was an alternate theory as to how appellant's semen got on the shirt was irrelevant because Ms. Carter testified she had never seen the shirt before. Further, respondent argued the trial court was correct when it ruled that the true issue at hand was "not sex but rape." (RB 155.)

C. REPLY ARGUMENT

Respondent's argument is impossible to fathom. It was the *prosecutor* who presented the evidence of the semen found on the cream colored shirt for the purpose of demonstrating to the jury that appellant ejaculated at the crime scene, hence, he was involved in the rape. (24 RT 5401.) This was despite the fact that Monte Gmur testified appellant was not wearing this shirt on the night of the crime. (20 RT 4376.)

However, respondent now argues that an alternative theory as to how the semen appeared on the shirt is irrelevant because Ms. Carter said she never saw the shirt before. Therefore, once again, what was relevant for the prosecutor to prove, became suddenly irrelevant when appellant attempted to disprove it. Once again, appellant was denied an opportunity to refute

evidence presented by the prosecutor and for reasons discussed in the opening brief the error was prejudicial. (AOB 269.)

Respondent cited to *People v. Jones* (1964) 228 Cal.App.2d 74, 89 for the proposition that prejudice must be affirmatively established by the appealing party. However, in *Jones,* no prejudice to defendant's case had been claimed, let alone shown. In the instant case, appellant both claimed and established such prejudice in that he was denied the opportunity to provide an alternative theory as to how his semen came to be on the shirt.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE AS TO APPELLANT'S FEAR OF PEARSON, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

During appellant's direct examination related to his conduct in allegedly helping to remove various items from the crime scene, counsel attempted to expand upon appellant's relationship with Kevin Pearson. Appellant testified that he was afraid of him. Counsel asked why this was the case and appellant stated because of Pearson's reputation. (23 RT 4974.) At side bar, the prosecutor objected to this question and the court

indicated testimony about Pearson's reputation would be hearsay and rhetorically asked "We're not going to have a trial on Kevin Pearson's reputation, are we?" (23 RT 4975.) The prosecutor asked for a jury admonition that the answer be stricken and the court complied. (*Ibid.*)

In the opening brief, appellant argued that once again, the court denied appellant an opportunity to present relevant evidence that would have served to create a reasonable doubt as to his guilt. The verdicts in this case hinged largely on appellant's intent and actual conduct. It was the prosecutor's argument that appellant was an eager and equal participant in the crimes committed against Ms. Keptra. Much of that argument was based upon prosecutorial speculation as to what really happened the night of Ms. Keptra's death. (AOB 273 et seq.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent claimed that appellant failed to preserve a claim that the trial court erred in denying him an opportunity to present evidence of his fear of Pearson on appeal. (RB 158.) Respondent elaborated that to preserve such a claim the proponent of the evidence must reveal to the trial court and must make an offer of proof regarding "the substance, purpose, and relevance of the excluded evidence..." (Evidence Code section 354 subd. (a); *ibid.*) Respondent further indicated that when the trial court stopped appellant from testifying about Pearson's reputation, defense

counsel indicated that he did not intend to inquiry into the reputation, and did not lay a foundation for the admission of this evidence. (RB 158.)

In addition, respondent argued that even assuming the claim has been preserved on appeal, the trial court properly exercised its discretion in excluding the reputation evidence. (RB 158; Evidence Code section 1324.)

C. APPELLANT'S REPLY ARGUMENT

1. The Issue on Appeal was Appropriately Preserved

Specificity as to the grounds for an objection is required both to enable the court to make an informed ruling on the objection and to enable the party proffering the objection to cure the defect. (*People v. Boyette* (2002) 29 Cal.4th 381, 425.) In the instant case, the trial court made clear that it fully understood the issue at hand. The court knew that the witness was about to explain he was afraid of Mr. Pearson because of his reputation. (23 RT 4975.) The trial court made clear that it would not allow that testimony because it was hearsay and sarcastically indicated that it had no intention of having a trial on Mr. Pearson's reputation. Any objection would have been futile as the trial court had made it perfectly clear it was not going to allow the admission of any such reputation evidence as it felt it was hearsay and unduly time consuming. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn 4; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

Respondent cited to *People v. Anderson* (2001) 25 Cal.4th 543, 580 and *People v. Whitt* (1990) 51 Cal.3d 620, 648 to support its position. (RB

158.) All that these cases state is the general law that a judgment may not be reversed for erroneous exclusion of evidence unless "the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof or other means." (*Anderson*, at p. 580; RB 580.) However, as explained above, that is exactly what occurred in instant case. Essentially, the trial court tricked defense counsel into not making further objection because the court suggested that the intended line of questioning would turn into a trial on the reputation of Kevin Pearson. This fact made unavailing respondent's citation to *Nienhouse v. Superior Court* Cal.App. 4th 83, 93-94; RB 159.)

