IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**AUTOMATIC APPEAL**
Plaintiff/Respondent,	**No. S058157**
v.	**(Contra Costa Superior Court**
MICHAEL NEVAIL PEARSON,	**No. 951701-2)**
Defendant/Appellant.	

APPELLANT'S OPENING BRIEF

On Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable RICHARD S. FLIER, Judge Presiding

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People v. Minifie
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People v. Robinson
(2003) 110 Cal.App.4th 1196 198

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Powers v. Ohio
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State v. Frost
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State v. Hill
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State v. McKinney
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2001 Tenn. Crim. App. Lexis 230 315

State v. Mosley
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State v. Nesbit
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State v. Rizzo
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State v. Taylor
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Taylor v. Louisiana
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Tuilaepa v. California
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Turner v. Murray
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United States v. Beaty
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United States v. Booker
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United States v. Gaudin
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United States v. Glover
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United States v. Sanchez
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United States v. Young
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Wade v. Terhune
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Penal Code § 190.3, factor (b) 120, 367

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California Rules of Court, rule 4.42, subd. (e) 372

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1978 Voter's Pamphlet, "Arguments in Favor of Proposition 7" 353

ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, adopted Feb. 10, 2003, reprinted at 31 Hofstra L.Rev. 913 115

4 Blackstone, Commentaries on the Laws of England 343 (1769) 344

Table of Authorities, cont'd

Blume, et.al., *Probing "Life Qualification" Through Expanded Voir Dire* (2001) 29 Hofstra L. Rev. 1209 . . . . . 88, 115, 192

Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727 374

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CALJIC No. 8.85 . . . . . 96, 105, 144

CALJIC No. 8.87 . . . . . 341, 342

CALJIC No. 8.88 . . . . . 105-370 *passim*

Cancado, Note, *The Inadequacy of the Massachusetts Voir Dire* (2000) 5 Suffolk J. Trial & App. Advoc. 81, 96-97 192

The Death Penalty: Abolitionist and Retentionist Countries (Mar. 4, 2007) Amnesty International <http://web.amnesty.org/pages/deathpenalty-countries-eng> . . . 373

Garvey, *Essay: Aggravation And Mitigation In Capital Cases: What Do Jurors Think?* 98 Colum. L.Rev. 1538. . . . . 118, 120, 121

Haney, *Violence and the Capital Jury* (July 1997) Stanford L.Rev. 1447 185

International Covenant on Civil and Political Rights, Art. VI, § 2 375

Jefferson, Cal. Evidence Benchbook (1972) § 29.3 282

1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9 . . . . . 218, 226, 240

1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8 226

1 Kent's Commentaries 1 374

Table of Authorities, cont'd

Long X. Do., Comment: *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L.Rev. 1843, 1844 211

1 McCormick on Evidence (4th ed. 1992) § 6 225

Natl. Ctr. for State Courts, Jury Trial Innovations (1976) chs. III-1, 68 192

Nietzel & Dillehay, *The Effects of Voir Dire Variations in Capital Murder Trials*, 6 Law & Hum. Behav. 1 193

Nietzel et. al, *The Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 Behavioral Sci. & L. 467, 473 . . 193

Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366 373

3 Wigmore, Evidence (Chadbourn ed. 1970) § 769 . . . . . 225, 226

3 Witkin, Cal. Evidence (3d ed. 1986) § 1820 225

3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168 . . . . . 218, 226, 240

5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2914 . . . . . 232, 255

6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36 . . . . . 173, 251, 347

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**No. S058157**
Plaintiff/Respondent,	)	
	)	
v.	)	**(Contra Costa Superior Court**
	)	
MICHAEL NEVAIL PEARSON,	)	**No. 951701-2)**
	)	
Defendant/Appellant.	)	
	)	

STATEMENT OF APPEALABILITY

This is an automatic appeal following a sentence of death. (Pen. Code, § 1239, subd. (b).)[1]

STATEMENT OF THE CASE

On September 26, 1995, the Contra Costa County District Attorney filed an information charging appellant with the murder of Ruth Lorraine Talley (Count One) and Barbara Garcia (Count Two) on April 25, 1995. Personal use of a firearm was alleged as to each count. (Pen. Code, § 187; § 12022.5(a).) The information also alleged multiple murder as a special

[1] Unless otherwise noted, all statutory references are to the California Penal Code.

circumstance under section 190.2(a)(3). (2CT 611.) Appellant pled not guilty. (2CT 615.)

Trial commenced with jury selection on September 4, 1996. (2CT 674.) On October 16, 1996, the jury found appellant guilty of murder in the first degree on both counts, and found the special circumstance and firearm use allegations to be true. (3CT 899-901.)

The jury returned death verdicts for each count on October 31, 1996. (3CT 1052.) Motions for new trial, for modification of the verdict, and to continue sentencing (3CT 1054-1063) were denied. (3CT 1072.) The trial court sentenced appellant to death on December 18, 1996. (3CT 1095.)

STATEMENT OF THE FACTS

I. Guilt Phase

A. The termination of appellant's employment

Shortly after 4:00 p.m. on Tuesday, April 25, 1995, Richmond Housing Authority Director Arthur Hatchett and Administrative Analyst Ruth "Lorraine" Talley called appellant, the office receptionist, to a meeting in Hatchett's office. (11RT 2276-2278.)

While the three sat in chairs facing Hatchett's desk, Hatchett told appellant that they had decided to terminate his probationary employment with the agency because he had not performed his job to their satisfaction. (11RT 2278-2279.) They told him he would be leaving "that day" and

"immediately." (11RT 2279.) They handed him his final paycheck and direct deposit receipt. (11RT 2286.)

Appellant had worked for the agency as a receptionist for almost six months. Talley had reviewed his performance at three months and noted a need for improvement in his work with tenants. (11RT 2247-2248.) The probationary period would end on the coming Friday. Accordingly, Hatchett said that they did not see "that there would be a substantial amount of improvement to warrant continuing probation at that point." (11RT 2279.)

Hatchett saw that appellant's eyes were "somewhat red" and watery. (11RT 2282.) To Hatchett appellant "seemed to certainly be hurt" and "surprised." (11RT 2280.) Hatchett could not say that appellant was "enraged." (11RT 2280.) He seemed to "be in control of himself." (11RT 2280-2281.) But appellant said "very little" and made no specific statements that Hatchett could recall at trial. (11RT 2283.)

Appellant surrendered his building keys and employee identification when Talley asked him to do so. (11RT 2284-2285.) Appellant was wearing slacks and a sport coat, his usual attire. (11RT 2308.) Hatchett concluded the meeting by giving appellant his business card and telling him they could talk about other employment in the future. (11RT 2285-2286.)

Not wanting to "cause any type of emotion if [he] didn't have to," Hatchett did not mention what he knew to be the "real reason" for the abrupt termination. (11RT 2279-2280.)

The "real reason" was, as Hatchett recalled at trial, "the conversation [appellant] supposedly had with an employee that Lorraine Talley mentioned to me that morning." (11RT 2280.)

Earlier that day, Talley told Hatchett that appellant had told coworker Janet Robinson that he "would do some shooting at the Housing Authority" and had done "some practice over the weekend."[2] (11RT 2268.) Talley had also informed Hatchett that appellant's employment records revealed experience with firearms in the military. Talley told Hatchett that her supervisor, Assistant Director Pat Jones, and the personnel department, agreed that appellant should be terminated. Talley informed Hatchett that she had arranged for police to be stationed near the Housing Authority office at 4:00 p.m. Hatchett believed a patrol car he saw in the parking lot across the street represented the arranged protection. (11RT 2270-2276.)

At the end of the termination meeting, appellant returned to his office, a reception area he shared with the Housing Authority cashier. (11RT 2287.) Hatchett lost sight of appellant along the way. (11RT 2289.)

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[2] At appellant's trial, Housing Specialist Janet Robinson recalled two separate conversations with appellant related to shooting. On the previous Friday appellant told Robinson that her companionship on the job was the only thing keeping him "sane" and that "sometimes . . . [he felt] like doing a 101 California Street in here." When she expressed fear, appellant told her he would not shoot her. (13RT 2539.)

Robinson related this conversation to colleague Barbara Garcia. Later, in Robinson's presence, Garcia related the conversation to Lorraine Talley so as to convey what Robinson would later call "the threat." (13RT 2540, 2545-2546.)

On the following Monday, appellant told Robinson he had enjoyed target shooting at a range the night before. Robinson reported this additional statement to Garcia. (13RT 2553.)

Housing Specialist Janet Robinson saw appellant return to his desk. At trial she recalled appellant "had like a glazed look in his eye." To her surprise, "he went back and he started answering the phones." (13RT 2558.) Robinson knew appellant had just been fired, so it seemed odd that he went on doing what he had been doing before the firing occurred.

By the time Hatchett found appellant back at the reception desk, appellant "seemed to be sort of gathering his items, but not putting them in a box or anything." (11RT 2289.) Hatchett did not speak to appellant at that point. Instead he stepped away to the office of Assistant Director Pat Jones, and lost sight of appellant for "a minute or so." (11RT 2289-2292.) In going from appellant's desk to Pat Jones's office, Hatchett passed the cubicles where the Housing Specialists Barbara Garcia, Janet Robinson, and Shirail Burton sat. (11RT 2292.)

Hatchett returned to the reception office after visiting the assistant director. (11RT 2292-2293.) He noticed a lunch pail he could not recall seeing before, some keys, papers and personal "junk stuff" on appellant's desk. (11RT 2294-2295.) Appellant was speaking to the cashier, Betty Walther.

Hatchett asked appellant "if there was anything" Hatchett could help him with, "if he needed any help, things of that nature." (11RT 2293.) Appellant said he did not, and spoke to the cashier. (11RT 2293.) The next thing Hatchett knew, "it seemed like appellant wandered out of the office" and Hatchett was following him. (11RT 2296.) Hatchett was "only somewhat" concerned about the safety of other employees at that point; he

followed appellant because he was "concerned that he get all his materials so he would be able to leave that day." (11RT 2297.)

Hatchett found appellant talking to Lorraine Talley in the office of Hatchett's secretary, Mary Martinez. (11RT 2297.) Martinez was one of the employees who knew that appellant was to be terminated before anything was said to appellant. (14RT 2713.) Martinez and Talley were filing and discussing papers in appellant's personnel files when appellant came in. (14RT 2716.) Appellant asked to meet privately with Talley, indicating to Martinez that he did not wish her to be there. Talley told appellant that she would meet with him only in Martinez' presence. (14RT 2717.)

When Hatchett arrived appellant reiterated that he wanted to "have a one-on-one" with Talley. (11RT 2298.) Talley said appellant "could meet with herself and her supervisor, referring to Hatchett, and "that would be as private as it gets." (14RT 2717-2718.) Appellant stood there, looking at the floor, "for a little extended time," about ten seconds. (14RT 2718.) Hatchett said they could reconvene with him in his office if he wished. Appellant agreed. (11RT 2298.)

Once inside Hatchett's office appellant asked Talley "if that was it or if that was all." (11RT 2298.) Talley said something to the effect that, "If you are speaking of this job as a receptionist, yes, this is all, but Art [Hatchett] may continue and talk to him about other kinds of things." (11RT 2299.) Appellant said something about wanting to make sure the termination was fair. Talley said she had something to do, made reference

to her vacation plans, and indicated appellant should talk to Hatchett if he had anything further to say. Her tone was firm but regular. The meeting was over in a few minutes. Hatchett could recall no other events of the meeting. (11RT 2300-2301.)

Talley returned to the office of Mary Martinez. Appellant walked to his office, with Hatchett following approximately ten steps behind. (11RT 2303-2304.)

Housing Authority cashier Betty Walther was at her desk in the reception area when appellant told her he had just been fired. (17RT 3426-3427.) She looked up, said she was sorry to hear that, and said "stay in touch." (17RT 3427.) Hatchett approached and began speaking with appellant. (17RT 3429-3430.) Appellant again began moving things around on his desk. He appeared hurt and sad. (11RT 2305-2306.) Appellant asked Walther if she would "catch the phones for awhile while he went to the restroom." (17RT 3430.) Appellant proceeded in the direction of a restroom. (11RT 2306.) Hatchett did not follow. (11RT 2306.) Walther heard shots some time perhaps three or four minutes later. (17RT 3432.)

B. The shootings

Pam Kime was working on a computer in the Housing Authority conference room when she heard loud voices coming from outside the room, despite the closed door. She looked up and saw through the windows in the conference room Lorraine Talley and appellant arguing. Appellant

was saying he wanted to talk to her again and Talley was telling him that she had said everything that she wanted to say and they did not have anything further to talk about. (13RT 2589-2590.)

Appellant's voice became louder. He asked Talley, "you mean all of this work I've done is for nothing?" He made eye contact with Kime, who looked at him as if to say, "look you know you're disturbing me." Appellant shrugged his shoulders and grinned as if to say, "I'm sorry" and "I didn't mean to get so loud. I didn't mean to disturb you." (13RT 2589-2590.)

Talley opened the conference room door and yelled at someone to "go get Art." (13RT 2590.) Arelene Reed screamed to Mary Martinez "call 911." (14RT 2720.) Martinez did so. While waiting for an operator to answer, she heard doors slamming on both ends of the hall. (14RT 2720.) Talley told appellant "I don't have anything more to say about it." (13RT 2619.)

Appellant asked Talley if she was "saying that all of the time I've spent here has been for nothing?" (13RT 2619.) Talley entered the conference room and passed Kime quickly, making Kime feel the air move behind her. (13RT 2591-2592.)

Appellant repeated the question. Talley started to run or walk fast around the conference table. Eric Spears, a computer expert working with Pam Kime in the conference room, looked up and saw that appellant had a gun in his hand. (13RT 2619-2620.) The gun was positioned as though he

had just then removed it from his coat. (13RT 2620.) Spears said, "No Michael, no, no." (13RT 2621.)

Appellant fired the gun at Talley, causing her fall into a slumped position on a conference room chair. (13RT 2622-2623.) Standing over Talley, appellant said "I ain't no joke. I ain't no joke." (13RT 2592.) Appellant looked at Spears for an instant, shrugged, shook his head, and fired a second shot at Talley. (13RT 2622.) Kime stood up. Appellant pointed the gun at her, and told her she had "better get back because he wasn't no joke." Kime sat down. (13RT 2594-2595.) Appellant then lowered the gun and left. (13RT 2596.)

Talley was alive when appellant left the room. She was still holding her keys, while blood spouted from her neck. (13RT 2596.) Housing Authority employee Arelene Reed called out "Michael has a gun" and gave Kime a sweater to staunch the bleeding from Talley's neck. (11RT 2310, 2598.) The first of the bullets had hit Talley in the small of the back and exited through her abdomen. The second had entered the back of her head near her left ear and had exited on the right side of her neck. (15RT 2994, 2997-2998.) The head wound was fatal and "rapidly" debilitating. (15RT 3000-3001.) Kime remained with Talley "so she wouldn't die by herself." (13RT 2597.)

Appellant walked quickly out of the conference room, and turned to the right. (13RT 2596.) Hatchett saw appellant running down the hallway with a gun. Hatchett fled the building. (11RT 2312-2313.)

After hearing the shots, Housing Specialists Janet Robinson, Barbara Garcia, and Shirail Burton ran into the office of Housing Authority Assistant Director Patricia Jones. (13RT 2561-2562.) Screaming "call 911," Robinson knocked Jones off her chair and pushed Jones, and herself, into a hiding position under the desk. (14RT 2824.) Shirail Burton removed her shoes, climbed out a window on to a planter box, and ran through the streets. She was jumping down from the planter box when she heard the first shot that was fired after she got out the window. (14RT 2884-2885.) She did not see appellant outside. (14RT 2885.)

Barbara Garcia ran behind Jones's desk and into a corner. There, she found herself trapped by a computer table. (14RT 2824.) She ran in place, whimpering, when appellant entered the room. (14RT 2825.) Appellant fired three shots at Garcia.

One shot entered the left side of Garcia's abdomen, passed through the back of the abdomen, and pierced the abdominal aorta. Another entered her left arm first, and then her abdomen, where it traveled left to right. The last shot entered the back of her head and exited through her right cheek. (15RT 3009-3010.)

Robinson came up from under the desk after Garcia was shot. She said, "Michael please don't kill me." Appellant said, "See Janet, I told you I wouldn't hurt you. I told you I wouldn't hurt you." (14RT 2827.) Robinson said, "Thank you." Appellant left the room with Garcia still alive and trying to breathe. (13RT 2566.) Robinson then left the building through the window, still afraid that appellant would shoot her too. (13RT 2566.)

C. The immediate aftermath

Joaquin Nascimento heard the shots and saw the exodus from the Housing Authority building while he was at work at a pizza restaurant across the street. He saw a woman without shoes run to a parking lot adjacent to the police department and the Hall of Justice. (10RT 2010.) He saw a man with a gun come out after her. The man stood by a fire hydrant. He was looking. (10RT 2012-2017.) He looked toward the parking lot but didn't walk toward it. (10RT 2019-2020.) He kept the gun at his side. (10RT 2023.) He didn't seem to see what he was looking for and came back. (10RT 2019.) Nascimento later saw this man being brought out by the police in handcuffs. (10RT 2030-2031.)

Richmond Police Officer James Merson was sitting in a patrol car in the city government parking lot near the Housing Authority at about 4:30 p.m., when he heard two shots fired. He began moving toward the building slowly through the parking lot. He saw a Black woman running toward him in the parking lot. He heard three more shots fired. He broadcast a report of the shooting and proceeded toward the building. (10RT 2066-2071.)

Richmond Police Officer Dick Tack reached the Housing Authority offices "less than 30 seconds" after Officer Merson broadcast his report of shots fired. (10RT 2052-2053.) He saw a Black woman, approximately "late 30s, early 40s, about 5 foot 9, 179-180." She was running. He saw an open window in what appeared to be a boardroom. Through the window he saw Talley with a visible wound in her neck, sitting "down low" in a chair, receiving aid from a Caucasian woman. (10RT 2054.) At 4:40 p.m. the

ambulance arrived. EMT Robert Duval came into the boardroom and pronounced Talley dead. (10RT 2061.)

With other officers inside and with weapons drawn, Officer Merson entered the building and asked for the whereabouts of the shooter. Merson found appellant in the administrative offices. Appellant had a telephone in one hand and the other hand was free. (10RT 2075.) He had the receiver up to his ear. He appeared to wave his free hand as if drawing attention to himself. Officer Purcell ordered appellant to get down on the ground. He did so. (10RT 2076.)

Merson patted down appellant, but found no weapon. (10RT 2077-2078.) Appellant said, "It's on the ledge. I put it out the window. It's out there." (10RT 2079.) Merson saw an area where the blinds were pulled back away from a window as though someone had pulled them to put something outside. (10RT 2079-2080.) Merson found a .38 semiautomatic pistol where appellant indicated it would be. (10RT 2080.)

When the weapon was found by Merson, the "slide" on the pistol was only partially closed. The top of a bullet protruded from the interior of the chamber. (10RT 2082.) The bullet had "stove-piped," or jammed, in the ejection port adjacent to the fire chamber of the gun. (10RT 2082.) There were a total of two live rounds in the gun, one in the clip and one jammed into the ejection port. (10RT 2083.)[3]

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[3] Criminalist Kenneth Fujii later examined the weapon and a photograph of how it appeared when it was found by Merson. He found the weapon capable of holding eight rounds of ammunition, seven cartridges in the magazine and one cartridge in the gun itself. (15RT 3028-3029.) To load more than seven rounds, one would have to load a round into the chamber

Merson photographed and collected a gray plastic lunch pail in the reception area. It was open. (10RT 2101.) Inside he saw two checks in it issued by the City of Richmond to appellant, some food wrappers, and an 8 by 4 inch or 5 inch baggie that was thicker than the sort used for sandwiches and lacked a sealable top. (10RT 2101-2105.)

Richmond Police Officer Ronald Calderon arrived at the scene one minute after hearing the report of the shooting on the radio. Other officers were already inside. (10RT 2040-2041.) Calderon saw one officer handcuffing a Black male. (10RT 2042-2043.) Calderon found Barbara Garcia still had a light pulse. (10RT 2043-2044.) Garcia was later pronounced dead by fire department personnel. (10RT 2044.)

Calderon processed appellant with a gunshot residue collection kit. (10RT 2049.) He asked appellant to remove everything from his pockets. Appellant removed a .38 caliber unexpended bullet. (10RT 2050.)

Pat Jones, Art Hatchett, and Isaiah Turner, were outside the building when police removed appellant to a patrol car. Jones thought appellant had

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of the gun itself, either by carefully holding the gun open and inserting it with a finger, letting it close, and then loading a full magazine into the base of the gun. Or one could insert the loaded magazine, load a round by operating the slide, and then remove the magazine, load it to capacity, and then put it back in the gun. (15RT 3041.)

The weapon was semiautomatic in the sense that the discharge of a round would cause ejection of the shell casing that held the gunpowder, cause a new round to enter the firing chamber that could be discharged by pulling the trigger again. (15RT 3029.)

The jammed condition of the weapon when it was found by Officer Merson was the result of a "misfeed" from a magazine to the chamber. In Fujii's opinion, this misfeed occurred when the gun was fired. (15RT 3043-3044.)

a smug "yes I-did-it" look. (14RT 2832.) Hatchett thought appellant looked "really hurt. . . . [H]e was still teary-eyed." (11RT 2324.)

Isaiah Turner asked appellant, "What happened, what went wrong?" Appellant said something like, "I'm sorry, but it just wasn't right." (11RT 2323-2324.) To Hatchett, appellant's words and tone of voice made it "obvious he was really hurt." (11RT 2324.)

Appellant's friend Rodney Ferguson saw appellant sitting in handcuffs in a patrol car at the scene. Appellant nodded his head. Ferguson recalled a statement of readiness to kill his boss that appellant had made to Ferguson a few hours earlier, when Ferguson thought he was joking. In Ferguson's mind, the nod meant that appellant was recalling that part of their prior talk. (12RT 2480-2481.)

D. The search of appellant's home

Early the following morning, Richmond Police Evidence Technician Steven Zeppa and other members of the Richmond Police department searched appellant's home, an apartment at 1428 Alice Street, in Oakland. (11RT 2167.) After a security guard opened the deadbolt lock on the front door of the apartment, Zeppa found his entry blocked by chain lock on the interior side of the door. They forced the door open. (11RT 2167.)

An empty .38 caliber ammunition box was found in a wastebasket just inside the door. Inside the garbage can was a shooting target and an empty cartridge container. In a closet there was a second target, a plastic box for a Lorcin firearm, and two receipts. (11RT 2168, 2174.) There was

a United Jewelry Mart receipt dated April 24, 1994, for the sale of a Lorcin L380 to appellant. (11RT 2175.) There was also a second receipt in the gun box, a dealer's "report of sale" document. This document was dated but the month was not readable. The day was the 8th and the year was 1995. (11RT 2176.) The document had appellant's name, and a date of birth of February 15, 1958. His address was said to be on Jackson Street in Oakland, which was not the address where appellant actually lived. (11RT 2177.)

Zeppa looked closely for ammunition inside the apartment, but all he found was an empty box. (11RT 2178-2179.) Someone found a book entitled Madness in Criminal Law, by Norval Morris, in appellant's closet. (11RT 2168-2169, 2183-2191.) The book had the name Gary Stone or Ston written on the inside cover. (11RT 2199.) There were 15 to 20 other books on the shelf in the closet. (11RT 2201.)

Zeppa subsequently searched appellant's 1971 Volkswagen bug. (11RT 2179.) This vehicle had been parked across the street from the Housing Authority office on 24th Street at the time of the shooting. (11RT 2179.) Inside was a traffic citation and vehicle registration associating the vehicle with appellant, but no firearm-related material. (11RT 2180.)

E. Buying the gun and shooting at targets

Robert Goldstone, owner of the United Jewelry Mart in downtown Oakland, authenticated documents Zeppa found in appellant's home relating to the purchase of the Lorcin handgun. (14RT 2701-2703.) He

confirmed that a gun purchased on April 8 could legally be delivered to the purchaser no sooner than April 23, in accordance with the 15-day waiting period requirement. If, however, April 23 was a Sunday, his store was closed. Under that hypothetical scenario, the earliest appellant could have obtained the gun was April 24. (14RT 2703-2704.)

Goldstone's records confirmed that appellant took delivery of the Lorcin handgun at 12:15 p.m. on April 24. (14RT 2705.) Goldstone also told the jury that his records contained a copy of appellant's military discharge record, which showed that he was in field artillery for three years and ten months, in military police for four years and three months, and that he had received a good conduct medal. (14RT 2706.) Such military discharge records demonstrated that appellant was exempt from the firearms training requirement and related fee. (14RT 2705-2706.) Goldstone also identified the thick plastic bag police found in appellant's lunch pail as a type supplied by Lorcin with the gun appellant bought. (14RT 2706-2707.)

Rangemaster Charles Luckey of the San Leandro Rifle Range authenticated records indicating appellant used the range on April 24, 1995. Appellant registered as M.N. Pearson and gave the address of 1428 Alice Street, number 401. (12RT 2455-2456.) The range sold P.M.C. .38 caliber ammunition. It also sold reloads from a company called Monterey Bay Service Agency. (12RT 2457-2458.) Such ammunition is sold in the box found empty in the garbage can inside appellant's home. (11RT 2174, 12RT 2459.)

F. Protestations of unfairness and comments on "101 California" offered as proof that killing was premeditated

A "couple of months before" the shooting, appellant told former coworker Learinza Morris that he had "received a poor evaluation and that it was not really justified in a sense." (13RT 2655-2656.) Appellant indicated that "his work wasn't being evaluated properly — truthfully" and "he was being railroaded to a degree." (13RT 2657.)

Sometime in the first quarter of 1995 (the shooting occurred in April) appellant told Housing Authority employee Leona Kelly that if his boss, or "they," endeavor to "get rid of" him, "it's going to be another 101 California Street." Another employee was present when appellant said this to Kelly. Neither took it seriously. (14RT 2751-2753.)

In early April of 1995, appellant told Learinza Morris he was "very unhappy. He wanted to be transferred out of there" (referring to the division of the Housing Authority that employed Lorraine Talley) and "transferred back to Section 8" (the division of the Housing Authority in which he worked previously). (13RT 2659-2660.) Appellant also told Morris something Morris recalled as "'They better not mess with me because there might be a 101 California,' something like that, something similar to that." (13RT 2660.) Morris did not take the latter comment to represent anything more than the kind of "trash talk" men exchange at work and at basketball courts. (13RT 2689.)

At about 2:30 p.m. on the day of the shooting, appellant told former coworker Rodney Ferguson that he thought his boss was "doing him in," and made a gesture of backstabbing. (12RT 2470-2471.) As the

conversation went on, five or ten minutes later, he said he had been to the shooting range, and in the same breath he said he could shoot his boss. Appellant was looking down at the ground, looking pensive, like he was talking to himself, when he said this. (12RT 2491.) He went in and out of being pensive or angry, depending on what statement was being made. (12RT 2495.) But Ferguson did not take appellant's remarks seriously; they had been joking. (12RT 2471-2474.) The conversation was light and airy except for the part where he made a backstabbing gesture. (12RT 2494.) Ferguson responded by saying something to the effect of "I'll kill yours and you kill mine." (12RT 2475.)

G. Appellant's three years as an "at will" civil servant for the City of Richmond

i. Introduction to the Richmond Housing Authority

In Hatchett's tenure as Director, the Richmond Housing Authority had what Hatchett said were "quite a few management problems." It was performing poorly in a lot of areas, and running a financial deficit. (12RT 2353.) The Housing and Urban Development Department ("HUD") said it failed its public housing management assessment. (12RT 2354.) There were problems with staff training and continuity of management. There was a lot of turnover. (12RT 2354.) Employees complained to Hatchett about other employees' behavior on the job to no avail. (12RT 2362-2366.)

a. The Conventional Housing Authority

The division of the Housing Authority that administered the conventional public housing projects, i.e., Lorraine Talley's division, employed women who connected with one another and with Art Hatchett as friends. Talley and Housing Specialist Shirail Burton took vacations together and spent holidays together. Talley was the maid of honor at Burton's wedding, present at the birth of two of her children, and godmother to them as well. They were very close. (14RT 2862-2863.) Hatchett considered himself a friend of Talley at least as far back as April of 1992. (11RT 2256.) Assistant Director Pat Jones was likewise both friend and supervisor to Talley. (14RT 2793.)

Employees in the Conventional division who did not get along with Talley, Burton, and Jones had low morale. (17RT 3289.) Housing Project Manager Sylvia Gray-White said the atmosphere in their division prior to appellant's tenure was "tense." (17RT 3294.) "People were on stress leave . . . everything was confused. There was no continuity. . . . The chain of command was out the window it seemed." (17RT 3294.) At Gray-White's request, the employee's union filed a formal grievance petition concerning the procedures neglected in giving Pat Jones the Assistant Director position. (17RT 3294-3297.) Gray-White perceived Talley to be letting Burton "run the show" because Burton had been at the Housing Authority longer than Talley had. (17RT 3281.)

Housing Project Manager Donnie Bell perceived Burton to be "basically the operations manager and there was no check and balance."

(18RT 3496.) Burton's conduct was confusing for some of the employees who she was not supposed to be supervising who nevertheless received her directions. (18RT 3465.) Bell himself had problems with Shirail Burton's work, and could not get Talley or Jones to respond correctively because of the "friendship thing." (18RT 3468.) He explained:

> Lorraine, Shirail, Pat, Janet, they are real good friends and they are good friends at work and after work. They had like a strong bond thing there. Whereas their friendship would supersede policies and procedures. It was real strange and it caused a lot of stress and frustration among the employees. (18RT 3470.)

Donnie Bell understood that Shirail Burton had been given preferential treatment for years "and it showed." (18RT 3471.) "[W]hen I came to the agency there was so much tension between the housing managers and the housing specialists that they didn't speak a whole lot, and especially Shirail Burton." (18RT 3472.)

Bell spoke with both Pat Jones and Lorraine Talley about his sense that Talley was getting preferential treatment as a result of friendship. (18RT 3470.) Jones "screamed and she stood up and she reached over the table and she pointed at me . . . She said 'What do you mean? I don't give her preferential treatment. She doesn't get any preferential treatment and I object to you saying that.'" (18RT 3471.)

Office assistant Cecilia Gardner saw the close personal relationship between Burton and Talley as the source of favoritism and conflict of interest. (17RT 3365.) Gardner instituted grievance proceedings over

being forced to do the job of a Housing Specialist without being classified as such or receiving the appropriate pay. (17RT 3368.)

Union representative Lynda McPhee found Talley to have an "antagonistic personality" and to be "impossible to work with" in terms of labor management. (17RT 3403.) "She was never willing to get together with me one-on-one to try to come up with a plan for improving the situation, which is normally the way I work. . . . [Para.] She wanted to invoke her discipline and that was that." (17RT 3403.)

Talley stood out in McPhee's memory "because she seemed to have a real big head about her position and tended to lord it over her employees which created a very adversarial relationship . . . between management and labor. . . ." (17RT 3404.)

When meeting with employees represented by McPhee, Talley "talked down to them pretty much like they were less than human" though the issues "were reasonable grievances in terms of their working conditions. . . ." (17RT 3404.) "[S]he just treated them like she had no time for them and she really should be out working and handling other problems because their grievances weren't even worth listening to." (17RT 3404.)

Once in meeting with McPhee Talley said the employee involved "'should just go out and look for a job,' which is to insinuate that there is not a process that you go through to get rid of employees, that she actually had the power to say, 'you're out of here.' It was very demoralizing." (17RT 3405.)

Talley eventually fired Gardner. (17RT 3372.) When asked whether one of the reasons she was fired was that she had been giving her relatives preference in the waiting list for public housing, Gardner said, "Yes. That was the same thing Shirail Burton did who trained me to do so, okay, and nothing was done about that." (17RT 3377.) When asked whether she falsified documents to indicate that a person named Sheila Alexander applied for public housing much sooner than she actually applied, Gardner said, "If that's the case, if that's why I was fired, the whole department should have been fired, because everybody was violating policies." (17RT 3379.)

b. The Section 8 division

The division of the Housing Authority that administered Section 8 subsidies[4] was housed in a building separate from the Conventional division. Section 8 staff worked under the supervision of Antoinette ("Toni") Hancock-Lawrence ("Lawrence"). (11RT 2253-2254.) Lawrence was "like a mother" in management style. (11RT 2247.) In other words, Lawrence was a polar opposite to Talley in style; she was "completely professional but very caring kind of individual. She was kind of a mother figure." (14RT 2669.)

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[4] In the Section 8 program, tenants who have qualified for rent subsidies will find a place they want to rent and ask the landlord if he or she will accept a tenant with a Section 8 subsidy. If so, the landlord and the Housing Authority enter into a contract. (11RT 2216.)

According to Shirail Burton, Section 8 employees "did not speak cordially" with Conventional division employees. (15RT 2933.) Burton believed that employees in the Section 8 division were jealous of Conventional division employees, who were always "professional" in their dealings with Section 8. (15RT 2934.) Toni Lawrence believed Burton was "a liar," "mean spirited" and possessed of "no integrity." (16RT 3105.)

ii. Appellant's first job and introduction to Art Hatchett

In January of 1993, appellant began work for the City of Richmond in a temporary position with Richmond's federally-funded Employment and Training Department. (14RT 2699.) He was hired for six months, and rehired for another six months after the first six concluded. (14RT 2699, 16RT 3183.) Appellant worked under Isaiah Turner, the Director of the program.

While working with Turner appellant met Art Hatchett and began asking about the possibility of getting a permanent job with the Housing Authority. Hatchett recalled appellant frequently complimented Hatchett on his clothing and said things indicating he regarded Hatchett and Turner as "movers and shakers" in city government. This behavior impressed Hatchett in a positive way. (11RT 2231-2235.)

Nevertheless, neither Hatchett nor Turner hired appellant immediately upon the termination of appellant's second six-month term with the City of Richmond's employment and training department.

Appellant was unemployed in May or June of 1994. (14RT 2699, 16RT 3183.)

iii. Working under Toni Lawrence in the Section 8 division

With Hatchett's recommendation, appellant began working for the Section 8 division of the Housing Authority in a temporary office assistant job in July of 1994. (14RT 2699, 2253-2254.)

Appellant's job at Section 8 was to collect and input data for a computer conversion. (11RT 2256.) While entering data, he also did the work of a receptionist. (11RT 2257, 13RT 2670.)

Leona Kelly trained appellant to assist her in finding out which of the many people on the waiting list for Section 8 housing were still in need, and in amending the waiting list accordingly. (14RT 2745.) Kelly regarded appellant as an exemplary worker with people and with the computer. (14RT 2761-2762.) "I know people who do the work and do it well and he was actually the best in terms of handling that waiting list." (14RT 2761.) Once Kelly saw appellant getting angry "with a really nasty lady." Kelly just had to look at him and say "Michael" to get him to smile and keep on going. (14RT 2762-2764.) She recalled, "He is a perfectionist. . . . He's a stickler for doing things just so. . . ." (14RT 2765-2766.)

Section 8 Housing Inspector Francine Williams met appellant when she visited the Section 8 office. She became acquainted with him outside of work too, as a result of their shared interest in the Oakland Ensemble Theater. Appellant was the coordinator of ushers for the theater. Williams

and her husband were on his list of ushers who volunteered. (17RT 3352.) In her opinion, appellant did an excellent job on the Section 8 waiting list. (17RT 3351.)

Toni Lawrence was similarly pleased with appellant's performance. Lawrence noted the complexity of the job, his handling of data entry job while working at a counter where he was expected to assist with clients and interact with other staff, and his inclination to "set goals for himself and write memos to her about what he was doing without having to be asked." (16RT 3109.)

The job of dealing with clients was difficult. Clients came in complaining angrily at whoever was at the counter where appellant worked entering data and answering phones. (13RT 2670-2671.) Some called frequently, asking to be told where they were on the list. (13RT 2673.) In the words of Housing Manager Learinza Morris,

> [T]he counter where you work being a receptionist . . . you get the blunt of all these complaining clients and they come in with swearing, cussing, all this stuff. So you got to be able to take that without dishing it back out. . . . [¶] Just being able to handle that front counter, it takes a lot of doing to do. (13RT 2670-2671.)

Morris observed appellant's work at the Section 8 division on a daily basis. (13RT 2670.) When appellant first came to work there, he had what Morris described as "rough edges." (13RT 2670.) It was difficult for him to accept the "blows" delivered by people "you never saw before." (13RT 2671.) Initially, appellant responded "somewhat defensively" to

antagonistic clients, arguing back, telling them they were wrong "just straightforward," and cutting them off without giving them "room to talk." (13RT 2672-2673.)

Morris thought this conduct "upset a few people" and caused confrontations "at the counter" a few times. (13RT 2673-2674.) After training, appellant "learned to sometimes walk away from the counter and let the person blow off steam." (13RT 2671.) Appellant became an "excellent" employee. (13RT 2674.) He had no run-ins with fellow employees, and was "not at all" difficult to be around. (13RT 2674.)

The training that caused appellant's improvement came from Toni Lawrence. (13RT 2673.) It consisted of a single conversation.

After hearing him raise his voice in responding to an angry client, she asked him if she could speak with him privately. He came to her office. She told him she saw the client had got him "tested up." (16RT 3109-3110.) He agreed, and asked Lawrence what was wrong with that client.

Lawrence said, "Well, you haven't dealt with this before so I need to let you know that there will be people that come to the counter and they will take everything out on you and you can't take it personal. Most of all, you have to keep calm and realize that there is a way that we would be talking to people no matter how they treat us, we are expected as public servants to act a certain way." (16RT 3110.) Appellant said, "You are right" and "I didn't realize that . . . I was raising my voice." (16RT 3110.) He promised her it would not happen again, and thanked her for taking the time to make him understand what was needed. (16RT 3110.)

Later, she observed that appellant "would step back and take a deep breath if someone was yelling at him rather than feel that he needed to engage in the same manner of discussion." (16RT 3111.) She told him she noticed he was taking a new approach, and asked him if it was working. He said "Yes, Ms. Lawrence, it's working. I see what you mean." (16RT 3111.)

Section 8 Housing Specialist Connie Taylor recalled appellant as a cheerful, very energetic, "eager-beaver type" who was "very into the latest thing he was doing with the waiting list." (17RT 3269.)

Taylor also recalled that appellant's conversations with her gave her the sense that he "really thought having a job was important." (17RT 3271.) At one time appellant said, "Connie, if people put half the energy that they put into trying to hammer the system about their application on Section 8 and calling HUD and calling the Director and doing all of that, into trying to find a job, a lot of people would find a job and they wouldn't need the Section 8." (17RT 3272.). He said "his mother worked hard all of her life, and he just didn't understand why people didn't work harder to get a job." (17RT 3272.)

iv. Expressed concerns about appellant going to work in Talley's division

In November of 1994, before the expiration of appellant's temporary job with the Section 8 division, Lorraine Talley examined appellant's application for a permanent job. Talley's division had a job

opening for a receptionist. She recommended that Hatchett hire appellant for the spot. (11RT 2240-2241.)

The receptionist position in Talley's division was a permanent job, but it had a probationary period of at least six months and as long as one year. (11RT 2241, 14RT 2695.) A probationer would not have the same kind of civil service protection as a permanent employee. Like a temporary employee, he could be dismissed "at will." (11RT 2242.)

Talley was the Conventional division's "Lease and Occupancy Supervisor," and "assistant analyst." (11RT 2255, 13RT 2652.) Previously, Talley was the secretary to Hatchett's predecessor as director, Leon Hunter. (14RT 2711.)

Toni Lawrence and Lorraine Talley had a history of discord that began seven years prior to appellant's employment. Initially, the relationship between the two women was "cordial but strained." (14RT 3081.) Then former Housing Authority director Leon Hunter told Lawrence he was going to give Talley responsibility for developing programs that Lawrence had initiated so that Talley "would have something to do." (16RT 3081.) In Lawrence's view, Talley "never acted or did anything with those programs" after receiving the assignment. (16RT 3081.)

In retrospect, Lawrence considered Talley an "opportunist" (16RT 3142) and "incompetent." (16RT 3098.) Lawrence felt resentment for the loss to the community occasioned by Talley's receipt of more responsibility than she was capable of handling. (16RT 3144-3145.) She thought former director Leon Hunter inappropriately allowed Talley to rise in the Housing

Authority "the easy way." (16RT 3159.) When Hunter sought to promote Talley to new positions in the Housing Authority before Lawrence or other potential applicants could be considered, Lawrence complained, cried, and prevented Talley from becoming temporary Assistant Director. (16RT 3151-3159.)

Lawrence had harder feelings toward Talley's friend, Shirail Burton. In addition to describing Burton as "a liar," "mean spirited" and possessed of "no integrity" Lawrence said Burton "has a way of instilling fear in people who get on her bad side. People tended to be afraid of her. She took advantage of not having to work and didn't mind showing it." (16RT 3105.) Lawrence believed Burton was "in a relationship with the director" while serving as a union employee representative, and "getting away with murder." (16RT 3223.) When pressed, Lawrence acknowledged having a "strong dislike" for Burton as a person. (16RT 3139.)

Lawrence's perspective on Burton came with a painful history. After Lawrence charged another employee with fraud in obtaining housing for relatives, Burton accused Lawrence of the same misconduct, and told Section 8 staff she intended to call the FBI and the Inspector General's office to investigate Section 8 operations. (16RT 3205.) Hatchett was later forced to put Lawrence on leave for 14 months while HUD investigated charges of fraud and incompetence. (16RT 3215-3220.) Section 8 division employees were very close-knit and cooperative, and went "through a lot of trauma" while Lawrence was gone. (17RT 3254.) Lawrence was

ultimately exonerated and returned to her job shortly before appellant was hired. (16RT 3215-3220.)

Lawrence learned that appellant was going to work in Burton and Talley's division from Talley herself. Talley told Lawrence "kind of jokingly, 'I know you're not going to like this, but I'm going to take Michael. I'm going to offer him a job.'" (16RT 3123.)

Lawrence subsequently spoke with appellant about his plans. Appellant told Lawrence he needed to take the job, but didn't want to leave the Section 8 department, and loved working there. He asked if there was any way that she could keep him on. Lawrence said that union requirements prevented him from working in the temporary position for more than six months. (16RT 3124.)

Appellant said that "it was the hardest thing in the world for him to leave and go over to Conventional because of all the terrible things that he had heard about Shirail and Lorraine." (16RT 3124.) Lawrence encouraged him to think about his future; he needed to get a permanent job; he might be able to withstand "the treatment" in order to get permanent status, and then maybe another position would come up in the city and he could transfer. (16RT 3124.)

Lawrence told appellant he needed to "realize that he would be expected to do some of Shirail's work." (16RT 3125.) He asked what she meant. Lawrence said she understood that others who worked in his position were required to type Burton's letters, screen her calls, "and do things for her that may not be done for other people." (16RT 3125.)

Lawrence told appellant that Talley was a "very difficult person to work with. . . . [S]he carried herself in such a way that made people feel she was above them." (16RT 3170.)

Section 8 Housing Specialist Connie Taylor gave appellant her own advice about working in the Conventional housing division based on what Taylor had heard from other employees. Taylor said, "Michael, you must get along with Lorraine and Shirail. If you get along with Lorraine and Shirail, you will pass your probation and you can transfer out of the department and go some place else. But you will have the job." (17RT 3260.)

Section 8 Housing Manager Learinza Morris knew Talley as a supervisor and as a friend. He had also known Shirail Burton and Pat Jones for a number of years. (13RT 2674.) He knew that Talley and Burton were best friends. (14RT 2691.) He was aware that people had "a hard time getting along" in the conventional housing division. (13RT 2674-2675.) He knew Talley had the ability to be vindictive. (13RT 2668.) He believed that successfully working in her division would require more than hard work, and said:

> You would have to keep basically your nose in your work and not recognize anything else going on around. If you did, keep it in your own mouth and don't say anything, don't — you would have to not react to some of the gossip that would be going on. If you did, if you said anything about it to the wrong people, you would get stepped on, certainly. (13RT 2675-2676.)

When Morris heard appellant was going to take the job at the Conventional division, he told appellant "things are a little different over there." (13RT 2648-2649.) He told him that "there's a different style of management," that "we show a little love over here. If you got rough edges we help you smooth them out. [O]ver there it's a little different, and he has to watch himself and just be careful." (13RT 2650.) He told appellant to "watch his back." (14RT 2696.) He told appellant that if he stepped out of Lorraine Talley's bounds, "you could catch it from both sides." (14RT 2697-2698.)

Appellant was excited about the new position and the opportunity to become a permanent employee. (13RT 2676.) Morris was excited for appellant, and felt he deserved the job. (13RT 2678.) But Morris was concerned because he knew that appellant "had in his past showed the ability to be . . . straightforward and spoke his mind about certain things. And when he comes to know what was fair and what's not, Mike will let you know." (13RT 2678.)

Shirail Burton expected to have a problem with appellant due to his relationship with Section 8. When Talley told Burton she had hired someone who had been working in the Section 8 division, Talley told Burton that appellant had said he had "the 411 from Section 8 on all of us." (14RT 2870.) Burton told Talley that it was a mistake to hire someone who had "preconceived ideas" about Conventional division staff derived from information provided by Section 8 staff. Burton said appellant would not be receptive to them as a result of these "ideas." (15RT 2954.) Meeting

appellant confirmed Burton's suspicions. He shook her hand in an overly aggressive way, as if he was trying to hurt her. Her hand ached all day. (14RT 2869-2870.)

v. Alienation and hostility in Talley's division after appellant began work

After appellant began work at the Conventional division, Learinza Morris saw that appellant was "somewhat disturbed." "[H]e would give me like that down head shake type of thing like they're killing me over here." (13RT 2680.)

Connie Taylor saw appellant had become "subdued" and always serious. (17RT 3269.) Appellant told Taylor that Burton was complaining about his work to Talley. He said that if it hadn't been for Janet Robinson he wouldn't have been able to be sane there. He said she was his friend. (17RT 3270.)

Computer expert Eric Spears gave appellant his computer training at the Conventional division, and listened to his expressions of frustration with the way he was treated by the people he was working with. (13RT 2606-2607.) Spears advised appellant to focus on what he needs and get what he needs in spite of whatever unfair treatment may be going on. He also suggested that some of the people involved might respond to compliments in spite of how they were treating him. (13RT 2608.)

At times, appellant told Spears that things were going well enough, and at other times he indicated they were not so good. (13RT 2610.) He said Lorraine Talley had chastised him, or had been disciplining him, and

that he listened until she finished, and as she was leaving he complimented her shoes and she came back and sat and had a friendly conversation for a while. That was something that made him feel good. (13RT 2610-2611.)

Art Hatchett saw appellant about once a week after he started working at the Conventional portion of the Housing Authority. (11RT 2244.) At some point appellant mentioned a difference between working for Lorraine Talley and working for Tony Lawrence. (11RT 2244.) Hatchett did not disagree. In Hatchett's opinion, Talley was a "very well-dressed, well-kept professional woman, very lively, vocal, honest, sincere. Very concerned about the Housing Authority. Very plain-spoken . . . a perfectionist." (11RT 2246.) Toni Lawrence was "more like a mother" in her management style. (11RT 2247.)

Toni Lawrence continued to have contact with appellant after he went to work for Talley. On a couple of occasions she called to see how he was doing. More often, she would speak to appellant briefly when she called to talk to the director or to someone else who was not available at the time. (16RT 3129.) When she asked how he was doing, he told her "he didn't know it was going to be like this." He said, "these people are too much" (16RT 3129) and that Burton was a "real witch." (16RT 3130.)

When appellant talked about Burton, Lawrence "would just listen." Lawrence "already knew Shirail. . . . So there was no point in my reiterating. It would just be a matter of understanding what he was talking about. (16RT 3135-3136.) When he told her Talley was mistreating him, she advised him to complain to the Director, Art Hatchett. Appellant said

he would consider doing so. (16RT 3131.) He assured Lawrence he would "hang in there" because he needed his benefits. (16RT 3129.)

On a couple of occasions appellant called Lawrence. He asked how she was doing. He asked if they could "do lunch." (16RT 3129.) Lawrence made a lunch date with appellant at least once, but was never able to meet with him as planned. (16RT 3132.) A week prior to the shooting, they talked about why or how she "got her times mixed up." Appellant said, "That's okay Mrs. Lawrence, I understand you are real busy. I do need to talk to you and so let's set another date. She said she would call him after she looked at her calendar. (16RT 3133.)

About two or three months before the shooting, appellant told Housing Manager Ronald Keeton something like "I ought to pull a 101" (17RT 3336) or "I can see why that person pulled a 101" (17RT 3342) or "If something happens to me, or if they get on me, or make me quit my job or lose my job, there might be another 101 going on here." (17RT 3344.) Keeton took this statement as a reference to the shootings at 101 California Street, and as a joke. (17RT 3336.)

Appellant told Keeton his supervisors were "riding him" and giving him more than he could actually handle, and work outside the job description. Keeton found this complaint understandable because "being a temporary employee, they kind of dump things on you as much as they want, actually." (17RT 3337.) Appellant also complained that he was not being treated as an adult. (17RT 3337.)

Appellant told Learinza Morris he was being "lied on . . . being taken advantage of. He complained about not being treated fairly as far as other workers could have — well, privileges that he didn't have. It wasn't a level playing field." (14RT 2693.) He complained of favoritism, and about "other people not doing their part of the job and putting it on him." (14RT 2693.) He mentioned Lorraine Talley and Shirail Burton in telling Morris about his problems. (14RT 2694.)

Some of the abuse appellant described to Morris and Keeton was seen by other employees. Toni Lawrence recalled seeing Burton talking to Talley and other coworkers about matters unrelated to work during the hours she was supposed to be at her desk responding to client calls. (16RT 3101-3104.) Lawrence observed both Talley and Burton "talking down" to others. (16RT 3120-3122.)

Cashier Betty Walther saw favoritism at work when Talley complained about Walther and appellant taking a lunch break at something other than the usual time one day. (17RT 3420.) Walther said Talley tended to talk down to people. That was her way. (17RT 3421.)

Housing Project Manager Ronald Keeton heard Shirail Burton address appellant in a degrading way, in front of the public, using an authoritative or threatening tone that left no room for interchange. (17RT 3325-3326.) Keeton saw Burton on the phone "too much" with personal calls. He heard complaints from clients about Burton leaving clients in the lobby waiting while she did nothing. (17RT 3332.) Keeton heard Lorraine Talley talk down to people like they were children. (17RT 3329.) He heard

Talley direct appellant in a way that seemed demanding and overwhelming. (17RT 3327.)

Accounting Assistant Mary Frisby observed Shirail Burton saying something to appellant about talking to his supervisor. "It was sort of mean, the way she said it. It was the way you would talk to a child." (16RT 3233.) Frisby worked at the Housing Authority for 28 years. (16RT 3226.) She saw Burton as the beneficiary of "favoritism." "She got preferential treatment." (16RT 3235.) Talley permitted Burton "to do things." An employee who was not one of the chosen few did not get proper treatment. (16RT 3236.)

Administrative secretary Mary Martinez saw Lorraine Talley "publicly castigate" appellant "in front of everyone and clients in the lobby." (14RT 2736.) Talley "wouldn't take anybody aside privately to discuss anything. . . . If it hurt somebody's feelings that was just too bad." (14RT 2741.)

Computer expert Eric Spears saw Talley "fussing" at appellant in front of all of the staff and some of the clients. It was demeaning, humiliating. (13RT 2633, 2641.) She was chastising him about something related to work. Spears remembered thinking that she should have had that conversation with him privately. (13RT 2633.) The message was "I am the boss, and you are my worker, and you're gonna do what I tell you to do." (13RT 2634-2635.) The tone of voice suggested a person who could exercise authority and was displaying or boasting about that authority rather than using it appropriately. (13RT 2641.)

In Spears's view, a group of "friends" at the Housing Authority treated appellant as "an outsider" and as someone "not wanted there." (13RT 2632, 2635.) This was not the normal office situation where some people "pal around" together. This was an office where there are four or five people, and one person is just excluded even during work time. (13RT 2642-2643.) Appellant was not ostracized, but was treated as an outsider and as someone not wanted there. (13RT 2632.) There were jokes and comments behind his back. (13RT 2635.)

Some of the comments made behind appellant's back were acknowledged at trial. Janet Robinson said that she, Shirail Burton, and Barbara Garcia regularly brought appellant's shortcomings to Talley's "attention." (13RT 2574-2575.) Robinson said "at first I was trying to help him and be on his side" but "it came to a point where I said, 'Okay Lorraine, come see for yourself.'" (13RT 2575.) Talley appeared protective and reluctant to fire appellant in response to these efforts. (13RT 2574-2575.)

Shirail Burton had "numerous discussions" with Talley about appellant's performance. (15RT 2900, 2913.) Burton told Talley she did not know if he could not do what he was told, or if he just refused to do it, but he would not complete what he was told to do. (14RT 2871-2872.) When appellant continued working on other things after being given assignments by Burton, Burton would tell Talley "Michael was instructed to do X amount of things . . . and . . . it's not being done." (15RT 2928.)

Burton also told Talley that appellant seemed "like a very evil person." (15RT 2952.) She said this "because of his mannerisms . . . the way he looked at you . . . the way he talked to you . . . the way he talked to the clients . . . the way he belittled them . . . his body language. . . . Even if I was giving him some type of instruction . . . he would be sitting there looking at you and at the same time you just felt by the way that he looked that he wanted to just cut your throat or he wanted to do something violent to you, you know." (15RT 2952-2953.) There was hatred in his tone of voice. (15RT 2953.)

