No. S065720

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	(Sacramento Superior Court No. 94F08352)
vs.	
SEAN VENYETTE VINES,	
Defendant and Appellant.	

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Sacramento

The Honorable James L. Long, Judge Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION.

Respondent asserts that there was:

"overwhelming evidence of appellant's guilt on all charges." RB 45.

If saying so could make it so, respondent would be correct. But this Court must actually review the record. And the record, objectively considered, shows that the case against appellant Sean Vines, particularly on the Florin Road McDonald's robbery-homicide charges, was far from overwhelming.

Identity was the central issue. Two eyewitnesses to the Florin Road crimes testified, Jeffrey Hickey and Pravinesh Singh. Both knew Vines; they had worked with Vines when he was an employee at the restaurant.

Neither identified Vines as one of the robbers.

Singh testified the gunman he saw was not Sean Vines. RT 4112. The gunman Singh saw was 5'8". Vines is 6'3".

Hickey could not identify Vines as one of the robbers even after he was shown a videotape of the two robbers taken by a security camera. Though the appearance of one of the robbers he saw was consistent with that of Vines, because of the method used to rob the restaurant, Hickey did not think an employee was responsible for the robbery. RT 3925, 3944.

Only one witness placed Vines at the scene of the crime – co-defendant William Deon Proby's teenage girlfriend, Vera Penilton, a six-times-convicted thief who testified under a grant of immunity. Penilton lied to police about these events. At trial, she testified that Vines confessed the crime to her while at her house, more than two hours after the robbery. RT 3570, 3904.

Vines' presence at Penilton's house was not corroborated by any other witness. Indeed, Penilton's story *materially conflicted with that of another prosecution witness*. Ulanda Johnson testified on direct that her roommate Vines came home at 11:30 p.m. that night – during the time

Vines was supposedly at Penilton's residence, and more than an hour-and-a-half before his purported confession to Penilton. RT 3762-3763, 3789.[1]

Because the prosecution's case against Vines on the Florin Road counts rested heavily on the testimony of Vera Penilton, and had to overcome contrary eyewitness testimony, it was shaky indeed.

Moreover, the prosecution's theory at the penalty phase -- that Vines deserved to die because he had personally committed an "execution" -- as well rested almost entirely on Vera Penilton's testimony. There was no other evidence that Vines was the shooter, let alone that the shooting was "execution-style."

Nor did the case against Vines on the Watt Avenue McDonald's counts even approach justifying the adjective "overwhelming." Four eyewitnesses testified; all four knew Vines because they had worked with him. Stanly Zaharko testified on two occasions that he couldn't positively identify Vines. Leticia Aguilar first described the robber as much shorter than Vines, but later said it was him. Michael Baumann didn't identify Vines as the robber until he had talked to a police officer, then to the store manager, then to the officer again; before talking to these people, he wasn't sure. And John Burreson testified the robber was about three inches shorter than Vines, and did not walk with Vines' distinctive limp.[2]

This Court should reverse the judgment entirely due to racial discrimination in jury selection by the prosecutor, in violation of the

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[1] Tellingly, Johnson's testimony regarding when Vines arrived is not mentioned by respondent in its brief.

[2] With the exception of Burreson's comment about Vines' limp, none of the facts set forth in this paragraph are acknowledged by respondent in its brief.

Because respondent's brief omits to mention facts in the record that are contrary to its position, respondent's brief is an unreliable guide to the facts in this case.

doctrines of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. If it does not decide this case based on *Batson* and *Wheeler*, the Court will confront a record replete with constitutional error, including: (1) the trial court's erroneous ruling precluding Vines' third-party culpability defense that the Florin Road gunman was gang member Anthony Edwards, Vera Penilton's cousin; (2) trial counsel's inexplicable failure to introduce admissible eyewitness evidence in the form of Jerome Williams' statement to police that the Florin Road gunman was 5'7" tall; and (3) grave misconduct by the prosecutor, including informing the jury in closing argument of an inflammatory "fact" not in evidence, that prosecution witness Michael Baumann actually risked his life by testifying against Vines.

Vines is confident that, if the Court does review this record, it will find the case against him was weak, not "overwhelming," and that the egregious constitutional violations of his trial rights that occurred, in fairness, require a new trial.[3]

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[3] In this brief, Vines does not reply to each and every one of respondent's arguments, but replies only when further argument may, in his view, be helpful to the Court. The failure to address any particular 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 (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

I. THE JUDGMENT MUST BE REVERSED DUE TO *BATSON/WHEELER* ERROR.

A. Introduction.

After the trial court impliedly found a prima facie case of racial discrimination under *Batson* and *Wheeler*, the prosecutor set forth six asserted reasons why he challenged African American prospective juror Mark Hopkins. In doing so the prosecutor materially misrepresented Hopkins' views on the death penalty, and materially misrepresented that he had excused other prospective jurors who held similar views.

Under this Court's precedents, because the prosecutor gave reasons that were not supported by the record, the trial court had the critical constitutional obligation at the third step of the *Batson/Wheeler* procedure to conduct a probing inquiry, make a sincere and reasoned evaluation, and clearly state the basis for its findings.

Instead, immediately after the prosecutor stated his reasons, the trial court, without a single question or a word of comment, denied the motion.

The trial court's failure to conduct a constitutionally adequate *Batson/Wheeler* inquiry at step three requires reversal.

Had the trial court conducted an adequate inquiry that reviewed the available evidence bearing on discrimination, the trial court would have determined that the prosecutor had misrepresented the record, and further determined that the three non-death penalty related reasons given by the prosecutor for striking Hopkins applied with equal or greater force to Juror No. 7 -- a white juror with a remarkably similar background who was not stricken and served on the jury. Because the evidence of the prosecutor's discriminatory purpose in peremptorily challenging African American juror Hopkins was overwhelming, the trial court, had it conducted an adequate inquiry and evaluation, could only have concluded the prosecution's strike was racially motivated.

Respondent makes a number of scattershot, undeveloped arguments. It denies that the record contradicts the prosecutor's representation that Hopkins would only impose the death penalty "if he were required to." It urges the Court to simply ignore the record of Hopkins' voir dire because the prosecutor did so. It denies that the prosecutor falsely told the trial court he had excused other jurors who had expressed similar views. It denies the trial court had any obligation of inquiry or express findings. It contends that this Court cannot even consider the comparison between Hopkins and Juror No. 7. It contends the comparison is unfair because other distinctions between the jurors can be identified that might have hypothetically supported the prosecutor's challenge. And it insists that for a *Batson/Wheeler* motion to succeed, racial discrimination must be the sole reason for the peremptory challenge, and here it was not.

All of these arguments are wrong. We have here racial discrimination by a prosecutor, and a trial judge who rubber-stamped it. This Court should not tolerate it. The judgment must be reversed.

B. The Record Contradicts the Prosecutor's Asserted Justification for Excusing African American Juror Hopkins on the Basis He Would Only Impose the Death Penalty If Required and Would Lack the Strength to Vote for Death If Warranted.

When the prosecutor was required by the trial court to state a non-racial justification for his peremptory challenge of African American juror Hopkins, he claimed that his challenge of Hopkins was based in part on Hopkins' view of the death penalty: that Hopkins would only impose the death penalty "if he were required to." RT 2977. This, the prosecutor asserted, was Hopkins' "frame of mind." RT 2977.

As shown in the opening brief, the prosecutor's claims as to Hopkins' attitude toward the death penalty were materially false – in fact, Hopkins'

questionnaire response and answers given in voir dire unambiguously show him to have been entirely willing to consider all the aggravating and mitigating circumstances and, in complete conformance with the letter and spirit of California law, to impose the penalty of death, if warranted. AOB 62-66; RT 2939-2941.

Respondent claims that the prosecutor reasonably interpreted Hopkins' answer to a question on the questionnaire as indicating he would only impose the death penalty if required to do so. RB 30-31.

Respondent is wrong.

This is Mr. Hopkins' actual answer to Question 90 ("Briefly describe your opinions about the death penalty"), with line breaks, spelling and punctuation as in the original:

> "death penalty
> should only be applied under certain
> circumstances. only after fair trail
> if I were required to impose it I would." CT 2548.

Respondent misquotes Mr. Hopkins' answer: respondent omits the line breaks Hopkins used, and substitutes a comma for the period Hopkins used after the word "circumstances."[4] RB 30.

Respondent argues that the prosecutor properly construed the final sentence of Mr. Hopkins' response to Question 90 as if it read:

"I would only impose it if required to."

Respondent's argument is that since Hopkins used the qualifier "only" twice in his response to Question 90, the prosecutor might reasonably interpret his response as if he had used "only" a third time, to say that he would only impose the death penalty if required to do so. RB 30-31.

---

[4] Compare, e.g., Mr. Hopkins' use of a comma in his answer to Question 90a, at CT 2549.

This is specious.

Mr. Hopkins was not using technical jargon, arcane terms of art, or legalistic doublespeak. He used plain language. He completed and signed the questionnaire under penalty of perjury. CT 2553. The only reasonable presumption is that he meant what he wrote – not what he didn't write.

Respondent's reasoning in support of its conclusion is an exercise in pretzel logic. Respondent argues that Hopkins really meant to "list" the circumstances in which the death penalty should be imposed, and therefore the final circumstance in which it should be imposed is "only if I were required to impose it". RB 30-31. Respondent ignores that there is no evidence Hopkins intended such a list; all the typical indicia of lists, such as numbered items or bullet points, or parallel constructions, are missing in Hopkins' response to Question 90, and Hopkins' choice of language indicates no such list was intended. Respondent insists that the prosecutor could reasonably believe that Hopkins really meant to indicate that he was not "open to a wide number of possible circumstances in which [he] might impose the death penalty," which in turn somehow supports the view that this juror would only impose death if required to do so. RB 31. These tortured constructions do not arise naturally from the language Mark Hopkins used in response to Question 90; they are spawned by respondent's need to justify its conclusion, and nothing more.

Nor do Hopkins' answers to other questions indicate he would only impose the death penalty if required to do so. Question 91 asked, "What purpose do you think the death penalty serves?" Hopkins wrote: "deterrence; prevention (against future offenses)." Question 92 asked, "In what cases, if any, do you think the death penalty should be imposed?" Hopkins answered: "capital offenses." CT 2549.

Ultimately, the plain meaning rule – and common sense – must prevail. If Hopkins had meant to write that he would only impose the death

penalty if he were required to, he would have written that. But he did not. What he did write – *before* he and other jurors had heard the judge's instructions making clear that the death penalty was never required (RT 2837-2839) – was that he would impose the death penalty if required to do so.

The juror questionnaire provides no support for the prosecutor's materially false statement that Hopkins "would only impose [the death penalty] if he were required to". RT 2977.

But if Hopkins' response to Question 90 had contained language that was ambiguously open to this "interpretation," the record of the voir dire of Hopkins by the trial judge would erase any such ambiguity.

The voir dire of prospective juror Hopkins is set forth in the opening brief at AOB 63-65. In voir dire, Hopkins forthrightly and without any ambiguity confirmed that:

> [1] he could and would fairly consider both death and life without parole;
>
> [2] he did not favor one penalty over the other;
>
> [3] he would follow the court's instructions; and
>
> [4] if the evidence warranted it, he could impose death in this case. RT 2939-2941.

Respondent acknowledges there was a voir dire examination of Mr. Hopkins, but claims that the individual voir dire of Hopkins "in no way diminishes the propriety of the prosecutor relying on an answer in the questionnaire . . . ." RB 31-32.

This is absurd. On its face, the voir dire vitiates any reliance on the questionnaire to support the view that Hopkins would only impose the death penalty if required to do so. The prosecutor's claim is flatly contradicted by the record. And the court must consider the entire record.

Miller-El v. Dretke (2005) 545 U.S. 231, 125 S.Ct. 2317, 2331-2332, 162 L.Ed.2d 196; *Batson v. Kentucky, supra*, 476 U.S. at p. 93.

Similarly, there is no support in the record for the prosecutor's assertion that Hopkins did not have the strength to impose the death penalty. There is nothing in his answer to Question 90 or in his voir dire that indicates that, if the evidence warranted it, it would be a struggle for Hopkins to vote for death. It was not as if he had expressed moral or religious scruples against the death penalty. Hopkins stated that the death penalty should only be imposed after a fair trial – a concept flowing from our nation's commitment to fair trials. And Hopkins' view that the death penalty should only be applied in certain circumstances is a typical view of jurors -- indeed, it is one that has been specifically described by the Supreme Court as "uncontroversial, and responsible." *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2331 fn.10.[5]

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[5] Prosecutor Robert Gold may well be a recidivist *Batson* violator.

Another death penalty appeal from Sacramento County now pending before this Court, *People v. Jeffrey Jon Mills*, No. S059653, involves the same trial judge, the Hon. James Long, and the same prosecutor, Robert Gold. Together with this brief, appellant has filed a motion for judicial notice of portions of the record now before this Court in *Mills*.

In *Mills*, prosecutor Gold peremptorily struck all six African American jurors. Judge Long denied the defense's *Batson/Wheeler* motion, finding no prima facie case. *Mills,* RT 1961.

In *Mills* as well as in this case, Mr. Gold willfully misrepresented the views of an African American juror regarding the death penalty.

In *Mills,* Gold alleged he excused African American juror Lisa Laster in part because "she is unsure about the death penalty. She would only impose it if everyone agrees." *Mills,* RT 1960. Just as in this case, prosecutor Gold based his claim solely on this prospective juror's questionnaire answers; Gold did not question her. *Mills,* RT 1857-1858.

And just as in this case, prosecutor Gold falsely attributed to a challenged African American juror views regarding the death penalty that the juror simply did not hold. African American juror Laster did not say she would only vote for the death penalty if everyone else agreed. Nor did

(continued on next page)

If Hopkins' answer to any question in the questionnaire *had* given rise to the inference that he would only impose the death penalty if required, or lacked the strength to impose the death penalty, the prosecutor could have cleared up any ambiguity by asking questions of Hopkins in voir dire.

But the prosecutor failed to ask even a single question of Hopkins. RT 2941. The prosecutor's failure to ask any questions of a challenged prospective juror on a subject the prosecutor professes to be concerned about is itself probative of discrimination. *Miller-El v. Dretke, supra*, 125 S.Ct. 2317, 2328.

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she indicate in any way that she was unsure as to the legitimacy of the death penalty. Rather, her answer clearly indicates she viewed death as a legitimate penalty: what prospective juror Laster wrote in her questionnaire about agreement on the death penalty was that "if agreed upon by all jurors who are completely sure of their decision, the death penalty is a fair decision." *Mills,* 23 Augm. CT 6887; see *Mills*, RT 1857-1858 (voir dire).

But in *Mills*, just as in this case, Judge Long saw no need to question prosecutor Gold about his misrepresentation, or to even note the conflict between what prosecutor Gold falsely represented the African American juror's views to be, and the prospective juror's own description of those views. Instead, Judge Long denied the motion. *Mills*, RT 1962.

The *Mills* record provides additional confirmation that prosecutor Gold's actions in challenging African American prospective juror Hopkins in this case, and justifying that challenge by use of the same tactic -- involving deliberate distortion of an African American juror's unobjectionable views on the death penalty, while relying on a questionnaire answer and declining to question the juror in voir dire -- is part of a deliberate strategy to eliminate, if possible, the presence of African American jurors on death penalty juries in Mr. Gold's cases.

Thus, the record fails to support – indeed, it actually refutes -- the prosecutor's assertions that Hopkins would only impose the death penalty if required to, and would lack the strength to impose the death penalty.

C. The Record Also Affirmatively Contradicts the Prosecutor's Asserted Justification for Excusing Hopkins on the Basis He Had Also Excused Other Jurors of the Same Views.

Attempting to rebut the prima facie case of bias regarding African American prospective juror Hopkins, the prosecutor also claimed that he had excused other jurors who had also stated they would only impose the death penalty if required. RT 2977. Vines demonstrated that this, too, was a false assertion contradicted by the record. There were no such other jurors. AOB 66-67.

Respondent asserts:

> "the prosecutor's statement that he excused other jurors who had put their reservations in similar terms was also correct." RB 32.

In support of its assertion that there were other jurors who "put their reservations in similar terms" to those supposedly used by Hopkins and who were peremptorily challenged by the prosecutor, respondent identifies only prospective jurors Sarkis and Stamper. RB 32.

The views of prospective juror June Sarkis were nothing like those of Hopkins; Sarkis made quite clear she would never vote for the death penalty, and would even vote not guilty to avoid reaching the death penalty. RT 2387-2388. Prospective juror Teresita Stamper also stated in voir dire that she "couldn't put him to death," and also would vote not guilty in order to not impose the death penalty. RT 2388-2389. These jurors' views were not even remotely similar to Hopkins' actual views, or even to the views the prosecutor falsely attributed to him.

And indeed, the prosecutor did not apparently think these jurors' views were similar to Hopkins', because he successfully challenged both Sarkis and Stamper *for cause* (RT 2391-2396), but he did not even attempt a for-cause challenge to Hopkins.[6]

The plain implication of the prosecutor's statement that, as to jurors whose views were similar to the views he wrongly represented were Hopkins', he "excused those people as well" is that the prosecutor excused those jurors with peremptory challenges.

Thus, the prosecutor affirmatively misrepresented the record when he stated to the trial court, in support of his peremptory challenged of Hopkins, that

> "On the death penalty views, [Prospective Juror Hopkins] put that in his belief about the death penalty, his opinions, he would only impose it if he were required to, *and a number of other people put it in those terms, and I excused those people as well. . . .*"

RT 2977 (emphasis added). There were no such other jurors.

D. *People v. Silva* and This Case.

The Court's decision in this case should be guided by this Court's opinion in *People v. Silva* (2001) 25 Cal.4th 345, a case that, in many ways, parallels this one.

In *Silva*, a penalty phase retrial of an Hispanic-surnamed defendant, the defense raised the issue of impermissible discrimination when the prosecutor challenged five jurors with Hispanic ancestry or surnames. The

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[6] It is also significant that prosecutor Gold conducted voir dire of both prospective jurors Sarkis (RT 2387-2388) and Stamper (RT 2388-2389) – who were unqualified to serve because they would not follow the law -- but conducted no voir dire of African American prospective juror Hopkins, who was in no sense legally unqualified to serve as a juror. RT 2941.

trial court required the prosecutor to state his reasons for his peremptory challenges. *People v. Silva, supra*, 25 Cal.4th at pp. 376, 382.

The prosecutor stated reasons for excusing each challenged juror. As this Court later concluded, "the record of voir dire failed to support some of the reasons that the prosecutor gave". *People v. Silva, supra*, 25 Cal.4th at p. 375. In particular, the record did not support the prosecutor's claim that one challenged juror, Jose M., "would be reluctant to return a death verdict or that he was 'an extremely aggressive person.'" *Id.*

Yet the *Silva* trial judge denied the *Batson/Wheeler* motion. The trial court did not ask any questions of the prosecutor, or note the disparities between the prosecutor's representations and the voir dire, or make any express findings.

This Court held that the trial court had failed to perform its obligations under the third step of *Batson/Wheeler*:

> "[W]hen the prosecutor gave reasons that misrepresented the record of voir dire, the trial court erred in failing to point out inconsistencies and to ask probing questions."

People v. Silva, supra, 25 Cal.4th at p. 385. The trial court had failed to make a sincere and reasoned effort to assess the prosecutor's explanation, and to clearly express its findings and the bases therefore. *People v. Silva, supra,* 25 Cal.4th at p. 385. This Court in *Silva* found

> "nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses. On this record, we are unable to conclude that the trial court met its obligations to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" [citation] and to clearly express its findings [citation]."

People v. Silva, supra, 25 Cal.4th at p. 385, citing *People v. Hall* (1983) 35 Cal.3d 161, 167-168 and *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 5.

Unlawful discrimination against even one juror mandates reversal. This Court in *Silva* found that the prosecutor's reasons for challenging juror Jose M. were unsupported by the record, and reversal was warranted. *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.

This case has important parallels to *Silva.* Here the defense made a motion based on the prosecution's challenge of two of three African American jurors in this trial of this African American defendant. The trial court required the prosecutor to state his reasons for his peremptory challenge of African American prospective juror Mark Hopkins. There is no dispute that the trial court thus impliedly found a prima facie case.

The prosecutor stated his reasons. And here, just as in *Silva,* "the record of voir dire failed to support some of the reasons that the prosecutor gave". *People v. Silva, supra*, 25 Cal.4th at p. 375. As shown in the opening brief, the prosecutor set forth a materially false account of Hopkins' expressed views on the death penalty, and falsely claimed that he had excused other jurors who had given similar answers about the death penalty.

In this case just as in *Silva,* the trial judge heard the prosecutor's explanations and accepted them. The trial court did not ask any questions or note the disparities between the prosecutor's representations and the voir dire. The trial court did not make any express findings, or otherwise clearly express its conclusions and their basis.

Just as in *Silva*, this Court should hold that the trial court failed to perform its obligations at the third step of the *Baston/Wheeler* procedure. Here as in *Silva*, "when the prosecutor gave reasons that misrepresented the record of voir dire, the trial court erred in failing to point out

inconsistencies and to ask probing questions." *People v. Silva, supra,* 25 Cal.4th at p. 385.

