IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

BRANDON ARNAE TAYLOR,

Defendant and Appellant.

Case No. S062562

San Diego County Superior Court No. SCD1113815

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of San Diego

The Honorable Frederick Link

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief.[1] The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

[1] The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB").

I.

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S *MARSDEN* MOTIONS BEFORE AND DURING THE COMPETENCY PROCEEDINGS

In Argument I of the AOB (pp. 57-70), appellant discussed the trial court's erroneous failure to grant appellant's first requests for a new lawyer under *People v. Marsden* (1970) 2 Cal.3d 118 and how that failure prejudiced appellant during his competency trial.

Appellant's dissatisfaction with his lawyer, Mary Ellen Attridge, first surfaced during a pre-trial hearing on January 25, 1996, when Ms. Attridge told the trial judge that she did not believe appellant was competent to stand trial. (4 RT 601.) At that time, appellant expressed a lack of trust in his attorney, claiming that she had "turned against" him. (4 RT 604.) Counsel immediately recognized that appellant might want to proceed with a "Marsden" claim.[2] The trial judge tried to defuse this concern, but appellant continued to complain, contending that Ms. Attridge was "insubordinate" and "had turned a federal court case over to some psychologist I don't even know." (4 RT 604-605.) After the trial judge suspended the criminal proceedings to initiate the process for assessing competency under Penal Code section 1368, appellant continued to renounce Ms. Attridge, telling the judge that he had fired her as his lawyer. (4 RT 605.)

At the next hearing in the case, appellant persisted with his claim that he did not want Ms. Attridge to represent him: "So far my attorney believes that I am incompetent and for that reason I decide that I need

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[2] *People v. Marsden* (1970) 2 Cal.3d 118

another attorney." (5 RT 614.) During the course of that hearing, appellant made clear how much he did not trust Ms. Attridge and that he wanted a new lawyer. (5 RT 614, 616.) Appellant also did not trust nor want co-counsel, John Lee, another lawyer from Ms. Attridge's office who was now assisting her. (*Ibid.*)

It was clear from the first time appellant expressed his dissatisfaction with Ms. Attridge that the trial judge wanted to avoid the whole *Marsden* issue. The judge's first reaction to appellant's assertion that he wanted to replace his attorney was to dismiss the request out of hand. Ms. Attridge said that she believed that the hearing on competency had turned into a *Marsden* hearing (because of appellant's complaints about her) and that the prosecutor should be excused and the record sealed. (4 RT 604.) The judge's reaction to her requests was: "This is not a *Marsden* hearing." (*Ibid.*) That hearing concluded with appellant saying that " I have fired this attorney," and the judge simply responding, "I know you have." (*Ibid.*) The judge then scheduled another hearing to address the competency issue under Penal Code section 1368.

At this subsequent hearing, a month later, the trial judge tried to abort the 1368 proceedings immediately because the mental health professional he had appointed to assess appellant had submitted a written report stating that appellant was not mentally ill. (5 RT 608.) When defense counsel explained that she was requesting a jury trial, as permitted under section 1368 et seq., the trial judge denied that request and declared that he found appellant competent and that criminal proceedings were reinstated. (5 RT 609.) Only after the prosecutor opined that appellant indeed did have a right to a jury trial under the statute did the trial judge retract his dismissal of the competency claim. (*Ibid.*) At this hearing the appellant again stated

that he needed another lawyer. (5 RT 614.) The trial judge said he could not deal with a *Marsden* claim until after the competency issue had been resolved. (*Ibid.*)

Appellant also demanded a speedy trial. He told the judge that he wanted to go trial within the next 24 hours. (5 RT 615.) When the judge said that would not be possible because his attorney was not prepared, appellant restated his desire for a new attorney because he did not trust Ms. Attridge or Mr. Lee. Appellant also said "they are against me, or she is." (5 RT 616.) The trial judge countered, "Trust me, she is not against you." (*Ibid.*) Thereafter, the judge simply ignored appellant's subsequent remarks about his desire for new counsel. (5 RT 616-620.)

The next morning, February 23, 1996, there was a third hearing on competency, and again, appellant told the judge that he opposed having Ms. Attridge represent him. (6 RT 622.) The judge responded, "I know that. Just hold on." (*Ibid.*) Again, it was not until the prosecutor opined that because of this Court's decisions in *People v. Stankewitz*,[3] the trial judge needed to address the *Marsden* motions before the competency proceedings went forward. (6 RT 626-627.) This colloquy between the trial judge and the prosecutor resulted in the anomaly of the trial judge asking the prosecutor if he had to give appellant a *Marsden* hearing. (6 RT 630.) The prosecutor recognized the impropriety of the situation and noted that she didn't have "a right to ask you [the judge] for a *Marsden* hearing." (*Ibid.*) Finally, the trial judge asked the appellant if he wanted a *Marsden* hearing, and appellant said he needed one. (6 RT 631.)

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[3] See *People v. Stankewitz* (1982) 32 Cal.3d 80 [*Stankewitz I*] and *People v. Stankewitz* (1990) 51 Cal.3d 72 [*Stankewitz II*].

At the in camera *Marsden* hearing, also held on February 23, 1996, appellant again said that he did not want Ms. Attridge to represent him. (6A RT 634.) He charged that she gave him "misleading legal advice." Appellant offered the following examples:

> Every time I try to speak to her she decided to lash out at me when I tell her – when I ask for something she decides to —she decides to be insubordinate. . . .She ignores my requests....for certain legal equipment, such as for a quick and speedy trial. She denied that....

(6A RT 635.)

Ms. Attridge argued that the problems between her and appellant began as a result of appellant's "mental defect." While he originally agreed to waive a speedy trial, appellant later abandoned that position. Attridge also thought that appellant was angry at her because she had questioned his competence to stand trial and because she would not give him documents from his case. (6A RT 636-637.) Because she was still investigating penalty phase evidence, Ms. Attridge said she was not yet ready for trial. (6A RT 637.)

The trial judge denied appellant's *Marsden* motion, relying primarily on his belief that Ms. Attridge was a "fine lawyer." (6A RT 638.) He accepted Attridge's reasons for needing more time to prepare for trial and for not releasing documents to appellant because she was afraid they would fall into the wrong hands in the county jail. The trial judge also noted:

> It is apparent that Mr. Taylor does have some type of mental problem. What the extent of that mental problem is, whether or not it is feigned or no, it could be feigned or it could not be feigned, either put on or not put on, or if not put on, you know, I don't know what the extent of it is. But for some reason Mr. Taylor feels that Ms. Attridge is not properly representing him. . . .I know he has made statements that evidently he gets messages through the

> television and other waves, whatever, that gives him information about Ms. Attridge and other people including even me, and I feel that evidently there–if there is a problem in this case this problem has not – is not the result of anything done by the attorney in this case.

(6A RT 638-639.)

The trial judge also concluded that "there is no breakdown in this relationship." (6A RT 639.) And even if there were such a breakdown, the judge blamed it on appellant. (*Ibid.*)

Respondent urges this Court to accept, without scrutiny, the trial judge's decision to deny appellant's motion to replace his attorneys at the competency proceedings. This Court, however, has a duty to review the trial judge's actions to determine whether he abused his discretion in denying appellant's request for substitution of counsel. The denial of a *Marsden* motion is reviewed under an abuse of discretion standard. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1190.) The trial judge erred because he focused primarily on his belief that Ms. Attridge and Mr. Lee were good lawyers who were doing their best, and perforce were providing effective assistance, for their client. The competence vel non of defense counsel was not the issue in assessing the merits of the *Marsden* motion in this case. The question was whether irreconcilable differences had developed between appellant and Ms. Attridge.[4]

It is clear from the record that the conflict between them was

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[4] A disagreement over trial tactics may require the substitution of appointed counsel when there is a breakdown in the attorney-client relationship. (*People v. Lindsey* (1978) 84 Cal.App.3d 851, 859.) A cooperative relationship between counsel and the client is necessary, especially in a criminal case where the client's liberty is at stake. (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 561.)

extreme. On January 26, 1996, at the same hearing where appellant first requested that new counsel be appointed, appellant lunged at Ms. Attridge and called her a "fucking cunt." (37 CT 8105; 43 RT 4303.) In describing his reasons for denying appellant's *Marsden* motion at the February 23, 1996, hearing, the trial judge never mentioned this incident. Similarly, respondent does not mention this incident in its argument asserting that there were not any irreconcilable differences between appellant and Ms. Attridge which would necessitate taking her off of appellant's case.

To compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. (*Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025, quoting *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.) Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1198.) "Even if trial counsel is competent, a serious breakdown in communications can result in an inadequate defense." (*Ibid.*, citing *United States v. Nguyen* (9th Cir. 2001) 262 F.3d 998, 1003-1004.) "A court may not deny a substitution motion simply because it thinks current counsel's representation is adequate." (*Daniels v. Woodford*, 428 F.3d at p.1198, citations omitted.)

It is noteworthy, however, that the prosecution found this unfortunate episode between appellant and Ms. Attridge to be significant enough to be presented to the jury at the penalty phase as evidence of why appellant should be sentenced to death. If this incident were important enough to qualify as an aggravating factor certainly it was significant

enough to justify some consideration in determining whether the relationship between appellant and Ms. Attridge had become "embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Marsden, supra,* 2 Cal.3d at p. 123.)

Over the course of the competency proceedings, appellant made it clear that he did not trust Ms. Attridge to be his lawyer. Not only did he object to her questioning his competency to stand trial, but he disagreed with her decisions to waive a speedy trial of his case and to waive a jury trial of the competency issue. Trust is essential to the attorney-client relationship, particularly in a criminal case where the attorney is defending the client's liberty, and even more especially in a death penalty case, where the defendant's life is at stake. (*People v. Crandell* (1988) 46 Cal.3d 833, 893, citing *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-562.) As the United States Court of Appeals for the Sixth Circuit noted, "[B]asic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel." (*Linton v. Perini* (6th Cir. 1981) 656 F.2d 207, 212.) The *ABA Standards for Criminal Justice* (3d ed. 1993) recognizes the fundamental need for trust in this relationship: ". . . .nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." (*Id.* at section 4.29 (commentary).)

In this case, there was a confluence of factors which necessitated a substitution of counsel at the beginning of the competency proceedings. Appellant was facing a trial in which the prosecutor was seeking the death penalty in a case with highly emotionally charged facts: the sexual assault and consequent death of an elderly white woman in her home by a young African American man. In addition, there was substantial evidence in the record that appellant had a history of mental illness and/or serious substance

abuse. His appointed counsel, a white woman, asked the court for a competency hearing because she had grave concerns about her client's mental health based on his increased agitation and inability to cooperate with preparation of his defense. During the hearing where this claim of incompetency first arose, appellant declared that he did not trust his attorney and wanted the court to appoint a new lawyer. When the trial judge did not address his request for a new attorney and in fact appeared to ignore him, appellant lunged at his female attorney and called her a foul name. This attorney first requested a jury trial on the competency issue (5 RT 609), but at the eleventh hour waived the jury over appellant's objection. (10 RT 770, 772.) Despite this display of hostility by appellant to his attorney and to her request for a competency hearing, the trial judge denied appellant's request for substitution of counsel.

Under these circumstances, the trial judge erred in denying appellant's motions for substitution of counsel. His inability to work with Ms. Attridge and Mr. Lee due to his mistrust of them adversely affected him during the competency proceedings. For example, he refused to cooperate with the various mental health experts assigned to assess his competency. (12 RT 1039; 12 RT 1088-1089; 13 RT 1137.) The trial judge based, in part, his finding that appellant was competent on the fact that he could not accept Dr. Cerbone's findings because of the brevity of his interview with appellant. (15 RT 1577.)

In reviewing the trial judge's denial of the *Marsden* motions made before and during the competency proceedings, this Court should take into account the resistance of the trial judge in ensuring a fair trial. The record in this case shows that the trial judge resisted both the competency claim raised by Ms. Attridge and appellant's request for substitution of counsel,

the *Marsden* motion. The judge did not want to suspend criminal proceedings and hold a hearing on appellant's competency as required by section 1368. (4 RT 602.) He initially refused counsel's request for a jury trial on competency and relented only after the prosecutor informed him that the statute allowed the defendant to have a jury trial. (5 RT 609.) The record also shows that the trial judge tried to put off addressing appellant's *Marden* motion. (4 RT 604.) He said he was not going to address it until after the competency issue had been resolved. (5 RT 614.) Once again, it was only after the prosecutor informed the judge that this Court's decisions in *People v. Stankewitz* required that he first resolve the *Marsden* motion before he start the competency proceedings that the judge held an in camera hearing on that motion. (6 RT 626-627.) At that hearing, the trial judge gave short shrift to appellant's complaints and summarily denied the motion.

After the 1368 proceedings were over, however, the judge decided to substitute counsel. His stated reason for now granting appellant's *Marsden* motion was that because the two lawyers representing appellant at the competency hearing had testified, appellant's trust in them had been destroyed. (16 RT 1591.) The record shows that appellant's trust in his attorneys had dissolved *before* the competency hearing. Of course, the hazards of allowing these lawyers to act also as witnesses in the 1368 hearing were completely foreseeable. It is for that reason that attorneys normally will not be witnesses in the cases of their clients. (See, e.g., *Smith, Smith and Cring v. Superior Court* (1997) 60 Cal.App.3d 441, 445.)

The record in this case shows that the trial judge abused his discretion in the way he handled the several *Marsden* motions made by appellant. The judge's paramount interest was in expediting the trial in this

case. The judge did not want to interrupt the trial proceedings to hear a competency claim. And he certainly did not want to have to deal with the inconvenience and possible delay that would result if appointed counsel were substituted during the course of the competency proceedings. The trial judge was concerned, not with the question of whether irreconcilable differences between appellant and his counsel, Ms. Attridge and Mr. Lee, necessitated substitution of counsel, but with getting through the 1368 proceedings as quickly as possible. (See *United States v. Nguyen* (9th Cir. 2001) 262 F. 3d 998, 1004-1005 [where the Ninth Circuit reversed the defendant's conviction, finding that the trial court had placed undue emphasis on its calendar in denying both defendant's motion for a continuance and his motion for substitution of counsel].)

Respondent tries to minimize the importance of appellant having counsel with whom he did not have irreconcilable differences in the competency proceedings:

> An inability to assist or to communicate with counsel is a major reason for the need to determine mental competency, but any such break in the attorney-client relationship during a mental competency hearing is separate from the criminal process, which has already been suspended. Unlike a trial, in which a defendant must communicate with counsel to shape the investigation and defense strategy, a competency hearing involves different concerns. A defendant's inability or refusal to communicate during a competency hearing does not compromise any defense to the charged crimes. There is no basis from which to conclude that Taylor's right to assistance of counsel was substantially impaired by permitting Attridge and Lee to represent Taylor in the competency proceeding, or that any irreconcilable conflict existed.

(RB at p. 20.)

The law does not support respondent's position. Section 1368,

subdivision (a) requires that counsel be appointed for a defendant when the trial court or defense counsel doubts the defendant's mental competence. Moreover, a defendant has a right under the Sixth Amendment to counsel in competency proceedings. (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1252; *Estelle v. Smith* (1981) 451 U.S. 454, 470-471.) In addition, "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 172.)

It is immaterial that the *Marsden* motions at issue here involved representation in the competency proceedings rather than in guilt and penalty phase trials. Appellant had federal and state constitutional rights as well as a state statutory right to effective assistance of counsel during the section 1368 proceedings. Compelling a defendant to go forward with an attorney "with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (*Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025.) The loss of confidence by a defendant in his counsel, the degree of hostility present, and extent of the impairment in communications are factors the trial court should weigh heavily in deciding whether to substitute counsel. (See *Hudson v. Rushen* (9th Cir. 1982) 686 F.2d 826, 832); see also *People v. Daniels* (1991) 52 Cal.3d 815, 843 [defendant's distrust of and consequent difficulties communicating with appointed lawyer are matters to be considered].) As established *ante*, the record in this case shows a sufficiently high level of distrust, lack of communication and hostility between appellant and attorneys Attridge and Lee to require that they should be replaced, as requested repeatedly by appellant.

The trial judge in this case abused his discretion because he never seriously considered whether the conflict between appellant and his attorneys in the competency proceedings had undermined appellant's right to effective assistance of counsel. As noted previously, the trial judge was concerned first and foremost with moving the case forward. Initially, he did not want to have a full evidentiary hearing on the competency issue itself. He capitulated only after the prosecutor assured him that appellant did have a right under section 1368 to a jury trial. Further, the trial judge resisted and put off addressing appellant's *Marsden* requests to replace attorneys Attridge and Lee until, once again, the prosecutor counseled him that the law required him to address appellant's claims. After the trial judge finally commenced an in camera proceeding on the *Marsden* motions, he summarily dismissed appellant's inarticulate complaints about counsel and ruled that because he believed that counsel were competent attorneys the motion should be denied. This was a ruling dictated not by concern about appellant's constitutional right to effective counsel at the competency hearing of his capital trial but about "going through the motions," so that he could move the trial along as quickly as possible.

It is difficult, even impossible, to determine the prejudice vel non which resulted from the trial court's failure to replace attorneys Attridge and Lee before the end of the competency proceedings. Accordingly, in his opening brief, appellant argued that this Court should treat this error as prejudicial per se. (See, e.g., *People v. Hill* (1983) 148 Cal.App.3d 744, 755.) Appellant recognizes, however, that this Court applied the *Chapman* standard of prejudice in the *Marsden* decision. (*Id.*, 2 Cal.3d at p. 126.)

Assuming that the *Chapman* standard applies, respondent nonetheless cannot prove beyond a reasonable doubt that the error of the

trial judge in failing to grant appellant's *Marsden* motion before the competency proceedings was not prejudicial. Respondent cannot prove that appellant would not have been more cooperative with counsel with whom he was not embroiled in conflict; that is, that appellant would not have met with the various mental health experts who had been appointed to assess his competency. Also, respondent cannot show that such counsel would not have waived appellant's jury trial at the 1368 proceedings, nor can respondent show that a jury, unlike the trial judge, would not have been persuaded that appellant was not competent to stand trial.

For all of the foregoing reasons as well as for the reasons set forth in appellant's opening brief, this Court should reverse appellant's convictions and death sentence because the trial court's error resulted in an unreliable competency determination.

* * * * *

II.

THE TRIAL JUDGE ERRED IN FAILING TO CONDUCT ADEQUATE VOIR DIRE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

In appellant's opening brief ("AOB"), appellant challenged the adequacy of the voir dire process in the selection of both juries in this case. (Argument II, AOB, pp. 71-93.) A criminal defendant is entitled to a trial by jurors who are impartial and unbiased. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) The United States Supreme Court has observed that "voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 (plurality opinion).) (See also *Morgan v. Illinois* (1992) 504 U.S. 719, 729, where the Court wrote: ". . .part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors.")

Respondent first argues that this Court should not entertain appellant's challenge of the voir dire process in his guilt and penalty phase trials because he did not exhaust his peremptory challenges during either jury selection proceeding. (RB at pp. 21-22.) This claim is without merit. In *People v. Bolden* (2002) 29 Cal.4th 515, this Court stated:

> When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. *Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the*

adequacy of voir dire.
(*Id.* at pp. 537-538; italics added.)

Accordingly, the Court should reject respondent's claim that appellant has waived the issue of the inadequacy of the voir dire process in his case.

Citing *People v. Viera* (2005) 35 Cal. 4th 264, respondent also argues that appellant has not identified any specific or actual bias resulting from the trial court's use of group voir dire. (RB at p. 23.) However, it is because the voir dire process was so inadequate that the record in this case is insufficient to show any actual prejudice resulting from the trial court's failure to ask questions which would lead to the possible revelation of the bias of particular prospective jurors. The lack of adequate voir dire makes it impossible to pinpoint which of the jurors who actually served on the two juries may have had biases or prejudices. Since the failure to adequately voir dire prospective jurors implicates appellant's federal constitutional rights (6th and 14th Amendments) to a fair and impartial jury, the burden is on respondent to establish beyond a reasonable doubt that this failure did not have any effect on the outcome of appellant's trial. (*Chapman v. California* (1967) 386 U.S. 18, 26.)

Section 223 of the Code of Civil Procedure provides that voir dire of any prospective jurors shall, *where practicable*, occur in the presence of the other jurors in all criminal cases.[5] (*Ibid.*; emphasis added.) The question of

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[5] As noted in the AOB, appellant's trial counsel filed a motion for individual voir dire. (2 CT 242-258.) The AOB also discusses the colloquy at the hearing on this motion about the issue of whether voir dire was "practicable" in this case under Code of Civil Procedure section 223. (AOB at pp. 74-77.) Proposition 115 did away with the requirement of individual sequestered (*Hovey*) voir dire in capital cases. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171.) However, trial courts
(continued...)

whether individual sequestered voir dire should take place is within the trial court's discretion; however, such discretion is abused if the questioning is not reasonably sufficient to test the jury for bias or partiality. (*People v. Box* (2000) 23 Cal.4th 1153, 1179.) Therefore, the court must insure that voir dire is meaningful and sufficient to discover the potential biases of the prospective jurors. (*People v. Wilborn* (1999) 70 Cal.App. 4th 339, 347.) An inadequate voir dire is one in which "the questioning is not reasonably sufficient to test the jury for bias or partiality." (*Ibid.*) Without adequate voir dire, the trial judge cannot fulfill his/her responsibility to remove prospective jurors who will not be able to evaluate the evidence and impartially follow the court's instructions. (*People v. Bolden, supra,* 29 Cal. 4th at p. 538.) Indeed, with the heightened authority of the trial court to conduct voir dire, conferred by Section 223, comes an increased responsibility to assure that the process adequately uncovers bias and prejudice on the part of prospective jurors. (*Wilborn, supra*, 70 Cal.App.4th at p. 343.) As detailed in the AOB and discussed further *post*, the voir dire in this case was cursory. Moreover, besides being brief, it often concerned

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[5](...continued)
still have the discretion to allow *Hovey* voir dire, and when it is requested, the court must exercise its discretion to determine, under the plain terms of section 223, whether group voir dire is "practicable." (*Id.* at p. 1182.) If the record does not show that the trial judge has considered the "particular circumstances of the case," his or her ruling cannot be sustained. (*Id.* at pp. 1182-1184.) As discussed in the AOB (pages 75-77), the trial judge in this case stated that he was following his usual protocol for picking jury and "*Hovey* is gone, and I don't use *Hovey*." (18 RT 1685.) He dismissed the defense argument about how the particular facts of this case necessitated individual, sequestered voir dire. The record in this case establishes that the trial judge did not exercise his discretion properly by engaging in the type of case specific finding of "practicability" required by section 223. (*Covarrubias, supra*, 60 Cal.App.4th at pp. 1182-1184.)

the most trivial matters not relevant to the task of the trial judge to determine which prospective jurors could be fair and impartial jurors.

Respondent further claims that appellant had the opportunity to question and view all of the potential jurors. (RB at p. 22.) This claim mischaracterizes the jury selection in this case. In fact, the trial judge resisted the participation of the attorneys in the voir dire process. As described in appellant's opening brief, defense counsel filed four pre-trial motions regarding jury selection. (AOB at p. 71.) Because of the particular facts of this case—the allegations that a young African-American man had sexually assaulted an 80-year-old white woman in her house and that she died as a result of this assault, defense counsel believed that it was going to be difficult to seat an unbiased jury. (2 CT 244.) During the hearing on the pre-trial motions, defense counsel argued that prospective jurors were more likely to be honest about their prejudices if they were questioned individually or in smaller groups.[6] (18 RT 1687-1688.)

During this pre-trial hearing regarding jury selection, the trial judge made clear that he was not going to grant appellant's requests about individual or small group voir dire or about asking open-ended questions. The trial judge described how he customarily conducted voir dire and insisted that there was nothing exceptional about this case that would cause

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[6] This claim by the defense is not remarkable. After all, in *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 80, this Court held that "[i]n order to minimize the potentially prejudicial effects [of open-court voir dire], this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration."

him to change or adapt his protocol. (18 RT 1685-1687.)