The issue has been adequately preserved for appeal.

2. The Trial Court Erred in Disallowing Appellant the Opportunity to Testify as to Pearson's Reputation

This Court has specifically stated an individual's reputation for violence may be admissible to prove a defendant's fear of that person when such fear is a relevant issue in the case. (*People v. Davis* (1965) 63 Cal.2d 648, 656; *People v. Minifie* (1995) 13 Cal.4th 1055, 1068.) Both of these cases held that where a defendant's statement of mind, i.e., his fear of a third party is relevant to an issue in the case, defendant's knowledge of the third party's reputation is admissible.

Respondent attempted to dispute this legal axiom by stating that reputation is not what a witness personally knows about a third party, but the regard that third person was held in the relevant community. (RB 159, citing to *People v. McAlpin* (1991) 53 Cal.3d 1289, 1311; *Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 27; *People v. Neal* (1948) 85 Cal.App.2d 765, 771; *People v. Long* (1944) 63 Cal.App.2d 679, 684.) Appellant does not dispute this. Appellant sought to testify about Pearson's reputation when he was interrupted and the court declared reputation evidence to be hearsay and an undue consumption of time. (23 RT 4975.) Therefore, respondent's citations to these cases was unavailing.

Respondent further claimed that even if the trial court erred, the error does not amount to a miscarriage of justice. (RB 160.) Appellant strongly disagrees. As stated in the opening brief (AOB 249 et seq, Introduction to Arguments III-VI), the trial court systematically excluded all evidence appellant attempted to present that would have formed a basis for attacking the prosecutor's case. As stated therein, the exclusion of this evidence deprived appellant of his right to due process of law. Without this evidence, appellant's testimony had to stand alone and was especially vulnerable to cross-examination as there was no other evidence to support his testimony. In effect, only the prosecutor's version of the crime was allowed before the jury.

HARMLESS ERROR ANALYSIS ARGUMENTS III-VI

In Arguments III-VI respondent claimed that whatever error occurred was harmless. Further, it was argued that if a trial court improperly excludes evidence, defendant must show that it is more probable he would have received a more favorable result had that evidence been admitted. In that "the application of ordinary rules of evidence like Evidence Code section 352 do not implicate the federal constitution." (*People v. Marks* (2001) 31 Cal.4th 197, 227; see *People v. Watson* (1956) 46 Cal.2d 818, 836; RB 148-149, 154-156, 160.)

Respondent was wrong in evaluating each court error independent from one another. Even if one of the errors analyzed in Arguments III-VI was harmless, standing alone, they were anything but harmless when analyzed cumulatively. The High Court has held that the combined effect of trial court error can be violative of due process of law when it "renders the resulting criminal jury trial fundamentally unfair." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298.) The *Chambers* Court further stated that the cumulative effect of multiple errors can violate due process even if no single error rises to the level of a federal due process violation. (*Id.* at p. 290, fn 3; *Parle v. Runnels* (9th Ci.r 2007) 505 F.3d 922, 927.)

That is precisely what occurred in this case. The individual errors of the trial court had the cumulative effect of depriving appellant of a defense, rendering the trial fundamentally unfair. (AOB 277; *California v.*

Trombetta (1984) 467 U.S. 479, 485.) The prosecutor's entire case against appellant revolved around his own statements. There was no testimony presented from eyewitnesses to the crime and there was no forensic evidence tying appellant to the scene. As described in the opening brief Arguments III-VI and herein, the excluded evidence would have both explained the prosecutor's evidence, as well as supported appellant's testimony. It would have shed a completely different light on the initial confrontation, the sperm found on appellant's shirt, and the relationship between appellant and Pearson.

Appellant's testimony was the only evidence presented on his behalf. As described above, the credibility of that testimony was hopelessly damaged by the trial court's refusal to allow the jury to hear the evidence in question. As such, the magnitude of the cumulative error was of a constitutional nature and the standard to be employed in judging prejudice should be that of *Chapman v. California* (1986) 386 U.S. 18, 24. The prosecutor bears the burden of proving the error was harmless beyond a reasonable doubt. It cannot do so for the reasons discussed above and in the opening brief. The judgment should be reversed.