While stating that Vines "relies principally upon this Court's decision in *People v. Silva* (2001) 25 Cal.4th 345" (RB 29), respondent does not offer any reason why Vines should not rely on *Silva.* Respondent fails entirely to even address *Silva*, let alone to convincingly demonstrate it does not apply.[7] Respondent's only attempt to address the impact of *Silva* is by indirection – it quotes, from a court of appeal opinion having nothing to do with jury selection, the rule that "[a] ruling on a motion implies a finding by the court of every fact necessary to support the ruling." RB 29, quoting *Trapasso v. Superior Court* (1977) 73 Cal.App.3d 561, 567 (upholding expungement of lis pendens). This general rule has, in the *Batson/Wheeler* context, been superseded by the specific rule this Court set forth in *Silva* requiring clearly expressed findings.

E. Because The Trial Court Failed to Meet its Obligations at Step Three, Reversal Is Required.

The trial court listened to the prosecutor's explanation for his peremptory challenge of African American juror Hopkins and then, immediately thereafter, asked defense counsel if the motion was submitted. When counsel replied it was, the trial court immediately denied the motion, without any inquiry, comment or explanation. RT 2979.

People v. Fuentes, supra, 54 Cal.3d 707, instructs that when the trial court fails to satisfy its obligations at the third step, the judgment must be reversed.

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[7] Thus, respondent also does not contend that this case comes within the exception to the express finding requirements of *Silva* recognized in *People v. Reynoso* (2003) 31 Cal.4th 903, 929 for challenges exercised for "demeanor-based reasons".

> *"the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge.* We reiterate that the trial court is in the best position to determine whether a given explanation is genuine or sham. For that reason, we continue to accord great deference to the trial court's ruling that a particular reason is genuine. [Citation.] In this case, however, ***the trial court failed to take the next, necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged. For this reason, we are compelled to reverse the judgment of death."***

People v. Fuentes, supra, 54 Cal.3d 707, 720-721 (emphasis added).

More was done at the third step by the trial court in *Fuentes* than was done by the trial court here, but even that was constitutionally insufficient. In this case, in contrast to *Fuentes*, the record does not show that the trial court made at least "some effort to evaluate the prosecutor's explanations . . . [though] only in the abstract." *Fuentes, supra*, 54 Cal.3d at p. 718. Here the record shows no effort whatsoever by the trial court to evaluate "whether the 'bona fide' or the 'sham' reasons actually applied" to prospective juror Hopkins. *Id.* The trial court did not even determine that the prosecutor's claim as to Hopkins' supposed reluctance to impose the death penalty was contradicted by the record, let alone carefully scrutinize each of the prosecutor's explanations in the context of the record as a whole.

Because the trial court failed to perform its obligations of inquiry, evaluation and express findings at the third step of the *Batson/Wheeler* procedure, reversal is required. AOB 61, 69-70; *People v. Fuentes, supra*, 54 Cal.3d at pp. 718, 721; accord, e.g., *People v. Hall* (1983) 35 Cal.3d 161, 164; see *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 286, 287 (ordering habeas corpus relief in capital case because of trial court's failure to complete step three by making express, reviewable findings); *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969 fn. 3 (finding that "[t]he

[trial] court's deeming the prosecutor's explanation 'plausible' was not the required 'sensitive inquiry'" under *Batson*).

F. Once the Trial Court has Found a Prima Facie Case and the Prosecutor Has Set Forth Reasons, All the Trial Court's Obligations at Step Three of the *Batson/Wheeler* Procedure are Triggered Without Further Argument of Defense Counsel.

Because the record did not support the prosecutor's claims about Hopkins' views on the death penalty and the reason he excused other jurors, under *Silva* the trial court had the obligation perform an adequate inquiry and to clearly express its findings. *People v. Silva, supra,* 25 Cal.4th at p. 385.

Respondent contends that the trial court's compliance with the requirements of *Silva* became unnecessary because "none of the alleged contradictions were brought to the attention of the trial court." RB 29.[8] In other words, respondent's position is that, even when a prosecutor has

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[8] Respondent mischaracterizes Vines' argument as requiring "detailed, on-the record-findings . . . because the record affirmatively contradicted the prosecutor's proffered reasons." RB 29. While detailed on-the-record findings are one way a trial court can satisfy its obligations, express findings are not the only way the trial court could clearly express its basis for decision. The trial court might also satisfy this obligation by, for example, questioning the prosecutor carefully with specific reference to the voir dire and jury questionnaire answers, and engaging in dialogue with counsel that makes the basis for decision clear. See *People v. Allen* (2005) 115 Cal.App.4th 542, 553, fn. 8.

Moreover, respondent mischaracterizes Vines' argument as dependent on the record "affirmatively contradicting" the prosecutor's representations. Vines argues that the requirements of *People v. Silva* apply here, not because the prosecutor's reasons are affirmatively contradicted by the record – though they were – but because the record did not support those assertions. *Silva*'s standard is whether or not the record supports the prosecutor's assertions.

misrepresented the record in justifying a challenge to a juror, the trial court is relieved of its obligation to carefully examine the record and clearly express its findings if the defendant did not bring specific contradictions between the prosecutor's assertions and the record to the attention of the trial court.

Silva, however, recognizes no such exception.

Indeed, respondent cites to not a single case decided under *Batson* or *Wheeler* in support of its contention that the trial court did not have to perform any analysis or make any express findings in this case.[9]

And for good reason. Cases from the Supreme Court and this Court make clear that, once the third step has been reached, the trial court has the duty to complete the *Batson/Wheeler* third-step analysis. Nothing in that duty is contingent on defense counsel's arguments.

In *Silva* itself, this Court clearly emphasized the trial court's duties at the third step:

> "During the ex parte hearings, when the prosecutor gave reasons that misrepresented the record of voir dire, ***the trial court erred in failing to point out inconsistencies and to ask probing questions. 'The trial court has a duty to determine the credibility of the prosecutor's proffered explanations'*** (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220), and it should be suspicious when presented with reasons that are unsupported or otherwise implausible (see *Purkett v. Elem, supra*, 514 U.S. 765, 768 [stating that at step three "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"]; *McClain v. Prunty, supra*, at p. 1221 ['Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions

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[9] Respondent argues that generally, a trial court is not obligated to examine the record for evidence to support a party's motion. But in this *Batson/Wheeler* context, the court has an affirmative obligation that trumps the routine allocation of duties. See *People v. Silva*, *supra*, 25 Cal.4th at p. 385.

about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.']).''

People v. Silva, *supra*, 25 Cal.4th at p. 385 (emphasis added). In *Silva* the trial court had erroneously excluded defense counsel from step three of two successive *Batson/Wheeler* hearings. *Id.* at p. 384.[10] Yet in detailing the scope of the trial court's obligations of inquiry, evaluation and express findings at step three, the Court did not even suggest those obligations could be expanded or contracted because of defense counsel's input, or the lack thereof. Nothing in *Silva* makes the active role of the trial court dependent on defense counsel pointing out specific contradictions in the prosecutor's justifications at the third step.

Nor is the trial judge's duty particularly onerous. The trial judge is not a potted plant. Because the trial judge has first-hand knowledge of the voir dire, it is not too much to expect the judge -- after finding a prima facie case of intentional discrimination -- to note when the prosecutor's representations are not supported by the record, and to follow up on such disjunctions, including making express findings at the third step. This Court made that reasonable expectation plain in *People v. Silva*.

Respondent's argument that it is onerous to require the trial judge to "comb[] the record" looking for contradictions (RB 29) is misconceived – all the trial court has to do to meet its obligation of inquiry with respect to contradictions under *Silva* is look at <u>those portions of the record expressly relied on by the prosecutor</u> to determine if the record supports the prosecutor's claims.

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[10] The defendant in *Silva* obtained access to the transcripts after trial, and used them in his new trial motion. *Silva, supra*, 25 Cal.4th at pp. 383-384. Thus, in *Silva*, defense counsel did not present any argument at the third stage of the *Batson/Wheeler* hearings.

If a prima facie case is demonstrated on the original objection to a prosecutor's discriminatory challenges, the trial court must complete the third step under *Batson:*

> "The Supreme Court has never suggested that a defendant must repeatedly request that the trial court proceed to each successive stage of the *Batson* process once the defendant has made his or her original objection. Nor would such a requirement for repeated demands by counsel be correct. We hold that ***a defendant's original objection to a prosecutor's allegedly discriminatory peremptory strikes, even after it is met with a prosecutor's gender-neutral explanation, imposes on the trial court an obligation to complete all steps of the Batson process without further request, encouragement, or objection from counsel.***"

United States v. Alanis, supra, 335 F.3d 965, 968 (emphasis added).

In *Miller-El v. Dretke, supra,* 125 S.Ct. 2317, the Supreme Court directly addressed the trial court's duty at step three, making clear that duty includes a review of <u>all</u> the evidence:

> "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it ***requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it.***"

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2331 (emphasis added).

Nothing in *Miller-El v. Dretke* indicates that the scope of "all evidence" that must be considered by the trial court depends on the specificity of defendant's arguments. Instead, the duty is a *positive duty* of the trial court, conditional only on completion of the second step.

Respondent proposes to relieve the trial court of its necessary duties at the third step, as expressed in *Miller-El* and *Silva,* based on the fact that defense counsel did not point out specific contradictions at the third step of the *Batson* hearing. But in ordering habeas relief in *Miller-El* itself, <u>the Supreme Court considered and relied on evidence and arguments that the defense had not presented to the state trial court in the original *Batson* hearing</u>. See *Miller-El v. Dretke, supra,* 125 S.Ct. 2317, 2325-2332. This

vitiates respondent's argument that before a reviewing court may consider particular arguments, evidence or disparities in the evidence as part of its review of "all evidence," defense counsel must have pointed out the particulars to the trial judge at step three.

The question arises: Why is a trial court's duty to conduct an adequate step three inquiry and make express findings not dependent on defense arguments at step three?

This is the answer: After the finding of a prima facie case, at step three there is a convergence of fundamental interests -- amounting to a critical mass – that requires all efforts be made by the trial judge to eradicate racial discrimination in the jury-selection process. These interests are of such paramount importance that collectively they trump any interest in making the trial court's duty contingent on the specificity of the arguments of defense counsel.

There are four mutually-reinforcing fundamental interests at stake:

1. The *defendant's own interest* is at stake when a prosecutor attempts to discriminate on the basis of race in jury selection to obtain a more favorable panel.

2. *The right of the excluded juror* – the right to participate in the jury, one of the most basic institutions of self-government in our democratic society, and the right to not be excluded on account of race -- is at stake. This is no less fundamental than, for example, the right to vote. See *Powers v. Ohio* (1991) 499 U.S. 400, 407. "To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 628.[11]

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[11] "*[T]he injury caused by the discrimination [in the jury selection process] is made more severe because the government permits it to*

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3. *The judicial system itself has an essential interest* in vindicating equality in this context. The Fourteenth Amendment, the equal protection clause of the California Constitution, and an array of federal and state civil rights laws leave no doubt that as a matter of fundamental public policy invidious racial discrimination is unacceptable and unlawful, in housing, in employment, whether public or private, in education, in places of public accommodation, in business establishments, and in a wide variety of settings in the "public" sphere. But there is one setting at which the interest in eradicating race discrimination is at its zenith:

> "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is *most compelling* in the judicial system."

Powers v. Ohio, supra, 499 U.S. at p. 416 (emphasis added). Courts, of course, are the institutions charged with adjudicating and enforcing civil and constitutional rights with respect to all other governmental and private actors and institutions. Equality before the law is central to the mission of justice in our society, and essential to the legitimacy of the courts. And the judicial system itself has an essential interest in vindicating equality in this context.

> *occur within the courthouse itself.* Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.
>
> "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. . . . "

Edmonson v. Leesville Concrete Co., supra, 500 U.S. 614, 628 (emphasis added).

> "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' That is, ***the very integrity of the courts is jeopardized*** when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication [citations]."

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2324 (emphasis added) (citations omitted).

4. *The community at large* possesses a vital interest in eradicating racial discrimination in the selection of jurors. The Supreme Court has stated with respect to the injury caused by discrimination in selection of grand juries:

> "The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' "

Rose v. Mitchell (1979) 443 U.S. 545, 556, quoting *Ballard v. United States* (1946) 329 U.S. 187, 195. Those same harms to the community at large result when a prosecutor excludes citizens from petit juries based on their race.

So essential is the fundamental promise of equality under law as applied to jury service that since Reconstruction a federal statute has provided: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . . ." 18 U.S.C. § 243. Accordingly,

> "*the courts are under* ***an affirmative duty*** *to enforce the strong statutory and constitutional policies* embodied in [the] prohibition [against discrimination in the selection of jurors]."

Powers v. Ohio, supra, 499 U.S. 400, 416 (emphasis added).

* * *

Under current law, the trial judge has the duty to review all the evidence bearing on discriminatory intent at step three of the *Batson/Wheeler* hearing, regardless of whether defense counsel makes specific arguments. Because the right at issue is not just a right of defendant's alone – but implicates the interests of the defendant, the excluded juror, the judicial system, and the community at large – it is appropriately the law that the trial court have an affirmative duty under step three to review the entire record. Together, these four sets of interests synergistically reinforce each other, and raise the interest in eradicating discrimination to its absolute zenith at step three of the *Batson/Wheeler* process.

No case law supports respondent's position that defense counsel must raise specific contradictions to trigger the trial court's obligations under the third step.[12] Respondent attempts to erect a new procedural obstacle, which is inconsistent with the public purpose of the *Batson* doctrine. To do so would disserve the interests of the defendants; of jurors who have been denied an opportunity to participate due to their race; of the judicial system; and of the community at large. Respondent's proposal serves only the interest of the prosecutor in securing a jury he or she likes, by any means necessary.

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[12] It is evident from the trial court's words to defense counsel immediately after the prosecutor gave his reasons for the challenge ("It is submitted, isn't it?") (RT 2979) that the court did not wish to hear argument, and clear from the court's immediate denial of the *Batson/Wheeler* motion that the question did not seem a close or difficult one to the trial court.

G. The Prosecutor's Discriminatory Treatment of White Juror No. 7 and African American Juror Hopkins is Highly Probative of An Impermissible Racial Purpose.

If the trial court had properly conducted step three of the *Batson/Wheeler* procedure, it would have determined that the prosecutor had materially misrepresented the record with respect to prospective juror Hopkins. Because the prosecutor materially misrepresented the record, the trial court should have viewed the prosecutor's reasons as a likely pretext for racial discrimination. See CALJIC 2.21.2 ("A witness who is materially false in one part of his or her testimony is to be distrusted in others.") Had the trial court conducted the more searching inquiry that was called for under the circumstances, it would have discovered that three of the remaining four reasons were pretextual as well.

As shown in the opening brief, the prosecutor raised three criminal justice (but non-death penalty) related questions as bases for excusing Hopkins: (1) Hopkins' reaction to the O.J. Simpson trial (RT 2976); (2) that Hopkins "disagreed strongly" with the proposition that if the prosecution brings someone to trial, that person is probably guilty (RT 2976); and (3) that Hopkins felt it was better for society to let some guilty people go free than to risk convicting an innocent person (RT 2977). AOB 73-79.

Vines showed in his opening brief that each of these supposed reasons, based entirely on questionnaire answers, applied with equal or greater force to Juror No. 7, who is white. (1) Juror No. 7, like Hopkins, drew a positive lesson from the Simpson trial ("[t]he Court System still works") (CT 4003); (2) Juror No. 7, like Hopkins, answered that he "disagree[d] strongly" with the proposition that if the prosecution brought someone to trial, the person was probably guilty (CT 4004); and (3) Juror No. 7 also answered that he "agree[d] strongly" that it was better for society

to let some guilty people go free than to risk convicting an innocent person (CT 4004), while Hopkins, whose answer so troubled the prosecutor, answered only that he "agree[d] somewhat" with that proposition (CT 2544). Juror No. 7 was not challenged by the prosecutor, and served on the jury. AOB 73-77. Respondent does not contest this showing.

Accordingly, these reasons for excusing African American prospective juror Hopkins must be considered pretexts. See *Miller-El v. Dretke, supra*, 125 S.Ct. at 2329 (explaining that while a proffered explanation may appear facially neutral, "its plausibility [will be] severely undercut by the prosecution's failure to object to other panel members who express[] views much like [the struck juror's]").

The disparate treatment of white and black jurors by the prosecutor is even more remarkable because Hopkins and Juror No. 7 not only shared the same views on criminal justice issues – they also had remarkably similar backgrounds and life circumstances. Juror No. 7 and prospective juror Hopkins were both married homeowners with children, employed in professional technical capacities by the State of California, and lived in or near the Rancho Cordova neighborhood of Sacramento. Both had majored in accounting at CSU Sacramento and had bachelor's degrees only. Both had fathers who were Air Force officers. AOB 76-77; CT 2531-2535, 3991-3996.

Respondent attempts to distinguish Juror No. 7 from Hopkins. Respondent presents a laundry list of factual differences – e.g., Juror No. 7 was 51 years old, Hopkins was younger; Juror No. 7 had an employed spouse, Hopkins' wife did not work; Juror No. 7 was not religious, Hopkins was; Juror No. 7 had never gone to court, Hopkins had contested a traffic ticket; etc. RB 35-37. But here as in *Miller-El*, "the differences seem far from significant, particularly when we read [the African American juror's]

voir dire testimony in its entirety." *Miller-El v. Dretke, supra,* 125 S.Ct. at p. 2329.[13]

None of these differences respondent relies on were material. The record is clear that when the prosecutor was required to give his reasons for excusing Hopkins, he did not mention any of the characteristics from respondent's list of characteristics that Hopkins did not share with Juror No. 7. Nor did the prosecutor bother to question either Hopkins or Juror No. 7 about any of these items. Instead, the prosecutor questioned Juror No. 7 on a subject that obviously mattered – his views on the death penalty. RT 2610-2611. And the prosecutor did not question Hopkins at all. RT 2941.

> "[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."

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2329 fn.6.

Respondent's laundry list of factual differences between Hopkins and Juror No. 7 is immaterial to those reasons *the prosecutor himself* identified as pertinent to his excusal of Hopkins.

What *is* material is that, of three non-death penalty criminal justice-related reasons the prosecutor gave for excusing Hopkins, all three applied with equal or greater force to white Juror No. 7.

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[13] Hopkins' voir dire testimony is set forth at AOB 63-65.

H. The Prosecutor's Discriminatory Treatment of African American Juror Hopkins and White Juror No. 7 Should Not Be Ignored on Appeal.

The prosecutor's disparate treatment of African American juror Hopkins and white Juror No. 7 is further compelling evidence that the prosecutor improperly struck Hopkins because of his race.

Respondent insists this compelling evidence of racial discrimination must be ignored.

Respondent's position is pernicious. Under respondent's approach, the Court would avoid its "affirmative duty" under *Powers v. Ohio*, *supra,* and, by ignoring probative evidence of official discrimination in the case before it, be placed in a relationship of complicity with an act of racial discrimination:

> "'Be it at the hands of the State or the defense,' if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it.'"

Georgia v. McCollum (1992) 505 U.S. 42, 49-50.

1. *People v. Johnson* is Inapplicable.

Respondent, relying on *People v. Johnson* (2003) 30 Cal.4th 1302, contends that this Court should not consider the comparison between Hopkins and Juror No. 7 because it was not argued to the trial court. RB 33, 35.

In the opening brief, Vines explained why this Court's opinion in *Johnson* does not preclude comparative analysis in this case even though the comparison was not presented to the trial court at the *Batson/Wheeler* hearing. AOB 77-79. Vines showed:

- By its terms, *Johnson* set forth a general rule precluding comparative juror analysis for the first time on appeal, but not an absolute one. *Johnson* , *supra*, 30 Cal.4th at p. 1325.

- This case is distinct from *Johnson*. The latter was a step-one case – "the record supports the trial court's finding of no prima facie case" (30 Cal.4th at p. 1325) -- and the Court qualified its holding with reference to that fact (*id.*). This appeal involves review of a step-three decision.
- The rationales of *Johnson* have no application here. The subjective or demeanor-based reasons often given for excusing jurors, which trial courts are better-equipped to assess, are not at issue here, because the prosecutor relied not on demeanor, but on reasons related to Hopkins' views on the death penalty and criminal justice issues.
- And *Johnson*'s concern that considering the issue on appeal is inconsistent with the deference normally given to trial courts (30 Cal.4th at p. 1324) is not implicated here, because no deference is due when, as in this case, the trial court failed to perform its duties of inquiry, evaluation and findings at step three. *People v. Silva, supra*; AOB 78-79.

Respondent fails to address any of these points. Respondent has effectively conceded that *Johnson* is properly distinguishable from this case.

Thus, for the reasons set forth in the opening brief, *Johnson* is simply inapposite here. This Court should not extend *Johnson* to a case neither fitting its facts nor furthering its rationales. And in declining to extend *Johnson*, the Court will avoid the conflict with *Miller-El v. Dretke*.

2. In Light of *Miller-El v. Dretke*, *Johnson* is Unsound, and Should be Disapproved.

Vines showed in his supplemental brief that if, despite *Johnson*'s qualifying language indicating it is directed at review of first-step cases, *Johnson* nevertheless applies to prohibit argument on appeal based on juror

comparisons if that argument was not first made to the trial judge, then *Johnson* should be overruled. ASB 7-12.