The trial judge stated:

> I don't bring them [venire panel members] singly or in small groups. *Hovey* [7] is gone, and I don't use *Hovey* – and I bring back in two groups and then you will have two or three days to go through the questionnaires and I go through the questionnaires word for word, line per line and acquaint myself with these people, bring them back. In all probability, I will bring them back in two groups of 50 each and then I will do the confidentials [sic] in chamber.

(18 RT 1685.)

Also, the judge made clear that he was not going to allow the attorneys to engage in voir dire:

> I do all the voir dire. I do not do *Hovey*, I do not do small groups. 50 is the smallest group I will do, and I will do all the questioning in front of everybody.

(18 RT 1686.)

Moreover, the prosecutor urged the trial judge to deny appellant's pre-trial motions, maintaining that there was no reason for the judge to deviate from the way he handled voir dire in any other case:

> . . . . I haven't done a trial in here [this judge's courtroom], but my understanding [is] the court has been doing this for many years and does an outstanding job at it. I see no reason to alter – nothing that special about this case. There is no reason to alter what the court is already using. I don't think there is anything presented by the defense that would cause the court to mess with system that has been working.

(18 RT 1688-1689.)

The record in this case clearly shows that the trial judge had a very

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[7] See footnote 1, *ante*, for citation for the *Hovey* decision.

rigid view of the voir dire process and that he did not intend to allow the lawyers any significant role in the process. Moreover, the judge wanted to rely extensively, if not virtually exclusively, on the jury questionnaire. However, as defense counsel pointed out during the pre-trial hearing, one of the problems with the questionnaire was that many of the questions called for yes and no answers, rather than open-ended questions which are more likely to call for answers that reveal the true beliefs and feelings of the respondent. (18 RT 1693, 1 CT 169-170.)

Respondent gives short shrift to appellant's claim that the voir dire in this case was inadequate to determine the racial attitudes of prospective jurors. The prosecution simply argues that the four questions about racial attitudes found on the two jury questionnaires in this case were sufficient to uncover any racial biases the prospective jurors might have had. (RB at p. 23.) This position simply does not take into account the reality of this case, the facts of which presented a strong possibility that racial prejudice might taint any verdict. As noted in appellant's opening brief, both this Court[8] and the United States Supreme Court[9] have recognized the need for special care in selecting a jury in a case when a defendant is accused of a violent crime against a victim of a different race or ethnicity. (AOB at pp. 78-79.)

Appellant has identified a number of jurors from his two trials whose written answers to questions regarding race were either ambiguous or confusing. (AOB at pp. 80-85.) For example,[10] Juror No. 3 at the first trial

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[8] See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 660.

[9] See, e.g., *Turner v. Murray* (1986) 476 U.S. 28, 36-37.

[10] In this reply brief, appellant does not discuss all of the jurors (continued...)

checked "no" to question No. 53, asking whether if "you [can] be an impartial juror in this case where an African-American male is accused of committing crimes against a Caucasian female." (9 CT 1804.) During the short voir dire of this juror, the trial judge did not ask him about this answer on his questionnaire. (23 RT 2078-2082.) Nor did the judge ask this juror about the racial aspects of this case. Instead, the voir dire was about the juror's job as an engineer, his work in the army as a prison guard, his children's jobs, his brother's work as a Los Angeles police officer and the juror's statements about the O.J. Simpson verdict. In particular, the judge focused on statements made by Juror No. 3 on his questionnaire that he thought there was a preponderance of evidence to convict Mr. Simpson. (23 RT 2080.) Respondent contends that Juror No. 3 wrote that "there was no reason that [he] could not be fair." (RB at p. 23.) In fact, the juror did no more than check "no" in answer to question No. 98: "As a result of your having been asked to fill out this questionnaire, is there any reason you would not be a fair juror in this case?" (9 CT 1815.)

Similarly, Juror No. 8 at the guilt phase trial checked "no" in answer to question No. 53, thus indicating that she could not be impartial in a case involving an African-American man committing crimes against a white woman. (9 CT 1934.) This juror, like Juror No. 3, also checked "no" to question #98. (9 CT 1945.) As in the case of Juror No. 3, the trial judge did not ask any questions during voir dire of this prospective juror about the contradictions in these two answers on her questionnaire. The trial judge

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[10](...continued)
identified in Argument II of the AOB; however, that omission should not be construed as an abandonment of the claims regarding those jurors made in the AOB.

asked Juror #8 a total of eight questions, half of which involved her Corvette automobile. (23 RT 2086-2087.) The other four questions the judge asked concerned her attitudes about the death penalty; she answered that she was not biased for or against it. (23 RT 2087.)

Regarding Jurors No. 3 and No. 8 at the guilt phase, the record shows that there were contradictions in their answers on the juror questionnaire regarding being able to serve as an impartial juror in a case where an African-American man was charged with crimes against a Caucasian woman. In the short voir dire of each of these two jurors, the trial judge did not ask any questions about these contradictions. Therefore, for purposes of this issue about the racial attitudes of these two jurors who sat on appellant's guilt phase trial, the only information is contained in the written questionnaires, and, as described *ante*, there is a clear contradiction in the answers of Jurors No. 3 and No. 8.

The process used to select jurors for the second jury in this case–to decide the penalty phase retrial– was essentially the same. That is, the trial judge relied almost exclusively on the juror questionnaires and engaged in only very superficial voir dire in selecting the jury. The record shows that the answers of Juror No. 1 of the second jury to the questions regarding racial attitudes were ambiguous. For example, in answering question No. 52,[11] Juror No. 1 checked that he had "mild" racial or ethnic prejudices and also stated that "I feel all of us have some ethnic prejudices and I am no

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[11] Question No. 52 on the questionnaire used during the second jury selection in this case read as follows:

"Do you have any racial or ethnic prejudices?
Strong___ Moderate___Mild___None___
A. Please explain.
B. How do you compensate for these attitudes?"

different." (17 CT 3547.) In answering Part B of question No. 52 ("How do you compensate for these attitudes?"), Juror No. 1 wrote: "I feel the Holy Spirit convicts [sic] me and I adjust my attitudes in light of the Gospel." (17 CT 3547.) Obviously, this statement is confusing, yet the trial judge did not question Juror No. 1 about it. The judge asked him only three questions, only of one of which had anything to do with his ability to serve as juror: "So you talk about your strong religious beliefs, but you still feel with your strong beliefs you also feel that the death penalty can be imposed." (40 RT 3809.)

In answering question No. 56, Juror No. 3 of the second jury also checked that he had "mild" racial or ethnic prejudices, which he explained were the result of the influence of his parents. (17 CT 3603.) He wrote that his way of compensating for this prejudice was "respecting the individual as an individual not as being of an ethnic group." (17 CT 3603.) The trial judge did not question Juror No. 3 about his "mild" racial or ethnic prejudice or about any of the racial issues in the case. He asked this juror ten questions; only one of which concerned anything substantive about his ability to serve as an impartial juror in this case.[12]

Juror No. 7 of the second jury also checked that she had "mild" racial or ethnic prejudices and stated: "I think we are too lax on our borders for example." (17 CT 3715.) In response to the question of how she compensates for these prejudices, she gave an incoherent explanation: "I

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[12] The judge asked Juror No. 3 about his answer on the questionnaire stating that viewing gruesome photographs of the victim would affect his ability to be a fair and impartial juror. The juror said he didn't mean to answer the question that way and that the photographs would not affect his ability to be fair and impartial. (40 RT 3812.)

understand we are short of resources for that problem. I have had examples in my family to not judge too quickly what may appear differently to others—things are not always what they seem." (17 CT 3715, underlining in the original.) Once again, during a short voir dire of Juror No. 7, the trial judge did not ask her about her "mild" prejudices, nor did he ask her to explain her confusing answer, quoted *ante*. (40 RT 3843-3845.)

Given these facts, respondent's claim that "all of these jurors were questioned by the court, which was in the best position to evaluate their responses," is without merit. (RB at pp. 23-24.)

It is true that this Court has deferred on appeal to the trial judge's rulings regarding jury selection when the trial judge has observed and spoken with a prospective juror and heard that person's responses, including the tone of voice and demeanor. (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) However, such deference is not warranted when the trial judge's ruling is based solely on the written answers on the juror questionnaire because that is comparable to the "cold record," the same information available on appeal. (*Ibid.)* In the *Stewart* case, the Court reversed because the trial court had excused five prospective jurors for cause based solely on their answers on the juror questionnaire regarding their attitudes about the death penalty.

In a subsequent opinion, *People v. Avila* (2006) 38 Cal.4th 491, the Court explained its ruling in the *Stewart* opinion concerning a trial court's complete reliance on answers on juror questionnaires during the jury selection process. The Court wrote in *Avila* that the questions about the death penalty in the juror questionnaire used in the *Stewart* case were materially flawed; that is, the questionnaire did not ask whether the prospective juror's view of the death penalty would prevent or substantially

impair the juror's performance of his or her duties. (*People v. Avila, supra*, 38 Cal.4th at p. 530, fn. 25.) The *Avila* majority observed:

> . . . nothing in *Stewart* indicates that an excusal without oral voir dire is improper where the prospective juror's answers to a jury questionnaire leave no doubt that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties in accordance with the court's instructions and the juror's oath.

(*Id.* at p. 531.)

Indeed, the Court found the *Avila* juror questionnaire included more expansive and detailed questions regarding capital punishment and "gave jurors the clear opportunity to disclose views against it [capital punishment] so strong as to disqualify them for duty on a death penalty case." (*Ibid.*) Because the Court found that the answers of the disputed prospective jurors were "unambiguous," the trial judge in *Avila* did not err in excusing these people for cause based solely on their written answers to the questionnaire. (*Ibid.*)

Most recently, in *People v. Wilson* (2008) 44 Cal.4th 758, this Court reiterated the deference it accords trial courts in the jury selection process but only when the court has had an opportunity to observe the demeanor of the prospective jurors. In *Wilson*, this Court wrote: "when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.' "(*Id.*, 44 Cal.4th at p. 779, citing *Uttecht v. Brown* (2007) 551 U.S. __, __, 127 S.Ct. 2218, 2223.) Nonetheless, the Court also cautioned that

> trial courts must, before trial, engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the

> constitutional standard, thus protecting an accused's right to a fair trial and an impartial jury.

(*Wilson, supra*, 44 Cal.4th at p. 779, citing *People v. Heard* (2003) 31 Cal.4th 946, 963-968.)

The facts of the juror selection process in the instant case are totally different than those involved in *Avila* and *Wilson*. First, the answers of Jurors No. 3 and No. 8 of the first jury, as described *ante*, were confusing on the issue of their abilities to be impartial in a case involving allegations of violent crimes by an African-American man against a Caucasian woman. In fact, their answers to questions relevant to this issue were contradictory. Both jurors checked "no" to question No. 53 about being able to be impartial in judging cross-racial crimes. Yet, as respondent points out, both jurors also checked "no" to question No. 98, which asked "[a]s a result of your having been asked to fill out this questionnaire, is there any reason you would not be a fair juror in this case?" (9 CT 1815, 1945.)

Second, unlike the trial court in the *Wilson* case, the judge in this case, while engaging in very brief voir dire, did not ask either of these defendants anything about the contradictions in their answers on the jury questionnaire. Accordingly, it would be impossible for him to assess the demeanor and credibility of these jurors on this crucial issue. Indeed, as described *ante*, the judge's brief voir dire of both these jurors largely concerned trivial matters not important or even relevant to the question of their abilities to serve as fair and impartial jurors.

As described *ante*, similar problems existed with the jurors at the second trial. Jurors Nos. 1, 3, and 7 all stated on their questionnaires that they had "mild" racial prejudices, but the trial judge did not ask any of them to explain what they meant by this description. Appellant acknowledges

that in the *Wilson* decision this Court rejected the argument that defense counsel should have been allowed to ask "further clarifying questions" of some of the jurors. (*People v. Wilson, supra,* 44 Cal.4th at p. 780.) However, the situation in *Wilson* was different because in that case the trial judge did ask the challenged jurors follow-up questions about their disputed answers on the questionnaire. In this case, no such voir dire occurred. In addition to describing their racial or ethnic prejudices as mild, Jurors Nos. 1 and 7 on the second jury made confusing comments in their answers to question No. 52 regarding their racial attitudes. The trial judge's limited voir dire of these jurors did not seek clarification of these answers.

Conclusion

For all of the foregoing reasons and for the reasons set forth in appellant's opening brief, the guilt and penalty verdicts should be reversed because the trial judge failed to engage in adequate voir dire during the two jury selections in this case. Given the cross-racial nature of the crimes charged in this capital case, the judge had a duty to conduct a searching and exhaustive voir dire of prospective jurors in order to assure appellant his constitutional rights to a fair and impartial jury. Because appellant faced the death penalty, he was entitled, under the Eighth Amendment, to a jury selection process that met heightened reliability requirements. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The trial judge in this case appeared to more concerned with hurrying the trial along, by truncating voir dire and relying principally on the juror questionnaires, than he was in selecting in impartial jury in a capital case that involved the combustible allegations that a young African-American man had sexually assaulted an elderly white woman in her own home, resulting in her death. As detailed in the AOB, the voir dire of the

various jurors who sat on both trials of appellant was very cursory. (AOB at p. 86, fn. 25.) Not only did the trial judge ask prospective jurors few questions, but often those questions concerned trivial and irrelevant small talk.

The record in this case establishes that the trial judge erred in failing to conduct voir dire that was adequate to guarantee appellant his constitutional rights to an impartial jury and a fair trial. This error, in particular the failure to adequately question prospective jurors about their racial attitudes in a case where an African American man is charged with the murder of an elderly Caucasian woman, requires reversal of the convictions. (*Aldridge v. United States* (1931) 283 U.S. 308, 314.) Alternatively, the inadequate voir dire in this case, because it violated appellant's Sixth and Fourteenth Amendment rights to an impartial jury, requires reversal under the prejudice standard set forth in *Chapman v. California, supra*, 386 U.S. at p. 26.) The respondent cannot show beyond a reasonable doubt that the failure to adequately voir dire prospective jurors in this case did not affect the jury verdicts.

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III.

CODE OF CIVIL PROCEDURE SECTION 223, APPLICABLE TO APPELLANT'S TRIAL, WAS UNCONSTITUTIONAL BECAUSE IT TREATED CRIMINAL DEFENDANTS LESS FAVORABLY THAN CIVIL LITIGANTS

Appellant's conviction should be reversed because the jury selection process, pursuant to Code of Civil Procedure section 223, used in his case violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. (AOB at pp. 94-102.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. Appellant has already addressed why those prior cases should be reconsidered. Accordingly, no reply is necessary.

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IV.

THE PROSECUTOR VIOLATED THE PRINCIPLES OF *BATSON V. KENTUCKY* DURING THE TWO JURY SELECTIONS IN THIS CASE

Under the *Batson* decision, a prospective juror should not be peremptorily challenged because of his or her race. (*Batson v. Kennedy* (1986) 476 U.S. 79, 85.) Such a discriminatory exercise of a peremptory challenge violates a defendant's rights to a fair trial by an impartial jury and to equal protection of the laws, as required by the Fourteenth Amendment. (*Ibid; Miller-El v. Dretke* (2005) 545 U.S. 231, 237-238.) Even one peremptory challenge made because of the race of a prospective juror amounts to constitutional error, requiring reversal. (*Snyder v. Louisiana* (2008)___U.S.___, 128 S.Ct. 1203, 1208.)

A. Improper Use of a Peremptory Challenge During the First Jury Selection

1. Expressing Uncertainty About the Death Penalty

Respondent's brief ("RB") argues that the trial court properly overruled appellant's *Batson* objection to the prosecutor's peremptory challenge of Tanisha Brooks, an African-American woman, during the first jury selection. Respondent characterized the allegedly "race-neutral" reasons offered by the prosecutor for this challenge as follows:

> The trial court appropriately recognized these reasons, including that Brooks was relatively young, was not registered to vote, and had little life experience. These findings were reinforced by Brooks's admission that she had 'never really thought about' the death penalty. Brooks equivocated when asked on the jury questionnaire whether she supported or opposed the death penalty, as she checked both boxes. Each one of the prosecutor's race-neutral reasons sufficiently supports the trial court's ruling.

(RB at p. 26.)

Further, respondent argued that this Court should not credit appellant's claims regarding similarly situated white jurors who were not challenged by the prosecutor because the defense did not make these claims at trial and "no guilt-phase juror provided the same combination of answers or a similar number of troubling answers as Brooks." (RB at p. 27.)

The Court should reject these arguments. First, this Court has acknowledged that the United States Supreme Court performed a comparative analysis for the first time in *Miller-El v. Dretke,* a case like the present case where the defendant had established a prima facie case under *Batson.* (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109; *People v. Huggins* (2006) 38 Cal.4th 175, 232.) Similarly, in *Snyder v. Louisiana*, its most recent decision discussing *Batson*, the United States Supreme Court stated that if a "shared characteristic" of both a challenged juror and a juror who was seated "was thoroughly explored by the trial court," an appellate court may engage in comparative analysis. (*Id.* at p.1211.) In the instant case, the trial judge and perforce the attorneys relied, in lieu of voir dire, almost exclusively on the written answers of prospective jurors on their questionnaires. In the trial judge's view,[13] the written

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[13] Before the second jury selection, the trial judge stated:

> After going through all these [juror questionnaires], you have had 20 pages of questions on each one of these people, so I am just telling you folks right now, I don't intend going through much deeper with these people [prospective jurors]. My attitude is you get so much information and that is enough, and as far as I am concerned, you get plenty of information on these folks. I don't know what you plan on asking me to ask them further. As far as I am concerned, you have plenty of information on all of these people.

(continued...)

responses on the questionnaires constituted a thorough exploration of the background and attitudes of the prospective jurors and therefore provide a basis for appellate use of comparative analysis.

Second, the United States Supreme Court has already rejected respondent's claim that this Court should not conduct a comparative analysis of Ms. Brooks with white prospective jurors who were not challenged by the prosecutor because no juror provided the exact combination of characteristics as Brooks. In *Miller-El v. Dretke*, the majority opinion rejected the view, expressed by one of the dissenting justices, that for purposes of comparative analysis, "similarly situated" means a perfect match:

> none of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.....A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

(*Id.* at p. 247, fn. 6; emphasis in the original.)

Therefore, the Court should reject respondent's argument that a comparative analysis is not appropriate in this case because none of the white jurors who actually sat on the first jury had answered his or her questionnaire exactly as Ms. Brooks had.

As appellant established in his AOB, the record in this case shows that the so-called "race-neutral" reasons offered by the prosecutor were pretextual because the jury questionnaires of other prospective jurors, who are white and were not challenged, reveal that they also had characteristics

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[13](...continued)
(40 RT 3779.)

which the prosecutor identified as the reasons for his peremptory challenge of Ms. Brooks. (AOB at pp. 111-116.)

At trial, the prosecutor offered the following explanation for her challenge:

> She [Ms. Brooks] is 23 years old, which I have a rating as to youth and life experience, so it is a standard form I use for all the jurors. When I use the form, that's a negative being that age. I have an 18 to 29 range which is a negative, 23 years old, single, no children, basically no life experience and *the main reason is that she was undecided on death. I pretty much exercise this right who is undecided or opposed, and I have all the papers that corroborate that.* Her brother was arrested in '89. I didn't feel she was very forthright about what his crime was. . . .She did not vote, which is one of the things that I have on my check list.

(23 RT 2156-2157, emphasis added.) [14]

This explanation makes clear that the prosecutor claimed that the primary reason for his peremptory challenge of Ms. Brooks were her written responses to questions about the death penalty on the questionnaire.

The record in this case shows that Ms. Brooks answered these questions as follows. Question No.76 asked: "What is your opinion about the death penalty?" Ms. Brooks wrote: "I never really thought about." (13 CT 2904). Question No. 77 asked: "What is your opinion about life in prison without the possibility of parole?" Ms. Brooks wrote: " I really don't have an opinion." (13 CT 2904.) Question No. 79 asked the prospective juror to check either that s/he supported or opposed the death penalty. Ms.

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[14] As described in the AOB, the trial judge did not offer an explanation for why he denied appellant's *Batson/Wheeler* motion regarding Ms. Brooks. After the prosecutor offered his supposed race-neutral reasons, quoted *ante*, for striking her from the jury, the trial judge merely said: "Motion denied." (23 RT 2157.)

Brooks checked both. (13 CT 2904.) Question No. 80 asked which of the following [15] best described one's general attitude about the death penalty. Ms. Brooks checked "undecided." (13 CT 2904.)

The above-quoted answers on her questionnaire must have formed the basis for the prosecutor's alleged conclusion that the "main reason" for challenging Ms. Brooks was that she was undecided about the death penalty as the *only* question about the death penalty asked of her on voir dire was:

> In regard to your feelings and attitudes about the death penalty, do any of those feelings and attitudes prevent you in any way or substantially impair you from following the law in the state of California as far as I have explained it to you as it involves the death penalty?

(23 RT 2124.)

Ms. Brooks answered no to this question. (23 RT 2124.)

A review of the record of the juror questionnaires of people selected to serve on the two juries in this case shows that some of them, who are Caucasian, gave answers to the death penalty questions that were as equivocal as those given by Ms. Brooks. In answering Question No. 76, what is your opinion about the death penalty, Juror No. 1 of the first jury panel wrote, "No opinion." (9 CT 1759.) He then checked the option "support" for Questions Nos. 79 and 80 which asked whether he supported or opposed the death penalty and how would you best describe your general attitude toward the death penalty. (9 CT 1759.) Juror No. 6, who sat on the first jury, answered Question No. 76 about her opinion about the death penalty as follows: "Mixed emotions–Generally I support the death penalty, especially for repeat offenders of heinous crimes." (9 CT 1863.)

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[15] The possible answers to Question No. 80 were: strongly support, support, undecided, oppose, and strongly oppose. (13 CT 2904.)

Juror No. 8 of the first jury answered Question No. 76 about her opinion of the death penalty by stating: "It would depend on what counts if any he had be [sic] arrested before." (9 CT 1941.) In answering Question No. 79, "do you support or oppose the death penalty," Juror No. 8 did not check either the "support" or "oppose" option but instead wrote "none." (9 CT 1941.) Juror No. 8 also checked "undecided" on Question No. 80, which asked "Which of the following best describes your general attitude toward the death penalty?" (9 CT 1941.) That was the same answer as was given by Tanisha Brooks. (13 CT 2904.)

In answering Question No. 77 about his opinion about the death penalty, Juror No. 10 of the second jury wrote "I have mixed feelings." (18 CT 3806.) In answering the next question about his opinion about the sentence of life imprisonment without possibility of parole, he also wrote that "I have mixed feelings." (18 CT 3806.) In answering Question No. 80, juror No. 10 checked the box for "support" in response to the question, "Do you support or oppose the death penalty?" (18 CT 3807.) In answering Question No. 81, Juror No.10 checked "undecided" when asked about her general attitude about the death penalty. (18 CT3807.) Therefore, the responses of Juror No. 10 to Questions Nos. 80 and 81 were contradictory. The prosecutor did not ask the judge to ask Juror No. 10 follow-up questions about these contradictory answers about the death penalty in her questionnaire.

Alternate Juror No. 1 of the second jury answered Question No. 77 about her opinion of the death penalty by stating "I'm not sure." (18 CT 3890.) She gave the same answer to the next question about her opinion of the sentence of life imprisonment without possibility of parole. (18 CT 3890.) She answered Question No. 80 about whether she supported or

opposed the death penalty by writing "neither." (18 CT 3891.) Among the options listed in question in Question No. 81, she checked "undecided" to the question about what term best describes your general attitude toward the death penalty. (18 CT 3891.) Therefore, the answers of Alternate Juror No. 1, like those of Juror No. 10, described *ante*, on the death penalty were very close, if not identical, to those given by Tanisha Brooks, whom the prosecutor peremptorily challenged based primarily on those answers.

