SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL NATHAN HENDERSON Defendant and Appellant.	No. S098318 (Riverside Superior Court No. INF027515)

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Riverside

Hon. Thomas N. Douglass, Judge

APPELLANT'S OPENING BRIEF

DEATH PENALTY

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Reider, *The Right of Self-Representation in the Capital Case* (1985) 85 Colum. L.Rev. 130, 152-153 345

Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Geo. L.J. 827 225

Wegner et al., *California Practice Guide: Civil Trials and Evidence* (2010 rev.) ¶¶ 8:1364-1365 ..... 188, 191

3 Witkin, *California Evidence* (4th ed. 2000) "Presentation At Trial" §182, p. 245 188

Defendant and appellant Paul Nathan Henderson ("Mr. Henderson" or "Defendant") submits this opening brief on the automatic appeal from his conviction for first degree murder with two special circumstances found true and sentence of death and from his conviction on multiple non-capital counts. The case was tried in Riverside Superior Court, Case No. INF 0207515, before the Honorable Thomas N. Douglass, presiding.

I. INTRODUCTION

The conviction and sentence of death must be reversed. The crime at issue – though undoubtedly serious – became a *capital* crime for one reason, and one reason only: the deceased, Reginald Baker, had, in the words of the state's testifying pathologist, "severe, severe" heart disease and was a candidate for "sudden death" at any moment. During a robbery and burglary at his home, Mr. Baker had a heart attack and died.

The crime investigation revealed no forensic evidence, such as fingerprints, hair, blood or DNA, which pointed in the direction of Mr. Henderson or any suspect for that matter. But a professional snitch, angling for a reward, fingered Mr. Henderson as the perpetrator. Because the testimony of a snitch is an especially weak foundation upon which to build a capital case – particularly where no physical evidence links the suspect to the crime – the police knew they needed something more and they went after it. They arrested Mr. Henderson in the middle of the night and held him in custody for hours

before they read him his *Miranda* rights. Although he waived those rights, Mr. Henderson initially said little or nothing. Then, in response to a question, he said, "I want to speak to an attorney first. . . . I need to find out . . . I need to find out. . . ." The officers – one of whom testified he knew Mr. Henderson wanted to consult with counsel – ignored this unequivocal invocation of his Fifth Amendment rights. Questioning continued unabated and Mr. Henderson eventually made incriminating statements. Inexplicably, the trial court permitted Mr. Henderson's statements to be admitted at trial, erroneously concluding that his invocation of the right to counsel was somehow ambiguous. The unlawfully obtained confession formed the centerpiece of the prosecution case against Mr. Henderson and was easily the most damaging evidence against him. As a result, this Court need look no further than the erroneous admission of the confession to reverse the judgment. But there is more.

Because Mr. Henderson is African-American and the victims were white, the trial court should have been sensitive to the possibility of racial bias in the jury. However, the trial court

- denied a defense request to conduct discovery into the racial makeup of jury venires appearing at the court in Indio where this case was tried, despite evidence suggesting systematic underrepresentation of African-Americans; and then,

- granted a prosecution peremptory challenge to an African-American juror – which insured no African-Americans would serve on the jury – and, in doing so, relied upon the now-discredited state-law standard which required a defendant to establish a "strong likelihood" of bias at the first step under *Batson v. Kentucky*.

The jury which tried and convicted Mr. Henderson consisted of 11 white jurors and one Hispanic juror.

At trial, not only was there no physical evidence introduced to link Mr. Henderson to the crimes, the lone eyewitness, Mrs. Baker, who had observed the perpetrator throughout the crime, (1) described an assailant with facial features Mr. Henderson did not have; (2) assisted in a composite sketch of the perpetrator which did not resemble Mr. Henderson; and (3) declined to identify him as the perpetrator, both in a lineup and in open court. Indeed, Mr. Henderson's defense was that someone other than he committed the crime. At every turn, however, the trial court hobbled Mr. Henderson's ability to develop and present that defense. In particular, the trial court

- denied a defense request to conduct discovery into a string of nearly identical home invasion robberies committed in the vicinity before and after this crime, including while Mr. Henderson was

incarcerated, for the purpose of developing third party culpability evidence;

- excluded testimony of an expert who would have testified to scientific research pertaining to eyewitness observations that could have led the jury to conclude that Mrs. Baker's rejection of Mr. Henderson as the perpetrator was reliable and believable; and,
- refused even to instruct the jury on the factors jurors should consider in evaluating eyewitness testimony.

The trial court also crippled the defense by interfering with Mr. Henderson's rights to confront witnesses against him. Contrary to the principles articulated by the U.S. Supreme Court in *Crawford v. Washington* and its progeny, the trial court

- permitted Mrs. Baker to read virtually her entire direct testimony from a diary as "past recollection recorded" even though there was no showing of any kind that she could not recall the events; and,
- permitted a prosecution pathologist to testify to critical findings in the report of the autopsy of the victim, an autopsy which had been performed by another pathologist who was not shown to be unavailable to testify.

These errors, singly and in combination, paved the way for the jury to convict Mr. Henderson of capital murder. But there is yet more.

During jury selection, over defense objection, the prosecutor successfully challenged a prospective juror who harbored reservations about the death penalty, even though the prosecutor admitted the juror's beliefs about capital punishment were not a sufficient basis for a challenge. Later, just as the jury returned its guilty verdict, the trial court ruled that Mr. Henderson would be required to wear an electric stun belt at the penalty trial – this despite the absence of any finding that there was a "manifest need" for the restraint and despite the trial court's repeated acknowledgements that Mr. Henderson had never presented a threat during the proceedings.

Imposition of the stun belt had a predictably devastating psychological effect on Mr. Henderson. Shortly after the ruling, Mr. Henderson, who had previously attempted suicide, was permitted to relieve his counsel and represent himself so that he could "get this over with." To that end, his "defense" consisted of passively sitting at counsel table. The trial court knew that defense counsel had developed potentially powerful mitigating evidence, but did not appoint counsel to present that evidence to the jury. As a result, the jury was not fully informed and the resulting verdict cannot be considered reliable under the Eighth Amendment.