VII. APPELLANT WAS DENIED BY THE TRIAL COURT HIS RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WAS THEREFORE DENIED HIS RIGHT TO DUE PROCESS OF LAW

Appellant respectfully relies upon the discussion in Argument VII of the Appellant's Opening Brief. (AOB 279.)

VIII. THERE WAS INSUFFICIENT EVIDENCE FOR A TRUE FINDING ON THE TORTURE MURDER CIRCUMSTANCE HENCE, APPELLANT'S CONVICTION ON THIS SPECIAL CIRCUMSTANCE VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW, TO A FAIR TRIAL AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon the argument made in Argument VIII of the Appellant's Opening Brief. (AOB 286.) It should be noted that respondent cited many cases in its response brief. (RB 163-164.) However, they all simply repeated the basic framework for deciding an issue of insufficiency of evidence. This framework is whether "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Throughout its brief, respondent cites to cases that simply state the basic standard of the law but which do not apply to the facts controlling the issue. This was such a case. There was insufficient evidence to support a

finding of torture murder for the reasons stated in the opening brief. (AOB Argument VIII.)

PENALTY PHASE ISSUES

IX. THE TRIAL COURT'S EVIDENTIARY RULINGS IN THE PENALTY PHASE VIOLATED APPELLANT'S RIGHT TO PRESENT TO THE JURY EVIDENCE THAT TENDED TO MITIGATE THE PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. SUMMARY OF APPELLANT'S ARGUMENT

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution guarantee a capital defendant the right to introduce a wide range of evidence that has a tendency to mitigate a sentence of death. The jury must be allowed to consider all relevant evidence proffered by a defendant that he is deserving of a sentence less than death.

A California jury has great discretion in determining a capital defendant's fate. The individual jurors are instructed to place any moral weight they choose on any aspect of the circumstances of the crime or the character of the defendant. As long as the evidence is relevant to the circumstances of the offense or character of defendant, the court may not limit the defendant's presentation of relevant evidence. (AOB 293-296.)

The penalty phase that resulted in appellant's death judgment violated the above-referenced provisions of the United States Constitution. The trial court denied appellant the opportunity to present his case by

unconstitutionally excluding evidence from Reverend Clark regarding appellant being a follower when his brother (a co-defendant) initiated actions; observations of the intoxication of appellant's mother; the poor outcomes of other children in the family; and the conditions and circumstances surrounding the housing projects in which appellant spent his formative years.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that the mitigating evidence excluded by the court was irrelevant in that it did not "tend logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (RB 167; *People v. Farley* (2009) 46 Cal.4th 1053, 1128.) Respondent also argued that the trial court properly excluded this evidence because it did not bear upon "the defendant's character, record, or the circumstances of the offense." (RB 168; *People v. Souza* (2012) 54 Cal.4th 90, 137.) Respondent further argued that appellant failed to preserve his claim on appeal because he never made an offer of proof or otherwise attempted to advise the court the substance and purpose of the testimony he sought to elicit. (RB 168; Evid. Code section 354; *People v. Vines* (2011) 51 Cal.4th 830, 868-869.)

C. APPELLANT'S REPLY ARGUMENT

Respondent was disingenuous when in arguing that appellant was in some way in violation of Evidence Code section 354, pursuant to *People v.*

Vines, supra, 51 Cal.4th at pp. 868-869.) As stated above in Argument VI, under Evidence Code section 354 the specificity as to grounds for objection is required both to allow the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. (*People v. Boyette, supra,* 29 Cal.4th at p. 425.)

The trial court fully knew the purpose of this proffered evidence. It was mitigating evidence in the penalty phase. It could only have had one purpose - to inform the jury why a death sentence should not be imposed on this particular defendant. (*Jerek v. Texas* (1976) 428 U.S. 262, 271.) As stated by this Court, such evidence serves the purpose of showing that a particular defendant is not as morally culpable for the offense as other evidence may suggest. (*People v. Frye* (1998) 18 Cal.4th 894, 1016-1017.)

The questioning that the trial court kept from the jurors went directly to the purpose. Reverend Clark was not asked some generalized vague questions that had nothing at all to do with appellant and the circumstances in which he was raised. (AOB 296-297.) Reverend Clark ministered to Pamela Armstrong, appellant's mother. Appellant's mother was directly responsible for raising appellant. To claim that the reason why Reverend Clark had nothing to do with the issue at hand is nothing less than absurd.