Although the last two jurors described *ante* sat on the second jury chosen in appellant's case rather than the first, that is immaterial. In challenging Ms. Brooks, the prosecutor stated that "the main reason" for this challenge was the fact that she was undecided on the death penalty. Arguably, that would have been an even more important consideration when the prosecutor was looking at prospective jurors to serve at the second trial, the retrial of the penalty phase in this case. After all, the first jury had hung on the question of penalty only. Respondent alludes to this point in its brief when it states that the prosecutor struck juror Estrada from the second jury because "*the prosecutor was entitled to be cautious about jurors who could not agree...*" (RB at p. 29, emphasis added.) The implication of this statement is that since the first jury could not reach a penalty verdict, during the selection of the second jury, the State was allowed to put special emphasis on the prospective jurors' ability to reach a verdict. Therefore, it is puzzling and inconsistent that the same prosecutor would peremptorily challenge Ms. Brooks during the selection of the first jury for stating on her questionnaire that she had never really thought about the death penalty (13 CT 2904), but would leave on the jury for penalty phase re-trial a prospective juror who wrote that he had "mixed feelings" about the death sentence (18 CT 3806) and checked "undecided" when he asked his

general feelings about the death penalty. (18 CT 3807.) During voir dire, the trial judge did not ask Juror #10 about these equivocal answers to questions on the juror questionnaire about her view of the death penalty. (40 RT 3804-3406.) As described *ante*, like Juror No. 10, the answers of Alternate Juror No. 1 of the second jury showed similar ambivalence toward the death penalty as Ms. Brooks, and she was not challenged by the prosecutor.

2. Other Alleged Problems with Prospective Juror Brooks

As argued in the AOB, the other reasons cited by the prosecutor for his peremptory challenge of Tanisha Brooks were equally specious. First, the prosecutor stated that she challenged Ms. Brooks because she was young, single and did not have children. She explained this criteria as follows:

> She is 23 years old, which I have a rating as to youth and life experience, so it is a standard form I use for all the jurors. When I use the form, that's a negative being that age. *I have an 18 to 29 range which is a negative*, 23 years old, single, no children, basically no life experience .....

(23 RT 2156, emphasis added.)

There were several white people who served on one or the other jury in this case who fell into the 18 to 29 year old range identified by the prosecutor as suspect. At the first trial, Juror No. 4 was 27 years old (9 CT 1820) and Juror No. 9 was 29 years old. (9 CT 1829.) At the second trial, Juror No. 2 was 29 years old. (17 CT 3565.)

The prosecutor also contended that she struck Ms. Brooks from the jury because she was single and childless. Juror No. 4, who sat on the first jury, was not only just 27 years old but also single and childless. (9 CT

1822-1823.) The 29 year-old Juror No. 7 of the first trial was married, but she did not have any children. (9 CT 1900-1901.) At the second trial, Juror No. 2 was only 29 years old, single and did not have any children. (17 CT 3567-3568.) Therefore, under the criteria set by the prosecutor herself, Juror No. 4 of the first jury and Juror No. 2 of the second trial closely resembled Ms. Brooks in having "no life experience." They were not, however, challenged by the prosecutor.

The prosecutor also claimed that he had peremptorily challenged Ms. Brooks because "she did not vote [in the 1996 presidential] election, which is one of the things that I have on my check list." (23 RT 2157.) Four jurors actually selected to sit on the first jury did not vote in the most recent election, just like Ms. Brooks: Juror No. 6 (9 CT 1873); Juror No. 8 (9 CT 1925); Juror No. 12 (10 CT 2029) and Alternate Juror No. 4 (10 CT 2133). On the second jury, Juror No. 5 was not registered to vote nor did he vote in the 1996 presidential election. (17 CT 3650.)

As demonstrated *ante*, the record in this case shows that the prosecutor did not challenge a number of white prospective jurors whose questionnaires showed that they had the characteristics identified by the prosecutor as the reasons why she struck Tanisha Brooks from the first jury. Since the prosecutor stated in her explanation for striking Ms. Brooks that ". . .the main reason is that she was undecided on death. I pretty much exercise this right who is undecided or opposed, and I have all the papers that corroborate that," it is instructive to look at the answers on the juror questionnaires concerning the death penalty of some of those young white jurors who actually served.

The answers of Juror #2 at the second penalty trial, who was a 29 year-old unmarried woman with no children, showed a lot of ambivalence

about the death penalty. For example, in answering question #85(B), in which asks the juror if he or she would be able to consider imposing the death penalty in a felony murder case in which a defendant did not intend to kill the victim, she did not check either yes or not but put question marks in those spaces. (17 CT 3584.) In answering this question, Juror #2 also wrote: "I don't know, depends on all the facts, evidence and state of mind of the individual at the time of the crime." (*Ibid.*)

Juror #2 also showed a real openness to mitigation evidence of mental illness. For example, in answering a question about her "general feelings" about the mentally disturbed, she wrote: "Need to be understood more, not many of these people can control (except while taking medication) their actions." (17 CT 3579.) Also, in answering the question about what she considered worse for the defendant, death or life in prison without the possibility of parole, she wrote: "I don't know, depends on the individual who committed the crimes." (17 CT 3586.) This juror also indicated that she was very open to considering mitigation evidence, such the defendant's background and mental health.[16] (*Ibid.*)

Juror #8 at the first trial, who was a white woman, did not vote in the most recent presidential election. (9 CT 1924.) She also stated in her juror questionnaire that she was "undecided" about the death penalty. (9 CT 1941.) In answering question # 79, which asked the prospective juror to check either "support" or "oppose," Juror #8 did not check either but

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[16] This is important because in justifying her use of peremptory strikes during the second jury selection, the prosecutor claimed that she used peremptory challenges against several of the minority prospective jurors because of their attitudes towards mental illness, thus supposedly make them more open to the defendant's mitigation evidence. (See discussion *post* at pp. 49-52.)

instead wrote "none." (*Ibid.*) She checked "undecided" in answering question #80, which asked: "Which of the following best describes your general attitude toward the death penalty?" (*Ibid.*) This is exactly what Tanisha Brooks did in answering question #80 on her juror questionnaire. (13 CT 2904.)

Juror #5 on the second jury, a white man who was not registered to vote and had not voted in the most recent presidential election (17 CT 3650), also showed ambivalence regarding the death penalty. He wrote that he "reluctantly" supported the death penalty. (17 CT 3667.) In answering question #81 about which category best described his general attitude toward the death penalty, this juror created his own category "marginally support." (*Ibid.*) In addition, the wife of Juror #8 worked as an interpreter for the Federal Defender in San Diego. (17 CT 3659.)

Another problem with the trial judge's handling of the peremptory challenge of Ms. Brooks is that he did not address each of the reasons offered by the prosecutor for these challenges. In *People v. Silva* (2001) 25 Cal.4th 345, this Court observed:

> Although we generally 'accord great deference to the trial court's ruling that a particular reason in genuine,' we do so only when the trial has made a sincere and reasoned attempt *to evaluate each stated reason as applied as to each challenged juror.* [17] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible or both, more is required of the trial court than a global finding that the reasons appear sufficient.

(*Id.* at p. 385, quoting *People v. Fuentes* (1991) 54 Cal.3d 707, 720,

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[17] See also *People v. Stevens* (2007) 41 Cal.4th 182, 192.

emphasis added.)

As noted previously, the prosecutor offered several reasons for her decision to strike Ms. Brooks from the jury, but the trial judge did not say anything about any of her reasons, except to correct the prosecutor about Ms. Brooks' description of her brother's conviction. Instead, the judge merely denied appellant's motion without explanation. (23 RT 2157.) This silence on the part of the trial judge makes it impossible for a reviewing court to assess the reasonableness of the judge's determination that the reasons offered by the prosecutor for her peremptory challenge of Ms. Brooks.

3. Presence of One Minority Juror

Respondent also argues that the fact that a minority juror served during the guilt phase "suggests the prosecutor exercised her peremptory challenges in good faith and not for a prohibited reason." (RB at pp. 29-30.) This argument has been rejected by other courts. For example, in *Miller-El*, the government claimed there was no discrimination because the prosecution had left one African-American on the jury panel. The United States Supreme Court held this did not, "weaken any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play." (*Ibid.*, 545 U.S. p. 249.) While the presence of other persons similar in relevant respects to the stricken potential juror may be relevant in determining whether the prosecutor's stated reason for striking the potential juror is pretextual, it is not dispositive because the refusal to strike one potential juror does not foreclose the possibility of a discriminatory motive in striking another similar juror. (*Ibid.*, 545 U.S. at pp. 249-50 [holding that, under the circumstances, the "late-stage decision to accept a black panel member" did not "neutralize the early-stage decision to challenge a

comparable venireman"]; *Batson*, 476 U.S. at p. 95 ["'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266 n. 14)].) The striking of a single potential juror for a discriminatory reason violates the Equal Protection Clause even where jurors of the same race as the stricken juror are seated. (See, e.g., *Coulter v. Gramley* (7th Cir. 1996) 93 F.3d 394, 396; *United States v. Clemons* (3d Cir.) 843 F.2d 741, 747 cert. denied (1988) 488 U.S. 835; *State v. Rahman* (W.Va. 1996) 483 S.E.2d 273, 285

B. Improper Use of Peremptory Challenges During the Second Jury Selection

As stated in the AOB, the prosecutor improperly used peremptory challenges to eliminate three minority prospective jurors from the second jury selected at appellant's trial: Al Fulton, Carol Doxtator and Madelyn Estrada. (AOB at pp. 118-125.)

The first problem with the trial judge's disposition of the *Batson* challenges in the second jury selection in this case is that his remarks show that he did not understand the process for analyzing such claims. At the beginning of the in-chambers hearing on the *Batson* objections, the judge stated that: "I know in a *Wheeler* case there has to be some type of a showing that there is a pattern." (40 RT 3867.) At the end of this short hearing, the trial judge denied the defense motion for mistrial under *Batson,* concluding:

> I don't find any exercise of systemic exclusion at this time. There were reasons why you [the prosecutor] exercised your peremptories in this case, and in this court's opinion, it has nothing to do with having people of color off the jury.

(40 RT 3869.)

These statements demonstrate that the trial judge misunderstood the process of analysis and evaluation of the evidence regarding allegedly discriminatory peremptory challenges. For example, there is no requirement that when making a *Batson* motion a defendant prove either "a pattern" of discriminatory challenges or "systemic exclusion." As Justice Alito observed in the majority opinion in *Snyder v. Louisiana, supra*: "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*Id.* at p. 1208, quoting *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.)

In the *Vasquez-Lopez* opinion cited by Justice Alito in the *Snyder* decision, the Court of Appeals for the Ninth Circuit noted that *Batson* does not require evidence of a systematic pattern of discrimination against more than one juror to establish a prima facie case. (*Ibid.*, citing *United States v. Horsley* (11th Cir. 1989) 864 F.2d 1543, 1544.) Therefore, based on his statements during the hearing, at the second jury selection, regarding the *Batson* motion, the trial judge applied the wrong analysis to the issue of whether the prosecutor's peremptory challenges of these three minority prospective jurors showed improper discriminatory intent.

Another problem with the trial judge's findings about the prosecutor's peremptory challenges of minority jurors during the second jury selection is the fact that he did not address each of the reasons offered by the prosecutor for these challenges. In *People v. Silva, supra,* this Court observed:

> Although we generally 'accord great deference to the trial court's ruling that a particular reason in genuine,' we do so only when the trial has made a sincere and reasoned attempt *to evaluate each stated*

reason as applied as to each challenged juror. [18] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible or both, more is required of the trial court than a global finding that the reasons appear sufficient.

(*Id.* at p. 385, quoting *People v. Fuentes, supra,* 54 Cal.3d at p. 720, emphasis added.)

a. Al Fulton

In this case, the prosecutor offered the following explanation for her peremptory challenge of prospective juror Al Fulton:

> ....He was a probation officer for 28 years. Similarly to Mr. James Hastings who was Juror No. 6 who was white, 61-year-old male. He was also a U.S. Probation officer. My general feeling is that people who have had that many years in the system have their own precomposed [sic] ideas about the system, they are seen in so much of it that they come in and have a lot of preformed ideas. He might have seen – in my mind, my analysis, he might have seen cases that in his mind would be worse than this or less bad, and so he comes in with all of that baggage, just as Mr. Hastings did and he was kicked. In addition to that, he has what I categorize a social worker therapy type job. I have that under a category to consider in a very – I have a form that I use that is predeveloped for everybody, the same form that I use and I have those category of occupations as – and training under exclude, but to really look at to exclude. He has a social welfare degree from San Diego State University, he still counsels, has that counseling angle. A lot of his questions that he answered, for example, question No. 72, he said society needs to look at with regard to crime and what to do about it – I am rephrasing, this is my summary form – needs to look at not only the illegal use but the inequities and causes for that illegal use. So since I already know that the defense primarily is going to rely on causes and explanations for the defendant's behavior in this case, being illegal use or

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[18] See also *People v. Stevens, supra,* 41 Cal.4th 182.

whatever, I can see from this that he's a gentleman who's very open. (40 RT 3867-3868.)

Therefore, the prosecutor gave several reasons for his challenge of Mr. Fulton: (1) his job as a probation officer; (2) his education, a social welfare degree, and the fact he continued to work in counseling; and (3) in answering question No. 72 on the questionnaire, Fulton wrote that society should look at inequities as a cause of crime and of the use of illegal drugs. The record shows that the trial judge did not make any findings about which of these reasons he found to be legitimate, race-neutral reasons. His only comment after hearing the prosecutor's reasons was: "You have said enough on Mr. Fulton." (40 RT 3868.)

In his opening brief, appellant discussed how the questionnaires of other prospective jurors, who are white and who were not challenged by the prosecutor, showed very similar backgrounds and attitudes to those of the three minority prospective jurors challenged peremptorily by the prosecutor. (AOB at pp. 120-124.) Respondent counters by arguing that "he [appellant] exaggerates the alleged similarities." (RB at p. 28.) In addition, respondent seems to urge this Court to focus only on the prosecutor's first stated reason for striking prospective juror Fulton; that is, his job as a probation officer. (RB at p. 27.) That course, however, would not be consonant with this Court's proviso that it will accord deference to a trial judge's ruling on a *Batson* claim only if the judge has "evaluate[d] each stated reason as applied as to each challenged juror." (*People v. Silva, supra,* 25 Cal.4th at p. 385.)

Moreover, *Snyder v. Louisiana* demonstrates how important it is in a case where the prosecutor offers more than one reason for a peremptory challenge for the trial judge to evaluate each justification offered by the

prosecution and explain this evaluation on the record. In *Snyder,* the trial prosecutor offered two reasons for peremptorily challenging an African American college student: (1) this prospective juror looked nervous during voir dire and (2) he had expressed concern that the trial might conflict with his student teaching assignment. The U.S. Supreme Court found that the *Batson* claim had merit and reversed the judgment of the Louisiana Supreme Court denying the defendant's appeal. In making this determination, the Supreme Court found that the record did not show that the trial judge had credited the prosecutor's claim about the prospective juror's nervousness and that the record showed that the prosecutor's other stated reason for the strike was pretextual. (*Snyder v. Louisiana, supra,* 128 S.Ct. at pp. 1209-1212.)

In reaching the conclusion that the second reason offered by the prosecutor – that the prospective juror was worried about the trial conflicting with his student teaching assignment – was pretextual, the *Snyder* Court conducted a comparative analysis of the voir dire responses of this juror with those of white jurors who were not challenged by the prosecution. (*Ibid.*) Comparative analysis is "a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (*Turner v. Marshall* (9th Cr. 1997) 121 F.3d 1248, 1251.) In *Miller-El v. Dretke* the United States Supreme Court observed that, if "a prosecutor's proffered reason for striking a black panelist applies 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. [citation omitted]." (*Id.,* 545 U.S. at p. 241.) Indeed, in the present case, the trial prosecutor engaged in her own comparative

analysis when she cited another white prospective juror, Mr. Hastings, whom she also had peremptorily challenged because he had been a probation officer. (40 RT 3867.)

Under the principles stated in both *People v. Silva* and *Snyder v. Louisiana* this Court should reject respondent's argument that the Court should look at only one of the stated justifications for challenging prospective juror Fulton – his job as a probation officer. The second reason offered by the prosecutor for bumping Mr. Fulton was that he had "social worker therapy type job" and a social welfare degree from San Diego State University and "still counsels." (40 RT 3867.) It is unclear what the prosecutor meant when she said that he "still counsels." (40 RT 3867.) There is nothing else in either his questionnaire or in his brief voir dire indicating that Mr. Fulton did any counseling.[19]

The record in this case discloses that the prosecutor did not challenge a white prospective juror with an educational background similar to that of Mr. Fulton. Alternate Juror No. 5, chosen for the first jury in this case, had a B.S. degree in social work. (10 CT 2166.) Moreover, he had worked previously at Langley Porter, a mental health facility in San Francisco. (10 CT 2170.)

The third reason given by the prosecutor for challenging Mr. Fulton was that he stated on his jury questionnaire that inequities caused some illegal drug use and thus he would be "open" to the defense's "causes and explanations for the defendant's behavior in this case." (40 RT 3868.) The prosecutor cited Fulton's answer to question No. 72 but also mentions

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[19] Perhaps the prosecutor was referring to Mr. Fulton's statements in the jury questionnaire that he regularly mentored third, fourth and fifth graders. (22 CT 4941.)

Fulton's answers to "a lot of questions." (40 RT 3868.) Question No. 72 asked if one had strong beliefs regarding the use of illegal drugs or alcohol and, if so, to explain. Mr. Fulton wrote:

> We need to take a close look at what is happening to our society, not only from illegal use but the seemingly [sic] inequities and penalties. Also, the "causes" for abuse should be explored more thoroughly.

(22 CT 4953.)

As appellant discussed in his opening brief, the questionnaires of several white jurors who were not challenged by the prosecutor showed similar attitudes which would make them "open" to the defense of mental illness. In answering question No.66 about his general feelings about the mentally disturbed, Alternate Juror No. 5 of the first jury wrote "they need help, understanding & treatment." (10 CT 2172.) Similarly, Juror No. 2 of the second jury gave very sympathetic responses to questions Nos. 66 and 67 about mental illness. She described her feelings about the mentally ill: "Sadness because of the lack of control due to biological breakdown (chemical imbalance) in the brain. Most people don't have control and need to be on medication for the rest of their lives." (17 CT 3579.) She also wrote that the mentally disturbed "[n]eed to be understood more, not many of these people can control (except while taking medication) their actions." (17 CT 3579.) These remarks by Juror No. 2 certainly show far more receptivity to the defense of mental illness – the primary defense offered by appellant – than Mr. Fulton's answer to question No. 72, cited by the prosecutor as a reason for striking Mr. Fulton from the jury .

b. Carol Doxtator

The trial prosecutor gave the following justification for using a peremptory challenge against Carol Doxtator, an African American prospective juror at the penalty phase re-trial in this case:

> [she] is a psychiatric unit nurse. She discusses – that is her occupation. She discusses in her papers, mentioned that she has seen delusions, et cetera, exactly the kind of person that's – that's where she works. I don't know how much she knows or what opinions she really has about the mentally ill, whether she is going to buy everything that the doctors say on behalf of the defendant. I mean, that's mainly it, and then in addition, she started off undecided on the death penalty.

(40 RT 3868.)

The prosecutor thus identified three reasons for striking Ms. Doxtator from the second jury: (1) her job as a psychiatric nurse; (2) uncertainty about her opinions about the mentally ill and about the mental health professionals; and (3) fact that she "started off" undecided on the death penalty.

Juror No. 2 of the second jury, a white woman who was not challenged by the prosecutor, had a B.A. in psychology. (17 CT 3574.) As noted previously in the discussion of the peremptory challenge of Mr. Fulton, Alternate Juror No. 5, a white man chosen for the first jury in this case, had a B.S. degree in social work. (10 CT 2166.) Moreover, he had worked previously at Langley Porter, a mental health facility in San Francisco. (10 CT 2170.)

Alternate Juror No. 1 of the second jury was also a nurse who worked as a supervisor in the Sheriff's Medical Service. (18 CT 3873-3874.) She also had experience in psychiatric nursing. (18 CT 3882.) Indeed, Alternate Juror No. 1 wrote: "I have approx. 15 years experience as a psy. Nurse. 6 of those yrs were as an Ass. Prof. Nsy. I had BSN in psychiatric clinical experiences." (18 CT 3886.) This statement belies the claim of respondent in its brief that this alternate juror "had little direct contact with her female patients and who [sic] did not make any mental-health diagnoses." (RB at p. 29.) While Ms. Doxtator had only 5 years

working as nurse in a geriatric psychiatric setting (22 CT 4909), Alternate Juror No. 1 had 15 years working in a clinical setting as a psychiatric nurse. (18 CT 3886.)

In her explanation for peremptorily challenging Ms. Doxtator, the prosecutor said she didn't know what Doxtator's opinions were about the mentally ill and mental health professionals. This is not an accurate description of the record in this case. Ms. Doxtator's answers on the juror questionnaire describe her views of the mentally ill and mental health professionals. Ms. Doxtator checked "no" in answer to question No. 61 about whether she had any opinion about the ability of mental health professionals to diagnose mental conditions. (22 CT 4921.) Alternate Juror No. 1 gave the same answer to the same question. (18 CT 3885.) In answering the next question about how much weight, compared to other witnesses, the testimony of a psychologist or psychiatrist should be given, Alternate Juror No. 1 simply checked "same." She did not explain this answer, even though the questionnaire specifically asked for an explanation. (18 CT 3885.) By contrast, Ms. Doxtator did explain her answer, writing:

> If they [psychologist or psychiatrist] are giving expert testimony I would assume they have much education and experience [in] that field, however, if they are testifying as a witness their testimony should carry the same weight as other witnesses.

(22 CT 4921.)

Juror No. 2 of the second jury described her feelings about the mentally ill: "Sadness because of the lack of control due to biological breakdown (chemical imbalance) in the brain. Most people don't have control and need to be on medication for the rest of their lives." (17 CT 3579.) She also wrote that the mentally disturbed "[n]eed to be understood more, not many of these people can control (except while taking

medication) their actions." (17 CT 3579.) This juror stated that the testimony of a psychologist or psychiatrist should be given the same weight as other witnesses and wrote: "It depends on certain factors of the psychologist. Testing, interviewing, qualifications, thoroughness, etc." (17 CT 3577.)

It is clear from the record in this case that Ms. Doxtator's answers on her questionnaire gave a more definitive picture of how she would view the testimony of mental health professionals than did the answers of Alternate Juror No. 1 and Juror No. 2 of the second jury, who were not challenged by the prosecutor. Therefore, the prosecutor's claim that she struck Ms. Doxtator from the jury in part because the prosecutor didn't know "...how much she [Ms. Doxtator] knows or what opinions she really has about the mentally ill, whether she is going to buy everything that the doctors say on behalf of the defendant" doesn't really square with the only evidence in the record on this point, her answers on the juror questionnaire. (See *Miller-El v. Dretke, supra*, 545 U.S. at p. 244 [U.S. Supreme Court disapproves of the prosecutor's mischaracterization of the testimony of a minority juror against whom the prosecutor used a peremptory challenge].)

Moreover, if the prosecutor had questions about Ms. Doxtator's opinions on this issue, she could have asked the trial judge to explore the issue more thoroughly with Doxtator. In *Miller-El v. Dretke,* the Supreme Court observed "the State's failure to engage in meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Id.,* 545 U.S. at p. 246.) In *People v. Turner* (1986) 42 Cal.3d 711, this Court similarly noted that "a prosecutor's failure to engage minority jurors 'in more than desultory voir dire, or indeed to ask them any questions at all'

before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*Id.* at p. 727, citing *People v. Wheeler, supra,* 22 Cal.3d at p. 281.)