If the trial court's rulings increased the odds of a death sentence, the prosecutor loaded the dice to guarantee the result. On its face, the death sentence is difficult to square with the record, even accounting for the fact that

the jury heard only aggravating evidence. The victim's death was senseless and tragic to be sure, but it was essentially accidental; it could have occurred without the crime. And Mr. Henderson's criminal past was noteworthy for its lack of violence. In the most serious of the prior crimes, he carried fake weapons and took steps to ensure that victims were not harmed. Unwilling to permit the jury to decide the case on this evidence alone, the prosecutor undertook a campaign at the guilt and penalty trials to enrage the jury by manufacturing facts, arguing legal theories as to which the jury was not instructed and demonizing Mr. Henderson. That campaign – in conjunction with the numerous other flaws below – was a success: the jury returned a verdict of death after less than 90 minutes of deliberation.

Put simply, Mr. Henderson deserved a fair trial and did not get one. This Court should reverse.

II. STATEMENT OF THE CASE

A. The Charges Against Mr. Henderson.

In Count I of a complaint filed on July 24, 1997, Mr. Henderson was charged with murder of Reginald Baker (Cal. Penal Code ("PC") § 187) and two special circumstances: murder committed in the course of a robbery and murder committed in the course of a burglary. (PC §§ 190.2(a)(17)(A), (G.)) An enhancement for use of a knife was also alleged. (PC §§ 12022(b), 1192.7(c)(23).) He was also charged with attempted murder of Peggy Baker

(Count II), robbery (Count III), burglary (Count IV), grand automobile theft (Count V) and attempted auto theft (Count VI). The complaint alleged that he had been convicted of auto theft in 1989 and 1990, of being a felon in possession of a firearm in 1991, and of robberies in 1993 and included a special allegation that a 1993 robbery was serious and violent. (1 Clerk's Transcript ("CT") 1-4.)

B. Initial Procedural Matters.

During the first year after Mr. Henderson was charged, several different attorneys were appointed to represent him and then subsequently relieved because of conflicts. On April 8, 1998, the trial court appointed attorney Clark Head to represent Mr. Henderson. (1 CT 65, 67, 70.) On or about September 21, 1999, the trial court appointed attorney John Hemmer to assist Mr. Head. (1 CT 293.)[1]

On November 20, 1998, the case was assigned to the Hon. Thomas Douglass for all purposes. (1 CT 192.) The progress of the case was thereafter slowed, in part because of discovery-related issues, including efforts to enhance audio recordings of a custodial interrogation of Mr. Henderson. (*See, e.g.,* 1 CT 242-247, 264-267; 2 CT 297-308, 325, 328-341.)

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[1] See *Keenan v. Superior Court* (1982) 31 Cal. 3d 424, 431-434.

C. Preliminary Hearing.

The preliminary hearing commenced on January 27, 2000. (2 CT 419 *et seq.*) Over objection by defense counsel, the trial court permitted the preliminary hearing testimony of Peggy Baker to be videotaped. (2 CT 421-424, 429-432.) During her testimony, and over objection by defense counsel, the trial court ruled that Mrs. Baker would be permitted to read into the record a written account of the crime as "past recollection recorded." (2 CT 424-427, 441.)

Defense counsel moved to exclude the testimony of Officer Carl Wolford concerning statements Mr. Henderson made during a custodial interrogation on the grounds that the statements had been elicited in violation of Mr. Henderson's right to consult counsel before further questioning under *Miranda v. Arizona* (1966) 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477. (2 CT 494-499, 500-513.) The trial court denied the motion, concluding that Mr. Henderson's request for counsel was not unequivocal and, therefore, the evidence was admissible pursuant to *Davis v. United States* (1994) 512 U.S. 452. (2 CT 513-514.)

At the conclusion of the preliminary hearing, the trial court denied defendant's motion to dismiss Count II, attempted murder of Mrs. Baker. (2 CT 557-562.) Thereafter, defense counsel brought a motion, pursuant to PC § 995, to set aside the information on the grounds that defendant's statements to

the police had been obtained in violation of his rights protected by *Miranda* and *Edwards*. (3 CT 600-610; 4 CT 1145-1162) The trial court denied the motion. (*Id.*)

D. Other Significant Pre-Trial Motions.

Upon request of defense counsel, the trial court and parties agreed that any objection at trial would be deemed to include all relevant grounds, including under the California and U.S. constitutions. (1 RT 7-8; see 3 CT 637, 862-865.)

The defense brought a motion to discover evidence of other, similar crimes that had occurred in the vicinity at or around the time of the incident at issue. The trial court denied the motion on the grounds that the defense had made an insufficient showing to justify the discovery. (1 CT 158 *et seq.*; 1 CT 215-224, 238, 273-280.)

The defense brought three related motions pertaining to the representation of minority groups on Riverside County venires: a motion to distribute a questionnaire to 500 prospective jurors to determine the percentage of African-Americans among the group; a motion to quash the jury panel based on underrepresentation of African-Americans in Riverside County venires called to the courthouse in Indio where the case was to be tried; and a motion for a change of venue to a court in which no such underrepresentation existed. (1 RT 13-28; 3 CT 649-666.) The trial court took testimony and denied the

motions, concluding that an insufficient showing had been made to justify sending out the questionnaires, broadening the area of the juror summons to include cities not normally served by the Indio court or changing venue. (1 RT 13-28, 202-275.)

Finally, defense counsel brought a motion seeking discovery into the Riverside District Attorney's charging practices in capital cases. The defense contended that available evidence suggested racial bias in the decision to seek the death penalty. (3 CT 680-690; 1 RT 43-55.) The trial court denied the motion on the grounds that the defense had made an insufficient showing. (3 CT 870; 1 RT 55.)

E. Jury Selection.

Jury selection commenced on January 2, 2001 and concluded on January 29, 2001. (2 RT 381-10 RT 2423.) During the death qualification process and over defense counsel's objections, the trial court excused for cause prospective juror N., whom the prosecutor conceded could not properly be challenged based upon her views regarding the death penalty. (7 RT 1691; 10 RT 2243.)