Housing Project Manager Donnie Bell recalled Burton telling him that she did not like appellant, and that appellant "would not be there long, something like that." Coming from Shirail Burton, such words "definitely" carry power. (18RT 3477.) Bell thought Talley was "harsh" with cashier Betty Walther and with appellant. "[T]here was a consensus that he wasn't liked. . . ." (18RT 3483.)

vi. Evaluations of appellant's work in Talley's division

Talley's three-month evaluation of appellant asserted that he had excellent computer skills and had performed adequately in most areas, but his "interpersonal skills must be improved drastically." (People's Exh. 28, 1ACT 97.) Talley told Hatchett that appellant had problems working with tenants and that he was not going to complete probation unless he changed his behavior. This evaluation surprised Hatchett. (11RT 2247-2248.)

When Talley told Hatchett about her three-month evaluation of appellant's work, she also mentioned something about rumors that he was making derogatory remarks towards women, but she said she was not prepared to substantiate that. (11RT 2257-2258.)

Appellant received a copy of the evaluation and an opportunity to talk to Talley about it on February 9, 1995. Hatchett said it was "part of the routine to sit down and talk to them face-to-face." (11RT 2249-2250.) Appellant told Morris about the bad evaluation, and he offered to show it to him. (13RT 2681.) Appellant indicated he was willing to do whatever it took to keep his job. (13RT 2685.)

Hatchett believed Talley was "honest and fair in her evaluation of employees." Nevertheless, Hatchett consulted with secretary Mary Martinez as to whether there was a basis for Talley's negative remarks on appellant's performance. Hatchett concluded that the asserted need for improvement in appellant's performance was substantiated. (11RT 2251.)

After receiving Talley's three-month evaluation, appellant prepared a memorandum with the following text:

> March 3, 1995
>
> To: Lorraine Talley, Associate Administrative Analyst
>
> From: Michael N Pearson, Office Assistant II
>
> Subject: Improvement Goals
>
> Per my conversation with you on February 9, 1995, the areas we discussed that needed improvement, I am working on these issues in earnest and will continue to strive for excellence.

> All the Home Visits were scheduled with the 5-day notification time, to allow the applicant time to gather the requested papers. And when returned, I have adhered to the 5-day response time.
>
> The filing is current. The only applications that don't have file folders now are the applications submitted starting 3/1/95. Once the file is put in my box, I also adhere to 5-day policy when creating files. No files are kept in my area, this will insure the availability of the files to the Housing Specialists. I will periodically check the file area daily, in effort to keep in apha (sic) and numeric order.
>
> I have been responsive and sensitive to clients needs and concerns, and I have worked cohesively with my colleagues in Conventional Housing and will continue to do so.
>
> I would continue to work towards improvement of my customer service responsibilities.
>
> I'd appreciate any comments and or suggestions that would assist in my betterment, you can reach me at ext. 330. (Def. Exh. 35, 1ACT 83.)

Assistant Director Pat Jones received a copy of this memorandum. (14RT 2839.) She told Talley she wondered why appellant sent it to her. Talley told her she was going to have a meeting with appellant to discuss it. (14RT 2840.) Later Talley told Jones that she had had that meeting. Talley said that it was possible appellant could make some improvements, and that she hoped he would be able to improve enough to meet his probationary period. (14RT 2841.)

Jones was not aware that appellant complained of being treated unfairly. (14RT 2843.) Jones denied being aware of any employee complaining about being mistreated. (14RT 2848.) She later acknowledged that one former employee, Cecilia Gardner, complained in a

published newspaper story, and that she had been aware of that employee's complaints. (14RT 2849-2851.)

Other Housing Authority employees who testified at appellant's trial said appellant did not always perform his work properly. Administrative secretary Mary Martinez thought appellant's way of handling the public and answering phones "needed polishing" based on what she observed "on and off." (14RT 2712.) Janet Robinson said appellant argued with people on the phone and was rude to people who came into the office. (13RT 2523.)

Shirail Burton said appellant did not follow directions well and appeared to be incompetent and rude. (14RT 2871, 15RT 2903-2904.) Appellant failed to put files where she could find them. (13RT 2527-2529.) He would mix up numbers, and could not file consistently. (13RT 2575.) If Burton gave appellant a directive, or something indicating she wanted a certain number of files or home visits done in a timely manner, or a report regarding applications done in a certain time period, he acted as though that was not important. He would put the work aside and do something else. (15RT 2928.)

Burton regarded appellant's way of dealing with clients and the public as bizarre and unusual. She believed he displayed hostility, and talked down to them. On two or three occasions, he put the client on hold, walked away from the phone to get his composure, and came back to talk to them. (15RT 2960-2961.)

Assistant Director Pat Jones saw appellant appear agitated with clients on the telephone and with fellow employees. She recalled seeing

appellant on the phone, saying, "What is your name? What is your name? What do you want?" She said nothing at the time because there were people in the lobby. (14RT 2800-2801.)

Jones later told appellant that she had noticed that he was having difficulty with a client on the phone that morning. She suggested saying "May I have your name please?" or "How can I help you?" She said these words might get a better response. Appellant said he would try that. (14RT 2800-2801.)

A few days later appellant came back and said, "Miss Jones, you know, it works. I tried what you said and it really works." These events occurred about two or three months after appellant started work. (14RT 2801.)

On another occasion, Jones observed appellant arguing loudly with Janet Robinson over responsibility for delivering the mail on one occasion. Appellant was being loud. (14RT 2801-2802.) Later, Jones noticed that appellant was slamming doors. (15RT 2916.) Burton told Jones that this was attributable to appellant's fight with Robinson over responsibility for the mail. (15RT 2917.)

Jones thought some of appellant's observations about women's dress were inappropriate. "On occasion he would become overly exuberant in telling a person that they looked nice." (14RT 2803.) Appellant made a very dramatic gesture in remarking favorably about Jones's clothing one day when she came in dressed in burgundy. Jones told Talley she hoped appellant did not do that to everyone. Before Jones finished describing

appellant's behavior, Talley said, "Let me tell you what he did. I can tell you exactly what he did," and mimicked appellant's behavior. (14RT 2803.)

When Talley was preparing appellant's three-month evaluation, she told Jones she was not happy with appellant's performance in maintaining the home visit log. She said the home visit letters were handwritten rather than typed, and were not organized. Home visits were not being logged properly. The work area was sloppy. (14RT 2804.) Jones believed that the criticisms were fair. (14RT 2806.) She believed Talley went out of her way to assist appellant and wanted him to be successful on the job. (14RT 2806.)

Other Conventional division employees, and at least one member of the public, recalled appellant's on-the-job behavior very favorably. Two such employees were also witnesses to the crime. Pam Kime worked 12- and 14-hour days on a computer project in the conference room where Lorraine Talley was killed. She recalled appellant would come by and see if she wanted anything from McDonald's. He complimented her on how she dressed. When she complained that everybody else had music in their offices, he tried to find a way to get music in the boardroom for her. (13RT 2584.)

Eric Spears, the computer specialist who taught appellant his computer skills, said appellant was very diligent. (13RT 2635-2636.) He was very concerned about doing well. He took little things that Spears said to heart, indicating he was trying to do well. (13RT 2636.) He thanked

Spears for giving good advice after he advised him to sit in on a computer class and learn what he could. (13RT 2637-2638.)

Darlene Freeman-Hall, a legal assistant who contacted the Housing Authority four or five times on personal business during appellant's tenure, remembered appellant's manner as "very professional" and "polite." (22RT 4229-4234.) She contacted appellant's defense counsel after the shooting because she read in the newspaper that people were saying he was rude to the public, contrary to her experience with him. She had had a similar experience at her own job, and she did not feel that appellant was the kind of person that the news reports said he was. (22RT 4234.)

About a week and a half prior to the shootings, Talley recommended that Hatchett give appellant the cashier's position during the cashier's vacation. (11RT 2258-2259.) The cashier position represented a promotion. (11RT 2259.) Appellant's probationary period would expire, and he would become a permanent employee, if he held the position until the regular cashier returned. (11RT 2260.) Consequently, Hatchett inferred that appellant's performance had improved since the three-month evaluation, and that appellant might well complete his probationary period and become a permanent employee. (11RT 2252.)

viii. Lay opinions about the cause of appellant's performance problems and related fears

Some of the Housing Authority employees who made negative comments on appellant's work performance also opined on the reasons for his apparent dysfunction. Robinson said she concluded that appellant

perceived reality differently, and he did not like the work environment as he perceived it to be. On more than one occasion, appellant told Robinson that he didn't like "those people," referring to people Janet Robinson described as "wetbacks, Mexicans, Latinos." (13RT 2523.)

Asked if appellant had a reason to be angry, Robinson said she, Talley, Burton, and Garcia, never gave appellant a reason to be angry; appellant was "incompetent." Robinson tried to help appellant do his job, but she never saw any improvement. (13RT 2572-2573.) Some of what he did was "inexcusable." Robinson wrote in her journal at the time that she suspected appellant had a problem with numbers or a learning disability. (13RT 2575-2576.)

Shirail Burton believed appellant came to their department with "a chip on his shoulder." (14RT 2869.) "It was very apparent by his mannerisms and the animosity that he carried that he did not like us." (14RT 2869.) Burton felt that appellant's attitude was influenced by what he had heard about her before he came over. (14RT 2870.)

Burton saw something "bizarre or unusual" about appellant's mannerisms and behavior during and after the confrontation with Janet Robinson respecting responsibility for the mail. (15RT 2950.) He looked "very angry" and "it took all his might to contain himself, even while I was talking with him. It just seemed like he was ready to explode in a violent — you know, like he was violent and he was trying to do everything to suppress it." (15RT 2950-2951.) Though he slammed doors afterwards, he denied being angry. (15RT 2952.)

Some of the employees who criticized appellant's work expressed fear of appellant before they heard any statements contemplating shooting. Shirail Burton told Talley, Robinson, and Garcia that she believed appellant had a potential for violence three or four months after Talley hired him. She said that she thought appellant was evil and told Talley, "Please don't let him hurt you." (15RT 2957.) She told Talley she was concerned "because of his mannerisms and . . . his animosity that he was like a time bomb ticking." (15RT 2952.)

At some point approximately two months before the killing, Barbara Garcia telephoned Burton at home. Garcia was "crying because she was really scared." She had walked up behind appellant and found him talking to himself, cursing, saying "I'm going to get those bitches." (15RT 2958, 2969-2970.) Burton told Barbara that she should tell Talley. (15RT 2959.)

Barbara Garcia told Robinson she believed appellant was going to kill her, both before and after Robinson disclosed appellant's reference to 101 California. (13RT 2542-2544.) Robinson and Garcia both said that appellant was going to "go off on us." (13RT 2579.)

viii. Appellant's final communications with colleagues

In the week prior to the shooting, Janet Robinson and appellant discussed job prospects for each of them. (13RT 2536-2537.) On the Friday preceding the shooting, appellant said that he would miss her if she got the job in personnel that she wanted. (13RT 2538.) She told him that that was a nice thing to say, and that she would miss him too. He said,

"Well, you're the only one that keeps me sane" and then "sometimes, you know, I feel like doing a 101 California Street in here." Robinson jumped up and said, "No, no you wouldn't do that Michael, you know, you wouldn't do that. And if you do that I'll lock myself in the safe." Appellant said, "Oh no Janet, I wouldn't do that. You know I wouldn't shoot you, you know." (13RT 2539.)

On the day before the shooting appellant spoke with Learinza Morris by telephone. He seemed to be very depressed. He reiterated that he wanted to be transferred out of there. He mentioned a concern about being fired. (13RT 2661-2662.) At some point appellant told Morris he thought he would get the cashier's job for the month she would be gone, but in this conversation he was talking about whether or not he would lose his job. (13RT 2696.)

At 8:30 on the morning of the shooting (April 25, 1995) appellant told Robinson he had enjoyed a great evening. Robinson asked if he had gone out to dinner, or to a movie or something. Appellant said no, he went to the rifle range. Robinson said she didn't know he had a gun. Appellant said yeah, I'm a legal or licensed handgun owner. (13RT 2553-2554.)

Also on the morning of April 25th, appellant spoke with Leona Kelly, his colleague from the Section 8 division. Kelly called appellant because she heard a rumor that someone in his division had been fired. Kelly hoped he would tell her who had been fired if he knew. (14RT 2754-2755.) Appellant asked, "Are you trying to tell me something" and "Are you trying to tell me what Lorraine thinks about me"? He seemed to have a

laugh in his voice. (14RT 2758-2759.) Laughing, Kelly said, "Well, you know Lorraine loves you." (14RT 2759.) Appellant told Kelly, "Betty's here" and asked of Betty Walther, "Did you hear what Leona (Kelly) said? That Lorraine loves me?" (14RT 2759.) To Kelly, it seemed like a joke shared amongst the group. Appellant was poking fun at himself. (14RT 2759-2760.)

Finally, appellant spoke with accounting assistant Mary Frisby as was his custom when she came to work every morning. She found him "mannerable," respectful, and helpful. In the past, they had discussed wine, the theater, appellant's family, and appellant's military service. (16RT 3231.) On the morning of April 25th, appellant said, "Well Miss Frisby, today is the day." Frisby said, "Okay, yes Michael, you're going to be hired." He said, "All I want to do is get hired, so I can get out of here." (16RT 3242.)

At about 3:30 or 4:00 p.m. that day, Frisby asked appellant if he had heard anything yet. He said no. She said "No news is good news. I'm praying for you." (16RT 3242.) Frisby went next door to her supervisor's office. When she suddenly heard screaming, she thought they were being robbed. She heard appellant say, "You're not going to do that to me." (16RT 3243.) His tone was not angry. He was making a statement. Frisby told her supervisor that appellant was trying to catch the robber, and started praying. (16RT 3243.)

ix. Appellant's rage reaction when asked to relive the events leading up to the shooting

On September 3, 1995, Deputy Sheriff Steve LaFortune was at work in a jail module when he heard a loud voice coming from the room in which appellant was meeting with his attorney. LaFortune climbed the flight of stairs to get to the room, which was on another tier and bounded by a heavy door that LaFortune had left ajar. The voice he heard was appellant's voice. The voice was loud and angry. (22RT 4248-4257.)

LaFortune entered the room and asked if everyone was alright. Appellant's attorney was seated at a table. Appellant yelled at the deputy words to the effect of, "He wants me to relive it." (22RT 4259-4260.) Though counsel said everything was alright, and the yelling subsided, the deputy telephoned the jail's mental health officer, explained what had happened, and recommended that mental health staff interview appellant at their convenience. (22RT 4261.)

x. Expert testimony for the defense

Psychologist Carol B. Walser, Ph.D., was retained by defense counsel to evaluate appellant in April of 1996. (18RT 3535.) She administered the Halstead-Reitan battery of neuropsychological tests, re-administered the Minnesota Multiphasic Personality Inventory (MMPI II), interviewed appellant and appellant's mother, reviewed EEG, MRI and PET Scan reports, and reviewed various records provided by defense counsel, including reports of MMPI expert Alex Caldwell, Ph.D., psychologist John Kincaid, Ph.D., and psychiatrist George Wilkinson, M.D. (18RT 3536,

3541, 3610.) Defense counsel offered Dr. Walser as an expert in forensic psychology, neuropsychology, psychology, and clinical psychology. (18RT 3516.)[5]

a. How appellant behaved with Dr. Walser

Dr. Walser found appellant able to interact with her in an appropriate manner. He was pleasant and cooperative. She believed he tried very hard to do what she asked of him. (18RT 3551.)

Appellant seemed remorseful. He said he knew "it" was wrong, "he" was wrong, and he did not know what had come over him. (18RT 3560.) He cried a number of times, sometimes very hard. He was very emotional, and showed significant anxiety. (18RT 3551.) During the interviews, he had difficulty containing himself. He often became emotional and cried. (19RT 3699.)

Appellant did not seem to be psychotic during the first interview, but the way he presented himself did not enable Dr. Walser to rule out psychosis and it suggested that something was "wrong." (18RT 3553, 3559, 3561-3562.) His crimes didn't seem congruent with the way he interacted with her in an interview. (18RT 3562.) At some point appellant indicated he had been hearing voices, and said that people were asking him

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[5] Dr. Walser's qualifications were addressed at length at the outset of her direct testimony (18RT 3508-3616), and challenged by the prosecutor during and after a lengthy voir dire conducted in front of the jury. (18RT 3516-3532.) At the conclusion of his voir dire of Dr. Walser, the prosecutor objected to her testifying as an expert in neuropsychology. The trial court overruled the objection, and rejected Dr. Walser's qualifications only in forensic psychology. (18RT 3532.)

if he was having hallucinations. He indicated he didn't know what hallucinations were. (18RT 3557-3559.)

Some of appellant's behavior in the interview made Dr. Walser wonder if he suffered brain impairment. It was unclear whether he understood things, and whether he could conceptualize certain things. She had a question about his abstract thinking. (18RT 3569.) Sometimes it was the way he paused before answering a question, sometimes the way he just didn't answer a question. (18RT 3570-3571.)

In each interview appellant spoke of the stress he experienced on the job at the Housing Authority. (19RT 3697-3698.) Appellant felt that he was not treated well by his coworkers and superiors. He said he was trying as hard as he could to do a good job. He was working hard, and wasn't getting the praise he thought he was entitled to or that he worked hard to get. (19RT 3698-3699.) He had gotten a poor performance evaluation. He didn't understand that. He had written something back to "the people" about that, and it had been dismissed in some way. He said it was thrown away. It was not taken seriously. (19RT 3698-3699.) He said he responded by working harder and that he hoped that his hard work would be noticed, and that he would be rewarded with a promotion or at least permanent status. (19RT 3701.)

Appellant told Dr. Walser that he "never actually firmly believed that he would be fired. . . . [H]e may have had inklings about it, or . . . some ideas, but he didn't firmly believe that that would occur." (19RT 3708.) After he was told that he was fired, he wanted to meet with Lorraine Talley

again to find out why, and give her the chance to explain it. He would consider what she had to say. "When she would not speak to him, or dismissed him in a fairly harsh way, that seemed to put him over the edge." (19RT 3708.)

b. Test results

1. Neuropsychological

The results of the Wechsler Intelligence Scale Revised Test showed a "significant difference" between appellant's verbal functioning and his "visual spatial" functioning. Appellant's verbal IQ was 104. His performance IQ on spatial abilities was 87. This disparity is a "tip-off" to the possibility of neuropsychological abnormality. Appellant also had a very low score on the digit symbol test, the test considered "most predictive" of a neuropsychological deficit. (18RT 3564-3567.)

The results of the full Halstead-Reitan battery of neuropsychological tests indicated moderate neuropsychological impairment. (18RT 3596.) Some areas of his brain functioning were within normal limits. In others the impairment was mild, but even mild impairment affects behavior. (18RT 3596-3597.)

Appellant showed "mild to moderate" impairment on the test most applicable to everyday functioning, a test that looks at "thinking and concept formation." People who have trouble in this area frequently have trouble at work. "They just can't get what's going on. They can't get the meaning behind people's behaviors. They don't understand things."

(18RT 3598, 3600.) Their dysfunction can include inability to understand motivations behind people's actions. A boss telling someone how to do something could cause an impaired person to think, "they are criticizing me again, that means they don't like me." (18RT 3599.) It can be so severe as to be paranoid. (18RT 3600.)

Appellant's neuropsychological test results also showed difficulties in visual spatial functioning, attention and concentration. He had difficulty with tactile recognition, in recognizing things he was feeling. He also evinced reduced hearing in his left ear. (18RT 3601.) His processing was slow. (18RT 3601.) He had some difficulty with handwriting. (18RT 3602.) A receptionist with his level of difficulty in the visual spacial area "might get things mixed up." (18RT 3602.) The deficit in appellant's visual memory, as shown on one of the tests, was in the severe range. This impairment could affect remembering ways that things can occur, remembering where things are, or remembering where an office is down the hall. (18RT 3602-3603.)

Appellant evinced some difficulty with auditory functions, severe auditory impairment on the left side, problems with his handwriting, and a language disability. In his handwriting he omits letters, although his spelling is appropriate for his age level, probably due to an actual handwriting motor function. (19RT 3658.) He had difficulty with constructional disbrachia, which is also a verbal spatial ability. (19RT 3658). His results were in the borderline impaired range on the digit symbol sub-test, which is a visual motor perceptual test. (19RT 3659.)

He was severely impaired in visual memory, and in what is called "localization," the ability to remember where particular things were located in a space. (19RT 3660.)

Appellant's performance on one of the two the most difficult tests in the neuropsychological battery was "impaired." In the "category test," the subject is shown a series of cards and asked to discern ideas or principles needed to solve a problem by trial and error. Appellant had significant trouble on this test, indicating he has trouble understanding the idea, principle or meaning behind actions. (18RT 3569, 3598, 19RT 3604.)

Dr. Walser believed that appellant gave the tests his full effort. (18RT 3572.) The tests he failed were the hardest tests, those typically failed by people who are truly impaired. (18RT 3598.) He performed in a way that was very consistent with what she had seen with other people with neurological deficits. "They try very hard, and when they can't do it, it's upsetting to them." (18RT 3572.) There are patterns of results that indicate when someone is faking. (18RT 3572-3573.) In addition to looking for those patterns, she looked at body language and other indications that he was upset about failing. (18RT 3573-3574.)

2. Mental illness and personality

Appellant's scores on the Minnesota Multiphasic Personality Inventory II ("MMPI") were also significant. His profile was that of a paranoid schizophrenic. (19RT 3668.) Two administrations of the MMPI, ten months apart, showed a psychotic level of organization and paranoia.

(18RT 3578-3579.) Dr. Walser said these terms indicated appellant had significant problems with reality testing, and that he may misperceive things. People so afflicted are not in touch with reality the same way other people are. They are not always out of touch with reality, but have a strong propensity to get out of touch and to misperceive the world. (18RT 3580-3581.) The fact that he produced the same results both times he took the MMPI means that he very probably misperceives reality as part of his normal existence. (18RT 3583.)[6] The high score on the paranoia scale cannot be attributed solely to appellant's current situation. (21RT 4131-4132.)

The Rorschach test results obtained by Dr. Kincaid pointed up similar deficits in appellant's ability to perceive reality accurately. Those results indicated that appellant's reality testing was so poor that he could become psychotic under extreme stress. (18RT 3594-3595.)

Appellant's depression level as indicated by his Rorschach responses was not high, but he had a "coping deficit" that was significant. People with a coping deficit have trouble with interpersonal relationships, social relationships. They are under a huge amount of stress, and are easily disorganized by stress. When they are disorganized by stress they resort to defense mechanisms that are not helpful. They are more likely to

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[6] Appellant's MMPI test results were interpreted by Dr. Alex Caldwell, a psychologist well-known for his computer-assisted interpretations of MMPI results. On cross-examination of Dr. Walser, the prosecutor successfully objected to Dr. Walser testifying as to what Dr. Caldwell's report said. (19RT 3673-3679.)

deteriorate to the lowest level of a psychological function that they have. For appellant, that meant a psychotic level. (18RT 3589-3590.)

Other aspects of the Rorschach results suggested organic impairment. They showed that appellant is an impulsive person, as is typical of people who have organic impairment. (18RT 3591.) Also typical of organically impaired people was his quality of information processing. It was not complex or sophisticated. (18RT 3591.) He was not thinking things through, and was unable to process things in a fully mature, helpful way for himself. He had an information processing style known as "under incorporation" which means that he just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were not consistent. They were haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment. (18RT 3592.)

Dr. Walser looked at the test results for evidence that appellant was psychopathic, cold-blooded, capable of killing without conscience, and able to plan in the rational manner of an assassin, but found none. (21RT 4182.) There was, however, evidence to the contrary. Appellant's score on the psychopathic deviancy scale of the MMPI II was not elevated. His MMPI scores did not present the configuration normally seen in people who frequently act violently on impulse. (21RT 4183-4184.) Likewise, appellant's Rorschach results indicated that he had a passive nature, did not normally have aggressive thoughts as part of his makeup, and had little capacity for productive thinking. (21RT 4186-4189.)

3. Medical imaging

Appellant underwent a PET scan, an MRI, and an EEG, as part of the pre-trial evaluation process. Dr. Walser was informed that there was a "questionable abnormal EEG attributed to the left temporal region of appellant's brain." (18RT 3608-3609.) She said the report of the MRI showed "posterior left temporal lobe focal atrophy, or a small cyst." Dr. Walser told the jury that the term "focal atrophy" meant there was "dead tissue in a specific area." (18RT 3616.) She opined that either a cyst or a focal atrophy would be problematic in the brain. A cyst could push other structures out of place. (18RT 3616.) "Even though it was not a malignancy, it could almost have the same effect as a tumor." (18RT 3617.)[7]

c. Social and medical history

Dr. Walser interviewed appellant's mother, Mary Thomas, for three hours in Dr. Walser's office. (19RT 3660-3661.) Ms. Thomas seemed very earnest and hardworking. She put a lot of effort into trying to provide a good home for her three sons. (19RT 3662-3663.) She and appellant described her as a strict disciplinarian. She made efforts to see that her children behaved and dressed appropriately. There was a lot of focus on

[7] This line of questioning was interrupted by prosecutorial objection to the qualifications of Dr. Walser to testify about the significance of medical test results. The prosecutor was permitted to voir dire Dr. Walser on this topic at this juncture. (19RT 3619-3631.)

being appropriate, looking good, dressing appropriately, presenting a good face to the public and to the world. (19RT 3663.)

Dr. Walser perceived "underlying anger" in appellant's mother's demeanor. The cause of the anger was not clear. (19RT 3663-3664.) Considering appellant to be very sensitive, Dr. Walser believed appellant probably responded very strongly to his mother, and that he was very eager to please her to avoid any anger that she might have if he did not perform as she wished. (19RT 3664.)

Appellant's mother told Dr. Walser that appellant had suffered a seizure when he was about a year old, secondary to a high fever. Dr. Walser believed appellant had another seizure a few years later. (18RT 3615, 20RT 3890-3892.)

Appellant's mother said that she had seen appellant talking to himself in the months prior to the shooting. She had witnessed him doing this previously when he came back from the service. She thought he was acting peculiar, and was very standoffish. (19RT 3756.)

Appellant talked to himself at the Housing Authority as well. According to a report read by Dr. Walser, Lorraine Talley told her mother that she believed appellant was "crazy" and that appellant had been talking to himself. (19RT 3756.)

d. Diagnosis and conclusions

Dr. Walser concluded that appellant suffered from a "brief psychotic disorder with marked stressors" at the time of the shooting, chronic

posttraumatic stress disorder, an organic "cognitive disorder not otherwise specified," and an impulse control disorder secondary to that disorder. (19RT 3685-3691, 3714-3719.)

Her conclusion that appellant was psychotic at the time of the killings arose from his description of the day's events. "He heard people laughing at him." (19RT 3702-3703.) He said he did not know what he was doing until after he threw the gun outside. (19RT 3647.) She did not believe appellant met the diagnostic criteria for paranoid schizophrenia because of "the time element, and the fact that he's more appropriate in his interactions than schizophrenic people are. He has more affect, more emotion than many schizophrenics have. . . . You just don't get the same feel of the person." (19RT 3743-3744.)

The diagnosis of post-traumatic stress disorder was based partly upon appellant's reporting of the symptoms, i.e., nightmares, reliving the incident, flashbacks of the incident, excessive anxiety, and difficulty concentrating. (19RT 3719-3720.) The diagnosis was also supported by test results. Appellant's scores were "positive" on the two MMPI scales associated with post-traumatic stress disorder. (19RT 3719.) Post-traumatic stress usually ensues from a specific incident that has registered psychologically as overwhelming and disorganizing. (19RT 3721.)

The diagnosis of impulse control disorder secondary to a cognitive disorder means appellant reacts to situations "without thinking them through" and "without a lot of formal weighing of the pros and cons of the situation, or possibly considering the consequences of the action. It's just

acting or reacting without too much thinking." (19RT 3712-3713.) Appellant's impulse control problem was evinced in the police report's description of appellant's behavior, appellant's reaction to difficulty in taking Dr. Walser's tests, and by the test results. (19RT 3713-3718.)

She also diagnosed a "mild" major depressive disorder that was briefly severe with psychotic features while he was in jail and apparently hallucinating. (19RT 3691-3692.) Mental health staff at the jail noted that appellant had "incongruent reality testing" and suicidal ideation on April 27, and "incompetent" reality testing on April 28. (19RT 3722-3723.) "He was 'tearful, labile,' which means a lot of mood swings, 'gross difficulty in explaining his feelings, suicidal ideation.' That means he's thinking about killing himself." (19RT 3722-3723.)

Dr. Walser considered, but could not diagnose, temporal lobe epilepsy ("TLE"), in trying to understand why appellant "would test like a schizophrenic but not come across as a schizophrenic in the interview." (19RT 3732-3735, 3753.) She believed appellant's seizure history, and his aggressive outbursts, could be related to that disorder. (19RT 3753-3754.) Also, appellant's preoccupation with "rightness," which was evinced by his feeling that what he experienced at the Housing Authority was not right, could be associated with TLE. (19RT 3754.) If appellant had been presented to her for diagnosis or treatment, she would have referred him to a neurologist, and suggested further examination. (19RT 3755.)

Finally, she noted appellant's "paranoid and schizoid personality traits" and obsessive compulsive personality features. (19RT 3690.) His

"general perfectionism" and tendency to be meticulous in dress and appearance were his obsessive compulsive features. (19RT 3757.) An "odd" thinking style, evident in his test results, was schizotypal. (19RT 3757.) People with schizoid features feel uncomfortable in social situations, and tend to be loners. (19RT 3700.)

When a paranoid person is put in a situation where he feels he is not being treated as he deserves by his superiors, he becomes more and more fearful. (19RT 3700-3701.) Stress of the sort that appellant experienced in the workplace would tend to cause a paranoid person to decompensate, i.e., to become more and more psychologically fragile. Thinking that someone is out to get you is classic paranoid ideation. If someone is truly out to get him, such as a boss trying to fire him, the way that people treat him is likely to cause stress and some decompensation in functioning. (21RT 4195-4196.)

Dr. Walser believed that the poor performance evaluation appellant received at the Housing Authority made him more fearful. In her "clinical opinion" he was "possibly becoming more disorganized, moving towards a psychotic level of functioning" as a result of the stress. "[S]tress will kind of unravel a person if they don't have strong organization. So you start seeing them becoming more and more disorganized." (19RT 3701-3702.) Many people so afflicted would stop showing up at work, show up not dressed properly, or do the job in an insufficient way. But because of appellant's family background, "with that family value of looking good and

working hard, he did everything he could to try to please people." (19RT 3702.)

While firing the bullets, appellant "was consumed with rage. Rage is a state of being overwhelmed in many ways. It's an extreme state." (21RT 4154.)

x. Prosecution rebuttal

a. Cross examination of Dr. Walser

Dr. Walser agreed that her feelings are an important part of the evaluation process. Her "feeling" as to whether someone is or is not schizophrenic derives from how the person relates to her interpersonally. (19RT 3762-3763.) "Schizophrenics don't connect with you in the same way as another person would. There is a distance and a lack of interpersonal relating." (19RT 3763.) She purported to apply an "objective" understanding of appropriate behavior in determining whether someone related to her appropriately. When asked if she had been "psychoanalyzed," she said she had "been through extensive psychoanalytic psychotherapy." (19RT 3764.)

Appellant was given anti-psychotic medication at one point while he was in jail awaiting trial. (20RT 3932.) His elevated score on the MMPI paranoia scale was partly based upon answering questions listed on the "obvious" (as opposed to "subtle") sub-scale of the paranoia scale. (21RT 4127.) Some of the accusations of personal persecution that he endorsed could be fairly stated by a capital murder defendant awaiting trial. (21RT 4130-4131.)

Based on the reports Dr. Walser read, she believed that appellant had the gun on his person at all three intervals at which he told Lorraine Talley he wanted to have a one-on-one with her. (19RT 3781.) It was her understanding that appellant had the gun when he went to the bathroom, and that he loaded it in the bathroom. She was "not exactly sure" what appellant said about that. The first time that she and appellant talked about this was on September 6, 1996. (19RT 3780-3781.)

In the preceding December, Dr. Kincaid noted that appellant told him he could not recall when he got the gun. In the following January, appellant denied recalling making any statement about 101 California. (21RT 4079-4081.) He denied remembering saying anything about 101 California, or about when he got the gun, until he was interviewed for the last time on September 6th. (21RT 3780-3781.) Appellant "clearly" knew the answers were important. It is possible he is lying. (21RT 4081.)

Dr. Walser did not recall what the reports said about how Mr. Morris described appellant's demeanor when making a statement about 101 California, nor what was said in appellant's conversation with Mr. Ferguson an hour before the crime, but agreed that a statement appellant made about his mental state at that time would be very important. (19RT 3775-3777.)

As to Dr. Walser's belief that appellant perceived people laughing at him at the crime scene, she acknowledged that appellant once said he did not know that people were laughing at him until the preliminary hearing, when he heard somebody testify that people at the Housing Authority may have been laughing about his sexuality. (20RT 3899-3903.)

Later, Dr. Walser acknowledged that her notes indicated she had asked appellant whether he had had any hallucinations prior to hearing him say, "They are all rejoicing in my demise. I feel she was laughing." (20RT 3908.)

Dr. Walser acknowledged that appellant "blames Lorraine Talley for his predicament." (21RT 4075-4076.) Appellant's assertion that he had "made history" at the Housing Authority and that policies changed after his crime was unremarkable in light of his preoccupation with right and wrong, and belief that the way things were done while he was there was "not right." (21RT 4077-4078.)

As to the killing of Barbara Garcia, Dr. Kincaid's notes indicate that appellant told him, "When she saw me, she should have got the fuck out the window. But she said something." And that he continued, "She uses precious time to say something to me, so I shot her." Also, "She said something that had me wired." And, "She should have taken me seriously, kind of like Lorraine." (21RT 4151.) Dr Kincaid's notes say that appellant told him that Barbara Garcia, "was quite an instigator. She had tried to make an issue of his salary, as she had a degree in Hispanic studies, by then everyone else was out of the building; those [Janet and Barbara] were the last two people." (21RT 4151.)

Dr. Kincaid's notes also indicate appellant said "I just pulled it out and shot her. I smoked that bitch just like that, bang and bang" in describing his shooting of Talley (21RT 4150), and appellant said that he was looking for somebody when he went outside, but that he was still in a

rage, and felt exposed. The next thing in Dr. Kincaid's notes is the quote, "See what you all did." (21RT 4152-4153.) Dr. Walser agreed that the quote represents appellant saying that his state of mind when he was outside cast blame for the crime on others. (21RT 4153.)

Dr. Walser also acknowledged that appellant lied in some areas and had not told his doctors everything he could. (20RT 3926-3927.) Dr. Kincaid's notes for August 16th indicate that appellant was given a sodium amytal test. Dr. Walser said she does not "know much" about that test, doesn't know if the substance is truth serum, wasn't involved in the decision to use it. (21RT 4144-4145.) Dr. Kincaid's notes say that appellant's "paranoia and guardedness remained somewhat intact despite the sedation." Dr. Kincaid gave an example of asking the defendant, "When did you load the gun?" and appellant responding, "Why do you want to know that?" (21RT 4146.)

Dr. Walser acknowledged that appellant was reported to have said he enjoyed playing chess (19RT 3772) and that he told Dr. Kincaid that he wants his psychological evaluation to be more favorable to him. (21RT 4086.)

Dr. Walser received a copy of Dr. Kincaid's report after she wrote hers. The same is true with respect to Dr. Wilkinson's report. (21RT 4148.) Doctors Kincaid and Wilkinson concluded that appellant was not legally insane at the time of the offense. (20RT 3924.)

Dr. Walser conceded that the DSM IV precludes diagnosis of brief psychotic disorder unless the psychotic episode lasts more than a few hours,

and that appellant did not appear psychotic during the videotaped interrogation conducted on the night of the day in which the shooting occurred. She said the DSM is only a guideline. (20RT 3939-3942.)

Dr. Walser acknowledged that appellant was admitted to a Veteran's Administration Hospital in 1989 for cocaine dependence. The V.A. diagnosed him as having "immature personality" disorder with some antisocial passive/aggressive and resistant elements and grandiosity. The V.A. also said that he was malnourished and had psycho-social stressors apparently due to the fact that he was on probation and given drug diversion. (21RT 4073-4074.)

Dr. Walser's stated belief that appellant suffered at least two seizures in childhood was based upon on a jail report that was based upon the statement of appellant only. Mary Thomas described only one seizure each time she was interviewed. The reports of the interviews varied as to whether appellant was aged one or three years when the seizure occurred. (19RT 3893-3894.)

b. Testimony of Dr. Hoddick, Medical Imaging Specialist

William Kevin Hoddick, M.D., a specialist in diagnostic medical imaging, was asked to look at the MRI of appellant's brain and tell the prosecutor "what was going on." (22RT 4305-4309.) He found white "fossa" of the sort seen in brain scans of people over 50, people with diabetes, and people who have abused cocaine and other drugs. To his

knowledge, the effect of such fossa on behavior has yet to be established. (22RT 4309.)

Dr. Hoddick defined arachnoid cyst as an area of the brain filled with cerebral spinal fluid. He saw evidence of an arachnoid cyst, but no "mass effect or pressure associated with it" in appellant's MRI. Such cysts are common. Nothing in Dr. Hoddick's experience would indicate that this particular finding can alter the behavior of a human being. (22RT 4310-4311.)

Dr. Hoddick conceded that an MRI cannot detect every problem with a brain. Chemical problems are not detectable by MRI. Some things visible only in a microscope could be missed as well. The "MRI represents the best tool we have in medicine, but nothing in medicine is 100 percent." (22RT 4335-4336.)

The report of appellant's PET scan shows no abnormality in brain function, but indicates that a portion of appellant's brain described as the cyst is not metabolizing glucose and has no neurons. (22RT 4344.)

c. Testimony of Dr. Paul Berg

At the prosecutor's request, licenced psychologist, marriage family and child counselor, "workplace violence expert" and long-time expert-witness Paul Berg interviewed petitioner just prior to his arraignment on April 27, 1995. (22RT 4349-4351.) Dr. Berg reviewed police reports, and appellant's personnel file, at that time. (22RT 4351-4352.)

Dr. Berg found no evidence of psychosis in his interview of appellant on April 27, or in the interview appellant gave to police on the night of the killings. (22RT 4354.) However, Dr. Berg recalled, "He told me what he did and then he told me what I should think about it." (23RT 4564.) "He said words to the effect of, 'write down that I didn't premeditate this.'" (23RT 4562.)

Berg did not see a basis for Dr. Walser's diagnosis of a brief psychotic disorder in any of the data, including the test results. (22RT 4356.) On the contrary, appellant's behavior prior to and during the shooting exemplified organized thinking. (22RT 4376-4377.) Appellant's statements on the day of the killing show no misperception of reality, but rather "anger," "retribution," "revenge," and "close" orientation to "reality." (22RT 4368-4370.)

Dr. Berg opined that appellant's high scores on the MMPI's paranoia and schizophrenia scales are hard to interpret because appellant was in custody and his custodial status was not made known to the doctor who interpreted it. "Those scales are characteristically elevated in jail and prison populations." (22RT 4363.) Dr. Berg said "there are questions about the validity" of Dr. Walser's interpretation of appellant's MMPI because (Dr. Berg presumed) the interpretation on which she relied was created in ignorance of appellant's custodial status.[8] (22RT 4364.)

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[8] Evidence that Dr. Caldwell (the author of the MMPI report) was advised of appellant's custodial status by Dr. Kincaid was later adduced by the defense. (25RT 4756.)

Furthermore, the experience of killing people could potentially cause post-traumatic stress disorder. That experience would have an impact on how the person later took the MMPI and on everything else he did. (24RT 4686-4688.)

As to the Rorschach results, Dr. Berg opined that Dr. Kincaid's interpretation was "generally reasonable. I didn't find any fault with that." (22RT 4364.) He characterized Dr. Kincaid's interpretation as indicating only a very minor if any deficiency in reality testing, and no chronic depression. (22RT 4364-4365.) Also, Dr. Berg said that Dr. Kincaid's interpretation indicates that appellant is the kind of person who shows passive/aggressive behavior, which means he usually shows his aggression in passive ways. "That's what teenagers do. They . . . don't do what they're supposed to do. They grumble and mumble as opposed to typically doing it in the most aggressive way." (22RT 4366.)

Dr. Berg opined that appellant "suffers from personality disorder" and that the material he has seen supports his diagnosis "at least in part." (22RT 4366, 4376.) The personality disorder includes obsessive/ compulsive, schizoid and paranoid features. (22RT 4376-4379.)

Obsessive/compulsive personality disorder means that he is excessively fussy, very detail oriented, and he likes things "just in their right way" and "cares too much about certain things, whether it's work or any other thing. . . ." Schizoid personality disorder means he has difficulty in forming close relationships, "and there is a sense of removal in their interactions with other people." Paranoid personality disorder describes

people who are excessively suspicious, and feel "entitled, that they should get certain kinds of treatment that they never get, and that they just don't get a fair shake out of this world." (22RT 4377-4379.)

Dr. Berg also opined that people who engage in workplace violence "are usually not" delusional or psychotic. The fact that someone engages in that kind of act at an office does not mean that they are suffering from any kind of psychosis. (22RT 4374.)

Although Dr. Berg had been retained to evaluate only one case of workplace homicide other than appellant's (22RT 4375) he "made it [his] business to be aware of all the research in the field" of workplace violence, and taught classes on the subject. Lawyers have asked him to consult on the topic via the internet. (22RT 4353.) He conducted evaluations of individuals sent to him by employers concerned about the employees' violence potential. He interviewed people who had engaged in workplace violence or had been charged with crimes involved in workplace violence. He reviewed "more than two or three dozen" case studies. (22RT 4373.)

Dr. Berg challenged Dr. Walser's neuropsychological assessment by referencing a conversation he had with a "neuropsychologist named Dr. Kim McKenzie" (later spelled "McKinzey") during cross-examination. (22RT 4395-4396.)

According to Dr. Berg, Dr. McKinzey told him that the results of the testing given by Dr. Walser were equivocal, and that depending on which norms one chose to use, appellant either had "some mild damage" or none at all, and appellant "faked it." (22RT 4399-4400.) Dr. Berg said

McKinzey "applied the faking formula." (22RT 4396.) The formula is called Mittenberg, the name of its author, and was published in a journal of neuropsychology in 1996. (24RT 4608-4609.)[9]

Dr. Berg added that Dr. McKinzey "has published in the field of faking on neuropsychological testing. He lectures on it. It's one of his doctorates. He's a fake specialist." (22RT 4397-4398.)

Dr. Berg also disputed Dr. Walser's characterization of appellant's mental state as enraged at the time of the shootings. Dr. Berg believed appellant was "very angry, but his behavior doesn't sound like . . . rageful behavior." (22RT 4405.) Rage is a level of anger so great that the person can't control it. They act in ways that are disorganized, not on target. . . . Just purely emotional thought, no planning, no directed behavior." (22RT 4405.) He conceded, however, that being "very angry . . . distorts [a person's] thought process to a certain extent." (22RT 4405.)

When asked if there was any way he could look at the events of April 25th and say there is a suggestion of impulse control problem, Dr.

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[9] After Dr. Berg gave this testimony, Dr. Walser recounted her extensive but unsuccessful efforts to contact Dr. McKinzey and to locate the Mittenberg article to which Dr. Berg had referred. (25RT 4742-4751.) She added that none of the colleagues she talked to had heard of any "faking test" or formula for the Halstead-Reitan battery, and opined that "[i]f it exists, it is certainly not validated, or not widely used, not widely discussed in circles of neuropsychologists." (25RT 4751-4752.) The prosecutor subsequently produced a face sheet for a 1996 article in the Archives of Clinical Neuropsychology entitled "Identification of Malingered Head Injury on the Halstead-Reitan Battery." (25RT 4779.) The prosecutor then asked Dr. Walser a series of questions suggesting that she had claimed that appellant had suffered a head injury. (25RT 4779-4781.) She denied making any such claim, and added that both Mr. Pearson and his mother denied that he ever had a head injury. (25RT 4780-4784.)

Berg said, "It's not the way I look at the events of April 25th. I look at it more as somebody who had a reason, who planned to do something, and who carried it out." (24RT 4631.)

II. Penalty Phase

A. Victim impact evidence

i. Talley's mother

Lorraine Talley's mother, Gladys Dean, described how she and Talley's younger daughter, Nakia, found out that Talley had been shot. (27RT 5124-5128.) Ms. Dean said Talley was her only child, and recounted Talley's childhood and family experiences. (27RT 5128-5139.) She described her close relationship to Talley and the emotional effect of Talley's death. (27RT 5139-5140.)

ii. Talley's two daughters

Lorraine Talley's 23-year-old daughter, Tanisha Nishae Talley, recounted the experience of hearing of her mother's death from friends and relatives, described her relationship and with her mother at each stage of her life, and their commitment and closeness at the time of her mother's death. (27RT 5139-5153.) She went on to detail the emotional effect of Talley's death on herself, her own four-year-old daughter, and her grandmother, Gladys Dean. (27RT 5153-5155.)

Lorraine Talley's 22-year-old daughter, Nakia Talley, gave testimony similar to that of older sister, expanding on the emotional effect

with additional recollections of her mother and of the devastating effect of her mother's death upon her grandmother. (27RT 5156-5161.)

iii. Four close friends of Lorraine Talley

Harriette Langston, Lorraine Talley's friend since elementary school, recounted Talley's life and their close friendship. (27RT 5162-5164.) She described Talley's many virtues as a companion and a mother. (27RT 5165-5166, 5169-5170.) She told the jury that, just prior to the shooting, Talley spoke on the telephone with Langston about firing appellant, and what Langston referred to as "the threats he had made." Langston told Talley she should have the police there. Talley said, "Harriette, I don't want to embarrass him. That would just be awful for him to be carted out of here by the police. You know, he would never be able to get another job." While they were talking on the phone Langston heard a knock on the door. Talley said "hold on a minute" and laid the phone on the desk, without putting Langston on hold. Langston heard some talk, and then she heard what she thought were gunshots. She couldn't understand the words that were said before the shots. (27RT 5167-5168.)

Deputy Sheriff Samuel Henry Burns, the father of Lorraine Talley's son, recounted when he and Lorraine met, dated, moved in together, shared family life, and remained close friends after separation. (27RT 5171-5176.) Burns was watching their son run track when he heard of Talley's death. He described telling his son that she was dead after his son picked up some photographs and told him he was going to give them to his mom. (27RT

5176-5178.) When their son arrived at his grandmother's house, he called his mother's office so he could hear his mother's voice on her telephone answering machine. (27RT 5178.) Back at work, he saw appellant in the courtyard at the detention facility eating fruit of some kind, laughing and smiling. (27RT 5179.)

Maurice Mims, Lorraine Talley's boyfriend for the five years preceding her death, described their happiness together, the vacation they were about to take, and how he heard about her death. (27RT 5181-5184, 5189-5190.) He described his life after her death as "totally hell" and "miserable." (27RT 5191.)

Shirail Burton expanded upon her prior testimony respecting her long and close friendship with Lorraine Talley, and recounted the experience of hearing the shot that killed her, and the grief that followed. When asked what she would say to Talley if she could say something to her now, Burton said, "I would tell her how much I loved her. I would hold her, I would kiss her, tell her thank you so much for what she did for me and my family." (27RT 5196-5199.)

iv. Three colleagues with post traumatic stress

Pamela Kime said she had been unable to work since July of 1995 due to post traumatic stress symptoms. She described her symptoms in detail and said she believed that her daughter has been affected by fear as well. (27RT 5192-5195.)

Patricia Jones recalled seeing Barbara Garcia "lying there gurgling" and running out to get help despite fear that appellant might still be in the building. Jones saw Pam Kime with blood all over her hands, and then saw Talley's body. Jones said she "broke down" just prior to attending the memorial service for Barbara Garcia "thinking about what happened, and being crouched under the desk, not knowing what was going to happen, thinking that she could have done something to save both Barbara and Lorraine." (27RT 5200-5202.)

Janet Robinson said she could not go back to the school she attended with Garcia and Talley "because that was the last place Lorraine and Barbara and I . . . were together the Monday before the shooting." (27RT 5204.) Robinson said she lived the life of a recluse in between the time of the killing and the April preceding trial, fearing for herself and her family, leaving the house only for appointments with a psychologist and a chiropractor. (27RT 5204.) In April, she "decided" she "wanted her life back." Asked who took her life, she said she thought appellant took her life, and also that the "City of Richmond" had done so too. (27RT 5205.) She said, "I was being harassed. I was followed. I was terminated from my job. . . ." (27RT 5206.) She lost her job at the Housing Authority, and was told she was unable to pass probation. She believed her termination was caused by "this whole incident." Some months after the shootings, an employee whose time at the Housing Authority post-dated the shootings said he had come to understand why appellant "tried to murder us . . . because we treated people like shit." Robinson attributed her termination

from the Housing Authority to the shootings because she could not return to work after the employee made this statement. She experienced stomach pains and diarrhea. It pushed her "over the edge." (27RT 5206-5207.)

v. Barbara Garcia's two aunts and one cousin

Barbara Garcia's aunt, Irma Abarca, described Barbara Garcia's family, recounted her happy and unselfish character, and described in detail the family's emotional and physical response to the shooting. (27RT 5219-5225.)

Garcia's cousin, Celia Abarca, said she was appearing "on behalf" of Garcia, who was like a sister to her. She spoke of hearing about Garcia's death and of missing her afterwards. (27RT 5226-5229.)

Another aunt, Genoveva Calloway, told of hearing about Garcia's death, driving Garcia's parents to see her body, how Garcia's father (her brother) expresses his grief, the inability of the family to work for several months after Garcia's death, and the pain of discussing the case with the prosecutor in preparation for trial. (27RT 5229-5234.) Calloway said that Garcia's father declined to come to court because it was too painful for him, and court proceedings would not bring Garcia back. (27RT 5165-5166.) Calloway added that Garcia was involved in Hispanic groups in college, trying to help people get into college. She was Cinco de Mayo queen. (27RT 5233-5236.) The last time Calloway saw Garcia, she was borrowing some books on Hispanic culture. (27RT 5235.) She and Calloway were the

only members of the Garcia family to graduate from college. (RT 5236.) Her brother is still paying off Garcia's student loan. (27RT 5233.)

B. Defense

i. The drug-addicted friend appellant inspired to detox

Gary Reynolds became acquainted with appellant in 1994. Appellant helped him recover from cocaine addiction. He said appellant was an example to him, having once had a cocaine problem of his own. Appellant told Reynolds he didn't have to use drugs, that he was better than that, that his life was more than it was at the time. (28RT 5272-5278.)

ii. Appellant's uncle, Charles Thomas

Charles Thomas, a younger brother of the stepfather who helped raise appellant, came to know appellant's biological father and mother when they were all young adults living in the Cortland area of San Francisco. Appellant's father (called "Junior") and mother (called "Betty") became "boyfriend and girlfriend" about a year or two before appellant's birth. Appellant's mother was living with her mother and brother at the time. Junior was about 18 or 20 years old, and left the area shortly after appellant was born. They did not discuss Junior much after he left. (28RT 5283-5290.)

When appellant was four or five years old, he was sent to live with his biological father's family for some time. His mother talked of planning to go to get him back when "things had went kind of bad. . . . [L]ike Betty

was having — either she didn't have a job, or something or other. And when Michael left, and then she was going to job training and learning something. It's kind of confusing back in there." (28RT 5292-5293.) Thomas did not know the reason for sending appellant away. "It wasn't like she was unable to take care of him." If that had been the problem, her parents or Thomas's wife would have kept him. (28RT 5293.)

Appellant's mother later bore two children, named William and Kevin, with a man named Pete. Thomas and his wife and appellant's mother went their separate ways during the four- or five-year period in which Pete and appellant's mother were together "on and off." Thomas understood that Pete would, "drunk or something or another . . . start losing his mind" (28RT 5296) and "kind of got off the beam. . . . He would get angry a lot." (28RT 5295.) Appellant's mother complained about Pete being mean, and broke away from him, leading Thomas to believe that Pete had "pushed her around a little bit from time to time." (28RT 5295.) The last time he saw her with Pete, she had "some bruises." (28RT 5296.)

Appellant was about six or seven years old when appellant's mother and Pete broke up. (28RT 5297-5298.) About one year later, appellant's mother "took up with" and later married Lafayette Thomas, Charles Thomas's brother. (28RT 5299.) Lafayette had two children of his own, one in San Francisco and one in Shreveport. (28RT 5300.) The couple lived with appellant and his brothers at a Housing Project in San Francisco prior to moving to Oakland in the 1960s. (28RT 5301-5302.) Lafayette Thomas died in 1978 or 1979. (28RT 5318.)

Charles Thomas knew appellant and his brothers as children. Appellant was always a very nice, very respectful young man. (28RT 5298.) He and his brothers seemed to be doing well in school. (28RT 5303.) All three boys seemed well adjusted. (28RT 5304.) Appellant's mother tried to give them the opportunity to be what they wanted to be, develop their talents, or whatever she thought she could to help them advance in the best way she could. She was successful at teaching them to be respectful to their elders. Her children have been very nice and "convenient" children to their older family members. (28RT 5308.) "Being Black in America, the further back history goes, life was harder and harder. Each generation tried to strive to get it a little better for their children. This is what all of use were working for, and we still try to do that." (28RT 5308.)