In the supplemental brief, Vines discussed *Miller-El v. Dretke, supra*, 125 S.Ct. 2317, decided after the opening brief was filed, and explained that in that case, the Supreme Court considered comparative analysis of jurors even though the comparisons had not been presented to the state trial court at the *Batson* hearing.

In *Miller-El*, the Supreme Court made clear that appellate courts should consider ***all available evidence*** in determining whether *Batson* motions had been correctly denied. In doing so *Miller-El* swept away the analytic underpinnings of *People v. Johnson, supra.*

Vines' supplemental brief showed:

- *Johnson*'s analysis of *Miller-El* is factually inaccurate. The Supreme Court in *Miller-El* was not "simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge in support of his *Batson* motion." *Johnson, supra,* 30 Cal.4th at p. 1324 fn.7. Instead, the comparative juror evidence and argument had never been presented to the state trial judge. *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2334 fn. 15; ASB 7-8.

- *Johnson* incorrectly assesses the importance of comparative juror analysis, stating it is "largely beside the point". 30 Cal.4th at p. 1323. Yet the Supreme Court's opinion in *Miller-El v. Dretke* makes clear that comparative juror analysis is a critically important part of appellate review of third-step cases.

- *Johnson* expressly found it was inconsistent with the deference due trial courts to consider arguments comparing jurors if those arguments were not made to the trial court. 30 Cal.4th at p. 1324.

But *Miller-El v. Dretke* demonstrates that it is incumbent on the appellate courts in review of a third-step case to searchingly examine all the evidence in the record on appellate review, including relevant juror comparisons, even if some evidence was not brought to the attention of the trial court at the original *Batson* hearing.

Respondent presents no argument on any of these points.

Respondent does argue that comparative juror analysis conducted by a reviewing court is "unreliable" if the argument has not first been made to the trial court, citing *Johnson, supra,* 30 Cal.4th at p. 1318. RB 35.

But as shown in Vines' supplemental brief, in *Miller-El v. Dretke, supra*, 125 S.Ct. 2317, the Supreme Court itself considered argument regarding comparative juror analysis that had not been developed in or presented to the state trial court at the original *Batson* hearing, and ordered habeas corpus relief based in large part on those post-trial juror comparisons. ASB 3-4, 8.

Respondent's attempt to distinguish *Miller-El v. Dretke* is futile. It is true that "the decision in *Miller-El* was based on evidence that had already been developed prior to the appellate court (either the Fifth Circuit or the United States Supreme Court) deciding the issue." RB 34. But that evidence was not developed in the state trial court, but by the federal district court on habeas corpus – in other words, by the federal district court sitting as a reviewing court. Since it was proper for the federal courts, sitting as reviewing courts, to have reversed the judgment in *Miller-El* based in part on comparative juror analysis that was not first argued to the state trial court, it is no less appropriate for this Court to reverse the judgment here based in part on comparative juror analysis that was not first argued to the trial court.

Johnson's indication that comparative juror analysis cannot be reliably performed on appeal when the argument was not first made to the trial court is refuted by the example of *Miller-El v. Dretke*, and also by two recent cases from this Court.

In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court ***did*** perform a comparative juror analysis for the first time on appeal, and found:

> "the record supports the prosecutor's stated reasons, and a comparison of the two challenged prospective jurors with the seated jurors does not demonstrate such a degree of similarity as to establish the existence of pretext." 37 Cal.4th at p. 273.

In *People v. Guerra* (2006) 37 Cal.4th 1067, 1103-1104, the Court also conducted comparative juror analysis on appeal although the argument had not been made in the trial court, and concluded that comparative juror analysis failed to establish purposeful discrimination on the facts of that case. In both *Schmeck* and *Guerra* the Court determined it did not have to decide whether a comparative juror analysis was necessary on appeal, but performed the analysis in any event.[14] These cases, and *Miller-El*, plainly foreclose respondent's argument that a comparative juror analysis cannot be reliably performed by a reviewing court if the comparison was not first argued to the trial court.[15]

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[14] See also *People v. Gray* (2005) 37 Cal.4th 168, 189, *People v. Ward* (2005) 36 Cal.4th 186, 200-201, and *People v. Ledesma* (2006) 39 Cal.4th 641, 679, all performing comparative juror analysis on appeal though not first raised in the trial court.

[15] Federal cases are in accord.

In *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 361, the Ninth Circuit, sitting *en banc*, in a majority opinion by Judge Bybee, held that under *Miller-El v. Dretke*, comparative juror analysis was required in a federal habeas corpus appeal even when it had not been requested or attempted in any state court.

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Respondent argues that it is, in essence, unfair to the prosecutor to consider comparative juror analysis when it was not first argued at trial. Had appellant brought up Juror No. 7, "the prosecutor would have had an opportunity to explain why, in his *subjective* opinion, the two prospective jurors were in fact not similar." RB 35 (orig. emphasis).

In other words, respondent's position is that when the ***first*** set of reasons the prosecutor has come up with to justify a possibly discriminatory peremptory challenge are rejected because they are pretextual, the prosecutor should be given a ***second*** opportunity to come up with another

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Boyd v. Newland (9th Cir. 2006) ___ F.3d ___, 2006 U.S. App. LEXIS 26667, further illustrates the significance of *Miller-El v. Dretke*.

On first hearing the case, the appellate court in *Boyd* had affirmed the district court's denial of a habeas petition based on a failure to make a prima facie case under *Batson*. The court initially held, in a published opinion, that "*Batson* does not compel a court to conduct comparative juror analysis for the first time on appeal." *Boyd v. Newland, supra*, 2006 U.S. App. LEXIS 26667 at p. *21, summarizing *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008.

But the same panel reheard the case after the Supreme Court's decision in *Miller-El v. Dretke*, and determined that habeas relief was warranted. The appellate court found that "the Supreme Court . . . looked beyond the evidence that Miller-El had presented to the trial court and conducted a comprehensive comparative juror analysis on appeal", and stated that "after *Miller-El II*, we recognize that our previous reading of *Batson* was too narrow and that *Batson* does contemplate a comparative juror analysis on appeal." *Boyd v. Newland, supra*, 2006 U.S. App. LEXIS 26667 at p. *21.

> "Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either *step one or step three* of *Batson* was unreasonable in light of Supreme Court precedent. . . . . [¶] . . . . Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case."

Boyd v. Newland, supra, 2006 U.S. App. LEXIS 26667 at pp. *24, *25 (emphasis added).

set of reasons why the minority juror was treated differently than white jurors who were not excused.

Thus, *respondent would introduce a new step into the Batson procedure* – after the prosecutor has had an opportunity to provide his explanations, the court must allow the prosecutor to present a second set of explanations if his first are revealed as not neutral but pretextual. But *Batson* is a three-step procedure – not a four-step process.

And under that three-step process, a prosecutor has to stand or fall on the justifications he or she in fact provides when the trial court inquires, not those he or she *might* have provided if informed in advance that the first set of justifications would be found pretextual.

As the Supreme Court put it in *Miller-El v. Dretke, supra*, 125 S. Ct. at p. 2332:

> "But when illegitimate grounds like race are in issue, ***a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives***. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. ***If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false***."

Similarly, the "pretextual significance" of the prosecutor's first set of explanations "does not fade" because the prosecutor might have been able, *post hoc*, to think up additional reasons why he found a minority juror unacceptable. The problem with respondent's argument is that it asks the Court to ignore the reasons the prosecutor *did give* in favor of reasons he *might have given* to explain why the reasons he did give weren't the real reasons.

Distinctions that are hypothesized by lawyers as bases for peremptory challenges after their original distinctions have been exposed as

pretextual are simply not credible. As the Supreme Court observed in similar circumstances:

> "It would be difficult to credit the State's new explanation, which ***reeks of afterthought***."

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2328 (emphasis added). Respondent's attempt to give afterthought a preferred position in the *Batson/Wheeler* scheme should be rejected.[16]

I. Viewed Cumulatively, as the Supreme Court Requires, the Record Shows Purposeful Discrimination As the Only Reasonable Conclusion.

Only *one* of the six reasons that the prosecutor gave for peremptorily excusing African American juror Mark Hopkins is not either materially false, or applicable with equal or greater force to juror No. 7. The single reason related to Hopkins' response to question 90b on the juror questionnaire, asking whether "you feel the death penalty is imposed

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[16] Respondent's argument that lawyers should be allowed to propose successive rationales for excusing a given minority juror shares the defects of an argument rejected by the Virginia Supreme Court in *Coleman v. Hogan* (1997) 254 Va. 64, 68-69, 486 S.E.2d 548, 550:

> "Hogan's position, however, would allow a constitutionally proper reason to override a constitutionally infirm reason if the acceptable reason is given at a later point in time. To adopt the procedure suggested by Hogan ***invites a litigant to engage in creating successive rationales, hoping one will ultimately qualify as both facially neutral and not pretextual. Such a manipulation of the jury selection process would erode the constitutional protections enunciated in Batson and its progeny.*** Furthermore, it requires the trial court to ignore its prior determination and the prior explanations and conduct each successive evaluation of a newly proffered rationale as if on a 'blank slate.' Such a process improperly restricts the ability of the trial court to make the required evaluation." (Emphasis added.)

unfairly against African Americans or any minority group?" Hopkins answered that in the past the death penalty had been imposed unfairly against minorities, though he was not sure about today. CT 2549. In voir dire, the prosecutor asked no questions of Hopkins regarding this answer.

Whatever the merits of relying on this answer as a stand-alone reason under *Batson*, the answer does not stand alone, but must be viewed in context as only a part of the prosecutor's justification. The ultimate question for the trial court was not whether material misrepresentation or discriminatory treatment could be found with respect to every one of the prosecutor's six asserted justifications for challenging Hopkins, but whether, ultimately, the prosecutor discriminated against Hopkins because of his race.

To answer this question, the trial court should have viewed the evidence cumulatively. *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2339. And here, just as in *Miller-El*,

> "***when th[e] evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination***."

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2339 (emphasis added).

A conscientious trial judge who discharged his or her obligations under step three would have found the following:

> (1) The prosecutor materially misrepresented the views and attitude of African American juror Hopkins regarding the death penalty.
>
> (2) The prosecutor materially misrepresented the reasons he challenged other prospective jurors, falsely stating they were challenged for views similar to Hopkins' asserted views.

(3) The prosecutor represented that his challenge to Hopkins was based on Hopkins' answers to three non-death penalty related questions on the juror questionnaire about the criminal justice system. First, the prosecutor stated he was challenging Hopkins based on his answer to a question about the O.J. Simpson case, which assertedly "shocked" the prosecutor. Yet Juror No. 7, who was white, gave a very similar answer to this question, and the prosecutor did not challenge him.

(4) Second, the prosecutor represented he based his challenge to Hopkins on an questionnaire answer indicating Hopkins' disagreement with the proposition that if the prosecution brought someone to trial the person was probably guilty. Yet white Juror No. 7 gave an *identical* answer to this question, and the prosecutor did not challenge him.

(5) The prosecutor told the court his challenge was also based on Hopkins' response that he "agreed somewhat" with the proposition that it is better for society to let some guilty people go free than to risk convicting an innocent person. Yet white Juror No. 7 stated he "agreed strongly" with this proposition, and the prosecutor did not challenge him.

Thus, the record contained evidence that the prosecutor was untruthful as to five of the six reasons he gave the trial court to justify his peremptory challenge of this African American juror.

Under these circumstances, the prosecutor can have no credibility. The prosecutor's multiple untruths strongly militate in favor of a finding of discriminatory purpose.

The fact that the prosecutor used misrepresentation and pretext in justifying five of his six reasons for challenging Hopkins inevitably suggests that his representations are not trustworthy. A standard jury instruction given to all California jurors at the time of trial was CALJIC 2.21.2. It provided, in pertinent part: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others." This principle is applicable to the careful evaluation of reasons for a peremptory challenge at the crucial third step of the *Batson-Wheeler* procedure.

The prosecutor was willfully false in his statements explaining why he challenged juror Hopkins.

There is no evidence corroborating the prosecutor's assertion he challenged Hopkins in part because Hopkins had "said he originally felt the death penalty is imposed unfairly against African Americans, and now he is not sure. The key word in that question is unfairly." RT 2977-2978. And it's notable that although Hopkins wrote that he felt that "originally" the death penalty was imposed unfairly against African Americans,[17] but was not sure about today, he was responding to a written question expressly *asking* whether "you feel the death penalty is imposed unfairly against African Americans" (CT 2549), and did not himself raise the concept of unfairness. And Hopkins answered the next question – "Would the fact that Mr. Vines is African American have any bearing on your decision to vote for or against the death penalty in this case?" – by checking the "No" box, and adding: "I feel I would judge him fairly without bias." CT 2549.

This hardly smacks of racial favoritism on the part of Mr. Hopkins. But if the prosecutor had possessed a genuine concern that Hopkins' answer stating he was not sure about unfairness in the death penalty today signaled

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[17] Hopkins did not write, as the prosecutor asserted, that "originally he felt" the death penalty was imposed unfairly against African Americans. CT 2549.

a reluctance to impose the death penalty if warranted, he had ample opportunity to explore this topic during voir dire. The prosecutor declined to do so. The Supreme Court has noted the significance of such behavior – it is evidence of pretext:

> "*[T]he State's failure to engage in any 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*".

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2328 (emphasis added).

Moreover, the prosecutor engaged in disparate questioning: Juror No. 7 was questioned about his views on the death penalty; Hopkins was not. See *Miller-El v. Cockrell* (2003) 537 U.S. 322, 344 ("if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual").

Thus, ***there was evidence that every one of six reasons given by the prosecutor for dismissing prospective juror Hopkins was a sham or pretext for discrimination against him because he was African American.***

The rest of the record offers little on which respondent can rely. A single African American juror did serve on the jury. But this fact alone is insufficient to dissipate the stench of racial bias. The improper striking of one juror cannot be "offset" by the service of another juror of the same race. In *Miller-El v. Dretke* as well as this case, the jury that ultimately served included an African American, but this did not prevent the Supreme Court from determining that the evidence, "viewed cumulatively . . . is too powerful to conclude anything but discrimination." *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2339.

The prosecutor in this case materially misrepresented reasons he struck this African American juror, and clearly discriminated against

Hopkins relative to Juror No. 7 because of Hopkins' race. Viewed cumulatively, the only reasonable conclusion is that the prosecutor struck Hopkins because he was an African American. It is unreasonable to conclude that the prosecutor struck Hopkins for any other reason.

J. Respondent's Contention that the Prosecutor's Challenge of Hopkins Was Not Based "Solely" on Race and Thus Must be Respected is Meritless.

1. Background.

Respondent argues:

> "in *Batson*, the Supreme Court only invalidated strikes based 'solely' on race. [Citation.] At best, appellant can show that the prosecutor's challenge was based on four valid, race-neutral reasons and two other race-neutral reasons that are arguably contradicted by the record. Accordingly, the challenge was not based 'solely' on race, and the trial court's denial of the motion was proper." RB 32-33.

Respondent is wrong. As discussed above, and in the opening brief, two of respondent's six reasons are contradicted by the record, three more are pretextual and applied in a non-race-neutral fashion, and the last is undercut by the failure of the prosecutor to ask any questions regarding the reason during voir dire, thus providing evidence under *Miller-El* that it too was a sham or pretext. *Miller-El v. Dretke, supra*, 125 S.Ct. at p. 2328. Thus, there is evidence that all six reasons given by the prosecutor in support of this challenge were false or pretextual – not just two.

Under these circumstances it would be unreasonable for this Court to conclude that anything *other than* Hopkins' race actually motivated the prosecutor to remove him from the jury. The only reasonable conclusion on this record is that the prosecutor was only motivated by race in challenging Hopkins.

As noted elsewhere, no deference is due the trial court in this matter.

Thus, the issue whether a prosecutor's decision to remove a minority juror for reasons of race and one or more other reasons violated the United States and California Constitutions under *Batson* and *Wheeler* need not be decided in this case.

But if the Court does conclude that this is a "mixed motive" case, then the question is presented: Is a peremptory challenge exercised both on the basis of race and on some other basis ("race plus") permissible?

Neither the Supreme Court nor this Court has decided that question. See *People v. Schmeck, supra,* 37 Cal.4th at pp. 276-277 (expressly declining to decide this issue).

Although the Supreme Court in *Batson* wrote that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" (476 U.S. at p. 89), *Batson* itself was not a mixed motive case -- it did not present a case in which one motive was impermissible while another, standing alone, would not have been. Accordingly, courts have not understood *Batson* to require proof of a sole motivation of racial discrimination to require relief. See *Howard v. Senkowski* (2d Cir. 1993) 986 F.2d 24, 29.[18]

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[18] The Second Circuit in *Howard* identified no less than six reasons why *Batson* should not be interpreted to require proof of a sole motive of racial bias. 986 F.2d at pp. 28-30. One of the reasons was this:

> "*Batson* explicitly relied on the Court's prior equal protection jurisprudence as articulated in cases such as *Davis* and *Arlington Heights*, see *Batson*, 476 U.S. at 94, 95. It is highly unlikely that the Court would invoke cases specifically recognizing the vice of an impermissible reason forming part of a motivation and simultaneously and without discussion shift to a requirement of sole motivation. That is far more weight than an isolated adverb can bear. Perhaps the best evidence that the Court intended no such drastic curtailment of its equal protection jurisprudence is the Court's explicit reliance in a subsequent peremptory challenge case, *Hernandez v. New York*, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991),

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2. The Taint Rule and the Mixed Motive Approach.

Respondent cites not a single case in which a prosecutor's peremptory challenge, shown to be motivated in part by race and in part by other factors, was held to be permissible because race was not the sole motivating factor. The great weight of authority is to the contrary.

Instead, in dealing with peremptory challenges the courts use two approaches: the "taint" rule, and the "mixed motive" approach.

Under the mixed motive approach – sometimes also referred to as "dual motive" – the court asks whether, absent the racial motivation, the prosecutor would have used a peremptory challenge against the minority juror anyway, for some other non-racial reason. If the prosecutor would have challenged the juror in any event, then there is no *Batson* violation. This "but-for" causation approach has been adopted by a number of federal courts. *Howard v. Senkowski, supra,* 986 F.2d 24, 26, 30; *United States v. Darden* (8th Cir. 1995) 70 F.3d 1507; *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 421-22; *United States v. Tokar* (11th Cir. 1996) 95 F.3d 1520, 1533; *Gattis v. Snyder* (3d Cir. 2002) 278 F.3d 222, 234-235. It is an affirmative defense. *Howard v. Senkowski, supra*, 986 F.2d at 30.[19]

> on the passage from *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 279, equating discriminatory purpose with motivation that is 'at least in part' improper. *Hernandez*, 111 S. Ct. at 1866."

Howard v. Senkowski, supra, 986 F.2d 24, 29.

[19] A recent case, *Rice v. Collins* (2006) ___ U.S. ___, 126 S.Ct. 969, 163 L.Ed.2d 824, sheds some indirect light on the mixed motives issue.

In *Rice*, the prosecutor justified the decision to remove an African American female juror on several grounds, including demeanor, age, lack of community ties, and gender. Although finding gender an impermissible reason, the trial court upheld the peremptory challenge on the other grounds; the state appellate courts found no error in that ruling. On habeas, the federal appellate court concluded that it was an unreasonable factual

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A majority of state courts that have addressed the issue, however, reject the "mixed motive" approach, and instead adhere to the "taint" rule, under which a single racially discriminatory reason for a peremptory challenge taints any race-neutral reason and violates *Batson.* See, e.g., *State v. McFadden* (Mo. 2006) 191 S.W.3d 648, 657; *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1112-1113; *State v. Lucas* (Ariz.Ct.App. 2001) 199 Ariz. 366, 18 P.3d 160, 163; *Payton v. Kearse* (S.C. 1998) 329 S.C. 51, 495 S.E.2d 205, 210; *McCray v. State* (Ala.Crim.App. 1998) 738 So.2d 911, 914; *Coleman v. Hogan, supra,* 254 Va. 64, 486 S.E.2d 548, 550; *Wisconsin v. King* (Wis. Ct.App. 1997) 215 Wis.2d 295, 572 N.W.2d 530, 535; *Rector v. State* (Ga.Ct.App. 1994) 213 Ga.App. 450, 444 S.E.2d

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determination for the state court to credit the prosecutor's race-neutral reasons for striking the juror. *Rice, supra*, 126 S.Ct. at pp. 972-973.

The Supreme Court reversed. It noted that the prosecutor's focus on age and lack of community ties was race-neutral, because the prosecutor also challenged a white male juror with the same characteristics. *Rice, supra*, 126 S.Ct. at p. 975. Although one of the prosecutor's reasons was gender-based,

> "[t]he prosecutor provided a number of other permissible and plausible race-neutral reasons, and Collins provides no argument why this portion of the colloquy [regarding gender] demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race."

Rice, supra, 126 S.Ct. at p. 975.

Rice makes clear that when there are a number of permissible and plausible race-neutral reasons for a peremptory challenge, the presence of an impermissible reason that is not the basis of the alleged discrimination (e.g., gender when the basis of the alleged *Batson* violation is race) does not, without more, demonstrate a violation of *Batson.* This is, arguably, inconsistent with the "taint" rule and more consistent with the mixed motive approach. But the Court in *Rice* did not expressly address the mixed motive issue, and in view of the split of authority on this issue in the appellate courts, it seems likely that the *Rice* Court did not intend to resolve the mixed motive question.