Respondent's reliance upon *People v. Rowland* (1992) 4 Cal.4th 238, 279, *People v. Souza, supra,* 54 Cal.4th at p. 137, *People v. Loker* (2008) 44 Cal.4th 691, 729, and *In re Scott* (2003) 29 Cal.4th 783, 821 was

completely unavailing. In *Souza,* the excluded evidence was testimony from defendant's father that when defendant was in high school, his brother, Michael, engaged in a fight to protect him. Trial counsel submitted that this evidence was proffered for the purpose of showing "family closeness." This Court upheld the trial court's ruling of the inadmissibility of the proffered evidence as it showed Michael's good character and not the character or upbringing of the defendant, as was the case in the instant matter. (*Souza, supra,* at p. 137.)

In *Rowland*, this Court specifically stated that the background of a defendant's family *was* relevant as long as it pertained to the background of defendant himself. (*Rowland, supra,* 4 Cal.4th at p. 279.) In *Loker,* this Court upheld the trial court's exclusion of evidence describing how certain experiences *personally* affected *other* members of defendant's family. (*Loker, supra,* 44 Cal.4th at p. 729.) In *Scott,* this Court held that the mental condition of defendant's mother *was* evidence to be properly considered by the jury. (*In re Scott, supra,* 29 Cal.4th at p. 821.)

Respondent's citation to *People v. Williams* (2006) 40 Cal.4th 287, 320 and *People v. Farley* (2009) 46 Cal.4th 1053, 1128 (RB 167) are similarly unavailing in that they simply restate the axiomatic principle that the trial court retains the authority to rule upon the relevancy of the evidence in question.

Unlike, the very questionably probative evidence proffered in *Williams* and *Farley*, the proffered evidence of Reverend Clark's testimony went directly to the troubled life of appellant's immediate family. It did not seek to demonstrate how this troubled life affected other members of the family, it simply sought to elicit the type of background in which appellant was raised. As such it was directly and critically relevant to the issue of penalty. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 126.) This is so even if there was no nexus between the family background and defendant's criminal behavior. (*Poyson v. Ryan* (9th Cir. 2013) 711 F.3d 1087, 1105; *Penry v. Lynaugh* (1989) 492 U.S. 302, 322-323.)

The same argument applied to the exclusion of the proffered testimony of Reverend Clark about the type of conduct that appellant's brother and co-defendant, Warren Hardy, would initiate when the two were children. Not only was this evidence relevant to appellant's background, but it was relevant to the relative degree of culpabilities of appellant and his brother in the instant crime.

Regarding the testimony of appellant's father, James, there is no rational argument that can be made that his proffered testimony was irrelevant as a mitigating factor. James was put on the stand to demonstrate to the jury that appellant lacked a functional father and was raised in very bad neighborhoods that resulted in his lack of growth, maturity and stability. This evidence would have also served to humanize appellant and

offer a sympathetic view of his deprived background. The trial court inexplicably refused to allow this testimony stating that it was irrelevant.

Respondent argued that the trial court had the right and responsibility to exclude evidence when its "probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (RB 167.) However, respondent never even suggested how obtaining the answers to the proffered questions would have created *any* danger of confusing the issues or misleading the jury. There was but one issue: should appellant live or die based upon *all* of the aggravating *and* mitigating factors, including the type of father he had and the type of neighborhoods in which he was raised. The questions proffered to James Armstrong were directly relevant to this issue. It was the *exclusion* of this evidence that misled the jury by not allowing them to fully consider all relevant mitigating evidence .

This is why respondent's final argument, that any improper exclusion of this evidence was harmless, must fail. Respondent claimed that appellant was allowed to present "enough" evidence to make his argument for a life sentence and the excluded evidence was largely cumulative. (RB 169.) Further, respondent suggested that as the circumstances of the offense were so horrible and the wounds sustained by the victim so outrageous, no additional mitigating evidence would have been of any help to appellant. (*Ibid.*)

It is not the government's function to set the boundaries of an appellant's case in mitigation. The fact that there was "some" evidence that the trial court allowed in mitigation does not vitiate the error in not allowing appellant to present a full picture in mitigation. The entire concept of allowing the trial court to exclude parts of the defense case in mitigation as long as there was some mitigation allowed was soundly rejected by the High Court. This was fully discussed in the opening brief. (AOB 294-296.) Both *Skipper v. South Carolina* (1986) 476 U.S. 1, 5-6 and *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110 warn against using the "harmless error" analysis to justify the exclusion of relevant mitigating evidence.