Thomas was "totally surprised" when he heard about the shooting, and "figured somebody must have really shoved Michael over the cliff. Somebody must have pushed him really hard." (28RT 5314.) Referencing his own work experience, Thomas said, "Sometimes the bosses are really, can put you in a state of mind, you know. And it's very hard to contain yourself. So I understand exactly, you know, what he might have had to — went through with. Almost anyone who work as laborers would definitely know that." (28RT 5316.)

iii. Appellant's mother, Mary Jane Thomas

Appellant's mother said her name was Mary Jane Thomas, and that she did not want to be testifying, having already gone through "enough stress with this, . . . and I just don't feel that I can have much input in the matter at this point." (28RT 5323-5324.)

Appellant, 38 at the time of trial, was recalled as a normal, happy, playful, average child. "Michael was a good kid. Michael was a loner." (28RT 5325.) He always seemed to be happy to her. (28RT 5350.) He was an average student. (28RT 5349.)

When angry, he would pout, mumble, go to his room, get away from the situation. He would keep his difficulties inside. (28RT 5341.) He was "a responsible little kid." He had a paper route. He was proud of that. He graduated from high school. (28RT 5351-5352.) He wanted to get a job right after high school. He couldn't get a job as quickly as he wanted to, so he went into the service. He always mentioned college, but he wanted a job. (28RT 5352.) He liked nice things. He wanted his own money, and she was a single parent, working with children, and could not always afford what they wanted. She could not afford to send him to college. (28RT 5353.)

When he was about one and a half years old, he had a fever of 105, and went into seizure. He was jerking, and something was happening to his tongue. His eyes were rolling back. The seizure went on for quite a few minutes. Pete was there, and put a spoon in appellant's mouth, and she can't remember what happened after that. She ran downstairs screaming to

the neighbor to call the ambulance. (28RT 5344-5345.) After the seizure, she gave him an "alcohol bath." (28RT 5344.)

Appellant had a second seizure while suffering a high fever secondary to an ear infection when he was five or six years old. No treatment followed. Appellant may have suffered a third seizure while playing football at the age of 12 or 13. Appellant's mother could not recall if any medical treatment followed the third event. (28RT 5346-5347.)

She left appellant in Louisiana with his paternal grandparents when he was four or five years old because "they wanted to see him and have him live with them." Appellant "was excited to go." (28RT 5326-5329.) Without telling the grandparents she was coming, she retrieved appellant from his grandparent's home four or five months later, though the grandparents wanted him to stay longer. (28RT 5333.) Asked if she ever got the impression that appellant was traumatized by being away from her for that long, or the way she had to come and get him, she said, "It could have been." (28RT 5334-5335.) She didn't have "much more to do" with appellant's paternal grandparents after she got appellant back. (28RT 5335.)

She took her role as disciplinarian "seriously" because she "had to." Her husband, Lafayette, "was soft as butter." (28RT 5355.) She took a belt to the kids when she thought "it was necessary." Asked how often that was, she says "as often as needed." (28RT 5355.) When they needed a spanking, she "beat their butts or punished them. Or whatever I had to do I did it." This happened more than once a year, but not once a month. (28RT 5355.) Appellant was not allowed to drive her car, and was unable to buy

his own or get a licence to drive until he got out of the service. This caused discord "sometimes." (28RT 5357.)

Appellant's mother "often" suffered physical abuse in her relationship with Pete, and appellant observed it. (28RT 5358-5359.) Lafayette Thomas was the only father appellant knew, and his death in 1977 was "quite a blow." (28RT 5360.) Appellant was in the Army at the time. He came home for the funeral, talked to her about his sadness, and cried. (28RT 5360.)

Asked if appellant went to juvenile hall when he was a kid, she said she thought he went for a few hours one day. She believed that something happened in Alameda with some other children; perhaps they took another child's bike. She believed that appellant went to jail for "driving tickets" or for a warrant as an adult. (28RT 5379.)

She noticed appellant talking to himself after he came back from the Army. She wondered why he did it. She did not think he was "crazy." Nor "a little off." But "kind of strange." (28RT 5361-5363.) She found it strange when he would just ramble on and talk to himself, but she did not think it means he was crazy. (28RT 5364.)

She was angry when she found out he had a drug addiction. She expressed her anger and disappointment. (28RT 5365.) He said he was sorry. He said he would "get himself together" and he did. She told him if he did drugs she didn't want any part of him. (28RT 5367.)

Appellant was homeless for a period about four years prior to the trial. (28RT 5369-5370.) Later he came by and said, "Mommy, I'm not

doing drugs anymore. Look how clean I am." He was proud of himself. He was working. It meant a lot to him when he got his first job for the City of Richmond. He was very happy. She felt he had made great strides. He was very pleased. (28RT 5370.)

Appellant spoke highly of Toni Lawrence. (28RT 5373.) He also discussed his discontent with his job in the early part of 1995, but not in detail. She told him to "just do his job and keep his mouth closed." He worked hard towards the goal of becoming permanent. He was a hard worker. He needed dental work, and he wanted to buy a house for them. He wanted to give her security for her retiring years. (28RT 5374.)

Mary Thomas told appellant about the trouble she had with a supervisor on a job she had five years earlier. The supervisor didn't like her, and treated her in a way different from the way other people who worked there were treated. She asked her to work multiple successive shifts on short notice. She "worked me like a horse, and I was so tired and stressed out I hardly knew which way was up." Ms. Thomas was out sick for five months with a viral infection, which was verified by doctor's notes that she had brought in. The supervisor said, "You don't have to worry about your probation. I know you've been out a lot sick. You're going to make probation." The next day, the supervisor said, "I need to see you for five minutes." The next thing she knew, she was being fired on the spot. She was very angry. (28RT 5375-5377.)

iv. Appellant's half brother

One of appellant's half brothers, William Keith Pearson, recalled hearing that appellant had a seizure in a park. Appellant was about 13 at the time. Someone came to get William and brought him to the park, which was about a half mile away. By the time he reached the park the ambulance and fire department were there, and they assured him there was nothing he could do. Appellant was fine then, and did not want to go to the hospital. (28RT 5396-5397.)

Appellant "hung out with the good kids" while growing up, did his homework, tried to "be the boss" of the younger kids and "probably got in trouble only "once or twice, if any" between age eight and fourteen. (28RT 5398.) Appellant ended up homeless as a result of drug addiction, and his failure to "ask anyone for anything" because of pride. (28RT 5411-5412.)

Appellant talked about his problems at the Housing Authority, saying he was being treated unfairly. (28RT 5414.) Prior to the shooting, appellant said something about getting a review, and "if something wasn't cleared up, he would be terminated." (28RT 5414-5415.) Appellant had not known that he was supposed to be doing the work they told him he should have been doing. He said he was going to start bringing work home with him to do on his own time. (28RT 5415.) His half brother assured appellant that that would be a good thing to do, "So that's what he did." (28RT 5415.) When he learned of the killings, he "felt for" appellant "because he knew it wasn't him. It wasn't like him." (28RT 5416.)

He understands the crime only in terms of the situation appellant faced. (28RT 5416.)

Afterwards, appellant said he was very sorry about what he did, that he had disappointed people, that he had "put us through what he had to put us through, and he was sorry two people were dead." (28RT 5419.) In jail, he was having nightmares. "He's under a lot of stress and he's worried." (28RT 5429.)

v. Robert Young, head cook at the jail

The head cook at the jail spoke of appellant's work in the jail kitchen for about five months while awaiting trial. He found appellant did not understand or take directions very well at first. (28RT 5388-5390.) Appellant "would stare" at the head cook in a strange way, indicating he wanted to do things another way. (28RT 5388.) On about three occasions, Young said, "If you don't like my orders, I have to move you out of the kitchen." Appellant said, "No no no. I'm not saying anything." (28RT 5388.) They talked about his case a little. Appellant appeared to be sorry. (28RT 5391.) He was housed in a trustee unit where inmates were allowed to eat the same food as staff members. They have a pool table, a yard where they exercise and get sun. There were two inmates in each room. There was a television set and books. (28RT 5394.)

vi. Defense counsel

William Veale testified about the meeting with appellant that Deputy LaFortune overheard. According to Veale, appellant's demeanor in prior conversations had been very polite and controlled. During this interview, appellant "got to a point where he took on kind of another aspect, which was loud, his voice was deeper . . . he used profanity he hadn't used before. . . . And he went on, and I was unable to stop him." (29RT 5467.)

Veale subsequently arranged a meeting with Drs. Kincaid and Wilkinson and appellant, because the doctors agreed that the explosion Veale witnessed previously "would be significant for them to observe." (29RT 5468-5469.) He and the doctors developed a strategy for pushing appellant to the point where he was talking about the same emotions that he had been expressing to Veale. Though they applied the strategy, appellant simply got tearful when he got to the point in the conversation where the emotion had come up before. Appellant was using "very generic sorts of descriptions. Dr. Wilkinson then began to, in essence, bait him, push him. Bait him. He was very confrontational toward [appellant]." (29RT 5471.) In response, appellant finally said, "I smoked the bitch" after recalling the last conversation that he had with Lorraine Talley. (29RT 5471.)

ARGUMENT

I. THE TRIAL COURT'S PRECLUSION OF SPECIFIC INQUIRIES AND MISUSE OF GENERAL DEATH-QUALIFYING QUESTIONS MADE JURY VOIR DIRE INADEQUATE UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

Misconstruing old case law, appellant's trial judge categorically refused to clarify, and precluded counsel from clarifying, the meaning of the term "mitigating circumstances" that prospective jurors had in mind when they told the judge that they would weigh mitigating circumstances before imposing sentence.

Specifically, the judge refused to instruct, question, or permit counsel to question the venire so as to extinguish the assumption (expressed by one juror, and common among lay people undergoing capital jury voir dire)[10] that the "mitigation" penalty jurors had to consider "could be circumstances such as self defense, fear of life, [and] accidental occurrences" (14ACT 5415), i.e., extreme circumstances generally precluding a conviction of capital murder.

The judge also precluded counsel from probing potential jurors' ability to give mitigating effect to what California law declares to be "mitigating circumstances" in a capital case. In so doing, the trial judge prohibited the kind of jury voir dire necessary to identify jurors who, as a

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[10] See John H. Blume et.al., *Probing "Life Qualification" Through Expanded Voir Dire* (2001) 29 Hofstra L. Rev. 1209, 1244.

result of their pro-death penalty views, "will fail in good faith to consider the evidence of . . . *mitigating* circumstances as the instructions require him to do." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, emphasis added.)

The end result was a record on which we cannot determine which of the "death qualified" veniremembers held a disqualifying, pro-death bias. As this court recognized in *People v. Cash* (2002) 28 Cal.4th 703, this state of the record requires reversal of the judgment under *Morgan*.

A. The trial court's voir dire mandate

This case was tried in 1996. Under state law in effect at that time, trial judges in criminal cases were required to "conduct the examination of prospective jurors" and permit the parties' counsel to "supplement" the court's examination only "upon a showing of good cause." (Former Code of Civ. Proc., § 223.)[11]

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[11] In 1996, the first paragraph of Code of Civil Procedure section 223 provided as follows:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

This paragraph was amended by the legislature's adoption of Assembly Bill 2406 in 2000. The amended statute provides, inter alia, that counsel for the parties in a criminal case shall have "the right to examine by oral and direct questioning any or all of the prospective jurors."

This court had not yet decided *People v. Cash*, *supra*, 28 Cal.4th 703, the first case in which this court reversed a penalty judgment because the judge had failed to permit inquiries into prospective jurors' ability to refrain from imposing the death sentence automatically upon proof of particular aggravating facts.

Prior to the decision in *Cash*, dicta in some of this court's death penalty decisions was commonly misconstrued to prohibit questioning about a juror's ability to seriously consider a life sentence in light of the specific facts of the case. Accordingly, appellant's trial judge announced the following pretrial order:

> As far as death qualification is concerned, the ultimate question will be whether the prospective juror's views about the death penalty in the abstract would substantially impair his or her performance of his or her duties, and I'm relying upon *People v. Visciotti*, [1992] 2 Cal.4th 1, 47; and *People v. Ghent*, [1987] found at 43 Cal.3d 739, 767. These prospective could [sic] jurors whose answers reveal they probably could not be neutral on the death penalty issue or that they are not willing and will not be able to keep an open mind as between death and life without parole and base their penalty decision on the evidence in the case and on the applicable sentencing factor on which they will be instructed will be excluded for cause if they are be (sic) challenged, *People v. Medina*, [1995] 11 Cal.4th 694, 746.
>
> As a general rule, voir dire about attitudes concerning the death penalty must be limited to questions which seek to determine only the view of prospective jurors about capital punishment in the abstract to determine if any, because of opposition to or support for the death penalty, would vote against or in favor of the death penalty without regard to the evidence produced at trial.
>
> I will nevertheless in this case, based upon the nature of this case, allow a limited amount of cross of case-specific questioning in an abstract manner, such as the following:

> "Would you consider life without possibility of parole as a possible punishment if the defendant were convicted of first-degree murder involving the deaths of more than one fellow employee?"[12] (2RT 298-299.)

The trial court told counsel that the court would conduct the examinations of the prospective jurors in groups of 25, and then allow each side 30 minutes to pose general questions to each 25-member panel.

Defense counsel asked the court if he could pose questions to the individual panelists. The court answered:

> To the extent that someone gives a response where I feel it's fair and appropriate and this happens routinely in my courtroom, someone puts themselves to the point where their response begs the question, I customarily allow the attorney to question those prospective jurors. But it's not my intention to allow you to just take individual each [sic] unless you could convince me that's necessary. (1RT 130.)

Later, in defending the decision to limit each side to 30 minutes per panel for life and death-qualification voir dire, the court reiterated its plan to authorize very little questioning by counsel: "[Y]ou can get responses

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[12] A few weeks prior to reading this script, the court said it would give counsel a proposed procedure for selecting the jury, and added, "I take no pride of authorship because, believe me. I'm going to be plagiarizing from every other judge in the last year and a half who's tried a death penalty case to get ideas and just find out what has become the community standard in Contra Costa County." (1RT 63.) The court did not identify the author or authors.

Notably, neither the script nor the views expressed in the paragraphs quoted here resemble those suggested in the CJER and other benchguides this court cited in *People v. Heard* (2003) 31 Cal.4th 946, 967, fn. 9.

from the juror but you are not going to individually try to zero in on jurors unless they respond a certain way. . . ." (1RT 133.) The "certain way" that venire members must respond to general questions before counsel would be allowed to "zero in" was not further defined.

After hardship screening, the court told the remaining venire members that appellant's case involved two murder charges, a multiple murder special circumstance allegation, and the possibility for the death penalty. (2RT 319.) The court said that the proper frame of mind for a juror entering into a penalty phase would include willingness to consider each of the two possible penalties. (2RT 321.)

Prospective jurors were directed to complete questionnaires prepared by the prosecution and approved by the trial court. Apropos the proper use of the death penalty, the questionnaire asked prospective jurors if they believed the death penalty should "always, sometimes or never" be imposed by the state on "everyone" who (1) kills another human being, (2) intentionally kills another human being, (3) kills another human being with deliberation and premeditation.

Most of the respondents indicated belief that the state should impose the death penalty on *everyone* who kills another human being, either "sometimes" or "always." Many said the state should *always* do so if the killing was deliberate and premeditated, after checking the box affirming belief that they "should hear and review all of the evidence surrounding the case before deciding what penalty to impose." The trial court thus faced a substantial number of prospective jurors whose ability to refrain from

imposing death on appellant was questionable. (See 3ACT 923, 1007, 1028, 1091, 1112, 1196, 1217; 5ACT 1573, 1594, 1615, 1762, 1783, 1825, 1888; 6ACT 1972, 1993, 6aACT 2224, 2286, 2307, 2372, 2393; 7ACT 2601, 2622, 2643, 2664, 2789, 2810, 2999; 8ACT 3083, 3104, 3125, 3146, 3167, 3188, 3209, 3230, 3251, 3272, 3314, 3335, 3356, 3398; 9ACT 3419, 3440, 3460, 3481, 3502, 3523, 3544, 3565, 3586, 3607, 3628; 10ACT 3859, 3880, 3943; 12ACT 4572, 4614, 4635, 4656, 4677, 4698, 4719, 4740, 4761, 4782, 4844, 4865, 4886; 14ACT 5288-89, 5415, 5520, 5562.)

With very few exceptions, those who declared that the death penalty should "always" be imposed for premeditated or intentional killing agreed they could and should consider all the circumstances before imposing sentence, when questioned by the trial court.

Consistent with its pretrial order, the trial court led the questioning. In questioning veniremembers whose questionnaires expressed belief that the death penalty should "always" or "sometimes" be imposed on everyone guilty of premeditated murder, the court's questions focused on establishing their willingness to "receive" or "consider" and "weigh" "any mitigation" along with aggravation before imposing sentence.

Defense counsel's challenges for cause against jurors who said they would consider all the evidence before imposing death were uniformly denied, despite such jurors' declarations that the death penalty should *always* be imposed on everyone guilty of the charged crime. Only veniremembers who said their vote for death would be "automatic" were excused by the court for pro-death bias. (See, e.g., 5RT 1033-1034.)

B. The trial court's mishandling of mitigation issues and questions suggested by counsel during voir dire

i. The preclusion of defense efforts to probe the common misunderstanding represented in Juror No. 4's questionnaire

The multiple-choice formatted questionnaire completed by future juror No. 4, Mr. A.H., said that he believed the state should "sometimes" (as opposed to "always" or "never") impose the death penalty on "everyone" (the only choice) who kills unlawfully, intentionally, or with deliberate and premeditated intent (circling "sometimes" for all three). (14ACT 5400, 5415.)

On the explanation line, he wrote, "There could be circumstances, such as self defense, fear of life, accidental occurrences, etc." (14ACT 5415.)

Juror No. 4 was a member of the first panel of prospective jurors to undergo death-qualifying voir dire. Although the court referenced questionnaire responses of other panelists prior to questioning them, the trial court did not allude to Juror No. 4's questionnaire responses at all, much less touch upon the legal distinction between the mitigators Juror No. 4's questionnaire mentioned and those that could be found in the penalty phase of a trial in which the defendant was found guilty of deliberate and premeditated murder.

In response to the court's questions, Juror No. 4 told the trial court that he could place his mind in a receptive mode regarding the penalty phase, weigh mitigation against aggravation, vote for life without parole if

mitigation outweighed aggravation, and vote for death if the opposite were true. (5RT 915-916.)

Defense counsel promptly asked the judge to ask Juror No. 4 follow-up questions that would be important to the entire panel and particularly appropriate for Juror No. 4 in light of Juror No. 4's previously-noted questionnaire responses. The request was made outside the presence of the panelists, as required by the trial court's pretrial order.

Specifically, counsel moved the court to ask Juror No. 4 if he understood that self-defense and accident are defenses precluding a conviction of murder, whether "the only way he would not impose the death penalty is if he thought there was some defense to homicide in which a [sic] situation there would be no murder," and "in what respect is he not understanding the question [on the questionnaire] or in what respect is his mind set different now than it was when he answered the question." (5RT 972.)

The trial court declined to question Juror No. 4 as requested. Further, the court made findings precluding defense counsel from doing so under the court's pretrial conference order. In the court's words:

> I don't know that I can do that, because I think you are getting into the point then of [sic] he understands there are other matters in mitigation.
>
> I don't believe [the juror's] comment is a exhausted [sic] list. I was given examples, certainly there are such things as imperfect self defense which might go to mitigation, there are such matters as defense of others or defense of self which might not be a complete defense but could be used in mitigation.

> So I think his answer is — his answer is, I think, it's fairly clear what his answers meant. (5RT 972.)

Defense counsel responded, pointing out inter alia that Juror No. 4's list of mitigators did not include any statement supporting the court's assumption that Juror No. 4 was willing to give mitigating effect to facts that could be found after conviction of the charge appellant faced. (5RT 972.) Counsel reasserted "that there needs to be further questioning." (5RT 973.)

The court ended the discussion. "I don't follow. I don't agree with that. I won't question [Juror 4] on that. I think his answer is clear." (5RT 973.)

After the conference at which counsel made their requests for follow-up questioning of individual jurors on Juror No. 4's panel, the trial court asked other panelists to explain or elaborate on questionnaire responses, and allowed the prosecutor to further rehabilitate panelists whose questionnaires declared that the state should always execute people who kill with deliberate and premeditated intent. (5RT 977-990, 997-1001.)

At defense counsel's request, the court read the standard instruction defining deliberate and premeditated murder, CALJIC No. 8.20. The court also read the standard instructions defining malice and murder, CALJIC Nos. 8.10 and 8.11. At the prosecutor's request, the court read CALJIC No. 8.85, defining sentencing factors A through K. (5RT 991-996.)

In accordance with the court's previously-expressed view of the law, the court did not read and counsel did not request any instructions capable

of informing the panel that the defenses and mitigators listed on Juror No. 4's questionnaire could not be found in the case they were called to try. Defense counsel was permitted to ask Juror No. 4 a lengthy leading question informing Juror No. 4 that no one is convicted of murder for killing in self defense (5RT 1017), but was stopped by the trial court before he could ask Juror No. 4 any questions distinguishing the mitigators he listed on his questionnaire from those that penalty phase jurors must consider.[13]

ii. The misleading response to the next juror whose questionnaire set out inappropriate criteria for mercy

Ms. J.S., who was later sworn as Alternate Juror No. 2, was part of a panel questioned after that of Juror No. 4. In accordance with the trial court's usual practice, Alternate Juror No. 2's pro-death penalty questionnaire response was read aloud in the presence of her entire panel.

On the explanation line of the questionnaire item on which she declared that the state should "sometimes" impose the death penalty on

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[13] As soon as Juror No. 4 responded to counsel's leading question about self defense, the court interjected a leading question of its own, asking if Juror No. 4 would be "neutral" at the outset of the penalty phase after finding two murders, one of them deliberate and premeditated. Juror No. 4 said, "I believe I am, because of these factors that are involved that we have to consider." (5RT 1018.) Defense counsel then directed a question to the panel, told the panel "we are not allowed to try the case now" and asked Juror No. 4 if he could honestly say of himself "I am neutral and I am not predisposed one way or the other?" Juror No. 4 said, "That is correct." (5RT 1018-1019.)

everyone who commits unlawful, intentional, or deliberate and premeditated homicide, the trial court noted that she wrote:

> If the murderer has suffered repeated and serious sexual or physical abuse at the hands of the victim, some mercy or understanding might be shown. If the victim murdered or maimed or seriously harmed the child of the murderer, clemency would be in order. Otherwise, I would have to say that murder should be paid for with one's own life. (14ACT 5288-89, 6RT 1270.)

Rather than contrasting Alternate Juror No. 2's criteria with the kind of mitigation penalty jurors must weigh, the trial court told her that the facts she listed were not present "in every case." The court did not tell her that they were not present in the present or in any case likely to require a penalty trial.

The trial court asked Alternate juror No. 2 "if her mind is made up that the death penalty should be imposed" in the absence of such factors, "regardless of what other extenuating circumstances might exist." (6RT 1271.)

She said no, she "would listen" to whatever was presented in the penalty phase; the ances listed on her questionnaire were those that came to her mind at the time of her writing. And "[i]f the other view, you know, presented in the penalty phase that was absolutely compelling that there was a reason for this happening, I "would consider" it. (6RT 1271.)

The court then went back to asking its usual overly-general questions, i.e., "Is your mind open to the possibility that mitigating evidence

will be presented to you? Do you understand that you would be obligated to evaluate that evidence with aggravating evidence before you reached a decision regarding penalty? Would your vote for death be automatic upon finding the defendant guilty of first degree murder with special ances?" (6RT 1272.)

Upon denying that her vote for death would be automatic, she admitted that she would be leaning toward death "if picked for this jury" and "can't help having opinions" but "would do my best." (6RT 1273.)

The court concluded its rehabilitation of Alternate Juror No. 2 with the following exchange:

> THE COURT: Do you think these opinions would prevent you from considering life without possibility of parole?
>
> A. No.
>
> THE COURT: Okay. I think I understand then. As you sit here now, do you feel there is anything about this case that makes you feel you could not or should not sit as a juror in this trial?
>
> A. No.
>
> THE COURT: You feel you could fulfill the duties and responsibilities of a juror if selected in this case?
>
> A. Yes.
>
> THE COURT: All right. Thank you very much, ma'am. (6RT 1273.)

The prosecutor was allowed to further rehabilitate Alternate Juror No. 2 by asking her if she could "at least envision the possibility that

mitigation, whether it could be age, or mental disorder or prior criminality or the lack thereof or whatever it is that might be introduced during the penalty phase could be so mitigated and you could vote for life without possibility of parole, that there could be something?" She conceded, "there could be something." (7RT 1310.)

Defense counsel subsequently attempted to ask Alternate Juror No. 2 if she could indeed impose life upon finding a specific statutory mitigating factor: lack of prior criminal record. At the end of a rambling account of Alternate Juror No. 2's previous statements, defense counsel asked if she might "have no trouble" voting for life upon finding "the fact he's got no record something like that." (7RT 1321.)

Alternate Juror No. 2 said defense counsel's description of her position was "fair," but she immediately summarized her position differently. Rather than agreeing that she could vote for life upon finding that the defendant had no criminal record, she said, "I would listen to whatever you could present to win the sympathy of the jury over to life imprisonment. I would certainly listen to it. I would weigh it as carefully as I possibly could." (7RT 1320-1321.) Defense counsel unsuccessfully challenged her for cause. (7RT 1339.)

iii. The preclusion of defense efforts to show that venire members who said the state should *always* impose death for appellant's crime would not consider capital-case mitigation in the manner required by California law

As part of a lengthy rehabilitation effort, the prosecutor asked future Juror No. 9, Mr. E.M., (a member of Juror No. 4's panel who said the state should "always" impose death for premeditated murder) if it "made sense" to him to take the statutory factors "into consideration" and whether he would want to know about those factors before making a sentencing decision. He answered affirmatively. (5RT 989.)

Later, addressing a panelist whose questionnaire responses were even more absolutist than those of Juror No. 9 and whose rehabilitation by the trial judge was based on very general questioning, defense counsel attempted to clarify the type of consideration of statutory factors these panelists were able to give.

Specifically, defense counsel asked panelist Aileen Cabral if, in listening to the judge read the factors in mitigation, any of the factors moved her to think, "Gee, yeah, I guess if that were the case then maybe somebody shouldn't die for killing two people, one of whom in one situation where it was absolutely premeditated. Does anything like that occur to you?" (5RT 1013.)

After Ms. Cabral answered affirmatively, the trial court precluded counsel from asking the question of others by declaring the question improper. The court said:

I am not going to allow the juror to prejudge factors that way. We're dealing with challenge for cause. (5RT 1013.)

Later, the trial court noted that panelist Gloria Martin's questionnaire said she believed the state should "always" impose death on everyone who "intentionally" kills another human being, as well as on everyone who kills with premeditation and deliberation. As to simple unlawful killing, she said the state should only sometimes impose capital punishment. She explained, "Not in accidental death circumstances." (5RT 1085.)

Rather than asking Martin any pointed questions, the trial court sought affirmation of her ability to "do what [the court was] asking jurors to do in the penalty phase . . . , start once again evaluating what is the appropriate penalty . . . be able to receive evidence in mitigation . . . receive evidence in aggravation which could include the crime facts . . . determine whether or not one penalty or the other should be imposed." (5RT 1086.)

The court asked if her "comments about you would always impose a death penalty on a premeditated and deliberate murder, do those now take a back seat to your responsibilities as a juror in this case?" Ms. Martin said, "No. You've explained them. There is the second phase, the penalty phase, and other factors might be introduced." (5RT 1087.)

Although the court concluded the dialogue by asking Martin if she felt she "would be able to evaluate the mitigating factors that would be presented in the penalty phase and vote for a sentence of, for example, life without the possibility of parole," the trial court did not inquire into her

conception of the factors "that would be presented in the penalty phase." (5RT 1087.)

Defense counsel's examination of Martin produced an admission that the death penalty was "the" penalty for someone who made a "premeditated, cold, calculated judgment to kill" in her "heart, or the back of [her] mind, or what's really real in [her]." (6RT 1158.) But the court denied counsel's challenge for cause against Martin and rebuffed counsel's objections to the way the court was "get[ting] them to say they can do the job." (6RT 1178-1179.) The court noted that Martin "did respond appropriately, indicated she could evaluate this case, hear both sides, and make a decision regarding penalty." (6RT 1179.)

C. Why reversal of the penalty judgment is required

i. The court labored under misconceptions of law: life-qualification requires more than a denial of readiness to impose death automatically and an ability and willingness to consider a life sentence in some conceivable case of intentional homicide; a juror must be able to follow capital sentencing law in the case to be tried

The Sixth Amendment guarantees an impartial jury, one composed of "jurors who will conscientiously apply the law and find the facts." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

Accordingly, prospective jurors must be excused for cause when their views in favor of capital punishment would prevent or substantially impair the performance of their duties as jurors. As stated by this court in *People v. Cash*, *supra*, 28 Cal.4th at p. 721:

> Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S. Ct. 2222, 2228-2229, 119 L.Ed. 2d 492]), . . . the 'real question' is *whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.* (*People v. Cash*, *supra*, 28 Cal.4th at p. 720, emphasis added.)

Thus, to be removed for cause because of bias in favor of the death penalty, a prospective juror need not appear ready to engage in "'automatic' decisionmaking" in the choice of penalties." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

That standard was specifically rejected in *Witt* as inappropriate for sentencing under post-*Furman* [*v. Georgia* (1972) 408 U.S. 238] "guided discretion" death penalty schemes. As the Court explained:

> [W]e do not believe that language can be squared with the duties of present-day capital sentencing juries. In *Witherspoon* [*v. Illinois* (1968) 391 U.S. 510] the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to consider the death penalty arguably was able to "follow the law and abide by his oath" in choosing the "proper" sentence. Nothing more was required. Under this understanding the only veniremen who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.
>
> After our decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), however, sentencing juries could no longer be invested with such discretion. As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a venireman might

> vote for death under certain personal standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 421-422.)

Under the *Witt* standard, a venireman's ability to consider what he conceives of as mitigating evidence before imposing sentence is not dispositive. A juror who can impose one of the two possible sentences only "under certain personal standards" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 422) is not an impartial juror in the post-*Furman* world. A juror must be willing and able "in good faith to consider the evidence of aggravating and mitigating circumstances *as the instructions require*." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729, emphasis added.)

Thus, to be qualified to serve in California, a juror must be able to refrain from treating as an "aggravating circumstance" the elements of the crime itself (CALJIC No. 8.88), and any case-specific factor, including intoxication and other forms of impairment, that the state law treats as mitigating. (See, e.g., Pen. Code, § 190.3, factors (e)-(j).)

A California juror must also be willing and able to give mitigating effect to *every* factor that California or federal constitutional law deems mitigating, though the weight to be given to all mitigating evidence is left to her discretion. (CALJIC No. 8.85.) Youth and lack of serious criminal record are mitigating factors under California law. A juror who does not believe such factors are entitled to any weight whatsoever is therefore disqualified under *Morgan*, because she cannot "consider the evidence of

aggravating and mitigating circumstances *as the instructions require.*" (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729, emphasis added.)

Finally, in any American jurisdiction, a juror who will "invariably impose the death penalty upon conviction" of the charged offense cannot be allowed to sit as a penalty juror in any case where that offense is charged. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 738.) In defining the defendant's right to voir dire, *Morgan* specifically recognized the trial court's obligation to accept any "challenge for cause against those prospective jurors who would *always* impose death following conviction." (*Id.* at p. 733, emphasis added.)

In rejecting challenges for cause against veniremembers who declared that the state should "always" impose death for appellant's crime because those veniremembers also said they would consider all the evidence before imposing sentence, the trial court repeatedly displayed contempt for one of *Morgan*'s central tenets: a juror who will *always* impose death for the charged offense is *ipso facto* disqualified because a juror who will *never* impose death is disqualified. Without that symmetry in the rules, the jury as a whole cannot be considered impartial. (*Id.*, 504 U.S. at p. 733.)

ii. Contrary to the trial court's understanding of the law, "voir dire about attitudes concerning the death penalty" must not be "limited to questions which seek to determine only the view of prospective jurors about capital punishment in the abstract."

Contrary to these words spoken by the trial court in its pretrial conference order and implemented in the rulings noted above, no law

requires or allows trial courts to limit life or death qualification voir dire "as a general rule" to "questions which seek to determine only the view of prospective jurors in the abstract." (2RT 298-299.)

In *People v. Visciotti*, *supra*, 2 Cal.4th at p. 47, the first case cited by the trial court that contains language consistent with the trial court's view, this court said:

> *Hovey*[14] "voir dire seeks only to determine if, because of his views on capital punishment, any prospective juror would vote against the death penalty without regard to the evidence produced at trial." [Citations.] [Para.] It was not necessary, therefore, to permit extensive questioning of the prospective jurors *during the Hovey voir dire* regarding their willingness to impose the death penalty based on the anticipated facts of, or a hypothetical set of facts based on, the case to be tried.

This description of the limited agenda for *Hovey* (sequestered) death-qualification voir dire does not refer to, or comprehend, the qualification issues defined by post-*Hovey* cases. *Hovey* was decided in 1980, five years before *Wainwright v. Witt*, and over a decade before *Morgan v. Illinois*. *Visciotti* was itself decided in 1992, three months prior to *Morgan*. Furthermore, *Visciotti*'s commentary on the propriety of the prosecutorial questioning at issue was dicta. This court resolved that any error in allowing the prosecutor's questions was waived by defense counsel's failure to object.

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[14] *Hovey v. Superior Court of Alameda County* (1980) 28 Cal.3d 1

People v. Medina, the other case cited by the trial court (and by the Attorney General in *Cash*) that contains language recited by the trial court, uses the latter phrase in dicta. In this dicta, this court properly noted that the aggravating-fact-specific life-qualification questioning sought by defendant Medina was not "relevant" to the "death" qualification of a juror, and could be therefore excluded during *sequestered* voir dire.

In *People v. Cash*, this court rejected the Attorney General's effort to use *Medina's* dicta as justification for a trial judge precluding similar aggravating-fact-specific life-qualification throughout the voir dire process. Acknowledging that life-qualifying questioning of death-qualified jurors is now a matter of federal constitutional right, and that this court has permitted prosecutors to ask case-specific death-qualification questions, this court reversed the penalty judgment because of the trial court's failure to allow the requested defense question.[15]

As clarified in *Cash*, the only type of case-specific "life qualifying" questioning that trial courts must prohibit is that which "requires the prospective jurors to *prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.*" (*People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722, emphasis added.)[16]

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[15] Importantly, the *Cash* opinion acknowledges that the law was unclear in this regard when the case was tried. (*People v. Cash*, *supra*, 28 Cal.4th at p. 721 ["In fairness to the trial court, we note that most of our decisions clarifying the law on this point were announced after the trial in this case."].)

[16] In rejecting the Attorney General's arguments in *Cash*, this court said its prior decisions suggest that "death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify

Apropos the present case, counsel and court may, "properly inquire whether a prospective juror could impose" one of the possible sentences "only in particularly extreme cases unlike the case being tried [citation.]." (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.)

Likewise, counsel and court can question a panelist's ability to return a life verdict for a premeditated murder committed without any defense or mitigating circumstance that a defendant is known to be unable to present.

Prosecutors have been permitted to ask venire members if they can impose death on a defendant who did not personally kill the victim (*People v. Ervin* (2000) 22 Cal.4th 48, 70-71), and on one who lacked a prior murder conviction (*People v. Livaditis* (1992) 2 Cal.4th 759, 772-773). As summarized in *Cash*, this court has also authorized prosecutors to inquire whether a prospective juror could impose the death penalty in a felony murder case, on a young defendant, or on a defendant who had killed only one person. (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.)

There is no sound reason why such factual specificity and focus on willingness to impose (as opposed to merely consider) a particular sentence should be permissible for prosecutors and not for the defense. The Fourteenth Amendment's Due Process guarantee requires that rules be applied to the State and to defendants in an evenhanded manner. "The State

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those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] (*People v. Cash, supra,* 28 Cal.4th at pp. 721-722.)

may not insist that trials be run as a 'search for truth' so far as [death-scrupled venire members] are concerned, while maintaining 'poker game secrecy' for its own [death-prone jurors]." (*Wardius v. Oregon* (1973) 412 U.S. 470, 476.)

Accordingly, in *People v. Vieira* (2005) 35 Cal.4th 264, 285, this court declared that "a trial court's categorical prohibition of an inquiry into whether a prospective juror could *vote for life* without parole for a defendant convicted of multiple murder would be error."

Furthermore, it is the defendant, not the prosecution, whose right to voir dire is protected by the Due Process Clause (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 728-729) and whose right to find and prevent biased jurors from being seated is especially "great" in capital cases. (*Turner v. Murray* (1986) 476 U.S. 28, 35.)

iii. The trial court's mistaken impression of the governing law prevented the exercise of appropriate discretion

Where fundamental rights are affected by the exercise of discretion by a trial court, appropriate discretion "can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.)

That appellant's fundamental rights were affected by the trial court's limitations on voir dire is beyond cavil. As stated in *Morgan*:

> Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury

> will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citations.] Hence, "the exercise of the trial court's discretion, and the restriction upon inquiries at the request of counsel, are subject to the essential demands of fairness." [Citations.] (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730.)

iv. The preclusion of questions distinguishing Juror No. 4's listed mitigators from those that penalty phase jurors must consider was not an appropriate exercise of discretion

The trial court's first words in denying appellant's request to clarify Juror No. 4's position ("I don't know that I can do that, because I think you are getting into the point then of (sic) he understands there are other matters in mitigation") evince the trial court's confusion about the applicable law.

There is nothing wrong with asking a prospective juror if he understands that there are "matters in mitigation" other than fear of life, self defense, and accidental occurrences. The court asked Juror No. 4 and every other panelist who supported the death penalty if they could weigh "mitigation" as well as aggravation before imposing sentence. (5RT 915.) Having used the term "mitigation" the court was certainly authorized if not obliged to ensure that the examinees knew what the court was talking about.

The trial court's subsequent questioning of Alternate Juror No. 2 suggests that the trial court eventually realized that there was nothing wrong with asking a juror if she understands that there are "matters in mitigation" other than the extremely unlikely capital-case mitigation evidence Alternate Juror No. 2 described as a scenario in which she would not impose death.

Also, in questioning a later panel, the trial court gave realistic examples of the kind of evidence that could be introduced in mitigation following a conviction of deliberate and premeditated murder. (6RT 1169.) Still, the trial court did not retract its ruling on clarifying the position expressed by Juror No. 4, slight variations of which were expressed in the questionnaires completed by prospective jurors Schild, Taylor-Prater, Martin, and Watkins-Weiss (8ACT 3104, 7ACT 2664, 12ACT4886, 5ACT1825) nor force Alternate Juror No. 2 to say whether she would give mitigating effect to any statutory factor or to any other mitigation likely to appear in a capital case.

Consequently, if the trial court can be said to have exercised discretion in precluding questioning distinguishing Juror No. 4's mitigators from those that could occur in a capital case, that discretion was abused.

Questions aimed at uncovering or elucidating a veniremember's personal criteria for withholding capital punishment are necessary and appropriate to implement the capital defendant's right to remove a juror who cannot apply the statutory sentencing scheme.

As previously noted, the defense need not show that a juror will engage in "'automatic' decisionmaking" in the choice of penalties, or demonstrate that "he would never vote for [one of the penalty choices]." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The fact that "a venireman might vote for [life without parole] under certain personal standards" (*id.* at p. 422) begs the question of whether he can vote for life under the standards provided by law.

Just as prosecutors are permitted to identify and exclude jurors who will impose death "only in particularly extreme cases unlike the case being tried," the defense is entitled to expose this type of disqualification. (*People v. Cash*, *supra,* 28 Cal.4th at p. 721.)

Precluding clarification of answers suggesting a basis for a challenge for cause is not a defensible use of the court's discretion in the conduct of voir dire. As this court explained in *Bittaker*:

> Even under the rule of *People v. Edwards* (1912) 163 Cal. 752 [127 P. 58] (overruled prospectively in *People v. Williams* (1981) 29 Cal.3d 392 [174 Cal.Rptr. 317, 628 P.2d 869], which broadened the scope of voir dire to permit examination for peremptory challenge), a party was entitled to put questions which might expose a basis for a challenge for cause. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1083.)

The fact that Juror No. 4's questionnaire response showed a particular need for clarifying questions further supports appellant's claim of error. Seating a juror who has given an ambiguous answer without permitting counsel to clarify the ambiguity is a clear abuse of discretion. As stated in *Bittaker*:

> We do not question a judge's discretion to decide that a juror's disqualification is so clear that further voir dire is pointless, and to excuse the juror, but this does not justify denying voir dire when the juror's answers are equivocal and the juror is retained. (*People v. Bittaker*, *supra*, 48 Cal.3d 1046, 1085.)

The trial court's stated belief that Juror No. 4's questionnaire response was "clear" does not refute the application of this principal. While Juror No. 4's use of the word "etcetera" indicated that Juror No. 4 was not asserting that his list was exhaustive, his placement of that list on the line provided to explain his views on appropriate bases to impose or withhold capital punishment indicates that he had these and other similarly-extreme circumstances in mind when he chose to say the state should "sometimes," rather than "always" or "never" impose, capital punishment.

Likewise, the trial court's observation that not all of the circumstances on Juror No. 4's list were complete defenses to a homicide charge cannot excuse the court's decision. The fact that some of the listed circumstances might produce a voluntary manslaughter judgment rather than a complete acquittal would have been dispositive only if the issue before the court had been Juror No. 4's ability to be a fair juror in a manslaughter case. In a death penalty case, it is the juror's ability to fairly consider a life sentence for a capital crime that the court must resolve.

Finally, the clarifying inquiry that Juror No. 4's questionnaire caused counsel to seek was important and appropriate for every member of the venire who expressed willingness to consider all the evidence and "weigh mitigation" before imposing death.

"[A]ll too often, the potential jurors [who say the appropriateness of the death penalty for murder depends on all the circumstances] are thinking of 'circumstances' that would make the act or incident a killing in self defense, an accident, an act in the 'heat of passion,' a product of insanity;

that is, they are thinking of circumstances that would make the crime not a murder at all, let alone a capital murder." (Blume et. al., *Probing "Life Qualification" Through Expanded Voir Dire* (2001) 29 Hofstra L.Rev. 1209, 1244.)

New ABA guidelines draw a bead on this problem. (See ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, adopted Feb. 10, 2003, reprinted at 31 Hofstra L.Rev. 913.) Guideline 10.10.2 requires appointment of counsel "familiar with techniques" for exposing prospective jurors who are unable to give meaningful consideration to mitigating evidence" as well as those who "would automatically impose the death penalty." (31 Hofstra L.Rev. at p. 1049.)

Historical notes for Guideline 10.10.2 declare that "the failure to uncover jurors who will automatically impose death" following a conviction of a death-eligible crime, and "the failure to uncover jurors who are unable to consider mitigating circumstances" as such, are the "starkest failures of capital voir dire." (*ABA Guidelines 2003*, 31 Hofstra L.Rev. 913, 1050, History of Guideline 10.10.2.)

v. The preclusion of inquiries about reaction to the trial court's reading of statutory sentencing factors was not an appropriate exercise of discretion

The trial court ruled out appellant's last hope of challenging mitigation-impaired jurors when it condemned (as asking a juror "to prejudge the evidence") defense counsel's query as to whether any of the

statutory sentencing factors struck a veniremember as grounds to refrain from imposing capital punishment on someone convicted of the crimes that would render appellant death-eligible.

This ruling was not justified. No prejudgment of the evidence is possible upon a reading of the law alone. Only prejudgment of the law is possible, and that kind of prejudgment is an entirely appropriate focus of a life-qualification inquiry. A juror who does not feel that any of the statutory factors constitute good cause to impose life cannot apply California law impartially, and is disqualified under *Morgan v. Illinois*.

To be qualified as a capital case juror, a person must be willing and able to give effect to what the law deems mitigating evidence. He must not deem any such evidence "irrelevant" or "fail to consider" it "in good faith." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.)

Being willing to consider and give mitigating effect to some form of mitigating evidence is not enough. As Justice Scalia's dissent in *Morgan* points out, the inability or unwillingness to give mitigating effect to just one statutory mitigating factor renders a capital juror constitutionally unqualified. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 744, fn. 3, Scalia, J. dissenting.)

Reasonable questions about a potential juror's willingness to apply a particular doctrine of law must be permitted when the facts of the case call for application of that doctrine. A question is reasonable, and its preclusion will be deemed an abuse of discretion, if the question is substantially likely

to expose strong attitudes "antithetical" to the defendant's defense. (*People v. Williams*, *supra*, 29 Cal.3d 392, 410.)

The kind of inquiry counsel attempted with veniremember Aileen Cabral was appropriate to the screening task. In asking for the veniremember's reaction to the court's reading of the statutory sentencing factors, and in directing the veniremember's attention to the potential impact of those factors on the member's sentencing decision, counsel sought to force veniremembers to elucidate their biases against giving mitigating effect to some or all of the appropriate factors. An affirmative answer, like that given by Cabral before the court interrupted, invited follow-up questions isolating the factors that Cabral (and other pro-death prospective jurors) would not weigh as mitigating. "A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried." (*People v. Cash, supra*, 28 Cal.4th 703, 720, citing *People v. Kirpatrick* (1994) 7 Cal.4th 988, 1005.)

Finally, the importance of the inquiry attempted by defense counsel was such that the trial court should have assumed responsibility for conducting a proper inquiry into veniremembers' reaction to the statutory mitigating factors if the trial court had good reason to object to defense counsel's approach. (*People v. Fuentes* (1985) 40 Cal.3d 629, 639 [If the court's concern is with the form of the question, court should require rephrasing rather than precluding an entire area of inquiry].)

"'[W]ith the heightened authority of the trial court in the conduct of voir dire . . . goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors.' [Citation.]" (*People v. Mello* (2002) 97 Cal.App.4th 511, 516.)

Capital jurors who will not give any weight to the absence of prior criminality are common, and ferreting out such jurors was particularly important in this case. Research conducted by the Capital Jury Project with funding from the National Science Foundation found that 80% of the capital jurors interviewed for a study of attitudes toward statutory mitigating factors admitted they would not be at all moved by appellant's undisputed statutory mitigation: his lack of prior criminal record. (Stephen P. Garvey, *Essay: Aggravation And Mitigation In Capital Cases: What Do Jurors Think*? 98 Colum. L.Rev. 1538.) Only one-fifth of the ostensibly-qualified jurors said they would be somewhat moved toward a life sentence by proof that a defendant had no previous criminal record. Most of those who said this factor was at all mitigating for them felt it was only "slightly" so. (*Id.* at pp. 1562-1563.)

vi. The voir dire as a whole was constitutionally inadequate to identify jurors who would always impose death upon conviction of the charged offense and jurors unable to follow instructions to consider and weigh mitigation

Voir dire is constitutionally inadequate where, as here, a juror who would always impose death upon convicting a defendant of deliberate and

premeditated murder, or a juror who would "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require" (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729) "could in all truth and candor respond affirmatively" to all of the qualification questions jurors were forced to answer. (*Id.* at p. 735.)

As explicated in parts (C)(i-iv) *ante*, jurors who will *always* impose death for murder, and those who will fail to give mitigating effect to what the law deems mitigating evidence, can honestly say that they will "weigh mitigation" and "consider all the circumstances" before imposing death.

That question is capable of isolating jurors for whom the penalty trial is a perfunctory exercise only if joined with a description of the defenses and mitigators that will have been eliminated before the penalty phase begins, and with disclosure of the law's demand that some weight be given to less compelling mitigation, such as the absence of prior felony convictions and history of violent crime.

None of appellant's jurors, including those on Juror No. 4's panel, were given any such information before being asked if they could "weigh any mitigation." After the court completed its qualification inquiries, Juror No. 4 and his fellow panelists were informed that self defense would have been eliminated before the case reached the penalty phase. But they were not informed that insanity, fear of death or great bodily harm, or other circumstances warranting a manslaughter verdict would have been eliminated as well, nor asked to respond to the qualification inquiry after being informed as to the absence of self defense.

No one was told that any less compelling mitigating evidence, such as the absence of prior felony convictions and any history of violent crime, must be given mitigating effect. The standard instructions the trial court read to appellant's venire did not say that the sentencer must give mitigating effect to any statutory factor. Only at the end of the case, after appellant's counsel objected to misleading prosecutorial argument on the point, was the jury informed that the law requires that jurors treat appellant's record as mitigating. (29RT 5521-5528.)

California law requires all sentencers to give mitigating effect to the absence of any prior felony convictions (§ 190.3, factor (c)), and to the absence of any history of violent criminal activity (factor (b)). (*People v. Crandell* (1988) 46 Cal.3d 833, 884 ["the absence of prior violent criminal activity and the absence of prior felony convictions are *significant* mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past."].)

Veniremembers unable or unwilling to follow this aspect of California law had no reason to believe they should answer negatively when asked if they would follow the law as instructed by the court. And since published research indicates that only a minority (20%) of jurors who have passed a general death qualification regimen are moved at all closer to a life sentence by this type of mitigating evidence,[17] it appears more likely than

[17] As previously noted, research conducted by the Capital Jury Project with funding from the National Science Foundation indicates that large numbers of "death-qualified" jurors are unable or unwilling to consider common statutory mitigating factors as such.

not that the failure to question jurors' ability to give it mitigating effect enabled the state to seat one or more jurors who could not and would not follow this instruction.

The Fourteenth Amendment's due process guarantee demands fundamental fairness in jury selection procedure. "Hence, 'the exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.' [Citation.]" (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730.) If the inadequacy of voir dire leads a reviewing court to doubt that the defendant "was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand. [Citation.]" (*Id.* at p. 739.)

In this case, on the facts of record alone, the inadequacy of voir dire provides more than ample reason to doubt the fundamental fairness of the enpanelment process. Likewise, the extent to which the trial court's questions and statements were capable of affirmatively misleading death penalty supporters to underestimate the difficulty of the job is unacceptable. Like telling death-scrupled veniremembers that our death penalty law requires jurors to impose death without the level of culpability actually

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Most important to the issue at bar, 80% of the capital jurors interviewed for the study admitted they would not be at all moved by appellant's undisputed statutory mitigation: his lack of prior criminal record. (Stephen P. Garvey, *Essay: Aggravation And Mitigation In Capital Cases: What Do Jurors Think?* 98 Colum.L.Rev. 1538.)

Only one-fifth of the ostensibly-qualified jurors said they would be somewhat moved toward a life sentence by proof that a defendant had no previous criminal record. Most of those who said this factor was at all mitigating for them felt it was only "slightly" so. (*Id.* at pp. 1562-1563.)

required by law, retaining death penalty enthusiasts by implying that jurors have unfettered discretion to impose death after hearing all the evidence is constitutionally unacceptable.

Furthermore, "because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors" should have been removed for cause under *Morgan*, this court "must reverse defendant's judgment of death. [Citation.]" (*People v. Cash*, *supra*, 28 Cal.4th 703, 723.)

II. THE TRIAL COURT'S MID-VOIR DIRE INSTRUCTIONS STATING THAT JURORS WERE NEVER OBLIGED TO IMPOSE A LIFE SENTENCE AND ITS FRAMING OF QUESTIONS IN A WAY THAT CONFIRMED THE POINT CORRUPTED THE JURY SELECTION PROCESS, AND INVITED JURORS TO IMPOSE DEATH UNLAWFULLY IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

Penal Code section 190.3 states that the trier of fact *shall* impose a sentence of life without parole if it determines that mitigating circumstances outweigh the aggravating circumstances. Juries are instructed that they may sentence a defendant to death *only* if they find aggravating circumstances substantially outweigh mitigating circumstances, but are not told when to vote for life. (See CALJIC No. 8.88; CALCRIM 1-500-766.)

Usually, penalty jurors are allowed to *infer* that they have a duty to vote for life (rather than simply refrain from voting for death) if they find that the aggravating evidence is insubstantial or that it fails to substantially outweigh the mitigating. (See *People v. Duncan* (1991) 53 Cal.3d 955, 978-979 [instructing jurors to impose death *only* if they find aggravating circumstances substantially outweigh mitigating circumstances presumed to make instruction on the converse unnecessary].)

Here, however, the trial court instructed jurors to the contrary, telling them that they are *not* required to vote to impose life under any circumstances unless they deem it appropriate to do so. Worse yet, the trial court gave jurors that message repeatedly while examining their ability to

faithfully adhere to California law in making a penalty judgment. The voir dire process was thereby corrupted and rendered inadequate for identification and removal of jurors whose pro-death penalty bias would impel them to depart from the bounds of the law. People who believe that death should be imposed on everyone who commits the charged crime in order to deter others or to achieve eye-for-an-eye justice were qualified to serve through this corruption of the voir dire process. Those who later served as jurors served with permission to refrain from voting for life no matter what they and their fellows find to be the relative weight of mitigating and aggravating evidence. In essence, the trial court invited jurors to nullify a protective feature of California's death penalty law.

A. The relevant facts

On at least two occasions, in the presence of soon-to-be-seated jurors, the court specifically denied that California law required a vote for life when mitigating circumstances outweigh the aggravating circumstances in the case. At other times, the trial court simply framed its questions in a way that implied as much.