862, 865; accord, *United States v. Greene* (C.M.A. 1993) 36 M.J. 274, 282.[20]

3. The Court Should Adopt the Taint Rule.

This Court should apply the "taint" rule under *Batson*, and adopt and apply the "taint" rule as a matter of California constitutional law under *Wheeler*. It is the only rule that is consistent with the objective of eradicating racial discrimination in jury selection. As explained in *State v. Lucas, supra*, 18 P.3d 160, 163:

> "Under the dual motivation approach, once the opponent of a strike has established a *prima facie* case of discrimination, the proponent of the strike has the opportunity to show that the strike would have been exercised even without the discriminatory motive. [Citations.] ***We reject the dual motivation approach and adopt the tainted approach because we recognize that Batson protects against only the most conspicuous and egregious biases. 'To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection Batson provides against discrimination in jury selection.'*** *Payton,* 495 S.E.2d at 210." (Emphasis added.)

Accord, *McCormick v. State*, *supra*, 803 N.E.2d 1108, 1113; *State v. McFadden, supra*, 191 S.W.3d 648, 657.

Additionally, the mixed motive approach should be rejected because it makes the courts complicit with those who aim to discriminate, and undermines the integrity of the judicial system. As explained in *Payton v. Kearse, supra,* 329 S.C. 51, 59-60, 495 S.E.2d 205, 210:

> "it is inappropriate to apply the dual motivation doctrine in the *Batson* context. ***Once a discriminatory reason has been uncovered***

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[20] Additionally, Justice Marshall, dissenting from the denial of certiorari, set forth thoughtful arguments against using mixed motives analysis, which he called the "but for" test, in *Batson* cases. *Wilkerson v. Texas* (1989) 493 U.S. 924.

> ***-- either inherent or pretextual -- this reason taints the entire jury selection procedure.*** By adopting dual motivation, ***this Court would be approving a party's consideration of discriminatory factors*** so long as sufficient nondiscriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor." (Emphasis added.)[21]

The mixed motive approach is particularly inappropriate when, as here, it is a public prosecutor – who is, of course, obliged to seek justice – who has been revealed to have a racial reason for excluding a minority juror from participation in the jury. For the courts to essentially whitewash such consideration of discriminatory factors by a public official is to do a grave disservice to justice. This is especially true when the State seeks the ultimate sanction.

4. Even the Mixed Motive Approach Does Not Validate the Prosecutor's Strike of African American Juror Hopkins.

Even under the mixed motives test, the prosecutor's challenge of African American juror Hopkins was impermissible. The mixed motive approach requires the party seeking to uphold the peremptory challenge – here, respondent -- to show that the same action would have been taken in the absence of the improper, racially-motivated reasons. *Howard v. Senkowski, supra*, 986 F.2d at p. 27. Respondent has not done so, and cannot.

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[21] See also *Rector v. State of Georgia, supra*, 213 Ga.App. 450, 454-455, 444 S.E.2d 862:

> "'While we realize that it may be unrealistic to expect [trial] counsel to put aside every improper influence when selecting a juror, we conclude that that is exactly what the law requires.' *Speaker v. State*, 740 S.W.2d 486, 489 (Tex. App. 1987). 'Even though [the State's attorney] may have given [other] racially neutral explanations, the [trial court's finding of one] racially motivated explanation "***vitiates the legitimacy of the entire (jury selection) procedure.***"'" (Emphasis added.)

Here the prosecutor gave six reasons for peremptorily challenging African American juror Hopkins.

Two reasons were based on misrepresentations about Hopkins' attitude and questionnaire answers. Three other reasons applied just as well to another juror who was, in many ways, strikingly similar to Hopkins – except he was white. And a final reason, neutral on its face, was not the subject of any inquiry by the prosecutor – which is evidence, under *Miller-El v. Dretke*, that this reason too was pretextual. 125 S.Ct at p. 2328.

Under these circumstances, all six reasons were racially tainted. No conscientious court could say with any reasonable assurance, after the prosecutor's multiple attempts to dissemble and mislead the trial court regarding the true reasons he challenged this otherwise highly-qualified African American juror, that the prosecutor would have made the same decision to remove Mark Hopkins if Hopkins had been, like Juror No. 7, white.

Thus, even under the mixed-motive test, reversal is required.[22]

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[22] In *People v. Johnson* (2006) 38 Cal.4th 1096, this Court held that under *Batson*, a remand to the trial court may be appropriate to permit the prosecutor to explain his or her reasons for excluding the prospective jurors in question. The approach has no application here, because the prosecutor had ample opportunity to explain his reasons at the *Batson* hearing, and in fact did so.

II. BY DENYING SEVERANCE AND ALLOWING THE WEAKER FLORIN ROAD ROBBERY-MURDER CHARGES TO BE TRIED WITH THE RELATIVELY STRONGER WATT AVENUE ROBBERY CHARGES, THE TRIAL COURT PREJUDICIALLY VIOLATED CALIFORNIA LAW AND APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Vine showed in the opening brief that each of the four factors material to determining severance of charges militated in favor of severing the more serious Florin Road charges from the less serious Watt Avenue counts. Respondent takes issue with Vines' analysis on all four factors. Its legal logic is full of holes.

A. The Evidence Was Not Cross-Admissible.

The first factor to be considered in determining whether the trial court abused its discretion in refusing to sever charges is the cross-admissibility of the evidence -- or the lack thereof.

Vines showed that the evidence regarding the killing of the victim in the Florin Road robbery would not have been admissible to prove any facts about the Watt Avenue robbery in a separate trial. The evidence is, plainly, highly inflammatory.

Respondent does not dispute that the evidence of the Florin Road killing would have been inadmissible in a separate trial of the Watt Avenue charges.

Respondent does assert that the evidence that the Watt Avenue robber locked four employees in a freezer at closing time would have been admissible in a separate trial of the Florin Road capital murder case; respondent claims that this evidence "would have been admissible to show . . . *intent* regarding the murder of Lee at Florin Road." RB 43 (emphasis added),

The argument fails for an obvious reason – whether or not the Florin Road gunman intended to kill was simply not at issue, and would not have been at issue in a separate trial of the Florin Road crimes, because intent to kill is not an element of felony-murder. *People v. Koontz* (2002) 27 Cal.4th 1041, 1079-1080; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1263. Thus, intent to kill was also not at issue in the unsevered trial of the Florin Road crimes that occurred.

When evidence has no substantial probative value as to any disputed material issue, and is highly inflammatory as well, it is an abuse of discretion for the trial court not to exclude it under Evidence Code section 352, precisely because it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight [or no] probative value with regard to the issues." *People v. Robinson* (2005) 37 Cal.4th 592, 632. Here, the evidence that the Watt Avenue robber herded employees into a basement freezer would not only be irrelevant to any disputed issue of guilt or innocence at a separate trial of the Florin Road crimes, but inflammatory as well. It would plainly have been inadmissible at a separate trial limited to the Florin Road offenses.

In any event, even if intent to kill had been at issue in this felony-murder trial, the argument would nevertheless fail. While locking the Watt Avenue employees in a freezer may demonstrate indifference, it does not show an affirmative intent to kill – it shows an intent *not* to kill, but to make one's escape. As respondent itself notes, "'in order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbor[ed] the same intent in each instance."'" RB 43, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402. Shooting an employee in the back of the head unambiguously demonstrates an intent to kill; herding employees into a confined space demonstrates no such clear intent, especially when, as here,

the robber was wearing a mask (RT 249) – which obviously indicates that the robber intended to escape and to avoid later identification by the store employees, not that he intended to kill them.[23]

As to the remaining evidence, Vines showed in the opening brief that it would only be cross-admissible if it could show *identity* – which, in turn, requires "characteristics so unusual and distinctive as to be like a signature." *People. v. Balcom* (1994) 7 Cal.4th 414, 424-425.

Respondent does not contend that there are any "unusual and distinctive, signature-like" characteristics in play here.

Respondent does contend that there are "sufficient common marks" to lead to the conclusion that the Florin Road and Watt Avenue crimes were committed by the same person. RB 42. But in support of its "common marks" theory, respondent relies on *People v. Miller* (1990) 50 Cal.3d 954, 987 – which has been superseded in pertinent part by *People v. Ewoldt, supra*, 7 Cal.4th at p. 403, requiring that "'[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" Because respondent does not even attempt to show the "signature-like" characteristics this Court's cases require for cross-admissibility to prove identity, its list of supposed "common marks" falling short of such a showing is irrelevant.

Respondent also fails to address Vines' showing that there were at least two *other*, quite similar late-night fast food restaurant robberies in the Sacramento area in which the robber or robbers herded employees into a walk-in freezer – and which occurred shortly *after* Vines was taken into

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[23] And even assuming for the purposes of argument that (1) intent to kill *had* been at issue with regard to the Florin Road crimes, and (2) the Watt Avenue evidence *could* show intent, it is so inflammatory, and so slightly probative, that it would still be subject to exclusion under Evidence Code section 352 at any separate trial on the Florin Road charges.

custody. AOB 86, CT 101, 99-102. It was impossible for Vines for commit these crimes while in a Sacramento jail. These facts militate heavily against the admissibility of the most inflammatory Watt Avenue evidence in a separate trial of the Florin Road crimes.

And respondent fails to address ***any*** of the four material dissimilarities between the Watt Avenue and Florin Road crimes that Vines delineated in his opening brief at AOB 86-87. These dissimilarities further militate against cross-admissibility.

Respondents also fails to address the argument that, even assuming some evidence of each robbery would have been cross-admissible to demonstrate identity, the evidence should have been excluded under Evidence Code section 352 and the federal due process guarantee.

B. The Evidence was Inflammatory.

The second factor in determining whether the trial court abused its discretion in refusing to sever the charges is whether "the evidence supporting either charge was so inflammatory as to create prejudice regarding the other." *People v. Ochoa* (2001) 26 Cal.4th 398, 424.

Respondent offers no pertinent analysis; it merely claims that both the Watt Avenue and Florin Road crimes involved violent behavior that could have led to death, and that the evidence that the Watt Avenue robber locked the employees in a freezer was "no more or less inflammatory" than the killing of the victim at Florin Road. RB 44.

But the question is not whether the evidence on one charge was "more inflammatory" than the evidence on the other; it is whether "the evidence supporting either charge was so inflammatory as to create prejudice regarding the other." *People v. Ochoa, supra,* 26 Cal.4th at p. 424. And respondent makes no attempt to show that the evidence that the Florin Road robber shot and killed an employee, which was not relevant to

any contested fact regarding the Watt Avenue crimes, would not have prejudiced Vines at a separate trial of the Watt Avenue charges. Nor does respondent attempt to demonstrate that the evidence that a perpetrator of the Watt Avenue robbery herded the employees into a freezer, which was not relevant to any contested fact regarding the Florin Road crimes, would not have prejudiced Vines at a separate trial on the Florin Road offenses.

Vines' demonstration that the evidence supporting the Watt Avenue charge was so inflammatory as to create prejudice regarding the Florin Road charges, and that the evidence supporting Florin Road charge was so inflammatory as to create prejudice regarding the Watt Avenue charges, is unrefuted, and unrefutable.

C. The Evidence Against Vines was Substantially Stronger on the Watt Avenue Counts than on the Florin Road Charges.

The third factor considered in assessing severance is the comparative strength of the evidence on the counts sought to be severed, based on the record at the time the trial court decides the motion. Vines showed in the opening brief that case against Vines was substantially stronger on the Watt Avenue counts than it was on the Florin Road charges. AOB 92-93. (As noted elsewhere, this determination is made for state law purposes on the record as of the time of the trial court's ruling on the motion to sever.)

Respondent insists that there was "very compelling" evidence of Vines' guilt on the Florin Road charges. RB 45.

But respondent relies on the evidence of Vera Penilton's statement that she heard Vines admit the Florin Road crimes. Yet as Vines pointed out in the opening brief, her account was highly suspect, because she had criminal liability in this case as well – for which she was granted immunity – and because her relationship with codefendant Proby gave her an obvious motive to lie.

Respondent does not mention these facts, which sharply undercut its theory.

Respondent also claims the evidence against Vines was "very compelling" because gift certificates and a metal box taken in the Florin Road robbery were found in Penilton's bedroom (which she shared with Proby). RB 45. But this makes no sense – *Proby* was Penilton's boyfriend, not Vines. And respondent fails to mention that *none* of the take from the Florin Road robbery was found on Vines' person, or in his possession, or at his residence, or with any of his girlfriends.

Accordingly, it must be concluded that the evidence against Vines on the Florin Road charges was far from "very compelling" – it was weak.

The evidence against Vines on the Watt Avenue counts was substantially stronger. Respondent cannot dispute that three eyewitnesses identified Vines as a participant in the Watt Avenue crimes, and that no eyewitnesses identified Vines as participating in the Florin Road robbery. RB 45. But respondent claims this material evidentiary disparity makes no difference, because "'[d]irect evidence is neither inherently stronger nor inherently weaker than circumstantial evidence.'" RB 45, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 162.

As an abstract statement of law, this is correct: there are many variables that may affect the strength of a given piece of evidence. But there was not just an *absence* of eyewitness evidence identifying Vines in connection with the Florin Road counts – there was an actual failure of any of the three Florin Road eyewitnesses – all of whom *knew* Vines and had worked with him – to identify him as one of the robbers.

Moreover, two of the three eyewitnesses provided evidence strongly indicating that the Florin Road shooter was ***not*** Sean Vines.

Jerome Williams described the shooter as 5'7". RT 400.

Pravinesh Singh said he was 5'9" to 5'11". CT 495, 552, 565.

Vines is 6'3". RT 401.

This considerably weakened the case against Vines on the Florin Road counts.

Thus, respondent's contention that the evidence against Vines on the Florin Road counts was "very compelling" is refuted by the record.

The record as it existed at the time the trial court denied the severance motion is clear: the evidence against appellant Vines on the Watt Avenue charges was substantially stronger than the evidence against him on the Florin Road counts.[24]

D. The Florin Road Charges Carried the Death Penalty.

The fourth factor is whether "'any one of the charges carries the death penalty ***or*** joinder of them turns the matter into a capital case,' " *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120 (emphasis added). It is met here: Vines faced the death penalty for the Florin Road robbery-murder.

The fact that joinder did not turn this case into a death penalty case – respondent's sole argument on this factor (RB 45) -- is irrelevant.

E. Severance was Necessary.

Vines showed in the opening brief that any purported benefits of joinder were marginal, at best. Respondent does not attempt to show there were any benefits to joinder.

As shown above and in the opening brief, all four factors point to the severance of the weaker, but more serious (capital), Florin Road counts from the stronger, but less serious (non-capital), Watt Avenue charges.

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[24] This does not mean, of course, that the Watt Avenue evidence was strong in and of itself.

This should be decisive. If the four factors this Court has enumerated actually have meaning – if they are not just words on paper, to be recited and then ignored – the Court should conclude that, in this case, the trial court abused its discretion in summarily denying severance.

F. "If He Did It Once . . ." -- The Trial Court's Failure to Sever the Watt Avenue Counts from the Florin Road Charges Violated Due Process and Resulted in an Unfair Trial.

Apparently operating on the theory that, if it simply overlooks inconvenient aspects of the record, and ignores legal principles that militate against its position, this Court will too, respondent fails to address the substance of Vines' analysis of the due process violation arising from the denial of severance. It simply asserts that, because of the supposed strength of the evidence, Vines did not suffer any prejudice. RB 47.

As shown in the opening brief, the federal due process inquiry looks not to the record on which the trial court's decision to sever was made, but to whether unfairness at trial actually resulted. "[E]rror involving misjoinder 'affects substantial rights' and requires reversal ... [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Lane* (1986) 474 U.S. 438, 449. As also shown in the opening brief, empirical evidence makes clear this danger is very real. AOB 99, fn. 25.

There is a high risk of prejudice when joinder of charges allows evidence to be admitted that would not otherwise be admitted in separate trials. *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322. Here, as discussed above and at AOB 82-91, the evidence of the Watt Avenue crimes would not have been admissible at a separate trial of the Florin Road charges, and vice-versa.

The risk of an injurious effect is greater when the non-cross-admissible evidence is inherently inflammatory in nature – as, for example, the evidence that the Watt Avenue robber locked four employees in a freezer at closing time. This is the sort of evidence that is nearly certain to prejudice a jury against a defendant on other, jointly-tried charges.

The danger of improper influence on the jury's decision-making process is especially acute when there is a substantial disparity in the strength of the evidence on the charges sought to be severed. In this case, there was a substantial disparity in the strength of the Watt Avenue counts as compared with the strength of the evidence on the Florin Road counts, as discussed in the opening brief. AOB 92-93.

The likelihood of prejudice is even higher when the evidence of the charges sought to be severed is similar enough to invite lay jurors to infer, "if he did it once, he must have done it again." *People v. Grant* (2003) 113 Cal.App.4th 579, 593. This is just that sort of case. AOB 99-100.

Finally, the risk of impermissible prejudice is even greater when, as in this case, the trial court fails to expressly instruct jurors that they cannot consider evidence of one set of offenses as establishing the other. *People v. Grant, supra,* 113 Cal.App.4th 579, 592; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; AOB 100-101.

Respondent fails to address <u>any</u> of these issues.

Because the trial court abused its discretion in denying severance, Vines' federal constitutional right to a fair trial was violated. The judgment must be reversed.

III. THE TRIAL COURT PREJUDICIALLY ERRED BY COMPELLING VINES TO CHOOSE BETWEEN HIS RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO CONFRONT A WITNESS AGAINST HIM.

A. Introduction.

Vines sought to present evidence that Vera Penilton's cousin, Anthony Edwards ("Black-Black" or "Blackie") was Proby's partner in the Florin Road robbery-murder, and the shooter of Ron Lee. Vines made a 15-point offer of proof, to which Proby's identification of "Blackie" as a co-participant with him in the Florin Road robbery was central. In a videotaped interview, Proby had told police that Blackie was the getaway driver and had supplied a shotgun, and gave a description of Blackie that fit eyewitness descriptions of the shooter much better than those descriptions fit Vines, who was 6'3".

Proby had testified at his own earlier trial, and was cross-examined by the prosecutor. *People v. Proby* (1998) 60 Cal.App.4th 922, 926; RT 2654. But at Vines' trial, Proby claimed his Fifth Amendment privilege.

Vines, through no fault of his, could not compel Proby's live testimony. Accordingly, Vines sought to introduce Proby's statement to police regarding Blackie.

The trial court ruled that this evidence – the centerpiece of Vines' defense of third-party culpability – was admissible. But if Vines introduced the evidence, the court ruled, the prosecution would be able to present *another* portion of Proby's statement to police in which he directly implicated Vines -- despite Vines' inability to confront Proby as a witness against him.

This ruling directly implicated two fundamental rights: (1) the right to present a defense, and specifically the right to introduce statements of third-party confessions when they are made under circumstances that

provide assurance of reliability (e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, *Lilly v. Virginia* (1999) 527 U.S. 116, 130), and (2) the right, basic to the Sixth Amendment, to confront witnesses (*Crawford v. Washington* (2004) 541 U.S. 36).

The trial court forced Vines to choose: he could exercise his fundamental right to present a defense, or his fundamental right to confront a witness against him – but not both.

Vines showed in the opening brief that the trial court's ruling put him to a constitutionally impermissible election between two fundamental rights. And Vines showed that the ruling prejudiced him by cutting the heart out of his otherwise very persuasive defense to the Florin Road charges.

The main thrust of respondent's argument in defense of this ruling is that admission of Proby's statements about Blackie, without admitting Proby's statements about Vines, "would have impermissibly created a misleading impression for the jury." The jury would have heard "*only half of Proby's story*" regarding the Florin Road murder and robbery, and not the "whole story." RB 50-51 (emphasis added).

Respondent is wrong. The case-law respondent relies on in fact shows that a trial court's ruling precluding otherwise admissible and highly probative defense evidence is constitutional only as (1) a response to egregious defense misconduct, (2) where there is specific prejudice to the prosecution, such as the denial of the opportunity to cross-examine a defense witness or otherwise challenge defense evidence.

The constitutionally-acceptable rationales for exclusion, which are closely related to the doctrine of forfeiture by wrongdoing, are not applicable here.

First, there was no defense misconduct. Indeed, the situation was not one that Vines created, or in any way contributed to. There was no

fault on the part of Vines, let alone any forfeiture of his Confrontation Clause rights due to wrongdoing. He did not instruct Proby to invoke Proby's Fifth Amendment rights. Proby did so on his own, outside of Vines' control, for his own reasons. And unlike the prosecutor, Vines never had the opportunity to confront Proby at trial.

Second, there was no specific prejudice to the prosecution, *because the prosecutor had in fact cross-examined Proby at Proby's trial*, and could have used Proby's trial testimony to impeach his previous statements to police about Blackie. See RT 2110-2111, 2654.

What the prosecution sought, and obtained, was the not the right to refute or challenge Proby's statement about Blackie – it was the right to introduce *additional, otherwise inadmissible testimony against Vines* from Proby's mouth, when Vines had no opportunity to cross-examine Proby, and when that testimony did not contradict or impeach the statement of Proby regarding Blackie that Vines sought to introduce.

Respondent cites to no case in which any appellate court, much less the Supreme Court, has upheld the exclusion of relevant defense evidence crucial to a defense on the theory that the evidence would be misleading, *unless* the evidence was the product of defense misconduct, or the prosecution would be deprived of a fair opportunity to challenge the defense evidence.