Appellant has shown that the failure of the trial judge in this case to engage in adequate voir dire constituted reversible error. (AOB at pp. 71-93, 125-126.) Respondent counters: "The [trial] court, however, answered these concerns [about inadequate voir dire] on the record by noting, without objection,[20] that since the parties had 20 pages of answers from each juror on the questionnaires, it did not intend to go "through much deeper with these people." (RB at p. 29, citing 40 RT 3779-3780.) That this position is without merit is shown by the prosecutor's claim at trial that she challenged Ms. Doxtator in part because she didn't know the views of Doxtator about the mentally ill and/or mental health experts. Respondent's brief, on the other hand, takes the position that the questions and responses on the juror questionnaires were adequate for determining prospective jurors' views. It is contradictory to claim, as the prosecutor did at trial, that she didn't have enough information to determine Ms. Doxtator's views and thus was justified in challenging her, but at the same time argue on appeal, as respondent has, that the juror questionnaire adequately covered all questions

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[20] It is not true that appellant did not object to the trial judge's decision to conduct an abbreviated voir dire in this case. At trial, appellant filed a Motion for Use of Individual and Sequestered or in the Alternate Small Group Voir Dire. (2 CT 242-258.) Moreover, at the hearing on this motion and other motions filed by appellant regarding jury selection, the defense made clear how important it believed a detailed, individual voir dire was necessary in this case, given the fact that defendant/appellant was a young African American male accused of sexually assaulting and killing an elderly white woman. (18 RT 1686-1693.) (See also AOB at pp. 71-93, 125-126.)

and thus this Court should reject appellant's claim that the voir dire in this case was inadequate.

c. Madelyn Estrada

The prosecutor peremptorily challenged prospective juror Madelyn Estrada, a Hispanic woman. When the defense objected that this challenge was discriminatory in violation of *Batson/Wheeler*, the prosecutor defended his decision to strike Ms. Estrada:

> Prosecutor: One of the main things I looked at is that she sat on a murder jury and that jury had no verdict, so I –that's what I have on my form, I can double-check it.
>
> The Court: That was the reason why you excused her?
>
> Prosecutor: That is one of the reasons I excused her. She also, I have no feelings either way, she says I do not oppose the death penalty, my problem is with the consistency of the death penalty and who gets it, so, again, that indicates that she has – she is not trusting the system.

(40 RT 3868-3869.)

After hearing this explanation by the prosecutor, the trial judge stated:

> I see no exclusion....I don't find any exercise of systematic exclusion at this time. There were reasons why you exercised your peremptories in this case, and in this court's opinion, it has nothing to do with people of color off the jury.

(40 RT 3869.)

Ms. Estrada was not the only prospective juror in this case who had previously sat on a jury in a criminal case where no verdict was reached. Alternate Juror No. 2 of the second jury served on a misdemeanor criminal jury which resulted in a hung jury. (18 CT 3906.) Not only did the prosecutor not challenge this juror for having been on a prior hung jury but there was virtually no voir dire of Alternate Juror No. 2. The trial judge did not question this juror at all; the only thing the trial judge said to this juror

was:

> Judge: Now, you know, you said something here, my intuition is not as good as yours. I am teasing you, I understand what you are talking about. I am glad that you put it the way that you were thinking rather than trying to make it something else. That's the way you think, and I am glad you put it down that way. Thank you.

(40 RT 3894.)

This statement by the judge does not make sense except in the context of her questionnaire, where Alternate Juror No. 2 wrote that she was comfortable judging the believability of another person because "I feel I have 'woman's intuition' in evaluating a person's 'genuineness.' I have been wrong, but I'm usually right. Being a mom helps!" (18 CT 3905.)

Respondent argues that the prosecutor's explanation that he struck Ms. Estrada because she had been on a prior jury which did not reach a verdict was reasonable because

> The record here, however, demonstrates that the prosecutor was entitled to be cautious about jurors who could not agree and dismiss Estrada.

(RB at p. 29.)

However, if this factor was so important, it's curious that neither the prosecutor nor the trial judge bothered to question Alternate Juror #2 about her prior service on a jury that hung. By contrast, the trial judge did question Ms. Estrada about her prior jury service in the case that ended in mistrial. (40 RT 3853-3854.) In *Miller-El v. Dretke, supra*, the Supreme Court found that "disparate questioning" of struck minority jurors and white jurors who served was further evidence of discriminatory intent on the part of the prosecutor. (*Ibid.*, 545 U.S. at p. 266.)

The second reason given by the prosecutor for striking prospective juror Estrada was that she didn't "trust the system" because she wrote that

she did not oppose the death penalty but that she had problems with the consistency of when it was imposed.[21] Several jurors who actually served on the second jury in appellant's case gave answers on their questionnaires which implied that they didn't "trust the system." Jurors Nos. 2, 5 and 9 all responded "yes" to question no. 55, "[d]o you think that some groups of people are treated unfairly in our courts?" Each of these three jurors explained their answer to this question. Juror No. 2 wrote: "People who aren't wealthy to hire the best representation for their case." (17 CT 3576.) Juror No. 5 explained: "It would appear that poor people and racial minorities sometimes get a bumpier ride on the road to justice than the affluent or mainstream population." (17 CT 3660.) Juror No. 9 wrote: "Those who can't afford special lawyers & get special evidence tested."

While the prosecutor expressed concern about Ms. Estrada's views about the inconsistency of whom is sentenced to death, her support of the death penalty was clear. Indeed, in answering other questions about the death penalty, Ms. Estrada showed far stronger support for it than other jurors who actually sat on one of the juries in appellant's case. (23 CT 5095.)[22]

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[21] In response to question No. 78 about her opinion about the death penalty, she wrote:

> I do not oppose the death penalty. My problem is with the consistency of who get the death penalty vs. life imprisonment. (23 CT 5094.)

[22] See the description in the argument *ante* [pp. 5-8] of jurors who showed some kind of ambivalence about the death penalty.

C. The Trial Judge Did Not Rule on Each of the Reasons Offered by the Prosecutor For Striking Minority Prospective Jurors

As described in the AOB and in the discussion *ante*, the prosecutor in this case offered several reasons for using peremptory challenges against each of the minority prospective jurors, but the trial judge did not address any of these specific reasons. As will be addressed *post*, appellant believes that under the language of *Snyder v. Louisiana*, the most recent *Batson* decision of the United States Supreme Court, this Court should not defer to the trial judge's denial of appellant's *Batson* motions because the trial judge did not rule on each of the reasons proffered by the prosecutor for her exercise of peremptory challenges against minority prospective jurors.

In *Snyder*, the trial prosecutor offered two reasons for peremptorily challenging an African American college student: (1) this prospective juror looked nervous during voir dire and (2) he had expressed concern that serving on the jury might conflict with his student teaching assignment. The Supreme Court found that the record did not show that the trial judge had credited the prosecutor's claim about the prospective juror's nervousness and that the record showed that the prosecutor's other stated reason for the strike was pre-textual. (*Snyder v. Louisiana, supra,* 128 S.Ct. at pp. 1209-1212.) Because the trial judge in the *Snyder* case said nothing on the record about the prosecutor's claim about the prospective juror's demeanor, the Court found that this explanation should not be accepted as a race-neutral reason for the peremptory challenge.[23]

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[23] Justice Alito described the Court's analysis of the trial judge's failure to discuss the prosecutor's claim that Mr. Brooks [the African American prospective juror] appeared nervous during voir dire:

(continued...)

In the instant case, the trial judge did not address any of the reasons offered by the prosecutor for striking four minority prospective jurors. In the case of Tanisha Brooks, the prosecutor cited the following as the reasons for her challenge: her inexperience, her young age and single status, her failure to vote in the last election, her failure to be forthright about her brother's conviction and the fact that she was undecided about the death penalty. (23 RT 2156-2157.) The trial judge responded to one of these reasons, saying that Ms. Brooks had said that her brother was convicted of manslaughter and that she thought he had received fair treatment. (23 RT 2156-2157.) The judge then simply denied the motion without comment. (23 RT 2157.)

Similarly, during jury selection at the second trial, the trial judge failed to comment on the various reasons given by the prosecutor for striking three minority prospective jurors. In the case of Al Fulton, the prosecutor said that because he had worked in probation for many years he might have "precomposed" [sic] ideas about the "system." Also, the prosecutor cited Fulton's degree in social welfare and his work in

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[23](...continued)

> Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing this ruling completely on the second proffered justification for the strike. For these reasons, *we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous.*

(*Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1209, emphasis added.)

counseling as reasons for challenging him. Moreover, she characterized Fulton's answers on his questionnaire as showing that he would be open to the defense concerning appellant's background and problems. The trial judge did not rule on the peremptory challenge of Mr. Fulton but moved on to the next challenged prospective juror, Carol Doxtator. (40 RT 3868.)

The prosecutor claimed that he struck Ms. Doxtator from the jury because she was a psychiatric nurse and the prosecutor didn't know what she thought of mental illness and because she "started off" as undecided about the death penalty. (40 RT 3868.) Again, the trial judge did not say anything about the so-called race neutral reasons offered by the prosecutor for this challenge and asked the prosecutor to move on to Ms. Estrada. (40 RT 3868.) The prosecutor asserted that he struck Ms. Estrada from the jury because she had served on a jury that did not reach a verdict and she was neutral about the death penalty. (40 RT 3869.)

Only after having heard all of the reasons offered for challenging these four, did the trial judge rule: "There were reasons why you exercised your peremptories in this case, and in this court's opinion, it has nothing to do with having people of color off the jury." (40 RT 3869.)

Because the trial judge did not explain his views about the various reasons offered by the prosecutor, under *Snyder*, this Court cannot assume that he found each of the reasons credible. As discussed *ante*, a comparison of the challenged jurors' answers on their juror questionnaires with the answers given by others actually chosen for the two juries in this case, demonstrate that the reasons were pre-textual. Also, the failure to address each of the reasons offered by the prosecutor makes it very difficult, if not impossible, for a reviewing court to assess accurately the trial judge's determination of a *Batson/Wheeler* motion.

D. This Court's *Batson/Wheeler* Jurisprudence Does Not Comport With That of the United States Supreme Court

This Court's recent decision in *People v. Lewis* (2008)__Cal.4th__, 75 Cal.Rptr.3d 588, seems to be at odds with the language of the *Snyder* decision. In *Lewis*, this Court rejected the appellant's *Batson/Wheeler* claims. Although the trial judge in *Lewis* denied each of the *Batson* motions without any comment or discussion (*People v. Lewis, supra*, 75 Cal.Rptr.3d at p. 636), this Court presumed that this silence meant that the trial judge had accepted the prosecutor's various justifications for his peremptory challenges of minority prospective jurors:

> The trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty. Moreover, the trial court was not required to question the prosecutor or explain its findings on the record because, as we will explain, the prosecutor's reasons were neither inherently implausible nor unsupported by the record. Under these circumstances, we apply the usual substantial evidence standard.

(*Ibid.*, citations omitted.)

This Court's analysis in the *Lewis* opinion concerning how a record should be interpreted for purposes of determining whether a *Batson* violation had occurred differs sharply from the analysis provided by the United States Supreme Court in the *Snyder* decision. Justice Alito, writing for the majority, found that the absence of a specific ruling by the trial judge on the record concerning a "race-neutral" reason proffered by the prosecution meant that one could not presume that the trial court had credited this reason. (*Id.*, 128 S.Ct. at pp. 1209-1212.) By contrast, this

Court gave an opposite interpretation of the silent record in *Lewis*:

> The trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. *Nothing in the record suggests that the trial court either was unaware of t duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty.*

(*People v. Lewis, supra,* 75 Cal.Rptr.3d at p. 636; emphasis added.) This Court's interpretation of a silent record in the *Lewis* decision contradicts the conclusion the Supreme Court came to in the *Snyder* case. Quite simply, the Court found in *Snyder* that the failure of the trial judge to rule on the record concerning the prosecutor's claim that the prospective juror appeared nervous meant that the reviewing court could not rely upon that reason as support for the trial court's denial of the *Batson* motion.

In *Lewis*, by contrast, this Court upheld the trial judge's denial of four separate *Batson/Wheeler* motions by offering possible justifications, never articulated by the trial court, for the decisions to deny the defendant's motions. For example, in the case of prospective juror R.W., an African-American woman struck by the prosecutor, the defense pointed out that the prosecutor had failed to ask R.W. any questions on voir dire. Citing the Supreme Court's decision in *Miller-El v. Dretke* for the principle that a party's failure to engage in meaningful voir dire on a topic the party says is important for juror selection may show that the stated reason is pre-textual, this Court noted that "the prosecutor's failure to explore R.W.'s views on voir dire is somewhat troubling." (*People v. Lewis, supra,* 75 Cal.Rptr.3d at p. 40.) Nonetheless, in *Lewis,* this Court upheld the trial judge's denial of the *Batson* motion regarding R.W. In justifying this course, the Court speculates, inter alia, the prosecutor may not have questioned R.W. on voir

dire because he "had the opportunity to observe R.W.'s demeanor during questioning by the trial court and defense counsel." (*Ibid.*)

Relying upon this kind of speculation as a basis for upholding a trial court's denial of a *Batson* claim does not comport with the analysis in *Snyder* or with the Supreme Court's earlier decision in *Miller-El v. Dretke*. In the latter decision, the Court decried the use of speculation to find a justification for a peremptory challenge of a minority prospective juror:

> 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 pre-textual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

(*Ibid.*, 545 U.S. at p. 252.)

This Court's decision in *Lewis* is replete with examples of such speculation about possible reasons why the prosecutor used a peremptory challenge against a minority juror and therefore why the trial judge would have denied the defendant's *Batson/Wheeler* challenge.

This Court made clear in *Lewis* that its focus is on the intent of the prosecutor and not the trial court's determination of such intent. The Court observed:

> ....the question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly believed them not to be similarly situated in legitimate respects.

(*Id.* at p. 637, quoting *People v. Huggins* (2006) 38 Cal.4th 175, 233.)

By contrast, the decisions dealing with *Batson* issues decided by the United States Supreme Court focus on the factual findings of the trial judge. An appellate court must defer to the factual findings, if supported by the record, of the trial court regarding the discriminatory intent vel non behind a prosecutor's peremptory challenge of a minority prospective juror. In *Snyder,* the Supreme Court agreed with the Louisiana Supreme Court's observation in that case that "nervousness [of prospective juror Brooks] cannot be shown from a cold transcript, which is why . . . the [trial] judge's evaluation must be given much deference." (128 S.Ct. at p. 1209, quoting from *Snyder v. Louisiana* (La. 2006) 942 So.2d 484, 496.) However, because the record in *Snyder* did not show that the trial judge actually made a determination regarding the alleged nervousness of prospective juror Brooks, the Supreme Court held that "we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." (128 S.Ct. at p. 1209.) The *Lewis* decision shows that this Court improperly defers to the allegedly race-neutral reasons offered by the prosecution even if the record does not show the reasoning of the trial judge but only his/her simple denial of the *Batson/Wheeler* motion of the defendant.

The record in the instant case also suffers from such a deficiency. As described *ante*, the trial judge in this case did not explain during the selection process for either the first or second jury in this case why he was denying appellant's *Batson/Wheeler* challenges. In the first instance, the judge listened to the several reasons offered against Tanisha Brooks, corrected one of the "facts" offered by the prosecutor and ruled: "Motion denied." (23 RT 2157.)

During the second jury selection, the trial judge listened to the reasons offered by the prosecutor for using peremptory challenges of Al

Fulton, Carol Doxtator and Madelyn Estrada. He then stated that he did not see "systematic exclusion of these protected groups." After the defense declined to say anything further in support of its motion, the trial judge concluded:

> I see no exclusion. I might want to say that I noticed that the defense knocked off a person of color . . . I don't find any exercise of systematic exclusion at this time. There were reasons why you exercised your peremptories in this case, and in this court's opinion, it has nothing to do with having people of color off the jury.

(40 RT 3868-3869.)

The trial judge ruled in the most perfunctory manner on appellant's *Batson/Wheeler* motions; thus, his rulings are not entitled to deference as the Supreme Court explained in *Snyder v. Louisiana, supra,* 128 S.Ct. 1208-1209. In previous opinions, this Court has also found that the failure to engage in proper analysis under *Batson* and *Wheeler* means that the trial court's ruling is not entitled to deference. (See *People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Hall* (1983) 35 Cal.3d 161, 168-169 [trial court declined any inquiry into or examination of the prosecutor's proffered explanation for challenging black jurors before denying Wheeler motion]; accord, *People v. Turner, supra,* 42 Cal.3d at pp. 727-728 [trial court listened to prosecutor's reasons for challenging black jurors without question and then denied the *Wheeler* motion without comment].)

As demonstrated, the record in this case does not support the trial judge's denial of appellant's *Batson/Wheeler* motions in this case. First, the trial judge failed to engage in a sufficient analysis of the factual bases for these motions. Second, a review of the record shows that the reasons offered by the prosecutor were pre-textual because white jurors who actually served on the two juries selected in this case exhibited the

characteristics cited by the prosecutor for his peremptory challenges of four minority prospective jurors in this case.

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error]. As this Court has noted, reversal is required if only one prospective juror is excluded for race-based reasons. (*People v. Silva, supra*, 25 Cal.4th at p. 386.).)

Reversal of appellant's conviction and death sentence are required, because the record clearly reveals the prosecution's purposeful discrimination against three African-American and one Hispanic prospective jurors, in violation of appellant's rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky, supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler, supra,* 22 Cal.3d 258.)

* * * * *

V.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO CROSS-EXAMINE A DEFENSE EXPERT USING EVIDENCE ARISING OUT OF THE COMPETENCY PROCEEDINGS IN THIS CASE

Appellant challenged the use of evidence from his competency proceedings during the guilt phase of his trial. This issue was first raised before the trial in an in limine motion to preclude the use of any evidence from the Penal Code section 1368 hearing at the guilt or penalty phase. (2 CT 440-448.)

A. Proceedings in the Trial Court

At the initial hearing on this in limine motion, defense counsel noted that the prosecution only became aware of appellant's records from Harbor View Hospital as a result of Dr. Macspeiden's interview of appellant during the competency proceedings. (18 RT 1791-1792.) The admission of these records were the principal concern of the defense for purposes of this motion.[24] (18 RT 1792-1793.) At this hearing, the prosecutor argued that she should be allowed to present evidence regarding appellant's Harbor View records because those reports were not produced as result of the 1368 proceedings. Rather, the prosecutor contended, the defense had hired Dr. Macspeiden to examine appellant for a mental state defense, and he mentioned the Harbor View records in his report. (18 RT 1792-1793.) Given these facts, according to the prosecution, Macspeiden's report and testimony did not qualify for the judicially created immunity for evidence

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[24] The defense was concerned in part that, as stated in the notice of aggravation, the prosecutor proposed to use, at the penalty phase trial, the Harbor View records as substantive evidence of appellant's violence. (18 RT 1799.)

developed in 1368 proceedings although Macspeiden did testify at the competency hearing. (See, e.g., *People v. Arcega* (1982) 32 Cal.3d 504.)

During this first hearing, the parties discussed how the caselaw, including, *Arcega, supra,* and *Tarentino v. Superior Court* (1975) 48 Cal.App.3d 465, governed the issue of what evidence gathered during the competency proceedings could be used by the prosecution at trial. (18 RT 1788-1801.) According to the prosecutor, the theoretical underpinning for these decisions as that such testimony could not be introduced at trial because it had been compelled as a result of the 1368 process. (18 RT 1794.) The prosecutor argued that the judicial immunity conferred by those opinions applied only when the evidence resulted from appellant's compelled participation in the 1368 proceedings. (18 RT 1794-1795.) The prosecutor conceded that she would not have known about appellant's hospitalizations at Harbor View and his records at the hospital except through Dr. Macspeiden, who did testify at appellant's competency hearing. (18 RT 1795.)

At a second hearing on this motion, the trial judge stated his belief that if the defendant called as a witness at the guilt trial an expert who had also testified at the 1368 hearing, the prosecution should not be precluded from using evidence from that hearing to cross-examine the witness. (19 RT 1873.) At that hearing, the prosecutor again conceded that she learned about appellant's Harbor View records only as a result of the 1368 proceedings. (19 RT 1874.) The Court observed:

> If you [the prosecution] had no knowledge prior to the 1368 [of] statements by the defendant or evidence that was produced by the defendant to properly represent him during that proceeding, then you cannot use that evidence either in a guilt or penalty phase against the defendant unless, as I have said, that if the defense puts it in any

way, then it becomes part of the proceeding, cross-examine and then it is in. But I think that if that Harbor View does not come in the trial, I don't think you can use it because it was produced – the defense team had to produce it in order to properly represent him. Now, it was to his favor to a certain extent in the competency hearing, but as far as a guilt or penalty phase, it obviously is not in his favor, so he had to produce it, you see, so therefore it would be in violation of your burden of proving him guilty beyond a reasonable doubt, and he not having a burden and he not having to compel himself to incriminate himself.

(19 RT 1876.)

The trial judge then wanted to know if the prosecutor would have discovered appellant's Harbor View records had the 1368 proceedings not occurred. The prosecutor argued that she would have because the defense turned over in discovery a statement by appellant's mother which included references to appellant's stays at Harbor View. (19 RT 1877.) The prosecutor also asserted that she would have subpoenaed appellant's records from the hospital. (*Ibid.*) When defense counsel interjected that those records were privileged and not subject to the prosecutor's subpoena, the trial judge stated that the prosecutor could just have interviewed the staff of Harbor View to find out if appellant had assaulted anyone while staying at the hospital. (19 RT 1877-1878.) Defense counsel countered that the prosecution would not have known about appellant's connection with Harbor View.[25]

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[25] On the issue of what was revealed in the statement of Mrs. Taylor, turned over to the prosecution in discovery, defense counsel admitted that he had mishandled this material:

I would have blocked that [references to Harbor View in the statement of Mrs. Taylor] out. I probably should have blocked it out. I guess I was remiss in not doing so. I got an indication from the court the court was going to allow it in anyway. I didn't feel at that

(continued...)

To the prosecution's claim that the defense had "opened the door" by having experts testify about appellant's mental state, the trial judge disagreed, saying "the whole door doesn't open up" for purposes of the evidence produced during the competency proceedings. (19 RT 1879.) Defense counsel and the trial judge disagreed, however, about whether material from a 1368 hearing could ever come in as evidence at the guilt or penalty phase of a capital trial. Ultimately, the trial judge ruled:

> Let me tell you something, if you in your case in the defense – either in the guilt or penalty, put a 1368 witness up here and basically I can only assume that he or she will testify to the exact same thing that they testified in the 1368 proceeding, I am going to allow the prosecution to fully cross-examine that witness and I will allow that – the prosecution to use that witness' prior testimony. If it is impeaching it will be allowed. I mean, the law wants to be as fair as it can to your client and it says, if on the one hand you are compelled to incriminate yourself because the law says you have to, later on where you are not supposed to be compelled to testify we are not going to make you do that. But once you do that, then the blanket is lifted. That's only fair.

(19 RT 1881-1882.)

During the guilt phase of appellant's trial, despite the renewed objections of defense counsel, the trial judge allowed the prosecutor to cross-examine Dr. Cerbone about the report he prepared for the competency proceedings and about statements allegedly made by appellant while he was hospitalized at Harbor View.[26] (29 RT 2771-2772, 2775-2778.)

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[25](...continued)
time it was proper to block it out. I should have and had I done so, and I guess I am remiss in not having done so, but there was no way of discovering it.

(19 RT 1878.)

[26] As discussed in the AOB (p. 130), the trial judge became very (continued...)