While examining a member of the third panel whose questionnaire said he would not impose death, the trial court said "it isn't the duty of a juror to vote for death or life without the possibility of parole, but it's the obligation of the jury to at least be able to consider those things." (6RT 1215.) Although that panelist was excused, two other members of that

panel served on appellant's jury. One was Juror 6, the foreperson. The other was Juror 11.

The trial court's examination of Juror 11 displayed the court's application of that mistaken view of California law with a juror who believed the death penalty should *always* be imposed for the charged offense in order to send a deterrence message to others. Juror 11's questionnaire said the state should *always* impose death on *everyone* who intentionally kills or kills with deliberation and premeditation "so people know it's very wrong to take life just for the sake of it." (6RT 1210.) The trial court asked Juror 11 if he would "have any hesitation in voting for life" if the aggravation did not substantially outweigh the mitigation or if the mitigating evidence "over barrels" the aggravating. The juror said, "Yeah, I think so."

Although this answer (and the juror's questionnaire) indicated he would indeed hesitate to vote for life under the circumstances required by law since doing so would compromise his stated goal of sending a message about the wrongfulness of murder, the trial court simply asked the juror if he had "no problem." When the juror confirmed that he had "no problem" the court asked more questions seeking only the juror's own assessment of his ability to serve impartially. The court *never* asked this juror if he could actually vote for life, much less if he could vote for life based on mitigating factors, his desire to send a message to potential murderers notwithstanding. (6RT 1210-1211.) The defense challenge for cause against Juror 11 was denied. (7RT 1341.)

In preinstructing the fourth panel, which included the person who became Juror No. 1, the trial court said the jury *could* choose life if mitigation outweighed aggravation. But rather than following that statement with one making clear the need to vote for life in that scenario, the trial court sputtered its permission to choose death in any event: "As matter of fact, the instructions as I would indicate to you would suggest that that should be a consideration that you do in part of the result of the analysis that you do suggests what penalty you should consider. But as you can see there is no burden of proof in that particular portion of the case. It is very much a decision that's made by each juror after they weigh and consider the aggravating and mitigating factors." (7RT 1356.)

Lack of legal compulsion to impose life was communicated to the other panels from which the jury was drawn by the very nature of the court's questions. The trial court was particularly heavy handed on the point in examining Shane Blair, a vehement proponent of the death penalty for everyone guilty of premeditated murder. Blair was a member of the first panel, which included Jurors 4, 9, and 12.

Blair's questionnaire said that he believed the state should "always" impose the death penalty upon everyone who kills another human being with premeditation and deliberation, and explained, "only if they plan to kill another human being and admits (sic) to it." (5RT 879.) After repeating Blair's declaration that the state should always execute everyone who kills with premeditation and deliberation, the judge asked Blair if he felt he could "receive mitigating as well as aggravating evidence to evaluate the

appropriate penalty" in the penalty phase of the case. Blair said, "Yeah." The court asked Blair of he could vote for life "if the mitigating factors were sufficient." (5RT 879.) Though Blair said, "I don't think so" in response to that critical question, the court continued its efforts at rehabilitation. (5RT 879.)

When Blair questioned what the court meant by "overwhelming," the judge responded circuitously,[18] and then reduced the question to one of whether Blair could vote for life without the possibility of parole "if it would appear to you in an honest application of the jury instructions that life without possibility of parole should be the appropriate penalty rather than death." (5RT 882-883.) Blair said, "I think so." (5RT 883.)

After a break to question other panelists, the court concluded its examination of Mr. Blair by asking if he could "fairly and impartially evaluate this matter in the penalty phase . . . perform the function of receiving evidence in mitigation as well as aggravation . . . consider both aggravation and mitigation in making a decision" and would like to hear the mitigating evidence before fixing sentence. As though it were not

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[18] "You are going to be asked to evaluate this evidence and compare the aggravating evidence against the mitigating evidence. Based upon various instructions that I will be giving you, you will be asked to determine whether or not in your judgment this should be a death penalty or life without the possibility of parole.

"So I cannot tell you what quantum of evidence that is going to be. I can merely use the generalization that if you were legitimately following the jury instructions and you received evidence which you believe and found to be appropriate for your consideration and in evaluating the aggravating versus the mitigating evidence, it would appear to you in an honest application of the jury instructions that life without possibility of parole should be the appropriate penalty rather than death." (5RT 883.)

important, the court never clarified whether Blair could impose a life sentence for premeditated murder based on the sufficiency of the mitigating circumstances, even if he did not view that sentence as the appropriate penalty for a premeditated murder. (5RT 943-944.) Blair was later excused on hardship grounds, but the impact of his dialogue with the court remained.

The panelists who became Jurors 3, 5, 7, 8, and 10 heard a shorter but similarly misleading dialogue when the court was examining Ms. Adams, a member of the fifth panel who had written that death should always be imposed for premeditated murder. (7RT 1443-1444.) The trial court asked Ms. Adams if she would be able to vote for death if the aggravating factors substantially outweigh the mitigating factors (7RT 1445) but did not ask if she could vote for a life sentence for that crime. On the contrary, the trial court asked her if she would "be able to *consider* voting for life without the possibility of parole" if the "aggravating factors did not substantially outweigh the mitigating factors, in other words, the mitigating factors had suggested to you as to [sic] the appropriate penalty." (7RT 1446, emphasis added.)

Subsequent dialogue with another member of that panel showed how the trial court's previous remarks had shaped prospective jurors' perception of the law. Defense counsel noted that Ms. Morey's questionnaire said the death penalty should always be imposed for premeditated murder, and asked if agreed that what she wrote was "inconsistent with what the law would require of somebody who is chosen to be a juror in this case." She

said, "No, I don't think so." Counsel asked if she understood that her assertion that the death penalty should always be imposed "is different from what the judge has instructed the law *requires*?" (7RT 1561, emphasis added.) She said yes and explained that the law required jurors to "see all the evidence first to be honest before really making a decision like that." (8RT 1561.) That was indeed the court's message: jurors must listen to all the evidence with an open mind, but after doing so, they can *always* impose death on *everyone* who commits premeditated murder.[19]

In the middle of the jury selection process, after receiving an adverse ruling on a challenge for cause, defense counsel complained about the court's use of leading questions to rehabilitate panelists whose questionnaires said they would always vote for death, and about the court's mistreatment of him in the presence of the jury. (6RT 1179-1180.) The trial court responded defensively, reiterating its view of the overriding importance of finding out if a prospective juror "could evaluate this case, hear both sides, and make a decision regarding penalty." (6RT 1179.) After the court concluded its life-and-death-qualifying voir dire of the fifth panel, appellant personally addressed the court in the presence of the prosecutor and his own counsel. He complained that the jury selection

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[19] Ms. Morey went on to express agreement with a previously-examined panelist that mitigation would have to be overwhelming in order to "find for life" and said "I think so" when asked if she would require overwhelming mitigating evidence before she would even *consider* life. (8RT 1562.) The trial court denied the defense challenge for cause against Morey after declaring that "the crime facts are certainly considered to be facts in aggravation" (8RT 1564) and surmising that her viewing of the crime facts to be "of substantial nature" explained her need for "overwhelming mitigation" to consider life. (8RT 1576.)

process had been "skewed" and "unfair," as evidenced by the way venire members developed the ability to express what they believed was neutrality as a result of sitting through the process.[20] The court allowed appellant to speak on this topic but then dismissed his remarks as a product of his own inferior perspective. (8RT 1591-1595.)

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[20] Appellant complained that jurors were induced by exhaustion into changing the positions they expressed in their questionnaire responses. (8RT 1591) He complained that the court had sustained prosecutorial objections to defense counsel's questioning as argumentative, while allowing the prosecutor to argue his case for death on voir dire. (8RT 1592.) After the court responded at length, appellant pointed to venire member Mario Tovani's change in position after continued questioning, and summarized his complaint:

> THE DEFENDANT: That's what I am talking about obviously there is something going on that makes him go from one response to another.
>
> I'm saying that it appears to me now the selection process is attempted to be skewed a certain way.
>
> Are you telling me that you don't view that, you don't see it that way?
>
> THE COURT: No, I don't see it that way.
>
> THE DEFENDANT: Okay.
>
> THE COURT: All right. It's my obligation to make sure it's a fair process.
>
> THE DEFENDANT: Judge Flier, I really mean it, it hasn't been fair thus far.
>
> THE COURT: That's from your perspective Mr. Pearson.

B. The court's misstatements and misleading questions affected appellant's "substantial rights" so as to permit review even if appellant's objection was insufficiently specific

This court has statutory authority to review "any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, § 1259.)

A criminal defendant has a "substantial right" to fundamental fairness in jury selection, and this right is affected by instructions limiting or discouraging disclosure of juror bias on voir dire. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649-650 [*Mello* error reviewable without objection in trial court because it denies state and federal due process rights in that it results in "voir dire so inadequate as to render the trial fundamentally unfair"].)

Fundamental fairness requires that a trial judge conducting voir dire refrain from conduct discouraging or obscuring disclosure of bias among prospective jurors. (*People v. Mello*, *supra*, 97 Cal.App.4th 511.) This is especially true of the process of "death qualifying" a capital jury. "Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citations.]" (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730.)

Additionally, the capital defendant's "substantial rights" are affected by the misdirection of jurors respecting their obligation to vote for life when the aggravating evidence is insubstantial or fails to outweigh the mitigating. Although instructing jurors to impose death *only* if they find aggravating circumstances substantially outweigh mitigating circumstances has been said to make instruction on the converse unnecessary (*People v. Duncan*, *supra*, 53 Cal.3d 955, 978-979), it would be unreasonable to suggest that active misdirection of the jury respecting the duty to impose life cannot affect the defendant's substantial rights. "It is the rule that when a single instruction, standing alone, does not contain all the conditions and limitations which it should, and is thus subject to legal criticism, that the giving of it will not be error if it can be read in connection with other instructions, and thus make all the instructions harmonize as a whole, and if, being read together, supplemented by each other, they all together fairly and correctly state the law; but this rule does not apply when the instruction contains a plain statement of an incorrect principle of law. *An instruction plainly erroneous is not cured by a correct instruction in some other part of the charge.*' [Citations.]" (*People v. Westlake* (1899) 124 Cal. 452, 457; accord *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [applying the rule to preinstruction of a jury during voir dire].)

C. The court's misstatements obscured pro-death-penalty bias and prevented the court and counsel from fulfilling their duties to remove biased jurors after voir dire

As previously noted, a great many of the prospective jurors called to serve at appellant's trial expressed the belief that capital punishment should *always* be imposed on *everyone* who committed the crime with which appellant was charged. The trial court's erroneous repudiation of the jury's statutory duty to impose life without parole when mitigating evidence outweighs the aggravating evidence plainly enabled the court to obtain affirmative answers to qualification questions from veniremembers who would have otherwise proved unwilling and unable to vote for life under the circumstances dictated by California law. This error "irremediably tainted the trial by making it impossible for the parties to know whether a fair and impartial jury had been seated." (*People v. Mello*, *supra*, 97 Cal.App.4th 511, 517.)

Consequently, the rule of automatic reversal applied in *Mello* to misinstruction during voir dire and in *Morgan* and *Cash* to a trial court's failure to ask appropriate life-qualifying questions is appropriately applied when the court instructs the venire in a way that discourages biased jurors from making disqualifying admissions. ("[B]ecause the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors" should have been removed for cause under *Morgan*, this court "must reverse defendant's judgment of death. [Citation.]" (*People v. Cash*, *supra*, 28 Cal.4th 703, 723).) As stated in *Mello*:

> This error — which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the evidence — is a "defect affecting the framework within which the trial proceeds" that is not subject to harmless error analysis. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S. Ct. 1246, 1264-1265, 113 L.Ed.2d 302, 331]; *People v. Flood* (1998) 18 Cal.4th 470, 500 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18-19 [161 P.2d 934].) (*People v. Mello*, *supra*, 97 Cal.App.4th 511, 519.)

The Sixth Amendment requires an impartial jury, one "composed of jurors who will conscientiously apply the law and find the facts." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Where the voir dire allows jurors whose views would preclude them from following California's death penalty scheme to believe that they are qualified, the voir dire is constitutionally inadequate. (Cf. *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729, 735.) And where, as here, the record does not show that no seated juror held such disqualifying views, reversal is required. (Cf. *People v. Cash*, *supra*, 28 Cal.4th 703, 723.)

D. The likely effect on jury deliberations was prejudicial

In addition to rendering jury selection fundamentally unfair and constitutionally inadequate, the trial court's misrepresentation of California law no doubt prejudiced the ultimate deliberations on his life. Nothing in the final instructions directly contradicted the trial court's erroneous mid-voir dire instructions, nor otherwise imparted that the mid-voir dire instructions were wrong. Through CALJIC No. 8.88, the jury was given a

one-sentence description of the circumstance under which it could return a death sentence, i.e., when each juror is "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death." (1CT 985; 29RT 5501.) The final instructions said *nothing* about the circumstances under which jurors could, should, or must, vote for life. No matter how the jurors appraised the mitigating evidence, their instructions never *required* them to vote for life as individual jurors or to impose life as a sentencing body.

Imposition of the death penalty violates the Eighth Amendment when it is imposed for deterrence rather than solely for reasons "directly related to the personal capability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) Particularly where, as here, the jury contained at least one juror who espoused grounds to impose death for appellant's crime regardless of the weight of mitigation, the State cannot show the trial court's instructional errors to be harmless beyond a reasonable doubt.

III. THE TRIAL COURT'S MID-VOIR DIRE JURY INSTRUCTIONS ATTACHING THE LABEL "AGGRAVATING" TO "ALL THE CRIME FACTS" PREJUDICIALLY MISLED APPELLANT'S JURY ABOUT CALIFORNIA'S DEATH PENALTY LAW, VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL JURY, AND APPLIED CALIFORNIA LAW IN A WAY THAT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

Eighth Amendment doctrine prohibits states from labeling as "aggravating" any factor common to all murders or applicable to every defendant eligible for the death penalty. (*Arave v. Creech* (1993) 507 U.S. 463, 474 ["If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."] citing, et. al., *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [invalidating aggravating circumstance that appeared to describe "every murder"].)

Accordingly, this court's decisions construing California's Death Penalty Law have held that the term "aggravating" was properly defined for the jury when it was said to apply only to factors "above and beyond" the essential elements or constituents of the crime. (*People v. Brown* (2003) 31 Cal.4th 518, 565; *People v. Benson* (1990) 52 Cal.3d 754, 802-803; *People v. Dyer* (1988) 45 Cal.3d 26, 77-78; *People v. Adcox* (1988) 47 Cal.3d 207, 269-270.)

Since 1989, the editors of CALJIC have included this definition in the standard penalty phase "concluding instruction":

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases [its] guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself.* (1 CALJIC No. 8.88.)

The creators of CALCRIM agree that the definition of "aggravating factor" is so limited, and that juries should be so instructed. CALCRIM 763 states, in pertinent part:

> In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.
>
> An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, *above and beyond the elements of the crime itself*, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.
>
> A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.
>
> Under the law, you must consider, weigh, and be guided by specific factors, some of which may be aggravating and some of which may be mitigating. I will read you the entire list of factors. Some of them may not apply to this case. If you find there is no evidence of a factor, then you should disregard that factor.

Innumerable decisions of this court have said that premeditation, deliberation, and willfulness or specific intent to kill, are "elements" of the

crime of first degree murder on the single theory of that crime presented in the instant case. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345, 368; *People v. Hansen* (1994) 9 Cal.4th 300, 307; *People v. Cummings* (1993) 4 Cal.4th 1233, 1288.)

Although this court has held that it is inappropriate to instruct jurors that they should not consider as an aggravating factor any fact used to find the defendant guilty of first degree murder unless it establishes something in addition to an element of that crime,[21] this court has not held that any element of the crime can or should be considered "aggravating." Even where all the elements of more than one theory of first degree murder were established at trial, this court has been careful to distinguish the proper finding of aggravation in the fact that a killing was "cold-blooded" from a finding of aggravation in premeditated intent to kill per se. (*People v. Millwee* (1998) 18 Cal.4th 96, 167.)

Accordingly, this court refrained from attaching the label "aggravating" to any element of first degree murder when this court held that a penalty jury can find aggravation in "the method of killing or evidence of extensive planning" notwithstanding the fact the same evidence was used to establish first degree murder. (*People v. Coddington* (2000) 23 Cal.4th 529, 640.) Likewise, this court did not say that all of the

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[21] See *People v. Moon* (2005) 37 Cal.4th 1, 40, and cases cited therein. All of them condemn instructions demanding that "the facts of the murder" be "comprehensively withdrawn from the jury's consideration." (*Ibid.*) Yet none say that "the facts of the murder" or the elements of first degree murder should all be considered *aggravating* as a matter of law, much less that trial court should so instruct the jury.

circumstances of the crime could be labeled or considered "aggravating" when it noted that "[a]ll circumstances of the crime or crime may be considered." (*Ibid.*)

Appellant's trial judge was not so circumspect. While engaging in life-qualification of appellant's jurors, the judge repeatedly attached the label "aggravating" to the elements of first degree murder.

In qualifying a member of the first panel, which included Juror No. 9, Juror No. 4, and Juror No. 12, the court declared:

> In phase two you are going to be asked to evaluate mitigating and aggravating factors. *Certainly one of the aggravating factors may be the crime facts themselves, such as whether or not this was deliberate and premeditated murder.* (5RT 881.)

The context of the court's statement underlined its importance. The court was establishing the qualifications of Mr. Shane Blair, whose questionnaire, as described by the judge in open court, said he believed the state should "always" impose the death penalty upon everyone who kills another human being with premeditation and deliberation, and explained, "only if they plan to kill another human being and admits (sic) to it." (5RT 879.)

In qualifying a member of the third panel, which included future Juror No 1, the court attached the "aggravating" label to the element of deliberate and premeditated intent indirectly, but no less effectively. Referring to the standard instructions defining deliberate and premeditated

murder the court had begun giving each panel prior to questioning, the court advised as follows:

> Based on the instructions I have just given you, I can tell you that a first degree murder is a murder that is committed with *premeditation and deliberation.* All right. *That is one of the crime facts you consider in the penalty phase of this trial.*
>
> Do you feel based on your current frame of mind you would be able to evaluate possible *mitigating circumstances as well as the crime facts before you determined what penalty to impose*? (7RT 1367, emphasis added.)

In life-qualifying the panels from which appellant's other jurors were chosen, the trial court attached the "aggravating" label to *all* the crime facts without giving any particular emphasis to deliberation, premeditation or specific intent to kill, and thus made clear that the wrongful taking of human life was, in this trial court's view, a permissible "aggravating" factor if the sentencer wished to treat as such. (6RT 1170, 1234-1235; 7RT 1445; 8RT 1564.)

The panel that included future Juror No. 2 was given the following information while listening to the trial court rehabilitate a another veniremember:

> As you sit here now, as I suggested to you before, one of the factors that you would be entitled to consider as *an aggravating factor, the facts of the crime itself* and that certainly is something that both counsel have zeroes in on, but that isn't the end all of the penalty phase.
>
> Do you feel that your mind is in anyway made up going into the penalty phase because you know at least one of the aggravating factors is a given, that there would be these offenses . . .? (6RT 1170.)

The panel that included future Jurors 6 and 11 was told:

> [I] am going to move you into the penalty phase of our imaginary trial and in the course of the penalty phase you did receive *aggravating evidence* which *can include the crime facts themselves as well as mitigating evidence.*
>
> In all honesty you evaluate that evidence and you conclude, gee, the aggravating evidence substantially outweighs the mitigating evidence. Would you be able to vote for the death penalty under those circumstances? (6RT 1234-1235.)

Again, the context of the court's statement elucidates its importance. The court gave this guidance while rehabilitating venireman MacKenzie, whose questionnaire, as described by the judge in open court, said he believed "the State should *always* impose the death penalty on everyone who intentionally kills another human being" as well as upon everyone who kills with premeditation and deliberation. (6RT 1231.)

Venireman McKenzie had also said, "murder, once proven, should warrant the death penalty as a sentence to me. That is a simple question of justice." (6RT 1231.)

The trial court's rehabilitation concluded when MacKenzie agreed he could weigh aggravation against mitigation, and follow the law. (6RT 1235-1236.) The court did not address the difference between California law and MacKenzie's belief that "murder, once proven" should "warrant the death penalty," nor distinguish intent to kill from the aggravation required by law. Nevertheless, the trial court denied appellant's challenge

for cause, citing MacKenzie's change from his initial opinions. (6RT 1336-1337.)

The panel that included Jurors No. 3, 5, 7, 8, and 10, was similarly informed that "you will be considering aggravating evidence and *aggravating evidence* can include things like *the crime facts themselves.*" (7RT 1445.) And even more explicitly:

> In the course of the penalty phase you would be asked to listen to evidence of aggravation and mitigation. As I indicated, *the crime facts are certainly considered to be facts in aggravation*. You then are to give the weight or value to these factors in aggravation or mitigation that you feel is appropriate. The law is not going to give you any guidance as to these facts. (8RT 1564.)

As noted in the preceding argument, defense counsel complained about the court's use of leading questions to rehabilitate panelists whose questionnaires said they would always vote for death, and about the court's mistreatment of him in the presence of the jury. (6RT 1179-1180.) The trial court responded defensively, reiterating its view of the overriding importance of finding out if a prospective juror "could evaluate this case, hear both sides, and make a decision regarding penalty." (6RT 1179.) After the court concluded its life-and-death-qualifying voir dire of the fifth panel, appellant personally addressed the court in the presence of the prosecutor and his own counsel. He complained that the jury selection process had been "skewed" and "unfair," as evidenced by the way venire members developed the ability to express what they believed was neutrality

as a result of sitting through the process. The court allowed appellant to speak on this topic but then dismissed his remarks as a product of his own perspective. (8RT 1591-1595.)

A. The trial court's misstatements affected appellant's substantial rights and require appellate review, notwithstanding appellant's failure to make a specific objection

Even if appellant's complaints do not suffice for objections or show that specific objection from counsel would have been futile, the trial court's misdirection of the jury is appropriately reviewed on the merits.

First, the prosecution was at least equally at fault in failing to correct the trial court's erroneous mid-voir-dire instructions. (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th 642, 648-653 [reversing conviction for erroneous pre-voir dire jury instruction, despite lack of defense objection at trial, partially because prosecutor was at least equally at fault in failing to correct trial court].) Rather than correcting the trial court's error, the prosecutor exploited it in his own examination of two members of the first panel.

In questioning future Juror No. 9, the prosecutor recalled the juror's assertions of belief that the state should execute everybody guilty of deliberate and premeditated murder because "if you have time to think about it, you had time to decide to handle things differently" and "the more time I thought about it, the less sympathetic I would be." (5RT 985.)

The prosecutor then told this future juror that the law allowed him to consider "how much reflection there was" and "[a]ll the details that go

beyond the legal definition of first degree murder." (5RT 988.) The prosecutor did not, however, disclose California's bar against treating the essential elements of first degree murder as "aggravating factors" nor the fact that premeditation and deliberation are elements of that crime by definition.

The prosecutor's treatment of his next examinee, Mr. Heath, likewise confirmed and exacerbated the skewing effect of the trial court's erroneous instruction. When Heath affirmed that deliberation and premeditation "would be a circumstance in aggravation," the prosecutor did not disagree or seek to clarify the law to the contrary. The prosecutor simply proceeded to distinguish Heath's reasoning from a proclivity to impose death automatically before moving on to the next venireperson. (5RT 997-998.)[22]

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[22] The prosecutor's examination of Mr. Heath occurred immediately after the court read the standard instructions defining deliberate and premeditated murder (CALJIC No. 8.20) the list of factors in aggravation and mitigation (CALJIC No. 8.85), and the instructions defining murder (CALJIC No. 8.10) and malice (CALJIC No. 8.11). (5RT 990-997.) This examination is reported verbatim as follows:

> Q. Did it make sense to you that the factor the Court indicated in deciding the death penalty or not the death penalty, should be considered?
>
> A. Yes.
>
> Q. Do these seem to be reasonable things that you should think about before you make the decision whether to impose the death penalty?
>
> A. Yes.
>
> Q. Would you do that?
>
> A. Sure.

Furthermore, the misinstruction clearly affected appellant's

Q. So you made a statement that you thought you would automatically vote for the death penalty in the case after premeditated murder. What do you think about that?

A. If it turned out to be premeditated and deliberate act, thought about it?

Q. Yeah.

A. Yes, I would reason toward the death penalty very strongly.

Q. Because you think *if its premeditated and deliberate that would be a circumstance in aggravation*?

A. *It would be.*

Q. That would make the more serious in your mind?

A. Yes.

Q. Can you see where there are other factors that might exist? They might — may not exist but they might exist that would mitigate or make the less serious in your mind?

A. So I can straighten out this whole conversation. If my choice is just between life imprisonment and death, there is no in between. It would be death.

Q. No matter what?

A. If I found the person guilty of first degree murder, premeditated and the whole bit, there would be no reason that I've ever heard of or can think of that I would give him life in prison instead of death.

Q. Okay.

A. Period. I mean to me that is my opinion, my belief, and I will live by it.

Q. Nobody is criticizing you for your belief, sir. I just want to make sure you understand the rule.

A. That's the best I can explain it.

"substantial rights" as specified here, so as to permit review pursuant to Penal Code section 1259.

B. These misstatements of California law corrupted jury voir dire so as to prevent due process of law and the selection of an impartial jury

A criminal defendant has a "substantial right" to fundamental fairness in jury selection. (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th 642, 649-650 [*Mello* error reviewable without objection in trial court because it denies state and federal due process rights in that it results in "voir dire so inadequate as to render the trial fundamentally unfair"].)

Appellant was entitled to a jury voir dire procedure fitted to determine whether a prospective juror's views for or against capital punishment "would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Crittendon* (1994) 9 Cal.4th 83, 121.)

Clearly, a procedure in which the trial judge tells the venire that jurors can consider intent to kill, premeditation, deliberation, and "all the crime facts" as "aggravating factors" is not capable of identifying prospective jurors whose views prevent or impair their ability to abide by the court's subsequent, pre-deliberation instruction to treat as aggravating only factors "above and beyond the elements of the offense." (CALJIC No. 8.88.)

"Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citations.]" (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730.)

The trial court's use of an overbroad definition of the term "aggravation" in conducting voir dire enabled the court to obtain affirmative answers to qualification questions from veniremembers who were unwilling and unable to follow the restrictive definition of "aggravation" on which they would later be instructed. This error "irremediably tainted the trial by making it impossible for the parties to know whether a fair and impartial jury had been seated." (*People v. Mello*, *supra*, 97 Cal.App.4th 511, 517.)

Consequently, the rule of automatic reversal applied in *Morgan* and *Cash* to a trial court's failure to ask appropriate life-qualifying questions applies when the court instructs the venire in a way that discourages biased jurors from making disqualifying admissions. ("[B]ecause the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors" should have been removed for cause under *Morgan*, this court "must reverse defendant's judgment of death. [Citation.]" (*People v. Cash*, *supra*, 28 Cal.4th 703, 723).) As stated in *Mello*:

> This error — which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the evidence — is a "defect affecting the framework within which the trial proceeds" that is not subject to harmless error analysis. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S. Ct. 1246, 1264-1265, 113 L.Ed.2d 302, 331]; *People v. Flood* (1998) 18 Cal.4th 470, 500 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18-19 [161 P.2d 934].) (*People v. Mello*, *supra*, 97 Cal.App.4th 511, 519.)

C. The trial court's misstatements were not effectively corrected by the reading of CALJIC No. 8.88 just prior to penalty phase deliberations

The instructions given prior to penalty phase deliberations included a standard instruction telling the jury that "you will now be instructed as to all of the law that applies to the penalty phase of trial." (29RT 5491.) The court read CALJIC No. 8.88, the standard instruction defining aggravation as a "fact condition or event attending the commission of crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself." (29RT 5501.)

However, the court did not give any instructions informing the jury that intent to kill and premeditation were elements of the charged offense. Even the guilt phase instructions fell short of attaching the label "element" to any mental state beyond malice aforethought.

Moreover, the trial court did not inform the jury that its previous statements on the point, which were hammered in by their use in qualifying inquiries, were in any sense inaccurate or incomplete. This case gives no reason to depart from the general rule that "an instruction plainly erroneous

is not cured by a correct instruction in some other part of the charge.' [Citations.]" (*People v. Westlake*, *supra,* 124 Cal. 452, 457; accord *People v. Kainzrants*, *supra*, 45 Cal.App.4th 1068, 1075 [applying the rule to preinstruction of a jury during voir dire].)

D. The prosecutor exploited the trial court's misstatements in his penalty phase closing argument

Exploiting the trial court's error again, the prosecutor specifically argued that deliberation and premeditation made appellant's crime more worthy of capital punishment than "a lot of special circumstances cases out there where the killing was accidental or intentional, but it wasn't deliberate." (29RT 5518.)[23]

E. The trial court's misstatements violated appellant's 8th and 14th Amendment rights with respect to penalty determination and require reversal of the penalty judgment

In directing jurors to find aggravating circumstances in facts that are not "aggravating circumstances" but "elements of the crime" under

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[23] The prosecutor augmented his claim that substantial aggravation could be found in the circumstances of the crime by alleging that appellant "was thinking about" killing Shirail Burton "when he went outside." (29RT 5530-5531.) He said that "the most aggravating part about this case" was that appellant talked about 101 California before the killing. The prosecutor argued that those statements proved that appellant "understood what the shock waves were and he did it anyway." (29RT 5536.) The evidentiary support for these claims is obviously less solid than the support for the finding that appellant committed premeditated murder, and were not accompanied by any concession that it was improper to consider premeditation and deliberation as aggravating circumstances.

California law, the trial court created illusory factors in aggravation, made appellant appear far more deserving of death than he would otherwise appear, and thus put the proverbial "thumb on death's side of the scale" in the weighing process. (*Stringer v. Black* (1992) 503 U.S. 222, 232, 235-236.)

Attaching the label "aggravating" to constitutionally impermissible factors violates the Due Process Clause of the Fourteenth Amendment, as well as Eighth Amendment doctrine. As noted by this court in *People v. Benson*, *supra*, 52 Cal.3d 754, 801:

> It is settled that the due process clause of the Fourteenth Amendment prohibits the states from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty. . . ." (*Zant v. Stephens* (1983) 462 U.S. 862, 885 [77 L.Ed.2d 235, 255, 103 S.Ct. 2733].)

If not for the trial court's improper mid-voir-dire instructions, reasonable jurors would not likely have found aggravation sufficient to justify sentencing appellant to death.

This case has nothing like the substantial aggravating evidence usually seen in cases in which a jury chose death. Appellant was a 37-year-old office worker, who had no record of violent criminal activity or prior felony convictions. After his single episode of violence, he surrendered to police without resistance, and confessed responsibility for the killings without delay. While there was evidence that he thought and talked about

creating deadly havoc at the Housing Authority before he faced the final provocation, his thinking was precipitated by a long course of on-the-job provocation, a factor that most reasonable people would consider, to varying degrees, mitigating. On these facts, putting a thumb on death's side of the scale is not harmless error.

IV. THE TRIAL COURT'S CHOICE OF QUESTIONS TO VENIREMEMBERS WHO EXPRESSED STRONG FEELINGS ABOUT CAPITAL PUNISHMENT EXHIBITED A DOUBLE STANDARD AND BIASED THE JURY IN FAVOR OF CONVICTION AND DEATH IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

It is settled that trial courts should be evenhanded in their questions to prospective jurors during the death-qualification portion of the voir dire and should inquire into the jurors attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors. (*People v. Champion* (1995) 9 Cal.4th 879, 908-909.)

Appellant's trial court inquired into attitudes for and against the death penalty. But the questioning was *not* evenhanded.

Prospective jurors whose questionnaires expressed enthusiastic support for the death penalty, even readiness to impose it automatically for non-capital murder, were questioned by the trial court in an accommodating and rehabilitative manner. The court's questioning of such individuals focused upon their willingness to consider all the evidence before imposing sentence, and generally avoided the issue of whether they would ever choose life for someone guilty of capital murder. Those who expressed eye-for-an-eye views were told how those views could be expressed within the bounds of the law by finding "aggravating circumstances" inherent in the intent to commit the crime. Except for one venire member who expressed concern about systemic bias against African Americans, all the

prospective jurors who said they would consider all the evidence and refrain from imposing death "automatically" withstood defense challenges for cause.

In contrast, prospective jurors whose questionnaire responses expressed opposition to capital punishment were questioned by the court about their willingness to impose a death sentence, not about whether they would consider all the evidence before making a decision. The trial court did not tell many of them anything about the law akin to what the court told eye-for-an-eye jurors about how their general views about the death penalty might find proper expression, let alone guide them to see how they might label circumstances as aggravating or mitigating to reach the desired end. The trial court's voir dire led each of them to agree that they could not impose death or participate in the penalty trial.

Such disparate treatment of prospective jurors *for and against* the death penalty violates due process (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 523, citing *Crawford v. Bounds* (4th Cir. 1968) 395 F.2d 297, 303-304 ["double standard" in examining jurors pro and con the death penalty "inevitably resulted in a denial of due process"]) and the right to an impartial jury, an impartial judge, equal protection of the law, and reliable sentencing proceedings. (U.S. Const., 6th, 8th, & 14th Amends.) The effect of the process used by the trial court was to "entrust the determination of whether [appellant] should live or die to a tribunal organized to return a verdict of death." (*Witherspoon, supra,* 391 U.S. at p. 521.)

Because the trial court's voir dire of the first panel of prospective jurors was among the worst, if not the single worst episode of fundamental unfairness in the series of large-group voir dire proceedings, and that panel included three of appellant's twelve jurors, appellant will present the examination of that panel in detail.

A. The judge's rehabilitation of the first five panelists, all of whom wanted the state to execute everyone who commits even non-capital homicide, manifested strong interest in accommodating all pro-death penalty jurors

The first prospective juror to be questioned was Carolyn Atkins. Her questionnaire responses asserted belief that the state should always impose the death penalty upon everyone who kills another human being. (3ACT 1112) The judge repeated her written assertion at the outset of questioning. (5RT 871.)

The judge explained the two phases of trial, and said "your frame of mind when you enter the penalty phase must be one of neutrality." (5RT 874.) Atkins did not disagree, but nevertheless reaffirmed that she would automatically vote for death, regardless of mitigation. (5RT 874.)

When the judge repeated his query whether she would vote for death regardless of any evidence in mitigation in phase two, she said, "No, no, I would have to get everything in first before I would." The judge said, "okay." (5RT 875.) Atkins clarified that she would consider the evidence from both sides in phase two, and not determine the penalty until she did so. (5RT 875.)

The judge then asked Atkins to agree that, if mitigating evidence were presented, she "would have no problem obeying the rules and the law that I am going to be giving you and voting for life without the possibility of parole if you were given that opportunity to." (5RT 876.) Atkins said no, "I could change it, yeah." (5RT 876.)

Atkins was not asked to tell the court whether she could ultimately vote for life in the absence of mitigating evidence in the penalty phase, or if she were not required to do so under the rules and law that the judge referenced in his qualifying question. (5RT 876.)

The judge was even more accommodating in life-qualifying the second prospective juror, Shane Blair. Blair's questionnaire said that he believed the state should "always" impose the death penalty upon everyone who kills another human being with premeditation and deliberation, and explained, "only if they plan to kill another human being and admits (sic) to it." (5RT 879.)

After repeating Blair's declaration that the state should always execute everyone who kills with premeditation and deliberation, the judge asked Blair if he felt he could "*receive* mitigating as well as aggravating evidence to evaluate the appropriate penalty" in the penalty phase of the case. Blair said, "Yeah."

The judge asked Blair of he could vote for life "if the mitigating factors were sufficient." Though Blair said, "I don't think so" in response to that question, the judge continued his efforts at rehabilitation, asking Blair if he was saying that he "would always impose the death penalty if, in

phase one, he found deliberation and premeditation." To this, Blair said, "Unless I found otherwise in phase two." (5RT 879.)

The judge said he needed to "come back" to Blair and "make sure" he understood what Blair was telling him. (5RT 879.) He then asked Blair if he would "automatically" vote for the death penalty upon finding premeditation and deliberation in phase one. Blair said, "Not unless I found it in phase two as well." (RT 880.)

Blair continued taking a firm stand against life sentencing of people convicted of premeditated murder, answering "no" when asked if he could vote for a life sentence if he found life to be the appropriate sentence. (5RT 880.) The judge then assured Blair such views were compatible with the application our death penalty law.

> In phase two you are going to be asked to evaluate mitigating and aggravating factors. Certainly one of the aggravating factors may be the crime facts themselves, such as whether or not this was deliberate and premeditated murder. (5RT 881.)

The judge then restated his question as to whether Blair would "always vote for the death penalty if in phase one you found the person guilty of premeditated and deliberated murder." This time, Blair simply said, "I don't know." (5RT 881.)

The judge responded with two paragraphs explaining the duties of a juror in non-controversial terms, and asked Blair if he felt he could "be in a neutral frame of mind in phase two?" Blair said, "Yeah, I could." (5RT 882.) The judge asked Blair if he could vote for life "if the mitigating

evidence was overwhelming in your mind." (5RT 882.) When Blair questioned what the court meant by "overwhelming," the judge responded circuitously,[24] and then reduced the question to one of whether Blair could vote for life without the possibility of parole "if it would appear to you in an honest application of the jury instructions that life without possibility of parole should be the appropriate penalty rather than death." (5RT 882-883.) Blair said, "I think so." (5RT 883.)

The judge explained the distinction between acceptable and unacceptable methods of imposing death as follows:

> THE COURT: Okay. I think you understand the distinction I am making, Mr. Blair, where it's important to me to know whether or not you are going to be acting automatically? 'Gee, in phase one if I find this to be a premeditated and deliberate murder and I find a special circumstance, I am automatically going to vote for the death penalty.' If that is your frame of mind, you know that's certainly an appropriate frame of mind to have, but I think you understand that isn't the frame of mind that would be appropriate for a jury in a capital case because when you get to the penalty phase you have to basically start over and evaluate the appropriate penalty to impose.

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[24] "You are going to be asked to evaluate this evidence and compare the aggravating evidence against the mitigating evidence. Based upon various instructions that I will be giving you, you will be asked to determine whether or not in your judgment this should be a death penalty or life without the possibility of parole.

"So I cannot tell you what quantum of evidence that is going to be. I can merely use the generalization that if you were legitimately following the jury instructions and you received evidence which you believe and found to be appropriate for your consideration and in evaluating the aggravating versus the mitigating evidence, it would appear to you in an honest application of the jury instructions that life without possibility of parole should be the appropriate penalty rather than death." (5RT 883.)

Can you do that?

MR. BLAIR: I don't know. (5RT 884.)

The judge noted Mr. Blair's failure to answer some of the questions about the death penalty on his questionnaire, and tried asking them orally. Blair denied knowing whether he had a conscientious opinion or belief about the death penalty which would prevent or make it difficult for him to find the defendant guilty of first degree murder, find a special circumstance true, or impose the death penalty. (RT 885.) He said he did not know how to answer such questions, and was not sure if there was anything the judge could do to help him answer. (5RT 886.)

The judge said he would "get back" to Blair "in just a few moments" and resume asking him whether he felt "that as a result of finding a person guilty of premeditated and deliberated murder you would automatically vote for the death penalty regardless of what mitigating evidence might be produced." (5RT 887.)

After briefly questioning and excusing a juror whose brother had been shot to death, the judge questioned prospective juror Aileen Cabral. Cabral's questionnaire stated that she believed the state should impose the death penalty upon everyone who intentionally kills another human being. (5RT 888.) The judge told her that "what we are dealing with here in this courtroom is going to be what the law is rather than what any of us personally feels it should be" and asked her if she felt she could put her "personal feelings aside and deal with the law as I give it to you." (5RT 889.) She said, "Yeah."

Asked if she would "automatically vote for the death penalty" Ms. Cabral said, "No, huh-uh. I would have to hear the circumstances." (5RT 889.) Asked if she felt she could hear evidence that would convince her that the appropriate penalty was life without parole, she said yes. (5RT 890.) When asked if she felt that because of her opinion she had any leaning or tendency toward one penalty or another, she replied, "No, not after listening to you interview the others. I understand it a little better." (5RT 890.)

The judge said that "our function in the judicial branch of the government is to apply the law whether or not we agree with the law," and asked her if she thought she could do that. She said yes. The judge told her "the law may call upon you to vote for the penalty of life without possibility of parole even in the face of . . . deliberate and premeditated murder." She said she could do so, and gave all of the appropriate answers to other questions. (5RT 891-892.)

Next, the court questioned Ms. Darnsteadt, whose questionnaire stated that she believed the state should always impose the death penalty upon everyone who kills another human being with deliberation and premeditation. (5RT 898.) The judge asked her if she felt she would automatically vote for the death penalty in every case involving a deliberate and premeditated killing. She replied, "Almost always." (5RT 898.) She explained, "I would go in with the predisposition to give them the death penalty. It would take a lot for them to convince me otherwise if it were truly premeditated and done with aforethought." (5RT 898-899.)

After telling Ms. Darnsteadt that she "would certainly be allowed to consider those facts" (premeditation and aforethought) in the penalty phase equation, the judge asked if she could consider factors in mitigation as well. Darnsteadt said that she "could consider them" (5RT 899) and "could follow the court's instructions. I just think it would take a lot to convince me otherwise. That's just how I feel." (5RT 900.) Ms. Darnsteadt also said she did not know if she could be open to choosing a life sentence, but knew that she was "predisposed the other way." (5RT 900.) She said she would automatically vote for death upon conviction of premeditated murder, but said she "would try" to fulfill the duties of a juror in applying the law. (5RT 901.) Asked if she thought she would be able to succeed, she said "I would give it my best effort" (5RT 901) and "Yes, probably" when the judge pressed the question again. (5RT 902.)

Next, the court questioned Mr. Davilla, whose questionnaire said he believed the state should always impose the death penalty on everyone who intentionally kills another human beings. The judge asked him if he would automatically vote for the death penalty if he had found the defendant guilty of intentional killing. He said yes. (5RT 904.) He said yes when asked if he would be unable to function as a juror in the penalty phase, and explained, "premeditated, planned murder to me your guilty and you should suffer the death penalty." (5RT 904.) He continued to give unrehabilitated answers about the death penalty until the judge said "I think I understand your situation, Mr. Davilla. (5RT 905-906.) After Mr. Davilla, the court moved on to question death penalty opponents.

B. The judge's disqualifying inquiries of Ms. Escamilla, the first panel member opposed to capital punishment, communicated the court's belief that people with such views should not be seated on a capital jury

As announced by the judge at the outset of his examination of Prospective Juror Escamilla, her questionnaire responses said that she believed the state should never impose the death penalty, and explained, "I oppose the death penalty. I do not believe the state has a right to kill." (5RT 907.)

The judge did not attempt to rehabilitate Ms. Escamilla. He instead asked only leading questions that could establish and confirm a pro-life juror's legal disqualification.

Specifically, the judge asked if that statement in her questionnaire was her "opinion about those matters," and whether she felt that her opinion would "prevent [her] from sitting on this jury." She predictably said yes to both questions, and added "I do not believe in the death penalty and I know that I could not — I just can't be a part of it." (5RT 907.)

From there, the judge went immediately to the question of whether Ms. Escamilla would automatically vote for life regardless of the evidence. Upon getting an affirmative answer to that disqualifying question, the judge declared, "I think I understand your frame of mind" and asked if she understood that the law required her to "evaluate and add up the mitigating factors versus the aggravating factors before you vote." She said she understood that, but "I just can't be a part of it." (5RT 908.) The judge thanked Escamilla for her candor.

C. The trial judge's treatment of succeeding panelists and its final efforts to rehabilitate Shane Blair fell into the same pattern, evincing desire to keep death penalty supporters and remove all opponents

After thanking Ms. Escamilla, the court moved on to rehabilitate a panelist named Hankin whose questionnaire said he believed the state should always impose the death penalty on people who kill with deliberation and premeditation. (5RT 908-909.) Mr. Hankin quickly asserted that there are circumstances under which he could vote for life. (5RT 909-910.) The next panelist, Mr. Charles Heath, said he could not imagine a situation in which he would vote for life without the possibility of parole since he would rather have the death penalty for himself, but thought he could evaluate the evidence in aggravation and mitigation. (RT 912-913.)

The next prospective juror to be questioned was Mr. A.H., who later was sworn as Juror No. 4. His questionnaire said he believed that the death penalty should "sometimes" be imposed on "everyone" who kills another human being, as well as upon everyone who kills intentionally or with premeditation and deliberation. In the explanation section, he wrote "There could be circumstances, such as self defense, fear of life accidental occurrences, etc." (14ACT 5415.)

The judge did not repeat Juror No. 4's questionnaire comments in open court, and made no mention of California law's failure to allow for imposition of the death penalty on the grounds that there was no excuse or defense along the lines he described.

Instead, the judge asked Juror No. 4 if he could "place his mind in a receptive mode regarding the penalty phase," and vote for a life sentence if "the mitigating factors outweigh the aggravating factors." Juror No. 4 answered affirmatively. (5RT 916.)

The judge did not ask if Juror No. 4 could impose life if the factors in aggravation were simply equal to the mitigating factors, nor otherwise inform the jurors and prospective jurors attending Juror No. 4's rehabilitation that the law required a life sentence if there were no circumstances in aggravation, or if mitigation and aggravation were in equipoise. The trial court simply proceeded to question the next prospective juror after asking Juror No. 4 if he could impose death if the aggravation outweighed any mitigation. Juror No. 4 answered affirmatively. (5RT 916.)

The next prospective juror to be questioned by the court was a death penalty opponent, Margaret Knox. Ms. Knox's questionnaire responses said she "oppose[d] the death penalty" (3ACT 1175) belonged to the ACLU (3ACT 1173) and believed the state should "never" impose the death penalty on everyone who kills intentionally, or with premeditation and deliberation. (3ACT 1175.) She said she opposed the death penalty on both moral and practical grounds (3ACT 1176) and would have difficulty imposing the death penalty, but no difficulty finding a special circumstance true if proved by the evidence. (3ACT 1175.)

The judge made no attempt at rehabilitation. After noting that Knox expressed "strong feelings about the death penalty in her questionnaire," the

judge asked if she could "perceive a situation where [she] would be able to vote for the death penalty." (5RT 916.) She answered no. (5RT 917.) The judge asked her if she was "communicating to [him]" that she would "automatically" vote for life without parole, and that she would never "be able to vote for the death penalty." (5RT 917.) The judge obtained affirmative answers to these leading questions, and moved on to the next prospective juror, Ms. Kozy.

Death penalty supporter Heather Kozy said she believed the state should "always" impose death upon everyone who kills with deliberation and premeditation. (5ACT 1615) She told the judge that if someone had a fair trial and was considered guilty of premeditated murder, there should be "an eye for an eye." (5RT 918.) The trial judge said that part of a fair trial involves applying the law, and evaluating factors in mitigation and aggravation. (5RT 918.) He asked her if her opinions were sufficiently strong so that regardless of what he told her about the law and her responsibility as a juror, she would not be able to perform the factors of balancing mitigation and aggravation, and would vote for death every time. Kozy said it would be hard to convince her" otherwise and agreed, "It's not even a tendency, it's almost automatic." (5RT 919.)

Next, Jeannine Larsen was not asked any questions about her answers to the death penalty questions on the questionnaire. She was simply asked if she felt she could fulfill the responsibilities of a juror, and whether she had any trouble sitting on this case. (5RT 920.) Larson's responses to death qualifying questions on the questionnaire, which were

not mentioned in court, said the death penalty should sometimes be imposed on everyone who commits any of the three listed types of homicide. (9ACT 3607.)

The next examinee, Mr. Marquez, was a death penalty opponent. His questionnaire said the state should never impose the death penalty for the listed forms of homicide, and explained that no one has the right to kill anyone. (5RT 921.)

The trial court quickly confirmed Marquez's disqualification with leading questions pointed at how Marquez would vote, rather than what he would consider before voting. The court said, "You understand that in your work on this jury there may come a time when you would be asked to determine a penalty that would be imposed upon a person who had been convicted of first degree murder with a special circumstance, and the possible penalties would be either life without the possibility of parole, or death, do you feel that you could impose the death penalty on anyone? Marquez said no. The court asked, "So I understand that you would automatically vote for life without the possibility of parole." Marquez said that was correct. (5RT 921.)

The trial court went on to confirm the disqualification of Dorothy Moss, whose questionnaire said, "I do not believe in the death penalty" in the space provided for comment on the frequency with which the death penalty is used. The court told Ms. Moss that she did not fill out the questionnaire with respect to whether the state should impose the death penalty always, sometimes, or never, and asked her to choose in open court.

Ms. Moss said, "I would never" and "I don't believe in 'eye for an eye and a tooth for a tooth.'" (5RT 923.) Although the court asked her one relatively neutral rehabilitating question, such questioning was not as accommodating as the court's questions to pro-death penalty jurors. (5RT 924.)

Next, the court interviewed future Juror No. 9, noting that he said on his questionnaire that the state should "always" impose death for premeditated murder, and explained "if you have time to think about it, you have time to decide to handle things differently." This juror was rehabilitated by the trial court's questions, which included, but were not limited to, a question as to whether he would always vote in accordance with his belief in the justification for imposing death. (5RT 925-926.)

Future juror No. 12 was next. This juror's questionnaire responses, which said the state should sometimes execute everyone guilty of any of the three listed forms of homicide, were not mentioned in court. Her questioning was brief and generally qualifying. (5RT 926-927.) The court's treatment of the next examinee, Ms. Pioch, was similarly brief and qualifying. (5RT 928-929.)

The next death penalty supporter quickly rejected the court's usual efforts to rehabilitate death penalty supporters. Mr. Nevares said he was "not receptive" to the possibility of life without the possibility of parole. He would automatically impose the death penalty for a premeditated intentionally killing regardless of mitigation, and would not follow directions on the law. (5RT 930-931.)

After Mr. Nevares, the court briefly examined Mr. Porter, who said on his questionnaire that he cannot be impartial because he had already formed an opinion and had a view of how the trial should proceed. (5RT 931.) The court followed with brief, qualifying questioning of veniremembers Ross and Tatum, whose questionnaire responses were not disclosed. (5RT 933-935.)

Next, death penalty opponent Laverne Uhte was examined by the trial court in a manner likely to confirm her disqualification, and was ignored when she gave a qualifying answer. As with Mr. Marquez, the trial court did not ask Uhte about her ability to consider or weigh evidence. The court asked "Do you feel you could impose the death penalty in a case such as this?" and upon getting a negative reply, "So regardless of how strong the aggravating factors were, your frame of mind is one where under no circumstances could you have impose [sic] the death penalty; is that correct?" Upon receiving an affirmative reply, the court asked, "So you would automatically vote for life without parole regardless of what evidence might be presented in the penalty phase?" (5RT 935.)

The court then asked Uhte if she understood that the court wanted jurors who had discretion to vote for either penalty. Uhte said, "I understand you." The court asked if she felt she would be able to give herself that discretion in deciding this case. She said, "Yes." But the court did not acknowledge her assertion that she passed the court's stated litmus test in affirming her ability to vote for either penalty in accordance with her own discretion. The court instead moved on to the next panelist, asserting

that Uhte's frame of mind was understood. (5RT 936.) Outside the presence of the jury, the court later granted the prosecutor's challenge for cause against Ms. Uhte, saying only, "I'll grant the challenge regarding Mrs. Uhte. I believe she's unable to serve for personal beliefs." (5RT 1034.)

Next, death penalty supporter Matt Voelker encouraged and received the trial court's usual effort to rehabilitate prospective jurors who expressed bias toward death. Voelker said he did not see any reason why he couldn't fulfill the duties of a juror in this case, though he "would certainly lean toward the death penalty." (5RT 936-937.) He did not know if that leaning would overpower his ability to fairly consider factors in aggravation and mitigation at the second phase of the trial. (RT 937.) The court asked Voelker if he could "consider" in the penalty phase "evidence regarding a person's life history, personal things that may not amount to a defense for purposes of the guilt phase, but are very human terms which would have an effect if not understanding at least mitigating a punishment." (5RT 937-938.) Voelker said he "would certainly listen to it." (5RT 938.)

The court asked Voelker if he could be "neutral at the start of the penalty phase," and Voelker said "I think I probably could." The court asked if he "could participate in a process in which his mind has to be open to the possibility that it's inappropriate to impose the death penalty given mitigating factors." He said, "Yes, I think I have some feelings toward the death penalty." (5RT 939-940.) The court asked if he could keep those

feelings out of this analytical process of thinking what's the appropriate penalty. Voelker said, "Yes, I could say that." (5RT 940.)

After a brief and general qualifying examination of panelist Rose Pucchio, whose questionnaire responses were not mentioned, the trial court recommenced its effort to rehabilitate Shane Blair.

Despite Blair's previous admission that he would ultimately return a death verdict unless premeditation was disproved in the penalty phase, the trial court recommenced questioning of Blair in very general, qualifying terms.