There is no prosecution right to introduce "the whole story" in response to defense evidence at the expense of the defendant's right to confrontation.

Vines will demonstrate the correctness of this analysis below, and will address the question of prejudice. But a few preliminary matters merit discussion.

B. Respondent Does Not Dispute that Vines' Third-Party Culpability Evidence was Admissible, or that under *Crawford v. Washington* Proby's Statements Could Not be Admitted Against Vines.

It's worth noting critical points made by appellant in the opening brief that respondent has chosen *not* to contest:

- Respondent does not contest that Vines' third-party culpability evidence was admissible under this Court's standards, because it was "capable of raising a reasonable doubt of defendant's guilt." *People v. Hall* (1986) 41 Cal.3d 826, 833; see AOB 108-114.[25] Respondent does not even cite to *Hall.*

- Respondent does not dispute that Proby's statement regarding Blackie's involvement was admissible as a matter of federal due process under Supreme Court precedent because it was made under circumstances providing "'considerable assurances of [] reliability'". *Lilly v. Virginia* (1999) 527 U.S. 116, 130, *Chambers v. Mississippi* (1973) 410 U.S. 284; *Green v. Georgia* (1979) 442 U.S. 95; see AOB 114-121. Respondent fails to even mention *Lilly*, *Chambers* or *Green.*

- Respondent does not dispute that, under the rule of *Crawford v. Washington* (2004) 541 U.S. 36, Proby's statements to police regarding Vines could not be admitted consistent with the

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[25] The Supreme Court has recently reaffirmed the constitutional right to present evidence of third-party culpability in *Holmes v. South Carolina* (2006) 547 U.S. ___, 126 S.Ct. 1727, 164 L.Ed.2d 503.

Confrontation Clause because Proby was not subject to cross-examination by Vines. *Crawford* established that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at pp. 68-69. Respondent does not attempt to show this case would fit under the sole exception to the Confrontation Clause recognized in *Crawford*, for forfeiture due to wrongdoing. *Id.* at p. 62, discussing *Reynolds* v. *United States* (1879) 98 U.S. 145, 158-159; see *Davis v. Washington* (2006) 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224. Indeed, respondent does not even cite to *Crawford*, or its predecessors. Thus, respondent entirely fails to answer Vines' showing that admission of Proby's statements inculpating Vines without benefit of cross-examination would violate Vines' constitutional right to confront a witness against him under *Crawford.*

C. The Trial Court's Evidence Code Section 356 Ruling Was Incorrect.

Appellant made two arguments regarding the admissibility of Proby's statement to police implicating Vines in the Florin Road robbery: (1) that the trial court's ruling was incorrect under Evidence Code section 356, and (2) that the ruling independently violated the Confrontation Clause.

Respondent contends that the trial court's ruling was correct under Evidence Code section 356. At page 48 of its brief, respondent quotes in support of its argument this passage from *People v. Gambos* (1970) 5 Cal.App.3d 187, 192:

> "By its terms section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject*, and (2) it is necessary to make the already introduced conversation *understood.* " RB 48 (orig. emphases). Accord, e.g., *People v. Sandoval* (1992) 4 Cal.4th 155, 177.

But the standard relied upon by respondent does not support respondent's conclusion that the trial court correctly applied section 356. The parties dispute whether the two statements address the same subject.[26] But regardless of whether the two statements about two different people address the same subject, it is apparent that introduction of Proby's statements regarding Vines was in no sense "necessary to make the already introduced conversation *understood.*" The already introduced conversation -- Proby's statements about Blackie – stands on its own.

The offer of proof specifies that Proby stated to law enforcement officers that Blackie supplied a sawed-off rifle for the Florin Road robbery and drove the get-away vehicle after the robbery. Proby also stated that 'Blackie' was a friend from the neighborhood and that his girlfriend Vera Penilton would know his true identity. And Proby gave a physical description of Blackie that, as noted in the opening brief, far better matched witnesses' descriptions of the shooter than did Vines. CT 0000. The statement of Proby that Vines sought to introduce says nothing about Vines.

There is nothing about the additional evidence that the prosecution sought to introduce – that Proby *also* told law enforcement that Vines was involved, and shot the victim – that was "necessary to make the already introduced conversation *understood.*"

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[26] Plainly, Proby's statements regarding Blackie's participation in the Florin Road crimes can be considered a different subject than Vines' alleged participation; the answer depends on the specificity of the lens used to make the comparison, and nothing more.

Proby's statements regarding Blackie's involvement are easily understood without any supplementation by reference to Proby's statements about Vines. These statements would be sufficient, for example, to provide substantial evidence of Blackie's guilt of the Florin Road crimes, without any reference to Vines whatsoever.[27]

D. The Confrontation Clause Issue is Not An "Attempted End-Run'" Around the Trial Court's Evidence Code Section 356 Ruling.

The trial court ruled that the prosecution could introduce Proby's statement to law enforcement that Vines had participated in the Florin Road robbery. Vines showed that this ruling transgressed his right to cross-examine a witness against him under the Confrontation Clause.

Respondent cannot answer that argument. Instead, it claims that resolution of the question whether the trial court's ruling was correct under Evidence Code section 356 in its favor necessarily decides the constitutional question, asserting:

> "the trial court's Evidence Code section 356 ruling regarding Proby's confession was at the core of appellant's argument. In other words, appellant's alleged constitutional error argument is really just an attempted 'end run' around the court's proper evidentiary ruling." RB 50; see RB 48.

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[27] Moreover, as shown in the opening brief, rulings under section 356 must also take into account the discretionary responsibility for trial courts to exclude evidence as substantially more probative than prejudicial under Evidence Code section 352. *People v. Pride* (1992) 3 Cal.4th 195, 235; *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1349-1350. Here, the trial court failed to do so. As set forth in the opening brief, it is an abuse of discretion to admit evidence in derogation of the basic right of cross-examination under the Confrontation Clause.

Respondent simply fails to address this argument.

Respondent is wrong: the trial court's erroneous ruling under Evidence Code section 356 is not "at the core" of the Confrontation Clause argument. As a glance at appellant's opening brief shows, Evidence Code section 356 is not even arguably the main thrust of appellant's argument.

Indeed, the opening brief makes the independent nature of the constitutional argument indisputably clear:

> "And in any event, whether or not the admission of the statement would have violated state law, the admission of Proby's statement incriminating Vines would have independently violated Vines' right to confront the witnesses against him, as guaranteed by the Sixth Amendment." AOB 127 (emphasis added).

Vines demonstrated in the opening brief the violation of the Confrontation Clause under two related lines of Supreme Court caselaw: first, *Lilly v. Virginia* (1999) 527 U.S. 116, 131 and *Douglas v. Alabama* (1965) 380 U.S. 415, 419, holding that the admission of a nontestifying codefendant's confession violates the Confrontation Clause; and second, *Crawford v. Washington* (2004) 541 U.S. 36, holding that statements to police made by a potential codefendant who does not testify cannot be introduced at trial against a defendant.

Respondent does not challenge the substance of Vines' analysis.

The Confrontation Clause analysis based on *Douglas*, *Lilly* and *Crawford* that was set forth in the opening brief in no way depends on the correctness of the trial court's ruling under section 356. And respondent simply does not address the constitutional issue.

E. There is No "Whole Story" Exception to the Confrontation Clause.

As noted above, respondent's primary argument is that there was no impermissible election because

> "[A] ruling which would have allowed appellant to introduce Proby's statements about Blackie but precluded the prosecution from introducing Proby's statements about appellant would have impermissibly created a misleading impression for the jury. (*People v. Arias, supra*, 13 Cal.4th at p. 156.) The jury would have heard only half of Proby's story regarding the Florin Road murder and robbery (Blackie's alleged involvement) and the other half of the story (appellant's involvement) would have gone untold. In other words, *a critical portion of the whole story would have been omitted.* Certainly there is no right, constitutional or otherwise, that would permit a defendant to tell such a misleading half-truth. . . ." RB 50-51 (emphasis added).

Respondent does not deny that admission of Proby's statements about Vines would, standing alone, violate the Confrontation Clause. Rather, respondent posits a "whole story" exception to the Confrontation Clause – that when the defense introduces admissible evidence consisting of a portion of a nontestifying codefendant's statement to police, the prosecution has the right to introduce the remaining portions of the statement.

The Confrontation Clause recognizes no such exception. Under *Crawford v. Washington, supra,* 541 U.S. 36, the *only* recognized exception to the Confrontation Clause rule barring testimonial hearsay without the opportunity for cross-examination is for forfeiture by wrongdoing: "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington, supra,* 126 S.Ct. at p. 2280. That exception is not applicable here.

Moreover, Vines showed in the opening brief that, under *Gray v. Maryland* (1998) 523 U.S. 185, 192 and *Richardson v. Marsh* (1987) 481 U.S. 200, 211, it is not only permissible, but *mandatory*, for the trial court to eliminate any reference to the defendant when, in a joint trial, the confession of a nontestifying codefendant is admitted. AOB 122-124. In this case as in *Gray* and *Richardson*, the prosecution's interest was in

seeing the entire confession or statement of the codefendant admitted. Yet in these Supreme Court cases, the prosecution's interest in telling the "whole story" through the confession of a nontestifying codefendant had to give way to the defendant's Confrontation Clause rights not to be confronted with the testimony of a witness against him. *Gray and Richardson* require that the nontestifying codefendant's confession must be redacted to eliminate, not just the defendant's name, but any reference to the defendant's existence. *Gray, supra,* 523 U.S. at pp. 191, 197. *Gray* and *Richardson* thus make clear that the defendant's right to confrontation nevertheless trumps the prosecution's right to present "the whole story" according to a nontestifying codefendant, even when any reference to a defendant's existence or asserted role in a crime – clearly, a "critical portion" of "the whole story" of a nontestifying codefendant -- has to be omitted.

Respondent simply does not address *Gray* or *Richardson*.

In support of its argument, respondent relies on three cases: *People v. Arias* (1996) 13 Cal.4th 92, 156, *Nix v. Whiteside* (1976) 475 U.S. 157, 173, and *United States v. Nobles* (1975) 422 U.S. 225, 241. RB 51.

None of these cases recognizes a "whole story" exception to the Confrontation Clause, or otherwise supports respondent's position on the constitutional issue.

(a) *People v. Arias.*

In *People v. Arias* the defendant argued that the trial court erred in excluding evidence that was admissible under section 356; this Court determined that it need not decide whether error under the Evidence Code occurred, because any error was harmless. 13 Cal.4th at pp. 156-157. Although the defendant made unspecified constitutional claims in a supplemental brief, the Court rejected them, apparently for the same reasons of harmless error. *Id.* at p. 157, fn. 25.

Since *Arias* did not discuss the merits of the constitutional issue in that case, it provides no guidance on the merits of the constitutional issue here. Moreover, *Arias* also did not involve a compelled election between constitutional rights.

(b) *Nix v. Whiteside.*

In *Nix v. Whiteside*, the defendant told his lawyer he intended to testify falsely at trial that he had seen a gun in the hand of the victim. He made clear to his lawyer that he had not actually seen a gun, but thought it was necessary for him to testify he had. Counsel told the defendant he could not suborn perjury, and if the defendant insisted on presenting the false testimony, counsel would advise the court and withdraw. Defendant did not testify falsely, and was convicted. On habeas corpus, he claimed ineffective assistance of counsel. The Supreme Court disagreed, concluding that the "right to counsel includes no right to have a lawyer who will cooperate with planned perjury" and that "there is no right whatever -- constitutional or otherwise -- for a defendant to use false evidence." *Nix, supra*, 475 U.S. at p. 173.

Thus, *Nix v. Whiteside* establishes that there is no right to use known perjurious evidence. Accord, e.g., *United States v. Midgett* (4th Cir. 2003) 342 F.3d 321, 325 ("Under *Nix*, then, the defendant's right to counsel and his right to testify on his own behalf are circumscribed in instances where the defendant has made manifest his intention to commit perjury."); *People v. Riel* (2000) 22 Cal.4th 1153, 1217 (same).

The rule of *Nix* has no application to this case. Vines did not seek to present evidence known to his lawyer and to him to be false – instead, Vines sought to present third-party culpability evidence in the context of a 15-point offer of proof that *truthfully* identified Vera Penilton's cousin, Anthony Edwards, aka Blackie, as the Florin Road gunman. See CT 763-767; AOB 119.

Moreover, the Supreme Court in *Nix* took care to note that the case before it did not involve an impermissible election between constitutional rights:

> "Robinson's admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely."

Nix, supra, 475 U.S. at p. 173 (orig. emphasis); see *United States v. Midgett, supra,* 342 F.3d 321, 327 (rejecting prosecution's "false evidence" argument because not based on known perjury, and reversing because "the [trial] court impermissibly forced the defendant to choose between two constitutionally protected rights: the right to testify on his own behalf and the right to counsel.").

(c) *United States v. Nobles.*

Finally, respondent relies on *United States v. Nobles, supra,* 422 U.S. 225, in support of its position that the trial court did not err in ruling that, despite Vines' right to cross-examine witnesses against him, the prosecution could present evidence of Proby's statements about Vines if Vines presented evidence of Proby's statements about Blackie.

But respondent's use of *Nobles* is selective: it consists of quoting a single, decontextualized sentence, with no analysis of *Nobles* itself, or of the case law following *Nobles*.

Attention to the Supreme Court's reasoning in *Nobles* and its successor, *Taylor v. Illinois* (1988) 484 U.S. 400, shows that these cases do not support respondent. To the contrary, these cases, though not on point, support Vines' position, and show why reversal is necessary even without regard to *Crawford v. Washington.*

Nobles was, in essence, a case about discovery. In *Nobles*, two prosecution witnesses testified and inculpated the defendant. The defense

sought to call as a witness a defense investigator, who would testify to inconsistent statements the witnesses had made to the investigator. But the defense refused to provide the prosecution with the portions of the defense investigator's report that contained the allegedly impeaching statements of the witnesses. The trial court ruled that, as a consequence, the testimony of the investigator would be precluded. The high court stated the issue this way:

> "The question presented here is whether in these circumstances a federal trial court may *compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him." Nobles, supra*, 422 U.S. at p. 227 (emphasis added).

The trial court in *Nobles* did not rule that the prosecution was entitled to disclosure of *all* the investigator's report – but *only* those portions that would apply to test the veracity of the statements to which the defense investigator would testify. As the Supreme Court noted, the trial court's

> "considered ruling was quite limited in scope, opening to prosecution scrutiny only the portion of the report that related to the testimony the investigator would offer to discredit the witnesses' identification testimony." *Nobles, supra*, 422 U.S. at p. 240.

Under these circumstances, the Court held:

> "The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. *Washington* v. *Texas,* 388 U.S. 14, 19 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification

for presenting what might have been a half-truth." *Nobles, supra*, 422 U.S. at p. 241.

In context, the significance of the last sentence of this passage is clear: the investigator's testimony might have been a "half-truth" because, if the defendant had got the ruling he had sought, the defense investigator would not have been subject to cross-examination based on his own notes, which were being deliberately withheld by the defense. The "legitimate demand of the adversarial system" that the *Nobles* Court was concerned with was the right of the prosecution to discover, and use on cross-examination, material that might impeach the investigator's testimony. In this case, however, the legitimate demands implicated in *Nobles* are not at issue: the prosecution was not denied any discovery, and the defendant did not engage in any discovery misconduct of any sort.

(d) *Taylor v. Illinois.*

The only later Supreme Court case to discuss the issue of precluding defense evidence under *Nobles* is *Taylor v. Illinois*, *supra*, 484 U.S. 400.

In *Taylor*, the defense did not disclose the existence of a critical witness who had supposedly seen the crime at issue until the second day of trial -- well after the witness disclosure deadline. The defense had no good excuse for this omission. The trial court found the late disclosure to be a willful and blatant violation of the discovery rules, and precluded the witness's testimony. The defendant was convicted. On review of the judgment, the Supreme Court affirmed, holding that the trial court could properly preclude the testimony.

After quoting from *United States v. Nobles*, *supra*, the Court went on to explain:

> "It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public

> interests. The *integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also* ***weigh in the balance.***
>
> "A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and *motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence*, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony."

Taylor v. Illinois, supra, 484 U.S. at pp. 414-415 (emphasis added).[28]

Thus, in the context of intentional discovery violations, trial courts must "weigh in the balance" the defendant's right to present testimony in his favor against countervailing interests, which include deterring willful noncompliance with discovery rules, and avoiding "prejudice to the truth-determining function of the trial process."

The principle that relevant defense evidence may only be excluded on a balancing of the interests actually at stake in the particular case

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[28] In *Michigan v. Lucas* (1991) 500 U.S. 145, the Supreme Court held that the Michigan court erred in adopting a *per se* rule that the advance notice requirement of Michigan's rape shield statute violated the Sixth Amendment whenever it was used to exclude evidence of past sexual conduct between a rape victim and a defendant. The Court recognized that the Sixth Amendment right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at p. 149. But the Court emphasized that "[r]estrictions on criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* at p. 151, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56. The Court remanded to the state courts to determine "whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment." *Id.* at p. 153.

continues to be applied in the discovery context. See, e.g., *United States v. Nelson-Rodriguez* (1st Cir. 2003) 319 F.3d 12, 36; *United States v. Levy-Cordero* (1st Cir. 1995) 67 F.3d 1002, 1013; *LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, 669; *Eckert v. Tansy* (9th Cir. 1991) 936 F.2d 444, 447; *Noble v. Kelly* (2d Cir. 2001) 246 F.3d 93, 99. See AOB 121 (balancing discussed).

There is no "whole story" exception to the Confrontation Clause. The only exception to the constitutional rule barring testimonial hearsay is for forfeiture by wrongdoing, and there is no wrongdoing here. Even looking to cases involving intentional discovery violations, such as *Nobles* and *Taylor*, provides no support for respondent, because Vines committed no willful misconduct of any sort.

F. The Prosecution Had No Interest Sufficient to Overcome Vines' Rights to Present a Defense and to Confront the Witnesses Against Him.

At trial the prosecutor insisted that a ruling against Vines was necessary to prevent the jurors from believing there were only two robbers. RT 2652. Vines explained in his opening brief that admission of Proby's statement about Blackie itself would not necessarily lead the jury to believe there were two robbers and not three. See AOB 122.

Respondent has now abandoned the prosecutor's justification on appeal. It does not argue in its brief that the trial court's ruling was necessary to prevent the jurors from believing there were just two robbers.

Instead, respondent argues, as noted above, that admission of Proby's statement about Blackie without admission of Proby's statement about Vines would leave a misleading impression because it would provide the jury with only half of Proby's account, not the "whole story." RB 51.

But as seen above, the only exception to the Confrontation Clause's prohibition on testimonial hearsay offered against the accused without the opportunity for cross-examination is for forfeiture by wrongdoing, a principle that has no application here. *Crawford, supra*, 541 U.S. at p. 62.

As discussed, respondent's reliance on *Nix v. Whiteside* and *United States v. Nobles* is unavailing; these cases, together with *Taylor v. Illinois*, approve the preclusion of otherwise admissible and relevant defense evidence only when (a) the defense seeks to present known false evidence, or (b) the defense willfully violated discovery rules or engaged in bad faith conduct designed to deprive the prosecution of a fair opportunity to cross-examine the defense witness or challenge defense evidence. California cases are in accord.[29]

Thus, even if these cases governed this one, they would not aid respondent, because Vines did not seek to present known false evidence, nor did he violate any discovery rule or engage in any litigation misconduct.

The prosecution was not deprived of a fair opportunity to cross-examine a defense witness, or to challenge defense evidence. The prosecution had a full and fair opportunity to cross-examine Proby at Proby's own trial. And the prosecutor had in fact cross-examined Proby at Proby's trial, and Proby had assertedly disavowed his statements about Blackie. RT 2654. The prosecutor could have impeached Proby's statements introduced by Vines with Proby's testimony at his own trial, recanting his statement to police.

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[29] See, e.g., *People v. Jordan* (2003) 108 Cal.App.4th 349, 358 ("the exclusion of testimony is not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial."); *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.

Had the trial court ruled correctly, the prosecution would only have been precluded from eliciting affirmative evidence about Vines that was not subject to cross-examination by Vines.

The prosecution's purpose in seeking to introduce Proby's testimony inculpating Vines was not to rebut or impeach Proby's testimony inculpating Blackie – but to show affirmatively that Vines was the shooter.

Respondent's claim that introducing Proby's statements regarding Blackie would leave a misleading impression is inaccurate. Proby's statements regarding Blackie, if introduced, would not have necessarily implied anything whatsoever about what Proby might have said or not said about Vines. Nor did the portions of Proby's statement that Vines sought to introduce give rise to the conclusion that these statements were Proby's version of "the whole story." Indeed, Proby's statements regarding Blackie, in and of themselves, did nothing to inculpate or exculpate Vines – it was only in the context of the 15-point offer of proof that the statements gained evidentiary significance for Vines' defense.

In *Taylor v. Illinois, supra*, the Supreme Court made clear that an important consideration in the balance of interests, when such balancing is required, is the "integrity of the adversary process," which depends on the adversarial testing of evidence for reliability. 484 U.S. at p. 414. But here, as noted above, the prosecution had already manifested its belief in the reliability of Proby's statements to police, by using the very evidence in question to prosecute Proby. The prosecution found the evidence reliable enough then. See *Green v. Georgia* (1979) 442 U.S. 95, 97.