This axiom was recently supported by this Court in *People v. Virgil* (2011) 51 Cal.4th 1210, 1273. *Virgil* quoted directly to *Skipper* in mandating that a capital defendant should be allowed to present "any relevant evidence," that is any evidence that "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonable deem to have mitigating value." (*Ibid.*; *McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) *Virgil* also discussed the type of situation where the trial court is justified in excluding such evidence on the ground that it is cumulative. In *Virgil,* trial counsel proffered nine signed photos of defendant's baby and the baby's mother. The trial court allowed the admission of five of the photos to demonstrate that defendant had a family

who loved him, but excluded the other four as cumulative in that they added nothing to defendant's presentation.

This is the meaning of cumulative evidence and does not relate to the exclusion of percipient evidence, such as appellant's relationship with his father, his mother's lifestyle, the neighborhoods in which he was raised, and the result of this sort of lifestyle on other siblings similarly situated to appellant.

Respondent was correct about one thing. The aggravating nature of the instant crime was readily apparent to the jury. This made it even more imperative that appellant be allowed to present his mitigating case in the most compelling and complete way possible. However, as previously discussed in Arguments III-VI, *supra,* due to the prosecutor's unwarranted objections and the trial court's error, the jury only heard part of appellant's case.

The trial court's error was of a constitutional nature. As such respondent must prove beyond a reasonable doubt that the evidence was harmless. The state cannot meet this burden and the death judgment must be reversed.

Further, the interjection by the trial court of a clergy-penitent privilege as grounds for exclusion of this evidence was both ineffectual and disturbing. The statute that allows for this privilege, Evidence Code section 1034, states "a member of the clergy whether or not a party, has a privilege

to refuse to disclose a penitential communication if he or she claims the privilege."

The obvious problem with the court's reliance on Evidence Code section 1034 was that neither Reverend Clark nor appellant ever claimed the privilege. No authority exists that would allow the *trial court* to claim the privilege. However, even beyond the legal error, the very idea that the judge would exercise the privilege on behalf of appellant or a clergy witness called by him once again raised serious questions about the court's impartiality. This lack of impartiality was fully discussed throughout the opening brief. (AOB 335 et seq.)

X. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN THE PENALTY PHASE

Respondent argued appellant's rights were not violated. (RB 170.) Appellant disagrees for the reasons set forth in the opening brief. (AOB 301.)

The cases cited by respondent predominately discuss this issue in terms of the sufficiency of the evidence presented to prove the factor (b) crime, in this case the "jumping in" of "Chris." (*People v. Griffin* (2004)

33 Cal.4th 536, 585; *People v. Rodriques, supra,* 8 Cal.4th at pp. 1167-1168; *People v. Jones* (2011) 51 Cal.4th 346, 380; *People v. Martinez* (2003) 31 Cal.4th 673, 694; (RB 172-173.)

These cases, while clearly indicative of the general state of the law, are not persuasive in the instant case. There was no evidence that appellant had anything to do with any assault on "Chris." Further, there was no evidence of the actual nature of any such "assault." "Chris" did not testify as to his injuries and it is highly speculative as to whether he suffered any at all.

In addition, this evidence, by emphasizing gang activity was inordinately prejudicial to appellant.

XI. IN ALLOWING IMPROPER PROSECUTORIAL REBUTTAL EVIDENCE BEFORE THE JURY, THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN REBUTTAL IN THE PENALTY PHASE

A. SUMMARY OF APPELLANT'S ARGUMENT

During the prosecutor's rebuttal case, out of the presence of the jury, the prosecutor informed the court that she intended to call police witnesses and experts to testify as to the contact appellant had with gangs. (AOB 308.) Appellant objected to this proffered evidence on the dual grounds that it was both irrelevant and exceeded the scope of allowable rebuttal

evidence. (AOB 308.) The trial court overruled appellant's objection and allowed the testimony stating that "exceptional latitude is to be provided for background evidence to be presented at this trial. And this is background evidence." (*Ibid.*; 29 RT 6108.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent claimed that testimony of appellant's penalty phase witness, Reverend Clark, indicated that appellant was a person of good character in that as a youth he went to church every Sunday, "had the potential to be an artist," and helped clean the church and distribute gifts. (RB 175.) Respondent also claimed that even if the trial court erred in admitting the gang evidence, the error was harmless in that the jury already knew of appellant's gang affiliations. (RB 176.)

C. APPELLANT'S REBUTTAL ARGUMENT

Illustrative of this issue are three decisions of this Court. In *People v. Viscotti* (1992) 2 Cal.4th 1, 70, this Court upheld the admission of a violent crime committed by defendant to rebut testimony that he was a kind and considerate person. In *People v. Roberts* (1992) 2 Cal.4th 271, 335, this Court similarly allowed gang literature found in defendant's jail cell to rebut testimony that he was trying to leave the gang life. In *People v. Espinoza* (1992) 3 Cal.4th 806, 825, this Court allowed rebuttal evidence of an otherwise inadmissible non-violent crime to rebut testimony that

defendant had been trying to live a "Christ-like life" since his arrest for the capital crime.