The trial court asked Blair, "As you sit here right now, do you feel, could you, fairly and impartially evaluate this matter in the penalty phase?" He said yes. The court asked if he would automatically vote for the death penalty. He said, "I really don't know." Asked if he could perform the function of receiving evidence in mitigation as well as considering factors in aggravation, and then making a decision, he said yes. (5RT 943-944.) The court concluded its examination of Blair without clarifying whether Blair could impose a life sentence for premeditated murder based on the sufficiency of the mitigating circumstances, even if he did not view that sentence as the appropriate penalty for a premeditated murder. (5RT 943-944.) Blair was subsequently excused on hardship grounds, but the impact of his dialogue with the court remained.

Judicial questioning of subsequent panels was similar, although no death penalty supporter pulled quite as much rehabilitative effort from the trial court as did Mr. Blair. The trial court routinely attempted to

rehabilitate panelists who said the state should always impose death for one or more forms of homicide, often stretching if not grossly misstating California's death penalty law to assure them that the law would accommodate their "eye for an eye views" in allowing them to consider "all the crime facts" aggravating. (See Arguments II and III, *ante*.) The trial court did not make symmetrical efforts with death penalty opponents.

D. Appellant objected to the judge's mode of questioning as biased and unfair

In the middle of the process, and after being restricted in his efforts to impeach the strict eye-for-an-eye jurors after the trial judge rehabilitated them, defense counsel complained that the court itself had used leading questions more than he had used them, and was "setting up" an unfair trial in objecting to defense counsel's examination and telling jurors that defense counsel was making inappropriate emotional appeals. (5RT 1180.) Without identifying any particular question asked by the trial court, defense counsel said, "I object to that question" and "I believe [the trial court's condemnation of counsel] gives jurors the ability to disregard what the lawyers are saying." (5RT 1180.)

Later, appellant personally voiced objection to the trial court's "skewed" approach to voir dire. But the trial judge said he saw nothing wrong with his less-than-evenhanded questioning.[25] (8RT 1591-1595.)

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[25] Appellant complained that jurors were induced by exhaustion into changing the positions they expressed in their questionnaire responses. (8RT 1591) He complained that the court had sustained prosecutorial objections to defense counsel's questioning as argumentative, while

It is settled that a criminal defendant can assert the equal protection rights of potential jurors, as well as his own constitutional rights to equal protection, due process, and an impartial judge and jury, in objecting to discrimination by the State in jury selection procedure. (*Powers v. Ohio* (1991) 499 U.S. 400.) Appellant's personal protest invoked all of these rights. His counsel's objection speaks further to the question of why he could not overcome, through his own questioning of the panels, the juror-biasing and record-making effects of the trial court's voir dire. Further objection to the judge's mishandling of potential jurors would have been futile. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.)

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allowing the prosecutor to argue his case for death on voir dire. (8RT 1592.) After the court responded at length, appellant pointed to venire member Mario Tovani's change in position after continued questioning, and summarized his complaint:

> THE DEFENDANT: That's what I am talking about obviously there is something going on that makes him go from one response to another.
>
> I'm saying that it appears to me now the selection process is attempted to be skewed a certain way.
>
> Are you telling me that you don't view that, you don't see it that way?
>
> THE COURT: No, I don't see it that way.
>
> THE DEFENDANT: Okay.
>
> THE COURT: All right. It's my obligation to make sure it's a fair process.
>
> THE DEFENDANT: Judge Flier, I really mean it, it hasn't been fair thus far.
>
> THE COURT: That's from your perspective Mr. Pearson. (8RT 1594-1595.)

Furthermore, appellant's claim of is one of federal constitutional error. "[O]bjection in the trial court is not required to preserve a federal constitutional issue." (*People v. Vera* (1997) 15 Cal.4th 269, 279; accord, *People v. Santamaria* (1991) 229 Cal.3d 269, 279, fn. 7 [errors "of . . . magnitude" are cognizable on appeal in absence of objection]; *People v. Mills* (1978) 81 Cal.App.3d 171, 176 ["The Evidence Code section 353 requirement of timely and specific objection before appellate review is available 'is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law'"].)

This, furthermore, is a capital case. In keeping with the recognition that "death is different" (*Gardner v. Florida* (1977) 430 U.S. 349, 357), this court has held that "subdivision (b) of section 1239 imposes a duty upon this court" in capital cases "'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" (*People v. Stanworth* (1969) 71 Cal.2d 820, 833; cf. *People v. Easley* (1983) 34 Cal.3d 858, 863-864 [reversing a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this Court].)

Finally, even in non-capital cases, the court always has the discretion to consider claims advanced for the first time on appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.) As recently noted by the Fifth District Court of Appeal,

> [T]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an *appellate court* is precluded from considering the issue. "An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. . . . Whether or not it should do so is entrusted to its discretion." (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497, quoting *People v. Williams*, *supra*, 17 Cal.4th 148, 162, fn. 6; see *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].) (*People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985.)

E. Reversal of the judgment is required

Disparate questioning of prospective jurors based upon their support or opposition to the death penalty implies more than special interest in seating members of one group and not the other. When conducted by a litigant, disparate questioning implies intention to strike members of the disfavored group on pretext. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 344-345.)

Such conduct by a judge is no less meaningful, particularly when each group of venire members is aligned with the interest of a party in the outcome of the litigation. (*United States v. Beaty* (3d Cir. 1983) 722 F.2d 1090, 1095-1096; *People v. Ramirez* (1952) 113 Cal.App.2d 842, 852-853.)

"The influence of a trial judge on the jury is necessarily and properly of great weight [citation], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) As observed by this court in *Hovey v. Superior Court, supra*, 28 Cal.3d 1:

> [V]enirepersons who are in the unfamiliar and imposing surroundings of a courtroom, undergoing the oftentimes elaborate and sometimes baffling ritual of voir dire, will typically seek cues about appropriate ways of thinking, feeling, and believing. Such venirepersons are likely to look to the behavior of the most knowledgeable and respected figures in the courtroom, i.e., the judge and counsel. (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 129.)

Due process violations sufficient to void state criminal convictions have been found when the action of a trial judge created only the risk or appearance of partiality. (See *Johnson v. Metz* (2d Cir 1979) 609 F.2d 1052, 1057 [collecting U.S. Supreme Court decisions on point].)

Accordingly, a trial judge's ability to bias a jury by employing a double standard in questioning prospective jurors pro and con the death penalty was recognized prior to, and in, the *Witherspoon* decision. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 523, citing *Crawford v. Bounds, supra*, 395 F.2d 297, 303-304 ["double standard" in examining jurors pro and con the death penalty "inevitably resulted in a denial of due process."].)

In addition to eliminating death penalty opponents and accepting potential jurors who should be excused, use of a double standard favoring death penalty supporters biases previously neutral jurors who are forced to watch the process. As this court once observed, "[t]he fact that the court dismisses those venirepersons who express unequivocable opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so

irrevocable as to disqualify them under *Witherspoon* may feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty. [fn.][26] (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 73-74.)

"A process which systematically reduces whatever 'doubts about the wisdom of capital punishment' or '[reluctance] to pronounce the extreme penalty' is as constitutionally infirm as a jury from which individuals who hold such views are systematically 'culled.'" Neither jury can "speak for the community." [Citation.] Both juries are "less than neutral" with respect to the choice of penalty." (*Hovey v. Superior Court*, *supra,* quoting and citing *Witherspoon v. Illinois, supra,* 381 U.S. at p. 520, fn. 18.)

A verdict produced by a juror whose impartiality has been compromised in this manner cannot stand. Denial of the right to an impartial jury is the denial of a substantial right and a miscarriage of justice per se. It is never harmless. (*Gray v. Mississippi* (1987) 481 U.S. 648, 669

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[26] A footnote (n. 123) at this portion of the *Hovey* opinion states that "insofar as the venirepersons observe the judge dismissing prospective jurors who would automatically vote for the death penalty, the remaining jurors might infer a more symmetrical disapproval on the part of the law, offsetting the prejudicial operation of this particular psychological process."

In appellant's case, most of the venire, particularly members of the first panel, saw the trial judge make extremely lengthy, persistent, and highly instructive efforts to rehabilitate panelists who said they would impose death automatically. Panelists who said they would not impose death received no such rehabilitative for from the trial judge, and were dismissed after relatively few impeaching questions. No reasonable juror would infer "symmetrical disapproval on the part of the law" after attending appellant's jury selection proceedings.

[95 L.Ed.2d 622, 639 ["We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' [Citations.] The right to an impartial adjudicator, be it judge or jury, is such a right."].) Here, the fairness of the entire trial was compromised by the manner in which the jury underwent life and death qualification. The guilt as well as the penalty verdicts should fall.

V. THE TRIAL COURT FAILED TO PROPERLY EXERCISE ITS DISCRETION BEFORE EXPOSING EACH PROSPECTIVE JUROR TO THE LIFE AND DEATH QUALIFICATION VOIR DIRE OF 24 OTHERS IN A MANNER THAT INFRINGED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

At the time of appellant's trial, Code of Civil Procedure section 223 had been recently amended to demand that trial courts determine the "advisability" of having one or more prospective jurors attend the examination of another prospective juror. The determination was to be made in light of the particular circumstances of each case. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1183.)[27]

As stated in *Covarrubias,* "Depending upon the circumstances, conducting voir dire in the presence of the other jurors may not be the best process." (*Covarrubias*, *supra*, 60 Cal.App.4th at p. 1183)

Appellant's trial court decided to death-qualify jurors in very large (25-member) groups.

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[27] In 1996, when this case was tried, the first paragraph of Code of Civil Procedure section 223 provided as follows:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

The basis for the trial court's decision had nothing to do with the particular circumstances of appellant's case. At the time the court made this decision, the jury questionnaire the court later utilized was still being drafted and negotiated by counsel. The court did not know what information would be disclosed in the private circumstances in which questionnaires are completed, versus the information that would have to be developed in the voir dire process. (Cf. *People v. Waidla* (2000) 22 Cal.4th 690, 713.) The court had no plan to utilize individual sequestered voir dire when a juror made an affirmative response to a group inquiry involving a sensitive death or life qualifying matter. (Cf. *People v. Box* (2000) 23 Cal.4th 1153, 1180-1181.)

Like the trial judge in *Covarrubias,* appellant's trial judge simply thought group voir dire was superior to individual sequestered voir dire in general, and was unclear as to his power to sequester jurors for death qualification under current law. Appellant's trial judge also labored under the belief that trial courts could "give some credence to *Hovey*" only "under certain circumstances" that the judge did not know to be present in appellant's case.

Defense counsel requested sequestered voir dire and challenged the court's belief in the superiority of group voir dire. The prosecutor insisted that sequestered voir dire was "in fact" prohibited, and urged the court to use maximally large groups.

Months later, when the trial judge had the completed questionnaires in hand, he conducted death qualification voir dire personally, allowing counsel only 30 minutes per 25-member panel for follow-up questioning.

As shown in the previous argument, the judge's approach to jurors whose questionnaires indicated they would never vote for life was not at all like his approach to jurors whose questionnaires indicated they would never vote for death. When questioning the always-death voters, the judge carefully developed evidence of their willingness to consider all the circumstances of the crime before imposing sentence, rather than upon their willingness to impose a sentence other than death. The always-life voters were questioned relatively briefly by the judge. Their willingness to consider all the circumstances before imposing sentence was not developed by the judge's questioning. The questions the judge asked them confirmed the disqualifying views expressed on their questionnaires. The pattern of disparate questioning was dramatically informative as to the acceptability of pro-death biases, and the unacceptability of an anti-death biases, in the courtroom in which appellant's case was to be tried.

Because the trial court refused to sequester jurors as requested by the defense, none of appellant's jurors were spared the biasing and desensitizing effects of observing life and death qualification voir dire at its worst. Appellant had no chance of seating a jury that truly represented the conscience of the community, let alone develop a record of the information that could have been disclosed through individual sequestered voir dire. Whatever impartiality any juror brought to the courtroom was compromised

if not entirely lost by exposure to what appeared to be a strong judicial and legal bias in favor of seating a maximum number of pro-death penalty jurors. Appellant was denied the exercise of informed judicial discretion to which he was entitled under California law, his right to an impartial jury, and due process of law.

A. The trial court's dialogue with counsel reveals fundamental misconceptions about the law respecting discretion to sequester jurors for death qualification and no consideration of the most important facts

Prior to developing the questionnaire ultimately used with appellant's venire, the trial court asked counsel for their views on death-qualifying jurors in group voir dire.

The prosecutor urged the court to fill the courtroom for death qualifying voir dire. He said "we" believe "death qualification should be asked in the same fashion as all the other questions that are asked safe hardship." (1RT 51.) Informed that the courtroom could hold up to 60 veniremembers (1RT 50) the prosecutor said "it may be most efficient to get everybody all at once and get through the hardships and bring up who remains in teams to accommodate the size of this courtroom." (1RT 51.)

The prosecutor told the court that limiting the group size to six would "blow" his estimate of the amount of time necessary to pick a jury. Further to the point, he said, "I was originally thinking it would take about a week to pick a jury. . . . But that can change drastically. For instance, if the

court were to use six only, death qualify six at a time, it could take us three weeks to pick a jury." (1RT 52.)

The court asked counsel if they knew of any "statutory case law prohibition that you're aware of currently that would prevent me from talking with multiple jurors at the same time to qualify them." Both counsel answered negatively.

The court said that its experience in using "at least a group of six was not a major problem, and as we sorted through them, individually, I gave the attorneys an opportunity to talk to those panelists, individually." (1RT 53-54.)

Defense counsel said he found the structure the prosecutor said he had seen used to qualify 12 to 15 jurors "hard to visualize," and "I don't like things new and different, so I must say that the idea of having several people in the room when questions about the death penalty are asked is — doesn't occur to me as a good idea." He went on:

> I don't believe you learn what you want to know when people are sitting their with their fellows in a similar position, so I don't think that's productive of full disclosure, so I think I might — my tendency would be to want to have one person in the room at a time while they're being asked about death. (1RT 56.)

The court said it would "think about it" and "get back" to counsel with a proposed procedure. "We can talk about it after it's actually on the table." (1RT 56.) The court noted that it believed prospective juror responses can "trigger" other jurors to say things they would not say "had it

not been for the presence of other jurors, so I felt we got a good deal of candor and honest responses by having other people present who could talk about their fears and anxieties and concerns about sitting on the jury." (1RT 60.) As to the law, the trial court said, "I don't know that individual voir dire is mandated or even the best thing to do." (1RT 60.)

The prosecutor asserted that sequestered voir dire was now prohibited by statute:

> In fact, — in fact, *the Code of Civil Procedure, in some fashion, requires the voir dire to be conducted in the presence of others*. I assume the only caveat to that is limitation (sic) is the limitations of the courtroom and the logistics of it, but not with respect to death qualification. I mean, *Hovey*[28] is out. I think that's pretty clear, I think. (1RT 60, emphasis added.)

The court responded to the prosecutor's erroneous summary of the law affirmatively, with one qualification:

> Yes. It's more of a case where *I think in certain circumstances the court is entitled to give some credence to* Hovey. *And I don't know if the publicity generated by this case is one of those circumstances*. (1RT 60-61, emphasis added.)

Defense counsel did not offer any insight on the law. He instead offered what he called a "comment":

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[28] *Hovey v. Superior Court, supra*, 28 Cal.3d 1.

> I'm sure there are occasions that where [sic] it seems like the presence of other people is generating information from the group. I don't know how anyone would know to what extent that outweighed what was being kept in. At the same time, I don't know how anybody would know that. And so we all may have different experiences here to draw upon, but it seems to me — I still feel like I did before, that doing it one at a time makes the — at least me, feel like I'm getting more what I'm looking for. (1RT 61.)

The court acknowledged counsels' input, but did not respond to defense counsel's concerns. The next time the trial court discussed group voir dire, the court spoke only of the mechanics of processing numbers of people. The court said it expected "a drop off of at least a third on hardship" grounds. (1RT 126.) The court said it would distribute the questionnaire to veniremembers cleared for hardship, and voir dire them for death qualification, 25 at a time. (1RT 126-128.) To quote:

> My plan right now is to have groups of 25. My courtroom itself cannot seat more than 60 at a time. And my plan is to be calling back groups of 25 at a time, one in the morning session and one in the afternoon session on Tuesday, Wednesday and Thursday. (1RT 128.)

The prosecutor suggested that the groups be limited to 14, "however many this box holds." (1RT 134.)

A few months later, the court said the room could accommodate 70 veniremembers at a time, and would therefore bring in 70 for hardship screening. (1RT 246.) Without further discussion of the size of group appropriate for death qualification, the court declared the group size would be 25. (1RT 247.) The court said it would take 25 in the morning, 25 in the

afternoon, and "try to deal with the general voir dire as well as the death-qualified voir dire." (1RT 249.)

The court adhered to its plan to perform death qualification in open court, 25 people at a time. The court abandoned only that part of its plan requiring that general voir dire be conducted simultaneously. (2RT 300.)

B. The trial court's belief that it could not conduct individual sequestered voir dire or give any credence to *Hovey* unless the case had extraordinary publicity or other unusual circumstances was erroneous as a matter of law

Contrary to the trial court's premise,[29] Code of Civil Procedure section 223 did not limit a trial court's power to sequester jurors for death qualification voir dire, much less limit that power to high-publicity cases, or to cases presenting unusual factors. Rather than declaring group voir dire advisable or inadvisable in ordinary death penalty cases, the statute calls the trial court to determine the advisability of group voir dire in all cases, and to

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[29] This exchange between the prosecutor and the trial court about the applicable law is the most revealing of the trial court's premise.

> THE PROSECUTOR: In fact, — in fact, the Code of Civil Procedure, in some fashion, requires the voir dire to be conducted in the presence of others. I assume the only caveat to that is limitation (sic) is the limitations of the courtroom and the logistics of it, but not with respect to death qualification. I mean, *Hovey* is out. I think that's pretty clear, I think. (1RT 60, emphasis added.)

> THE COURT: Yes. It's more of a case where I think in certain circumstances the court is entitled to give some credence to *Hovey*. And I don't know if the publicity generated by this case is one of those circumstances. (1RT 60-61.)

permit group voir dire only if it is, indeed, advisable, considering all the circumstances of the case. (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th 1168, 1183.)

Moreover, the credence due *Hovey* does not turn on the presence or absence of anything other than a need to effectively examine the death-qualification of jurors while protecting the defendant's right to due process and an impartial jury. *Hovey* defined the risks associated with death qualification of prospective jurors and mandated that trial courts manage the risk the same way in all cases. *Hovey's* mandate as to how to manage the risk has been abrogated, but *Hovey's* description of the risk factors has not been discredited or superseded by any statute or decision of this court. The underlying evidence has only grown in recognition and stature since *Hovey* was decided.[30]

Of particular importance here is the *Hovey* court's description of how open-minded prospective jurors are likely to develop a pro-death bias as a result of observing a trial court's dismissive treatment of veniremembers who oppose capital punishment:

> Several theories discussed at the evidentiary hearing below explain why the current modes of death-qualification might increase jurors' willingness to impose a sentence of death. During a death-qualifying voir dire, venirepersons are questioned in open court about their attitudes toward the death

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[30] See, e.g., Haney, *Violence and the Capital Jury* (July 1997) Stanford L.Rev. 1447, 1482 [noting, inter alia, that systematic exclusion of people who say the state should never impose capital punishment tells all others present that "the legitimate and favored position within the legal system is one supporting imposition of the death penalty."].)

> penalty. The fact that the court dismisses those venirepersons who express unequivocable opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so irrevocable as to disqualify them under *Witherspoon* may feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty. [fn.][31] (*Hovey v. Superior Court*, *supra,* 28 Cal.3d at pp. 73-74.)

The *Hovey* court's observations respecting the desensitizing effects of exposure to death qualification are also very important here. In addition to cultivating belief in the defendant's guilt, exposing jurors to the death qualification process can desensitize them to the intimidating duty of determining whether another person should live or die:

> What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life. (*Hovey v. Superior Court*, *supra,* 28 Cal.3d at p. 75.)

Also important are *Hovey*'s observations respecting the possibility for reducing the risk of desensitizing neutral jurors, and the risk of biasing

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[31] A footnote (n. 123) at this portion of the *Hovey* opinion states that "insofar as the venirepersons observe the judge dismissing prospective jurors who would automatically vote for the death penalty, the remaining jurors might infer a more symmetrical disapproval on the part of the law, offsetting the prejudicial operation of this particular psychological process."

Appellant's jurors did not see the trial judge dismiss panelists who said they would impose death automatically. Instead, they saw the trial judge make every effort to rehabilitate them. No reasonable juror would infer "symmetrical disapproval on the part of the law" as a result of attending appellant's jury selection proceedings.

neutral jurors in favor of death, by adjusting the size of the group and the quantity of the questions. As stated in the study relied upon in *Hovey* and as quoted by this court,

> The more extensive the questioning, the more you would expect to find important differences between the state of mind of jurors who have been through the one process [death-qualification] as compared with those who have been though the other [voir dire without death qualification]. (*Hovey v. Superior Court*, *supra,* 28 Cal.3d at p. 79.)

This court concluded, "[this] proposition implies a corollary: 'the extent to which [these effects] are minimal will be a function of the extent to which the questioning is minimized.'" (*Hovey v. Superior Court*, *supra,* 28 Cal.3d at pp. 79-80.)

Appellant's trial judge's belief that courts were entitled to give "some credence" to *Hovey* only "under certain circumstances" not established in appellant's case might be deemed unimportant if the parties had presented the trial court with new evidence addressing the same issues. But no such evidence was adduced.

Defense counsel's concerns about getting the truth out of jurors were valid and supportable by independent evidence, but he did not adduce any evidence or cite any literature like that considered in *Hovey.* Moreover, defense counsel did not touch upon the risk that death-scrupled jurors would be influenced to appellant's detriment by repeated exposure to other death-qualifying inquiries. The prosecutor's input did not speak to the

issues at all, and included an unhelpful assertion that "*Hovey* is out." (1RT 60.)

Thus, the trial court was ignorant not only of what the questionnaires would reveal and what kind of voir dire would be appropriate in light of those revelations, but also of the guidance *Hovey* provides in assessing and managing the risk of biasing and desensitizing neutral jurors. In no sense did appellant's trial court exercise reasonably informed discretion in deciding to conduct death qualification voir dire in the manner was likely to infringe appellant's due process rights.

When a trial court is mistaken about the scope of its discretion, even if the mistake is reasonable, an action taken in accord with that mistaken view is error. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.) A court which is unaware of the scope of its discretionary powers can not exercise informed discretion. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) In situations in which a trial court is vested with "great discretion . . . an order based upon improper criteria or incorrect assumptions calls for reversal 'even though there may be substantial evidence to support the court's order.' [Citations.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

C. The trial court's misconceptions were no less important than those held to require reversal in *Covarrubias*

In *Covarrubias*, the appellate court found that the trial had not exercised the requisite discretion before deciding on group voir dire, despite

the trial court's careful and lengthy description of its decision-making process.

The trial court in *Covarrubias* stated that it "has reviewed the authorities in this area and has determined that individual and sequestered voir dire is not only not required, but that the lawful process and the best process is to conduct voir dire whenever possible in the presence of other jurors." (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th 1168, 1182-1183.).

The trial court further explained that "while it is true that the *Hovey* case has not been specifically overruled by another case, another California Supreme Court case, it has been effectively overruled with the enactment of Proposition 115 and the enactment of section 223 of the Code of Civil Procedure which I alluded to earlier." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th 1168, 1183.)

The appellate court concluded that the trial court's comments did not "reflect an exercise of discretion about whether, in the particular circumstances of this case, large group voir dire was practicable." (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th 1168, 1183.) Further:

> The trial court's statement that individual sequestered voir dire is "not only not required" but that conducting voir dire in the presence of the other jurors is the "best process" and "the lawful process" also demonstrates the trial court's misunderstanding of section 223. Depending upon the circumstances, conducting voir dire in the presence of the other jurors may or may not be the "best process." Certainly the trial court misapprehended section 223 to the extent its

> description of large group voir dire as "the lawful process" implied that individual sequestered voir dire was somehow unlawful. (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1183.)

The remand in *Covarrubias* accords with the settled rule respecting proper exercise of judicial discretion. To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. (*Martin v. Alcoholic Beverage etc. Appeals Bd.* (1961) 55 Cal.2d 867, 878.)

Like the judge in *Covarrubias,* the trial judge in appellant's case was not only underinformed about the law, but said nothing, and knew next-to-nothing, about the particular circumstances of this case apropos the use of sequestered voir dire for death qualification. Not having developed (let alone examined the venire's response to) the death-qualification questionnaire, the trial court could not have known how much, or what kind of, death qualification voir dire would be necessary. The trial judge attempted to impose a policy for this case based on generalities about voir dire, and an inaccurate assessment of the governing law. The judge's refusal to sequester appellant's jury was no better reasoned than the refusal in *Covarrubias.* And because appellant's trial judge gave no credence to *Hovey*, his reasoning was substantially worse.

D. Reversal of the judgment is required

i. The trial court's failure to exercise the requisite discretion in rejecting appellant's request for sequestered individual examination was not harmless error

Failure to exercise the requisite discretion due to misconception of the material facts or the law may not be held harmless unless the record proves that the misconception did not affect the ultimate judgment. (See, e.g., *People v. Konow* (2004) 32 Cal.4th 995 [grant of 995 motion by superior court improperly reversed by appellate court when magistrate misapprehended discretion to dismiss charges under Penal Code section 1385]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 [new sentencing hearing required unless record shows that trial court would not have exercised discretion in the defendant's favor]; *People v. Smith* (1997) 59 Cal.App.4th 46, 50.)

The record in the present case does not show how the trial court would have proceeded if it had exercised informed discretion. Although the trial court exhibited no interest in defense counsel's concerns about the quality of information likely to be revealed only in sequestered voir dire, the court gave no indication of the way it would have chosen to proceed if it had known that it was entitled to give, and should give, "credence to *Hovey*" in designing a life and death qualification procedure.

If the court had given appropriate credence to *Hovey,* the court could well have decided to question some or all veniremembers individually and in sequestration, reduce the size of the panels, or take care to pose the same

questions to extremists on both sides of the spectrum of death penalty views.

If the court had adopted any of these alternative approaches, the composition of the trial record would be different from what it is now. The development of more information about juror biases through such improvements in the voir dire is probably beyond dispute.

> There can be no question that individual, sequestered voir dire is far more effective at encouraging jurors to "speak the truth" than is group questioning. As the Supreme Court observed in one case, "no doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact [of] requiring such a declaration before one's fellows is often its father." fn. 136.[32] Scholarship supports this conclusion.[33] (Blume et. al, *Probing Life Qualification Through Expanded Voir Dire*, 29 Hofstra L.Rev. 1209, 1248-1249.)

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[32] This footnote cites *Irvin v. Dowd* (1961) 366 U.S. 717, 728, and a long list of other federal and state court decisions discussing the superiority of individual, sequestered voir as a means of developing reliable information.

[33] The authors cite, inter alia, Debora A. Cancado, Note, *The Inadequacy of the Massachusetts Voir Dire* (2000) 5 Suffolk J. Trial & App. Advoc. 81, 96-97 (footnotes omitted) (quoting Natl. Ctr. for State Courts, Jury Trial Innovations (1976) chs. III-1, 68). According to Cancado, "studies about conformity have demonstrated that to avoid calling attention to themselves, panel members subjected to collective questioning do not willingly volunteer information about themselves or reveal opinions that deviate from the other panel members." While the record in the instant case shows that some prospective jurors subjected to collective questioning will reveal deviant opinions, there can be no doubt that many prospective jurors will not do so. Notably, most of appellant's jurors were asked only general qualifying questions of the sort that do not force revelations of deviant views from people who do not wish to call attention to themselves.

Finally, the information lost as a result of the trial court's ill-advised use of large group voir dire is particularly valuable to the defense. Research indicates that trial judges grant more defense challenges for cause when prospective jurors undergo questioning individually and in sequestration, and traces this phenomenon to differences in the information disclosed.[34]

Thus, the trial court's failure to exercise the requisite discretion bears the hallmark of a structural error requiring automatic reversal: it affected the "composition of the record." (*Rose v. Clark* (1986) 478 U.S. 570, 579, fn. 7.) Even if this court could confidently declare that the trial court did not bias the jury, reversal should ensue.

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[34] Nietzel and Dillehay studied the results of four types of voir dire methods in thirteen Kentucky capital trials. Some voir dires were conducted in a sequestered fashion, while in others the questioning of prospective jurors took place en masse in open court, in the presence of other potential jurors. The type of voir dire affected the rate of successful challenges for cause. Judges eliminated a greater percentage of prospective jurors for cause for *defense* reasons when they were questioned in the former fashion. A follow-up study traced the phenomenon to variation in the information jurors disclosed. See Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Voir Dire Variations in Capital Murder Trials*, 6 Law & Hum. Behav. 1; Nietzel et. al, *The Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 Behavioral Sci. & L. 467, 473.)

ii. Exposing neutral jurors to judicial life and death qualification voir dire of 24 others is an abuse of discretion and denies the defendant due process of law and an impartial jury where, as here, the judge's questioning was unnecessarily long and likely to desensitize jurors to the gravity of the decision to impose death

"A process which systematically reduces whatever 'doubts about the wisdom of capital punishment' or '[reluctance] to pronounce the extreme penalty' is as constitutionally infirm as a jury from which individuals who hold such views are systematically 'culled.'" Neither jury can "speak for the community." [Citation.] Both juries are "less than neutral" with respect to the choice of penalty." (*Hovey v. Superior Court, supra*, quoting and citing *Witherspoon v. Illinois, supra*, 381 U.S. at p. 520, fn. 18.)

Thus, if it can be said the trial court exercised its discretion in exposing jurors to the life and death qualifying examinations of 24 others, that discretion was "abused." Reversal would be required even under the statutory "miscarriage of justice" standard. (Code of Civ. Proc., § 223.)

VI. APPELLANT WAS DEPRIVED OF EQUAL PROTECTION OF THE LAW, DUE PROCESS, AND THE RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY, UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND STATE CONSTITUTIONAL COROLLARIES BY THE TRIAL COURT'S FAILURE TO APPLY *BATSON* DOCTRINE TO APPELLANT'S *WHEELER* CLAIM

A. The relevant facts

After general voir dire, the prosecutor used his second peremptory challenge to strike Sandra Givens, an African American woman.[35] Appellant's counsel approached the bench. He said he understood "it was probably early to do it" and said he was going to make a "*Wheeler*" motion. He explained, "I have to do it this way because we only have so few."[36] (9RT 1831.)

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[35] Ms. Givens identified herself as African American on her questionnaire. (12ACT 4643)

[36] In the hardship screening process, defense counsel made an unnoticed motion challenging the composition of the venire, orally alleging that only one African American had appeared in a panel of 50. The judge said he did not believe defense counsel was entitled to a hearing on the petit jury panel. "You have to deal with the entire jury panel that was brought to Martinez today, and you have to give notice of such a motion." (2RT 366.)

Later, defense counsel said that there had been 17 African-Americans out of the entire venire of 300. He restated his motion "to have a hearing to discuss the question of whether or not the procedures in this county are sufficient to assure an adequate cross-section of the community." (4RT 860-861.) The judge said it was his understanding that such motions have to be noticed. He had received no writing from counsel; the motion was denied.

The prosecutor added that he did not wish his silence to be construed as acceptance of the number 17. He said he assumed that that was defense counsel's visual assessment, but he had not counted for himself. The court simply said "I wasn't alerted I was to make a count." (4RT 861.)

The trial judge's response expressed no opinion on the question of whether the challenge was, or appeared to be, racially motivated. Instead, he said:

> I am going to deny the challenge. I don't believe there's been a sufficient showing of systematic exclusion. (9RT 1831.)

Only one other African American, Fred Cummings, was in the jury box at that time. He was later sworn as Juror 11. He was the only African American sworn as a juror.

B. Contrary to the trial court's understanding of the law, no showing of "systematic exclusion" was needed to make a prima facie case

In *People v. Wheeler* (1978) 22 Cal.3d 258, this court held that peremptory challenges may not be used to remove prospective jurors on the basis of a presumed group bias. Group bias was defined as a presumption that certain jurors are biased merely because they are members of a cognizable group distinguished on racial, religious, ethnic, or similar grounds. (*Id.* at p. 276.)

After *Wheeler* was decided, the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment to the United States Constitution forbids peremptory challenges of potential jurors on account of their race. (*Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712].)

A defendant makes a prima facie case under *Batson* when he raises "a reasonable inference" of racial discrimination in the prosecutor's exercise of one or more peremptory challenges. (*Batson v. Kentucky*, *supra*, 476 U.S. 79, 97.) *Batson* spoke of "a pattern of striking blacks" as an example of a prima facie showing. (*Ibid.*) *Batson* said the defendant may also rely on the fact that peremptory challenges constitute "a jury selection practice that permits those to discriminate who are of a mind to discriminate." (*Id.* at p. 96.)

In establishing this structure, the Court specifically rejected the "systematic exclusion" standard for the evaluation of peremptory strikes, overruling its decision in *Swain v. Alabama* (1965) 380 U.S. 202, which had required a defendant to prove systematic discrimination in the sense of repeated exclusion of all members of a minority race in case after case. (*Batson*, *supra*, at p. 100, fn. 25.) In *Batson*, the Court characterized this as a "crippling burden of proof" that made peremptory challenges by the prosecution "largely immune from constitutional scrutiny." (*Id.* at pp. 92-93.) The Supreme Court announced that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (*Id.* at p. 95.)

Unfortunately, California trial and appellate courts had already begun marching to a different drummer, one that required the defense to show "systematic exclusion." In *People v. Harvey* (1984) 163 Cal.App.3d 90, 110-111, the Court of Appeal upheld a trial court's failure to find a prima facie case of discrimination under *Wheeler*, and declared that "the

critical question is whether defense counsel established a prima facie case that the prosecutor was engaging in a *systematic pattern* of excluding blacks from the jury." (*Id.* at p 110.) The opinion explains:

> We note considerable tension in this area of the law between the desirability of theoretical consistency and the need to develop workable rules which can be understood and applied by lawyers and trial judges. In theory at least, even the exclusion of a single prospective juror may be the product of a group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion. Assuming that peremptory challenges are not to be replaced with a system requiring that counsel explain the basis for each and every challenge, it would appear that a pattern of exclusion must be evident before Wheeler's prima facie requirement can be satisfied. (*People v. Harvey*, *supra*, 163 Cal.App.3d at p. 111, emphasis in original.)

This court attempted to bring California trial and appellate courts into line with *Batson* on this issue in *People v. Fuentes* (1991) 54 Cal.3d 707, where a footnote states that "[t]he term [systematic exclusion] is not apposite in the *Wheeler* context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (*Fuentes*, *supra*, 54 Cal.3d at p. 716, fn. 4.) Likewise, *People v. Montiel* (1993) 5 Cal.4th 877, 910, declares that the "trial court was mistaken in its belief that only multiple 'systematic' discriminatory exclusions are forbidden."

Nevertheless, at least one California Court of Appeal went on to repeatedly declare that *Wheeler* required "systematic exclusion," though over 10 years had passed since this court published its decisions in *Fuentes* and *Montiel*. (See *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208

[erroneously stating that "[a] *Wheeler* motion challenges the selection of a jury, not the rejection of an individual juror; the issue is whether a pattern of systematic exclusion exists"].)

In *People v. Reynoso* (2003) 31 Cal.4th 903, this court examined a case in which the trial court denied a *Wheeler* motion because it found no "systematic exclusion" after hearing the prosecutor's explanation for a series of strikes. This court divided on the question of whether the use of that term denoted use of an improper standard. The majority said the term "systematic exclusion" is a "misnomer" commonly used to denote *Wheeler* error, and therefore, ought not be taken to refer to an inappropriate standard. (*Id.* at p. 927.)

Justice Kennard's dissent, which was joined by Justices Werdegar and Moreno, said the trial court's "invocation of the long-abandoned 'systematic exclusion' standard raises serious doubts that the trial court correctly understood and applied the analysis required by *Batson*, *supra*, 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258." (*Reynoso*, *supra*, 31 Cal.4th at p. 934.) Noting the trial court's digression to discuss a strike against a member of the group made by the defense, the dissent posited that the trial court "may well have reasoned" that "systematic exclusion" is established only when the prosecutor has stricken all members of that group. (*Ibid.*)

The *Reynoso* majority's belief that the term "systematic exclusion" is commonly used to denote "*Wheeler* error" may be correct. Many *Wheeler* opinions have used that term. But the *Reynoso* majority did not assert that

the term denotes *Batson* error, much less that it denotes a correct understanding of the *Batson* inquiry.

In light of the historic divergence of *Batson* and *Wheeler* doctrine on the question of whether multiple strikes are required to make a prima facie case of "systematic exclusion" (*People v. Harvey*, *supra*, 163 Cal.App.3d 90, 110-111) the use of that term in denying a motion made after the first strike of a Black juror means that the trial court might well have ruled against the defense despite having drawn a reasonable inference of racial discrimination on the first strike.

C. When this case was tried, California courts applying California case law were requiring more proof of discrimination at the prima facie stage than does *Batson* for reasons additional to the misperception that *Wheeler* required a pattern of suspicious strikes

This case was tried in 1996, a year in between the publication of the Court of Appeal decision in *People v. Bernard* (1994) 27 Cal.App.4th 458, and this court's decision in *People v. Box*, *supra*, 23 Cal.4th 1153, 1188, fn. 7, wherein this court disapproved *Bernard*. In *Bernard*, the Court of Appeal said a "mere inference" of racial bias in a party's use of peremptory strikes cannot overcome the "presumption" that peremptory strikes were used properly established by *Wheeler*, *supra*, 22 Cal.3d at p. 278. Rather than a "mere inference," the trial court must find a "strong likelihood" of impermissible bias to find a prima facie case under *Wheeler*. (*People v. Bernard*, *supra*, 27 Cal.4th at p. 465.)

As a consequence of *Bernard*'s analysis of *Wheeler*, and of this court's recent citation of the "strong likelihood" standard in rejecting *Wheeler* claims, the United States Court of Appeals for the Ninth Circuit held that California courts were applying a standard that "does not satisfy the constitutional requirement laid down in *Batson*" in ruling upon "*Wheeler* motions." (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192.)

Four years after the trial of appellant's case, this court responded to the Ninth Circuit's decision in *Wade v. Terhune*. This court disapproved *Bernard* "to the extent it is inconsistent with *People v. Wheeler*, *supra*, 22 Cal.3d at pages 280-281." (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.) This court explained that its *Wheeler* decisions gave the same meaning to "strong likelihood" as they gave to "reasonable inference." (*Ibid.*)

Seven years after appellant's trial, this court further explained its view of the "reasonable inference" of racial discrimination required for the prima facie case. *Batson* and *Wheeler* were said to require a showing that group bias was "more likely than not" the sole motive for a strike, i.e., to require that the objector prove discrimination by preponderance of the evidence, in order to make a prima facie case. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306, 1314, 1317.)

The United States Supreme Court granted Johnson's petition for certiorari, and held that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie

case." (*Johnson v. California* (2005) 545 U.S. 162, 168.) Rather, "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 169.) Applying this standard, the court concluded that the inferences in *Johnson* "that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*." (*Id.* at p. 173.)

Appellant's trial judge did not, and could not, anticipate the Supreme Court's decision in *Johnson*. When appellant's trial judge made his decision, *Bernard*'s rejection of the inference standard was binding precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Furthermore, *Bernard*'s analysis appeared to be supported not only by *Wheeler*'s use of the terms "presumption" and "strong likelihood," but also by at least three contemporaneous decisions from this court.

In 1990, this court said that removal of all members of the defendant's race "may give rise to an inference of impropriety" but is not "dispositive" of whether the defendant made a prima facie case. (*People v. Sanders* (1990) 51 Cal.3d 471, 500.) In 1992, this court said that such an inference is "inconclusive." (*People v. Howard* (1992) 1 Cal.4th 1132, 1156.) In 1994, the same year *Bernard* was decided, this court again said the inference is "not dispositive." (*People v. Crittenden* (1994) 22 Cal.3d 258, 281.)

Thus, if we presume that the trial court followed controlling authority, the denial of appellant's motion does not mean the trial court did not infer racial bias in the prosecutor's strike of Ms. Givens. It does not represent a finding of fact against appellant's *Batson* claim. In light of the state of California law at the time, proper application of *Batson* to appellant's motion was, for the trial court, a legal impossibility. "It is generally presumed that a trial court has followed established law [citation], but this presumption does not apply where the law in question was unclear or uncertain when the lower court acted. [Citations.]" (*People v. Jeffers* (1987) 43 Cal.3d 984, 1000.)

D. Reversal or remand to the trial court is required

It is now settled that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to *permit* the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra,* 542 U.S. 162, 170, emphasis added.) Evidence sufficient to permit the trial court to draw an inference of discrimination was before the trial court when appellant made his motion.

First, there was statistical disparity. In using one of his first two strikes to remove Ms. Givens, the prosecutor had used 50% of his peremptory challenges against a group comprising only 12.5% of the 24-

member panel subject to peremptory challenge at that time. (8RT 1624-1625; 9RT 1755-1757.)[37]

Second, Ms. Givens was a member of the defendant's racial group. (Cf. *People v. Bell* (2007) 40 Cal.4th 582 [inference of discrimination "impossible" where prosecutor excused two out of three group members but did *not* use a disproportionate share of his peremptories against the group, and defendant was *not* a member].)

Furthermore, the prosecutor's questioning of Ms. Givens was unusual compared to his questioning of other prospective jurors. Indeed, the prosecutor made a special effort to bring out what would appear to be race-neutral grounds for removal, despite the absence of any indication that Ms. Givens was biased against the prosecution or in favor of the defense.

Ms. Givens's questionnaire disclosed that she was employed as a school custodian for the Orinda School District, and had been so employed for the preceding three and a half years. (12ACT 4644.) She had four adult children. (12ACT 4646.) She was previously employed by the county in general services for one and a half years (12ACT 4645), which involved cleaning the superior courthouse, the prosecutor's office, and that of the Public Defender. The prosecutor told Givens and everyone present that he

[37] The panel members who identified themselves as Black or African American were Givens, Berg and Juror 11. The prosecutor exercised six peremptories after striking Givens, and thus exercised eight strikes in total. (9RT 1829-1834.) Other panelists stricken by the prosecutor identified themselves as Caucasian or Hispanic or provided no ethnic or racial information at all.

recognized her, and recalled that they had exchanged pleasantries when she cleaned his office. (7RT 1406-1407.)

Her history disclosed no biases against law enforcement. She was a victim of car theft in 1993, but had no pleasant or unpleasant experiences with law enforcement. (12ACT 4648.) She had a brother who had been arrested for driving without a license (8RT 1720), and a son who served seven days in jail after being arrested on a warrant for unpaid tickets. She thought her son's treatment was fair; she had been telling him "all along" to "take care of business." (9RT 1778-1779.) She described herself as a very religious person, and said it would be "hard" for her to sentence someone to death. (12ACT 4651.) She believed that people who kill unlawfully or intentionally should sometimes receive the death penalty, and that people who kill with deliberate and premeditated intent should always be condemned. (12ACT 4656.) On the explanation line, she wrote, "It all depends on how hideous the crime was." (12ACT 4656.) She heard about the killings from a neighbor who works for the City of Richmond, and from the newspaper, but did not believe the information she received would influence her. (12ACT 4652.)

Finally, Ms. Givens had visited the Housing Authority Section 8 division as a renter four years before trial, and dealt with Connie Taylor there. (9RT 1786-1787.) Ms. Taylor testified for appellant at trial (17RT 3248) but was not listed as a witness on the list provided to prospective jurors. (12ACT 4658-4660.) After Ms. Givens responded to a question indicating acquaintance with the Housing Authority and Ms. Taylor, the

prosecutor made sure the record would show the identity of the speaker. He said, "It was Givens." (9RT 1787.)

Although it is appropriate to consider the effort the prosecutor invested in questioning Ms. Givens, reviewing courts may not assume that the answers she gave explain the strike. To rebut an inference of discriminatory purpose based on statistical disparity, it is not enough to find that the record would support race-neutral reasons for the questioned challenges. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.) As noted in *Johnson v. California, supra,* 545 U.S. 162, 172, it "does not matter that the prosecutor might have had good reasons; what matters is the real reason [potential jurors] were stricken." Without a proper trial court hearing, the actual reasons cannot be known, and their neutrality cannot be determined. Remand if not reversal should ensue.

VII. THE TRIAL COURT'S REMOVAL OF A PROSPECTIVE JUROR BECAUSE SHE WAS AFRICAN AMERICAN AND CONCERNED ABOUT INEQUITABLE TREATMENT OF AFRICANS AND CAUCASIANS IN THE CRIMINAL JUSTICE SYSTEM VIOLATED THE GUARANTEES OF EQUAL PROTECTION OF THE LAW, DUE PROCESS, AND THE RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY, UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND STATE CONSTITUTIONAL COROLLARIES

A. The relevant facts

Katrina Taylor-Prater's juror questionnaire said the death penalty should "sometimes" be imposed on everyone who kills another human being, and "always" on everyone who intentionally kills another human being or kills with deliberation and premeditation. On the comment line, she explained: "Murders should get death penalty, but I am concerned about the inequity between Africans and Caucasians." (7ACT 2664.)[38]

At the outset of voir dire, the trial court noted her questionnaire's expression of concern about "the inequity between Africans and Caucasians" and asked "is that going to play some significance in your function as a juror in this case." She replied, "I will think about it, yes."

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[38] Her questionnaire also asserted that she would vote for the death penalty in all cases in which there is a verdict finding the defendant guilty of first degree murder with special circumstances, and added "could be an accidental killing." (7ACT 2665.)

Under questioning by the trial court, she affirmed that she would be able to evaluate "mitigating factors as well as aggravating factors" and asserted that she would not always impose death; her judgment "would depend upon the circumstances." (6RT 1277.) In accordance with the trial court's ruling respecting Juror No. 4, no one questioned or instructed her on the meaning of the term "mitigating factors" to determine if she was prepared to seriously consider a life sentence in a penalty preceding after finding a defendant guilty of deliberate and premeditated murder.

The trial court asked, "Could you tell me how it will impair [sic] your judgment in this case?" Ms. Taylor-Prater said it "would depend upon the evidence." (6RT 1278.) The trial court asked if she felt "that the issue of race would have some significance" to her in this case. She replied, "If I did not find the evidence to be precise or specific." (6RT 1278.) But she affirmed readiness to apply the burden of proof beyond a reasonable doubt just as she would if the defendant were not African-American, and denied that the race of the defendant or the victims would have any significance in general. (6RT 1279.) The court asked if she could say how race would enter into her judgment. The following dialogue ensued:

> THE JUROR: I would only hope the evidence is very clear, very specific, that would — if it were in the gray area, then race might be a factor.
>
> THE COURT: And how would race be a factor?
>
> THE JUROR: Because I know that sometimes the court system is not fair to African Americans.
>
> THE COURT: That might be true in things like you read in the newspaper and certainly things you've heard descriptions of. . . . ¶ My concern is whether or not you as a prospective juror are going to either consciously — it sounds like consciously more than unconsciously allow race to enter into your decision making in this case?
>
> THE JUROR: Race alone is not going to be the sole factor in my final decision, no.
>
> . . .
>
> THE COURT: So is race really playing a part in your judgment making at all?
>
> THE JUROR: Not a part in my judgment making, but it is a concern.

> THE COURT: Could you give me any sense at all of how your concern is going to effect your function as a juror in this case?
>
> THE JUROR: I really don't think it will have an effect as long as I understand the evidence and it's clear.

Ms. Taylor-Prater went on to say that she would not vote for the death penalty in a case in which the only two witnesses to a weather condition disagreed about it, but in evaluating credibility she would look at the other answers given by the witnesses. (6RT 1282.) In the penalty phase, she would not be functioning differently from the way she would function if the defendant were not an African American. (6RT 1282.)

Under questioning by the prosecutor, Ms. Taylor-Prater said she perceived that the higher representation of Blacks on death row is a product of bias at some point in the system. (7RT 1300-1301.) The prosecutor asked her if she would "factor in this perception . . . of institutional bias in [the defendant's] favor and say, well, 'I think it's about time . . . for the scale to swing the other way, maybe aggravation outweighs mitigation but you have a social obligation to balance things out a little bit?" She answered firmly: "No. I don't find balance in making the wrong decision. . . ." (7RT 1303.) The prosecutor twice asked if she would factor or use the defendant's race into her penalty decision. She answered, "No, not if he's guilty, no" and "I thought I answered that 'no.'" (7RT 1304.) No further questions along those lines were asked.

Ms. Taylor-Prater was challenged for cause by defense counsel on the grounds that her responses on the death penalty were "all over the map"

and some indicated she would be "automatic" for death. The prosecutor said "some of her comments were of some concern to the People" and "frankly, I doubt she will be part of this jury ultimately, but I don't think a case for cause has been made against her." (7RT 1341-1342.)

The trial court "grant[ed] the challenge" and explained: "Part of my concern does not deal with her statement about the death penalty. It deals with her statement that she couldn't quantify in any way just about that race would be a factor in her decision. She couldn't tell me how it would be a factor, but it was a close case. So she said she would vote according to certain feelings she had about race."

"So Mrs. Taylor-Prater is an African American. She expressed those views. I was concerned about them in terms of this particular case and I will grant the challenge for cause." (7RT 1342.)

B. Reversal is required

The criteria for evaluating fitness to serve as a juror are race-neutral. "The proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra*, 469 U.S. at pp. 423-424 (quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.)

The fact that the court noted that Taylor-Prater was African American in explaining its decision to grant the challenge indicates the criteria the court applied were not entirely race neutral; indeed, the criteria

include race as an element. To disqualify a venire member because of her race or ethnic background offends the guarantee of equal protection of the law and that to a representative and impartial jury. (U.S. Const., 6th & 14th Amends.)

Being African American, and/or concerned about mistreatment of African Americans in the court system, does not compel anyone to nullify the law or to otherwise violate the oath of a juror. "Most observers and scholars today recognize the presence of racial disparities in the criminal justice system. Reports and studies overwhelmingly demonstrate adverse effects against African Americans with respect to incarceration rates, law enforcement practices, and sentencing guidelines. Many scholars prompted by this alarming reality wrestle daily to propound explanations and solutions." (Long X. Do., Comment: *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L.Rev. 1843, 1844.)

Likewise, a juror's ethnic background or concern about systemic inequity cannot justify subjecting him or her to an inquiry in which she is expected to "quantify" (as described by the trial judge) or qualify how her perspective on racial issues will affect her function as a juror. Jurors evaluate evidence and judge credibility. In so doing, they draw on their individual experiences and accumulated knowledge of human affairs in ways that cannot be predicted until they see the evidence in the case. If a group of citizens defined by ethnicity or race or concern about racial

injustice is subjected to a qualifying test that they are doomed to fail, the guarantee of equal protection of the law is violated. (U.S. Const., 14th Amend.) And when the context is jury selection, the right to jury trial is denied. As stated by the United States Supreme Court in *Taylor v. Louisiana* (1975) 419 U.S. 522, 530:

> The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

(See also *Adams v. Texas*, *supra*, 448 U.S. 38, 50 [state violates Constitution if it excludes potential jurors who "frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."].)

Nothing else Ms. Taylor-Prater said justified subjecting her to the trial court's ad hoc test of qualification to serve as a juror. Her acknowledgment that she would think about her concerns about racial inequity while functioning as a juror and that the impact of her thinking "would depend upon the evidence" did not bespeak any racial bias or readiness to act lawlessly. Moreover, contrary to the court's statement, Ms. Taylor-Prater had never "said she would vote according to certain feelings she had about race." On the contrary, she repeatedly denied that she would vote either way on guilt or penalty because of concern about inequity or her knowledge of anyone's race.

Defense counsel's challenge to Ms. Taylor-Prater on *Morgan* grounds does not justify or obviate the need to examine the trial court's action or to reverse the defendant's conviction upon finding invidious discrimination in the trial court's jury selection process. Defense counsel did not argue or otherwise suggest using any racial or race-related criteria in evaluating his *Morgan* challenges. The trial court's use of such improper criteria harmed appellant in that it brought about the removal of a juror of his race who may have been particularly skeptical of the state's case, and left all the prospective jurors who favored the death penalty as Taylor-Prater did in the pool from which the seated jurors were drawn.[39] Finally, even if defense counsel's challenge obviates the need to consider the harm

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[39] As previously discussed, defense counsel's challenges to the other prospective jurors who gave the same answers Taylor-Prater gave on the rectitude of imposing death on everyone who commits an intentional or deliberate and premeditated murder and the need to consider any "mitigating circumstances" were uniformly denied.

appellant suffered in losing this prospective juror, appellant has standing to raise "[t]he harm from discriminatory jury selection [which] extends beyond that inflicted on the defendant" (*Batson v. Kentucky*, *supra,* 476 U.S. 79, 87) to "the excluded jurors and the entire community." (*Powers v. Ohio*, *supra*, 499 U.S. 400, 406.) Appellant's conviction, as well as his sentence, must be reversed due to the trial court's use of invidious racial criteria in the jury selection process. (*Ibid.*)

VIII. THE TRIAL COURT'S FAILURE TO SUSTAIN OBJECTIONS AND RESPOND CORRECTIVELY TO PROSECUTORIAL OVERREACHING RENDERED THE TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

Like the record in *People v. Hill* (1998) 17 Cal.4th 800, the record in the present case reveals prosecutorial tactics that pushed and frequently exceeded the bounds of propriety, and for which the prosecutor never suffered the appropriate judicial rebukes. As in *Hill*, defense counsel often but not always entered timely and appropriate objections, and was too often overruled. The judge was quick to find fault in defense counsel's objections, but slow, halting, and ultimately toothless in responding to clearly improper prosecutorial tactics.