After all excusals for hardship and for cause during death qualification, the more than 100 potential jurors available for voir dire included only three African-Americans. (10 RT 2392.) One of those three (Juror D. B.) was called to the jury box late in the process of peremptory challenges (10 RT 2390); the

prosecution challenged her. (10 RT 2391.) Defense counsel objected to the challenge under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal. 3d 258. (10 RT 2392.) The prosecutor argued that defense counsel had not made a sufficient showing of racial bias at the first *Batson* step. The trial court agreed, concluding that the defense had failed to show a "strong likelihood" of bias. Although the prosecution had not asserted a racially neutral basis for the challenge, the trial court said that such a basis existed. (10 RT 2397.) The jury selection process was completed before the remaining two African-American prospective jurors could be called to the box.

The trial court later denied a defense request for additional peremptory challenges after all challenges had been exhausted. (10 RT 2400-2414.) The jury ultimately consisted of 11 non-Hispanic white jurors and one Hispanic juror. (5 CT 1335, 1374; 6 CT 1452; 14 CT 3813, 3852; 15 CT 3931, 4008; 25 CT 6756, 6834, 6873, 6912; 37 CT 9976.) There were five alternates: three non-Hispanic whites and two Hispanics. (5 CT 1413; 14 CT 3774, 3891; 15 CT 3969; 25 CT 6795.)

F. Guilt Phase.

The prosecutor gave her opening statement and witness testimony commenced on January 30, 2001. (11 RT 2437 *et seq.*) On February 20, 2001, the People rested their case-in-chief and the defense case commenced. (17 RT 3773.) During the defense presentation, Mr. Henderson testified on his own

behalf. The defense rested, and the People presented rebuttal and rested, on February 26, 2001. (19 RT 4119.) Counsel made closing arguments on February 27, 2001 and the judge instructed the jury the same day. (19 RT 4340-4385; 39 CT 10718-10722.) Jury deliberation commenced on the morning of February 28, 2001; the jury returned its verdict of guilty on all counts with both special circumstances found true the following morning. (20 RT 4455-4465; 39 CT 10723, 10818.)

G. Imposition Of A Stun Belt On Mr. Henderson.

While the jury was deliberating following the guilt trial, the prosecutor brought a motion to have a stun belt placed on Mr. Henderson. (20 RT 4407-4408.) Over objection by defense counsel, the trial court granted the request. (20 RT 4446.)

H. Motion For Self-Representation.

On March 7, 2001, Mr. Henderson made a motion to relieve his counsel and to represent himself at the penalty phase. The trial court granted the motion on March 8, 2001. (20 RT 4540-4544; 39 CT 10832; 40 CT 10851-10853.) The trial court permitted Mr. Henderson's now-relieved counsel to make an offer of proof for the record of the evidence counsel would have presented at the penalty trial. (20 RT 4548-4558; 40 CT 10851-10853.)[2]

[2] This portion of the Reporter's Transcript was originally sealed and on, June __, 2012, this Court granted Mr. Henderson's motion to unseal the record.

I. Penalty Phase And Judgment.

The penalty trial commenced on March 12, 2001. (20 RT 4581; 40 CT 10867 *et seq.*) The prosecution rested its case on March 14, 2001. Immediately thereafter, and without calling any witnesses, Mr. Henderson rested. (21 RT 4790; 40 CT 10875 *et seq.*)

On the morning of March 19, 2001, the prosecution made its final argument; Mr. Henderson gave an "argument" that consisted of less than one full page of Reporter's Transcript. (21 RT 4883-4884; 40 CT 11014 et seq.) The trial court instructed the jury, and deliberations commenced at 11:15 a.m. The jury was excused for lunch at 12:01 p.m., returned at 1:33 p.m. and, about 45 minutes later, reached a verdict of death. (21 RT 4915-4917; 40 CT 11014-11017.)

The court denied the automatic motion to modify the verdict on May 25, 2001, and sentenced Mr. Henderson to death on Count I of the indictment. (21 RT 4971-4975.) On the remaining counts, the trial court sentenced Mr. Henderson to a total of 15 years in prison, less credit for 1641 days, and ordered restitution of $10,000. (21 RT 4976-4991; 40 CT 11076 et seq.)

III. STATEMENT OF FACTS

A. Prosecution's Case-In-Chief At The Guilt Phase

1. Witnesses to the events of June 22 and June 23, 1997

In June 1997, Peggy Baker[3] and her husband Reginald lived at 102 Mt. Ararat in Cathedral City. (2 CT 435.) Mr. Baker was about 71 at the time. Around 10:30 p.m. on June 22, 1997, she and Mr. Baker were watching television. At that time, an African-American man entered her home through a sliding glass door. (2 CT 442.)[4] He was dressed in black pants, a black, zippered sweatshirt and a black or navy blue knit cap drawn down to his eyebrows. He said, "Don't yell or scream and no one will get hurt." (2 CT 442.) He held a "butcher knife" to Mr. Baker's throat. (2 CT 442.)[5]

Mr. Baker asked what the man wanted and he answered that he wanted the keys to their car. (2 CT 442.) The man instructed them to go into the bedroom and lie on the bed; he helped Mrs. Baker from her chair. (2 CT 442.) He asked where Mr. Baker's ties were located, got two of them and tied up Mr. Baker. (2 CT 443.) He asked where the bed sheets were located, retrieved one, tore it up and tied Mrs. Baker. (2 CT 443.) He then stuck a knife in a

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[3] At trial, counsel stipulated that Mrs. Baker was unavailable to testify, that People's Exhibit 16B was a videotape of her preliminary hearing testimony and that the videotape could be played for the jury and need not transcribed. (11 RT 2491-2492.) The transcript of Mrs. Baker's testimony at the preliminary hearing appears at 2 CT 433-467.

[4] She initially testified that the intruder was "Caucasian." (2 CT 437-438.)