This type of situation is what the *Loker* Court was referencing when it indicated when "general character" is an issue before the jury, the prosecutor is entitled to "present a more balanced picture of his personality." (*People v. Loker*, *supra,* 44 Cal. 4th at p.709.)

However, counsel never attempted to present evidence of appellant's "general character." As discussed previously (AOB 312), Reverend Clark stated he could not comment upon appellant's general character as he only knew what appellant did at the church when part of a program and he could have been a completely different person outside of the church setting. (27 RT 5853.) Further, Reverend Clark never stated that while in church appellant was a person of good character. (AOB at p. 313.) There was precious little to balance by the admission of the rebuttal evidence. Unlike in the above discussed three cases, appellant never attempted to portray himself as a reformed sinner who had taken to living a godly life. Respondent took out of context statements by Reverend Clark as to what duties appellant was assigned to at church and misconstrued them as Reverend Clark's opinion as to appellant's general character.

Moreover, respondent claimed that even if the evidence in question was improperly admitted it was harmless because the jury already knew about appellant's gang affiliation. Nothing could be further from the truth.

While the jury did already possess certain general information about appellant's general gang associations, the additional evidence allowed by the trial court's error included appellant's affiation with a "terrorist street gang." (29 RT 6231.)

Further, the additional evidence included testimony from a gang expert, without any basis in fact, that the commission of a murder would increase appellant's status in his gang and help him move up the gang leadership ladder. (29 RT 6225-6226.) Such testimony was extraordinarily prejudicial in that it improperly provided an even more nefarious motivation for appellant to have committed the crime; to increase his reputation and status in the gang.

As previously discussed (AOB 313-314), the trial court's justification for allowing this testimony spoke volumes about its lack of grasp of the California death penalty scheme as well as an apparent bias against appellant. The court's statement that this improper evidence was allowed because of the "extraordinary latitude" allowed the prosecutor in presenting death penalty evidence runs completely contrary to the actual law as set forth by this Court. In *People v. Boyd* (1985) 38 Cal.3d 762, 773, this Court made it clear that the prosecutor was specifically limited to evidence that fell into one of the aggravating factor categories set forth in Penal Code section 190.3. The State is not allowed "extraordinary latitude" in the presentation of aggravating evidence.

However, as seen in Argument X, *supra,* the trial court's attitude about "extraordinary latitude" clearly did not apply when appellant attempted to introduce evidence regarding why he deserved a sentence less than death. Basic mitigating evidence, such appellant's upbringing, was excluded because of "relevancy," contrary to the law.

Respondent's citation to *People v. Smith* (2005) 35 Cal.4th 334, 359 stands for the proposition that "the admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of palpable abuse." This is all well and good as a general principle of the law. However, as discussed in the opening brief (AOB Argument XI) and herein, the facts of this case show that such abuse existed.

As in the guilt phase, once again a jury selected to favor conviction and death was exposed to only that evidence which favored the prosecutor's theory of the case. The admission of the evidence complained of in this Argument was yet one more reason to overturn the death judgment.

XII. THE PROSECUTOR'S PERVASIVE MISCONDUCT IN THIS CASE VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, INCLUDING HIS RIGHTS TO DUE PROCESS OF LAW, A FAIR TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY AND IMPROPERLY WEIGHED THE SCALES IN FAVOR OF A DEATH JUDGMENT IN THIS CASE

Appellant generally relies on the discussion in the opening brief. (AOB 315 et seq.)

Additionally, respondent claimed that appellant's prosecutorial misconduct argument was forfeited for failing to timely object and request a curative admonition. In actuality, appellant or trial counsel objected to every claim made in this Argument when the claim arose. While appellant did not specifically denominate it as prosecutorial error, the nature of the prosecutor's actions was spelled out in great detail. (AOB Arguments I-XI.)

Further, any objection on the ground of prosecutorial misconduct would have been completely futile considering the trial court's rulings on these Arguments denying admission or improperly excluding evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 820; RB 177.)

In addition, respondent espoused that this claim was forfeited under California Rule of Court 8.204 in that it was not supported by argument and authority. (RB 178 citing to *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Garcia* (1987) 195 Cal.App. 3d 191, 198.) This Court can plainly conclude from reading appellant's extensive argument that it was well-

supported by specific factual and legal authority, as well as being a cogent argument. Appellant did not forfeit this claim.