Consequently, the prosecutor's misconduct was not limited to a few isolated instances. The defense had to endure a long course of bullying and misleading conduct directed toward jurors, witnesses, the trial judge, and defense counsel personally. Suffering no serious rebuke for any such behavior, the prosecutor controlled the trial, dominating the courtroom in ways both childish and carefully geared to obscure the weaknesses in his case.

In his guilt phase summation, he experienced no interruption or correction when he made misleading arguments that obscured the jury instruction's definition of "deliberation" — the single mental element of

first degree murder that the jury could well have found absent or insufficiently proved by the evidence.

In his penalty phase summation, he was allowed to go on with only limited correction after he derided lack of prior criminality as a mitigator (29RT 5521-5529), and falsely claimed that the statutory mitigating factor most relevant to impairment of deliberative faculties (i.e., factor (h): defect impairing ability to conform conduct to the requirements of the law) does not apply to this case. (29RT 5545-5546, 5557-5582.)

With every bad ruling, the prosecutor gained, and the defense lost, credibility with the jury; the prosecutor was encouraged to push the envelope further, and he did so — very pointedly, and very effectively. The trial court's errors in condoning the prosecutor's conduct and in curtailing the presentation of appellant's defense created a "negative synergistic effect" (*People v. Hill*, *supra*, 17 Cal.4th 800, 847) rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.

Accordingly, appellant submits that further efforts by counsel to preserve issues for review, including but not limited to asking the judge to recognize prosecutorial and judicial misconduct as such, would have been futile or counterproductive. (*People v. Hill*, *supra*, 17 Cal.4th 800, 821; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692-693.)

A. The court permitted argumentative prosecutorial questioning of a prospective juror concerning the ability of ballistic evidence to establish a shooter's "state of mind"

In the presence of the sworn jurors and all of the potential alternates, the prosecutor began his argument for a first degree murder verdict with a simple question. He asked a prospective alternate juror if he heard defense counsel say, "You don't have to know anything about ballistics." (9RT 1892.) The prosecutor's question misquoted defense counsel,[40] but the prospective alternate said "yes."

Then, the prosecutor rhetorically asked, "You think it might make a difference if somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?"

Defense counsel objected, but stated no legal basis for the objection. Instead, he disputed the factual assertion. ("Objection. That doesn't sound like ballistics to me. It has to do with medical evidence.") (9RT 1892.)

The judge overruled the defense, finding some unarticulated fault in the grounds stated. ("Is that your objection? I will overrule your objection.") (9RT 1892.)

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[40] Defense counsel's actual assertion was that "the questions that you will be confronted with in this case do not have to do with ballistics or who shot what and when." (9RT 1802.) This statement was made in the course of telling the jury that appellant did not dispute having killed two people unlawfully, and that the issues were going to "have to do with the mind." (9RT 1802.) The prosecutor objected to that assertion, alleging that "ballistics could say a lot about what is going on through somebody's head. He is not asking a question. He's arguing his case." (9RT 1802.) The court said it believed it knew where the defense "was going with this," and overruled the prosecutor's objection. (9RT 1802.)

The judge should have sustained the objection. The prosecutor's question was obviously argumentative as well as wrong on the facts.

A question is argumentative and thus improper when it seeks no new information, but rather assent to the inference suggested by the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168, p. 232; 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9, p. 764.)

The trial court's statutory obligation to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation . . . as effective for the ascertainment of truth, as may be, and to protect the witness from undue harassment . . ." (Evid. Code, § 765) means nothing if it does not include an obligation to sustain objection to argumentative questioning.

Nonetheless, the prosecutor in the present case was permitted to ask, "You think it might make a difference if somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?" (9RT 1892.)

Penal Code section 1093 prescribes the order of trial, delegating argument to the conclusion of evidence. (Pen. Code, § 1093, subd. (e).) It is not merely an arbitrary rule which separates argument from evidence. The presentation of evidence is hedged in by elaborate rules which seek to guarantee the process of ascertaining truth. When a question to a prospective juror does not call for a fact, but makes an argument or calls for

an inference from a fact, that question contributes nothing to the process of ascertaining the truth. Rather, it serves only the hostile party's eristic purpose of forcing a prospective juror to agree with his theory of the case, and places improper considerations before the jury.

When a forceful prosecutor, experienced in courtroom drama, and cloaked in the prestige of his office, engages in argument with prospective jurors about the significance of his evidence on the question of mental state, the trial court must sustain an objection, even if imperfectly worded. Jury voir dire is not the time for argument. It is "the trial judge [who bears ultimate] responsibility [for ensuring that closing argument is] kept within appropriate bounds. '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.' [Citation.]" (*United States v. Young* (1985) 470 U.S. 1, 10-11.)

B. The court allowed the prosecutor to use argumentative and leading questions in examining his own witnesses

In examining Former Housing Authority Director Art Hatchett respecting appellant's job, the prosecutor asked, "So at least in terms of his performance on the job, Mr. Pearson had no difficulty premeditating and deliberating?" Defense counsel objected on the grounds that the question was leading. The court sustained the objection, but added an explanation that suggested the court found nothing wrong with leading questions per se. ("I don't know what premeditation and deliberation means in terms of job performance so I will sustain it." (11RT 2265.) The prosecutor

subsequently led Hatchett from noting that appellant's "improvement goals" referred to future behavior to the conclusion that Hatchett did not perceive "any defect, mental or otherwise, in the mind of [appellant] that would prevent him from thinking about things in the future." (12RT 2447-2448.)

The prosecutor continued to use leading and argumentative questions to argue his mental state theory in his direct examination of former Housing Authority employee Janet Robinson. After Robinson told of having discussed current events and literature with appellant, the prosecutor asked Robinson "did you ever detect any kind of defect or oddity that enabled [appellant] to not really perceive reality at all. . . ." (13RT 2515-2516.) Defense counsel did not object to this question, although it was no less objectionable than that asked of Mr. Hatchett. Defense counsel did, however, object to a non-responsive portion of the answer. (13RT 2516.)

Onward, the prosecutor asked Ms. Robinson if she perceived any kind of "mental defect or something going on inside his brain that made him not be able to communicate with you rationally." (13RT 2516.) Ms. Robinson said no. The prosecutor followed that with "So he seemed to be thinking inside his head about the issues that you were talking." Defense counsel interjected, "It's got to be a leading question. Objection, judge." (13RT 2516.) The prosecutor began another question, without waiting for a ruling. Defense counsel interjected "Objection, judge." The prosecutor offered to rephrase. The court said "okay." The prosecutor asked Robinson, "Did he seem to be speaking with you in an appropriate way about these issues that you talked about?" Defense counsel said, "That's

just as leading, Judge. Objection." Robinson proceeded to answer the question affirmatively. The court's response: "I will allow the answer to stand as a leading question, counsel. I will allow the answer to stand based on the earlier comment by the witness." (13RT 2516-2517.)

After the prosecutor asked another leading question of Robinson and defense counsel interjected "That's got to be a leading question," the court asked counsel to approach the bench. The court told defense counsel that the objection is "leading" and chided defense counsel for stating his objection inappropriately. The court also told defense counsel it was going to allow leading questions "when the witness has already testified . . . as being repetition just to clarify the answer under those leading questions." The court also said it would allow "a certain amount of leading questions for purpose of foundational [sic]." (13RT 2519.) The court said it would sustain defense counsel's last objection, and again stated that "the legal objection is, 'Objection. Leading.'" (13RT 2519.)

The court did not admonish the prosecutor or otherwise act to discourage him from persisting in using leading questions outside the stated parameters. The prosecutor subsequently used a series of three leading questions to suggest (to the jury and to Ms. Robinson) that appellant violated office protocol for admitting visitors into a secure work area. After the court sustained the third defense objection, and the prosecutor complained that he did not know how else to ask his question, and "don't see how it suggests the answer" the court said, "All right. I will overrule

that objection" and told the prosecutor "another way of posing the question can be whether or not." (13RT 2526.)

The court then allowed the prosecutor to ask the same question embellished with a suggestion that there were times when the witness "would look up all of a sudden much to [her] surprise an applicant would be standing there." Defense counsel's objection to this leading question, which was as valid as the objections previously sustained, was overruled. (13RT 2526.)

Defense counsel subsequently refrained from futilely objecting to leading questions that utilized the "whether or not" phrase the trial court recommended to the prosecutor. Thus, though defense counsel objected to a leading and argumentative question explicitly suggesting to Ms. Robinson that she was aware of "some unnecessary work that was being done as a result of the way Mr. Pearson was doing his job," he did not object when the same question was rephrased to include a "whether or not." (13RT 2532.)

The court soon began overruling defense counsel's objections to the prosecutor's leading questions even not prefaced with the suggested term "whether or not." No explanation was given for overruling defense counsel's objection to a series of two leading questions suggesting that appellant leaned over Talley's body in the manner the prosecutor demonstrated and said, "I ain't no joke." (13RT 2594.)

Later still, the prosecutor asked one of his witnesses if publicity about the killings at 101 California was ongoing at the end of appellant's

employment, and then stated his question meant that those killings "affected a lot of people." Defense counsel objected that the question was "leading" and was not even a question." The court said "Okay. I will allow the answer to stand." The prosecutor said he had not heard the answer because of the objection, and repeated "I asked you it's [sic] harmed a lot of people, the publicity was great because it affected a lot of people, the 101 California." The witness answered, "That's correct." (17RT 3342-3343.) This witness had no special knowledge of the reasons why "publicity was great" following the killings at 101 California; the prosecutor simply used this examination of a lay witness to prepare the jury to accept his penalty-phase claim that appellant wanted to, and did, commit killings that would affect the lives of a lot of people with "tremendous shock waves" and linger like "radiation." (29RT 5533, 5536, 5542, 5596.)

With his record of frequent failure in objecting to leading questions as such, defense counsel objected only on alternative grounds when the prosecutor used a series of leading and rhetorical questions to argue his theory of the case while adducing testimony from prosecution mental health expert, Dr. Paul Berg. Such questions included whether, in Dr. Berg's opinion, "a person who engages in an act of work place violence [must] necessarily be delusional or psychotic?" (22RT 4374)[41]; whether there is "anything delusional or hallucinatory in a crime like [appellant's] in your

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[41] Counsel unsuccessfully objected to this question on relevancy grounds. (22RT 4374.)

judgement?" (22RT 4368)[42]; whether appellant's statements to Learinza Morris constitute "the kind of information" Dr. Berg referred to in opining "that since Pearson knew for weeks that his job was in jeopardy, there was nothing delusional about what was going on in his mind on the 25th of April" (22RT 4370); and whether any of the personality disorders Berg found in appellant "in any way prevent a person from committing deliberate and premeditated murder?" (22RT 4378.)[43] The prosecutor used a leading question to get Dr. Berg to opine that the "I ain't no joke" statement appellant made before and after shooting Lorraine Talley "speaks of the anger, and I think it speaks of retribution." (22RT 4368.) He used another leading question to get Berg to affirm that this meant "revenge." (22RT 4368.)

Notably, the trial court was very restrictive of defense counsel's use of leading questions in examining his own expert witness, Dr. Carol Walser, about the meaning of test results suggesting a "psychotic level of organization." When defense counsel asked Dr. Walser if having a psychotic level of organizations means the person "misperceives reality on a regular basis," the prosecutor objected to the question as leading. (18RT 3579.) The court said, "I will begin to sustain these, Counsel. The witness

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[42] Counsel unsuccessfully objected to this question as violative of the restrictions the court previously set down. (22RT 4368.)

[43] Defense counsel objected to this question as violative of the court's prior ruling. The court said it believed Berg's predictably negative answer to the prosecutor's argumentative leading question was "descriptive of the condition that has been diagnosed" rather than "anything that refers to the time of the event." (22RT 4378.)

can testify as to the meaning of these matters. The Court is exercising its discretion. So you can ask the witness to testify what it means." (18RT 3580.) Ironically, no one reminded the court of this ruling restricting defense counsel's use of leading questions when the prosecutor was leading his expert, Dr. Berg.

In *People v. Williams* (1997) 16 Cal.4th 635, 672, this court summarized the law respecting leading questions as follows:

> Evidence Code section 767, subdivision (a)(1), provides that leading questions "may not be asked of a witness on direct or redirect examination" *except in "special circumstances where the interests of justice otherwise require.*" Trial courts have broad discretion to decide when such special circumstances are present. (See *Estate of Siemers* (1927) 202 Cal. 424, 437 [261 P. 298]; *People v. Garbutt* (1925) 197 Cal. 200, 207 [239 P. 1080].)
>
> A question is "leading" if it "suggests to the witness the answer the examining party requires." (Evid. Code, § 764; see also 3 Witkin, Cal. Evidence (3d ed. 1986) § 1820, p. 1779 et seq.; 1 McCormick on Evidence (4th ed. 1992) § 6, p. 17; 3 Wigmore, Evidence (Chadbourn ed. 1970) § 769, p. 154.)
>
> One treatise on evidence offers this explanation on leading questions: "A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading. The question which contains a phrase like 'did he not?' is obviously and invariably leading, but almost any other type of question may be leading or not, dependent upon the content and context. . . . The whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another. *The form of a question, or previous questioning, may indicate the desire, but the most important circumstance for consideration is the extent of the particularity of the question itself.*" (1 McCormick on Evidence, supra, § 6, pp. 17-18.) Another treatise says that a question is leading if it "'instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, . . . or plainly suggests the answer which the party wishes to get from him.'"

> (3 Wigmore, Evidence, supra, § 769, p. 155, quoting *Page v. Parker* (1860) 40 N.H. 47, 63.) And in his treatise, Justice Bernard Jefferson states that "A question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.'" (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.) Justice Jefferson adds this caution, however: "When the danger [of false suggestion] is present, leading questions should be prohibited; when it is absent, leading questions should be allowed." (*People v. Williams* (1997) 16 Cal.4th 635, 672, emphasis added.)

No special circumstance calling for deviation from this rule was presented in connection with the prosecutorial questions noted here. None of the prosecutor's witnesses was hostile. None was immune to prosecutorial suggestion. The particularity of the questions and their argumentative quality[44] left no room for uncertainty about the desired response. The prosecutor was telling his witnesses what facts he needed them to affirm and eliciting their assent to the conclusions he would have the jury to draw. The court sustained some of counsel's perfectly-worded objections, but never in a manner that would discourage future exploits by the prosecution. Rather than concern for appellant's fair trial rights, the court showed undue concern with the prosecutor's complaints and with the imperfections in defense counsel's way of stating an objection. A request for admonitions would have been futile.

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[44] As previously noted, a question is argumentative and thus improper when it seeks no new information, but rather assent to the inference suggested by the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, §168, p. 232; 1 Jefferson, Cal. Evidence Benchbook (2nd ed. 1981) Examination of Witnesses § 27.9, p. 764.)

C. The court permitted and condoned the prosecutor's demeaning treatment of defense counsel's effort to expose the complaints about management that were circulating before appellant was hired

Defense counsel's cross-examination of former Housing Authority director Art Hatchett included many questions respecting the complaints he received about Shirail Burton and Pat Jones from lower-level employees. In response to the prosecutor's hearsay objection, defense counsel told the court his purpose was to establish what if any action Hatchett took in response to such complaints. (12RT 2361-2362.) The court accepted that statement of purpose and overruled the prosecutor's objection. But then the prosecutor made this scene in front of the jury:

> MR. JEWETT: Judge, to suggest that this is not being offered for the truth of the matter is disingenuous. This is an effort to prove that Shirail Burton doesn't do the work that she —
>
> MR. VEALE: Judge, I'm sorry.
>
> MR. JEWETT: — somehow —
>
> MR. VEALE: I'm sorry. If there's an objection, it seems to me there should be an objection, not more than an objection.
>
> MR. JEWETT: And it's hearsay again.
>
> THE COURT: I'm going to sustain hearsay at this point. (12RT 2362.)

Having succeeded in moving the court with this bluster, the prosecutor made another "speaking objection" a few minutes later, when defense counsel asked about other complaints made against Housing

Authority management involving disrespectful treatment of lower level employees:

> MR. JEWETT: I'm going to object. It's calling for hearsay. Essentially it's like defense counsel is asking the witness to confirm rumors.
>
> MR. VEALE: Judge.
>
> MR. JEWETT: That's irrelevant and it calls for hearsay. It's unreliable information.
>
> MR. VEALE: Judge, it seems if we could have an objection.
>
> MR. JEWETT: Objection; irrelevant. Calls for hearsay.
>
> THE COURT: Sustained. (12RT 2368.)

Soon afterwards, while outside the presence of the jury, defense counsel spoke further about his purpose in questioning Hatchett about the complaints he received. He told the court that he was seeking to prove that the Housing Authority atmosphere was "poisonous," particularly in the mind of a person afflicted with paranoia, partly because Hatchett allowed people in management positions to treat others employees in a demeaning manner. (12RT 2373-2374.) The prosecutor claimed that defense was using such complaints to establish that a manager was of bad character, and that a manager had acted in conformity with that character in dealing with appellant, in defiance of an Evidence Code prohibition against such use of character evidence. The prosecutor also argued, and the trial court agreed,

that a complaint about management that was made before appellant was hired had no relevance. (12RT 2375-2376.)

The court adhered to this view in sustaining several subsequent objections, including those to which defense counsel responded with the observation that a problem that existed before appellant was hired was "more likely to have existed afterwards." (12RT 2381.) Worse yet, the court began adding its own vituperative comments which were similar to those the prosecutor had put forth in his own speaking objections. When counsel said he was not interested in the truth of the employee complaints that Hatchett acknowledged receiving, the court declared, in the presence of the jury, that "If you are not worried about whether or not they are true, it sounds like so much rumor mongering." (12RT 2378.)

When defense counsel asked Hatchett if, at any time in his life, he had heard a peer or an associate use "black humor," the court gave defense counsel a stinging rebuke in the presence of the jury:

> [C]ounsel, we're dealing with a case here, it's not relevant. If you want to give me a time frame that has some relevance to this case, I'll certainly allow it. (12RT 2407.)

Defense counsel immediately asked for a recess. Outside the presence of the jury, defense counsel addressed the court as follows:

> Your Honor, I object to two things. One, the District Attorney's speaking objections. I've tried to object, had to yell to make an objection at one point or another during the

> course of the morning in order to overcome a speaking objection. I hope I don't have to do that again.
>
> I think I'm entitled to object to speaking objections whenever they are made and I will continue. I'm going to continue to do that, if I need to. But I would ask leave not to have to do that.

Defense Counsel also objected to the court making comments in issuing its rulings:

> I don't believe it is helpful for the trial of this matter for the defense lawyer to be lectured about rulings as to why or why not certain things are or are not properly sustained objections. I believe that's what the court is doing, and I don't believe it's helpful. I think it demeans the defense function.
>
> So I would object to those comments to the extent they are made. (12RT 2408-2409.)

The court agreed that speaking objections were inappropriate, and asked that all counsel make only legal objections. But the court did not reprimand the prosecutor for his strident use of speaking objections during the examination of Art Hatchett, nor acknowledge any judicial error in lecturing defense counsel in front of the jury. Rather, the court said it had made comments when and only when counsel "continue to do something after an objection has been sustained on a topic which has already been ruled upon, so to the extent that I feel you need the correction and need the clarification, I will do so to make sure you understand what the court's ruling was." (12RT 2409-2410.)

Although the examination of Art Hatchett was concluded without additional inappropriate prosecutorial objections or judicial comments, defense counsel encountered those problems again in his examination of Shirail Burton and Toni Lawrence.

Ms. Burton testified that the Conventional division employees maintained a "professional" atmosphere and did not "feed into" the problem of "jealousy or, whatever" in the Section 8 division. Defense counsel asked Burton if this was true when she "walked into the Section 8 and said 'I am going to get the FBI in here' and had Toni" fired, the prosecutor's legal objections were followed by an assertion that "defense counsel is trying to prejudice the jury with that last remark." The court said, "Seems to be. I am going to sustain the objection, counsel." (15RT 2934-2935.) The court did not remind the prosecutor of the need to stop after stating his legal objection, nor distinguish the court's reasons for sustaining the objection from the prosecutor's comment on defense counsel's motives. When defense counsel asked Ms. Lawrence what sort of problems gave rise to her concern about favoritism in the Conventional Housing Authority, the court sustained the prosecutor's "hearsay" objection though it was embellished with a claim that the question sought "gossip" and "rumor." The court did not admonish him against embellishing a legal objection with argumentative comments. (16RT 3101.)

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill*, *supra*, 17 Cal.4th 800, 832.) Where there is a reasonable likelihood

that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct is established. (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1302.) "'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 832, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2914, p. 3570.)

Like defense counsel in *People v. Pitts*, *supra*, 223 Cal.App.3d 606, 795, Mr. Veale was, at various points "begging the court to take control of the situation." (*Ibid.*) In "failing or refusing to do so, the court 'allowed the trial to be conducted at an emotional pitch which is destructive to a fair trial.' (*People v. Bain* [1971] 5 Cal.3d [839,] 849.)" Indeed, the trial court added to the problem, and gave defense counsel reason to despair of making a more direct request for admonitions, when the court echoed the prosecutor's characterization of the defense effort as "rumor mongering" and seeking to "prejudice the jury." (12RT 2378, 15RT 2934-2935.) Furthermore, the way the court instructed defense counsel was, on occasion, demeaning. "While one may criticize defense counsel's approach, where disparaging comments and the like permeate the record, especially when the prosecutor rarely received such treatment, they 'def[y] a finding of no prejudice.' [Citation.]" (*People v. Pitts, supra*, 223 Cal.App.3d at. p. 815.)

D. The court permitted improper accusatory questioning of defense witness Cecilia Gardner

After former Housing Authority employee Cecilia Gardner testified for the defense, the prosecutor took full advantage of the trial court's previously-demonstrated willingness to let him ask improper questions. He asked:

> Are you aware there is currently a felony bench warrant out for your arrest for grand theft, perjury, and check fraud? (17RT 3380.)

Gardner answered negatively. Defense counsel objected to the question. (17RT 3380.) Without waiting for a ruling, the prosecutor insisted that the witness answer what he implied to be the warrant's charge: "Did you or did you not?" (17RT 3380.)

Defense counsel again declared his objection, and told the court a ruling was needed. The court ruled:

> All right. Overruled. As far as I understand the correct state of the law as to impeachment. (17RT 3380.)

The prosecutor immediately asked Ms. Gardner "Did or did you not on May 5, 1996, fraudulently misappropriated [sic] a social services check?" The trial court suggested advising Ms. Gardner of "her rights." The prosecutor commenced doing so in front of the jury. Defense counsel objected. The jury was excused. (17RT 3380-3381.) The court asked the

prosecutor for the "dates alleged in the complaint." The prosecutor answered, adding additional claims of fact:

> On May 5, 1996, we have very conclusive evidence that this witness cashed a Social Services or Social Security check, she left her thumb print on that check.
>
> The following day she filed an application under penalty of perjury that the check had been lost. The check was then replaced and on May 10th, she then cashed that check.
>
> A felony complaint charging check fraud, perjury, and grand theft has been filed against her. There is a $30,000.00 bench warrant for her arrest. It's that incident that I want to inquire into. (17RT 3382.)

The trial court advised Ms. Gardner of her *Miranda* rights, and asked if she had any questions about her rights. She asked to speak with a public defender. (17RT 3382-3383.)

When the trial court agreed to appoint counsel for Ms. Gardner, the prosecutor said he did not see "further benefit in pursuing this line of questioning." He said he was nevertheless "entitled to ask about the warrant and her knowledge of it as it deals with her bias and her state of mind here today. Without going into the substance of the charges, the existence of a warrant out for her arrest and her relationship with the criminal justice system may have some bearing on her state of mind as a witness." (17RT 3384.)

After finally disclosing the date that the unseen warrant was issued — a date the judge noted was "only two weeks ago" — the prosecutor acknowledged that he "can't say that I have an independent ability to prove

that she had knowledge of the warrant other than this is an incident that happened four months ago." (17RT 3385.)

A prosecutor commits misconduct when he intentionally elicits inadmissible evidence (*People v. Bonin* (1988) 46 Cal.3d 659, 689) or asks questions suggesting facts harmful to a defendant without a good faith belief in his ability to prove those facts. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1221-1222; *People v. Warren* (1988) 45 Cal.3d 471, 480; *People v. Perez* (1962) 58 Cal.2d 229, 240-241; *People v. LoCigno* (1961) 193 Cal.App.2d 360, 388.)

Such improper questioning of a witness is particularly pernicious where, as here, the actual content of a leading question suggested to everyone present "that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wanger* (1975) 13 Cal.3d 612, 619.)

The prosecutor was out of line in asking Gardner if she knew there was a warrant out for her arrest for perjury and felony theft crimes. "It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means." (*People v. Price* (1991) 1 Cal.4th 324, 481.)

And because defense counsel objected in a timely manner, and the prosecutor was eventually asked to justify the question and admitted he had no proof that she knew of the warrant's existence, it is clear that this form of misconduct indeed occurred. (*People v. Price*, *supra*, 1 Cal.4th at p. 481)

The prosecutor's recitation of official allegations of perjury and theft in the presence of the jury had no purpose but to paint Gardner as a thief and a perjurer. In putting such matters before the jury in the form of his own question, the prosecutor violated appellant's right to present a defense, confront adverse witnesses, and other aspects of the due process right. (U.S. Const., 6th & 14th Amends.)

At the close of evidence, the trial court recognized its error in failing to sustain defense counsel's timely objection, and asked the defense to suggest a remedy. Defense counsel said it was impossible to cure (24RT 4728-4729), and made no comment on the court's proposed (and eventually delivered) instruction directing the jury to disregard the question about the warrant since no evidence of a warrant was produced. (25RT 4824, 4851.)

The remedy was not only late, but fell short of addressing the impact of the error on the course of the trial. Because the trial court had approved the prosecutor's question at the time, the prosecutor continued to overreach, and the jury was led to believe that Gardner was indeed officially charged with perjury and theft crimes.

The prosecutor's follow-up question accusing Gardner of being guilty as charged, coupled with his request that she be advised of her rights, was the first and most obvious product of the trial court's erroneous overruling of defense counsel's objection to the query about the warrant.

Like the former question, the latter "implies a fact harmful to a defendant." Likewise, the prosecutor did not have "reasonable grounds to anticipate an answer confirming the implied fact" and was not then

"prepared to prove the fact by other means." (*People v. Price*, *supra*, 1 Cal.4th 324, 481.)

The content of the question, which included new details of specific charges, suggested "that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wanger*, *supra*, 13 Cal.3d 612, 619.)

Again, the prosecutor's recitation of official allegations of perjury and theft in the presence of the jury, in conjunction with a suggestion that the witness should be advised of her rights, had no purpose but to use his own question as evidence of Gardner's guilt, in derogation of appellant's fair trial rights. (U.S. Const., 6th & 14th Amends.)

Finally, the joinder of *Miranda* warnings with the improper questioning persuaded the witness that she should not attempt to answer the prosecutor's charges at that juncture. A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf. (*In re Martin* (1987) 44 Cal.3d 1, 30; *People v. Warren* (1984) 161 Cal.App.3d 961, 971; *Berg v. Morris* (E.D. Cal. 1980) 483 F.Supp. 179, 182.) Such interference exists when a prosecutor tells the jury and the defense witness that the witness is charged with a crime and ought to be advised of her rights, and the witness declines to defend herself as a result.

The impact of the court's failure to control the prosecutor's improper questioning of Cecilia Gardner cannot be measured solely by its importance in evaluating Gardner's credibility. Gardner's direct examination testimony

about Lorraine Talley's mistreatment of her as an employee went to the question of whether Talley was likely to have demeaned appellant without good cause. The prosecutor's position was that Talley's treatment of Gardner was justified by Gardner's misconduct and bad character. When he besmirched Gardner's character, he besmirched appellant's as well. Gardner was, according to the prosecutor's closing argument, "the personification of the defense case." (26RT 4963.)

E. The court permitted argumentative prosecutorial questioning of Dr. Walser

The defense presented only one mental health expert as a witness, Dr. Carol Walser, but let it be known that other experts had been consulted and had provided Dr. Walser with reports. After asking a series of questions concerning the timing and preparation of Dr. Walser's report in relation to the reports of the consulting experts, the prosecutor cross-examined Dr. Walser as follows:

> MR. JEWETT: Essentially the three of you were getting your stories together before you formalized [sic] in a report, is it not?
>
> MR. VEALE: That's truly objectionable. I object to. [sic]
>
> MR. JEWETT: It's a question.
>
> THE COURT: I will overrule the objection. You could answer the question if you have an answer.
>
> MR. JEWETT: You were all getting your diagnoses, your opinions, whatever you want to call it together so

everybody lined up saying basically the same thing before any of you wrote a report; isn't that true?

DR. WALSER: I could say very clearly to that that I came to my own opinions independently. (RT 4149.)

Later, on re-cross examination, the prosecutor questioned Dr. Walser as follows:

MR. JEWETT: So the points that I've tried to bring up during a fairly lengthy cross-examination at every opportunity you've taken, you have taken, described of [sic] a defensive posture to protect your opinion, right?

DR. WALSER: No, I feel like I'm trying to explain what I understand. And at times the questions have only offered me or tried to have me offer only a part of it and it's an inaccurate representation.

What I am dedicated to is making sure that it's my opinion and the test data and everything that I have done are represented accurately.

* * *

MR. JEWETT: When Mr. Pearson actually went about the process of killing people, he actually did it very efficiently, didn't he?

MR. VEALE: That's argumentative. Argumentative, Judge, objection.

THE COURT: Overruled.

MR. JEWETT: It was actually a very efficient job in his — job in his mind, it was to kill people, he actually did it in a very organized and efficient way, didn't he?

DR. WALSER: I guess I would have to think about the word efficient. (21RT 4216.)

The prosecutor's questions were argumentative. They sought no factual information but rather assent to an inference favorable to the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168, p. 232; 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9, p. 764.)

Again, the trial court overlooked its statutory obligation to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation . . . as effective for the ascertainment of truth, as may be, and to protect the witness from undue harassment. . . ." (Evid. Code, § 765.) When the defense objected, the trial court overruled the objection. The prosecutor carried on accordingly.

F. The court permitted the prosecutor to make inappropriate remarks in earshot of the jury

During defense counsel's redirect examination of Dr. Walser, the prosecutor approached the bench to announce that defense counsel was "putting himself in a position of being a witness" in questioning Dr. Walser about the information she received from him respecting his communication with appellant.

After discussion of discovery, defense counsel conceded that he "may well have to testify." The prosecutor complained that he did not have notice, and then stepped back from the bench. While walking away, he declared, "I look forward to the opportunity to cross-examine [defense counsel] because I assume he will be laying a foundation." (21RT 4156.)

The court excused the jury at defense counsel's request. Defense counsel complained that the prosecutor had stood back two or three feet from the bench and spoke so loudly that "everybody else in the room can hear" when said he was looking forward to cross-examining defense counsel. Defense counsel argued, "what he's doing is trial lawyering, but he's not doing it fairly." (21RT 4157-4158.)

Defense counsel added that "this is the second time I have had to complain about Mr. Jewett's loud voice that he uses when we approach the bench" and "I think Mr. Jewett is prosecuting the case improperly when he makes argument to the jury in preface to every question that he asked and when he makes arguments to the jury at the bench in comments to you that are not supposed to be heard by the jury."[45] (21RT 4158-4159.)

The prosecutor denied raising his voice when he stepped away from the bench but conceded that his "last comment was taken as [he] was stepping away." (21RT 4159.)

The trial court agreed that the prosecutor's "voice may have carried further" as a consequence of his stepping away from the bench while speaking. But the court issued no reprimands or other expressions of concern with the prosecutor's behavior. (RT 4159-4160.)

The court's inaction was "but another example of how the trial court failed to place reasonable limits on a prosecutor who often approached the

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[45] Previous objections may have occurred in bench conferences that the reporters could not hear or declined to report for reasons unknown. The record shows several bench conferences were not reported. In record correction proceedings, the trial court denied appellant's request for permission to prepare settled statements respecting what occurred.

line between proper and improper argument, and who many times crossed that line." (*People v. Hill*, *supra*, 17 Cal.4th 800, 831, fn. 3.)

G. The court permitted the prosecutor to adduce irrelevant evidence of how Rodney Ferguson interpreted appellant's post-crime head-nodding and how other people whose mental states were not at issue experienced fear of appellant prior to the shooting

Over defense counsel's relevancy objection, the trial court allowed the prosecutor to ask Rodney Ferguson if, in his mind, the nod of appellant's head while appellant sat in a police car after the shooting "referred back to the conversation that you had with him before" the shooting, in which appellant spoke said he could kill his boss. (12RT 2481.)

Yet Ferguson's state of mind about appellant's purpose in nodding his head was of no relevance to any issue in the case.

Over defense counsel's hearsay objection, the trial court allowed the prosecutor to ask Janet Robinson if victim Barbara Garcia had expressed fear of appellant before hearing what he told Robinson about "101 California." (12RT 2540-2541.)

After Robinson answered affirmatively, the court permitted the prosecutor to ask Robinson if Garcia had said she believed appellant was going to kill her. (13RT 2544.) When Robinson went on to add (non-responsively) that she believed appellant was serious about, and capable of, "doing that," the trial court overruled defense counsel's motion to strike. (13RT 2544.)

The prosecutor then continued to expand on Robinson's fears of appellant, adducing her affirmation that she was afraid he would kill her if he found out she "told anybody" what he said (13RT 2545), that Barbara Garcia bought mace because appellant was going to kill her, that Garcia was terrified, and that the day appellant was to be fired "was a day of fear. We just — we were there waiting to die." (13RT 2554.)

Shortly thereafter, the court allowed the prosecutor to ask Shirail Burton about her own state of mind after she heard appellant was going to be fired. Predictably, Burton said she was very afraid and very nervous. (14RT 2875.)

A trial court has no discretion to admit irrelevant evidence. (*People v. Crittendon*, *supra*, 9 Cal.4th 83, 132; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Admission of irrelevant but emotionally charged evidence violates the federal due process guarantee. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.)

Whether Robinson, Burton or Garcia had the feelings about appellant expressed in the testimony was in no way probative on any element or on any issue of fact in the case. Their states of mind were not at issue. This evidence had no purpose other than to increase the jury's sympathy for the women and impart their view of appellant's character. And "'an appeal for sympathy for the victim is out of place during an objective determination of guilt.' [citation.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1129.) Allowing the jury to hear such evidence denied appellant a reliable determination of the facts on which the penalty determination rests,

fundamental fairness and due process of law. (U.S. Const., 8th & 14th Amends.)

H. The trial court silently permitted the prosecutor to misstate and misapply the "deliberation" element of deliberate and premeditated murder in closing argument

Near the outset of his guilt phase closing argument, the prosecutor defined the deliberation required for first degree murder in the following terms:

> Deliberation is in essence, I will go through it in a moment. It's the weighing and considering. *It's the thinking about am I going to do it? Am I not going to do it*? Okay? Which precedes the decision to kill. (26RT 4883, emphasis added.)

This is a very misleading statement of the actual, legal meaning of this key term.

"Deliberation means careful consideration and examination of the *reasons* for and *against* a choice or measure. [Citation.]" (*People v. Steger* (1976) 16 Cal.3d 539, 545; *People v. Honeycutt* (1946) 29 Cal.2d 52, 61; *People v. Bender* (1945) 27 Cal.2d 164, 183; *People v. Thomas* (1945) 25 Cal.2d 880, 899, emphasis added.)

Accordingly, CALJIC No. 8.20 states that "the word 'deliberate' means formed or arrived at as a result of careful thought and weighing of *considerations* for and *against* the proposed course of action."

The prosecutor's statement of what "deliberation is in essence" conveniently omitted the requirement that the slayer have considered the reasons against killing. "Thinking about am I going to do it? am I not going to do it?" may constitute "*premeditation*" if an intent to kill is ultimately formed, but without consideration and weighing of the reasons *not to* "do it," it is not "*deliberation.*"

Later, the prosecutor said that deliberation is "the thought and weighing of considerations for and against a proposed course of action" but he did not cite any evidence or otherwise draw attention to the last clause. (26RT 4900.) On the contrary, he soon misstated the law again to make it fit his facts. Paraphrasing the instruction's call for evidence that the slayer weighed reasons against killing, the prosecutor said Rodney Ferguson's description of appellant as pensive and reflective was that of "a person who is in deliberation . . . in reflection . . . is weighing and considering *the choices* for and against and he has the means readily at hand at the time that he makes that statement." (26RT 4902, emphasis added.) The prosecutor theorized that Ferguson would have described appellant differently had appellant been "enraged" or "suffering from passion." (26RT 4902.) The prosecutor also asserted that the fact that two hours elapsed between the talk with Ferguson and the killings was sufficient evidence of premeditation and deliberation. "That's deliberation and premeditation right there. Throw all of the rest of this stuff out." (26RT 4902.) But the prosecutor never made any forthright attempt to meet the law's requirement that the slayer have considered *the reasons against* committing the contemplated killing.

In the final portion of his summation, the prosecutor argued that any internal dialogue about killing would suffice in the absence of rage. The prosecutor quoted Rodney Ferguson telling police that appellant said "I could shoot her" in a manner Ferguson described as "almost as if he wasn't talking to me. It was almost like he was talking to himself. It was like a self query." The prosecutor said, "That is deliberation. The self query. That's what it is." (26RT 4952.) After quoting further from passages in which Ferguson described appellant looking downward and pensive, and in which Ferguson agreed that appellant "was kind of asking himself as much as telling himself" (26RT 4953) the prosecutor quoted Mary Frisby's recollection that appellant's voice was not angry when he said, "nobody is going to do that to me." (26RT 4956.)

Finally, he asked the jury to infer from the "press over the last few years" respecting 101 California and from appellant's acquaintance with Darlene Hall that appellant knew "full well . . . the kind of real harm" that homicide "causes real people" when he was "contemplating this shooting" and therefore his crime was "particularly callous." (26RT 4968.) But the prosecutor did not concede that he had to prove that appellant considered such things or any other reason against committing workplace homicide before committing his crimes in order to establish that the requisite "deliberation."

Thus, the prosecutor was able to, and did, take the case to the jury on the theory that "thinking about am I going to do it? Am I not going to do it?" constitutes deliberation per se, unless accompanied by obvious rage.

"It is improper for the prosecutor to misstate the law generally (citation) and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (Citations.)" (*People v. Hill, supra*, 17 Cal.4th 800, 829-830.)

Defense counsel did not object to this aspect of the prosecutor's closing argument, nor point up the prosecutor's misstatement of the definition of deliberation in his own argument to the jury. His own guilt phase closing argument included re-reading the proper definition of deliberation (27RT 5036-5037) but he said "the question" for the jury was whether appellant's disorganized thinking amounted to "careful thought." (27RT 5041.) Only much later, in arguing and writing his motion for new trial on insufficiency-of-the-evidence grounds, did defense counsel evince recognition that the "deliberation" element required proof that the defendant considered the reasons *against* killing before deciding to kill. (31RT 5668-5670.) Even then, he mistakenly equated the requisite consideration of the *reasons against* killing with consideration of the "*consequences*" of the act, and thus invited rejection of his argument on the authority of *People v. Cordero* (1989) 216 Cal.App.3d 275, 281.[46]

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[46] In *People v. Cordero, supra*, 216 Cal.App.3d 275, 281, a deliberating jury asked the trial judge the following question: "In deciding upon a verdict of first degree murder, part of the definition includes . . . having in mind the consequences . . .' what exactly does consequences mean? I.e., consequences: of the act relating to victim, resulting in death or consequences: relating to defendant personally (i.e., he would face punishment by law if he killed victim)?" (*Sic.*) Counsel for Cordero requested the jury be told "consequences," at a minimum, include "not only consequences to the victim, but to the defendant himself." The trial court did not answer. The Court of Appeal held that the trial court should have told the jury "to consider whether the defendant contemplated the

Nevertheless, the prosecutor's misrepresentation of the law and its prejudicial effect should be acknowledged as such, for the result was a denial of appellant's federal constitutional rights to jury trial on each element of the offense, a reliable penalty determination, and due process of law. (U.S. Const., 6th, 8th & 14th Amends.)

First, objection and request for admonition would have been futile. Prior to closing arguments, defense counsel's efforts to get the court to rein in the prosecutor were unsuccessful, even when black-letter law familiar to every law school graduate compelled a ruling in his favor. At the outset of closing argument, the trial court overruled defense counsel's objections and his request to admonish the prosecutor after the prosecutor alluded to facts of "most murder cases." The court said simply, "It's argument at this point, Mr. Veale. I will allow the statement to stand. Proceed counsel." (26RT 4881.) Later, after the prosecutor argued that the defense mental health experts were untrustworthy in part because they did not produce their

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consequences of his act, whether to himself or the victim." (*Id.* at p. 284.) That statement is fine, but the *Cordero* court's preliminary assessment that "deliberation" does not require reflection about more than one consequence is way off base. In addition to relying on cases for propositions never argued or decided, the *Cordero* court conflated the single thing that the jury instruction says the slayer must have in mind when he kills ("the consequences") with the multiple things the slayer must have considered ("the reasons for and against such a choice") for his reflection to constitute "deliberation." While it could be argued that neither the instruction nor this court's decisions require that the slayer have considered any particular reason for or against killing, both the instruction and this court's precedents clearly define "deliberation"to require consideration of reasons against, as well as reasons for, committing the crime. (CALJIC No. 8.20; *People v. Steger, supra,* 16 Cal.3d 539, 545; *People v. Honeycutt*, *supra*, 29 Cal.2d 52, 61; *People v. Bender*, *supra*, 27 Cal.2d 164, 183; *People v. Thomas*, *supra,* 25 Cal.2d 880, 899.)

reports until four weeks ago, defense counsel objected and complained of unfairness in that the prosecutor had insisted on setting the trial date before the defense was ready. The court said simply "It's argument, gentlemen. Your objection is noted. You may proceed, Mr. Jewett." (27RT 5055.) Likewise, when defense counsel objected to improper penalty phase argument and asked the trial judge to tell the jury that the prosecutor was wrong, the court refused, even though the court agreed that defense counsel's objection should have been sustained and that the prosecutor's subsequent argument was misleading. (29RT 5545-5546, 5557-5582.)

Second, it is "the trial judge [who bears ultimate] responsibility [for ensuring that closing argument is] kept within appropriate bounds. '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.' [Citation.]" (*United States v. Young*, *supra*, 470 U.S. 1, 10-11.) California case law allowing appellate courts to decline to review prosecutorial misconduct claims absent proper objection in the trial court does not control a claim of judicial error in failing to speak up when necessary to ensure the proper conduct of the trial. Where a trial court did nothing to "'disabuse[] the jury of [the] notion' (*[People v.] Green* [1980] 27 Cal.3d [1] at p. 68)" that an element of the crime is made out as stated by the prosecutor's legally incorrect argument "it ratified the prosecutor's error." (*People v. Morales* (2001) 25 Cal.4th 34, 43.)

Third, the claim is one of federal constitutional error. "[O]bjection in the trial court is not required to preserve a federal constitutional issue."

(*People v. Vera*, *supra*, 15 Cal.4th 269, 279; accord, *People v. Santamaria*, *supra*, 229 Cal.3d 269, 279, fn. 7 (1991) [errors "of . . . magnitude" are cognizable on appeal in absence of objection]; *People v. Mills*, *supra*, 81 Cal.App.3d 171, 176 ["The Evidence Code section 353 requirement of timely and specific objection before appellate review is available 'is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law'"].)

This, furthermore, is a capital case. In keeping with the recognition that "death is different" (*Gardner v. Florida*, *supra*, 430 U.S. 349, 357), this court has held that "subdivision (b) of section 1239 imposes a duty upon this court" in capital cases "'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" (*People v. Stanworth*, *supra*, 71 Cal.2d 820, 833; cf. *People v. Easley*, *supra*, 34 Cal.3d 858, 863-864 [reversing a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this court].)

This is not just any constitutional claim, moreover. It is a claim that challenges the validity of the first-degree nature of the crimes of which appellant has been convicted. Since that element is a prerequisite for a valid sentence of death (see Penal Code § 190.2(a)) the question raised here is literally one of life and death.

Finally, even in non-capital cases, the Court always has the discretion to consider claims advanced for the first time on appeal. (*People*

v. Williams, *supra*, 17 Cal.4th 148, 162, fn. 6.) As recently noted by the Fifth District Court of Appeal,

> "[T]he fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an *appellate court* is precluded from considering the issue. 'An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. . . . Whether or not it should do so is entrusted to its discretion.'" (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497, quoting *People v. Williams*, *supra*, 17 Cal.4th 148, 162, fn. 6; see *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].) *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985.)

Rather than establishing grounds to avoid review of the issue on the merits, the failure of appellant's trial counsel to object or otherwise address the prosecutor's misstatement of the deliberation element is a factor to be weighed in favor of finding that appellant was indeed prejudiced by the misstatement. Defense counsel's failure to contradict the prosecutor's definition of deliberation allowed the jury to believe that he agreed with the prosecutor as to what the law requires. Such apparent agreement suggests to reasonable jurors no need to scrutinize the court's definitional instruction, and no reason to give weight to language that neither counsel saw fit to mention.

As previously noted, the question of whether appellant deliberated, i.e., whether he considered reasons for *and against* killing, was a question on which the defense could well have prevailed in a fair trial. The very fact

that appellant committed homicide in the presence of people who knew him, without an "exit strategy," evinces his failure to see or consider, as a reason against killing, the likelihood of criminal sanctions. Evidence that appellant failed to consider this uniquely important reason against killing is evidence that he considered no reasons against killing whatsoever. Additional evidence that he considered no reasons against killing inheres in defense expert testimony respecting appellant's mental impairments. As recounted by Dr. Walser, appellant's Rorschach results showed impairment in his "quality of information processing. . . . [H]e was unable to process things in a fully mature, helpful way for himself." Technically speaking:

> He had an information processing style known as 'under incorporation,' which means that he just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were not consistent. They were haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment. (RT 3592.)

Furthermore, Dr. Walser testified that anger diminishes the ability to think constructively. It tends to disorganize thinking and reduce whatever ability for logical thinking an individual ordinarily has. (RT 4208.) Appellant's Rorschach results showed that he "had extremely poor reality testing." (RT 4189.) The score that was most closely related to "reality testing" — the ability to see "things as they are" (RT 3554) was equivalent to the mean score of people with schizophrenia. (RT 4189.)

The record gives no indication that the prosecutor would have obtained a first degree murder verdict had he not misled the jury about the

law. The prosecutor's response to defense counsel's presentation of the issue in his new trial motion simply and incorrectly contended that any consideration of circumstances under which appellant would not kill, or of reasons against killing people he did not attempt to kill, would suffice for consideration of reasons against killing the people he killed. (31RT 5678.) That was as good an argument as the prosecutor could make on the state of the evidence. The trial judge's response simply cited the evidence of premeditation and declared that he could "find nothing in the evidence that would support the evaluation that you want me to make regarding his lack of deliberation and premeditation." (31RT 5683.)

"An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.) The issue of whether appellant's intent was deliberate and premeditated was such an issue. The jury's tainted determination of this one issue not only produced the first degree murder conviction, but rendered appellant eligible for the death penalty. The prosecutor's tainting of that determination with misleading argument obscuring the law's requirements cannot be held harmless.

I. The trial court silently permitted the prosecutor to make emotional appeals and demean defense counsel in his guilt phase closing argument

After his faulty reduction of the deliberation element of the crime, the prosecutor openly appealed to the jury's emotions. He sought sympathy for the Housing Authority workers who fled as well as for those who died,

by making the jury look at pictures of the shoes they left behind, and commenting on their style. (26RT 4917-4018.) He opined on the emotional damage witnesses suffered in a four-page-long discussion of their observations of the shooting. As he observed, "I've been using up a lot of time, but I obviously can't sit down without talking about the victims in this case. And, boy, there are a lot of them." (26RT 4983.) He concluded his rebuttal argument by saying, "don't worry, baby," words Janet Robinson attributed to appellant. (27RT 5064.)

Asking jurors to consider or sympathize with the feelings of survivors and witnesses is impermissible in a prosecutor's guilt phase closing argument. (*People v. Kipp*, *supra*, 26 Cal.4th 1100, 1129-1130.) Nevertheless, defense counsel did not object. Instead, near the outset of his argument, he told the jury that the prosecutor "has every right" to say what he said, and all the jury could do was wonder whether the prosecutor was attempting to "drive the engine" with emotions. (26RT 5006.)

The prosecutor stepped further over the line of propriety by arguing that defense counsel attempted to mislead the jury in calling only Dr. Walser to testify respecting appellant's brain scan results. After discussing the portions of the reports of Drs. Kincaid and Wilkinson that appeared favorable to the prosecution, the prosecutor suggested the other doctors who looked at the brain scans for the defense would have been called to testify if they "could even offer an outside possibility that [the detected abnormalities] might have an effect on behavior. . . . But, no, what we're going to do is put a neuropsychologist who didn't even know how to read

an MRI *to try to leave you with the impression now this variant in the brain has something to do with behavior.*" (26RT 4911.)

As previously noted, "[a] prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill*, *supra*, 17 Cal.4th 800, 832.) Where there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct is established. (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1302.)

"'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 832, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2914, p. 3570.) Unless futile, objection was warranted.

J. The court refused to order the prosecutor to remove his victim photographs from areas visible to jurors while appellant was presenting his own evidence and arguments in the penalty phase

After the prosecutor rested his penalty phase case in chief, (which consisted entirely of victim impact evidence), defense counsel moved the court to "order the District Attorney to put the photographs of the victims away." (28RT 5263.) The court asked the prosecutor why he wanted them "consistently displayed" and noted that they were not in evidence. (28RT 5264.) The prosecutor responded:

> As the court knows very well, they have been out on counsel table for the last two days. I've shown them for the last two days. These, in essence, are now sitting by me. They are not being displayed to the jury. They are laying flat on counsel table. (28RT 5264.)

The prosecutor went on to claim that the victims were "the people, in essence, I represent." (28RT 5264.) Defense counsel countered that the prosecutor represented the state rather than the victims, and was endeavoring to make it appear that the victims supported his retributive demands and thus cause the jury to support those demands in turn. Defense counsel said that the photographs were still "obviously visible" to anyone sitting in the jury box and asked the court to order the prosecutor to "take them out of the room." (28RT 5265.)

The prosecutor did not dispute those claims, but insisted that he had a right to present a photograph of the victims in life, that "[t]hese are my clients, I submit they are entitled to sit at counsel table with me" and "They have been here throughout the penalty phase. There is no reason why they shouldn't be here now than they were [sic] at the time I was putting on my case." (28RT 5266-5267.)

Rather than ordering the prosecutor to refrain from displaying anything during the defense case, the court gave the prosecutor only the following request:

> I'm going to ask you to turn the frames over so the photographs themselves cannot be viewed during the time when [defense counsel] is putting on his defense evidence. . . . [T]his is the portion of the trial when I give the defense an

> opportunity to present penalty phase evidence and I feel it's appropriate at this particular point in time . . . to honor the request to turn the photographs over so that they cannot be viewed during the presentation of evidence. (28RT 5267.)

Defense counsel told the court "[w]ith all due respect . . . that ruling is worthless." He reiterated his request for an order directing removal of the photographs from the courtroom "to prevent now the constant reminder of the victims." (28RT 5268.)

The court denied that the photographs or the frames would "constitute a constant reminder" but said it would "instruct [the prosecutor] to at least, for example, put them on a chair so that they cannot be seen on the top of counsel table because this is the time when you are presenting your evidence. And I don't believe it's appropriate to have that sort of distraction in front of the jury." (28RT 5268-5269.)

The prosecutor's response was to announce that he "fail[ed] to see" why the jury ought not be "reminded" of the humanity of the victims, insofar as appellant's personal presence in the courtroom reminded the jury of his humanity. (28RT 5270.)

The court reiterated its belief that it was not "appropriate" for either attorney to distract from the presentation of the other. (28RT 5270.) The prosecutor neither agreed nor refused to comply with the court's request, and instead reiterated his own belief in the propriety of presenting reminders of the victims to the jury while appellant was presenting his defense. The court continued to avoid confrontation with the prosecutor,

and stopped short of directing that the frames be kept out of sight. The court instead declared that "You both made your record," and,

> All I will ask they [sic] be removed from the top of counsel table. They can be placed in a chair. They have should [sic] not be displayed to the jury until it's once again your time to discuss this matter with the jury. Okay. They can remain in the courtroom. (RT 5271.)

The prosecutor took advantage of the court's reluctance to order removal of the photographs while cross examining appellant's second witness. On direct examination, appellant's step uncle Charles Thomas had said that he and his family understood appellant's crime as an uncontrolled response to abuse of the sort they had all endured as laborers, and they knew that bosses "can put you in a state of mind . . . [in which] it's very hard to contain yourself." (28RT 5316.)

Seeing the prosecutor carrying the photograph of Lorraine Talley on his way to the witness stand, defense counsel objected. The prosecutor announced his intention to show it to the witness and ask him if he knows anything about "this manager here, since he's given an opinion about managers." (28RT 5321.) Defense counsel said this use of the photograph was intended to remind the jurors of the presence of the photographs in the room, and this is improper. The court said the objection is "noted and overruled." (28RT 5321.) The prosecutor showed the witness the photograph, and asked him if he knew the "lady in purple." (28RT 5321.)