[5] The prosecutor later conceded that Mrs. Baker was mistaken and what she thought was a knife was actually a tool used for stealing cars. (19 RT 4317.)

pillow. (2 CT 443.) He turned Mr. Baker over and asked where their wallets were located; he took less than $25 from the wallets. (2 CT 443.) He asked whether they had any guns, and asked about jewelry and a walking stick that he saw in the home. (2 CT 443.) The man put a gag in Mr. Baker's mouth. (2 CT 444.) Mrs. Baker told him that her husband was a "mouth breather" and might have a heart attack. The man said that the gag would be easy to get out. He tied her loosely and put a gag in her mouth loosely. (2 CT 444.)

The man went into the kitchen, then returned and cut her ankle binding. She untied one hand. (2 CT 444.) The man told her to go into the bathroom and she complied. He propped the door open and turned on the light. Up to this point, he had not been violent. (2 CT 444, 456, 458-459.) He left the room and she could hear him talking to himself. (2 CT 444.) On cross examination, she said she was unable to tell whether he was talking to himself or to someone else; it could have been either, but she had the impression that someone else was there. (2 CT 458, 463-464.) She heard a car door slam. (2 CT 445, 463.) The man returned to the bedroom and asked her to come out and remove the gag from her husband's mouth. (2 CT 445.) She came into the room, he sat down on the bed and put her in a stranglehold. He released her and began to hit her. (2 CT 445.) She fell to the floor and feigned unconsciousness. (2 CT

445.) He then left the home. (2 CT 445.)[6] She crawled over to the bed and saw that her husband was dead and had a bloody ring around his neck. (2 CT 445.) She did not see the intruder inflict the wound on Mr. Baker's neck. (2 CT 446, 460.) She could not use her telephone because the wires had been pulled from the walls. (2 CT 445.) She went to a neighbor's house and called 911. (2 CT 443-445.) Her car, a 1992 4-door maroon Chevrolet, was stolen during the incident. (2 CT 446-447.)

Mrs. Baker gave a description of the perpetrator to the first officer on the scene. She had seen the intruder's face the "whole time" during the incident, including while he was tying up her husband. (2 CT 457.) She said that he was "very pale, light skin," "clean shaven" and not wearing glasses. (11 RT 2484-2485.) The prosecutor asked her to look around the courtroom and state whether she saw the intruder. Although Mr. Henderson was present, *she did not see the man who came into her house that night.* (2 CT 446-447.)

Early on the morning of June 23, she assisted police with a composite drawing of the assailant which was marked as Defense Exhibit A. (2 CT 450-451.)[7] She thought that Exhibit A best represented what the intruder looked

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[6] During the incident, the intruder's voice was medium toned and he was talkative. He ranged from polite to angry to violent. (2 CT 456, 459-460; 11 RT 2485.)

[7] Defense counsel withdrew Exhibit A because it duplicated People's Exhs. 131, 132. (12 RT 2774-2776; 17 RT 3747; 19 RT 4208-4209; 3 Supplemental Clerk's Transcript ("Supp. CT") 21-24.)

like, but was "too dark." (2 CT 452; 11 RT 2774-2776.) Defense Exhibit B was a photo lineup the police showed her following the crime. (2 CT 453-454.) She said that #4 in the lineup looked most like the intruder, but was not him. (2 CT 454.) Defense Exhibit C was another photo lineup shown to her; she "presumed" that the suspect was shown in the lineup. (2 CT 453-454.)[8] She placed a sheet of paper over the foreheads of each of the individuals depicted to simulate the cap the intruder had worn and concluded that ##1-5 did not look like the suspect. (2 CT 456; see also 13 RT 2826-2827.) She said that #6 looked most similar to the suspect but, unlike the person in the photograph, the intruder had no facial hair and lighter skin. (2 CT 455-456.) Mr. Henderson was not depicted at all in Defense Exh. B/People's Exh. 130, but was shown as #5 in Defense Exh. C/People's Exh. 114. (12 RT 2772-2773; 13 RT 2821-2822; 16 RT 3576-3578; 3 Supp. CT 15-16.)

Morton Schuman lived at 117 Mt. Ararat Drive, in the Canyon Mobile Home Park, in Cathedral City. The Bakers were his neighbors. On the night of June 22, 1997, he and his wife were watching television when the doorbell rang insistently. He opened the door and, though he knew Mrs. Baker well, he did not recognize her at first. (11 RT 2497-2499.) She asked him to call 911 and he did so. He went with Mrs. Baker to her home; he saw that her car was

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[8] Defense Exhibits B and C were later withdrawn because they duplicated People's Exhibits 130 and 114, respectively. (19 RT 4208-4209.)

missing, so he went in with her. (11 RT 2500.) He wanted to call 911 again, but could not do so because the telephone cord had been pulled from the wall. The police eventually arrived, he gave a statement and Mrs. Baker was taken to the hospital by the police. (11 RT 2501.)

Officer Rudy Salinas was the first officer on the scene. He found Reginald Baker deceased in the bedroom. He saw that the kitchen drawers open. A wallet and purse, with credit cards strewn about, were located in the master bedroom. A steak knife lay on the bed, another steak knife rested on the floor and the carpet contained bloodstains. A jewelry box in the bedroom had been rifled and torn bed sheets lay on the floor. (12 RT 2478-2479.) He met with Mrs. Baker and Mr. Schuman. She had bruises on her face, was bleeding from her nose and mouth and had cuts on her scalp. Officer Salinas called for paramedics. (11 RT 2472.) Eventually, Mrs. Baker was taken to the hospital and other officers arrived to investigate. (11 RT 2482, 2501.)[9]

On June 22, 1997 at about 11:30 p.m., Officer Carl Wolford, a homicide investigator with the Cathedral City Police Department ("CCPD"), was called to investigate a possible homicide at 102 Mt. Ararat in the Canyon Mobile Home Park. (11 RT 2573-2574.) He had been assigned as the head investigator, with responsibility for overseeing the collection and preservation of evidence. (11 RT 2574-2575.) He and Detective David McGowan contacted

[9] Mrs. Baker's injuries were not life threatening. (12 RT 2761-2765.)