The trial judge erred in allowing this cross-examination. As discussed in the Appellant's Opening Brief ("AOB"), pages 130-135, this ruling violated the principles set forth in *Tarantino v. Superior Court*, *supra*, *People v. Arcega, supra,* and *People v. Pokovich* (2006) 39 Cal.4th 1240.

B. Respondent's Arguments on Appeal

Respondent contends that appellant "opened the door to the prosecutor's cross-examination." (Respondent's Brief ("RB") at p. 30.) Since Dr. Cerbone was called by the defense, the prosecutor was entitled, so respondent argues, to cross-examine Cerbone about his earlier statements that appellant had antisocial personality disorder and may be prone to violence. (*Ibid.*) Relying upon decisions [27] of the United States Supreme Court, respondent argues that because the defense requested the competency hearing in this case [28] and appellant had put his mental state in

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[26](...continued)
angry at defense counsel because during the direct examination of Dr. Cerbone, counsel asked him about what the judge characterized as the "ultimate issue" – whether appellant was suffering from a mental disease or defect when the crimes occurred. (29 RT 2773.) It is unclear why Dr. Cerbone's testimony about the "ultimate" issue so unhinged the trial judge as Evidence Code section 805 allows opinion testimony which "embraces the ultimate issue to be decided by the trier of fact."

[27] *Estelle v. Smith* (1981) 451 U.S. 454, 468; *Buchanan v. Kentucky* (1987) 483 U.S. 402, 422-425; *Penry v. Johnson* (2001) 532 U.S. 782, 794-795.

[28] The record shows that appellant himself consistently opposed his lawyers' efforts to have him found incompetent. (4 RT 604-606; 5 RT 614; 16 RT 1590.) Moreover, the counsel who represented appellant during the competency proceedings were taken off his case at the end of those proceedings. (16 RT 1590-1591.)

issue, his constitutional rights under the Fifth and Sixth Amendments were not violated by this cross-examination.

C. Applicable Law

This Court has recognized, however, that California rules regarding the use of evidence from a competency proceeding are more stringent than the federal rule for compliance with the Fifth and Sixth Amendments. (*People v. Arcega, supra*, 32 Cal.3d at p. 523, fn.6.) In *People v. Weaver* (2001) 26 Cal.4th 876, 960, this Court discussed the judicially declared rule of unqualified immunity derived from the California Penal Code provisions governing competency proceedings. A psychiatrist or psychologist appointed to examine a defendant for competency may not subsequently testify at the sanity, guilt or penalty trials of that defendant. (*Id.* at pp. 959-963.) In a subsequent decision, *People v. Jablonski* (2006) 37 Cal.4th 774, this Court noted:

> [t]he immunity granted in *Arcega* fully protects a defendant against any nonevidentiary uses of statements obtained from the defendant during the competency hearing to the same extent he or she is protected by the privilege against self-incrimination.

(*Id.* at p. 803.)

The cross-examination challenged here involved alleged highly inflammatory statements by appellant which appeared in his medical records from the Harbor View Hospital [29] as well as reports prepared by other mental health experts (Dr. Macspeiden and Dr Michel) who testified

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[29] Over his objections, appellant was hospitalized twice at age 16 at the Harbor View Hospital. His mother placed him there because she was concerned that he was abusing drugs, in particular, marijuana, crystal meth and LSD. (46 RT 4714.) He was placed in "lockdown" at that facility. (46 RT 4720.)

during the competency proceedings. (29 RT 2771-2772, 2775-2776.) These medical records became available to the prosecutor as a result of the competency proceedings and qualified as "statements obtained from the defendant during a competency hearing. (*People v. Jablonski, supra,* 37 Cal.4th at p. 803.)

In the decision, *In re Hernandez* (2006) 143 Cal.App.4th 459, the Court of Appeal stated a broad rule that applies to the instant case:

> The fruit of the defendant's competency evaluations, i.e., the competency expert's impressions, reports or the results of the evaluator's testing, are not to be made available to experts appointed to testify on the issues of the defendant's guilt, sanity, or penalty.

(*Id.* at p. 477.)

Because Dr. Cerbone testified at petitioner's competency hearing, it was improper at the guilt phase trial for the prosecutor to cross-examine him about statements appearing in appellant's records from Harbor View or to question Cerbone about assessments made by other mental health experts at appellant's competency hearing. The prosecutor justified this tactic on the groundt that Dr. Cerbone had reviewed these reports in preparation for his testimony at the guilt phase of appellant's trial. (29 RT 2778-2780, 2783-2785.) While it is true an expert has more leeway on cross-examination than on direct to testify about hearsay on which he or she relied in forming his or her opinion, that rule does not allow the admission of inadmissible evidence. (See, e.g., *People v. Gardley* (1996) 14 Cal.4th 605, 618-619 [The Court wrote: "A trial court also has discretion "'to weigh the probative value of inadmissible evidence relied upon by an expert witness ... against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform

inadmissible matter into 'independent proof' of any fact." (Citations omitted.)]

Citing Evidence Code sections 351, 356, 761, 769, 770, 773, 804 and 1203, respondent also argues that the prosecutor's questions to Dr. Cerbone regarding alleged statements by appellant described in his records at Harbor View Hospital were proper. Respondent claims that "this issue was fully litigated in limine." (RB at p. 33.) In fact, the Evidence Code sections cited by respondent in its brief in this case were not discussed during the hearings on this in limine motion. (18 RT 1788-1801; 19 RT 1873-1882.)

Respondent also argues that appellant's view that California's judicially created immunity applies to statements lifted from appellant's Harbor View medical records is a "novel argument [that] would permit a defendant to shield not only his own prior inconsistent statements [citation] but also his medical records and the inconsistent statements of an expert who has no self-executing Fifth Amendment trial right." (RB at p. 33.)

First, it is clear that the prosecutor never raised this particular argument at trial when the parties were debating the admissibility of this evidence, in particular alleged statements by appellant when he was involuntarily held at the Harbor View hospital for drug treatment. In the trial court, the parties focused on the case law, including the decisions in *Tarantino* and *Arcega*, concerning the judicially created immunity arising out of California law on competency and not on the Evidence Code sections cited by respondent. (18 RT 1788-1801; 19 RT 1873-1882.) As discussed in the AOB (pages 130-135), the prosecutor's use of appellant's medical records to cross-examine his expert was improper under this Court's rulings in *Arcega, supra, People v. Jablonski, supra*, and *People v. Pokovich* (2006) 39 Cal.4th 1240, 1251-1253, because, but for the competency

proceedings, the prosecutor would not have had knowledge of or access to the Harbor View records. Accordingly, the records themselves were fruits of the original competency proceedings; therefore, the prosecutor should not have been allowed to use them in the cross-examination of appellant's expert witness at his guilt phase trial.

Respondent further asserts that "[e]xperts should tell the truth whenever they testify and need not be called to testify when another expert's opinion could suffice." (RB at p. 34.) According to respondent, appellant could have chosen another mental health expert to testify at trial and that because he chose Dr. Cerbone, the prosecutor was entitled to "explore the bases for this expert's opinion in front of the jury."(*Ibid.*) This argument sidesteps the crucial question of whether the State is allowed to introduce evidence which was gathered as a result of the competency proceedings against a defendant in the guilt and penalty phases of a capital trial.

As discussed at length in the AOB, such evidence is impermissible. (AOB at pp. 127-135.) As the Court of Appeal stated in *Tarentino v. Superior Court, supra*:

> we have no hesitancy in declaring that neither the statements of petitioner to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of petitioner's guilt, under either the plea of not guilty or that of not guilty by reason of insanity.

(*Id.*, 48 Cal.App.3d at p. 470.)

This Court reiterated the judicially created rule of immunity applicable to statements and the fruits of such statements made during competency proceedings in *People v. Weaver, supra,* 26 Cal.4th at p.959. (See also *People v. Pokovich* (2006) 39 Cal.4th 1240, 1251-1253; *In re Hernandez*

(2006) 143 Cal.App.4th 459, 471-475.)

D. Conclusion

The trial judge erred in allowing the prosecutor to cross-examine Dr. Cerbone at the guilt phase about evidence gathered during the competency proceedings in this case. The California case law cited *ante* and in the AOB establish that there is a judicially created rule of immunity regarding statements and the fruits made during a competency proceeding pursuant to Penal Code section 1367 et seq. which prohibits the State from using such evidence against a defendant in subsequent criminal proceedings. The trial judge recognized this rule but stated that it did not apply if appellant produced witnesses and "the issues as discussed during the 1368." (19 RT 1873.) Under those circumstances, the trial court here ruled that the "prosecution [would] not be precluded from seeing [sic] 1368 evidence that was brought in at 1368 hearing to properly and fully cross-examine the witness." (*Ibid.*)

This ruling by the trial judge was error, and the improper use of materials derived from the competency proceedings in this case during the cross-examination of Dr. Cerbone prejudiced appellant. (See AOB at pp. 135-138.) Not only did the prosecutor read to the jury highly inflammatory statements attributed to appellant in his Harbor View records during her questioning of Dr. Cerbone, but she treated the hearsay found in those records as though they were true. She picked the most inflammatory statements allegedly made by appellant and made them part of her questions to Dr. Cerbone. These alleged threats included: "I will kill you, rip off your head and stuff it down your neck" and "Bitch, cunt, whore, suck my dick." (29 RT 2775-2276.) In addition, the prosecutor improperly cross-examined Dr. Cerbone about reports done by other mental health experts,

Drs. Macspeiden and Michel, in connection with the competency proceedings. (29 RT 2778-2780, 2783-2785.) Similarly, she referred to Dr. Macspeiden's report in her closing argument to the jury at the guilt phase even though Macspeiden did not testify at appellant's trial. (30 RT 2977-2979.)

For all of the foregoing reasons as well as for the reasons set forth in Argument V of the AOB, respondent cannot prove beyond a reasonable doubt that the error – allowing this improper use at appellant's guilt phase of evidence from appellant's competency proceedings – did not contribute to the verdicts in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24.)[30] Appellant's convictions and death sentence, therefore, must be reversed.

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[30] In *People v. Pokovich, supra*, 39 Cal.4th 1240, the Court found that the *Chapman* standard of harmless error analysis applies when the trial court has allowed improper admission of evidence from the competency hearing into the guilt phase trial. (*Id.* at p. 1255.)

VI.

THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ELEMENTS OF TRESPASS

Consistent with what seems to be a pattern in Respondent's Brief (RB), respondent has provided only a very minimal response, less than one page, to this argument. Respondent's counter argument does not address in any meaningful way appellant's contention that the failure to give, as requested, a trespass instruction as a lesser related offense of burglary denied him a fundamental, constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739.) A criminal defendant has a due process right to instructions on any recognized defense for which there exists evidence for a reasonable jury to find in his favor. (*Mathews v. United States* (1988) 455 U.S. 58, 63.) Respondent offers the following feeble counter to this claim:

> Although Taylor argues that the omission of trespass instructions deprived him of fundamental fairness or the ability to present his defense, he overlooks the fact that the jury had multiple options upon which to reach a verdict. [Citations omitted.] If jurors had had a reasonable doubt about Taylor's burglarious intentions, they would have acquitted him of burglary, trespass instruction or not.

(RB at p. 35.)

This argument is nonsensical. Just because a jury is given instructions on a variety of charges doesn't mean that the failure to give an instruction on a particular offense —in this case, trespass – is not error simply because the jury had lots of options from which to choose . As discussed in the AOB, appellant's defense, which offered a reasonable interpretation of the evidence, was that appellant did not have an intent to steal or any other felonious intent when he entered Mrs. Dixon's house. Initially, he came into the room where Mrs. Dixon was sitting with her

sister, and he sat down between them. He told the two women his name. He did not grab Mrs. Dixon until after she got up and asked her sister to call 911. (24 RT 2262-2263; AOB at pp. 140-141.) These facts, together with appellant's history of serious mental illness, make it plausible that he did not have any clear intent when he entered the Dixon house.

The plausibility of this defense theory is demonstrated by the fact that the prosecutor offered a second theory of burglary into the case. That is, she argued as well as sought and obtained a jury instruction to the effect that a burglary had occurred when appellant grabbed Mrs. Dixon and took her into another room in her house because it was at that time that he had formed the intent to sexually assault her. (30 RT 2961-2962; 4 CT 995.)

It was unfair for the trial court to instruct on this theory of burglary, espoused by the prosecution, while denying appellant's request for an instruction on trespass, which went to the core of his defense in this case. "There should be absolute impartiality as between the People and defendant in the matter of instructions. . ."(*People v. Moore* (1954) 43 Cal.2d 517, 526-527 [citations omitted]; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial. (*Wardius v. Oregon* (1973) 497 U.S. 470, 474.) Moreover, this kind of arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet* (1972) 405 U.S. 56, 77.) Respondent's brief is silent on this issue, raised in the AOB (pages 140-141), that the trial court treated the prosecution more favorably than the defense when it came to jury instructions. The lack of response to appellant's argument effectively concedes the issue. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529;

People v. Bouzas (1991) 53 Cal.3d 467, 490.)

For all of the foregoing as well as for the reasons set forth in the AOB (pp. 139-145), appellant's convictions for murder, burglary and the burglary felony murder special circumstance must be reversed.

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VII.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE OFFENSE OF SECOND DEGREE MURDER

Finding nothing in respondent's brief regarding this issue that requires a response, appellant will not reply because the argument in appellant's opening brief on this issue is sufficient. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the Argument VII of the AOB in this case does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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VIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 164-171.) Respondent asserts that this claim has been rejected by this Court in the past. (RB 39-40.) The decisions cited by respondent do hold that malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. However, this is based on a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are different crimes or the same crime. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections did describe different

crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.)

People v. Dillon (1983) 34 Cal.3d 441, the controlling interpretation of the felony murder rule at the time of appellant's trial, properly applied the *Blockberger* test for determining the "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p. 476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code, § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation. Felony murder does not; it requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony.

Therefore, it is incongruous to say, as this Court did in *People v. Silva, supra,* 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies meant "only that the *elements* of

the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488.)

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones* v. *United States*, *supra*, 526 U.S. at p. 232.) In this case, where appellant was charged with one crime, but the jury was instructed that it could convict him of another, that rule was breached as well, violating appellant's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair and reliable capital guilt trial.

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IX.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURORS THAT THEY MUST AGREE UNANIMOUSLY ABOUT EACH ESSENTIAL FACT OF THE MURDER CHARGE

Finding nothing in respondent's brief regarding Argument IX of the opening brief that requires a response, appellant will not reply because the argument in his AOB on this issue is sufficient. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the Argument IX of the AOB does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented, and the positions of the parties fully joined.

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X.

THE TRIAL JUDGE'S ERRONEOUS INSTRUCTIONS REGARDING THE THREE FELONY SPECIAL CIRCUMSTANCES REQUIRE REVERSAL OF THOSE FINDINGS AND THE DEATH SENTENCE

Appellant has demonstrated in the AOB that the trial court erred in giving a truncated version of CALJIC No. 8.81.17 regarding three felony murder special circumstances in this case . (AOB at pp. 182-196.) As has been true so often in this case, the response to this argument by respondent is very inadequate. Respondent's argument relies on two decisions of this Court, *People v. Valdez* (2004) 32 Cal.4th 73, 113-114 and *People v. Navarette* (2003) 30 Cal.4th 458, 505.[31] In the AOB, appellant explained why this Court should reconsider its holding in the *Valdez* decision. (AOB at pp. 186-187.) As discussed in the AOB, Justice Chin's dissenting opinion in *Valdez* sets forth the reasons why it was error to give a truncated version of CALJIC No. 8.81.17. That is, the shortened form of the instruction, given in *Valdez* and also in the instant case, essentially mirrored the instruction on first degree felony murder. (*Valdez, supra*, 32 Cal.4th at pp. 146-147.) Therefore, it was inevitable in this case that once the jury found appellant guilty of first degree felony murder, they would also find the three felony murder special circumstances true, particularly since the prosecutor told the jury: "Special circumstances are basically the same as the murder thus charged." (30 RT 2959.)

Given the perfunctory nature of respondent's argument in refutation

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[31] The *Navarette* decision does not contain any analysis of this issue that is not included in the majority decision in *People v. Valdez, supra.*

of Argument X of the AOB, no further reply by appellant is necessary. Appellant believes that the issue has been adequately addressed in the AOB, and the positions of the parties are fully joined. Appellant's convictions and death sentence should be reversed.

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XI.

THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

In his opening brief, appellant has established that the trial judge erred in instructing the guilt phase jury in his case with CALJIC Nos. 2.03 and 2.52, and that this error violated appellant's constitutional rights to due process, trial by jury and a reliable capital trial. (AOB at pp. 197-211.) Relying on prior case law of this Court,[32] respondent contends that the instructions were proper and constitutional. (RB at pp. 42-43.)

Appellant has already addressed in the opening brief why that prior case law should be reconsidered, so no further reply is necessary. For all of the reasons set forth in Argument XI of the AOB, appellant's convictions and death sentence should be reversed.

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[32] Respondent does cite *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157-161, but does not explain how this decision supports respondent's argument that CALJIC Nos. 2.03 and 2.52 do not create irrational impermissive inferences and are, therefore, constitutional. (RB at p. 43.)

XII.

THE JURY INSTRUCTION REGARDING REASONABLE DOUBT, CALJIC No. 2.90, WAS CONSTITUTIONALLY DEFECTIVE

In the opening brief, appellant established that the trial judge gave a constitutionally deficient reasonable doubt and burden of proof instruction, CALJIC No. 2.90. (AOB at pp. 212-225.) The prosecution's response is grossly inadequate. Respondent simply enumerates the contentions in Argument XII of the AOB, and then states: "Taylor's argument is frivolous and should be rejected." (RB at p. 44.) This single-sentence argument is followed by a string cite of five decisions and sections 1096 and 1096a of the California Penal Code. (*Ibid.*) Therefore, respondent has in effect not provided any basis for rejecting the argument and analysis appearing in Argument XII of the AOB. Because of respondent's perfunctory, one-sentence argument on this issue, no reply by appellant is necessary. Argument XII of the AOB in this case provides ample grounds for reversing the appellant's convictions and death sentence because of the constitutional deficiencies of CALJIC No. 2.90.

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XIII.

OTHER INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In Argument XIII of the opening brief, appellant has shown that a series of jury instructions, including CALJIC Nos. 2.02, 2.22, 2.27 and 2.51, given by the trial judge were erroneous. Collectively these instructions diluted the constitutional requirement that the prosecution prove its case against appellant beyond a reasonable doubt. (AOB at pp. 226-236.) The only response to this argument by respondent is the following one-sentence opposition: "Taylor's contention in Argument XIII has been addressed with Argument XI, *ante*, which is incorporated by this reference." (RB at p. 44.)

By failing to address in any way the claims made in Argument XIII of the AOB, respondent has conceded the merits of appellant's argument on this issue. Accordingly, no reply by appellant is necessary, and, for all of the reasons stated in Argument XIII of the AOB, appellant's convictions and sentence should be reversed.

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XIV.

THE PROSECUTOR IMPERMISSIBLY BURDENED APPELLANT'S RIGHT TO REMAIN SILENT BY COMMENTING ON APPELLANT'S DECISION NOT TO TESTIFY AT THE GUILT PHASE OF HIS TRIAL

In Argument XIV of the opening brief (AOB at pp. 237-243), appellant has shown that the prosecutor violated his Fifth Amendment rights when she, during her closing argument at the guilt phase of his trial, commented on his failure to explain why he entered the victim's house. (30 RT 2001.)[33] As Argument XIV of the AOB explained, in *Griffin v. California* (1965) 390 U.S. 609, 615, the United States Supreme Court held that prosecution may not comment at any phase of a trial on defendant's silence because such comment would violate the defendant's right to remain silent under the Fifth Amendment, as applied to the states through the Fourteenth Amendment. (AOB at pp. 237-240.)

The record in this case shows that the prosecutor made such improper comment on appellant's failure to testify at his trial and that this comment prejudiced appellant because his chief defense was that the prosecution had not proved the mental state necessary to convict him of first degree murder. On this issue, respondent's brief offers no argument or analysis that requires a reply. (RB at pp. 44-46.) Argument XIV of the AOB is sufficient, and, therefore, for all of the reasons set forth therein, appellant's convictions and death sentence should be reversed.

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[33] The prosecutor argued: "Who took this stand and gave a reasonable explanation as to another reason that the defendant may have been there?" (30 RT 3001.)

XV.

DURING THE SELECTION OF THE SECOND JURY, THE TRIAL JUDGE ERRONEOUSLY INCLUDED PINPOINT QUESTIONS IN THE JUROR QUESTIONNAIRE WHICH FAVORED THE PROSECUTION'S PURSUIT OF A JURY UNFAIRLY BIASED IN FAVOR OF THE DEATH PENALTY

In Argument XV of the opening brief, appellant established that the trial judge erred when, over defense counsel's objection, he included questions in the juror questionnaire used for the selection of the jury for the penalty retrial which asked prospective jurors if they would vote for the death penalty only if the prosecutor proved that appellant had an intent to kill. (AOB at pp. 244-254.) These questions were based on statements made by the two jurors from the first penalty trial, which resulted in a mistrial, who had voted for a sentence of life without the possibility of parole. These jurors stated that they could not vote for the death penalty because they did not see any evidence of an intent to kill on the part of appellant. (38 RT 3650-3651.)

Respondent's argument in response to Argument XV of the AOB contains nothing that requires a reply. Appellant believes that his argument in the opening brief is sufficient, and his decision not to reply does not constitute a concession, abandonment or waiver of any point made in Argument XV of the AOB. It merely reflects appellant's view that the issue has been adequately presented , and the positions of the parties are fully joined.

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XVI.

THE TRIAL JUDGE ERRED IN FAILING TO LIMIT VICTIM IMPACT EVIDENCE

In a capital case penalty phase, victim impact evidence is perhaps the most powerful evidence available to the prosecution to convince a jury to sentence the defendant to death. Justice John Paul Stevens acknowledged this fact in his statement respecting the denial of petitions for writs of certiorari involving two recent decisions of this Court, *People v. Kelly* (2007) 42 Cal.4th 763 and *People v. Zamudio* (2008) 43 Cal.4th 327. Citing observations in a federal district court decision, *United States v. Johnson* (N.D. Iowa 2005) 362 F.Supp.2d 1043, Justice Stevens wrote: "Victim impact evidence is powerful in any form." (*Kelly v. California; Zamudio v. California* (2008) __U.S.__, 129 S.Ct. 564, 567 (Mem).) In the *Johnson* decision, cited and quoted by Justice Stevens, the judge described his experience of victim impact evidence:

> . . . .I have already presided over the "penalty phase" in the companion case against Dustin Honken. This case will likely involve victim impact evidence that is substantially similar to the "victim impact" evidence in Honken's case, because this case involves the same alleged murders of the same victims. I can say, without hesitation, that the "victim impact" testimony presented in Honken's trial was the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years. Indeed, I cannot help but wonder if *Payne v. Tennessee* (1991) 501 U.S. 808, which held that victim impact evidence is legitimate information for a jury to hear to determine the proper punishment for capital murder, would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury.

(*Id.* at p. 1107.)

As pointed out in the AOB in this case, appellant's trial counsel objected, both in a written motion (4 CT 863-876) and at trial (31 RT 3063-3064), to the proposed victim impact evidence as being inflammatory and cumulative. The trial judge rejected appellant's claims, although he said that these witnesses could not testify about their opinions about the appropriate penalty. (31 RT 3063.)