Predictably, he said he knew no one in the photograph, and did not know Lorraine Talley. (28RT 5322.)

Defense counsel called himself as appellant's final witness. After the close of evidence, he addressed the court as follows:

> Judge, the activities in the courtroom concerning the photographs, I guess the court has been aware of what they are.
>
> As I was up on the witness stand, it became apparent to me that even though photographs may have been on chairs, they were visible to the jury and have been — at least to some members of the jury, from my perspective, and so I'd like to make a record of that fact.
>
> And, further, it looks like they are out again. They are not in evidence. And I think it's inappropriate for the District Attorney to be referring to them at this time. (29RT 5487.)

The trial court said that it could not see the photographs from the bench. "[T]he photographs were set on the chairs. The chairs were pushed underneath the counsel table." (29RT 5488.) At defense counsel's request, the court sat various juror seats, and acknowledged that the seat of the chair on which the photographs had been stored could be seen in "side glances" from some of the jurors' seats. (29RT 5488-5490.)

Defense counsel renewed his motion to remove the photographs from the courtroom prior to the prosecutor's closing argument. The court denied the motion "for the reasons I stated previously. This is argument. You are allowed to use demonstrations as well as exhibits as well as things to make your point." (29RT 5490-5491.) The court did not distinguish the

prosecutor's use of "demonstrations" during his own argument from use during the argument of counsel for the defendant.

The motion was again renewed (and augmented by appellant's personally-spoken complaint) just prior to defense counsel's argument. At that point, the prosecutor had placed the photographs atop counsel table. The court saw the photographs on top of the table, but did not reprimand the prosecutor. The court simply asked the prosecutor to put the photographs "down" after noting "this is going to be [defense counsel's] portion of the argument." (30RT 5583-5584.)

Allowing the prosecutor to keep the frames of the photographs in view of the jury during the defense presentation served no purpose but to distract defense counsel and the jury from the presentation of mitigating evidence. Because victim photographs generate juror sympathy, this court has "repeatedly cautioned against the admission of photographs of murder victims while alive unless the prosecution can establish the relevance of such items. [Citations.]" (*People v. Osband* (1996) 13 Cal.4th 622, 677, accord *People v. Ramos* (1982) 30 Cal.3d 553, 577-578.) Photographs that generate sympathy and other emotions necessarily generate interest, particularly when only partially revealed, and thus hold the power to distract.

The United States Supreme Court recognized the power of a "constant reminder" when the Court established a defendant's right to attend trial free of prison garb and other indicia of his custodial status. "[T]he probability of deleterious effects on fundamental rights calls for

close judicial scrutiny. [Citations.] Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." (*Estelle v. Williams* (1976) 425 U.S. 501, 504-505.) More recently, the Ninth Circuit granted relief to a man convicted of rape whose trial was attended by people wearing "Women Against Rape" buttons. (*Norris v. Risley* (9th Cir. 1990) 918 F.2d 828) and to one whose trial was attended by people with buttons bearing photographs of the homicide victim in life. (*Musladin v. Lemarque* (9th Cir. 2005) 427 F.3d 653, 656-658, overruled on other grounds by *Musladin v. Carey* (2006) __ U.S. ___, 127 S.Ct. 649.)

The right to a fair trial, guaranteed by the federal Constitution, includes the right to present a defense. (U.S. Const., 6th & 14th Amends.; *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) The right to fundamentally fair and reliable sentencing proceedings includes the right to present mitigating evidence and arguments without government interference or obstruction. (U.S. Const., 8th & 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 686.) For the reasons stated above, these rights were denied by the trial court's failure to order removal of the photographs when requested by the defense.

K. The court permitted the prosecutor to misstate the law, mislead the jury, deride statutory mitigation, and impugn defense counsel's motives, in his penalty phase argument

The prosecutor's penalty phase argument misstated critical points of law, mislead the jury on the application of the law to the facts, encouraged

dismissive treatment of statutory mitigation and included another improper attack on defense counsel's motives. And as with previous aspects of the trial, the court failed to admonish the prosecutor or the jury as necessary to minimize harm.

First, the prosecutor told the jury that appellant's lack of violent crime history and felony convictions was neither mitigating nor aggravating, but neutral. Defense counsel objected. The court sustained the objection, and informed the jury of the contrary law. But the court said nothing to discourage the prosecutor from further adventure.

The prosecutor then proceeded to characterize the law spoken by the judge as a call to determine "how much you should favor [appellant] because he didn't have a felony conviction. How special he could be because of that, how many blue ribbons you want to paint on his chest because he doesn't have a felony conviction or he didn't commit a crime of violence." (29RT 5528.) Defense counsel did not object.

The prosecutor went on to say that this mitigation "was not worth very much" and would move a scale "about the width of a hair away from the middle." (29RT 5529.)

Soon afterwards, the prosecutor attacked the application of "factor (h)" — the impairment of ability to conform conduct to the requirements of the law, a mitigating factor codified in Penal Code section 190.3, factor (h). The prosecutor asserted that factor (h) "is the definition of insanity" and Dr. Walser (the defense mental health expert) had conceded that appellant was not insane. (29RT 5545-5546.)

Defense counsel objected as soon as the prosecutor said that Dr. Walser had said appellant was not insane:

> I'm sorry, Your Honor, I object to that statement. I believe that's an incorrect statement of the law. Using it in that context is misleading the jury. (29RT 5546.)

"Overruled" was the court's only word at that point. The prosecutor immediately went on to define insanity accurately, as though he knew defense counsel was right and that he had indeed misstated the law. (29RT 5546.)

The prosecutor then proceeded to offer more subtle misstatements of the law, further misleading the jury with respect to the application of factor (h) to this case. He asserted that factor (h) was "an insanity thing, maybe it's not quite there, but pretty close. You can still consider the evidence, though it doesn't rise to the level of insanity." (29RT 5546.) He contrasted factor (h) with "the mental duress or emotion, the stress" that appellant's defense had established, which he said was "already covered under (d)" and "if one thing applies to two separate things, you just consider it where it best belongs." (29RT 5546.)

Defense counsel did not interrupt with further objection until the prosecutor began telling the jury about evidence "typically" found in the penalty phase of a capital murder trial and what "you usually would hear" and that such evidence is what defense counsel "was trying for." Defense

counsel's repeated objections to that line of argument were overruled by the trial court, which repeatedly noted, "It's argument." (29RT 5548-5549.)

And so the prosecutor continued to assert his expertise respecting defense counsel's motivation in presenting the evidence he presented, and to tell the jury the inferences he expertly drew from the absence of "typical" penalty phase mitigation. (29RT 5549.)

During a recess following the prosecutor's argument, the trial court informed "counsel" that "factor (h) is not the equivalent of insanity. Factor (h) is the equivalent of diminished capacity." The court cited *People v. Babbitt, supra*, 45 Cal.3d 660, in support of this analysis. (29RT 5557-5558.)

The court said it believed it should "clarify the statement made" and "sustain your objection now" and "I believe there should be some correction in the jury's mind that factor (h) is not sanity." (29RT 5558.)

The prosecutor denied misstating the law. The court reconvened the discussion after a transcript was produced.

In reading the transcript aloud to counsel, the court observed that the prosecutor had not only misstated the law of insanity, but had gone on to "carry on and encourage the jury this really isn't factor (h), this is factor (d)." (30RT 5570.) The court minimized the importance of what the prosecutor said ("I think in reality at least, it may be more of a difference in semantics than anything else") but urged the prosecutor to admit that "it is a factor (h) situation. Because factor (h) deals with any impaired capacity. It

doesn't have to deal with an emotional impaired capacity. It may deal with an actual condition." (30RT 5570.)

The prosecutor defended himself at length, saying (inter alia) that he was "alluding to the evidence in this case, which is more in the nature of emotional distress, the result of hurt feelings as a result of being fired." (30RT 5571.) He asserted that he had the right to say "there is no mental disease or defect" and that factor (h) "did not apply." (30RT 5572.)

The trial court told counsel it would tell the jury that the court was incorrect in overruling his objection "regarding the definition of insanity" and give the jury the correct definition of insanity and re-read factor (h). (30RT 5574.)

Defense counsel said the court should also acknowledge that the prosecutor's "comments misled this jury into believing factor (h) had no application in this case when, in fact, it does because there is evidence of impaired mental capacity in this case. That is what I now request the Court to say to the jury." (30RT 5574.)

Although the court did not dispute defense counsel's observation or analysis in any respect, the court refused to inform the jury as requested. The court reasoned, "that overstates what your objection was about. . . . Because your objection dealt with the definition of insanity and factor (h)." (30RT 5574.)

Defense counsel rightly opposed limiting the remedial measures to the portion of the improper argument that preceded his objection. In his words:

> Your Honor, I objected. It should have been sustained. . . . [M]aybe I should have and it is my fault that I didn't object to every word that then came out of his mouth, given the fact that the Court thought I was wrong, I don't see any reason for me at that point to continue to object with every sentence because the court has already told me that I don't know what I am talking about and that's the problem here. (30RT 5574-5575.)

The trial court's response questioned defense counsel's ability to articulate how the prosecutor's subsequent argument amounted to "further misdirecting of the jury." (30RT 5575.) Defense counsel answered the call as follows:

> [I] believe that when I objected properly and was overruled, that something else goes on in a moment like that, beyond the simple words now written on the page and that is that the defendant here and his lawyer are wrong about a certain issue. It then actually provides impetus and strength to the prosecution's argument. It does that.
>
> I am asking the court to redress that more than I am asking the court to redress his misstatement of the law. What the jury might well have thought when the District Attorney was — finished his comments, was that factor (h) has no application in this case. Whether or not they care to provide one ounce of weight to factor (h) in this case is entirely and completely up to them to say which is what he did and which is wrong and which I did not object to as he was saying it with each sentence, and that is my problem, obviously, *what he said was that factor (h) had no application in this case, which is to say that there is no evidence of it in this case. That is the state of the record which I believe the court needs to redress and that is what I am asking the court to do.* (30RT 5576, emphasis added.)

The trial court declared itself "unable to tell a jury that this evidence is aggravating, this evidence is mitigating." (30RT 5576.)

The trial court was wrong. Impairment of a person's ability to conform his behavior to the requirements of the law is mitigating under Penal Code section 190.3, factor (h), as a matter of law. When a trial court finds in reviewing a transcript of closing argument that the prosecutor told the jury that a statutory mitigating factor has no application to a case in which the defense has presented evidence of that statutory mitigating factor, the court can and should tell the jury that the statutory factor is indeed applicable. The court need not comment on the weight or the credibility of the defense evidence. But the court should, on request, countermand the prosecutor's assertion that the law is inapplicable.

Such judicial intervention is only fair where, as here, defense counsel's credibility with the jury was compromised, and the prosecutor's credibility with the jury was enhanced, by the court's erroneous ruling on a closely related point. As previously noted, it is "the trial judge [who bears ultimate] responsibility [for ensuring that closing argument is] kept within appropriate bounds. '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.' [Citation.]" (*United States v. Young*, *supra*, 470 U.S. 1, 10-11.)

After the court refused to admonish the jury as he had requested, defense counsel asked the court to emphasize the words "any impairment" by saying "and I emphasize 'any' impairment" in re-reading factor (h) to the jury. The court did not respond to this request. (30RT 5578.)

In his own summation, defense counsel told the jury what factor (h) calls for, rhetorically asked if that "makes sense" and "Is that something

you might want to think about? The human being who did a horrible thing turned out in fact not to be right in his head. Give it something. Something." (30RT 5594-5595.)

After a recess, he talked about the evidence of mental disorder, and briefly alleged that appellant lacked "fully formed thought . . . thought which takes into consideration the consequences." (30RT 5603.) He later mentioned factor (h), saying it required "just mental disease or defect" and assuring the jury that appellant had "a mental disease of some sort or another. Probably four or five different kinds. Mental disease, mental defect. Mental problems. Call it whatever you will, but it is a reason not to kill him." (30RT 5604, 5606.) At some point not clear from the reporter's transcript, he put marbles representing "mitigation" on a plate that broke. (30RT 5613.) Disorganized and only partially coherent on the critical points, his argument cannot be considered curative.

The presentation of the factor (h) theory in penalty phase argument was critical to the jury's sentencing decision. The relevant evidence had to be recalled from the guilt phase and considered in connection with the language of factor (h).

The connection was not obvious. Dr. Walser never explicitly addressed appellant's capacity to conform conduct to the requirements of the law. Rather, she said he had an impulse control disorder and a cognitive disorder. As recounted by Dr. Walser, appellant's Rorschach results showed "he had extremely poor reality testing." (21RT 4189.) They showed impairment in his "quality of information processing. . . . [H]e was

unable to process things in a fully mature, helpful way for himself. . . . [H]e just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were . . . haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment. (18RT 3592.)

Six years after appellant's trial, the United States Supreme Court outlawed executed of mentally retarded defendants in recognition of how the deficits in impulse control and information processing evident in the instant case affect the morality of imposing capital punishment:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable for example, *the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses* that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. (*Atkins v. Virginia* (2002) 536 U.S. 304, 320.)

Appellant had a right to have his jury consider his diminished ability to process information and control impulses under factor (h). (U.S. Const., 6th, 8th & 14th Amends.) The prosecutor's argument denied the existence of any such right by denying both the existence and the relevance of the evidence itself. The trial court's erroneous ruling on defense counsel's contemporaneous objection helped the prosecutor sell his denial to the jury.

The court's subsequent effort at cure was not only too late, but too little; defense counsel alone could not and did not regain the ground he lost.

"An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald*, *supra*, 37 Cal.3d 351, 376.) The issue of appellant's capacity to conform his conduct to the requirements of the law was a critical one. The evidence suggesting that he had any such capacity was closely balanced with evidence that he was, like the mentally retarded defendants discussed in *Atkins*, unable to perceive or anticipate the legal consequences of his crimes as necessary to control his behavior. This error was not harmless.

L. Due Process was denied

Due process of law (U.S. Const., 14th Amend.) is denied when a prosecutor's efforts to gain a conviction or sentence of death infringe upon the defendant's rights as enumerated in the Bill of Rights, and where they otherwise "infected the trial with unfairness." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Here, the prosecutor's misconduct was pervasive, and infected every phase of the trial with unfairness. As specified above, the prosecutor's conduct infringed appellant's right to counsel, jury trial, compulsory process, a reliable penalty determination, and the right to present a defense. (U.S. Const., 5th, 6th, 8th & 14th Amends.) The trial court's failure to respond correctively to the misconduct, and the trial court's own repeated disparaging of defense counsel, compounded the constitutional violations, and denied appellant his due process right to even-

handed application of the law. (U.S. Const., 14th Amend.; *Wardius v. Oregon*, *supra*, 412 U.S. 470, 474.) Cumulatively if not singly, these errors were prejudicial. "Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects." (*People v. Hill*, *supra*, 17 Cal.4th 800, 847.)

IX. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN SUSTAINING AND IN ECHOING THE STATED BASIS OF THE PROSECUTOR'S SPEAKING OBJECTION TO QUESTIONS SEEKING DR. WALSER'S ACKNOWLEDGMENT OF PROOF THAT APPELLANT THOUGHT ABOUT COMMITTING HOMICIDE BEFORE DOING SO

A. The relevant facts

Acknowledging that appellant talked about "going postal" (in current vernacular)[47] before his employment was terminated, defense counsel attempted to show the jury that his mental health expert saw a distinction between holding homicidal thoughts in general and the deliberation and premeditation required to make homicide first degree murder.

Accordingly, appellant's counsel twice asked the defense mental health expert, Dr. Walser, to acknowledge for the jury that evidence of appellant's talk about "doing 101" was evidence that he had indeed thought about committing such a crime, i.e. that the "thought" of work place homicide indeed "existed" in appellant's mind before the date of his offense. (19RT 3710, 21RT 4207.)

The prosecutor objected. First, he declared (in the presence of the jury) that the question called for the witness to offer "an opinion as to the defendant's, [sic] specifically premeditation and deliberation." (19RT 3710.) The court sustained the objection. Defense counsel asked to adjourn for lunch. The court agreed. (19RT 3710.)

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[47] As previously noted, witnesses testified that appellant referred to his homicidal fantasy as "doing a 101 California" or simply "doing a 101."

Defense counsel asked the same question after lunch and additional questioning of the expert. The prosecutor objected, declaiming "that's impermissible opinion for this witness to testify to" in the presence of the jury.

Defense counsel said he disagreed because "the existence of the thought is not the ultimate conclusion." (21RT 4207.)

Still in the presence of the jury, the prosecutor responded: "An element is premeditation and deliberate. That's a jury question, not a witness question."

Defense counsel agreed with that statement "precisely." He explained:

> I am trying to distinguish between the existence of a thought and something else. Premeditation and deliberation is much different, much more different in my opinion than the simple existence of a thought in a person's mind. So that's the critical distinction.

The court again said it would sustain the objection, and explained in the presence of the jury, "It *calls for one of the elements* that is within the jury's province and not within the base of the expert to testify." (21RT 4201-4208.)

B. The controlling statute

Penal Code section 29 provides a limited exception to the general rule of Evidence Code section 805 allowing expert testimony on the ultimate issue:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged.

C. The trial court should have overruled the objection

A defense expert's opinion about a defendant's mental state is not excludable under Penal Code section 29 unless it asserts that the defendant had or lacked a mental state constituting an element of a charged crime. (*People v. Smithey* (1999) 20 Cal.4th 936, 958-961 [evidence that a defendant had the mental element]; *People v. Coddington*, *supra*, 23 Cal.4th 529, 582 [evidence that defendant lacked the mental element].)

The mental element of the charged crime was willful, deliberate and premeditated intent to unlawfully kill. (Pen. Code, § 189.) "The verb 'deliberate' means to 'weigh in the mind; to consider the reasons for *and against* . . . a proposed course of action." (*People v. Thomas*, *supra*, 25 Cal.2d 880, 899, emphasis added; accord CALJIC No. 8.20.) "Deliberation means careful consideration and examination of the reasons for and *against* a choice or measure. [Citation.]" (*Ibid.*, emphasis added.)

Holding homicidal thoughts prior to committing a killing may evince premeditation of an intent to kill, but evidence of such thought is not dispositive. The thought of committing homicide does not necessarily end in the formation of an intent to kill, let alone involve the "deliberation" required to render the intent "deliberate" within the meaning of the statute.

Therefore, a question calling for a defendant's mental health expert to acknowledge that the "thought" of committing homicide "existed" in the defendant's mind before the date of the charged crime does not call for the expert to opine that the defendant had, or did not have, any mental state amounting to an element of deliberate and premeditated murder.

Moreover, a defendant's call for his expert to acknowledge proof of homicidal thoughts in aid of his efforts to distinguish the finding of such thoughts from the required finding of premeditation and deliberation does not pose a risk of supplanting the jury's role in deciding the ultimate issue. On the contrary, this call is for clarification of the expert's position in a manner that distinguishes and highlights the issue that the jury must decide.

In construing the exclusionary rule so broadly as to prohibit the defendant from showing the jury that his expert acknowledges that he had homicidal thoughts, the trial court rendered that statute unconstitutional as applied. (U.S. Const., 6th, 8th & 14th Amends.; *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690 [6th Amendment compulsory process clause and 14th Amendment due process clause right to present a defense]; *In re Winship* (1970) 397 U.S. 358, 364 [relieving burden to prove elements beyond a reasonable doubt offends due process clause]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 ["rules that diminish the reliability of the guilt determination" in capital case violate 8th Amendment].)

D. The trial court misinstructed the jury and made impermissible comment on the evidence when it told everyone present that defense counsel's question "calls for one of the elements" of the offense

Even if the trial court was technically within its rights in precluding defense counsel from asking his expert if appellant had homicidal thoughts prior to being fired from his job, the way the trial court explained the ruling in the presence of the jury was erroneous and extremely prejudicial.

The trial court's assertion that the question "calls for one of the elements of the offense" may have been intended merely to discourage defense counsel from asking such questions. But the jury was listening too, and absorbing what the judge said about the applicable law. The trial court appeared to be agreeing with the prosecutor's argument equating homicidal thought with premeditation and deliberation as a matter of law.

Hearing the trial court declare that the question "calls for one of the elements" after hearing the prosecutor argue that the question called for an opinion on deliberation and premeditation (21RT 4207), reasonable jurors would naturally infer that the trial court equated homicidal thought with those key elements of the charged crime and that the court saw no merit in the distinction urged by defense counsel. "It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge from which they may gather enough to read his mind and get his opinion of the merits of the issues under review." (*Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 822.)

At minimum, there is a "reasonable likelihood" that the jury drew this inference respecting the trial court's views. Accordingly, the decisive question is not whether the trial court intended to denounce the defense theory in explaining its ruling, but whether the court's pronouncement was factually inaccurate and damaging to the defense theory. (*People v. Sturm, supra,* 37 Cal.4th 1218, 1231-1232 [trial court's jury voir dire statements that premeditation was not in issue require reversal because they undermined and severely damaged penalty phase defense]; *People v. Coddington*, *supra*, 23 Cal.4th 529, 615-617 [acknowledging "reasonable likelihood" that a juror inferred that the trial court vouched for credibility of witness, even though judge may have intended only to give proper explanation of expert appointment process].)

E. The trial court's misinstructive comment infringed appellant's 6th Amendment right to have the jury determine whether his homicidal thoughts constituted premeditation and deliberation, and his 14th Amendment right to due process of law, and led to a miscarriage of justice

Because jurors presume the trial judge is fair and knows more than they do, the judge's implicit findings in favor of the prosecution are not easily dismissed. "The influence of a trial judge on the jury is necessarily and properly of great weight [citation], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States*, *supra*, 326 U.S. 607, 612.)

Judicial comment expressing judgment on a jury issue infringes the jury trial right, even when followed by an instruction directing the jury to

exercise its independent judgment on the issue. (*People v. Sturm, supra*, 37 Cal.4th 1218, 1234.) "In these circumstances there is a great danger that a jury which may wish to escape its responsibility to determine the facts will give weight to the comment of the judge without considering the evidence and the instructions." (*People v. Brock* (1967) 66 Cal.2d 645, 652, overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, 413; [judge's comment on state of the evidence directed a verdict for the prosecution, though accompanied by instructions admonishing jury to exercise its independent judgment].)

"The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' [citations]." (*United States v. Gaudin* (1995) 515 U.S. 506, 515.) Although the judge's misleading comment went to only one element of the offense, the element the court intruded upon was a vigorously disputed element, and the jury's understanding of that element was key to the outcome of the case.

Moreover, that element was not well supported by the evidence. Appellant's dialogue with his friends showed that he had thought about killing before doing so, and his ultimate homicidal acts evinced intent to kill. But without proof that his meditations included deliberation — the "weighing of considerations for *and against* the proposed course of action"

(CALJIC No. 8.20) — the jury was supposed to acquit appellant of first degree murder.[48]

The very fact that appellant committed homicide in the presence of people who knew him, without an "exit strategy," evinces a failure to see or consider, as a reason *against* killing, the likelihood of criminal sanctions. Failure to consider the "reasons against" killing is a failure to engage in the deliberation required for the offense. (CALJIC No. 8.20.) Additionally, as recounted by Dr. Walser, appellant's Rorschach results showed "he had extremely poor reality testing." (21RT 4189.) They showed impairment in his "quality of information processing. . . . [H]e was unable to process things in a fully mature, helpful way for himself. . . . [H]e just glances at things, missing much of what is going on. His decision-making and problem-solving techniques were . . . haphazard, as is typical of people with neurological impairment. Such impairment can lead to errors in judgment." (18RT 3592.) Dr. Walser added that anger diminishes the ability to think constructively; it tends to disorganize thinking and reduce whatever ability for logical thinking an individual ordinarily has. (21RT 4147.)

"An error that impairs the jury's determination of an issue both critical and closely balanced will rarely be harmless." (*People v. McDonald*, *supra*, 37 Cal.3d 351, 376.) The issue of whether appellant's

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[48] In the instructions read prior to closing argument, the term "deliberate" was properly defined to require "weighing of considerations for *and against* the proposed course of action." Deliberate and premeditated killing was said to require that the slayer "weigh and consider the question of killing and the reasons for and *against such a choice* and, having in mind the consequences, he decides to and does kill." (CALJIC No. 8.20; 26RT 4867, emphasis added.)

intent was deliberate and premeditated was such an issue. The jury's tainted determination of this one issue not only produced the first degree murder conviction, but rendered appellant eligible for the death penalty. Indeed, under the trial court's mid voir dire jury instructions, the finding that murder was deliberate and premeditated constituted an aggravating factor, to be weighed against any mitigation, in the decision to impose capital punishment. (See Argument III, *ante*.) Reversal of the judgment is required.

X. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES IN ALLOWING THE PROSECUTOR TO DISCREDIT THE DEFENSE WITH TESTIMONY FROM A MEDICAL IMAGING EXPERT ON A SUBJECT OUTSIDE HIS AREA OF ESTABLISHED EXPERTISE

In rebuttal testimony discrediting Dr. Walser and the defense case in general, the prosecutor asked medical imaging expert William Hoddick, M.D. (22RT 4305) if the abnormalities detected in radiological scans of appellant's brain had any effect on "behavior." (22RT 4309.) Defense counsel objected to the prosecutor's failure to establish a foundation in the witness's expertise. The prosecutor said, "As a medical doctor, specifically in the area of radiology, he certainly can testify in respect of his diagnosis on the human body." (22RT 4309-4310.) The trial court overruled the defense objection, without explanation. The witness went on to testify that neither of the detected types of abnormality can be said to have any effect on the patient. (22RT 4310-4311.) When cross-examined respecting his qualifications, he said he needed to know a lot of medicine to do what he does, and he needs to know "to a degree" about how behavior is affected by parts of the brain. He acknowledged that many neurologists know more about the brain than he does. (22RT 4314-4317.)

Evidence Code section 720, subdivision (a), states that a witness is allowed to testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party,

such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

Of course, an expert's qualifications "must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient. [Citations.]" (*People v. Hogan* (1982) 31 Cal.3d 815, 852.) "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited. [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)

A trial judge's ruling on the question of an expert's qualifications is reviewed only for abuse of discretion. (*Hogan, supra*, 31 Cal.3d at p. 852.) Yet such abuse of discretion will be found where "'the evidence shows that a witness clearly lacks qualification as an expert. . . .'" (*Ibid.*, citing Jefferson, Cal. Evidence Benchbook (1972) § 29.3, p. 502.)

Here, no effort was made to establish that all medical doctors, those specializing in medical imaging, or Dr. Hoddick in particular, are so expert in the attributes of brain abnormalities as to reliably opine that an abnormality in brain tissue is not problematic. The trial court abused its discretion in accepting this witness as an expert on this critical issue without requiring that his expertise be shown in response to defense counsel's timely objection.

The end result was a denial of the right to effective aid of counsel, due process of law, and the reliability required for imposing capital

punishment. (U.S. Const., 5th, 6th, 8th & 14th Amends.) Dr. Hoddick's testimony was used by the prosecutor in guilt phase closing argument to discredit the entire defense by discrediting defense counsel, whose opening statement spoke of the brain scans as evidence of brain dysfunction, as well as Dr. Walser, who testified that the brain tissue abnormalities were problematic. To quote:

> You heard Dr. Hoddick. He was an extremely credible witness. He told you what the truth was of that [sic] there is no organic brain damage. It's all a bunch of smoke and mirrors.
>
> They make assertions. Just because the defense attorney says doesn't make it true. Okay. They don't have foundation for the assertions they are making. . . . (26RT 4911.)

Admission of untrustworthy evidence of guilt has been held to violate even a non-capital defendant's right to error resulted in a denial of due process of law. (*Stovall v. Denno* (1967) 388 U.S. 293, 302 [identification testimony based on suggestive police procedure].) Accordingly, this court has found reversible error in the admission of such evidence in a capital case notwithstanding the absence of a statutory rule of exclusion. (See, e.g., *People v. Davenport* (1985) 41 Cal.3d 247, 288 [testimony predicting capital defendant's future dangerousness].)

Dr. Hoddick's testimony was untrustworthy. Its impact on the reliability of the trial was profound and fundamentally unfair. Dr. Walser's testimony was the linchpin of the defense case. It alone explained the nature and severity of appellant's mental impairments and linked them to

the killings. The loss to the credibility of Dr. Walser and defense counsel in turn undermined the totality of the defense case and discouraged the jury from considering critical mitigating evidence. The error thus prejudiced appellant's defense in the penalty phase as well as in the determination of guilt. Insofar as the aggravation consisted solely of the circumstances of the crime, there were no prior violent criminal acts or felony convictions, this error was not harmless beyond a reasonable doubt.

XI. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN APPLYING EXCLUSIONARY RULES TO DEFENSE EXPERT TESTIMONY THAT WERE NOT APPLIED TO THE PROSECUTION'S EXPERTS, DESPITE APPROPRIATE OBJECTIONS FROM THE DEFENSE

When the prosecutor objected to Dr. Walser's qualification to opine on the brain tissue abnormalities detected on appellant's brain scans, the court strictly applied the governing law, and facilitated close examination of her qualifications on each point. (18RT 3516, 3532, 3611-3614, 3617-3619, 3628-3629, 3633-3636.) But as noted in the previous argument, the statutory call for evidence of expertise upon the lodging of an objection to the qualification of an expert was not applied when the defense objected to the testimony of Dr. Hoddick. This is one of several situations in which the trial court's rulings were less then evenhanded, and tended to give the prosecutor a distinct and unjustified advantage in the use of expert testimony.

When the prosecutor announced intention to call a new pathologist to testify about the cause of death of the victims based on the reports of the pathologist who did the autopsies (who was no longer employed by the county), defense counsel objected on hearsay grounds. The objection was overruled. The court pointed out that "experts testify from other experts' comments and reports. It's part of the expert opinion." (15RT 2986-2987.)

But when the defense began eliciting testimony from Dr. Walser about the analysis of appellant's MMPI results by Dr. Alex Caldwell, the

prosecutor soon persuaded the court to preclude such testimony on direct examination, citing *People v. Campos* (1995) 32 Cal.App.4th 304, 308, which indeed held that an expert witness may not on direct examination reveal the content of reports prepared or opinions expressed by non-testifying experts. (19RT 3664-3665, 3674-3679.) No one asked why that ruling was not brought to the fore when the court was passing upon the defense objection to the prosecution's pathologist relying on another expert's report.

Indeed, the *Campos* exclusionary rule was applied only to the defense, and in such a way that only the prosecutor was allowed to limit and select from the reports of the non-testifying experts the facts that would be brought out to the jury in the testimony of Dr. Walser. Since the record does not include the non-testifying defense experts' reports, it does not disclose how much factual material was lost to the jury as a result of the mid-trial change in the rules. The court struck Walser's re-direct examination testimony that Dr. Wilkinson found no evidence of malingering on a "Ray 15-Item Test" for malingering that he gave appellant, and forbade her testimony about what Dr. Caldwell told her in explaining how he came to conclude that the MMPI results were valid. (25RT 4754-4755.) She was allowed to say that her communications with the other doctors did not change her opinions about the validity of the tests, but she was not allowed to say why not. (25RT 4755-4760.)

Most disturbingly, the court refused to allow defense counsel to question Walser on re-direct about whether appellant's Rorschach results

showed disorganized thinking. Although only the prosecutor had explored this aspect of Dr. Kincaid's opinion with Dr. Walser, and neither the court nor counsel asserted that the defense had done so, the court agreed with the prosecutor that re-direct examination on this critical test result would be cumulative. (25RT 4764.)

The court's rulings on the admissibility of expert opinion on various points added even more to the prosecutor's advantage in the case, in that they allowed the prosecutor (but not the defense) to have an expert witness put forth a coherent theory of the case.

First, the court overruled objections from defense counsel on relevancy and lack-of-foundation grounds, and allowed the prosecutor to offer psychologist Paul Berg as an expert in, among other things, "work place violence." (22RT 4372-4374.) The court did not demand and the prosecutor did not articulate a theory of how work place violence or the attributes of other people who have committed work place violence were relevant to any issue in the case. In seeking repeated affirmation of his suggestion that a person who engages in work place violence is not necessarily delusional or psychotic, the prosecutor's questions soon revealed that his purpose in adducing evidence that Berg had studied other cases of work place violence was simply to confirm Berg's qualification to argue his theory of the case. (22RT 4374.)

The prosecutor also had Dr. Berg opine that the "I ain't no joke" statement appellant made before and after shooting Lorraine Talley "speaks of the anger, and I think it speaks of retribution." (22RT 4368.) He asked

Berg to affirm that this meant "revenge," and Berg dutifully agreed, it meant "revenge." (22RT 4368.)

Over defense objection referencing the court's rulings preventing Dr. Walser from opining on the dynamics that produced the homicide, Berg was allowed to opine that the termination of appellant's employment and what appellant "believed was going to be happening to him for weeks before that" explained the crime to the exclusion of "anything delusional or hallucinatory." (22RT 4368.)

The court also permitted the prosecutor to ask Berg if the personality disorders Berg believed appellant had "in any way prevent a person from committing deliberate and premeditated murder." Berg answered negatively. Defense counsel's objection and motion to strike, referencing "the court's earlier ruling" was overruled. (22RT 4378.)

The court's rulings restricting Dr. Walser's testimony were indeed severe in comparison. In addition to ruling out defense counsel's questions eliciting her acknowledgment of evidence that appellant thought about killing before his employment was terminated, the court sustained prosecutorial objections and struck Dr. Walser's opinion on points indistinguishable from those reached by Berg.

When Dr. Walser said that Lorraine Talley's refusal to meet alone with appellant after terminating him "tipped the balance," the court sustained the prosecutor's "impermissible opinion" objection, and struck the testimony, which the court told the jury was "an attempt to describe the state of mind at the time of the incident." (19RT 3708-3709.)

Her response to defense counsel's inquiry about her reasons for believing that appellant was psychotic at the time of the killing was cut off in mid sentence by another sustained "impermissible opinion" objection after she said appellant's description of his own mental state "seemed to be a reactive kind of state, rather than . . . cold and calculated." (19RT 3706.) Without saying which portion of her lengthy answer was being stricken, the court told the jury "that portion will be struck, ladies and gentlemen, as inappropriate opinion. The description will be allowed to remain only for the purposes of forming the previous stated opinion, and you can proceed with your next question." (19RT 3706-3707.)

Her testimony that appellant "didn't seem to know what he was doing" rendered in response to defense counsel's query as to whether appellant had planned to commit suicide, was struck as well. (19RT 3719.)

And as previously noted, defense counsel was not allowed to ask Dr. Walser leading questions. When defense counsel asked Dr. Walser if having a psychotic level of organizations means the person "misperceives reality on a regular basis," the prosecutor objected to the question as leading. (18RT 3579.) The court said, "I will begin to sustain these, Counsel. The witness can testify as to the meaning of these matters. The Court is exercising its discretion. So you can ask the witness to testify what it means." (18RT 3580.)

Furthermore, the court sustained the prosecutor's objection and admonished the jury to disregard "that last comment" after Dr. Walser said that appellant's "impairment needs to be taken into consideration here. It's

part of why he couldn't handle the stress he was under." (21RT 4202.) Dr. Walser gave this answer in response to defense counsel's two-part query as to whether the characterization of neuropsychological impairment as "moderate" meant that it could not interfere with the deliberation of a homicide. (21RT 4201.)

After Dr. Walser's testimony concluded, the court received from juror #1 a note complaining of being forced to "pick out pieces here and there to arrive at a cohesive 'opinion'" from Dr. Walser and inquiring "Did she ever state her opinion?" (Court Exh. 14, 1ACT 266.)

When the prosecutor made his closing argument, he reminded the jury of his success in making clear his own expert's opinion on what he claimed was the ultimate issue, by way of telling the jury that mental health expert testimony ought not be decisive. In the prosecutor's words, "Dr. Berg has some pretty obvious opinion about the depth of the premeditation of Michael Pearson at the time that he murdered two people." (26RT 4980.)

The federal due process guarantee requires that the defense be permitted to appear and defend, that proceedings to determine sentence be reliable, and that both parties to a criminal case be treated equally in the interpretation and application of evidentiary rules. (U.S. Const., 6th, 8th & 14th Amends.; *Wardius v. Oregon*, *supra*, 412 U.S. 470, 474.) Here, the trial court's rulings created imbalance in expert testimony, and reduced the coherence of the defense. The mental state issues to which the expert testimony related were critical and closely balanced. Given appellant's lack

of any prior felony convictions or violent crime, and the People's reliance on "the circumstances of the crime" as aggravation, neither the inequality in the application of the law, nor the rulings themselves, should be held harmless.

XII. THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO CROSS EXAMINE DR. BERG ABOUT HIS MEDI-CAL FRAUD CASE VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

A. The facts of record

After cross examining prosecution witness Dr. Paul Berg concerning his evaluation of appellant (and adducing damning opinion evidence additional to that adduced by the prosecutor) defense counsel asked Dr. Berg if he had "been a thief" in his "time." The prosecutor objected to the question as argumentative. (24RT 4570.)

The court sustained the objection. Defense counsel asked Berg if, the "early 1980s" he stole "in the neighborhood of $10,000.00" in a Medi-Cal fraud. The prosecutor objected, and asked to be heard outside the presence of the jury.

Outside the presence of the jury, the prosecutor claimed that defense counsel's query was unethical because "he knows that there's been a finding of factual innocence." (24RT 4572.) Defense counsel argued that the finding of factual innocence "means nothing about the reality of fraud" and described the documentation of guilt in his possession. Defense counsel said the charges were dismissed because of a successful motion to suppress evidence, and that Berg had asserted his Fifth Amendment privilege when another court allowed defense counsel to ask Berg if he was indeed innocent of the charges. (24RT 4572-4574.)

Most importantly, defense counsel told the court that the factual innocence finding was obtained by Berg many years after his case was dismissed because questions and stories about the fraud charges threatened "his very livelihood." (23RT 4575-4576.) Counsel said the sequence of events in his case leading to the factual innocence finding "*goes to his bias and goes to his desire to do what he can to keep into the system, to keep his viability as a product for the District Attorney's Office and for the criminal defense bar.*" (23RT 4576, emphasis added.)

The prosecutor railed against defense counsel's ethics and the suggestion of letting the jury draw an adverse inference from Dr. Berg's assertion of the self incrimination privilege. The trial court said it would set a hearing to examine defense counsel's ethics after trial, and would sustain the prosecutor's objection and "indicate it was a totally inappropriate question, not based upon facts." (23RT 4576-3578.) Citing its intention to investigate counsel's ethics after the trial, the court refused to accept defense counsel's submission of documents from the Medi-Cal fraud case, which counsel said established his good faith. (23RT 4577.)[49]

Accordingly, the court refused to permit any related inquiry in the presence of the jury. The court said the fraud case "seems to be a collateral matter under [Evid. Code §] 352. It appears to be consumption of time which would be unnecessarily unwarranted by bringing in documents regarding Alameda County, but more importantly, it doesn't establish any

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[49] The trial court never held any such hearing, and never received the offered documents.

sort of bias, it doesn't establish any sort of allowable impeachment under the California law and I'm finding that." (23RT 4577.)

Defense counsel subsequently addressed the importance of exploring the events surrounding Berg's acquisition of the factual innocence finding, including "whether or not there was actually any opposition to it." (23RT 4580.) He also said he had a copy of a newspaper story in which Berg responded to the reporter's question about the case by saying, "I was never convicted of any crime in this State or any other state and a story like this would be very harmful to my reputation. This is going to be ruinous to me and I feel ripped off." (23RT 4582.)

Counsel said he wanted to question Berg about the accuracy of the article and bring out the fact that a colleague of his in the Public Defender's Office was the attorney whose cross examination about the fraud case led to the newspaper story. The latter was urged as an additional theory of bias, specifically bias against public defenders whose clients opposed him. (23RT 4582.) The court stood by its ruling, and ordered defense counsel not to discuss the testimony elicited from Berg by his colleague. (23RT 4583.)

When the jury returned to the courtroom the court announced:

> Ladies and gentlemen, with regard to the last two questions that were posed by Mr. Veale, I will tell you they were inappropriate questions. *There was no factual basis for those questions*. And I would ask you to erase them from your mind as not having been said at all. (23RT 4585, emphasis added.)

B. The governing principles

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' . . . The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316.)

In *Davis v. Alaska*, the Court "emphasized that 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' (*Id.* at pp. 316-317, citing *Greene v. McElroy* (1959) 360 U.S. 474, 496.)

In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, the Court "reaffirmed *Davis*, and held that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 475 U.S. at p. 680, quoting *Davis*, *supra*, at 318." (*Olden v. Kentucky* (1998) 488 U.S. 227, 231.)

In *Davis*, the Court ruled that a criminal defendant must be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness's probationary status as a juvenile delinquent, even though such cross-examination would conflict with the state's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 320.)

The Court concluded that, although it could not speculate whether the jury would have accepted defense counsel's argument that the prosecution witness was possibly biased, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided 'a crucial link in the proof . . . of petitioner's act.'" (*Davis v. Alaska*, *supra*, 415 U.S. at p. 317 (quoting *Douglas v. Alabama* (1965) 380 U.S. 415, 419.) Indeed, the Court reasoned that, to make cross-examination effective, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318.)

Similarly, in *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, the Court held that a defendant was denied his constitutional right to effective cross-examination where "the trial court prohibited all inquiry into the possibility that [the witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." (*Id.* at p. 679.) The Court, relying on *Davis*, reasoned that "by thus cutting off all questioning

about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." (*Ibid*, footnote omitted.) In so ruling the Court stated that:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited in engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680, quoting *Davis*, 415 U.S. at p. 318.)

Under both state and federal law, a trial court has discretion to limit cross-examination. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) But that discretion is limited. "A trial court's limitation on cross-examination . . . [pursuant to Evidence Code section 352] violate[s] the confrontation clause [when] . . . a reasonable jury *might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.*" (*Id.* at pp. 623-624, emphasis added; accord, *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 680.)

Like other violations of the Sixth Amendment, state action in violation of the confrontation clause constitutes a violation of the constitutional guarantee of due process of law. (U.S. Const., 14th Amend.; *Pointer v. Texas* (1965) 380 U.S. 400.)

And like other violations of fundamental fairness, the interpretation and application of evidentiary rules in a less-than-evenhanded manner violates the Fourteenth Amendment due process guarantee. (*Wardius v. Oregon*, *supra*, 412 U.S. 470, 474.)

C. How this case differs from *Sapp*

In *People v. Sapp* (2002) 31 Cal.4th 240, a case from the same county that produced this one, Dr. Berg's testimony for the prosecution linked the defendant's homicidal behavior to anti-social personality disorder, and posited that the mitigating factors discussed in defense expert testimony had no link to the crimes. The defendant sought reversal of the capital judgment because he was barred from cross examining Dr. Berg about the Medi-Cal fraud charges. This court affirmed the trial court's finding under Evidence Code section 352. "Whether Dr. Berg had or had not filed false claims with Medi-Cal was, at most, nominally relevant to the subject matter of his testimony." (*Id.* at p. 290.)

Here, the appellant's claim of error does not depend upon his right to prove the truth of the charges that Dr. Berg faced. Even if Berg was not guilty, his remarkable success in obtaining suppression of the fraud evidence, dismissal of fraud charges, and a finding of factual innocence, could well be linked — in his own mind if not in the minds of the prosecuting agency and the courts that provided the relief he sought — to his service as a witness for the prosecution.

D. The trial court's error requires reversal of the judgment

Appellant was entitled to develop through cross examination a claim that Berg was biased as a result of any possible link between Berg's service as an expert witness and the favorable resolution of his own criminal case. (U.S. Const., 6th & 14th Amends.; *Hyman v. Aiken* (4th Cir 1987) 824 F.2d 1405, 1414 [defense counsel ineffective in failing to assert defendant's right, under *Giglio v. United States* (1972) 405 U.S. 150, 154-155, to cross examine prosecution witness about circumstances surrounding acquisition of pardon].) "[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (*Napue v. Illinois* (1959) 360 U.S. 264, 269.)

In *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 684, the Court held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* [*v. California* (1967) 386 U.S. 18] harmless-error analysis." The Court stated:

> The correct inquiry is whether, *assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the *importance of the witness' testimony in the prosecution's case*, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. (*Chapman v. California* (1967) 386 U.S. 18, emphasis added.)

Dr. Berg's importance to this case is not limited to the phase of the trial in which he testified. His churlish opinions and characterizations of the facts, which included describing Talley's killing as an "assassination," supported the prosecutor's call for the death penalty, as well as the prosecutor's theory of guilt.

Moreover, Berg's claim that a "faking expert" who looked at appellant's neuropsychological test scores applied the "Mittenberg faking formula" and concluded that appellant was either faking impairment or at most mildly impaired, was particularly damning. (22RT 4395-4397, 24RT4673-4674, 4677.) In addition to undermining the credibility of appellant's mental health expert and related defense theories, this evidence that appellant sought to contrive the appearance of mental disability supplied a new, independent, emotionally compelling and unlawful impetus to impose death.

Considering the closeness of the question of whether the killings were "deliberate" as well as premeditated, and the impact of Dr. Berg's testimony on both the penalty and guilt determinations, the unconstitutional restriction of counsel's impeachment effort appears clearly prejudicial.

Considering as well the compounding effect of the trial court's false admonition to the jury ("There was no factual basis for those questions"), which discredited defense counsel and bolstered the credibility of Dr. Berg, in conjunction with the failure of the court to admonish the jury in a discrediting or punitive manner when the prosecutor accused a defense witness of a moral turpitude offense based solely on the allegations of a

criminal complaint (see argument VII (D) ante), the effect of the error may be seen in every sector of the trial in which the credibility of the prosecutor and defense counsel was important. The error was not harmless beyond a reasonable doubt.

XIII. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN PRECLUDING AND LIMITING INTRODUCTION OF DEFENSE EVIDENCE RESPECTING COMPLAINTS ABOUT HOUSING AUTHORITY MANAGERS CIRCULATING BEFORE APPELLANT WAS HIRED, AND TESTIMONY ABOUT HOW THOSE MANAGERS TREATED OTHER EMPLOYEES PRIOR TO APPELLANT'S TENURE

As noted in the discussion of prosecutorial misconduct (Argument VII, ante), the trial court ruled that complaints about management made to Housing Authority Director Art Hatchett prior to the time appellant began working for the Housing Authority were irrelevant or unduly prejudicial and consumptive of time. (12RT 2375-2376, 2381.) This ruling was applied in sustaining objections to evidence from other witnesses, except Toni Lawrence, who was permitted to testify about past events if within her personal knowledge, insofar as they "bore on her credibility." (22RT 4279.) The evidence that was excluded was important to appellant's defense — particularly on the penalty phase issue of whether he perceived some moral justification or necessity for his crimes — in that it tended to illuminate what he was likely to have heard and believed about the Housing Authority employees with whom he had hostile interactions.

A few examples illustrate the nature of the lost information. Defense counsel was not allowed to ask Hatchett if there was "some talk" about how Shirail Burton obtained her position, nor permitted to identify the people who had complained about Burton's work. (12RT 2358-2359.) Donald Richmond, a "close friend" of appellant who served as Director of

Personnel Administration and in other positions for the City of Richmond before appellant was hired, was precluded from testifying that he had received a report from the Inspector General working with HUD that said Lorraine Talley and a coworker "did not possess the skills, knowledge, ability to be in their jobs." (22RT 4283-4284, 4290-4291, 4292.) The trial court's own questioning of the witness confirms that the decisive factor was found in the evidence that the report was made in November of 1991, approximately two years before appellant was hired. (22RT 4286, 4289-4290.)

Likewise, Toni Lawrence was precluded from testifying about her observations of Lorraine Talley and Shirail Burton work habits prior to appellant's tenure, and precluded (on hearsay grounds) from testifying that employees who worked under Burton and Talley spoke to her about problems they were having and led her to conclude that Talley was letting Burton get away with doing "virtually little or no work" because of their friendship. (16RT 3100.) Testimony from Connie Taylor about favoritism in the Conventional Housing Authority was excluded on the same grounds. (17RT 3261-3265.)

City of Richmond Information Director and former union representative Mark Hamilton was precluded from saying whether he received any complaints about Talley's treatment of people that she supervised. (22RT 4271.) Documentation of Ronald Keeton's and Sylvia Gray-White's 1994 complaint about Pat Jones and about Hatchett's failure to follow rules in giving her the supervisory position was likewise excluded.

In the court's words, "I'm going to exercise my discretion under 352. I don't believe that that has anything to do with your concerns . . . and I feel that the probative value of this particular matter is far outweighed by the possible inappropriate effect it may have on the evidence. ¶ I just think under 352, to go back even before Mr. Pearson was employed at the agency is far afield, and I don't see that these is any relevance to it." (12RT 2375-2376.)

The trial court also excluded testimony from appellant's colleagues about his supervisors' history of mistreating other employees. The court sustained the prosecutor's objection when defense counsel asked Learinza Morris and Leona Kelly if they saw Shirail Burton treat other employees in an inappropriate way. (15RT 2691-2692, 2779.) Leona Kelly was precluded from testifying that Lorraine Talley treated Cecilia Gardner in a demeaning way, and her testimony that Pat Jones had reduced another employee to tears was stricken on hearsay and relevancy grounds. (14RT 2773-2774, 2783-2785)

The prosecutor argued, and the court apparently assumed, that the only purpose of the evidence was to establish that the named managers acted badly toward appellant because of a character trait. At least once, defense counsel urge admission of evidence on that ground. (14RT 2773.) But defense counsel stated his overarching purpose was to show the poisonous quality of the atmosphere in order to better explain how appellant perceived the people to whom he showed hostility. (12RT 2373-2374.) This was a valid and overwhelmingly important purpose for offering such

evidence in connection with a mental state defense, particularly in a capital trial, where the mitigating "circumstances of the offense" must be found and weighed by the jury. (U.S. Const., 6th, 8th & 14th Amends.; *Lockett v. Ohio, supra*, 438 US 586, 604; cf. Pen. Code § 190.3, factor (f) [sentencer should determine "whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct"].)

Evidence Code Section 352 allows a trial court to exclude admissible evidence in its discretion "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Nevertheless, appellant "was entitled to present evidence of his circumstances so that the jury could see them from his point of view." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.) As this Court said of evidence of third party threats in *Minifie,*

> None of the considerations supporting the discretionary exclusion of relevant evidence substantially outweighed the probative value of the evidence at issue here. Presentation of evidence at the heart of the defense would not have represented an "undue" consumption of time. There was no risk of prejudice associated with the evidence. "The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] . . . and which has very little effect on the issues." (*People v. Wright* (1985) 39 Cal.3d 576, 585 [217 Cal.Rptr. 212, 703 P.2d 1106] [internal quotation marks omitted].) Evidence bearing on [defendant's] state of mind was highly

> probative, and had no "unique tendency" to evoke any emotional bias against the prosecution. (*People v. Minifie, supra*, 13 Cal.4th at pp. 1070-1071.)

Appellant's federal constitutional rights to have a fundamentally fair trial, to present a defense, to obtain a jury determination on all factual issues, and to introduce evidence in mitigation and obtain a reliable determination of penalty (U.S. Const., 5th, 6th, 8th & 14th Amends.) were infringed by the trial court's decision to rule out the evidence at issue here. The lost evidence was critical. Although testimony from people with personal knowledge of Burton and Talley's behavior during appellant's tenure at the Housing Authority gave the jury some insight into how appellant could see them as abusive, the jury did not get to hear all of what appellant likely heard "through the grapevine" about their mistreatment of other employees. Consequently, the jury did not have an accurate or complete picture of appellant's state of mind, nor of the circumstances of the offense. Most pointedly, jury could not reliably determine "whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct" as required by Penal Code section 190.3, factor (f). In light of appellant's lack of prior record, and the reliance of the People on the circumstances of the offense in aggravation, the exclusion of this evidence was not harmless.

XIV. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN REFUSING TO ALLOW THE JURY TO VIEW THE ENTIRETY OF HIS VIDEOTAPED CONFESSION

During cross-examination, both Dr. Berg and Dr. Walser acknowledged that they had not viewed or listened to the videotape of appellant's confession in forming their opinions. Dr. Berg said he had relied on what proved to be not a transcript, but simply a report of the interrogation prepared by a participating police detective. After these facts were established, defense counsel asked the court to permit the jury to view the entire videotape. The prosecutor said the tape was two and a half hours long and complained about the lack of opportunity to cross-examine appellant. After resolving hearsay and other issues, the court refused to allow the entire videotape to be shown because "it would take too long." (24RT 4595.) But with the prosecutor's concurrence (24RT 4706-4707), the court allowed counsel to play one excerpt that evinced disorganized thinking, and later, two snippets suggestive of a memory problem. (24RT 4695-4710.)

As noted previously, Evidence Code Section 352 allows a trial court to exclude admissible evidence in its discretion "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." But "[p]resentation of evidence at the heart of the defense would not have

represented an 'undue' consumption of time. . . . Evidence bearing on [defendant's] state of mind was highly probative, and had no 'unique tendency' to evoke any emotional bias against the prosecution." (*People v. Minifie, supra*, 13 Cal.4th at pp. 1070-1071.)