Officer Salinas at the scene who briefed them on what he (Salinas) had found when he arrived. (11 RT 2574.) Wolford walked through the scene and found Mr. Baker dead in the master bedroom. Neither he nor his officers were permitted to move the body until after the coroner had arrived and inspected it. (11 RT 2575.)

Beverly Ann Brune lived at 94 Armenia at the Canyon Mobile Home Park, near the Bakers. (11 RT 2504-2506.) She had been home on Sunday evening, June 22, and heard noise, but no talking, outside. (11 RT 2512.) She went to bed around 9 p.m. The following morning, she saw that the driver's side door of her car was slightly ajar. (11 RT 2507.) She discovered that the ignition assembly had been removed. She made a report to the police about the incident. (11 RT 2504-2512.)

Around midnight, on June 22, 1997, Latesha ("Tasha") Lyn Wasson was in the Noble's Ranch neighborhood in Indio visiting her friend Dana Flowers. (11 RT 2530-2531.) She had been drinking that evening and had used methamphetamine. (11 RT 2539-2540.) She and Dana were sitting in her car when an acquaintance, Mr. Henderson, drove up in a large, burgundy car with a gray stripe.[10] (11 RT 2533.) She did not know the make or model. A photo, People's Exhibit 27, depicted a car similar to the car he was driving. (11 RT

[10] She acknowledged that she first told police that Mr. Henderson had been driving a medium-sized vehicle and later said that it was a large car. (11 RT 2533-2534.)

2534; see also 11 RT 2544-2545.)[11] He got out of the car and came over to talk. She asked him whose car he was driving and he told her that it belonged to a woman for whom his mother worked. (11 RT 2539.)

She had known Mr. Henderson for about 10 years and had met him through her brother, Michael White, and an ex-boyfriend. (11 RT 2535.) When he drove up that evening, it had been about five years since she had seen him. They spoke for about a half hour. His demeanor was normal, neither happy, sad nor angry. (11 RT 2537, 2546.) Wasson thought that Mr. Henderson was wearing a goatee that evening, but recalled that he certainly had a moustache. (11 RT 2548.) She saw a mole on his forehead; it had been there as long as she had known him. (11 RT 2565.) There were streetlights on in the vicinity when she saw him. (11 RT 2549.) During her conversation with Mr. Henderson, he mentioned that he had a job interview the following morning. (11 RT 2537.) Mr. Henderson asked about her brother and she gave him Michael's phone number and directions to his house. (11 RT 2538.)

Mr. Henderson asked her to go with him to a Denny's located in an area known as Nairobi and she agreed. (11 RT 2540.) Two men were also at Dana's house that evening. She saw the two men get in the car with Mr. Henderson. She knew of them from "being around" but did not know them

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[11] People's Exhibit 27 was apparently a photograph of the Bakers' car (40 CT 11005), although the record does not seem to so state specifically.

personally. (11 RT 2541.) They had asked her for a ride before Mr. Henderson gave them a ride. (11 RT 2541-2542) Wasson later told police that the men had been in the car when Mr. Henderson arrived. (11 RT 2564-2565.) She said at trial that her statement to the police "could be" accurate. (11 RT 2564-2565.) Mr. Henderson gave the men a ride to the Nairobi neighborhood. (11 RT 2541-2542.) Although she followed them to the Denny's, she ultimately decided not to go in and eat with him. (11 RT 2540-2541.)

She spoke with her brother, Michael, the next day; Michael told her that he had seen Mr. Henderson that day. (11 RT 2551.) Sometime later, she heard from her brother that the police were trying to locate her in connection with information about the crime. (11 RT 2544.) She went to see Detective Wolford about a week later. (11 RT 2545.) Her boyfriend, Jerome Thomas, was then in the Indio jail awaiting trial on a felony charge for which, if convicted, he would be imprisoned for a very long time.[12] Jerome insisted that she meet with Wolford because he hoped to get a deal. (11 RT 2568-2569; see also 16 RT 3576-3577, 3582-3583.)[13]

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[12] The charge would have been a third strike and would have subjected Thomas to a possible life sentence. (11 RT 2552-2555.)

[13] Although Thomas did not get a deal, he had tried "hard" to get one. (16 RT 3583.) Wolford interviewed Thomas, but Thomas did not give him any information he had not already obtained and, in the end, Thomas got nothing for the information he provided. (16 RT 3589-3590.)

Ronald Brown, Mr. Henderson's stepfather, was living with him and Mr. Henderson's mother in June 1997. (12 RT 2602.) His bedroom was in the back of their mobile home; Mr. Henderson slept on the couch in the living room. (12 RT 2608.) As was his custom, Brown awoke between 6:30 a.m. and 7 a.m. on Sunday, June 22, attended to household matters and made breakfast for the family. Mr. Henderson went to church with a relative and returned around 2-2:30 p.m., at which point Brown left and did not return until the evening. (12 RT 2609.) He usually went to bed at about midnight. At approximately 10 p.m. that evening he was in his bedroom watching television. Around 10:15 p.m. he went into the kitchen. Mr. Henderson was there in his underwear. (12 RT 2611.) Mr. Henderson asked for an aspirin because he had a headache. The next morning, Mr. Henderson was there, getting ready to go job hunting. Mr. Henderson seemed to be in a good mood. (12 RT 2611.) Brown left for awhile and when he returned, he saw Mr. Henderson walking up the street to catch a bus. (12 RT 2612.)

Officer Wolford interviewed Ronald Brown on Thursday, June 26, 1997 and recorded the interview. (12 RT 2616.) During the interview, Brown said that he went to bed sometime between 11:00 p.m. and midnight on Sunday and that Mr. Henderson was not home at the time. (12 RT 2619.) Brown said that he did not see Mr. Henderson between mid-afternoon on Sunday, June 22, until about 6:30-7:30 a.m. the next morning. (12 RT 2618.) The tape of the

interview was played and Wolford said that it accurately depicted what Brown had said about Mr. Henderson's whereabouts on Sunday, June 22. (12 RT 2616-2619.)