Respondent's brief gives short shrift — less than two pages — to appellant's argument that the victim impact evidence offered in this case was improper and unduly prejudicial. (RB at pp. 50-51.) The prosecution argues that testimony of the members of Rosa Mae Dixon's family were brief and described only "their grief, loss, and difficulty adjusting to life after learning of Taylor's crimes." (RB at p. 51.) As the AOB discusses, the victim impact evidence in this case went far beyond a description of the effect of the killing of Mrs. Dixon on members of her family. Some of the witnesses focused on the way Mrs. Dixon died. For example, one great granddaughter described her grandmother as being "tortured [] to death." (43 RT 4295.) A daughter, Bonnie Dixon, testified:

> I think I probably speak for everybody in the grand circle. Family, close friends, we are so completely utterly, bitterly angry at that idiot. . . . .We are – it is the best word I can think is heart broken. We know this dear little lady that never really hurt anybody died in pain and terror and humiliation in a puddle of blood in the safety of her own house.

(43 RT 4317.)

Ms. Dixon also described her mother's killing as a "slaughter." (43 RT 4311.)

While *Payne v. Tennessee* (1991) 501 U.S. 801 overruled the earlier

decisions of *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805 insofar as those opinions held that any victim impact statement evidence violated the Eighth Amendment, it did not overturn the rule set forth in those cases that the victim's family members could not characterize and give opinions about the crime, the defendant and the appropriate sentence. (*Payne v. Tennessee, supra,* 501 U.S. at p.830, fn.2.)

Other states have limited emotional victim impact evidence in capital cases. Very recently, the Idaho Supreme Court reversed and remanded a death penalty case because of improper victim impact evidence. In *State v. Payne* (Idaho 2008) 199 P.3d 123, the Court noted: "[W]hile evidence relating to the victim's personal characteristics and the impact of the crime on the murder victim's family is admissible, *characterizations and opinions about the crime, the defendant and the appropriate sentence are not admissible*. (*Id.* at p. 148; emphasis added.) As described in the AOB and noted *ante*, the six members of the Dixon family who testified at appellant's penalty trial and retrial offered not only their harsh opinions of appellant but their characterizations of the crime as a "slaughter" "torture" and "terror."

In its brief response to appellant's challenge of the victim impact evidence, respondent cites several recent decisions, including *People v. Prince* (2007) 40 Cal.4th 1179, 1286-1291, fn. 28, of this Court to support its position. Appellant acknowledges that recent decisions[34] of this Court have given an expansive definition of permissible victim impact evidence.

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[34] See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 364; *People v. Kelly, supra,* 42 Cal.4th 763; and *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.

Appellant asks the Court to reconsider this expansive definition because it contradicts both state and federal death penalty jurisprudence.

In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that aggravating evidence is only admissible when it is relevant to one of the statutory factors. (*Id.* at p. 775-776.) Since there is no "victim impact" sentencing factor in the California death penalty statute, such evidence has been admitted under factor (a), as a "circumstance of the crime." (*People v. Edwards* (1991) 54 Cal.3d 787, 833.)

As noted in the AOB, the testimony of six members of the Dixon family was highly emotional. (AOB at pp. 262-267.) Victim impact evidence must be limited by the fundamental principle that penalty determinations should be based on reason rather than emotion or vengeance. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) While the federal Constitution does not impose an absolute ban on victim impact evidence, the Fifth, Eighth and Fourteenth Amendments prohibit such evidence if it so inflammatory as to invite an irrational, arbitrary, or purely speculative response from the jury. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 824-825.) The Oklahoma Court of Appeals described the problem with highly emotional victim impact evidence as follows:

> The more a jury is exposed to the emotional aspects of a victim's death, the less likely its verdict will be a reasoned moral response to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process.

(*Cargle v. State* (Okla.Crim.App. 1996) 909 P.2d 806, 830.)

In this case, the family members all testified about how the killing of Mrs. Dixon virtually ruined their lives. One granddaughter attributed the loss of her business and the ending of a long-term relationship to her reaction to her grandmother's death. (43 RT 4295.) One of Mrs. Dixon's

daughters testified that she suffered from clinical depressions, insomnia and social withdrawal as a result. (44 RT 4386-4387.) Mrs. Dixon's 13-year old great-grandson told the jury that he had trouble sleeping and sometimes woke up crying because he was thinking about his grandmother. (43 RT 4292-4293.) No one disputes that the family members had suffered and continued to suffer profoundly as a result of the killing of Mrs. Dixon. It is however true, as stated in *United States v. Johnson, supra,* that such victim impact testimony is often "the most forceful, emotionally powerful, and emotionally draining evidence," one can ever hear in a trial. (*Id.,* 362 F.Supp.2d at p. 1107.) Accordingly, such evidence threatens the principle that a "death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) [35]

Not only did six members of Mrs. Dixon's family give very emotional testimony, but two other witnesses from the community testified about how her death affected the larger community. Her neighbor, Erik Kirkpatrick, testified briefly about how Mrs. Dixon's death had affected him. (42 RT 4119-4120.) Emmanuel Francouis, who worked at the Child Development Center where Mrs. Dixon volunteered, talked about her work with the children at that center. (44 RT 4331-4335.) In his opinion in *Payne v. Tennessee, supra*, Chief Justice Rehnquist suggested that victim impact evidence should be limited to the victim's family's loss but not to society's general harm. For example, he wrote:

A State may conclude that evidence about the victim and *about the*

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[35] See also *Gardner v. Florida* (1977) 430 U.S. 349, 358, where the Court wrote that "it is of vital importance. . .that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. . ."

impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. (*Id.* at p. 827; emphasis added.) [36]

Francouis was not a family member or a close friend of Mrs. Dixon. He testified primarily about Mrs. Dixon's work as a school volunteer and the effect of her death on the students. During his testimony, he showed the jury a large birthday card that the children had made for Mrs. Dixon on the occasion of her 80th birthday. (Court Exhibit 102). He also told the jury that the children called her "Grandma Mae," and that they were very upset when they learned of her death. (44 RT 4334-4335.)

Of course, neither Francouis or the children at the Children's Development Center were survivors of Mrs. Dixon within the terms of the *Payne* decision. Some states have prohibited the use of this type of attenuated victim impact evidence. In a case analogous to this one, *State v. Young* (Tenn. 2006) 196 S.W.3d 85, the Tennessee Supreme Court found that the trial court erred in admitting the testimony of a university professor, a member of the department in which the victim was a student, about the effect of the murder on everyone in the department. The court noted that the testimony had some probative value since the professor's description "illustrated how interwoven a single individual's life is with many others." (*Id.* at p. 109.) Nonetheless, the court concluded that the danger of unfair prejudice outweighed the probative value of the evidence:

Dr. Sundstrom's testimony was not limited to a "brief

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[36] In *People v. Marks* (2003) 31 Cal.4th 197, 245, this Court took a different position, stating that the prosecution can introduce evidence about "the effect of [the victim's] loss on friends, loved ones, and the community as a whole." (*Id.* at p. 235.) See also *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.

> glimpse" of the victim's life, but rather laid the debilitating grief of over one hundred people at Defendant's feet. The risk of inflaming a jury's passions with such testimony is simply too great to allow its admission.

(*Id.* at p. 110.)

In addition, the *Young* decision found the admission of testimony that one of the victim's friends had gone into in therapy and become suicidal as a result of the murder, and that the victim had "'a whole army of friends out here'" and "'friends all over the world will never have her again'" to be error. (*Ibid.*) Although the Tennessee Supreme Court found that this evidence "exceed[ed] the permissible scope of victim impact evidence," it also found that the error was not prejudicial, largely because of the limiting instructions given to the jury and the lack of attention paid to this evidence in the prosecutor's closing argument to the jury (*ibid*), circumstances not present in this case.

The Florida Supreme Court has taken a similar position. In *Windom v. State* (Fla. 1995) 656 So.2d 432, 438-439, the Court found that testimony about the effect of the victim's death on children in the community was erroneously admitted because it was not limited to the uniqueness of the victim, and the resultant loss to the community members. Other states, such as Louisiana, have limited, by statute, victim impact evidence to family members after considering but rejecting a broader definition. (*State v. Frost* (La. 1998) 727 So.2d 417, 429 [amendment to expand victim impact evidence to include "the impact that the death of the victim has had on the family members, friends, close associates, and the community in which the victim lived" was unsuccessful].) Oklahoma is even more restrictive, permitting only immediate family members to testify as victim impact witnesses. (*Lott v. State* (Okla.Crim.App. 2004) 98 P.3d 318, 346-348

[error to admit testimony of grandmother about impact of victim's murder].)

These judicial and legislative judgments reflect an understanding of the risk of arbitrariness in defining "victim" broadly and the view that under *Payne*, victim impact evidence is restricted to the victim's survivors. (*Lott, supra,* 98 P.3d at p. 347, quoting *Cargle v. State, supra,* 909 P.2d 806, 828 ["'victim impact evidence is intended to provide a quick glimpse of a victim's characteristics and the effect of the victim's death on survivors.'"].)

As pointed out in the AOB in this case, the sheer number of victim impact witnesses testifying in this case created undue prejudice. Six members of her family and two community members testified. *Payne v. Tennessee, supra,* involved the testimony of a single victim impact witness who described the effects of the murder of a mother and her young daughter on the woman's three–year-old son who was present at the scene of the homicide and had been injured himself. (*Id.*, 501 U.S. at pp. 811-812.) In *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180, the New Jersey Supreme Court noted the greater number of survivors who testified as victim impact witnesses, the greater the chance that such evidence would unduly prejudice the defendant. In *State v. Mosley* (Tex.1998) 983 S.W.2d 249, 253, the Texas Court of Criminal Appeals cautioned "that victim impact and character evidence may become prejudicial through sheer volume." Similarly, the great number of victim impact witnesses offered by the prosecution in *State v. Payne, supra,* was one of the factors that led the Idaho Supreme Court to overturn Payne's death sentence. (*Id.,* 199 P.3d at p. 148.)

The victim impact evidence offered in this case was not a mere "quick glimpse of the life" of Rosa Mae Dixon. (*Payne v. Tennessee, supra,*

501 U.S. at p. 822.) The quantity and tone of the victim impact evidence went far beyond that authorized by *Payne v. Tennessee, supra*. The witnesses described more than Mrs. Dixon's uniqueness and the impact of her death on them. Rather they emotionally described their horror at the way she died and the awful effect it on had on them and others. In both its depth and emotionality, the victim impact evidence was so unduly prejudicial as to render appellant's trial fundamentally unfair. (*Id.*, 501 U.S. at p. 825.) Unlike the evidence introduced in the *Payne* case the highly emotional and inflammatory nature of the evidence introduced in this case shifted the jury's attention from "a reasoned moral response" to appellant's personal culpability and the circumstances of the crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319) to a passionate and irrational response to the grief and anger of Mrs. Dixon's family. (*Cargle v. State, supra,* 909 P.2d at p. 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question of whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."])

The extensive and highly emotional victim impact evidence presented in this case was critical to the prosecutor's quest for a verdict of death. The sheer number of the witnesses violated the spirit of *Payne v. Tennessee, supra,* which sets forth the basic perimeters for victim impact evidence. In addition, some of the witnesses talked about the nature of the crime and their personal evaluations of appellant's character; such evidence was barred by *Booth v. Maryland, supra*, and that portion of *Booth* was not overruled in the *Payne* decision. (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2.) As noted previously, members of the Dixon family testified that the killing of Rosa Mae Dixon was torture and slaughter. They also emphasized how the

way she died was a source of continuing pain for them. In her closing arguments to the jury at penalty, the prosecutor echoed these sentiments of the victim impact witnesses. Just as some of the witnesses described Mrs. Dixon's killing as torture, the prosecutor repeatedly talked about the torture involved in this case. (48 RT 5050, 5061, 5081, 5115-5118.) Indeed, the prosecutor's rhetoric about the torturous death of Mrs. Dixon culminated in her statement to the jury that:

> This case, there is only possible intentions, only two possible logical intentions, no other. One, the defendant intended to torture his victim, and or the defendant intended to kill her. There are no other options.

(48 RT 5118.)

The prosecutor, of course, did not charge appellant with a torture special circumstance, which, based on her closing argument, would seem to have been the logical thing to do. The prosecutor made other references to the victim impact evidence in this case. For example, she argued:

> The circumstances of the crime in this case which have three special circumstances and encompass the victim impact evidence in this case, ladies and gentlemen, they come up with this woman, this woman, this woman who gave a good life, this woman, this woman with her grandson, my grandmother died an awful painful dead (sic), I can't sleep at night.

(48 RT 5081.)

Given the quantity and tone of the victim impact evidence and the prosecutor's reliance upon it in her closing arguments to the jury at the penalty phase, respondent cannot prove beyond a reasonable doubt that this evidence was harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Also, there is a reasonable possibility that but for this improper victim impact testimony, the jury would have returned a verdict more favorable to

appellant. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Accordingly, the Court should reverse appellant's death sentence.

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XVII.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR UNADJUDICATED ALLEGED CRIMINAL ACTIVITY AS AGGRAVATING EVIDENCE SUPPORTING A VERDICT OF DEATH

The argument regarding this issue made in Respondent's Brief is both inadequate and inaccurate. Once again, respondent's counter argument is very brief—about two pages long — in response to a twenty-seven page argument in the AOB. Moreover, respondent makes several inaccurate claims about what was written in the AOB.

First, respondent states: "Taylor concedes that evidence of prior violent juvenile criminal conduct may be considered as an aggravating factor." (RB at p. 52.) Appellant did not make such concession. The AOB recognizes that this Court has found such evidence to be both admissible and constitutional, but it argues that the Court should reverse its position. (AOB at pp. 280-282.) Next, respondent claims: "Taylor concedes, moreover, that the trial court had no duty to identify in the jury instructions the elements of the crimes implicated by Taylor's unadjudicated conduct." (RB at p. 53.) Once again, no such concession appears in the AOB. Appellant merely pointed out that this Court has held that a trial judge does not have a duty to give such instructions, but the AOB argues that this policy violates a capital defendant's constitutional rights under the Eighth and Fourteenth Amendments. (AOB at pp. 282-285.) Respondent also argues incorrectly that: "Taylor's brief also identifies, at footnote 96 on page 294, the appropriate crimes implicated by his assaultive and criminal threats to Officer Cherski, including Penal Code sections 240 and 422." (RB at p. 53.) In fact, the AOB argues that appellant's allegedly threatening statement to Officer Cherski did not amount to any crime under California law. (AOB at

pp. 293-294.)

The AOB in this case describes in detail the myriad reasons why section 190.3 (b) ("factor b") is unconstitutional. (AOB at pp. 269-296.) In this case, the prosecutor presented evidence regarding three alleged incidents of criminal activity involving "the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (§ 190.3 (b).) The admission of this evidence violated appellant's Sixth and Fourteenth Amendment rights to a fair trial by an impartial and unanimous jury, to effective assistance of counsel, to effective confrontation of witnesses and to equal protection under the law. Further, factor b, as written and applied, violates a capital defendant's Eighth Amendment right to a reliable death penalty sentencing procedure and results in an arbitrary and capricious rendering of a verdict of death.

As discussed in the AOB, this Court's interpretation of § 190.3 (b) does not comport with federal constitutional requirements because, inter alia, it is not necessary for all jurors to agree unanimously that defendant engaged in the alleged unadjudicated criminal activity beyond a reasonable doubt (*People v. Caro* (1988) 46 Cal.3d 1035, 1057); the trial court is not required to identify the unadjudicated crimes allegedly involved or to instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207); and the prosecutor can present evidence of unadjudicated criminal activity which occurred when the defendant was a juvenile. (*People v. Lewis* (2001) 26 Cal.4th 334, 378-379.)

A. The Decision in *Cunningham v. California*

Since appellant filed his opening brief in this case, the United States Supreme Court decided *Cunnigham v. California* (2007) 549 U.S. 270. Appellant asks the Court to reconsider its position that the holdings of

Apprendi v. New Jersey (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington* (2004) 542 U.S. 296 do not apply to the California capital sentencing process. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 358.)

Because of the *Cunningham* decision, this Court should re-examine its earlier decisions rejecting the application of *Apprendi, Ring* and *Blakely* to the capital sentencing process.[37] In *Blakely*, the United States Supreme Court found that the trial judge's finding of an aggravating factor for purposes of sentencing violated the requirement of the Sixth and Fourteenth Amendments that a defendant is entitled to a jury determination, beyond a reasonable doubt, of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. (*Blakely, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California, supra,* the U.S. Supreme Court considered whether the holding of *Blakely* applied to California's Determinate Sentencing Law ("DSL"). The Court found that it did, holding that any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and decided unanimously and proved beyond a reasonable doubt, including facts relied upon a trial judge in choosing an upper term sentence. (*Cunningham v. California, supra,* 549 U.S. at p. 289.) In her majority opinion, Justice Ginsberg specifically rejected this Court's reasoning in *People v. Black* (2005) 35

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[37] Appellant recognizes that the Court recently stated in *People v. Salcido* (2008) 44 Cal.4th 93, 166, that the U.S. Supreme Court's decision in *Cunningham* applies only to California's DSL and "has no apparent application to California's capital sentencing scheme." Appellant requests that the Court reconsider this position.

Cal.4th 1238, 1254, about why the holdings of the *Apprendi* and *Ring* decisions did not apply to California's DSL. (*Id.* at p. 290.)

This analysis applies equally to the capital sentencing process in California. Just as a sentencing judge in a non-capital case must find at least one aggravating factor before he or she can sentence the defendant to the upper term, in a capital case, the jurors must find the existence of at least one aggravating factor before they can sentence the defendant to death. (See, e.g., *People v. Farnum* (2002) 28 Cal.4th 107, 192.) In rejecting the applicability of the *Apprendi, Ring*, and *Blakely* line of cases to the California capital sentencing process, this Court has cited principles which have now been rejected by the Supreme Court in *Cunningham*. For example, the *Cunningham* decision rejected this Court's determination in the *Black, supra.* that, under the DSL, the upper term, rather than the middle term, was the statutory maximum. *(Cunningham, supra*, at p. 290.) Also, the High Court disagreed with this Court's finding that because California law accords the trial judge so much discretion in the sentencing process, the *Apprendi* line of cases did not apply to the DSL:

> We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. *(Blakely,* 542 U.S. at p. 305, fn. 8.)

(*Cunningham, supra*, 549 U.S. at p. 290.)

This statement by the Court in *Cunningham* relates as well to this Court's explanation for not applying the principles of *Apprendi, Ring* and *Blakely* to the determinations about sentencing made by the jury in

California capital cases. In *People v. Prieto* (2003) 30 Cal.4th 226, 275, this Court stated that it would not reconsider its ruling about the constitutionality of California's death penalty in light of the *Ring* decision because "the penalty phase determination in California is normative, not factual.[38] *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Ibid.*; italics added.)

This comparison in *Prieto* between the penalty determination in a capital case and the trial judge's broad discretion in other sentencing decisions in California must be re-evaluated given that the United States Supreme Court's *Cunningham* decision specifically rejected this Court's reasoning in *People v. Black, supra*, that a trial judge maintained great discretion in sentencing under the DSL. As Justice Scalia observed in his concurring opinion in the *Ring* case:

> I believe that the fundamental meaning the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring, supra,* 536 U.S. at p. 610.)

B. *Roper v. Simmons* and Alleged Criminal Activity Committed as a Juvenile

As discussed in the AOB, the most prejudicial evidence introduced by the prosecution during the penalty phase of appellant's trial was a claim that appellant, when he was a juvenile, had allegedly sodomized and forced an

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[38] In *People v. Brown* (1988) 46 Cal.3d 432, 448, however, this Court acknowledged that fact-finding is part of a sentencing jury's responsibility in the penalty phase of a capital trial.

oral copulation on a younger boy. This evidence was improper and should have been excluded. (AOB at pp. 276-286.) Respondent does not really address the arguments made in the AOB regarding this evidence. Instead, citing this Court's decisions in *People v. Lucky* (1988) 45 Cal.3d 259, 295 and *People v. Lewis, supra,* 26 Cal.4th at pp. 378-379, respondent simply argues that alleged violent criminal activity committed when the defendant was a juvenile is admissible as factor b evidence. (RB at p. 52.)

As noted in the AOB, none of this Court's decisions have addressed the use of unadjudicated juvenile crimes since the United States Supreme Court decided *Roper v. Simmons* (2005) 543 U.S. 551 (hereafter *Simmons*). In the *Simmons* case, the Court held that the death penalty is not an appropriate punishment for a crime which was committed when the offender was less than 18 years of age. (*Id.* at p.568.) Because adolescents lack maturity and self-control,[39] the death penalty is a disproportionate sentence which violates the Eighth Amendment. (*Id.* at p. 569.) Although the *Simmons* decision concerned a defendant who was younger than 18 at the time of the capital murder itself, the underlying principles of the decision also should apply to the introduction of juvenile misconduct as aggravating evidence used to convince a jury to sentence the defendant to death. That is, the *Simmons* holding was premised on what the Court perceived as three differences [40]

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[39] Scientific research has established that the brains of juveniles are less developed than those of non-mentally retarded adults. (See, e.g., Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations* (2000) 24 Neuroscience & Biobehavioral Revs. 417.)

[40] First, juveniles lack maturity and have an undeveloped sense of responsibility that leads them to engage in impetuous and ill-considered

(continued...)

between juvenile and adult offenders. These differences apply equally to crimes other than the capital murder which were committed by the defendant when he or she was under the age of 18.

In the present case, the prosecutor called as a penalty phase witness the son of a former lover of appellant's mother; appellant and he had lived together with their mothers off and on for about 8 years. (44 RT 4352.) Jason Labonte testified that he was about 8 years old when appellant sodomized him and forced him to orally copulate him. (44 RT 4353.) According to Labonte, appellant is about 3½ years older than him, making appellant about 11½ years old at the time of the alleged incident.[41] The Court observed in *Simmons*:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

(*Id.* at p. 570.)

This observation applies equally to the evidence of an alleged sodomy and oral copulation by appellant as it does to the murder at issue in the *Simmons* case.

The prejudice resulting from this evidence was immense. The

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[40](...continued)
actions and decisions. Second, they are more suspectible to outside negative pressures, including peer pressure. Third, the character of a juvenile is less well formed and fixed than adults. (*Simmons, supra*, 543 U.S. at pp. 569-570.)

Jason was born on October 25, 1976 (44 RT 4351), and appellant was born on March 23, 1973. (1 CT 8.)

prosecutor made repeated references to this incident during her closing argument at the penalty phase retrial. (48 RT 5046, 5067, 5075-5077.) Not only did she equate Jason Labonte with Rosa Mae Dixon, but she emphasized appellant's youth when he allegedly assaulted Jason. (48 RT 5077.) In the *Simmons* case, the prosecutor also had argued that the defendant's youth — he was 17 at the time of the murder — should be considered an aggravating factor. The U.S. Supreme Court criticized this argument:

> . . . .the prosecutor argued Simmons' youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

(*Id.* at p. 573.)

Just as such an argument was improper in the *Simmons*, it was improper in this case.

Respondent cited this Court's decision in *People v. Lewis, supra,* 26 Cal.4th 334, as support for the proposition that the use of alleged criminal activity by a capital defendant when he or she was a juvenile is proper factor b evidence. However, the *Lewis* decision reveals the inherent illogic of California's death penalty process. Section 190.3 favors the use of improper and unreliable evidence of alleged but unadjudicated acts of violence over evidence of actual adjudicated crimes. In *Lewis,* the prosecutor introduced evidence of a prior murder in which the defendant was involved when he was 13 years 9 months old. Lewis had been tried in juvenile court, which found that he had committed second degree murder and incarcerated him in the California Youth Authority.