Appellant's federal constitutional rights to have a fundamentally fair trial, to present a defense, obtain a jury determination on all factual issues, and to introduce evidence in mitigation and obtain a reliable determination of penalty (U.S. Const., 5th, 6th, 8th & 14th Amends.) were infringed by the trial court's decision to allow the jury to see only a short excerpt of the videotape. There is unique value in a videotape that allows the jury to see and hear the person whose mental state is at issue respond to police interrogation for two and a half hours. The prosecutor himself emphasized that value in his cross-examination of Dr. Walser respecting her failure to view it before forming an opinion, asserting that the tape has "Mr. Pearson talking rather candidly about things surrounding the commission of the crime, it's visual, it's not reading a transcript, it's his reflection of voice. How come you didn't review that? . . . Why wouldn't it be important to you? I mean you have evidence of his demeanor within hours of the offense, whether he is saying things, I shot him with a banana, what his voice inflection is whether he is yelling, whether he appears to be particularly distraught . . .?" The trial court's refusal of defense counsel's request to show the videotape to the jury was fundamentally unfair. The People cannot prove this error harmless in the determination of guilt or penalty.

XV. UNLIMITED VICTIM IMPACT EVIDENCE AND IMPROPER USE OF SUCH EVIDENCE VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Introduction

At the outset of the penalty phase, the prosecutor said he would be presenting only victim impact evidence as evidence in aggravation, and that he would thereby "develop the relationship" that his witnesses[50] had with the deceased. He described his presentation as "testimony regarding the lives of Lorraine Talley and Barbara Garcia and the effect that their death had on the people who I call as witnesses." (27RT 5107.)

At the time this case was tried, this court's decisions posed no bar to the admission of victim impact evidence.

Defense counsel objected to the entire presentation, citing "the reasons stated in *Booth v. Maryland*" (1987) 482 U.S. 496, and arguing that "testimonials" to the victims would be particularly inappropriate under the circumstances. (27RT 5109.)

The trial court overruled the objection, citing *Payne v. Tennessee* (1991) 501 U.S. 808, and *People v. Clark* (1993) 5 Cal.4th 950, 1034, for the admissibility of evidence that "describes the victim as a unique and

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[50] The record does not disclose how many witnesses or which witnesses were contemplated at that juncture. The prosecutor did not file his notice of intention to introduce aggravating evidence, and the trial court did not inquire about such matters.

valuable person." The court agreed to treat defense counsel's objection as "continuing." (27RT 5111.)

What the prosecutor went on to present was consistent with his promise, but was much more extensive and prejudicial than the evidence held admissible in *Clark* and *Payne*.

A. The law: only limited quantities and types of victim impact evidence and arguments are authorized by *Payne* and Penal Code section 1191.1

The United States Supreme Court majority opinion in *Payne* summarizes the holding as follows:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that *evidence about the victim and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827, emphasis added.)

In so holding, the United States Supreme Court overruled its decisions in *Booth v. Maryland*, *supra*, 482 U.S. 49, which created a per se bar to victim impact evidence, and *South Carolina v. Gathers* (1989) 490 U.S. 805, which prohibited prosecution argument on the subject.

In *Payne*, a mother and her three-year-old daughter were killed with a butcher knife in the presence of the mother's two-year-old son, who survived critical injuries suffered in the defendant's attack. The prosecution

presented the testimony of the boy's grandmother that the boy missed his mother and sister, and argued, among other things, that he will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Payne*, *supra*, 501 U.S. 808, 816.)

The *Payne* court warned there are limits to victim impact evidence, and observed that it would violate the federal constitutional guarantee to due process of law to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." (*Payne*, *supra*, 501 U.S. at p. 825.)

As made clear by Justice O'Connor in a concurring opinion joined by Justices Kennedy and White, the absence of any due process violation in *Payne* was established by the distinctly limited quantity of otherwise irrelevant victim impact evidence presented in that case:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." Ante, at 827. *If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.*
>
> That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony — who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41

> times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived — only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 831-832, emphasis added.)

Justice Souter's concurrence, joined by Justice Kennedy, added the following warning to that written by Justice O'Connor:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. [Citations.] With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." [Citation.] (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837.)

Most notably, the only type of victim impact evidence addressed in *Payne* was one witness's evidence describing the impact of the capital crimes on a family member who was personally present during, and immediately affected by, the capital murders.

California Penal Code section 1191.1 is consistent with *Payne*. It provides in pertinent part that "the next of kin of the victim if the victim has died" may appear and testify "at the sentencing proceeding. . . ." While the statute was clearly enacted, inter alia, to assist victims in obtaining restitution and not merely to assist the court in assessing the proper

punishment, it should be noted that the statutory limitation on the type of witness — that is, to "the next of kin of the victim" — applies to the penalty phase of a capital trial because, after all, the penalty phase is a "sentencing proceeding" and the statute does not exclude capital trials from its reach.[51]

Further, the statute's description of a singular victim impact witness, "or up to two of the victim's parents or guardians if the victim is a minor," appears to limit the prosecution to a single victim impact witness at penalty phase, just as the Illinois Supreme Court interpreted the similar provisions of the Illinois statute in *People v. Hope* (Ill. 1998) 702 N.E.2d 1282. To be sure, *People v. Mockel* (1990) 226 Cal.App.3d 581, 585-587, holds the statute does not limit the number of persons who may send letters to the court for consideration at sentencing, but letters to a judge in a noncapital case are not comparable with the emotionally laden testimony of victim impact witnesses at the penalty phase of a death penalty trial.

Other courts accept similar limitations as necessary to avoid fundamental unfairness. As observed by the New Jersey Supreme Court in *New Jersey v. Muhammad* (N.J. 1996) 145 N.J. 23, 54 [678 A.2d 164, 180]:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will

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[51] Cf., *State v. Hill* (S.C. 1998) 501 S.E.2d 122, 128, which concluded that the South Carolina statute authorizing victim impact statements at sentencing did not limit the scope of victim impact evidence in capital cases because the statute expressly "exclud[ed] any crime for which a sentence of death is sought. . . ."

> be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

In *People v. Hope*, *supra*, 702 N.E.2d 1282, the Illinois Supreme Court interpreted the provisions of The Illinois Rights of Crime Victims and Witnesses Act to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."

In *State v. Mosley* (Tex. 1998) 983 S.W.2d 249, the Court of Criminal Appeals of Texas called upon trial courts to exercise discretion "in permitting some evidence about the victim's character and the impact on others' lives while limiting the amount and scope of such testimony" (*id.* at p. 262) and cautioned "that victim impact and character evidence may become unfairly prejudicial through sheer volume." (*Id.* at p. 263.)

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court held:

> Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. Of these types of proof, evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice, particularly if no proof is offered on the other types of victim impact. (Citations and footnote omitted.)

In *State v. McKinney* (Tenn. Crim. App. 2001) 2001 Tenn. Crim. App. Lexis 230, a case involving the capital murder of a police officer in which another officer testified as a victim impact witness, the Tennessee Court of Criminal Appeals upheld such testimony despite the fact that the testifying officer was not related to the victim, expressing its belief that the Tennessee "statutory scheme [did not] limit[] or restrict[] the source of the information about the personal characteristics of the victim to solely family members or representatives . . ." and that "the statutory amendment is permissive, not restrictive, in nature and does not ban co-workers or employers, for instance, from offering testimony that provides a brief 'glimpse' of the victim's life."

In Louisiana, the prosecution is permitted to introduce victim impact testimony in the form of general statements describing the victim's qualities, but "detailed descriptions" and "specific examples" are discouraged. (*State v. Taylor* (La. 1996) 669 So.2d 364, 372.) Even family members are limited to general statements describing the impact of the victim's death on their lives, and are not permitted to provide "detailed responses" or testify to "particular aspects of their grief. . . ." (*Ibid.*) Noting that the Louisiana statute limits victim impact evidence to the "impact that the death of the victim has had on family members . . . ," the Louisiana Supreme Court has held that no victim impact evidence is admissible concerning neighbors, friends or other non-family members. (*State v. Frost* (La. 1998) 727 So.2d 417, 429-430; *State v. Wessinger* (La. 1999) 736 So.2d 162.)

United States v. Glover (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236, ruled that victim impact witnesses would be limited to presenting "a quick glimpse of the [victim's] life . . . ," including "a general factual profile of the victim, [and] information about the victim's family, employment, education and interests . . . ;" it must "be factual, not emotional, and free of inflammatory comments or references." The court further held that no victim impact witness may be permitted to testify "if the witness is unable to control his or her emotions." (*Id.* at p. 1236.)

Some forms of family member testimony have been recognized as unduly prejudicial under the Due Process Clause. "Comments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; . . . [but] address only the emotional impact of the victim's death . . . [and increases] the risk a defendant will be deprived of Due Process." (*Conover v. State* (Okl.Cr. 1997) 933 P.2d 904, 921.)

In *Cargle v. State* (Okl.Cr.1995) 909 P.2d 806, 829-830, the Oklahoma court also held it was error to admit testimony "portraying [the decedent] as a cute child at age four . . . ;" and "that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a talented athlete and artist, and was thoughtful and considerate to his family. . . ."

One additional restriction necessary to keep the trial fair and avoid offense to the Eighth Amendment is strict prohibition of evidence and

arguments encouraging judgment based upon comparison of the goodness of the victims' lives and that of the defendant. To argue that a defendant should be sent to death because his life was of less value than his victim is to ask a jury to decide, not on the character of the crime, not on the consequences of the crime, not on the criminal record of the perpetrator of the crime, but on some unfettered evaluation of human worth.

The Connecticut Supreme Court has condemned use of victim impact evidence in a comparative worth analysis as inconsistent with a sentencing scheme in which aggravating factors are to be weighed against mitigating factors:

> This improper appeal to emotion was exacerbated by the fact that it was a blatant misstatement of the statutory weighing test. That test required the jury to weigh the aggravating factor proven against any mitigating factor or factors proven. It did not permit the jury to weigh the life of the defendant against the life of the victim. (*State v. Rizzo* (Conn. 2003) 266 Conn. 171, 258.)

This court has not, as of the time of this writing, articulated similar limits or guidelines on the admission and use of victim impact evidence. It has construed section 190.3, factor (a) ("circumstances of the crime") to permit all that may be permitted under *Payne*. (*People v. Fierro* (1991) 1 Cal.4th 173, 235 [majority], 264 [Kennard, J. dissent]), and has yet to find a violation of federal constitutional limits on the use of victim impact evidence in any California capital case, although many have included

evidence more extensive than that which passed muster in *Payne*. (See, e.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172.)

B. The prosecutor's presentation rendered the trial fundamentally unfair and requires reversal of the penalty judgement

The prosecutor called 10 victim impact witnesses, and effectively proved that each decedent was a wonderful person living a great life, and that each witness had suffered severe emotional distress and loss of enjoyment of life as a result of the deaths.

This presentation was unlike any "quick glimpse of the life" of the victims that might be necessary to keep the defendant's mitigating evidence in proper perspective. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.)

This massive display of the victims' virtues, and the value of their lives, called out for judgement based on the virtues of the victims in comparison to the virtues of appellant, the value of their lives versus the value of his. The prosecutor exploited that call in closing argument.

In his words, the jury had to "compare [appellant's] life, you have to compare it to something and it's the lives of these people." (29RT 5542.)[52]

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[52] Accordingly, the prosecutor also argued that the "death penalty is a statement of essentially indignation at the gravity of the wrong that was committed" and "a measure of the lives that were taken, as ironic as that might be." (29RT 5505-5506.) The death penalty was appropriate in "a case like this, with the value of lives that were taken. . . ." (29RT 5520.) He emphasized the jury's ability to decide what weight to give the absence of a prior felony conviction, which he equated with deciding "how special [appellant] should be because of that. How many blue ribbons you want to paint on his chest because he doesn't have a felony conviction, or he didn't commit a crime of violence." (29RT 5528.)

He asked the jury, "what value are you going to give to the taking of their life, before you can compare it with factor (k), which is the kind of end-all factor that allows you to consider things like pity and sympathy for the defendant." (29RT 5541.)

He told the jury that weighing appellant's lack of prior criminal record required them to determine "how many blue ribbons" to paint on his chest because he doesn't have a felony conviction, or he didn't commit a crime of violence." (29RT 5528.)

He reminded the jury that Barbara Garcia was always involved in Hispanic groups, trying to help people get into college, and was "Cinco de Mayo queen." (29RT 5542.) He invited the jury to compare her attitudes and the defendant's attitudes, and to evaluate her life and his. (29RT 5541-5542.) He said, "Maybe it's a little mitigating that defendant told Gary Reynolds to get off drugs, but then after he did the shooting his friend went back on drugs . . . he shot his friend in the foot, didn't he?" (29RT 5543.) This use of the evidence was improper and fundamentally unfair.

Moreover, the quality and quantity of the evidence itself went far beyond that authorized by *Payne* or by Penal Code section 1191.1. None of the witnesses stood in the position of the single witness at issue in *Payne*, i.e., a member of the homicide victims' family offering brief comment on the impact of the deaths upon another family member who was present at the scene of the crime.[53]

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[53] Mr. Payne killed a woman and her two-year-old daughter in the presence of the woman's three-year-old son, Nicholas. Nicholas was himself stabbed by Payne, but was conscious when rescuers arrived, and

Over appellant's continuing objection, Housing Authority employees who were not members of any victim's family were called to address the impact of the killings on their personal and professional lives, and to speak of the victims' virtues.

Lorraine Talley's friend Harriette Langston recalled hearing Talley say that she did not ask police to be in the office when appellant was fired because of her perception of the impact police presence would have on his feelings. (27RT 5167-5168.)

Lorraine Talley's mother was asked if she had been "a happy child" and "a good child" and described Talley's childhood joys. (27RT 5130-5131.)

Two men who had been romantically involved with Lorraine Talley testified about the impact of her death on their lives. One of the men, her current boyfriend, spoke of his personal loss of her companionship, recalling their vacation plans. (27RT 5182-5184.)

The other man, Sam Burns, effectively pled for a death sentence as a means of curtailing the continuing trauma of knowing that appellant might be enjoying life while his motherless son suffered as a result of appellant's crime. Burns was a deputy sheriff who fathered one of Talley's children. He spoke of having to tell their son about his mother's death, and of seeing

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survived as a result of surgery and blood transfusions. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 811-813.) At Payne's trial, the State presented testimony from the woman's mother, who was asked how Nicholas had been affected by the murders of his mother and sister. The grandmother described, in just six short sentences, Nicholas's cries for his mother and expressions of longing for his little sister. (*Id.* at pp. 814-815.)

appellant enjoying eating fruit and laughing in a courtyard of the jail. (27RT 5176-5177, 5179.) Accordingly, the prosecutor's closing argument told the jury that the death penalty was appropriately imposed to deny the killer possibility of experiencing pleasure in life in custody (29RT 5509-5512), recalling and highlighting Burns's picture of appellant "walking around the jail . . . laughing it up in the courtyard." (29RT 5512.)

In its massiveness and emotionalism, and with its subtle plea for death in testimony from a former mate of a victim who saw the defendant enjoying a moment of life in custody, this presentation was "so unduly prejudicial that it renders the trial fundamentally unfair" and, under which "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. [Citation.]" (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) On the facts of this case, the use of massive and very emotional victim impact evidence, coupled with calls for comparison between the value of the defendant's life and that of his victims, and testimony from a victim's former partner who saw the defendant experience some pleasure in life in jail, cannot be harmless.

XVI. THE TRIAL COURT'S REFUSAL TO PERMIT THE PENALTY JURY TO SEE ANY OF THE 33 LETTERS THAT PEOPLE ACQUAINTED WITH APPELLANT WROTE ON HIS BEHALF VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

A. The relevant facts

Under direct examination, appellant's mother testified that she sought "to have people write letters for" appellant. She identified a file folder containing "a number of letters that have been written on Michael's behalf" and "letters that have been written" to her at an unstated point in time. (28RT 5377-5378.)

The prosecutor objected to introduction of the letters on hearsay grounds. (28RT 5378.) Before the court ruled on the objection, the prosecutor cross-examined appellant's mother, adducing the fact that most of the letters were postmarked in San Jose and that most of her family lives there. (28RT 5381.)

The court read the letters and consulted with counsel outside the presence of the jury. When warned that the court considered the letters "clearly hearsay," defense counsel said he thought "the existence of the letters is probative of something that has to do with this case and the issues before this jury. And so I believe that I'm not necessarily offering them — I would like to have them come in for their truth, but I would offer them also simply for their existence, not as hearsay." (28RT 5435-5436.)

The court found the folder, marked as Exhibit 43, contained at least three types of letters which are not consistent with what appellant's mother

testified to. Two letters were written in 1993, and another is a letter that the court had "been led to believe was not solicited by [appellant's mother] but was volunteered by a person." The court noted that the remainder of the letters were consistent with appellant's mother's testimony, and asked for counsel's authority to admit them. (28RT 5436.)

Defense counsel invited the court to give limiting instructions, and said "the simple existence of those letters is probative of something about Michael Pearson's character and his worth as a human being." (28RT 5436.) The prosecutor accused defense counsel of wanting the jury to consider the letters for their truth that Michael Pearson is a good person. That he's a helpful person. That he's a hard worker. That he's all of those things." (28RT 5437.) The prosecutor noted that "the letter is the very letter [defense counsel] tried to introduce in the guilt phase." (28RT 5437.)

"The letter" to which the prosecutor referred was that of Frances Carter Collins, a former Housing Authority employee whose letter about appellant was mentioned in the guilt phase testimony of Connie Taylor. Ms. Taylor testified that Ms. Collins was, at the time of trial, "very sick" with breast cancer, unable to concentrate or work, and unable to come to court. (17RT 3251-3252.) The defense effort to place the letter in evidence in the guilt phase was blocked by the prosecutor's hearsay objection. (25RT 4818-4819.) In the penalty phase, the prosecutor argued that the court's ruling should be the same because the rules of evidence had not changed. (28RT 5437.)

The court ruled all the letters inadmissible in the penalty phase, citing *People v. Livaditis*, *supra*, 2 Cal.4th 759, respecting the state standard, and *Green v. Georgia* (1979) 442 U.S. 95, respecting the due process right to admission of reliable evidence relevant to a critical penalty phase issue. (29RT 5452-5453.)

The court declared that the letters "are primarily character reference type letters, or testimonials of Mr. Pearson" and therefore "cumulative" of previously introduced "substantial evidence regarding such character." The court said that three to four of the letter writers had already testified about their feelings for appellant. (29RT 5453-5454.)

The court said that counsel had failed to lay an adequate foundation, in that all the writers had Bay Area addresses, and could have been summoned. The court said there were "substantial reasons to doubt this particular statement's reliability" but did not make clear which statement he was referring to. (29RT 5454.)

Finally, the court said that all the statements, with the exception of three of them, were solicited by appellant's mother, at a time when litigation is pending. "I am led to believe that such statements are unreliable just because they are meant to support a person in a situation where his character is called into question in the actual heat of litigation." (29RT 5454.)

The court did not indicate how it was "led to believe" that such statements are unreliable. The court simply told defense counsel he could

nevertheless tell the jury that there were 33 "character references or testimonials" submitted on [appellant's] behalf." (29RT 5454.)

During penalty deliberations, the jury sent the trial court a note asking to see, among other things, "the letters entered into evidence during the penalty phase, if allowed." (3ACT 1026.) The court discussed the note with counsel off the record, and then told the jury that "the 33 letters were not received in evidence." (3ACT 1026.) Back on the record with counsel, the court reiterated this response, and asked counsel if they wished to make a further record on the matter. Both said no. (30RT 5627.)

B. The court's refusal to let the jury see the letters rendered the trial fundamentally unfair and requires reversal of the penalty judgment

First, the trial court's action was in no sense compelled by state law. As the trial court implicitly acknowledged, the fact that letters were written on appellant's behalf was relevant to the penalty determination. The letters themselves were clearly admissible as proof of that fact. The Evidence Code provided for their appropriate treatment as evidence of that fact. "When evidence is admissible . . . for one purpose and is inadmissible for another purpose," a trial court is not required to exclude the evidence, but rather "upon request" is required to give a limiting instruction "restricting the evidence to its proper scope." (Evid. Code, § 355.)

Second, federal constitutional law favors allowing the jury to see the letters for the proper purpose for which they were offered. In *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604 (plurality opinion), the Supreme Court

recognized that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any aspect of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

The Supreme Court has also held that the Due Process Clause requires that a state's rules not be applied mechanically when doing so would preclude the defendant from introducing highly relevant evidence at the penalty phase. Thus, the exclusion of hearsay testimony at the penalty phase of a death-penalty case violates the Due Process Clause of the Fourteenth Amendment where "the excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons exist to assume its reliability." (*Green v. Georgia*, *supra*, 442 U.S. 95, 97.)

"Substantial reasons" existed to "assume" the "reliability" of all the letters as evidence of how appellant was perceived and recalled by the writers. Their authenticity was undisputed. Each is unique, and appears to represent the writer's own perspective, opinions and judgments. (Exhibit 43, 1ACT 163-217.) They show that each writer thought enough of appellant to write a letter recalling the good things they saw in him. To the extent that some assert facts contrary to the evidence at trial, they show the writers' limitations of perspective and personal knowledge. There appears little if any basis for concern that the jury would misuse the letters if

allowed to read them as evidence of what appellant meant to the individual writers.

This is no less true of the letter written by Frances Collins, whose present unavailability as a witness was previously established. Guilt phase testimony of Ms. Collins's colleague, Connie Taylor, had authenticated the letter and established Ms. Collins's unavailability due to ill health at the time of trial. (17RT 3251-3252.) No contrary evidence was adduced. In seeking admission of the letter at the close of the guilt phase, defense counsel specifically referenced "the sentiment" she expressed in her letter. (25RT 4818.)

Ms. Collins's letter was indeed a unique expression of particular sentiment for appellant as a colleague. Ms. Collins's letter was dated September 15, 1995, about six months after the killings. It was addressed "To whom it may concern" and was signed "Adjectively yours, Frances D. Carter Collins, Co-Worker, Richmond Housing Authority, Section 8 Dept., Richmond, CA." (Exhibit 43, 1ACT 213.)

There are no sentences in the text. Instead, the letters of appellant's name are presented in a large bold font, followed by two to six adjectives that begin with those letters. Thus, the writer associates with appellant the words mature, mannerly, mild-mannered, matchless, magnanimous, independent, intelligent, integrity, industrious, imaginative, competent, capable, conscientious, courteous, candid, confident, honest, humble, helpful, hardworking, able, articulate, affable, attentive, agreeable, ability,

earnest, etc., and, in the end, neat, nice, nattily attired. (Exhibit 43, 1ACT 213.)

The relevance of the writers' particular feelings about appellant as expressed in their letters is as readily apparent as the relevance of the fact that 33 people wrote something on his behalf. Yet the court acknowledged only the latter. This failure to perceive the relevance of the writers' subjective views of appellant is striking, given the length at which the court had entertained subjective views of the victims.

In light of the imperative to allow the sentencer to consider positive views of the capital defendant's character or record, the trial court was mistaken in focusing upon the general reliability of testimonials "meant to support a person in a situation where his character is called into question in the actual heat of litigation." (29RT 5454.) Whether or not such evidence is reliable as a predictor of a person's behavior, it may well be reliable evidence that the supporter perceives the person as he stated.[54]

The prejudicial effect of the court's error is most evident in the court's negative response to the jury's mid-deliberation request to see the letters, which cited the fact that they were not "in evidence." (3ACT 1026.)

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[54] Notably, the trial court's concern about the reliability of testimonials offered for a person whose character is questioned in "the heat of litigation" is not one shared by the authors of our Evidence Code. Section 1100 of the Evidence Code permits character evidence "in the form of opinion, evidence of reputation, and evidence of specific instances of a person's conduct." It applies "without restriction . . . when character or a trait of character is an ultimate fact in dispute in the action." (1965, Law Revision Commission Comment.) Evidence that a person is reputed to be of good character is always a product of hearsay, and is nevertheless deemed admissible proof on the point. (Evid. Code, § 1324.)

Telling the jury that the letters were not "in evidence" allowed the jury to assume that the writers had said nothing the jury could fairly consider in mitigation.

In actuality, the jury could and should have considered the views of the writers much as they considered the views of associates of the victims, i.e., as a reflection of appellant's humanity and the value that other human beings saw in his character and in his life. In the penalty phase of a capital trial in which the prosecution has been allowed to have ten people testify to establish such things with respect to the victims, it is fundamentally unfair and conducive to cruel and unusual punishment to preclude the defendant from adducing similar evidence in the form of letters, the authenticity of which is not in doubt. (U.S. Const., 8th & 14th Amends.)

This error was not harmless. As previously noted, this case has nothing like the substantial aggravating evidence usually seen in cases in which a jury chose death. Appellant was a 37-year-old office worker with no prior criminal record. The jury's mid-deliberation request to see the letters confirms that their content was a matter of particular interest. Properly considered, the letter writers' reflections on appellant's humanity and the value of his life as perceived by others could well have tipped the balance in appellant's favor. The penalty judgment must be reversed.

XVII. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, IN EXCLUDING DEFENSE COUNSEL'S TESTIMONY RESPECTING APPELLANT'S REMORSE DUE TO COUNSEL'S FAILURE TO CREATE A WRITTEN DESCRIPTION OF HIS COMMUNICATIONS WITH HIS CLIENT TO ASSIST THE PROSECUTION IN PREPARING FOR TRIAL

A. The relevant facts

Prior to resting his case in mitigation, defense counsel told the court he wished to call himself as his "last witness." First, counsel said he wished to describe a conversation he had with appellant on September 3, and appellant's demeanor at the time, and that he also wanted to give some context to the "'smoke the bitch' remark that took place during the course of the interview with [appellant] that I was present at while Dr. Wilkinson and Dr. Kincaid were there." (29RT 5442-5443.)

The prosecutor pointed out the need to establish appellant's demeanor and behavior on other days, in order to support any inference as to what caused appellant to behave differently on September 3. Nevertheless, the prosecutor said the testimony should be "carefully circumscribed," without indicating how the court should do so. (29RT 5444.) The prosecutor asked for a further offer of proof, alleging that he did not have "any discovery on this at all." (29RT 5446.)

The trial court asked counsel to give "some sense of the tenor" of his anticipated "comments." (29RT 5446.) After hearing counsel's description, the court agreed that defense counsel should be permitted to testify about his and the doctors' plan to provoke appellant's emotional

outburst on September 6, and what each of them said to appellant "immediately before and immediately after" appellant made the "smoke the bitch" remark. (29RT 5448.)

After a short recess, counsel made a further offer of proof. He said he would testify "on the issue of remorse" that "the first several times" he interviewed appellant alone, appellant "would break down and start crying and talk about how he is so tore up." (29RT 5455.) The court said it did not "have any problem" with counsel being a witness "to that" except for the "discovery issue" and the attorney client privilege. (29RT 5455.)

Counsel and appellant assured the court that appellant was waiving the privilege with respect to the conversations counsel described, and that the prosecutor could inquire into all of their conversations if he wished. (29RT 5455-5456.)

The prosecutor then insisted that the testimony should be barred on lack-of-discovery grounds. In the prosecutor's words:

> If [defense counsel] wants to get up there, he darn well better sit down and write out every conversation he had with his client so we can have an opportunity to review it and test his memory before he gets up there with the opportunity to opine whatever he conveniently remembers or doesn't remember based on his point of view that right now he is trying to save his client's life. (RT 5456-5457.)

The prosecutor also interposed a hearsay objection to counsel testifying that appellant said he was sorry. Defense counsel agreed that he could not testify about what appellant said respecting remorse, and would speak only of what he saw. (29RT 5457.)

The prosecutor insisted that this was "not good enough. I want to know everything you saw, everything you talked about so I can put some context into what he saw. . . . I would need days and he would have to provide discovery to give me the opportunity to do that because I don't have the opportunity to do that right now." (29RT 5457-5458.)

The trial court noted that defense counsel was not on the witness list, and said it must assume from counsel's statements that the decision to testify was "last minute." (29RT 5458.) The court said it would allow counsel to testify only as to the two meetings initially described by counsel. "To go beyond that, I believe would call upon you to divulge matters of discovery which you have not divulged and you have not given me any reason why you have not divulged matters in discovery." (29RT 5458.)

Defense counsel confirmed that he had no notes of his conversations with appellant, "nothing in writing clearly that would be applicable in terms of discovery." (RT 5458.) The trial court was unmoved.

> All right. I think *there are certainly things if you anticipated you were going to be a witness on this matter that you as a witness could have prepared for the other side so that they would know the scope and nature of your testimony regarding these matters*, rather than just some sort of free-flowing state of consciousness type of situation. I believe that's only fair. That's appropriate. (29RT 5459, emphasis added.)

The trial court cited no authority for excluding testimony on such grounds, and appellant's research has uncovered none.

B. The order excluding counsel's testimony violated California law and denied appellant a fair jury trial, effective aid of counsel, and a reliable determination of penalty

California's reciprocal discovery statutory scheme, Penal Code section 1054 et seq., defines and delimits trial court authority with respect to discovery of defense evidence in criminal cases. (Pen. Code, §1054.5 subd. (a); *In re Littlefield* (1993) 5 Cal.4th 122, 129.) It requires disclosure of the name and address of witnesses intended to be called, and disclosure of any written statements of such witnesses (Pen. Code, §1054.1), but it does not require that either side create written statements to educate the other about the nature and scope of a witness's potential testimony.

Moreover, the trial court did not order defense counsel to prepare the written statement the court apparently believed defense counsel should have prepared "for the other side," much less give counsel an opportunity to comply with such an order. Subdivision (b) of section 1054.5 authorizes a trial court to make any order necessary to enforce the provisions of the statutory discovery scheme. Even when an intentional violation of the discovery law is established, subdivision (c) prohibits the exclusion of evidence unless "all other sanctions have been exhausted." (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1264.)

Finally, exclusion of evidence as a discovery sanction violates the defendant's rights to present evidence and to due process of law at where, as here, any discovery violation was not willful or designed to obtain a tactical advantage, and no significant prejudice was shown. (U.S. Const., 6th & 14th Amends.; *Michigan v. Lucas* (1991) 500 U.S. 145; *People v.*

Jordan (2003) 108 Cal.App.4th 349, 358; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758; *People v. Edwards*, *supra*, 17 Cal.App.4th 1248, 1264.) Where the evidence relates to the appropriateness of death as a punishment, exclusion of evidence without good cause surely violates the Eighth Amendment as well. (*Green v. Georgia*, *supra*, 442 U.S. 95, 97.)

Here, there was no evidence, and the trial court made no finding, of willfulness or design to obtain any tactical advantage. On the contrary, the court ruled on the assumption that defense counsel had not decided to call himself until the "last minute." (RT 5458.) The court did not find that he should have anticipated testifying, but only that "if" he had anticipated being a witness, there are "certainly things" he "could" have prepared. (29RT 5459.)

There was no evidence or finding that the truth-seeking function of the trial would be prejudiced by the lack of discovery. Counsel was available for cross-examination. The meetings he proposed to testify about could not have occurred more than 20 months prior to the time he offered his testimony. There is no evidence that a report of counsel's observations of appellant's behavior would have given the prosecutor or the court any information that could not be obtained through cross-examination.

In *Washington v. Texas* (1967) 388 U.S. 14 [18 L.Ed.2d 1019, 87 S.Ct. 1920], the court held that the Sixth Amendment right to compulsory process in criminal prosecutions includes the right to present a defense, and that this right is applicable to the states through the Fourteenth Amendment. "Just as an accused has the right to confront the prosecution's witnesses for

the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Id.* p. 19.)

Where an error implicates a federal constitutional right, it may not be held harmless unless its beneficiary proves, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, 386 U.S. 18, 25-26.)

The State cannot meet that burden here. The excluded evidence was unique, and related to a decisive sentencing issue. While other witnesses said appellant said he was sorry or that he seemed to be sorry for his crimes, the testimony counsel offered would have set forth observable behavior from which the jury could ascertain the validity and the significance of that conclusion.

The prosecutor identified and exploited the weakness in the state of the evidence on this point in his penalty phase closing argument. He claimed that appellant said he was sorry because he was preparing his defense (29RT 5552), but always saw his act as justified, on balance, and always felt ready to excuse his act, saying "but they were mistreating me." (29RT 5554.) This attack on the quality of appellant's remorse consumes more than two pages of transcript. (29RT 5552-5554.)

As the prosecutor recognized, evidence of remorse makes a compelling case for mercy, even when aggravating evidence abounds. Where, as here, aggravation is minimal, and significant mitigating circumstances exist, this error cannot be held harmless.

XVIII. THE TRIAL COURT'S ULTIMATE FAILURE TO INFORM THE JURY SUA SPONTE, PRIOR TO OR DURING DELIBERATIONS, THAT DELIBERATE AND PREMEDITATED INTENT TO KILL WAS AN "ELEMENT OF THE OFFENSE" AND THUS NOT AN "AGGRAVATING FACTOR" UNDER CALIFORNIA LAW ERRONEOUSLY PERMITTED THE JURY TO USE MID-VOIR DIRE INSTRUCTIONS TO TREAT THAT ELEMENT AS AN AGGRAVATING FACTOR, AND VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

As discussed in the Argument III, *ante*, the trial court instructed the jury prior to penalty phase deliberations that aggravation excludes the essential "elements of the offense" in the language of CALJIC No. 8.88. The court also told the jury that it was instructing "on all the law that applies to the penalty phase of this trial." (29RT 5491.) But the court did not give any instructions informing the jury that intent to kill or premeditation were elements of the charged offense. The instruction defining the crime of murder (CALJIC No. 8.11), which was given only at the guilt phase, said the mental state element of that offense was malice aforethought, express or implied. The instruction defining deliberate and premeditated murder (CALJIC No. 8.20) did not use the term "element" at all.

Innumerable decisions of this court have said that premeditation, deliberation, and willfulness or specific intent to kill, are "elements" of the crime of first degree murder on the single theory of that crime presented in the instant case. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th 345, 368;

People v. Hansen, *supra*, 9 Cal.4th 300, 307; *People v. Cummings*, *supra*, 4 Cal.4th 1233, 1288.)

Appellant's jury was given no such information, nor otherwise informed that the court had erred in its mid-voir-dire instructions asserting that all the crime facts, particularly premeditation, could be considered "aggravating." Thus, the only fully understandable instructions the jury received on the definition of "aggravating" in relation to premeditation and deliberation were the instructions rendered during voir dire.

Although this court has held that it is inappropriate to instruct jurors that they should not consider as an aggravating factor any fact used to find the defendant guilty of first degree murder unless it establishes something in addition to an element of that crime,[55] this court has not held that any element of the crime can or should be considered an aggravating factor. Moreover, this court has never held clarifying final instructions would be inappropriate where, as here, the trial court misstated the law during voir dire. In telling prospective jurors they could find aggravating circumstances in facts that are not "aggravating circumstances" but "elements of the crime" under California law, the trial court plainly created a special need to render a specific, fully understandable contrary instruction prior to deliberations.

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[55] See *People v. Moon*, *supra*, 37 Cal.4th 1, 40, and cases cited therein. All of them condemn instructions demanding that "the facts of the murder" be "comprehensively withdrawn from the jury's consideration." (*Ibid.*) Yet none say that "the facts of the murder" should all be considered *aggravating* as a matter of law, or that the elements of first degree murder should be considered *aggravating*, much less that trial courts should so instruct the jury.

The prosecutor augmented the need for corrective instruction when, in his closing argument, he told the jury that its finding of premeditation and deliberation in two counts of murder made this case a particularly appropriate one for capital punishment. His theory was premised on an assertion "that there is a lot of special circumstances cases out there where the killing was accidental or intentional, but it wasn't deliberate." (29RT 5518.) He made brief reference to a trial court instruction defining aggravation as "all those little details that go beyond the killing with malice aforethought, premeditation, deliberation, and includes other things as well." (29RT 5531.) But the context made clear that he was not conceding that the elements he listed can not be treated as aggravating circumstances; this was simply a preface to his argument that the jury should weigh appellant's apparent intention to kill Shirail Burton as a circumstance in aggravation, even though it was not a charged crime or an element of any of the conviction offenses. (29RT 5531.)

The trial court's failure to meet the jury's need for corrective instructions, sua sponte, requires reversal of the penalty verdict. As previously noted, the trial court created illusory factors in aggravation, made appellant appear far more deserving of death than he would otherwise appear, and thus put the proverbial "thumb on death's side of the scale" in the weighing process. (*Stringer v. Black*, *supra*, 503 U.S. 222, 232, 235-236.) In attaching the label "aggravating" to constitutionally impermissible factors, the court violated the Due Process Clause of the Fourteenth Amendment, as well as Eighth Amendment doctrine. (*People v. Benson*,

supra, 52 Cal.3d 754, 801.) The jury could well have rendered a decision in appellant's favor were it not for this error.

XIX. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY SUA SPONTE TO WEIGH IN FAVOR OF DEATH ONLY THE AGGRAVATING FACTS THAT ALL JURORS AGREED WERE PROVED BEYOND A REASONABLE DOUBT VIOLATED APPELLANT'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT UNDER THE UNITED STATES SUPREME COURT'S DECISIONS IN *APPRENDI, RING, CUNNINGHAM* AND *BLAKELY.*

Introduction

In asking the jury to choose death, the prosecutor did not rest his case upon the facts unanimously found beyond a reasonable doubt. On the contrary, he took advantage of state law allowing him to urge the jury to consider "facts" that were never found true and were only marginally supported by the trial evidence.

Calling upon the jury to condemn appellant as a racist, the prosecutor sought the inference that appellant, an African American, was contemptuous of Hispanic Americans and of victim Barbara Garcia because of her ethnicity. The prosecutor had elicited from Janet Robinson testimony that appellant told Robinson that he didn't like "those people," referring to people Robinson, an African American, described as "wetbacks, Mexicans, Latinos." (13RT 2523.) In closing argument, the prosecutor declared that Garcia was, to appellant, "a wetback" despite her status as a college graduate, Cinco De Mayo queen, and volunteer in the Hispanic community. There was no evidence that appellant had ever referred to Garcia in such terms, but since there was no instruction requiring that aggravation be

proved beyond a reasonable doubt, the jury could well have weighed appellant's alleged racism on death's side the scale.

With more solid evidence, the prosecutor asked the jury to weigh as an aggravating circumstance appellant's apparent intention to kill Shirail Burton when he was seen outside the Housing Authority Office building with gun in hand. (29RT 5530-5531.) The prosecutor had not charged attempted murder or otherwise submitted that issue for determination beyond a reasonable doubt; no instruction on the standard of proof to be applied to adjudicated criminal activity (CALJIC No. 8.87) was given or requested. On the contrary, the prosecutor pointed out to the jury that there was no burden of proof on the People at the penalty phase. (29RT 5503-5504.)

Most pointedly and repeatedly, the prosecutor asked the jury to impose death because appellant wanted to, and did, commit killings that would affect the lives of a lot of people with "tremendous shock waves" and linger like "radiation." (29RT 5533, 5536, 5542, 30RT 5596.) In the prosecutor's words, "That's the most aggravating part about this case. He understood what the shock waves were and he did it anyway. That puts him right at the top of the pyramid" of death-eligible defendants. (30RT 5536.) The evidence supporting the claim that appellant had such things in mind was weak at best. It consisted of appellant's pre-crime references to "101 California" and one prosecution witness's affirmative answer to the prosecutor's request for affirmation that the crime at 101 California "harmed a lot of people, publicity was great because it affected a lot of

people." (17RT 3343.) Anticipating his inability to introduce solid evidence that appellant viewed 101 California as the prosecutor did, the prosecutor told the jurors that the information about the repercussions of that crime he laid out in his opening statement was "presumably . . . the information that Mr. Pearson . . . was relying on in expressing himself to his fellow employees about doing a 101 California." (10RT 1967-1968.)

Although the trial court could well have instructed the jury to use the reasonable doubt standard at least with respect to the prosecutor's implicit claim that appellant attempted to kill Shirail Burton without defying California law (see CALJIC No. 8.87) the trial court gave no penalty phase burden of proof or unanimity instructions. The trial court said nothing to discourage the jury from giving full weight to aggravating circumstances that were proved by scintillas of evidence, or accepted as true by only a small, vocal percentage of the jury. And in accordance with the law as settled at that time, the trial court did not place upon the People the burden to prove beyond a reasonable doubt that the aggravating facts were indeed "so substantial" in comparison to the mitigation that death was the appropriate sentence. (See, e.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 ["neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ."].)

No death sentence imposed under these circumstances can be squared with the rights guaranteed by the Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. In *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." But this pronouncement must be reconsidered in light of the Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. ___, 166 L.Ed.2d 856 [hereafter *Cunningham]*; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531 [hereinafter *Blakely*].

A. The Reasonable Doubt Standard and the Unanimity Requirement must now be applied in making all of the factual findings essential to the determination that a defendant should be put to death

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring*, *supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing

Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring*, *supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. The Supreme Court ruled that Washington's procedure was invalid because it did not comply with the right to a jury trial. To quote:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours," 4 W.

> Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," [citation]. (*Blakely v. Washington, supra,* 542 U.S. 296, 301, emphasis added.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that *any* fact (other than a prior conviction) that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 124 S.Ct. 2531, 2537, emphasis in original.) "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment." (*Id.* at p. 2543, emphasis in original.)

Finally, in *Cunningham*, the Court declared unconstitutional California's Determinate Sentencing Law [DSL]. Mr. Cunningham had been sentenced in state court to an upper term of 16 years for an offense punishable by a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. In *Cunningham*, the upper term was imposed based on circumstances in aggravation found by the sentencing judge by a preponderance of the evidence. The U.S. Supreme Court held that by placing sentence-elevating factfinding within the judge's province, the DSL violated the defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. "Factfinding to elevate a

sentence from [the midterm to the upper term] . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard. . . ." (*Cunningham v. California*, supra, 166 L.Ed.2d 856, 875.)

B. The failure of defense counsel to object or to request the instructions required to impart the rules established by *Apprendi, Ring, Cunningham* and *Blakely* does not justify denying relief on direct appeal

This court has held that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra*, 15 Cal.4th 269, 276-277 [citing *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial].)

Because appellant complains of a the denial of his Sixth, Eighth, and Fourteenth Amendment rights to a unanimous jury determination and proof beyond a reasonable doubt on the aggravating factors, his lack of an objection in the superior court does not forfeit appellant review.

Furthermore, waiver cannot be premised on a failure to take action in the court below when such action would have been futile. (See, e.g. *People v. Hill, supra*, 17 Cal.4th 800, 820; *People v. Abbaszadeh, supra,* 106 Cal.App.4th 642, 648-649; see also *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by higher court on issue].) At the time of appellant's trial, the United States Supreme Court had not yet decided *Apprendi, Ring, Cunningham* or *Blakely*. This court's

determinations on the inapplicability of jury trial rights to aggravating circumstances would have required that the trial court reject appellant's claims at trial.

Finally, this Court has discretionary power to review the issue. "The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. . . . Whether or not it should do so is entrusted to its discretion. (*People v. Williams*, *supra*, 17 Cal.4th 148, 161-162, fn. 8.)

Violation of the federal constitutional right to a jury trial and proof beyond a reasonable doubt constitutes an egregious violation of appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and thus affects his substantial rights. And it constitutes a pure question of law. Accordingly, the issue is properly preserved.

C. Reversal is required

The failure to apply the reasonable doubt standard when its use is demanded by the Constitution is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) Moreover, even applying the harmless error standard enunciated in *Chapman*, respondent would be unable to prove the constitutional violations harmless beyond a reasonable doubt.

The elements of the offense and special circumstance allegation — the only facts submitted to the jury for unanimous determination under the reasonable doubt standard — made appellant only barely eligible for the death penalty. Mitigating circumstances were substantial. Moreover, the facts that the prosecutor argued in seeking the death penalty without submitting them for unanimous determination by the jury when applying the reasonable doubt standard were distinctly egregious. They included a charge that appellant's killing of Garcia expressed contempt for all Hispanic Americans, and that his overarching goal was that of a terrorist, intentionally harming innocent people in order to achieve "shock waves" and "radiation." Moreover, these allegations were very thinly established, and would not likely have been found true if analyzed under any burden of proof or held up for unanimous jury determination. Consequently, it is unlikely that a properly instructed jury would have considered these "facts" in weighing aggravating against mitigating circumstances in the final analysis, let alone have found that aggravation outweighed mitigation beyond a reasonable doubt.

The judgment of death must be reversed.

XX. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL AND A DEATH JUDGMENT THAT MUST BE REVERSED UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Where no one error appears to warrant reversal, the cumulative effect of all the errors may require reversal in accordance with the due process guarantee. (*Taylor v. Kentucky* (1978) 478, 487, fn. 15.) This is especially true in a case such as this, where the facts make the death sentence an aberration.

This case has nothing like the substantial aggravating evidence usually seen in cases in which a jury chose death. Appellant was a 37-year-old office worker, who had no record of criminal violence or prior convictions. In his single episode of criminal violence, he killed two people quickly, without gratuitous infliction of pain or humiliation and without other criminal activity. Afterwards, he surrendered to police without resistance. While there was evidence that he thought and talked about creating deadly havoc at the Housing Authority before he faced the final provocation, his thinking was precipitated by a long course of on-the-job provocation, a factor that most reasonable people would consider, to varying degrees, mitigating. There was evidence of significant neuropsychological impairment, and the impairment was causally related to the capital crime.

Multiple errors of court and counsel impaired the jury's ability to hear and weigh all the facts. Prosecutorial misconduct was severe, pervasive, and unchecked by the trial court. From the jury selection

procedure through the evidentiary and argument phases of the trial, the trial court made decisions against appellant's interests that were fundamentally unfair. Appellant "was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. [He] is thus entitled to a reversal of the judgment and a retrial free of these defects." (*People v. Hill*, *supra*, 17 Cal.4th 800, 847.)

XXI. APPELLANT'S SENTENCE MUST BE REVERSED BECAUSE CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Introduction

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.) See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps almost every murder into its grasp. It places the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each

other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Penal Code § 190.2 is impermissibly broad

Section 190.2 violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution both on its face and in its application to appellant's case because it does not meaningfully narrow the pool of murderers to those most deserving of consideration for the death penalty. The 1978 death penalty law came into being not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained over two dozen special circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and

unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down on the grounds that it allows arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prevailing international law.

B. Penal Code § 190.3(a) as applied allows arbitrary and capricious imposition of death

Section 190.3, factor (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of

every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, can be and have been characterized by prosecutors as "aggravating" within the statutes meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, or having had a "hatred of religion," or threatened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery. It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts — or facts that are inevitable variations of every homicide — into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in the context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal Constitution.

C. California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, factor (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to condemn a fellow human to death.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some

knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[56] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code § 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*, 536 U.S. 584; Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), its basis can be, and should be, articulated.

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[56] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra*, 126 S.Ct. 2516 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

Notably, California's death penalty statute, as interpreted by this court, forbids inter-case proportionality review, a measure which other jurisdictions us to reduce arbitrary, discriminatory, and disproportionate impositions of the death penalty. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing

scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris,* 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See section A of this Argument, *ante.*) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*, 126 S.Ct. 2516) this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This court's categorical refusal to engage in inter-case proportionality review compounds other problems with the scheme so as to violate the Eighth Amendment.

D. California's death penalty scheme denies the right to a unanimous jury determination beyond a reasonable doubt of all facts essential to the sentencer's decision to impose a death penalty

Except as to the special circumstance allegations, appellant's jury was not told that it had to find any aggravating factor true unanimously or beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any other aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before voting for a death sentence.

All this was consistent with this court's previous interpretations of California's death penalty scheme. (See, e.g., *People v. Fairbank, supra*, 16 Cal.4th 1223, 1255, *People v. Stanley* (2006) 39 Cal.4th 913, 963.)

Yet this was not consistent with recent decisions of the United States Supreme Court case law construing the Sixth Amendment right to trial by jury and related due process doctrines. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 478 [Sixth and Fourteenth Amendments preclude imposition of a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt]; *Ring v. Arizona*, *supra*, 536 U.S. 584 [applying *Apprendi* to capital sentencing scheme]; *Blakely v. Washington*, *supra*, 542 U.S. 296, 301 [aggravated sentence based in part on judicial finding of "deliberate cruelty" legal under state law upon finding compelling and exceptional circumstances declared invalid under United States Constitution due to lack of unanimous jury finding on the issue].)

Most recently, in *Cunningham v. California* (2007) 549 U.S. ___, 166 L.Ed.2d 856, the United States Supreme Court struck down the part of the California Determinate Sentencing Law that permits imposition of the upper term on the basis of facts, other than a prior conviction, not found by a jury beyond a reasonable doubt or admitted by the defendant. The court held the California system violates the Sixth and Fourteenth Amendments.

Prior to *Cunningham,* this court repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930;

People v. Snow (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker* [(2005) 543 U.S. 220], a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[57] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line

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[57] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p. 873.)

rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham*, *supra*, 166 L.Ed.2d 856, 873.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable."

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* 166 L.Ed.2d at p. 874.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to

life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance. (Pen. Code, § 190.2.) Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC 8.88 (7th ed. 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, *supra*, 124 S.Ct. at p. 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

E. California's death penalty scheme denies the right to a unanimous jury determination beyond a reasonable doubt of unadjudicated criminal activity presented in aggravation

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance permitted under section 190.3, factor (b), may violate due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable and unconstitutional. (See, e.g., *Ring v. Arizona, supra*, 536 U.S. 584; *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*; *Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra;* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Although California law requires that prior criminal activity be used in the penalty trial of a capital case only if such activity is proved beyond a reasonable doubt (*People v. Varnum* (1969) 70 Cal.2d 480, 485-486) it fails to require that the jury's finding of such proof be unanimous. And in

appellant's case, as previously noted, even the requirement of proof beyond a reasonable doubt was ignored.[58]

F. This court's decisional law allows trial courts to instruct juries on penalty phase duties in terms that discourage the meaningful consideration of mitigation, and appellant's jury was so instructed

Appellant's jury was instructed to consider "extreme" mental or emotional disturbance and "substantial" impairment in fixing punishment. Use of restrictive adjectives in listing potential mitigating factors for the jury has long been considered proper by this court. (*People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Fairbank*, *supra*, 16 Cal.4th 1223, 1255.) However, such use of adjectives discourages consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

Appellant's jury was not instructed that all statutory mitigators must indeed be weighed in mitigation, and only in mitigation. This court has

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[58] Appellant's jury was not instructed on the need for such a unanimous finding; nor even on the need to find any unadjudicated criminal activity proved beyond a reasonable doubt. Nevertheless, the prosecutor urged the jury to weigh as an aggravating circumstance appellant's apparent intention to kill Shirail Burton when he was seen outside the Housing Authority Office building with gun in hand. (29RT 5530-5531.) The prosecutor had not charged attempted murder or otherwise submitted that issue for determination beyond a reasonable doubt; no instruction on the standard of proof to be applied to adjudicated criminal activity was given or requested. On the contrary, the prosecutor pointed out to the jury that there was no burden of proof on the People at the penalty phase. (29RT 5503-5504.)

held that such instructions are not necessary. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) However, this instructional deficit allows jurors to give little or no weight to the absence of prior felony convictions or a lack of any history of violent crime, even though this court knows those two factors to be significant mitigators. (*People v. Crandell*, *supra,* 46 Cal.3d 833, 884 ["the absence of prior violent criminal activity and the absence of prior felony convictions are *significant* mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past."].) This deficit thus enables jurors to disregard mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

Appellant's jury was never instructed to refrain from treating mitigating evidence (such as evidence establishing a defendant's mental illness or defect) as grounds to impose an aggravated sentence. Such lack of instruction is consistent with this court's decisional law. (See *People v. Morrison* (2004) 34 Cal.4th 698, 730.) However, this deficit enables jurors to disregard mitigation, and find aggravation where none exists as a matter of law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

Appellant's jury was never told that California law precludes voting for death unless death is deemed the appropriate sentence in light of all the circumstances of the case. (*People v. Brown* (1985) 40 Cal.3d 512, 541.)

Rather, per CALJIC No. 8.88, the jury was told it had only to find that death was "warranted." This instructional deficit was consistent with this court's decisions, but it denied appellant the benefit of California law and denied him due process and a reliable sentencing proceeding in turn. (U.S. Const., 6th, 8th & 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) A reasonable juror can find that death was "warranted" in the sense of being permitted, yet not "appropriate" in that it was not especially suitable or not compatible with the juror's overall judgment. The distinction is particularly important where, as here, the aggravating circumstances were minimal at best.

G. The California sentencing scheme violates the equal protection clause of the federal Constitution by denying procedural safeguards to capital defendants which are afforded to non-capital defendants

The U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*, as in *Snow*, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections III.A.-III.B., ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section III.C., ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d 417, 421; *Ring v. Arizona*, *supra*, 536 U.S. 584.)

H. California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the 8th and 14th Amendments; imposition of the death penalty now violates the 8th and 14th Amendments to the U.S. Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (The Death Penalty: Abolitionist and Retentionist Countries (Mar. 4, 2007) Amnesty International <http://web.amnesty.org/pages/deathpenalty-countries-eng> (as of Apr. 12, 2007).)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'"

(1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes." Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION

The conviction and sentence were obtained through a fundamentally unfair trial and must be reversed.

DATED:_____

Respectfully submitted,

_____

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The foregoing opening brief on appeal was produced in 13 point proportional Times Roman typeface and contains 93,918 words as counted by WordPerfect version 12.

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PROOF OF SERVICE BY MAIL

RE: People v. Michael Pearson, No. S085157

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached appellant's opening brief by placing same in a sealed envelope addressed as indicated below, and causing same to be mailed with postage thereon fully prepaid.

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