The transcript of the Brown interview was made a part of the record as Court Exhibit 4. (12 RT 2787 *et seq.*; 3 Supp. CT 25-29.)[14] The transcript, which the judge read into the record, reflected that Brown said that on Sunday around 11 a.m., one of Brown's in-laws picked up Mr. Henderson to take him to church. Mr. Henderson returned around 2 p.m. Around 6-7 p.m., Brown left to get Mr. Henderson's mother from work. He went to sleep around midnight. (12 RT 2792.)[15] He did not know what time Mr. Henderson arrived home that night and did not think that he saw Mr. Henderson again until Monday morning. (12 RT 2657.) About 6:30-7 a.m. on Monday, he saw Mr. Henderson, who said he had a headache and wanted something for it. (12 RT 2790-2791.) Mr. Henderson said that he had to go to Desert Hot Springs for a physical for a job for which he had applied. (12 RT 2791.)[16]

On Monday, June 23, 1997, Riverside Deputy Sheriff Adam Elders received a radio dispatch of a robbery/homicide in Cathedral City and a

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[14] The Reporter's Transcript erroneously indicates that the interview was Court Exhibit 5. (12 RT 2787.)

[15] Wolford recalled, and his notes reflect, that Brown said he went to bed around 11 p.m. (12 RT 2656.)

[16] During his direct examination by the prosecutor, Brown denied that he had made the statements to Wolford reflected in the transcript. (12 RT 2603-2604.)

description and license plate number for a vehicle taken from the scene by an African-American man. (12 RT 2691-2692.) While patrolling in Desert Hot Springs, he saw a maroon Chevrolet Caprice that fit the description of the stolen vehicle. The driver appeared to be African-American. (12 RT 2692-2693.) A pursuit ensued. Eventually the driver of the Caprice lost control; the car spun, hit a stop sign and came to a stop. (12 RT 2695.)

Elders pulled up behind the car, drew his gun and yelled at the driver to get out. (12 RT 2696.) The driver got out with his hands up. Elders went around to the passenger side to open the door, but it was locked. At that point, the driver escaped and ran. (12 RT 2698.) Elders gave chase, but the driver got away. (12 RT 2698.) The driver was a light-skinned African-American man with a round face, about 5'10" to 6' tall, and was wearing a baseball cap, light-colored shirt and dark pants. (12 RT 2699.)[17] Elders was shown a photo lineup that included Mr. Henderson (People's Exh. 114), but he did not identify any of the men in the lineup as the driver of the Caprice. (12 RT 2706-2707; see also 13 RT 2827.)

In June 1997, Tamara Elam lived in Desert Hot Springs with her boyfriend, Michael White, Latesha Wasson's brother. (12 RT 2710.) On Monday, June 23, 1997, Mr. Henderson (whom Elam identified in the

[17] Elders testified later that the driver did not have facial hair, but he acknowledged he had not gotten a good look at the suspect. (19 RT 4127-4130.)

courtroom) came to her house, looking for Michael. (12 RT 2718.) She called Michael (who was not at home) to let him know that Mr. Henderson was there. (12 RT 2720.) She and Mr. Henderson talked and watched television. A news report came on about a car chase. He told her that the report was about him; he said that he had been on his way to a job interview and the police chased him. (12 RT 2721-2722.) Eventually, Michael came home and he and Mr. Henderson left together. Several days later, she contacted the police to report information about Mr. Henderson. (12 RT 2726-2727.)[18] Elam initially lied to the police by saying that she knew Mr. Henderson and had seen him on the street in the stolen car. (12 RT 2728.) She lied because Michael was then on parole and she did not want him to get into trouble for associating with Mr. Henderson. (12 RT 2729.) Thereafter, law enforcement personnel came to take Michael to jail[19] and told her that she had best tell the truth to the police. (12 RT 2730.) She then went once again to speak with the Cathedral City police. (12 RT 2730-2731.)[20]

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[18] Wolford said that he first heard Mr. Henderson's name from Elam and had no reason to suspect him until then. (13 RT 2815-2816.)

[19] The record is silent about why, but the context suggests it was for an alleged parole violation.

[20] The police also interviewed Michael White. Although a transcript of the interview reflected that White said Mr. Henderson told him about the car chase, White insisted at trial that Elam told him that Mr. Henderson had been chased by police. (12 RT 2751-2757.)

2. Forensic evidence

The prosecution called a number of witnesses to testify about evidence gathering at the scene of the crime as well as forensic testing done on evidence retrieved during the investigation. Witnesses testified to their efforts to locate and obtain usable fingerprints at the Bakers' home, in and on the Bakers' car, on Ms. Brune's car and on various items of evidence retrieved from the vehicles and near the scene of the car chase; to their efforts to collect and test blood found in and around the Bakers' home; to their efforts to collect and test hair and fibers found at the Bakers' home and in the vehicles; to their efforts to obtain DNA samples from the evidence they had gathered; and to their efforts to locate, photograph and analyze footprints around the Bakers' residence.

In the end, despite this lengthy and time-consuming testimony, the evidence revealed that no fingerprints, no blood samples, no hair or fiber samples and no DNA evidence tied Mr. Henderson to the crime at the Bakers' residence or to the Bakers' or Ms. Brune's vehicles. A single, inconclusive footprint found at the scene bore a resemblance to shoes that the evidence later revealed Mr. Henderson had worn. (13 RT 2835-2989; 14 RT 3104-3128; 15 RT 3176-3224, 3261-3280.)

Dr. Joseph Cohen, a forensic pathologist, testified that the autopsy of Mr. Baker revealed that he had "severe, severe" heart disease, and was a candidate for sudden cardiac arrest under any circumstances. (15 RT 3237-

3238, 3239-3240, 3242.) The cut to Mr. Baker's neck was a "relatively superficial" wound which did not sever any veins or arteries and which a healthy person would have survived. (15 RT 3236-3237.) There were no stab wounds on Mr. Baker's body. (15 RT 3235-3236, 3237-3244.) While the wound to his neck would not have killed him, the stress of the situation was sufficient to have caused a fatal heart attack. (15 RT 3237-3242, 3246.) *He could not say whether Mr. Baker's neck was cut before or after he died.* (15 RT 3244.) Nor could he say whether Mr. Baker died before or after he was bound. (15 RT 3242-3245.)