This Court noted that the prosecution could not have introduced evidence of appellant Lewis's juvenile adjudication for second degree murder

because such adjudications do not qualify as prior convictions under section 190.3, factor (c).[42] (*Id.* at p. 378.) Nonetheless, the prosecutor was free to introduce the underlying evidence of this crime under the amorphous provisions of factor b. This is an anomolous result because it allows the prosecutor to introduce the "facts" of the criminal activity but not the fact that there had been a prior adjudication of the crime. An adjudication by a juvenile court provides more procedural safeguards for a defendant than does the process used pursuant to §190.3 (b). Although the jurors in a capital penalty phase trial are instructed that they must find any alleged crime for which evidence is offered under factor b beyond a reasonable doubt, there is no requirement that they be instructed concerning the elements of the crime or even that the crime be identified. Moreover, the jurors are not required to be unanimous about whether any of the alleged crimes introduced under factor b have been proven. Indeed, there is no requirement that any two jurors agree [43] that an alleged incident of criminal activity constituted any

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[42] Section 190.3, factor © provides that the following evidence can be introduced at the penalty phase of a capital trial: "The presence or absence of any prior felony conviction."

[43] In a non-capital case, the United States Supreme Court upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364; see also *Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding a conviction obtained by a 9-3 jury vote in a non-capital case].) But the Court struck down, as violative of the Sixth Amendment, a Georgia law which allowed criminal convictions with a five-person jury. (*Ballew v. Georgia* (1978) 435 U.S. 223.) The Court also held that is unconstitutional to allow a criminal conviction based of the vote of five of six jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323.)

Because this is a capital case, the need for reliable fact finding determinations is substantially greater. Therefore, it is unconstitutional to allow the jury to sentence appellant to death when the sentencing process

(continued...)

particular crime.

Another way in which an adjudication by a juvenile court would be more reliable than a capital jury's determination, under factor b, of whether appellant had committed an alleged and unadjudicated crime is the timeliness factor. In the *Lewis* case, a juvenile court had adjudicated the murder case he was involved in shortly after the crime occurred. In the case at bar, the allegations of Jason Labonte against appellant involved an incident which had occurred more than ten years [44] before appellant's penalty retrial. (44 RT 4353-4355.) Obviously, appellant was unduly prejudiced by the fact these highly inflammatory allegations of sexual crimes were being decided for the first time over a decade after they allegedly had occurred by a jury charged with deciding whether to sentence appellant to death, particularly when the jury was not instructed on the elements of the alleged crimes nor were the jurors required to reach a decision unanimously, or even by a majority vote.[45]

C. Incident Involving Officer Cherski did not Qualify as a Crime Under Factor B.

The AOB explains why appellant's encounter with a police officer,

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[43](...continued)
does not require any two jurors to agree that the State has proved, beyond a reasonable doubt, that the defendant committed a previously unadjudicated crime.

[44] Indeed, if appellant had been prosecuted, as either a juvenile or an adult, for committing sodomy or forcing Jason to orally copulate him when the crimes allegedly occurred (sometime between 1984 and 1986), the statute of limitations for such prosecution would have been no more than six years. (Penal Code §§ 800-801.)

[45] See footnote 7, *supra*.

who was not in uniform at the time, did not constitute a crime under California law. (AOB at pp. 293-295.) This Court has stated on more than one occasion that evidence of prior criminal activity is admissible under factor b only if it demonstrates "the commission of an actual crime, specifically, the violation of a penal statute. . ." (*People v. Lancaster* (2007) 41 Cal.4th 50, 93.)

Officer Cherski testified at appellant's penalty phase retrial that he had met appellant on the street, and appellant had stared at him and then told him "I will fuck you up." (42 RT 4266.) Respondent claims that appellant's actions constituted a crime under Penal Code sections 240 and 422. (RB at p. 53.) Clearly, the testimony of Officer Cherski, the sole evidence offered concerning this incident, did not establish a violation of section 240, which defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." A single verbal threat to "fuck [someone] up" does not constitute an "attempt" to commit a violent injury. Officer Cherski did not testify that appellant made any physical gesture that would amount to intent to inflict "violent injury." The officer also stated that once he told appellant that he was a police officer in plain clothes, appellant was fully cooperative. (42 RT 4266.)

Similarly, the evidence did not establish a violation of Penal Code section 422. That statute requires that the State prove that a defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person. (*People v. Toledo* (2001) 26 Cal.4th 221, 227.) It also requires that the threat be such as to cause a reasonable person to be in "sustained fear" for his or her personal safety or for that of his or her family. (*Ibid.*) As noted above, Officer Cherski was not in "sustained fear" of appellant after he issued the threat. Indeed, immediately after the threat

was made, when the officer identified who was, appellant became cooperative. (42 RT 4266.)

The fact that respondent does not identify which of these two criminal statutes, sections 240 and 422, were violated by appellant's one-sentence threat to Officer Cherski demonstrates that the State has not and could not successfully prosecute appellant for either of these crimes. The only instruction the jury received about the Cherski incident was:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity which involved the express or implied use of force or violence, or the threat of force or violence.....3) defendant's express or implied threat to use force or violence on Officer Cherski on August 11, 1994.

(7 CT 1588.)

The "criminal activity" presented by Officer Cherski's testimony is as questionable and flimsy as the factor b evidence offered in *People v. Lancaster, supra.* In the *Lancaster* case, this Court found that it was error for the trial court to allow evidence of the defendant's mere possession of handcuff keys while he was in jail as factor b aggravating evidence. The Court rejected the prosecution's claim that possession of the keys showed the defendant's intent to escape, noting that there was not any evidence of an actual escape attempt or of any other crime related to the keys. (*Id.*, 41 Cal.4th at p. 94.)

While the prosecution's use of the Officer Cherski's incident was not, standing alone, nearly as prejudicial as the testimony of Jason Labonte, its introduction nonetheless "injected irrelevant and prejudicial evidence into the sentencing equation." *(Barclay v. Florida* (1983) 463 U.S. 939. The cumulative effect of the erroneous admission of evidence of both incidents was clearly prejudicial.

The testimony of Officer Cherski was unconstitutional because he allowed the jury to punish appellant for alleged prior bad acts which were wholly unrelated to the murder charges. The United States Supreme Court has recently held that, in the context of civil punitive damages, due process requires some relation to prior transgressions before they can be used to increase punishment. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423, quotations omitted.) If principles of due process hold that a civil "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *id.* at p. 422, it must follow that a criminal "defendant's dissimilar acts," independent from the capital offense, may not serve as the basis for the most extreme punishment of all, a death sentence. If "courts must ensure that the measure of punishment is both reasonable and proportionate" in cases where mere money is at stake, *State Farm Mut. Auto. Ins. Co. v. Campbell, supra*, 538 U.S. at p.426, then the Eighth Amendment requirement of "heightened reliability" surely mandates that the punishment be reasonable and proportionate when a man's life is at stake.

D. Conclusion

For all of the foregoing reasons and for the reasons set forth in the AOB (pages 269-296), appellant respectfully requests that the Court reverse his sentence of death because the admission of factor b evidence at his penalty retrial constituted prejudicial error under both state and federal law.

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XVIII.

THE TRIAL JUDGE PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTOR TO INTRODUCE A SHOCKING AND INFLAMMATORY PHOTOGRAPH DURING APPELLANT'S PENALTY RETRIAL

Respondent's brief fails to address the crucial points raised in the AOB (pages 297-312) regarding the trial judge's improper ruling concerning the prosecutor's use of a photograph of the victim during the penalty retrial in this case. Appellant argued that the trial judge's admission of this evidence was improper because (1) he did not engage in proper weighing under Evidence Code section 352; (2) he did not listen to or rule on the objections actually made by defense counsel to this evidence and (3) the photograph should have been excluded under section 352 and its admission violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Rather than addressing these points, respondent merely argues that the trial judge did not err in admitting the photograph, or alternatively, if he did, such error was harmless because at penalty phase trial the standards for admission of potentially prejudicial evidence is lower than it is in a guilt phase.

The photograph in question, marked Exhibit #141[46] at the penalty retrial, shows the vaginal area and thighs of the victim, Rosa Mae Dixon. (38 RT 3667.) As described in the AOB, defense counsel at appellant's penalty

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[46] Exhibit #141 was the original Polaroid photograph upon which the larger photograph, marked Court Exhibit 8 at the guilt phase, was based. (42 RT 4179.) At the penalty retrial, both the prosecution and defense agreed that the smaller, original photograph was a better depiction; therefore, the defense agreed to its use at the penalty retrial but specifically maintained its original objection to the use of either of these photos. (42 RT 4180-4181.)

retrial asked the trial judge to revisit the admissibility of this photograph. First, the reasons offered by the prosecutor at the guilt phase,[47] no longer applied because appellant had already been found guilty of felony murder (based on rape) and rape. (6 CT 1392.) Second, the defense believed that because the photograph was taken hours after the incident and after Mrs. Dixon had undergone various procedures, the photograph was not relevant at the penalty phase. (7 CT 1517-1518; 38 RT 3668.) Third, the photograph showed not only blood stains but also the orangish-red antiseptic betadine which had been applied after the victim was taken to the hospital. (6 CT 1389, 1391; 7 CT 1520.)

As described in the AOB (pages 298-303), the trial judge chose to focus only on the question of whether the photograph depicted only the blood of the victim or whether it also showed betadine mixed with blood. (38 RT 3667-3673.) Defense counsel asked the judge to consider the time when the photograph was taken before it considered whether betadine was present:

> What I am indicating to the court, first of all is that before we even reach the issue – before we even reach the issue as to whether it is blood or not blood, there is a preceding issue that deals with the timing of the photograph and the timing of the photograph is such that it is three hours subsequent to the incident, occurred at approximately 9:25. . .

(38 RT 3668.)

The trial court was, as described in the AOB, very hostile to the defense's contention that the photograph showed both blood and betadine on the victim's body. (38 RT 3667, 367, 3673.) Because the judge focused on

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[47] At the guilt phase, the prosecutor argued that the photo would demonstrate that appellant had forcibly raped Mrs. Dixon and also would establish the intentional infliction of great bodily injury as an element of "one strike" rape law. (6 CT 1391.)

the question of whether there was betadine present, he failed to address the issue raised by defense counsel that the photograph didn't show the state of Mrs. Dixon at the crime scene or even how she looked when she first arrived at the hospital. Indeed, as counsel argued, five doctors saw and examined Mrs. Dixon before this photograph was taken. (38 RT 3669.) Dr. Mike Ritter, who saw her just after she arrived at the hospital, noted in his report that when he did a "gross inspection" by spreading her legs there was "a small amount of bleeding that appeared to be coming from the vagina. There is no profuse bleeding." (7 CT 1525.)

The judge refused to listen to the defense argument regarding the timing of the photograph and became irate because counsel did not have a witness to testify that the photograph showed both betadine and blood even though the autopsy report stated that a Foley catheter had been placed in uterus. (7 CT 1521.) In addition, the SART (Sexual Assault Response Team) nurse testified that she had used a speculum to examine Mrs. Dixon's vagina. (26 RT 2555.)

This reaction by the trial judge and his refusal to rule on the question of when the photograph was taken and if it was proper to admit it as evidence of the circumstances of the crime was error. The tone of the judge's reaction to the defense argument about the admissibility of the photograph at the penalty phase shows that he did not properly weigh, under Evidence Code section 352, the probative value of the evidence against its potential prejudicial effect.

Relying on this Court's decision in *People v. Moon* (2005) 37 Cal.4th 1, 33-35, respondent argues that because appellant is challenging the admission of evidence at the penalty rather than at the guilt phase, there was no error. Appellant recognizes that this Court has found that the discretion to

exclude photographs at the penalty phase is narrower than at the guilt phase. (*Ibid.*; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 353.) The *Moon* decision does not, however, provide a carte blanche for the admission of all photographs no matter how potentially prejudicial at the penalty phase of a capital trial. In *Moon,* the trial judge had excluded the autopsy and crime scene photographs from the guilt phase, but allowed them in at the penalty phase. Moreover, in *Moon*, the same jury which had already convicted the defendant of two murders was deciding the penalty as well. By contrast, in the instant case, the admission of the photograph occurred at a penalty retrial where a new jury was being asked to decide whether to sentence appellant to death. Regardless of the propriety of admitting the photograph under section 352, its admission at the penalty phase violated appellant's rights under the Sixth, Eighth, and Fourteenth Amendments because the photo was irrelevant, cumulative and unduly gruesome and was intended to arouse anger and revulsion rather than a reasoned response. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

The decisions made at penalty trials are far more discretionary than the decisions made at the guilt phase of a capital trial. (*Hendricks v. Calderon* (9th Cir. 1995) 70 .3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts"].) Accordingly, a jury's sentencing determination in a capital trial is more likely to be affected by inflammatory photographs than its guilt determination. Empirical studies have shown that after viewing graphic photographs, jurors tend to make premature decisions to sentence a defendant to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev. 1476, 1497-1499

[jurors reported that autopsy photographs played a prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)[48]

Respondent argues that any error by the trial judge in admitting the photograph as evidence at appellant's penalty retrial was harmless because defense counsel agreed that Exhibit #141 was less objectionable than the photograph introduced at the guilt phase and marked Court Exhibit 8. (RB at p. 56.) This claim is rather specious because respondent also acknowledged that the defense continued to object to the admission of either photograph at the penalty retrial. (RB at p. 55.) Respondent further argues:

> The first jury saw exhibit 8, which in defense counsel's view was less desirable than the original [Exhibit #141]. The photo could not have been inherently prejudicial because the jury that did not return a death judgment viewed the less-objectionable photograph. The photographs could not have caused prejudice.

(RB at p. 56.)

These statements contain internal contradictions and thus do not make sense. However, let us assume that respondent means that because appellant's first jury, which hung on the issue of penalty, saw the more objectionable photograph (Court Exhibit #8), the less objectionable version of the photo (Exhibit #141) could not been unduly prejudicial and affected the second jury's decision to sentence to death. This argument is unpersuasive. The two juries were not fungible, and although the second jury saw much of the same evidence as the first, there were differences. Also, appellant has not argued that the introduction of this photograph at the penalty retrial was the

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[48] See also Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am.J.Trial Advoc. 549, 563 [juries which had viewed autopsy photos during medical examiner's testimony were more likely to convict the defendant than those who were not shown photos].

sole reason why the second jury voted for death. Rather, the admission of the photograph was one of several prejudicial errors which occurred at the penalty retrial.

The admission of this gory photograph, which did not represent the condition of the victim's body at the crime scene or even as she appeared when she arrived at the hospital, violated appellant's constitutional rights to due process and a fundamentally fair trial and to a reliable and fair penalty adjudication. Given the constitutional nature of the error, respondent must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)[49] It cannot meet this burden. Accordingly, appellant's death sentence must be vacated.

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[49] Even if this decision to admit Exhibit #141 at the penalty retrial were evaluated solely as an improper under Evidence Code section 352, it is reasonably probable that appellant would not have been sentenced to death if the photograph had not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

XIX.

APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO GIVE A COMPLETE REASONABLE DOUBT INSTRUCTION AT THE PENALTY PHASE RE-TRIAL

In Argument XIX of the opening brief, appellant established that the trial judge erred in giving an incomplete version of the reasonable doubt instruction, CALJIC No. 2.90, to the jury at his second penalty trial. (AOB at pp. 313-316.) This truncated version of 2.90 omitted the first paragraph of the instruction which sets forth the presumption of innocence and the prosecution's burden to prove appellant's guilt beyond a reasonable doubt. (7 CT 1589; AOB at p. 313.)

Argument XIX of the AOB points out that this failure to instruct the jury regarding the concepts of presumption of innocence and the prosecution's burden was particularly important in this case because the prosecution relied on alleged and unadjudicated crimes to convince the jury to vote for the death sentence.[50] In addition, the failure to give a complete reasonable doubt instruction to this jury was exacerbated by the fact that the trial judge specifically told the jurors at the penalty re-trial during pre-instructions that "we are not talking about guilty beyond a reasonable doubt." (40 RT 3931.)

The response to Argument XIX by respondent consists of one paragraph, which contains no analysis of the issue. Respondent cites two opinions of this Court, *People v. Benson* (1990) 52 Cal.3d 754, 810 and *People v. Prieto* (2003) 30 Cal.4th 226, 262-263. However, the facts of those

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[50] This evidence was introduced pursuant to factor b of Penal Code section 190.3.

cases are different than those presented here. In both *Benson* and *Prieto*, the jury was instructed that the prosecution bore the burden of establishing beyond a reasonable doubt that the defendant had committed crimes, under Penal Code section 190.3 (b), beyond a reasonable doubt. (*Ibid.*) In those decisions, this Court found that a trial court did not have the duty to instruct, sua sponte, a jury about the presumption of innocence at a penalty trial. (*People v. Prieto, supra*, 30 Cal.4th at p. 262.)

Given the inadequacy of the response to this argument in respondent's brief, appellant believes that Argument XIX of the AOB has presented the issue adequately, and that the positions of the parties are fully joined.

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XX.

APPELLANT'S RE-TRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS

As appellant argued in his AOB (pages 317-321), allowing a penalty retrial after the original penalty phase jury had hung constituted federal constitutional error.[51] The vast majority of states and the federal death penalty statute either prohibit the death penalty altogether[52] or prohibit penalty retrials after a hung jury in capital cases. The death penalty is currently authorized under federal law and in 36 state jurisdictions. In most of those jurisdictions if the jury is not able to agree unanimously on a penalty phase verdict, no penalty retrial is permitted, and the defendant is sentenced to life or life without the possibility of parole.[53] Indeed of the 37 death

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[51] It violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I, sections 1, 7, 15, 16 and 17 of the California Constitution.

[52] Including those jurisdictions that do not have the death penalty at all with those jurisdictions which prohibit a penalty retrial after a hung jury is sound methodology. In *Roper v. Simmons* (2005) 543 U.S. 551, the Supreme Court held the executions of juveniles unconstitutional based on the fact that 30 states prohibit such executions, including the 12 states that prohibit the death penalty in any circumstance. (*Id.* at p. 564.) These same statistics were used in the Court's earlier decision finding the execution of the mentally retarded to be unconstitutional. (*Atkins v. Virginia* (2002) 535 U.S. 304.)

[53] Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id.

(continued...)

penalty jurisdictions, 27 do not allow for a penalty retrial after a jury has failed to agree unanimously on a penalty phase verdict. Also, the federal death penalty prohibits a penalty retrial after a hung jury. Given these facts, California's death penalty scheme is anomalous and contrary to "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The United States Supreme Court has often based its analysis of the meaning of the "cruel and unusual punishment" component of the Eighth Amendment on whether a practice is consistent with the "evolving standards of decency" discussed in *Trop v. Dulles, supra.*

Citing *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, respondent argues that the Supreme Court has found that a penalty phase retrial does not violate the double jeopardy clause. (RB at p. 57.) Appellant does not dispute

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[53](...continued)
Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NM Stat. Ann. § 31-20A-3 (1994); NY Crim. Proc. Law § 400.27(10) (WESTLAW 1995); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

The New York death penalty was declared unconstitutional in 2004. (See www.deathpenaltyinfo.org/state/ [as of February 2009].) Since appellant filed his AOB, New Jersey and New Mexico abolished the death penalty altogether.

that point and did not argue in the AOB that in a capital case a penalty retrial after a hung jury constituted a double jeopardy violation. Rather, appellant argues that California's allowance of a penalty retrial after a hung jury violates the cruel and unusual prohibition of the Eighth Amendment. Under United States Supreme Court death penalty jurisprudence, a capital sentencing process must "comport[s] with the basic concept of human dignity at the core of the [Eighth] Amendment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 182.) Most states with a death penalty statute recognize that one penalty trial is enough because no person should be subjected to repeated efforts by the State to obtain a death sentence against him.

Citing *People v. Gurule* (2002) 28 Cal.4th 557, 645-646 and *People v. Davenport* (1995) 11 Cal.4th 1172, 1192-1194, respondent also argues that "this Court has also rejected similar constitutional challenges." Neither of these opinions, however, addressed the argument made here. *Davenport, supra*, dealt with the issues of whether a penalty retrial would deprive the defendant of the right to have the jury treat "lingering doubt" from the guilt phase as a reason not to vote for death. (*Id.* at p. 1193.) In *Gurule, supra,* the defendant challenged the penalty retrial on double jeopardy grounds under both the California and United States constitutions. (*Id.* at p. 646.) Appellant has not raised either of these claims; therefore, *Davenport* and *Gurule* are not applicable because "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

Lastly, respondent argues:

> Since a defendant may be held for a retrial without violating double-jeopardy principles, it is inconceivable that the fact of retrial alone – which has nothing to do with punishment – could be cruel or unusual.

(RB at p. 57.)

Respondent apparently believes that the procedures used in a capital trial, such as a penalty retrial after a hung jury, are not matters within the purview of the cruel and ususual provision of the Eighth Amendment. That is not simply wrong. When the State seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) As a result, the Eighth Amendment requires a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 ["[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim or error."].)

As discussed in the AOB (pages 318-321), a consensus has begun to emerge that requiring a defendant to endure more than one penalty phase trial is not consistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 101.) California is one of only seven jurisdictions out of 53 (the 50 states, the federal government, the District of Columbia and Puerto Rico) which permit a penalty retrial following a hung jury in a capital case. That means that even if one considers only the 50 states, 43 of them do not allow a penalty retrial after a hung jury. That is far more than the 30 states found to mark a "national consensus" by the United States Supreme Court in *Atkins v. Virginia, supra*, and *Roper v. Simmons, supra*, which led the Court to find the use of the death penalty against the mentally retarded and juveniles unconstitutional under the Eighth Amendment. Because of this consensus against penalty phase retrials, representing "evolving standards of decency," California's use of this procedure violates the cruel and unusual punishment

provision of the Eighth Amendment.

Accordingly, because of all of the foregoing reasons and for the reasons stated in the AOB (pages 317-321) in this case, appellant's death sentence must be reversed.

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XXI.

THE TRIAL JUDGE'S FAILURE TO COMPLY WITH THE MANDATE OF PENAL CODE SECTION 190.9 THAT ALL PROCEEDINGS IN A CAPITAL CASE BE RECORDED CONSTITUTES REVERSIBLE ERROR

In his opening brief, appellant enumerated some fifty-eight incidents where the trial court failed to have a court reporter record pre-trial and trial proceedings in this case, as required by Penal Code section 190.9. (AOB at pp. 322-326.) Respondent counters simply, stating that the "amended stipulation regarding engrossed settlement of the record [] painstakingly reconstructed nearly all of the omissions." (RB at p. 58.) This is not an accurate characterization of the engrossed settled statement. Indeed, this settled statement shows that none of the parties had specific memories of what happened during the unrecorded portions of the trial; therefore, this settled statement does not constitute an accurate reconstructed record. (41 CT 8656-8660.)

Respondent also claims that any error in failing to comply with the requirements of section 190.9 was harmless because "the more than twelve-hundred-page record provides 'meaningful appellate review.'" (RB at p.58.) This is a nonsensical argument; the mere size of a trial record does not insure that it is complete or sufficient to allow meaningful appellate review, as described in *Rushen v. Spain* (1983) 464 U.S. 114, 118. As Argument XXI of the AOB shows, many of the proceedings that were not recorded in this case involved important events in both the first and second trials, including conferences about jury instructions, jury notes and requests, and closing arguments of the attorneys. (AOB at p. 327.)

Although section 190.9 contains an absolute mandate that all proceedings in a capital trial be transcribed by a court reporter, trial courts

routinely violate that mandate. This Court has refused to put any teeth in the enforcement of section 190.9. Instead, the Court requires that an appellant show that the failure to record certain proceedings in his capital trial actually prejudiced him. That is virtually impossible to do because it requires one to prove a negative. Settled statements about what occurred in the unrecorded proceedings are usually unhelpful because memories fade with time, and capital trials are often very long. Of course, those are the very reasons underlying the requirement set forth in section 190.9. Until the Court actually sanctions the failure to comply with 190.9, trial courts will continue to ignore the provision.

For all of the foregoing reasons and for the reasons set forth in Argument XXI of the AOB, appellant's convictions and death sentence should be reversed.

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XXII.