The Supreme Court in *Taylor* looked to the "potential prejudice to the truth-determining process." 484 U.S. at p. 415; accord, *Davis v. Washington, supra*, 126 S.Ct. at p. 2280.

Here, the prejudice to the truth-determining process, if the evidence of Proby's statement regarding Blackie was precluded, far outweighed the arguable prejudice to the prosecution's case if Proby's statement about Vines was excluded.

Precluding Proby's statement to police about Blackie eviscerated Vines' third-party culpability defense to the Florin Road charges. Without this statement, there was no evidence linking Blackie, aka Anthony Edwards, to the Florin Road crimes.

But precluding Proby's statements about Vines would not have caused any comparable prejudice to the prosecution's case. As we have seen, the prosecution would not have been deprived of the means of adversarial testing of the statements of Proby that Vines sought to admit, because the prosecution had already cross-examined Proby at his own trial, and could use that cross-examination for impeachment. See *People v. Proby, supra*, 60 Cal.App.4th 922, 926; RT 2654.

Moreover, Proby's statements regarding Vines were not just inadmissible under the Confrontation Clause, because not subject to the only kind of adversarial testing for reliability that the Sixth Amendment recognizes – they were also *cumulative evidence*, because the prosecution could and did present Vera Penilton's testimony inculpating Vines through his purported admission to her.

Thus, the trial court's ruling deprived Vines of an essential component of his defense, on grounds other than reliability. But had the trial court ruled in Vines' favor, the prosecution would not have been deprived of any essential portion of its case against Vines.

Thus, even under the line of Supreme Court cases invoked by respondent, the balance overwhelmingly favors Vines. The trial court erred in forcing Vines to choose between two constitutional rights.

G. Vines Was Prejudiced at Both the Guilt and Penalty Phases.

1. Guilt-Phase Prejudice.

To assess prejudice flowing from federal constitutional error, the Court must review the entire record. *Chapman v. California* (1967) 386 U.S. 18, 24. When evidence has been erroneously precluded, the reviewing court must assess the likely impact of the excluded evidence. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684. To facilitate this Court's review, Vines in his opening brief: (a) reviewed all the evidence bearing on the Florin Road offenses; (b) assessed the strength of the evidence that was admitted; and (c) discussed the probative value of the third-party culpability evidence that was erroneously precluded. AOB 140-152.

a. Respondent's argument.

Respondent's argument on guilt-phase prejudice is a single paragraph:

> "Assuming, arguendo, that error occurred, it was harmless because appellant has not established that he suffered any resulting prejudice. Regardless of the applicable standard, there was more than sufficient evidence for the jury to conclude that appellant committed the murder and the robbery at the Florin Road McDonalds. For instance, on the day of robbery, appellant and Proby were together both before and after the crimes occurred. (RT 3553-3555, 3760-3763, 3771.) The manager, Jeffrey Hickey, described the second robber as a black man who was approximately six feet two inches tall, 185 to 200 pounds, and 20 to 25 years old. (RT 3871-3872.) He further indicated that the second robber's physical features were consistent with appellant. (RT 3873, 3899.) Most importantly, appellant told Vera Penilton that he robbed the McDonalds and that he shot and killed Lee "because the boy had said his name," and appellant was concerned that Lee "would tell on him" if he did not shoot him. (RT 3557, 3561-3564, 3566-3567, 3584, 3666.) Accordingly, appellant's claim should be rejected on this basis as well." RB 51.

b. Respondent's argument considered.

Let us consider each part of respondent's argument against guilt-phase prejudice:

First, respondent insists:

> "[any error] was harmless because appellant has not established that he suffered any resulting prejudice. " RB 51.

Plainly, this misstates the burden of persuasion flowing from federal constitutional error. It is respondent's burden to show the absence of harm from the error, based on a review of the whole record. *Chapman v. California* (1967) 386 U.S. 18, 24. Under federal law, it is not Vines' burden to establish prejudice – though he has established it for purposes of state law.

Second, respondent writes:

> "Regardless of the applicable standard, there was more than sufficient evidence for the jury to conclude that appellant committed the murder and the robbery at the Florin Road McDonalds." RB 51.

Respondent misunderstands or deliberately misstates the law. Whether or not there is "more than sufficient evidence" of guilt to survive substantial evidence review is simply not the legal standard in assessing prejudice resulting from violation of federal constitutional trial rights. *Chapman v. California*, *supra*, 386 U.S. 18, 24. Nor is it the standard under state law. *People v. Watson* (1956) 46 Cal.2d 818, 836-838.

Third, respondent asserts:

> "For instance, on the day of robbery, appellant and Proby were together both before and after the crimes occurred. (RT 3553-3555, 3760-3763, 3771.)" RB 51.

This is true, and it is not helpful to Vines. But this evidence, of course, proves nothing by itself. Hanging out with someone who commits a crime is not the same thing as actually committing a crime. Our judicial system has never embraced the principle of guilt by association.

Fourth, respondent turns to the eyewitness evidence:

"The manager, Jeffrey Hickey, described the second robber as a black man who was approximately six feet two inches tall, 185 to 200 pounds, and 20 to 25 years old. (RT 3871-3872.) He further indicated that the second robber's physical features were consistent with appellant. (RT 3873, 3899.)" RB 51.

Respondent does not mention in its discussion of prejudice that Jeffrey Hickey knew Sean Vines, and that Hickey failed to identify Vines as one of the robbers even after he was shown a security video of the robbers. RT 3899, 3939-3940.[30]

And respondent fails to mention, anywhere in its brief, that Jeffrey Hickey, who had worked for McDonald's for twenty years, told police that, because of the way the robbery was carried out, he believed the robber was not a McDonald's employee. RT 3944, 3849, 3925. Vines, of course, had been an employee of the Florin Road McDonald's; Hickey had trained him. RT 3852-3853.

Fifth, respondent claims:

"Most importantly, appellant told Vera Penilton that he robbed the McDonalds and that he shot and killed Lee 'because the boy had said his name,' and appellant was concerned that Lee 'would tell on him' if he did not shoot him. (RT 3557, 3561-3564, 3566-3567, 3584, 3666.)" RB 51.

But respondent entirely fails to even *acknowledge* -- much less address -- the *material conflict* between Penilton's testimony that Vines confessed to her at her residence some two hours after the robbery (RT

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[30] Jeffrey Hickey had never seen Proby before, but based on seeing only the first robber's eyebrows, eyes and nose, he was able to identify the first robber as Proby. RT 3939.

Hickey saw the second robber's eyes and forehead and the bridge of his nose, but was unable to identify Vines:

"Q. But you know Mr. Vines, you have known Mr. Vines, you have worked with Mr. Vines, yet you weren't able to identify that second person as Mr. Vines?

"[WITNESS HICKEY]. Correct." RT 3939-3940.

3570), and prosecution witness Ulanda Johnson's testimony that Vines came home to their residence more than an hour-and-a-half earlier (RT 3762). See AOB 142-143.

Moreover, respondent fails to come to account with the numerous defects in Penilton's testimony, as discussed in Vines' opening brief. AOB 140-143.[31]

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[31] Numerous problems surrounded Penilton's testimony, which respondent fails to address:

- Penilton was impeached with her priors for theft, committed with Proby. RT 3620-3622.
- Penilton was herself criminally implicated - she knew about the robbery in advance, she provided the murder weapon, and ***all the recovered property and gift certificates were found in the bedroom Penilton shared with Proby. No money, gift certificates or property was recovered from Vines' person or residence.***
- Penilton testified under a grant of immunity. RT 3514-3515. Penilton admitted she lied to police in the first interview. RT 3577, 3623.
- Penilton tried to protect Proby, by making sure that the detectives knew he didn't have a gun since he was on parole; she told them it was not possible he could have had one. RT 3673.
- She later lied to a defense investigator about her thefts. RT 4223.
- Penilton admitted she did not like Vines. RT 3632.

In addition to these reasons, and the material contradiction between Penilton's testimony about Vines' presence in her apartment after the robbery and Ulanda Johnson's testimony that he had come home at least an hour and a half earlier, there were further contradictions and implausibilities arising from Penilton's story:

- Penilton implausibly insisted that it was a "complete surprise" to her when the officers found the cell phone, the box and the McDonald's gift certificates in her bedroom. RT 3678, 3681.
- But Lawrence Day, her mother's boyfriend, testified that he saw the metal box while cleaning Penilton's room, and asked her about it. RT 401.
- Penilton's story that Proby first leaned Vines had shot the victim more than two hours after the robbery was highly suspect. When Vines supposedly told Proby he had shot someone, Penilton

(continued on next page)

Of course, under *Chapman v. California*, *supra*, 386 U.S. 18, 24, and *People v. Watson, supra*, 46 Cal.2d 818, 836-838, this Court must consider the entire record when assessing prejudice.

That includes the testimony of eyewitness Pravinesh Singh.

Singh knew Sean Vines, and he saw the gunman. Singh described the gunman as about 5'8" tall, wearing all black with a green ski mask. RT 4102, 4141. Singh testified that the gunman was not Sean Vines. RT 4112.

Singh's testimony is not mentioned by respondent in its discussion of prejudice.[32]

In order to determine whether or not Vines was prejudiced, it is also necessary, as shown in the opening brief, for the Court to assess the probative value of the precluded evidence. AOB 147-148; *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.

Vines showed in the opening brief that, had he not been precluded from presenting his third-party culpability defense to the Florin Road charges, it is highly probable that he would have obtained a more favorable result, thus warranting reversal even under the standard of *People v. Watson.*

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stated Proby sounded really surprised. RT 3653. But Proby could not be surprised, because he was present in the store when the shooting occurred, according to eyewitness Hickey, and the gunshot that killed Lee was quite loud, according to Singh. RT 4178.

- Though at least four other people lived at Penilton's residence in addition to Proby and Penilton herself – her mother, Mildred Robinson, her mother's boyfriend, Lawrence Day, her sister Monica Allen, and Catrell Smith (RT 3516, 4198) – no other witness corroborated that Vines was even present at the apartment during the hours following the Florin Road robbery.

[32] Respondent mentions the critical testimony of Pravinesh Singh only once in its brief after its statement of facts, in a single dismissive sentence at RB 55, in response to Argument IV.

Proby's description of Blackie (black male, 5'9" to 5'10", thin, dark-complected) would have strongly corroborated Singh's description of the gunman (black male, 5'8" to 5'9", 150 pounds, small build, dark) and his testimony that the gunman was not Sean Vines. RT 4140, 4112.

Introduction of Vines' third-party culpability evidence would have supplied a specific answer the to the jury's inevitable question, "If Vines didn't do it, who did?" See *United States v. Crosby* (9th Cir. 1996) 75 F.3d 1343, 1347. The third party was Anthony Edwards, aka Black-Black, a member of the Bloods criminal gang with a violent felony record, a friend of Proby's, and Vera Penilton's cousin. CT 601, 763-767. Law enforcement descriptions of Edwards match Hickey's description of the second robber. CT 773, RT 3871-3872, 3916-3917.

And introduction of the precluded evidence inculpating Vera Penilton's cousin, Anthony Edwards, would have substantially weakened the believability of Penilton, by showing that she had a strong reason to lie about Sean Vines – to protect her cousin. Moreover, the jury could conclude that if she did not protect her cousin, because of his gang affiliation, she would have reason to fear retaliation.

Respondent completely foregoes any effort to demonstrate, through analysis of the precluded evidence, that Vines' third-party culpability defense would not have made a difference to the result in this case, had it not erroneously been precluded. Compare AOB 148-152.

When the entire record is considered, including the facts respondent willfully ignores, it provides no support for the argument the evidence was so overwhelming that, "beyond a reasonable doubt," the trial court's preclusion of Vines' third-party culpability defense "did not contribute to the verdict obtained." *Chapman*, *supra*, 386 U.S. 18, 24. Indeed, even under the *Watson* standard, Vines has established a reasonable probability that, absent the trial court's erroneous rulings precluding evidence of third

party Anthony Edwards' culpability, the result at the guilt phase would have been different.

2. Penalty Phase Prejudice.

Vines showed in his opening brief that, even assuming *arguendo* he was not prejudiced at the guilt phase, preclusion of the evidence of third party Anthony Edwards' culpability as the Florin Road gunman prejudiced him at the penalty phase of the trial. AOB 152-155.

Respondent entirely fails to answer Vines' showing of penalty phase prejudice. See RB 51. The penalty phase judgment must be reversed.

IV. BECAUSE VINES' TRIAL COUNSEL INCOMPETENTLY FAILED TO INTRODUCE ADMISSIBLE EVIDENCE THAT EYEWITNESS JEROME WILLIAMS DESCRIBED THE FLORIN ROAD GUNMAN AS 5'7" TALL – 8 INCHES SHORTER THAN SEAN VINES – THE JUDGMENT MUST BE REVERSED.

In the opening brief, Vines showed that his trial lawyer unaccountably failed to introduce evidence that would almost certainly have led the jury to a different verdict – that Florin Road robbery victim and eyewitness Jerome Williams told a law enforcement officer that the robber with the silver handgun was five feet seven inches tall. Sean Vines is six feet three inches tall. AOB 156-167; RT 400-401.

Vines demonstrated there was no rational tactical purpose for defense counsel not to introduce this evidence -- it was admissible under Evidence Code section 1240, and it was separately admissible as a matter of due process under cases such as *Chambers v. Mississippi, supra*, 410 U.S. 284, 300 and *Lilly v. Virginia, supra*, 527 U.S. 116, 130.

And Vines showed prejudice.[33]

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[33] Contrary to the implication in respondent's brief, this Court has made clear that relief on appeal may be granted for ineffective assistance of counsel even when the record does not "affirmatively disclose" that counsel had no rational tactical purpose for the challenged act or omission.

> "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' "

People v. Ledesma, supra, 39 Cal.4th 641, 746.

In this case, Vines' trial counsel ***was*** asked to explain, in connection with Vines' *Marsden* motion, why he had not presented the Jerome Williams evidence, which would include his description of the gunman. Trial counsel explained:

> "Jerome Williams we looked for, tried to find, tried to subpoena, we were unable to do so." RT 4619 (emphasis added).

(continued on next page)

A. The Evidence Was Admissible Under Evidence Code section 1240.

Detective Richard Overton of the Sacramento Police Department took Jerome Williams' statement less than two-and-one-half hours after Williams had been the victim of robbery; the robber had trained a silver handgun on him and commanded him to lie down on the floor. Detective Overton described Williams' demeanor at the time of the interview as:

"***Upset, frightened***, sad, concerned." RT 416 (emphasis added).[34]

Respondent argues that Williams' description of the robber with the silver handgun was inadmissible hearsay because "there is no persuasive evidence that Williams was still under the emotional influence of the crime at the time he gave his statement." RB 54.

On this record, respondent's assertion is nothing short of incredible.

Plainly, this Court cannot ignore the testimony of Detective Overton that Jerome Williams was "upset" and "frightened" at the time he gave his statement.

Apart from the fact that Williams had been robbed at gunpoint, and his co-worker shot to death a few feet from him, no *other* reason appears

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This is plainly an unsatisfactory explanation, because it fails to address why counsel did not present Jerome Williams' description of the 5'7" gunman through the testimony of Detective Overton -- as Vines' previous counsel had done at the preliminary hearing. RT 400.

In any event, on this record, there simply could be no satisfactory explanation for failing to present the admissible, highly probative defense evidence of Jerome Williams' description of the second Florin Road robber.

[34] Respondent claims that "the preliminary hearing transcript contains no reference to Williams being frightened or upset during the interview." RB 104. This claim is false.

from the record why Williams would be in an "upset" and "frightened" mental state when he made his statement to the detective after the robbery.

This is clearly substantial evidence that Jerome Williams' statement was not the product of deliberation or reflection.

And ***there is no contrary evidence***.

This Court has made plain that the passage of a few hours' time itself will not preclude admissibility of a crime victim's statement under Evidence Code section 1240. E.g., *People v. Raley* (1992) 2 Cal.4th 870, 893-894 (crime victim's statement made 18 hours after event held spontaneous under section 1240); *People v. Brown* (2003) 31 Cal.4th 518, 541 (crime victim's statement made two-and-one-half hours after event held spontaneous under section 1240).

Similarly, the Court has made clear that even when a crime victim's statement is made in response to law enforcement questioning, it may nevertheless qualify as spontaneous under section 1240. E.g., *People v. Poggi* (1988) 45 Cal.3d 306, 319-320. There is no evidence that Detective Overton's question or questions to Williams were suggestive in any way. There is no evidence the questions were particularly detailed.[35] And there is no evidence that Williams had any motive to lie about the individual who had just robbed him at gunpoint and killed his co-worker.

There can be no satisfactory explanation for trial counsel's failure to introduce this highly probative evidence.

> "A lawyer who fails . . . to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises

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[35] While respondent claims Detective Overton engaged in "detailed questioning" of Jerome Williams (RB 55), there is *no evidence* in the record that the questioning was detailed at all; it may well have been no more a few questions, or even a single question, such as, for example, "Please tell me everything you remember about the robbery."

sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance."

Reynoso v. Giurbino (9th Cir. 2006) 462 F.3d 1099, 1112; accord, *Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083.

B. The Evidence Was Separately Admissible Under Federal Constitutional Fair Trial Guarantees.

The evidence that eyewitness Jerome Williams told Detective Overton that the robber with the silver gun was 5'7" was also admissible independently as a matter of federal due process, as discussed in the opening brief. AOB 161. Cases such as *Taylor v. Illinois* (1988) 484 U.S. 400, 408 and *Washington v. Texas* (1967) 388 U.S. 14, 18 make clear the defendants have a right to put before a jury evidence that could influence the determination of guilt or innocence. And cases such as *Rock v. Arkansas* (1987) 483 U.S. 44, 55 establish that state hearsay rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi, supra*, 410 U.S. 284, 300-301 and *Lilly v. Virginia, supra*, 527 U.S. 116, 130 mandate that state courts admit hearsay evidence of third-party culpability when the statements are made in circumstances that provide "considerable assurances of their reliability," (*id.*) even when that evidence might technically fall outside state-law hearsay exceptions.

Here, Jerome Williams' statement was made under circumstances giving considerable assurance of reliability – a statement made shortly after the crime, by an eyewitness and victim, still upset and frightened after the robbery, in response to law enforcement questioning, and with a level of factual specificity indicating a good memory and powers of observation.

Indeed, as noted in the opening brief, *the prosecution itself relied on Jerome Williams' statement to Detective Overton as part of the evidence it*

presented against Vines at the preliminary hearing. RT 374-376.[36] This is strongly probative of the statement's admissibility. *Green v. Georgia*

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[36] Prosecutor Robert Gold questioned Detective Overton at the preliminary hearing as follows:

"Q. As part of your investigation, did you interview a witness named Jerome Williams?
"A. Yes, I did.
"Q. Was that down at the Hall of Justice?
"A. Yes, it was.
"Q. And who is Jerome Williams?
"A. He's one of the employees that was working at that McDonald's restaurant that night.
"Q. Did you ask him about his observations of the incident that night?
"A. Yes, I did.
"Q. What did Mr. Williams tell you?
"A. In brief, he stated that he was in the back kitchen area by the sink. The faucet was running. The first thing he remembered hearing was one of his co-workers who he only knows by the nickname of Bubba saying words to the effect: Oh shit, oh shit. Moments later, he then heard one gun shot.
"Q. What time -- what time approximately did he tell you that he heard Bubba say those words?
"A. He said it was about five minutes before closing time, so about 10:55 P.M.
"Q. So he heard Bubba say those words, and then what did he hear?
"A. He heard one gun shot.
"Q. Did he tell you what type of gun that it sounded like?
"A. He said it sounded like a small caliber, possibly, a .22.
"Q. What did he do when he heard this gun shot?
"A. He said he was then confronted by a male Black adult who motioned with a handgun for him to lay down on the floor which he complied with.
"Q. Was anything said to get him down to the floor, or was there just a motion?
"A. There was just a motion with the hand gun.
"Q. Was the gun pointed at Mr. Williams?

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(1979) 442 U.S. 95, 97. The prosecution's use of the statement for its own purposes, alone, provides "considerable assurances of [the statement's] reliability." *Lilly v. Virginia, supra*, 527 U.S. 116, 130.

Respondent entirely fails to contest Vines' argument that Jerome Williams' statement would have been independently admissible under the Due Process Clause of the federal constitution.

The conclusion is inescapable. On this record, no rational tactical purpose can be hypothesized to support the failure of Vines' trial counsel to introduce this reliable, highly probative evidence of factual innocence.

"A. Yes, it was.
"Q. Did he get down on the floor?
"A. Yes, he did, face first. He then closed his eyes.
"Q. Did he tell you that he heard some things after that?
"A. Yes. He then heard a deep male voice saying words to the effect of: Hurry up, you're moving too slow, empty all the drawers.
"Q. And at some point in time, did he see Ronald Lee?
"A. Yes. Uhm, later on he saw the victim Ronald Lee and realized at that point that he had been the victim of a shooting.
"THE MAGISTRATE: Pardon me. Victim of a shooting you said?
"THE WITNESS: That's correct, Your Honor.
"Q. BY MR. GOLD: Did he tell you what he observed to lead to that conclusion?
"A. I believe he stated that he saw the victim with the bullet hole in the back of his head on the right side."
RT 374-376.