3. Incriminating statements allegedly made by Mr. Henderson.

Gregory Clayton, an inmate at Ironwood State Prison,[21] testified that on June 25, 1997, he was staying at the Weingart Center in Los Angeles, where he met a man he identified as Mr. Henderson and with whom he became friendly. (13 RT 2926.) Mr. Henderson was then using the name "Caylin Hawk." (13 RT 2926.) One night, about four or five days after they had met, Mr. Henderson told Clayton that he done something very bad; a couple of hours later, he said that he had killed someone. (13 RT 2927.) Clayton did not believe Mr. Henderson at first, but later questioned him about the events.

[21]Clayton had a lengthy criminal record. He had been convicted of grand theft in 1986, 1989 and 1990, of forgery, burglary and passing bad checks in 1991 and of forgery in 1993 and 1995. In 1997, he was convicted of petty theft with prior convictions. (14 RT 3091)

Mr. Henderson said that he owed someone money, and went to a trailer where he cut a man's throat and beat his wife. He said that he cut the man's throat because the man was being "loud." (13 RT 2928.) Under prompting by the prosecutor, Clayton agreed that he had told police that Mr. Henderson had said he beat the woman "profusely." (13 RT 2930.) Mr. Henderson also told him about a maroon Chevy Malibu. Under further prompting by the prosecutor, he recalled that Mr. Henderson had mentioned a Chevy Caprice and said he took a car which had belonged to the couple. (13 RT 2935.)

Sometime after his first conversation with Mr. Henderson, Clayton called the Palm Springs police department which directed him to the CCPD. (13 RT 2932.) He lied to the police, telling them that he was calling from Orange County and declined to give his name. (14 RT 2985.) He also mentioned the name Caylin Hawk and asked about a reward, but the police did not recognize the name. (13 RT 2932; 14 RT 2985.) And when, during the call, he provided a description of Mr. Henderson, he was told *that the description did not fit the person for whom the police were looking.* (14 RT 3038.)

He then undertook his own "research" to determine if Mr. Henderson was being truthful. (13 RT 2928.) Later, he had his second conversation with Mr. Henderson, during which Mr. Henderson cried. (13 RT 2931.)[22] Clayton

[22] Clayton told police that Mr. Henderson had been contemplating suicide. (13 RT 2950.)

wanted Mr. Henderson to believe that he was a "shoulder to cry on," so that Mr. Henderson would provide him more detail and he (Clayton) would be more believable when he spoke to police. (13 RT 2931.) Clayton said that he wanted to snitch on Mr. Henderson because he (Clayton) had been raised by his grandparents and was not "comfortable" that Mr. Henderson might be able to do "that" to anyone. (13 RT 2931-2932.)

Following the second conversation, he called the FBI and then called a television station. (13 RT 2933.) Clayton spoke for about 40 minutes with Derrick Toberson, a television reporter. Toberson put him in contact with Sgt. Hanlon at the CCPD. (13 RT 2933)[23] Clayton learned about a reward for information about the crime when he spoke with Sgt. Hanlon. (13 RT 2933-2934, 2948.) He discussed with her his efforts to contact Crime Stoppers and We Tip about a reward. In a subsequent conversation, she told him that she had spoken with Lt. Griffith about a reward and Griffith had confirmed that a reward was both available and "negotiable." (14 RT 2993.) At that point, he believed that the reward might be $5-10,000. (14 RT 3044.) Clayton gave Sgt. Hanlon his name and location and told her where Mr. Henderson could be found. (18 RT 4049.) Officers arrived later that night to apprehend Mr.

[23] Toberson suggested to him that the suspect's name was Paul Henderson. (14 RT 2994.)

Henderson. Officer Wolford brought him $1,000 and told him he would receive the remainder at the completion of the case. (14 RT 3045.)

On cross-examination, he said that while he spoke by phone with Sgt. Hanlon, he saw Mr. Henderson who was in tears and who said that he had spoken with his family. Mr. Henderson said that two others were involved in the crime, that they "put him in a situation where he didn't want to be at" (14 RT 3037) and that he feared he would be killed if he identified the other men. (14 RT 3029-3030.) He also said that he was not in his right "frame of mind" during the crime and did not mean to kill the man. That was why he was so upset. (14 RT 3031.)

During an interview with police on July 5, 1997, Clayton said that Mr. Henderson told him that the two other men were "trained killers," that the killing was a "paid hit," and that "they" cut Mr. Baker's throat. (13 RT 2967.) The two men, whom Mr. Henderson said were named Mike and John, had been arrested several years before for murder and rape. (13 RT 2964.) Although Mr. Henderson originally said that "they" committed the crimes,[24] he later said that he had done it. (13 RT 2694.) Clayton also said that Mr. Henderson had described the victims as "prominent people who worked at city hall" and that

[24] Under questioning by the judge, Clayton said he had understood "they" to mean all three men. (13 RT 2965.)

Mr. Baker had been stabbed numerous times before his throat had been cut. (13 RT 2968.)

Clayton acknowledged that he "very possibly" told police that Mr. Henderson used drugs and that Mr. Henderson told him that the two men with him that evening were drug dealers. (13 RT 2973.) Clayton also told a defense investigator that Mr. Henderson had said the two men drove him to and from the crime scene, and that he waited outside while the other two went inside and "did the dirt." (14 RT 3046.)

While researching the crime, Clayton spoke with a number of people about what Mr. Henderson had told him, including a reporter named Kenny Klein, a radio station, Crime Stoppers, someone at a television station, the FBI, and Pam Knowles, a reporter from the Desert Sun newspaper. (14 RT 3006-3007.) Knowles read him some newspaper articles which contained details of the crime. (14 RT 3007.)