THE PROCESS USED IN CALIFORNIA FOR DEATH-QUALIFICATION OF JURIES IS UNCONSTITUTIONAL

In Argument XXII of the opening brief, appellant demonstrated that the death qualification process used in California, in general and as applied in this case, violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as article I of the California Constitution, sections 7, 15, 16 and 17. (AOB at pp. 332-367.) The response to this argument in Respondent's Brief is inadequate and fails to make any points that require a reply from appellant. Appellant believes that Argument XXII of the AOB sufficiently presents this issue and the positions of the parties are fully joined. Appellant's convictions and death sentence should be reversed.

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XXIII.

UNDER THE EIGHTH AMENDMENT, THE DEATH PENALTY IS A DISPORTIONATE SENTENCE FOR FELONY MURDER SIMPLICTER

Argument XXIII of the AOB in this case argues that California's imposition of the death penalty for felony murder *simpliciter* is out of step with the nation's laws and violates the Eighth Amendment and international law. (AOB at pp. 368-383.)

Respondent's brief (RB) addresses only some of the issues raised by appellant in this argument. First, respondent argues that this Court already has rejected similar claims in previous opinions.[54] (RB at p. 60.) Appellant already has discussed this case law in the AOB (pages 370-371). Respondent also gives short shift to appellant's reliance on the reasoning of *Hopkins v. Reeves* (1998) 524 U.S. 88. The only assertion in the RB about the *Hopkins* decision is that it holds that "'proof of a culpable mental state with respect to the killing' is not an element of a capital-eligible felony murder and may be established on appeal." (RB at p. 60.)

In the opening brief, appellant relied upon *Hopkins, supra*, for the principle that in order to sentence a defendant to death in a felony murder case, the prosecution must prove, at a minimum, that the defendant exhibited a reckless indifference to human life.[55] (AOB at pp. 375-376.) While it is

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[54] Respondent cites *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1147 and *People v. Anderson* (2001) 25 Cal.4th 543, 601.

[55] This principle was based on the Supreme Court's earlier decision, *Tison v. Arizona* (1987) 481 U.S. 137, 158, in which Justice O'Connor, writing for the majority, held that proof of an "intent to kill" was not an Eighth Amendment requirement for imposition of the death penalty,

(continued...)

true that in *Hopkins* the Supreme Court stated that the mens rea requirement (minimally a reckless indifference) need not be decided by the jury, it had to be made sometime before a defendant could be executed. (*Hopkins v. Reeves*, 524 U.S. at p. 100.) However, it is not clear that this holding that the mens rea finding need not be made by a jury survives the Court's later holding in *Ring v. Arizona* (2002) 536 U.S. 584, 588, that defendant is entitled to a jury trial of any fact that increases the maximum sentence in all cases, including capital cases. Given the California death penalty procedure, it is only the jury which is invested with the power to decide that a defendant can be sentenced to death. A trial judge can overrule, under Penal Code section 190.4, subsection (e), the jury verdict of death, but he or she has no authority to sentence a defendant to death unless the jury has done so first. Accordingly, it is up to the jury in California to find that a defendant charged with a felony murder special circumstance had acted with an intent to kill, or at the minimum with reckless indifference to human life.

The heart of respondent's argument on this issue is that because appellant's sexual assault of Mrs. Dixon resulted in grave injuries to her vagina that appellant deserves the death penalty because these injuries showed reckless indifference to human life, as discussed in *Tison v. Arizona* (1987) 43 Cal.3d 1104, 1138-1147. The jury, however, was never instructed that in order to find true the special circumstances allegations of rape, burglary and oral copulation felony murder that they needed to find that appellant had committed those felonies with "reckless indifference." (See instructions given on these three special circumstance allegations, 5 CT 986-

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[55](...continued)
but that proof that the defendant acted with "reckless indifference to human life" and as a "major participant" in the underlying felony is required.

988.) [56] Indeed, neither the word "reckless" or the phrase "reckless indifference to life" even appeared in the guilt phase instructions. (5 CT 946-1012.) Accordingly, when deciding the special circumstance allegations in this case, the jury was never asked to consider whether appellant had acted with reckless disregard of life when he allegedly committed the felonies of burglary, rape and oral copulation.[57] Similarly, the instructions given at the penalty phase did not tell the jurors that in deciding whether to sentence appellant to death they must find, at a minimum, that he committed the felonies with a "reckless indifference to life." (7 CT 1567-1611.)

This Court should revisit its previous decisions upholding the felony-murder special circumstance and hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless disregard to human life. Because the factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona, supra*, 536 U.S. at pp. 602-603; see also *Cunningham v. California* (2007) 549 U.S 270, 274; *Blakely v. Washington* (2004) 542 U.S. 296, 304-305; *Apprendi v. New Jersey, supra*, 530 U.S. at pp. 466, 493-

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[56] A "[c]apital defendant[ ]...[is] entitled to a jury determination of any fact on which the legislature conditions an increase in [his] maximum punishment." (*Ring v. Arizona, supra*, 536 U.S. at p. 589; accord, *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 476-477.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 602.)

[57] In *People v. Prieto, supra,* 30 Cal.4th at p. 256, this Court acknowledged that, under the Sixth and Eighth Amendments, a capital defendant has the right to have the jury determine the existence of all of the elements of a special circumstance.

494.) There is no jury finding in this case that appellant intended to kill or acted with reckless indifference to human life.[58]

Respondent's brief completely ignores the central premise of Argument XXIII in the AOB – that the use of the death penalty in cases of felony murder simpliciter violates the proportionality principles underlying the Eighth Amendment because it is out-of-step with the vast majority of other jurisdictions regarding what kind of murders should be punished by the ultimate sentence of death. (AOB at pp. 377-383.)

As noted in the AOB, the United States Supreme Court has established a two-part test for evaluating whether the death penalty is disproportionate, under the Eighth Amendment: (1) whether the use of death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penalogical purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.) In *Atkins v. Virginia, supra,* 536 U.S. 304, the Court found the execution of the mentally retarded to be a violation of the Eighth Amendment prohibition of cruel and unusual punishment. (*Id.* at p. 312.) The Court emphasized in *Atkins* that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Subsequently, in *Roper v. Simmons , supra,* 543 U.S. 551, the Court found the death penalty for juvenile offenders unconstitutional based in part on what the Court saw as a national consensus against capital punishment for juveniles, reflected by the fact that the majority of states prohibit the practice. (*Id.* at p. 561.) By the Court's calculations, 30 states preclude the death penalty for juveniles (12

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[58] See Shatz, Steven F., *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murders: A California Case Study* (2007) 59 Fla. L. Rev. 719.

non-death penalty states and 18 death-penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 564.) Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins*, the Court found that "the consistency of the direction of the change" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 565-566.)

In 2008, the Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. (*Kennedy v. Louisiana* (2008) __ U.S.__, 128 S.Ct. 2641.) This decision, like the decisions of the Court in *Atkins* and *Roper*, rested in part on a national consensus; that is, 44 states do not allow for the death penalty for the rape of child. (*Id.* at p. 2652.)[59] The *Kennedy* decision analogized the six states allowing a death sentence for child rape to the eight states, discussed in *Enmund v. Florida* (1982) 458 U.S. 752, which allowed this punishment for vicarious felony murderers. Language appearing in *Kennedy v. Louisiana* suggests that the Supreme Court now is moving toward a view that death penalty is unconstitutional for any unintentional murder. This decision noted that retribution, as a justification for punishment, "most often can contradict the law's own ends," especially in death penalty cases. The Court further observed that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency

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[59] Moreover, unlike Louisiana which law was at issue, four of the states allowing the death penalty for child rape only permit it the defendant has had a previous rape conviction. *(Ibid.)*

and restraint." (*Id.* at p. 2650.)

In the *Kennedy* decision, the Supreme Court reiterated that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose level of culpability make them the most deserving of execution. (*Id.* at p. 2650.) In determining that the death penalty is excessive for the crime of child rape, the Supreme Court distinguished between "*intentional* first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other." (*Kennedy v. Louisiana, supra,* 128 S.Ct. at p. 2660, emphasis added.) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Ibid.*)

These references build upon the Court's understanding in *Hopkins v. Reeves, supra,* 524 U.S. at p. 99, that there must be a finding that an actual killer had a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder (see AOB at pp. 375-376), and the Court's decision in *Tison v. v. Arizona*, *supra*, 481 U.S. at pp. 157-158, in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder (see AOB at pp. 374-375). They also are consonant with statements made by individual Supreme Court justices about the limits of the death penalty for murder. (See *Graham v. Collins* (1993) 506 U.S. 461, 501 [conc. opn. of Stevens, J., stating that an accidental homicide, like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also *Lockett v. Ohio* (1978) 438 U.S. 586 621) [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring about the death of the victim is . . . grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony

murder *simpliciter.*

The decision in *Kennedy* not only supports appellant's challenge to felony murder *simpliciter*, but it goes further by signaling that the death penalty is disproportionate for any unintentional murder. The Supreme Court's references to intentional murder indicate another step toward "confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650.) Given the language and observations of the *Kennedy* decision, it appears that the Court now considers intentional murder as the constitutional norm for capital punishment. The decision pointedly suggests that under the Eighth Amendment, *Tison*'s requirement of reckless disregard for human life is no longer sufficient. To impose a death sentence, there must be proof that the defendant, whether the actual killer or an accomplice, acted with an intent to kill.

Conclusion

As discussed in the AOB (pp. 377-378), there are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the homicide. Forty-five states – 90% of the nation – prohibit the death penalty in this situation. The national consensus on this issue is beyond dispute, and, in fact, the RB in this case does not dispute or even address this fact.

For all of the foregoing reasons as well as for the reasons set forth in the AOB, appellant's death sentence should be reversed.

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XXIV.

APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED DUE TO CUMULATIVE ERRORS

Appellant's convictions and death sentences should be reversed due to the multiple errors that occurred in the guilt and penalty phases of his trial. (AOB at pp. 384-386.) Respondent argues in conclusory fashion that there were no errors, either individual or cumulative, during appellant's trials which require reversal. (RB at p. 61.) Citing three decisions by this Court, respondent simply asserts that appellant had a fair trial, if not a perfect one. (*Ibid.*)

As appellant established in the opening brief, and as argued throughout this brief, taken separately, or in combination, the errors and violations of appellant's constitutional rights deprived him of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *People v. Brown, supra,* 46 Cal.3d 432, 448.) Therefore, the standard applicable here is the federal *Chapman* [60] standard, which requires reversal unless the prosecution can show that the combined effect of all of the errors, of federal constitutional magnitude and otherwise, was harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) Even for state law errors, reversal is required

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60. *Chapman v. California, supra,* 386 U.S. at p. 24.

when there is a reasonable possibility the error affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) That standard is "the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Rogers* (2006) 39 Cal.4th 826, 901.)

Should this Court find errors which it deems non-prejudicial when considered individually, it nonetheless must reverse the judgment based on the cumulative effect of those errors as respondent has not established that those cumulative errors were harmless beyond a reasonable doubt. Appellant's convictions and death sentence accordingly should be reversed.

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XXV.

IF APPELLANT'S CONVICTION ON ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, HIS DEATH SENTENCE MUST BE REVERSED, AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

In Argument XXV of the AOB, appellant demonstrated that if this Court should reverse any of the convictions or the three special circumstances findings, the case would have to be remanded for a new penalty phase trial. (AOB at pp. 387-389.) Relying upon the Supreme Court's decision in *Brown v. Sanders* (2006) 546 U.S. 212, respondent claims that the reversal of any special circumstances findings would not require a new penalty phase trial as long as "all the facts and circumstances admissible to prove the invalid special circumstances were properly introduced under another factor regarding the circumstances of the crime." (RB at pp. 61-62.) [61] Respondent also cites this Court's decision in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1102, for the proposition that "a single valid special circumstance is sufficient to determine the defendant is eligible for the death penalty." (RB at p. 62.)

Respondent misapprehends the meaning of Argument XXV of the AOB. Appellant does not contend that the reversal of one of the special circumstances found to be true in this case would render appellant ineligible for the death penalty. Rather, the thrust of his argument is that if one or more aggravating factors, including but not limited to special circumstances findings, is invalidated, the delicate calculus made by a penalty phase jury in its weighing of both mitigating and aggravating factors is necessarily skewed.

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[61] Respondent also cites the decisions in *Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750 and *Zant v. Stephens* (1983) 462 U.S. 862, 890.

> In *Sanders*, the United States Supreme Court determined that: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process [fn. omitted] *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(546 U.S. at p. 220.)

The Supreme Court recognized, however, that an invalidated factor may cause "other distortions . . . beyond the mere additional of an improper aggravating element." (*Ibid.*, fn. 6) The issue which the Supreme Court addressed in *Sanders* was "the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty. As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.* at p. 221.)

In analyzing the error in *Sanders*, the Supreme Court noted that two of four special circumstances in that case had been found invalid. A burglary-murder special circumstance was held to be invalid based on the merger doctrine (*People v. Wilson* (1969) 1 Cal.3d 431, 439-40) and a "heinous, atrocious or cruel" special circumstance because that special circumstance had been previously found to be unconstitutionally vague. (*Brown v. Sanders, supra,* 546 U.S. at p. 223.)

> . . . [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore

upon the invalidated eligibility factors.

(*Id.*, at p. 224.)

The burglary-murder special circumstance was not invalidated because there was no burglary,[62] or because the murder was not committed during the commission of a burglary, but because the jury was instructed on a theory of felony murder, and of the special circumstance, of a burglary committed with intent to commit assault. Under the merger doctrine (*People v. Wilson*, *supra*, 1 Cal.3d at pp. 439-440; *People v. Ireland* (1969) 70 Cal.2d 522), such a burglary will not support a conviction of felony murder nor of a felony murder special circumstance. (See *People v. Sanders* (1990) 51 Cal.3d 471, 509-510, 517.)

The reasoning was explained by this Court as follows:

> "In [*People v.*] *Ireland* [(1969) 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580], we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*People v. Wilson* (1969) 1 Cal.3d 431, 441, 82 Cal.Rptr. 494, 462 P.2d 22.) We thus concluded that "a burglary based on intent to assault ... cannot support a felony-murder instruction." (*Ibid.*; see also *People v. Smith* (1984) 35 Cal.3d 798, 804, 201 Cal.Rptr. 311, 678 P.2d 886.)

(51 Cal.3d at p. 509.) Thus, *Brown v. Sanders* involved a question solely of the applicability of a legal theory to the facts determined by the trial court, not

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[62] The defendant in *Sanders* was convicted of a separate count of burglary, which was not affected by the ruling setting aside the burglary-murder special circumstance. (*Id.* 51 Cal.3d at p. 485.)

to the facts themselves, which were then available to the jury during penalty as bearing upon the "circumstances of the crime" under Penal Code section 190.3, subd. (a). (See 546 U.S. at p. 224.)

Sanders thus involved a situation different from that presented here. Appellant in this case has challenged his convictions and the special circumstances findings against him on grounds of various instructional error (see Arguments VI-XIII, XXVI) at both the guilt and penalty phases of his trial. A special circumstance finding based upon flawed instructions leaves no valid special circumstance finding but also leaves no findings of the elements of that special circumstance. Consideration of a special circumstance which "has been revealed to be materially inaccurate" rather than legally inaccurate as in *Sanders*, is a violation of the Eighth and Fourteenth Amendment and reversible per se. (*Ibid.*)

Thus, while *Sanders* was based upon a situation where special circumstances were invalidated on purely legal bases which did not affect the actual findings upon which the guilt and special circumstance findings were based, in appellant's case, flawed instructions which leave the jury's factual findings on the three special circumstances in this case unknown and unknowable. Appellant's case raises an unacceptable and unconstitutional risk that the jury considered evidence and factual "findings" which were not valid factors in the jury's weighing of an appropriate penalty. Therefore, as stated in the opening brief, the judgment of death must be reversed.

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XXVI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF

In his opening brief, appellant argued that the California death penalty statute and the instructions implementing its application are unconstitutional because they fail in several respects to set out the appropriate burden of proof. Specifically, the statute and jury instructions fail to: assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death; delineate a burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence; and require jury unanimity as to the existence of aggravating factors. As appellant has demonstrated, these critical omissions in the California capital sentencing scheme violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (AOB at pp. 390-422.)

The AOB argued that this Court should reexamine its positions that it is not necessary (1) for the prosecution to prove aggravating circumstances beyond a reasonable doubt or (2) for the jury to apply any burden of proof to its decision to sentence a defendant to death. Appellant cited three United States Supreme Court decisions, *Apprendi v. New Jersey, supra*, *Ring v. Arizona, supra* and *Blakely v. Washington, supra*, as a basis for such a re-examination. (AOB at pp. 392-403.) Respondent counters that this Court has already rejected the applicability of *Apprendi* and *Ring* to the California death penalty scheme in several decisions, including *People v. Prince, supra*, 40 Cal.4th 1179, 1297-1298, *People v. Beames* (2007) 40 Cal.4th 907, 934-935,

People v. Chatman (2006) 38 Cal.4th 344, 409-410 and *People v. Jurado* (2006) 38 Cal.4th 72, 143. Respondent's brief does not bother, however, to discuss the reasoning of any of these decisions. (RB at p. 63.)

The AOB in this case was filed before the United States Supreme Court's decision in *Cunningham v. California, supra*, 549 U.S, 270; that decision limited the discretion afforded under California law to sentencing judges in noncapital cases. The *Cunningham* opinion rejected this Court's analysis in *People v. Black, supra,* 35 Cal.4th 1238, 1254, 1258, which held that California's Determinate Sentencing Law (DSL) did not violate the principles set forth in *Blakely* and *Apprendi* because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been a part of the sentencing process." The U.S. Supreme Court disagreed, finding that circumstances in aggravation under the DSL (1) were factual in nature, and (2) were required for a defendant to receive the upper term. (*Cunningham v. California, supra*, 549 U.S. at pp. 276-279.) The Court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293, fn. omitted.) The Supreme Court further noted:

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th at p. 1260 (stating,

remarkably, that "[t]he high court precedents do not draw a bright line").

(*Id.* at p. 869; emphasis added.)

Although this Court has concluded that "[t]he *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme" (*People v. Prince, supra,* 40 Cal.4th at p. 1297; see also *People v. Stevens, supra*, 41 Cal.4th 182[63]), the *Cunningham* decision itself suggests otherwise.

This Court has rejected prior *Apprendi-Ring-Blakely* challenges to California's death penalty law on the grounds that the jury's penalty determination is a "normative judgment" that aggravation outweighs mitigation, and not fact-finding within the scope of the Supreme Court's *Apprendi, Ring,* and *Blakely* cases. This Court has concluded that even if this "normative judgment" requires that the jurors make findings, those findings are simply "discretionary sentencing choice[s] within a statutory range of punishment that remains allowable under *Apprendi-Ring-Blakely*." (See e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 475; *People v. Morrison* (2005) 34 Cal.4th 698, 730; *People v. Prieto, supra*, 30 Cal.4th at p. 263; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Anderson* (2001) 25 Cal.4th 543,

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[63] It appears that *People v. Prince, supra*, 40 Cal.4th 1179 and *People v. Stevens, supra*, 41 Cal.4th 182 both address *Cunningham* only in relation to argument regarding failure to require the jury to make written findings concerning the aggravating circumstances it relied upon, and the failure to require juror unanimity as to aggravating circumstances relied upon. (40 Cal.4th at p. 1297; 41 Cal.4th at p. 212.) Appellant has also relied upon *Apprendi, Ring* and *Blakely* in Arguments ___ and __ in the opening brief. Appellant incorporates this discussion of the effect of *Cunningham* into each of those arguments in this reply brief.

589-590.) According to this Court:

> The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(*People v. Snow, supra,* 30 Cal.4th at p. 126, fn. 32.)

This rationale for upholding California's death penalty scheme cannot survive *Cunningham,* which made clear that a sentencing scheme that allows the sentencer discretion to select the appropriate sentencing term within a statutory range by balancing aggravating and mitigating facts, regardless of whether those facts have been found beyond a reasonable doubt, violates the federal Constitution. As stated by the United States Supreme Court:

> [A sentencer's] broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the [sentencer] must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

(*Cunningham v. California, supra,* 127 S.Ct. at p. 869, citing *Blakely v. Washington* (2004) 542 U.S. 296, 305 & fn. 8.)

Therefore, under the *Apprendi, Ring, Blakely* and *Cunningham* line of cases, for purposes of the Sixth Amendment question, it does not matter that California capital cases juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be

sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point. (*Id.*, 549 U.S. at p. 279.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (See *People v. Farnam, supra,* 28 Cal.4th at p. 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

California's statute authorizing imposition of the death penalty requires that having found a defendant guilty of murder and a special circumstance, the jury must make additional determinations that aggravating circumstances exist and outweighs any facts in mitigation. (Pen. Code, § 190.3.)[64] Under United States Supreme Court precedent, it does not matter how those determinations are labeled (*Ring v. Arizona, supra,* 536 U.S. at p. 602 ["The dispositive question . . .'is not one of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the

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[64] Under the terms of Penal Code section 190.3, "the trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt."]), or that the jurors have broad discretion in making those determinations. (*Cunningham v. California, supra,* 127 S.Ct. at p. 869.) What matters is that these determinations are not included in the jury's guilt and special circumstance verdicts, and they must subsequently be made in order to impose the death penalty. Under *Apprendi, Ring, Blakely,* and now *Cunningham,* these determinations must be found by the jury beyond a reasonable doubt. To the extent that this Court's prior cases, relied upon in the RB in this case, have held otherwise, those cases must be overruled.

For all of the foregoing reasons and for the reasons set forth in the AOB, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XXVII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The penalty determination should be reversed because CALJIC No. 8.88, which formed the centerpiece of the trial court's instruction on the sentencing process, is constitutionally flawed. (AOB at pp. 423-434.) Relying solely on prior case law of this Court, respondent contends that no error occurred. (RB 361-365.) Appellant has already addressed in the opening brief why that case law should be reconsidered; therefore, no further reply is necessary.

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XXVIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant's death sentence should be reversed because the failure of California courts to conduct intercase proportionality review in capital cases violates federal constitutional law. (AOB at pp. 435-438.) Relying solely on prior case law and with virtually no real explication of that law, respondent asserts that no constitutional violation occurred. (RB at p. 64.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

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XXIX.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

Appellant's death sentence should be reversed because application of the death sentence violates international law and evolving standards of decency. (AOB at pp. 439-443.) Relying solely on prior case law of this Court and without any real explication of that law, respondent asserts that no constitutional violation or violation of international norms have occurred. (RB at p. 64.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

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XXX.

THE FAILURE TO REQUIRE WRITTEN FINDINGS ABOUT THE AGGRAVATING FACTORS DENIED APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

Appellant's death sentence should be reversed because California's death penalty scheme fails to require written findings regarding the jury's findings and reasons for voting for the death sentence. This failure deprived appellant of his constitutional rights to due process, equal protection and meaningful review of his death sentence. (AOB at pp. 444-445.) Relying solely on prior case law of this Court and with virtually no explication of that law, respondent asserts that no constitutional violation occurred. (RB at p. 65.) In the opening brief, appellant has discussed why that prior case law should be reconsidered. Accordingly, no further reply is necessary.

* * * * *

CONCLUSION

For all of the foregoing reasons as well as for the reasons stated in his opening brief, appellant's convictions and his sentence of death should be reversed.

Dated: April 7, 2009

Respectfully submitted,

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Attorneys for Appellant Taylor

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, Alison Pease, am the Deputy State Public Defender assigned to represent appellant Brandon Arnae Taylor, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 41,766, words in length excluding the tables and this certificate.

DATED: April 7, 2009

Alison Pease
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Brandon Arnae Taylor*
Case Number: **Superior Court No. Crim. SCD113815**
Supreme Court No. S062562

I, the undersigned, declare as follows:

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

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and

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

The envelope was addressed and mailed on **April 7, 2009**, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 7, 2009**, at Sacramento, California.

Saundra Alvarez

SAUNDRA ALVAREZ