Respondent again cited to the general law when it stated that the prosecutor's misconduct "violated that Fourteenth Amendment to the federal Constitution when 'it effects the trial with such unfairness as to make the conviction a denial of due process.'" (See *People v. Harrison* (2005) 35 Cal.4th 208, 242; *People v. Cole* (2004) 33 Cal.4th 1158, 1202; RB 178.) As stated by respondent, this occurs only if the prosecutor used "deceptive or reprehensible methods to attempt to persuade either the court or jury." (*Harrison, supra,* at p. 242; RB 179.) Based upon the opening brief (AOB, Argument XII) and above, this is precisely what happened in this case. As such, the prosecutor must prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1987) 386 U.S. 18, 24.) It cannot do so.

XIII. BY CONDUCT DEMONSTRATING BIAS FAVORING THE PROSECUTOR'S CAUSE, THE TRIAL JUDGE DENIED APPELLANT DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent argued appellant waived any claims of judicial bias by failing to assert a timely objection in the trial court to the bias of which appellant now complains. (RB 187.) Respondent is wrong. Despite the

general applicability of the timely objection rule, when a timely objection and any admonition to the jury would not have cured the prejudice caused by improper conduct or questioning, failure to object does not preclude urging error on appeal. (*People v. Terry* (1970) 2 Cal.3d 363, 398.)

In *People v. Mahoney* (1927) 201 Cal.618, 622, this Court discussed the issue of timely objection in a case in where trial counsel failed to object to multiple prejudicial actions by the trial judge directed against defendant. On appeal, appellant claimed that the court's action conveyed to the mind of the jury the impression that the judge was convinced of appellant's guilt and was solidly aligning himself with the prosecution. No assignments of error were made by defendant's counsel and no opportunity was given to the court to right the wrong done. This Court stated:

> We are not unmindful of the rule which requires some effort to be made in the trial court to prevent and to correct such errors when they occur. But there may be instances, and this is one of them, where such effort would be entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error. Further, it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for the appellant, by making an assignment, would have brought upon himself further attack. (*People v. Mahoney* (1927) 201 Cal. 618, 622 citing to *People v. MacDonald*, 167 Cal. 545; *People v. Derwae*, 155 Cal. 592; *People v. Frank*, 71 Cal. App. 575.)

The purpose of the timely objection rule is to give the trial court an opportunity to correct its errors and thus, if possible, prevent by suitable

instructions the harmful effect upon the minds of the jury. However, "Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court." (*People v. Simon* (1927) 80 Cal.App. 675, 679; see also *People v. Arends* (1957) 155 Cal.App.2d 496, 507-508.)

As in *Mahoney*, the errors complained of in this case were not isolated errors, insignificant within the context of the entire trial. They were pervasive throughout the trial and arose from a fundamental prejudice of the trial court against appellant. Raising an objection to the court's questioning would have exacerbated the harm and subjected appellant, his counsel and the defense to further attack from the court.

Even if respondent was correct that an objection to the court's conduct and comments should have been made, when a defendant's substantial rights are involved, failure to make an objection does not waive the claim. Penal Code Section 1259 states

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and

> which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

This Court recently reaffirmed this basic principle of law in *People v. Hillhouse* (2002) 27 Cal.4th 469, 504.

In addition, the failure to object in the trial court will not waive any claim of error if the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*People v. Anderson* (1994) 26 Cal.App.4th 1241; see also *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) In the case of a substantial constitutional right, such as the right to a fair and impartial trial, appellant "deserves" the review of the appellate court regardless of whether defense counsel objected below. (*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383-1384.) Such is clearly the case here.

Once again, the only way to effectively approach this issue is by examining the totality of the circumstances of the trial. The opening brief set forth multiple actions of the trial court that were designed to either deprive appellant of a jury not constituted to find for death (Argument I), silence the voice of African-American males from the jury room (Argument II), deprive appellant of an opportunity to present relevant evidence that

would have supported his case or refuted that of the prosecutor (Argument III-VI) , prevent appellant from presenting relevant mitigating evidence (Argument IX), or allow the prosecution to present non-statutory aggravating factors (Argument XI).

As explained in these Arguments, the rulings of the trial court were not simply mistakes or misinterpretations of law or a misapprehension of the facts. On multiple occasions, the trial court so badly misstated testimony of jurors or ruled so contrary to the law that the inference of discrimination against appellant was manifest.