Notably, the prosecutor did not ask Detective Overton about the description of the 5'7" robber that Jerome Williams had given.

C. Respondent Has Failed to Refute Vines' Showing of Prejudice.

Vines demonstrated in the opening brief a reasonable probability that, but for his trial counsel's failure to introduce the highly probative evidence of Jerome Williams' description of the robber with the silver gun, the outcome would have been different, as to both guilt (AOB 163-167) and penalty (AOB 167).

1. Guilt Phase Prejudice.

Respondent's argument on guilt-phase prejudice is a single paragraph:

> "Furthermore, appellant has also failed to show any prejudice. The jury had already heard evidence from the other eyewitnesses about the second robber. Singh had testified that the man was 5'8". (RT 4102-4103, 4141.) Hickey could only say that the features of the second robber were consistent with appellant, but did not identify appellant as the perpetrator. (RT 3873, 3898-3899, 3916, 3939-3940.) Given this testimony from the live eyewitnesses, introducing the hearsay statement of Williams would have been cumulative and significantly less persuasive than the evidence already before the jury. Accordingly, appellant's claim must be rejected." RB 55.

The prosecution's theory of the case at trial was that there were two Florin Road robbers, Proby and Vines. According to the prosecution, Vines got a small silver handgun from Proby, and used it to shoot victim Ron Lee. RT 4452-4453.

To support this theory, the prosecution had the testimony of immunized witness Vera Penilton.

Against Penilton's testimony, there was the testimony of eyewitness Jeffrey Hickey, who had nothing to gain. Hickey identified the first robber as Proby. But despite agreeing that Vines' physical description was consistent with the second robber, Hickey never identified Vines as the second robber. RT 3899, 3939-3940. And Hickey believed that the

robbers had not worked at that McDonald's because of the way the robbery was conducted. Vines was a former employee of Hickey's at the Florin Road McDonald's

And there was the testimony of eyewitness Pravinesh Singh. He described the robber with the silver gun as five foot eight inches tall, wearing a green ski mask and black clothes. RT 4102, 4141.

Eyewitness Jerome Williams described the robber with the silver gun as a "male black in his late 20's or early 30's, approximately five foot seven, a hundred and forty to one hundred and sixty pounds," dark-complected, wearing a dark green mask and dark clothes. RT 400.

Plainly, Williams' description of the robber with the silver gun is strongly corroborative of Singh's testimony. Respondent does not dispute that Williams' description of the second robber was made under circumstances that provide considerable assurances of its reliability. AOB 161.

There were two eyewitnesses who testified. Respondent's position – that a third eyewitnesses' description of the robber, provided to law enforcement on the night of the robbery, would be *cumulative* – is absurd. No rational jury would regard the description of a perpetrator given to police by a third eyewitness to a serious crime as unimportant because it *matched* the description given by one of the other two eyewitnesses.

Indeed, it is highly likely that, had the jury heard the evidence of Jerome Williams' description of the robber with the silver gun – given in a statement to a detective a few hours after the robbery, while it was fresh in his mind – as a man five feet seven inches tall, at least one juror would have had a reasonable doubt that the six foot, three inch Sean Vines was, in fact, the second Florin Road robber.

2. Penalty Phase Prejudice.

Respondent entirely fails to answer Vines' showing of penalty phase prejudice. AOB 167.

V. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT VERA PENILTON'S TESTIMONY SHOULD BE VIEWED WITH DISTRUST BECAUSE SHE TESTIFIED UNDER A PROSECUTION GRANT OF USE IMMUNITY REQUIRES REVERSAL.

Vera Penilton, Proby's girlfriend, was the only witness to place Vines at the scene of the Florin Road crimes. The prosecution granted her use immunity in exchange for her testimony. As shown in the opening brief, the trial court reversibly erred in refusing to instruct the jury on defendant's request that her testimony should be viewed with distrust. AOB 170-179.

Respondent's answer to this argument is replete with false claims, distortions and material omissions.

Respondent asserts that in *People v. Hunter* (1989) 49 Cal.3d 957, "this Court addressed an identical claim as that raised by appellant, and found it to lack merit." RB 56.

This is false. *People v. Hunter* dealt only with transactional immunity, and *specifically distinguished* cases, such as this one, dealing with use immunity. *Hunter, supra*, 49 Cal.3d at pp. 977-978, citing *United States v. Leonard* (D.C. Cir. 1979) 494 F.2d 955, 961 fn. 11.

Moreover, contrary to respondent's claim, appellant has never argued that "the rationale of this Court's decision in *Hunter* has evaporated." RB 58. Rather, appellant has argued that the distinction this Court pointedly drew in *Hunter* between use immunity and transactional immunity should be honored in this case. See AOB 169-171.

Respondent additionally argues that *People v. Hampton* (1999) 73 Cal.App.4th 710 disposes of this issue. Respondent neglects to mention that the statements it relies on in *Hampton* are the sheerest dictum, because the record in that case did not even reveal what *type* of immunity the witness

there had been provided, use or transactional. *Id.* at p. 723. Accordingly, the *Hampton* opinion's assertion that it was only following *Hunter* is plainly defective.[37]

Respondent further contends that "[a]ppellant argues at length that immunized witnesses generally . . . had such great motives to lie that they should be deemed the equivalent of accomplices." RB 60.

Respondent has misconstrued appellant's argument, which carefully distinguishes between witnesses who have been granted transactional immunity, and witnesses, like Penilton, who have been granted only use immunity: the latter class of witnesses, in the words of this Court, have a "direct, compelling motive to lie" – because if witnesses granted only use immunity do not testify as the prosecutor wishes, they may yet face prosecution for their underlying offenses. AOB 170, quoting *Hunter, supra*, 49 Cal.3d at p. 978.

Contrary to respondent's contention, appellant seeks no sweeping new rule of law – appellant in fact has proposed that a narrow holding would correctly resolve this case.

Appellant's *actual* argument is that a cautionary instruction may not be required in all cases in which use immunity is granted by the prosecutor, but is required when, as in this case four conditions concur: (a) a witness has given a prior statement to law enforcement inculpating the defendant, (b) the witness testifies under a grant of use immunity, (c) the witness

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[37] Respondent additionally claims that "even appellant acknowledges [Penilton] was not an accomplice. (AOB 177, fn. 47.)" RB 60. This, too, is wrong – appellant specifically argued that there *was* sufficient evidence that Penilton was an accomplice, though not enough evidence to show she was an accomplice as a matter of law. AOB 177 fn. 47. Appellant noted that "Penilton's status as an accomplice, or not, was in fact debatable." AOB 178.

testifies as to admissions purportedly made by the defendant, and (d) a cautionary instruction is requested. AOB 173-174.

Respondent fails to answer the argument appellant has actually made.

Finally – and perhaps most incredibly – respondent argues:

> "There was nothing to suggest that Penilton's description of her observations was a product of an effort to falsely inculpate appellant." RB 60.

There was, in fact, *ample evidence in the record strongly pointing to the conclusion that Vera Penilton falsely testified against Sean Vines.* That evidence is discussed at AOB 140-143.

It is simply ignored by respondent. But it cannot, in fairness, be ignored by this Court.

VI. THE PROSECUTOR'S PRESENTATION OF FALSE TESTIMONY BY VERA PENILTON REQUIRES REVERSAL.

Respondent claims there is no evidence that William Proby was the father of any of Vera Penilton's children, and no evidence that the prosecutor knew Penilton's testimony to the contrary was false. RB 62.

Respondent is wrong on both counts.

The prosecutor told the jury in his opening statement:

> "At this time in September of 1994
> William Proby had a girlfriend name[d] Vera Penilton. Vera is living over in the Del Paso Heights area.
>
> "She was 16 years old. She had one child, *had another child on the way.* She was -- William Proby goes by the nickname of Deon -- Deon's girlfriend, and Deon was living over at Vera's home at this time." RT 3044 (emphasis added).

The evidence showed that Penilton's first child was born on August 20, 1994. RT 3516. The prosecutor also elicited from Penilton that the next month, in September 1994, she was pregnant again. RT 3516.

And, Penilton testified, she had met Proby in April 1994, and was living with him that summer. RT 3518, 3516.

Thus, the testimony of Vera Penilton showed that, *while Penilton was living with Proby in an intimate relationship, she became pregnant for a second time.*

At the time of trial, Penilton had three children. RT 3684.

Prosecution witness Sonya Williams met Vera Penilton for the first and only time in September 1994. RT 3071. In her videotaped interview with law enforcement, Sonya Williams told officers that in that encounter, "me and Vera, we was just talking about babies, cuz she just had a baby by, um, Deon [Proby]. *And she thinks pregnant again,* and we was just talking and stuff." CT 4902 (emphasis added). Plainly, Penilton told Williams,

during a social occasion involving both Proby and Vines, that she had become pregnant by Proby and had his baby.

Williams was not speculating – she was reporting what Penilton had told her when they were "just talking." Respondent's assertion that Williams may have been lying or guessing is completely unfounded. Respondent suggests no reason why Williams might have lied about this fact in her interview with law enforcement, and supplies nothing but its own speculation that these statements might be unreliable – without suggesting any reason *why* these statements to officers might be unreliable.

Notably, the prosecutor at trial found Williams' other statements to law enforcement *in this same interview* reliable enough to use in his case-in-chief against Vines. E.g., RT 3114.

Thus, the obvious and unavoidable inference is that at least one of Penilton's children was fathered by Vines' codefendant Proby.

Yet the prosecutor deliberately elicited testimony from Penilton that Proby was not the father of any of her children. RT 3684.

On this record, the prosecutor knew, or should have known,[38] that Penilton's testimony was false. A contrary conclusion would have required the supposition that Penilton, while living in her mother's house with Proby, and while in an unmarried romantic relationship with Proby, sharing

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[38] Respondent insists that for the Court to find prosecutorial misconduct, it must be shown that the prosecutor actually knew the testimony of his witness was false. RB 62.

This Court's cases unequivocally say otherwise. E.g., *In re Jackson* (1992) 3 Cal.4th 578, 594-595 (prosecution has a duty "to correct any testimony of its own witnesses which it knew, *or should have known*, was false or misleading") (emphasis added); *People v. Dickey* (2005) 35 Cal.4th 884, 909 (same); accord, *United States v. Agurs* (1976) 427 U.S. 97, 103 (when prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.").

a bed, became pregnant by another man. There is no evidence to support *this* speculation either. It would additionally require the prosecutor to suppose that, during a law enforcement interview which the prosecutor found, in other respects, reliable enough to use at a death penalty trial, Sonya Williams lied about her conversation with Penilton -- though no reason for such a lie can even be hypothesized by respondent.

Prosecutors are, at least in theory, held to the highest ethical standards, even in death penalty cases. There can be no serious doubt that the prosecutor in this case transgressed those standards.

Vines demonstrated that the prosecutor's failure to correct Penilton's false testimony prejudiced him, pointing out that Penilton's credibility was nothing short of essential to the prosecution's case. The prosecutor's correction of this false testimony would have affected the jury's deliberations in at least three ways, as shown at AOB 185-186.

Respondent make no effort to refute this showing.

VII. VINES' TRIAL LAWYER INEXCUSABLY FAILED TO IMPEACH THE PROSECUTION'S STAR WITNESS, VERA PENILTON, WITH INFORMATION SHOWING SHE PERJURED HERSELF BY TESTIFYING THAT CODEFENDANT PROBY WAS NOT THE FATHER OF ANY OF HER CHILDREN.

As discussed in the opening brief and in the immediately preceding argument, the record contained substantial evidence that Vera Penilton, the only witness to place Vines at the scene of the Florin Road robbery-murder, lied to the jury when she testified that codefendant William Deon Proby was not the father of any of her three children. Vines' trial counsel, however, failed to even attempt to impeach Penilton with evidence of her untruth.

Respondent repeats its meritless contention that there was no evidence that Penilton did have a child fathered by Proby. RB 65. Respondent asserts there is "absolutely nothing" to explain the basis for Sonya Williams' statement that Penilton told her that she had a baby by Proby.

Respondent is willfully blind to the record – it clearly shows that, when Sonya Williams met Vera Penilton for the first and only time, she learned in conversation from Penilton that Penilton had a baby by Proby, and was pregnant again:

> "me and Vera, *we was just talking about babies*, cuz she just had a baby by, um, Deon [Proby]. And she thinks pregnant again, and *we was just talking* and stuff." CT 4902 (emphasis added).

The obvious inference is that Williams learned of these facts <u>because Penilton told her</u>, when they were "just talking." There is nothing that would suggest, contrary to all reason, that Williams did not learn of the facts in her conversation with Penilton, making it admissible under

Evidence Code section 702. Respondent's tortured reading of the record is insupportable.

Moreover, respondent ignores the fact, admitted by the prosecutor (RT 3044), that Penilton became pregnant for a second time in August or September 1994, when she was living with Proby at her mother's house, in an intimate boyfriend/girlfriend relationship with Proby. Again, the obvious inference is that she became pregnant by Proby, who was the father of her second child. There is nothing to support any contrary speculation.

The evidence that Penilton lied was clearly admissible, and no reason appears why Vines' lawyer should not have impeached her.

Respondent further insists that, because Vines' trial counsel was able to impeach Penilton on other grounds, his failure to bring up Penilton's perjury was inconsequential.

But because Vines' lawyer was able to impeach the prosecution's most important witness on other grounds does not mean that impeachment on these grounds would not have made a decisive impact on the jury.

The Supreme Court has specifically rejected the notion that impeachment on some grounds can obviate the necessity of exposing false testimony by a prosecution witness, or preclude prejudice arising from such perjury. *Napue v. Illinois* (1959) 360 U.S. 264, 270.

The case against Vines was far from strong, as explained elsewhere.

As discussed in the opening brief, the evidence that Penilton had lied about Proby in this way was unique and powerful impeachment evidence. It would have demonstrated, among other things, that Penilton concealed the extent of her true relationship with Proby, and that Penilton did not just lie to police officers (which she had admitted) – she lied on the stand to the jury. Jurors do not appreciate perjured testimony. As noted above, Penilton was the *only* witness to place Vines at the scene of the Florin Road crimes. It was, therefore, vital to expose her false testimony. And as the

Supreme Court has pointed out, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence". *Napue v. Illinois, supra*, 360 U.S. 264, 269. And in this case, the jury had its doubts about Penilton's testimony, and about Vines' actual guilt on the Florin Road charges. RT 4560, CT 952. Impeachment of Penilton – whose testimony was nothing less than essential for the prosecution case on the Florin Road charges, and for the prosecution's case for the death penalty -- with evidence of her perjury on the witness stand would likely have turned the tide.

VIII. BECAUSE THE PROSECUTOR REFERRED TO AN INFLAMMATORY "FACT" NOT IN EVIDENCE BY STATING THAT PROSECUTION WITNESS MICHAEL BAUMANN "PUTS HIMSELF IN JEOPARDY AND RISK" OF BEING KILLED BY TESTIFYING AGAINST SEAN VINES, REVERSAL IS REQUIRED.

A. The Record Unambiguously Supports the Claim that the Prosecutor told the Jury that Baumann Actually Risked His Life by Testifying Against Vines.

In the opening brief, Vines showed that the prosecutor improperly told the jury that prosecution witness Michael Baumann had actually risked his life by testifying against Vines. This supposed "fact" was not in evidence. AOB 196-210. It is, of course, misconduct for a prosecutor to refer to facts not in evidence, and violates the Sixth Amendment, the federal constitutional right to due process, and state law standards. AOB 200.

Respondent flatly insists:

"The record does not support this claim." RB 68.

It is, therefore, appropriate to review the record.

The prosecutor brought out in his examination of Baumann that Baumann was fearful for his life, and the lives of members of his family, if he testified against Vines. RT 3446, 3479.

In his closing argument , the prosecutor told the jury that Baumann

> "is scared to death to sit in front of this man [Vines] and say these things [identifying Vines]." RT 4529.

The prosecutor told the jury that Michael Baumann

> "cares about his family, and he doesn't want his family to get hurt. He wouldn't even tell us the name of the family member that works with Mr. Vines because maybe he is hoping Mr. Vines forgot. He was afraid." RT 4529.

But the prosecutor was not content with the evidence of Baumann's fear. He had to valorize his witness:

> "We submit Michael Baumann is somewhat of your quiet hero. He is in a tough jam, but he came up on it." RT 4433.

Thus, the prosecutor told the jury, Baumann was a "hero" and did the right thing by testifying against Vines *not just because he was fearful, but because he was in a "tough jam."*

The prosecutor's statement unquestionably denotes not just a subjective fear – but the objective reality of a "tough jam." Plainly, the prosecutor was not just "articulating Baumann's perspective," as respondent disingenuously contends, but was asserting Baumann actually was at risk.

The prosecutor went on to state that Baumann, who had told the jury that if you testify against somebody, you could die, "risk[s] that" by testifying. RT 4433.

Thus, the prosecutor informed the jury, Baumann was in a tough jam and *risked death* by testifying against Vines.

The prosecutor's argument drove the point home:

> "It would be real easy for [Michael Baumann] to say I don't know who it was, ***and he is off the hook. He puts himself into jeopardy and risk by saying it is him***." RT 4530 (emphasis added).

Respondent's argument that the record does not support the claim that the prosecutor told the jury that Michael Baumann was actually in mortal danger as a result of his testimony is blatantly false.

B. The Prosecutor's Improper Reference to An Inflammatory "Fact" Outside the Record was Inherently Prejudicial.

There is no dispute as to one thing – there was no evidence before the jury to show that Michael Baumann actually did place himself in mortal danger by testifying against Sean Vines.

In a perfunctory argument, respondent claims that, because there was no objection to the prosecutor's improper argument, the issue is waived. But respondent offers no analysis to support this assertion. RB 71-72.

As this Court has made clear, prosecutorial misconduct is not waived even when no objection is made if an admonition would not have cured the harm caused by the misconduct. *People v. Valdez* (2004) 32 Cal.4th 73, 122. This Court has further clarified that misconduct is not waived when it is "inherently prejudicial." *People v. Dennis* (1999) 17 Cal.4th 468, 521.

The inherently prejudicial nature of the prosecutor's misconduct is demonstrated at AOB 201-202. The prosecutor's representation, in his rebuttal argument shortly before deliberations began, that Baumann actually *risked his life* because he testified against murder defendant Vines was not information the jury could rationally be expected to disregard even if admonished to do so. It was nothing less than "dynamite." *People v. Hill* (1998) 17 Cal.4th 800, 828.

C. Reversal Is Required on Guilt and on Penalty.

Respondent contends any prejudice was obviated because the prosecutor elicited from Bauman that Vines did not "directly threaten" him. RT 3445.

As the jury was instructed, however, there are two types of evidence – direct, and circumstantial. RT 4369. While Baumann testified that Vines did not directly threaten him, he went on to testify to his fear that he would be killed for testifying against Vines. RT 3446, 3479. The prosecutor then

represented to the jury in closing argument that Baumann was, in fact, in actual danger of losing his life for testifying against Vines: "[Baumann] puts himself into jeopardy and risk by saying it is [Vines]." RT 4530. The unavoidable implication is that, although Baumann was not *directly* threatened by Vines, Baumann was at risk because Vines might have him killed even while Vines was incarcerated. The state of actual mortal risk does not depend on a direct threat by Vines. It is entirely plausible in the abstract that a witness may be killed for testifying against a murder defendant, without ever being directly threatened by the defendant himself. Baumann's statement he was not "directly" threatened by Vines did not negate the prosecutor's representation that Baumann was at actual risk of being killed for his testimony.

Moreover, the fact that there was no evidence before the jury that Vines had directly or indirectly threatened Baumann's life, or otherwise posed any risk to Baumann in return for his testimony, does not, contrary to respondent, somehow obviate the misconduct – instead, it *confirms* it. The Sixth Amendment and due process violations at issue here arise from the prosecutor's informing the jury of facts *not in evidence* – if there had been evidence that Baumann's life was at risk, there would have been no such misconduct. But incontestably, there was no such evidence.

For the same reason, the prosecutor's statement that there was no evidence that Vines "directly threatened" Baumann, and defense counsel's argument that there was no evidence of any threat, are also beside the point.[39] If there *had* been evidence of a threat by Vines, direct or indirect, there would be no misconduct arising from prosecution references to a "fact" not in evidence, and this issue would not have been raised.

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[39] Contrary to respondent's assertion at RB 72, the trial court did not tell the jury there was no evidence of any actual threat.

As demonstrated in the opening brief, the misconduct amounts to federal constitutional error. The prosecutor served as his own witness, not subject to cross-examination, in contravention of the Sixth Amendment, and violated due process as well. Vines showed why reversal is required in his opening brief, in detailed, fact-specific discussions as to the guilt phase (AOB 203-208) and the penalty phase (AOB 208-210).

Baumann's identification of Vines as the robber was shaky. AOB 205-206. The prosecution's false representation -- that Baumann actually risked his life by testifying -- exalted Baumann's credibility, and illegitimately boosted the prosecution case. If Baumann did testify despite danger to his life, then Baumann was, indeed, a "quiet hero," as the prosecutor said (RT 4433), and we all want to believe heroes. The prosecutor used his improper "evidence" to underhandedly shore up his weak, but critical, witness, surrounding him with a halo of virtue and credibility. AOB 206.