Respondent cited to *People v. Freeman* (2010) 47 Cal.4th 993, 996 to stand for the proposition that it is only in the "exceptional case presenting extreme facts where a due process violation will be found. (*Id.* at p. 1005; RB 188.) Further, it cited to *People v. Snow* (2003) 30 Cal.4th 43, 78 for the proposition that to obtain relief the judge's prejudice must create not only an imperfect trial but deprive appellant of a fair trial. (RB 188.) Appellant does not dispute this law. Instead, he points to Arguments I-XI that prove that both the extent and depth of the court error clearly did so deprive appellant.

This bias was manifested from the initiation of the *Witt* voir dire, through the improper granting of the racially biased excusal of all four black male jurors, to the exclusion of guilt and penalty phase evidence that

would have given appellant a chance to defend himself. This bias was sufficient to render appellant's trial manifestly unfair.

Appellant did not receive a fair trial for the reasons stated above. The trial court's bias played a key role in the denial of this fundamental constitutional right.

INSTRUCTIONAL ISSUES

XIV. CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

Appellant respectfully relies on the discussion in Argument XIV of the Appellant's Opening Brief. (AOB 351 et seq.)

XV. THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT THEY MUST AGREE UNANIMOUSLY WHETHER APPELLANT HAD COMMITTED MALICE MURDER OR FELONY-MURDER

Appellant respectfully relies on the discussion in Argument XIV of the Appellant's Opening Brief. (AOB 355 et seq.)

XVI. THE PROSECUTION'S UNCHARGED CONSPIRACY THEORY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS, FAIR TRIAL, JURY TRIAL THE RIGHT TO DEFEND, AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY, AS IT PERMITTED JURORS TO INFER GUILT OF CHARGED OFFENSES ON A QUANTUM OF EVIDENCE LESS THAN THE STANDARD OF PROOF.

Appellant respectfully relies on the discussion in Argument XVI of the Appellant's Opening Brief. (AOB 367 et seq.)

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

XVII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD

Appellant respectfully relies on the discussion in Argument XVII of the Appellant's Opening Brief. (AOB 374 et seq.)

XVIII. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant respectfully relies on the discussion in Argument XVIII of the Appellant's Opening Brief. (AOB 378 et seq.)

XIX. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies on the discussion in Argument XIX of the Appellant's Opening Brief. (AOB 386 et seq.)

XX. EVEN IN THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

Appellant respectfully relies on the discussion in Argument XX of the Appellant's Opening Brief. (AOB 444 et seq.)

XXI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant respectfully relies upon the discussion in Argument XXI of the Appellant's Opening Brief. (AOB 446.)

XXII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

Appellant respectfully relies upon the discussion in Argument XXI of the Appellant's Opening Brief. (AOB 450.)

CONCLUSION

For the reasons stated above and in the Opening Brief, appellant respectfully requests that the judgment against appellant be vacated.

September 10, 2013

Glen Niemy
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Reply Brief was composed in 13 point font, New Times Roman type, and consists of a total of 40, 296 words.

September 10, 2013

Glen Niemy
Attorney for Appellant

DECLARATION OF SERVICE

RE: PEOPLE V. ARMSTRONG
SUPREME COURT # 126560
SUPERIOR COURT # NA051938

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Reply Brief,** on each of the following by placing the same in an envelop addressed respectively

Clerk of the Supreme Court of California
350 McAllister St
San Francisco, CA 94102
(Original and 14 copies.)

Geraldine Russell, Esq
P.O. Box 2160
La Mesa, CA. 91943

Jamelle E. Armstrong
P.O. Box V-44482
San Quentin, CA 94974

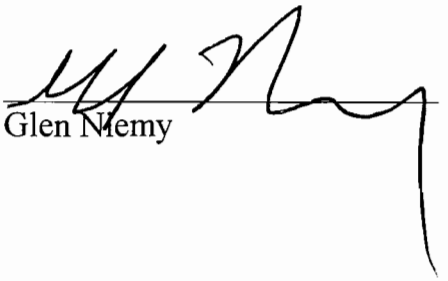
Attorney General's Office
300 So. Spring St
Los Angeles, CA 90013

District Attorney for Los Angeles County
210 W. Temple St
Los Angeles, CA 90012
(Appeals Section)

Los Angeles Superior Court
210 Temple St
Los Angeles, CA 90012
(Appeals Section)

Each envelop was then on September 12, 2013, sealed and placed in the United States mail, at Bridgton, ME, County of Cumberland, the county in which I have my office, with postage thereon fully repaid. I declare that under the penalty of perjury and the laws of

California and Maine that the foregoing is true and correct this September 12, 2013.



Glen Niemy