This argument was raised in the opening brief, but respondent fails to respond to it.

And ***the prosecutor's claim that Baumann was in mortal danger for testifying against Vines strongly supported an improper inference of murderous criminal propensity***. AOB 206-208. " '[P]ropensity evidence' . . . creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States* (1997) 519 U.S. 172, 181.

Respondent does not take issue with this argument.

For the reasons set forth in the opening brief, none of which are addressed by respondent, Vines was prejudiced by the prosecutor's misconduct in the trial of the Florin Road crimes as well. AOB 207-208.

With reference to the penalty phase, the opening brief demonstrated that the prosecutor's implication that Vines was *homicidally dangerous*

even while incarcerated was particularly likely to prejudice the jury against life and in favor of the death penalty. AOB 208-210.

Respondent bears the burden of demonstrating this egregious misconduct was harmless beyond a reasonable doubt at both the guilt and penalty phases – a burden it does not even *attempt* to meet by analysis of the evidentiary picture in this case.

> "'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.'"

People v. Hill, supra, 17 Cal.4th at p. 828. Reversal is required here.

IX. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY ADMITTING AN IRRELEVANT AND INFLAMMATORY STATEMENT ATTRIBUTED TO VINES BY SONYA WILLIAMS.

A. Respondent Fails to Advance Any Viable Basis on Which the Challenged Statement Would Be Admissible.

Over defense objection, the trial court allowed the prosecutor to introduce into evidence statements Sonya Williams made in a videotaped interview with law enforcement relating a statement she claimed Vines made to her regarding the four people in the freezer at the Watt Avenue McDonald's robbery. In response to Sonya Williams' question about what he would have done if the people in the freezer had died, Vines said: "'They just would have died.'" CT 4916. Because this alleged statement was not relevant to any disputed fact, and was inherently inflammatory, the trial court was wrong to admit it. The error was not just inflammatory but prejudicial. AOB 211-220.

Respondent contends the evidence was admissible, claiming it was relevant to show intent to falsely imprison. RB 78. But as pointed out in the opening brief, it was never in dispute that the Watt Avenue robber intended to falsely imprison the employees – the disputed issue was identity, not intent. Because the intent element was never in dispute, it had no probative value on a disputed material issue, as shown in the opening brief (AOB 214).

Respondent does not dispute Vines' showing that this was the sort of evidence "uniquely tend[ing] to evoke an emotional bias against the defendant . . ." AOB 215, *People v. Karis* (1988) 46 Cal.3d 612, 638. The statement should have been excluded as substantially more prejudicial than probative under Evidence Code section 352.

Respondent also claims that the evidence of Vines' alleged statements to Williams regarding the people in the freezer was admissible because it demonstrated that the movement of the victims was not "merely incidental to commission of robbery," but was done "for a purpose above and beyond completing the robbery." RB 78.

This justification may sound plausible in the abstract – but it fails when the *actual content* of the alleged statement is considered: Sonya Williams asked Vines, according to her statement to police, what he would have done if the people in the freezer had died. His answer was, according to Williams:

"'They just would have died.'" CT 4916.

On its face, appellant's alleged words do not demonstrate an independent purpose apart from robbery. This statement does not demonstrate that there was any purpose *beyond* robbery. If it is credited, what it demonstrates is indifference – and the inference is that the speaker has *no* independent purpose other than robbery, not the opposite. For the prosecutor to seek admission of this statement in order to demonstrate a purpose in addition to robbery would be self-defeating. In fact, the prosecutor did not do so; the rationale is invented for appellate purposes.

The trial court erred in denying Vines' federal and state law objections to this evidence.

B. The Statement Was Inflammatory and Prejudicial at Both the Guilt and Penalty Phases.

Vines showed that the trial court's erroneous admission of the statement Sonya Williams claimed he made in response to her question prejudiced him at the guilt phase with respect to both the Watt Avenue and Florin Road crimes, and at the penalty phase. AOB 217-219.

Respondent addresses only guilt phase prejudice as it affected trial of the Watt Avenue offenses. Its argument is that the "the strength of the eyewitness testimony" makes it impossible to show prejudice. RB 78. In support of this argument, respondent offers only the following: "[Eyewitnesses] Zaharko, Baumann, and Aguilar all described having appellant point his gun right at their heads as he robbed the restaurant and locked them in the freezer." RB 78.

A fair examination of the record, however, shows this was a far closer case at trial than respondent is willing to admit.

Zaharko was an equivocal witness – he had testified that he didn't feel he had sufficient evidence to stand up in court and identify Vines as the robber. At the scene, he told officers he couldn't positively identify Vines from what he had observed. RT 3335, 3373.

Baumann's identification of Vines as the robber was vacillating and uncertain; he testified it wasn't until after he had talked to authority figures not present at the robbery – a police officer and his store manager – that "it seemed like it could be" Vines. RT 3416-3417.

Aguilar did not tell the officer who interviewed her just after the robbery that the robber was Vines, and eventually stated the robber was just a little taller than Zaharko – who is 5'9" -- that is, six inches shorter than Vines. RT 2447, 3250.

And respondent entirely fails to mention *the fourth eyewitness* – John Burreson, who knew Vines, and testified he did *not* recognize Vines as the robber. Burreson testified that the robber did not walk with Vines' characteristic limp. Critically, Burreson described the robber as about *three inches shorter than the 6'3" Vines*. RT 4081-4085, 4093-4095.

There are, of course, cases in which identifying testimony by eyewitnesses is, indeed, overwhelming. This is not one of those cases. The evidence against Vines on the Watt Avenue counts was equivocal enough

for a jury taking the reasonable doubt standard seriously to return a verdict of not guilty.

The improperly admitted evidence of Vines' statement, reported by Sonya Williams in the videotaped interview she gave police, was likely important to the jury's deliberations – the jurors asked for the transcript of her videotaped interview during deliberations. RT 4560.

Respondent ignores this.

Vines showed in the opening brief that the admission of his purported statement that the four people in freezer "just would have died" was just the sort of comment that is inherently prejudicial because it is likely to evoke an emotional bias against the speaker.

As discussed in the opening brief, admission of this statement further prejudiced Vines on the trial of the Florin Road counts. AOB 218-219.

Respondent fails to address the prejudice to Vines on the Florin Road counts.

Vines also showed that the admission, in violation of federal and state law, of his alleged statement regarding the fate of the four employees locked in the Watt Avenue freezer prejudiced him at the penalty phase. AOB 219-220.

Respondent ignores Vines' showing of penalty phase prejudice.

X. THE ERRONEOUS ADMISSION OF THE "THREATS" LETTER FROM VINES TO SEAN GILBERT WAS PREJUDICIAL.

Over defense objections, the trial court allowed the prosecution to read to the jury a portion of a letter, redacted by the prosecutor, from Vines to prosecution witness Sean Gilbert. RT 3291-3293. The redacted version of the letter contained a threat of physical injury to Sean Gilbert, and a threat of harm to a non-witness, Anthony Motley, because of an unrelated matter. Vines demonstrated the letter was improperly admitted – its contents were not admissible as party admissions, were not relevant, and any event were more prejudicial than probative and thus should have been excluded under Evidence Code section 352. AOB 222-231.

Respondent contends the letter was properly admitted for a single reason:

> "The admission of the evidence was correct because the threats were admissible as evidence of consciousness of guilt." RB 79.

But respondent fails to explain *how* the particular threat at issue – and respondent only addresses the threat to Sean Gilbert -- showed any consciousness of guilt. No admissions of guilt, or even allusions to any admissions, were made by Vines in the letter. On its face, the statement at issue here demonstrates no mental state indicating guilt. It is prejudicial *not* because it demonstrates consciousness of guilt, but because it is evidence of a propensity for other criminal behavior including violence.

Respondent's argument that, under appellant's approach, "all threats would have to be deemed be consciousness of innocence, rather than guilt" (RB 80), is ridiculous. Threats *do* have to be examined to see if they gave rise to an inference of consciousness of guilt; if, as in this case, they do not, then they are not admissible to show consciousness of guilt. This is not a new rule.

Even assuming that evidence of the threat to Gilbert somehow showed consciousness of guilt, the letter nevertheless should have been excluded as substantially more prejudicial than probative under Evidence Code section 352. The evidence of threat was also evidence of violent criminal propensity. Evidence of violent propensity is particularly likely to prejudice a jury in a case such as this, involving an intentional killing.

Moreover, as shown in the opening brief, the letter was misleadingly edited by the prosecutor to give rise to the false implication that Vines was "mad as hell" at Gilbert was because of Gilbert's statements to law enforcement. CT 4878-4879. In fact, the letter in its original, *unedited* version shows that the reason Vines was "mad as hell" with Gilbert had to do with Gilbert's behavior with one of Vines' girlfriends, and had nothing to do with this case. CT 4874-4875; AOB 227-228 fn. 56. Respondent does not dispute this. Plainly, this "doctored" evidence was more potent.

The letter admitted into evidence also contained an unrelated threat to a third person, Anthony Motley, suggesting Vines would retaliate against Motley for planning to "jump" his friend Debbie Allen when Vines and Allen went to retrieve her clothes. AOB 226-227. Respondent does not even attempt to defend this "threat" evidence as admissible on any theory, let alone more probative than prejudicial.

The United States Supreme Court has made clear that "'propensity evidence' . . . creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States* (1997) 519 U.S. 172, 181. Vines demonstrated in the opening brief that the letter was prejudicial because it comprised evidence of violent propensity.

Vines discussed in his opening brief how this evidence, tending to show a propensity for violence, prejudiced him at the guilt phase as to both the Florin Road and Watt Avenue charges. AOB 229-230. Respondent

fails to address the gravamen of prejudice, which is that the letter provided evidence of violent propensity. RB 80.

Vines also showed in his opening brief that this improperly admitted evidence prejudiced him at the penalty phase. AOB 230-231.

It is especially significant that, during their penalty phase deliberations, the jurors asked to see this letter from Vines containing threats. RT 4922. Apart from factual guilt, which had already been decided, the letter was relevant to no disputed fact issue at the penalty phase. It did, however, show a propensity for violence; the type of evidence that "creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States, supra,* 519 U.S. 172, 181.

Respondent fails to address penalty phase prejudice.

XII. VINES' CONVICTIONS ON THE WATT AVENUE COUNTS MUST BE REVERSED DUE TO THE PREJUDICIAL "SPILLOVER" EFFECT OF ERRORS IN THE TRIAL OF THE FLORIN ROAD COUNTS.

Respondent claims that appellant's argument that the case against him on the Watt Avenue counts "was not a strong one" is "much different and inconsistent with" his argument that the trial court prejudicially erred by refusing to sever the Florin Road charges because, in making the latter argument, appellant contended that "the evidence against him on the Watt Avenue charges was 'substantially stronger' than the evidence against him on the Florin Road charges." RB 86.

There is no inconsistency. The fact that the Florin Road case against Vines was much weaker than the Watt Avenue case does not mean that the Watt Avenue case was a strong one. It was not.

Vines has discussed in detail the evidence presented against him on the Watt Avenue charges, and demonstrated its weaknesses. See AOB 203-206. Respondent's claims to the contrary do not substitute for analysis of the evidence. Vines welcomes this Court's inspection of the record, which reveals the relative weakness of both sets of charges.

Respondent's analysis of the "spillover" effect is cursory. Respondent fails to address the fact that the central disputed factual issue for both the Watt Avenue and Florin Road sets of offenses was *identity*. And because of the general similarity of the charges, the jury was likely to infer that "because he did it once, he did it again." There were no instructions expressly directing the jury that evidence on one set of offenses was not to be considered as proof of guilt on the other set of offenses; thus, it is that much more likely that the spillover error from one set of charges prejudicially affected the jury's determination of the other set of charges.

XIII. VINES' CONVICTIONS FOR KIDNAPPING TO COMMIT ROBBERY MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE.

The record shows that the Watt Avenue robber ordered four employees to move from other areas of the restaurant to the freezer in the basement.

This Court has repeatedly held that the movement of robbery victims inside the premises in which a robbery occurs is insufficient to constitute asportation as a matter of law. E.g., *People v. Rayford* (1994) 9 Cal.4th 1, 12-13; see AOB 242-243. In particular, movement inside the premises fails to satisfy the first component of the asportation requirement, that the movement of the victims not be "merely incidental to the commission of the robbery." *Id.*, citing *People v. Daniels* (1969) 71 Cal.2d 1119, 1140; accord, *People v. Williams* (1970) 2 Cal.3d 894; *People v. Mutch* (1971) 4 Cal.3d 389; *People v. Hoard* (2002) 103 Cal.App.4th 599, 607. This is a bright-line rule.

The second component of the asportation requirement is that the movement "substantially increase the risk of harm beyond that inherent in the crime of robbery." *In re Early* (1975) 14 Cal.3d 122, 127. Both components must be satisfied for there to be substantial evidence of asportation.

Respondent's argument focuses on the second component. Respondent fails to supply any reason why the rule of *Rayford, Daniels, Williams, Mutch* and *Hoard* -- that the movement of robbery victims inside the premises occurs is insufficient to satisfy the *first* component of the asportation requirement – should not apply to this case.

XVII. THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE AT THE PENALTY PHASE A VIDEOTAPE OF EMOTIONALLY AFFECTING LIVE MUSICAL PERFORMANCES BY VICTIM RON LEE.

Over defense objection, the trial court approved the prosecutor's introduction of Exhibit 130, a videotape showing musical and dance performances by victim Ron Lee, including part of his rendition of a song about an absent loved one, the Stevie Wonder hit, "I Just Called To Say I Love You."

Vines showed in the opening brief that the trial court's ruling was prejudicially erroneous. AOB 277-290.

Respondent argues that since the defense put on evidence to "humanize" Vines at the penalty phase, the prosecution was entitled to do the same. RB 116.

But this is not in question; the Supreme Court has made clear that the prosecution is entitled to put on evidence of victim impact. *Payne v. Tennessee* (1991) 501 U.S. 808. The question is whether *this* evidence – a videotape of the victim's singing and dancing to music, communicating with his audience – was so fundamentally unfair that it violated due process guarantees.

Respondent argues that admission of the videotape was "appropriate" because Vines "also introduced evidence of his own hip hop dancing through the testimony of his sister." RB 117. Aside from the fact that Vines' evidence was introduced after the videotape was played by the jury and not before, that Vines introduced a defense witness's testimony regarding his dancing might be argued as justifying a prosecution witness's testimony as to the victim's singing and dancing – but not the playing of

videotapes of the victim's performances, which is qualitatively quite different.

Respondent chooses to ignore that, as shown in the opening brief, the videotape was entirely cumulative – it added nothing of substance to the testimony of Lee's cousin, Littell Williams IIII, who described Lee's musical activities in the context of his life. AOB 282-283.[40]

In the opening brief, Vines discussed *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, holding that a victim-impact videotape was improperly admitted in the sentencing phase of a criminal trial. AOB 284-285. Recently, this Court has described *Salazar* as presenting an "extreme example" of a "due process infirmity." *People v. Robinson* (2005) 37 Cal.4th 592, 652.

Respondent distinguishes this case from *Salazar* because here, unlike in *Salazar*, the video included no images of the victim as an infant, but "contained footage of Lee when he was a senior in high school, which was just a couple of years earlier." RB 117.

But respondent overlooks the pertinent point – that the tape of Ron Lee did not depict him as he was at or around the time of his death – a man living on his own, working as an assistant restaurant manager, the father of a young child – but instead as he was at an earlier stage of his life, as a boy living at home, before the profound changes that brought him to young adulthood. The videotape did not portray the adult Ron Lee who was lost to his loved ones – it depicted an adolescent. The loss that Lee's family suffered was not the loss of an adorable youngster – but of a young man enmeshed in the workaday world, living a very different life as a working person and father.

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[40] Compare *United States v. McVeigh* (10th Cir. 1999) 153 F.3d 1166, 1221 and fn. 47, noting that the prejudicial impact of the victim-impact evidence was minimized by the exclusion of home videos.

And, perhaps most critically, respondent fails to address the communicative nature of the videotape of Ron Lee's singing.

The videotape in this case was not, as was ruled inadmissible in *Salazar*, a montage of still photographs. Universally, humans recognize that watching a videotape of another person conveys, subjectively, far more, and far more affectingly, about that person than all but the most remarkable photographs.

Nor was it merely a tape of some activity the victim engaged in while alive, with no particular communicative purpose.

It is instructive to consider *State v. Allen* (N.M. 1999) 128 N.M. 482, 505, 994 P.2d 728, 751, a death penalty case in which the New Mexico Supreme Court approved the admission of a videotape of the victim in a careful opinion, conscious of constitutional constraints. The court explained:

> "The videotape had been edited so that it lasted only three minutes. It depicted and described a campground scene during an elk-hunting trip a few months prior to the victim's death. Neither the victim nor any other person were in view during most of the video. During the few moments when the victim did appear, she was shown eating lunch and standing beside other campers. She was dressed in a jacket and blue jeans. *There were no close-ups, and she did not speak.*
>
> "No members of the victim's family testified regarding the emotional impact of the victim's disappearance and death. . . ."

State v. Allen, supra, 994 P.2d at p. 751 (emphasis added). Under these circumstances, the court found the videotape was admissible to give a "brief glimpse" of the victim's life under *Payne*. *Id.*

Here, in contrast to *Allen*, there was extensive victim impact testimony, as shown in the opening brief. And that testimony could hardly have been more emotional. See, e.g., the testimony of Diane Williams ("all of a sudden I will burst out crying because I just can't accept it. I just can't come to realize that this has happened. It's just so devastating" (RT 4662))

and Littell Williams III ("It's like I haven't got a grip on it yet in this life. Every time that I do, it's like I break down, and I want to try to stop me from thinking about it so hard. . . . "I have no joy in Christmas or whatever, you know. It's like I am just living from day to day." (RT 4674-4675).

And here, in stark contrast to *State v. Allen* – and unlike any case cited by respondent – the videotape showed the victim not just engaging in an activity he enjoyed, but *specifically engaged in a verbal communicative activity directed at the audience for the videotape.*

The videotape of murder victim Ron Lee singing "I Just Called To Say I Love You" -- and assuring his audience that he "means it from the bottom of [his] heart" – is more emotionally wrenching that watching a murder victim eating lunch on a hunting trip.

It is far more poignant and affecting than hearing Celine Dion signing the theme song from a movie, as in *Salazar*.

Ron Lee spoke directly to the jurors from the grave. He sang to them from the bottom of his heart.

No juror could fail to be deeply affected by this videotape.

It is no wonder that prosecutor Gold told the jury it was:

> "real hard to watch that video." RT 4883.

Its introduction was fundamentally unfair.

The videotaped evidence here passed beyond "the outer reaches of evidence admissible as a circumstance of the crime" under this Court's precedents. *People v. Edwards* (1991) 54 Cal.3d 787, 836. The videotape that was played for Sean Vines' jury is just the sort of evidence that "invites an irrational, purely subjective response" (*id.*) and, accordingly, its presentation to the jurors violated Vines' right to due process at the penalty phase of this trial. *Id.*

Respondent's single-paragraph string cite to cases setting forth the standard of prejudice (RB 117) is no argument on prejudice at all.

This was a close case on penalty. There was evidence about the physical abuse Vines had suffered as a child. Moreover, substantial evidence was presented that Sean Vines had a number of redeeming qualities, and cared for and helped others. See RT 4720, 4737, 4804, 4794-4795, 4845. By any standard, he was, and is, far from the worst of the worst. And during penalty phase deliberations, the jury continued to harbor doubts about Vines' actual guilt as the Florin Road shooter, as indicated by the jury's request for a read-back of Florin Road eyewitness Jeffrey Hickey's guilt-phase testimony. CT 952.

Death was by no means a foregone conclusion. In these circumstances, there is more than a reasonable possibility that admission of this inflammatory, emotionally-potent videotape tipped the balance.

The penalty phase judgment should be reversed.

CONCLUSION.

For the foregoing reasons, as well as those set forth in Sean Vines' opening and supplemental briefs, the judgment should be reversed.

DATE: December 26, 2006

Respectfully submitted,

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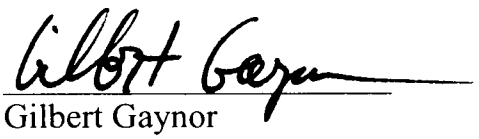

Gilbert Gaynor

CERTIFICATE OF WORD COUNT

I certify that the foregoing appellant's reply brief contains 33,648 words, exclusive of tables, according to the word-count feature of the Microsoft Word program on which it was produced.

DATE: December 26, 2006

Respectfully submitted,

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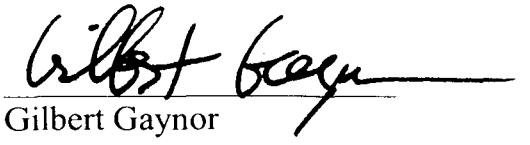

Gilbert Gaynor

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA BARBARA)

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is P.O. Box 41159, Santa Barbara, CA 93140-1159.

On December 26 2006 I served the document entitled **APPELLANT'S REPLY BRIEF** by placing a true and correct copy of the document in an envelope addressed as indicated on the attached Service List.

X (BY US MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

— (BY FEDERAL EXPRESS) I placed such envelope in the federal express drop off on December 23, 2006 for delivery the next business day.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 26 2006, at Santa Barbara, California.

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