Shown several newspaper articles written by Knowles, Clayton agreed that at least one contained information she had given him, notably that the police had released a composite of a man believed to have killed a man and beaten his wife during a robbery. (14 RT 3014.) He told a defense investigator that Knowles had given him "all the details that were in the newspaper" and told the police that he had gotten his information from Mr. Henderson and from

"the news." (14 RT 3018, 3025.)[25] It was "very possible" that he told the police that he called the news agencies to obtain details of the crime, that he did not call the police until after he had spoken with the various reporters and that he had gotten the basics of the crime from news sources. (14 RT 3025.) He "very possibly" told police that he learned that the couple was elderly "through the newspapers" (14 RT 3032), "very possibly" told a defense investigator that he had gotten more information about the crime from Knowles than from the police (14 RT 3047) and "very possibl[y]" told the police that Mr. Henderson only gave him information about the crime on the "day" that he was arrested. (14 RT 3021.)[26]

On re-direct, Clayton testified that the information about contract killers and the victims being prominent citizens had been conveyed to him by Mr. Henderson during the first part of their conversation, not later. (14 RT 3051.) Mr. Henderson told him that he had been contacted by his family and began to cry; that was when Clayton realized something was wrong. (14 RT 3052.) Mr. Henderson told him that he had done something bad. (14 RT

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[25]On June 27, a press release regarding the crime issued and Mr. Henderson's photo was published on television. (16 RT 3579-3581.) On July 3, shortly before the arrest and before Clayton called the police, Wolford gave a television interview about the crime during which a photo of Mr. Henderson was broadcast. (16 RT 3584.)

[26]Clayton acknowledged that he "very possibly" got his information from a variety of sources, including from Sgt. Hanlon, who told him there was a lot of blood at the crime scene. (14 RT 3026.)

3054.)[27] That was when Mr. Henderson said he had killed the man and had beaten the woman. (14 RT 3054.) Mr. Henderson said that he owed something to two drug dealers in Palm Springs and that they had required him to kill these "two dignitaries." (14 RT 3054-3055.) Clayton said that he did not believe that part of the story. (14 RT 3055.) As time went on, Mr. Henderson's version of the crime changed. (14 RT 3057.)

He called Knowles and she read him an article. He stopped her at various points and asked if "this, this, this" were in the article. She said yes, and he knew he had the right person. (14 RT 3088-3089.) He did not give his name to police initially because he was concerned about going back to prison. (14 RT 3063.) When he spoke with Hanlon he was interested in the reward; he wanted to give accurate information. (14 RT 2989.) Mr. Henderson was in the room when he spoke with Hanlon and as Hanlon asked about Mr. Henderson's physical features, he confirmed them. (14 RT 3065-3066.)

On re-cross, Clayton said that it was not until Hanlon had confirmed the possibility of a reward that he provided any details of the crime. (14 RT 3085.) He agreed that his career had been that of a thief and that he had a "practice" of being an informant, had been an informant in prison and had testified

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[27] This testimony cannot be reconciled with Clayton's other testimony that he was already on the phone with Sgt. Hanlon when he saw Mr. Henderson crying. (See 18 RT 3945.)

previously. (14 RT 3081-3082.) He recalled that Mr. Henderson may have had a goatee as well as a moustache in 1997. (14 RT 3083; see also 14 RT 3068.)

Mr. Henderson's aunt, Patrice Henderson, received a call on July 5, 1997 that he was in the custody of the CCPD. She and his mother went to speak with him. (18 RT 3974.) Their conversation lasted about 5-10 minutes. Mr. Henderson repeatedly said, "I'm sorry, I'm sorry." (15 RT 3301.)[28] Under questioning by the prosecution, she said she did not recall Mr. Henderson saying that he did it and was sorry, nor did she remember saying to him that he should "stand up" and say that he did it, or that the crime was a "family debt." (15 RT 3290-3295.) A portion of a purported transcript of the tape recording of their conversation with Mr. Henderson was read to her during which she was alleged to have said "You stand up and say yes, I did it, you damn coward. That's called justice. That's got to happen now." (15 RT 3301-3302.) She denied making that statement and only recalled that Mr. Henderson was "spent" and kept repeating that he was sorry. She did remember saying that, because his name was associated with the crime, they were forever linked with the Bakers. (15 RT 3302-3303.)[29]

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[28] Wolford secretly taped their conversation. People's Exhibit 153 is a tape of the conversation. (15 RT 3313-3314, 3357.)

[29] The alleged transcript of Mr. Henderson's conversation with his mother and aunt is Court Exh. 3. (39 CT 10543 *et seq.*) The judge stated that what he heard on the tape was different in some respects than what is reflected in the transcript. At line 45, the transcript reads, "you're the only one that went into

Raymond Griffith, a detective lieutenant with the CCPD, listened in on the conversation between Mr. Henderson, his mother and aunt. He heard Mr. Henderson say, "I'm sorry. I didn't mean to kill him." (15 RT 3318.)[30]

At about 9 or 10 p.m. on July 4, 1997, Officer Wolford received information about Mr. Henderson's whereabouts. (16 RT 3593.) He left for Los Angeles in the early morning hours of July 5, and arrived at the Weingart Center about 4:40 a.m. (16 RT 3593-3594.) He and two other officers (Officers Herrera and Luna) arrested Mr. Henderson in his room and took his belongings (including the shoes that were used for footprint comparisons). (15 RT 3361-3362.) Following the arrest, Wolford went to a Los Angeles police station for about a half-hour. Then he, Officer Herrera and Officer Luna drove Mr. Henderson to Cathedral City, arriving about three to four hours later. (15 RT 3362; 16 RT 3594.) At around 10 a.m., after getting Mr. Henderson some breakfast, Wolford, along with Officers Herrera and Luna, interviewed him for about 3 hours about the events of June 22. (15 RT 3363.) Mr. Henderson was

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that house." But the judge heard a question: "Let me ask you this. You're the only one that went into that house[?]" And, at line 54, the judge felt strongly that the transcript was incorrect. The transcript reads, "This is that Paul went out and did something." The judge believed that he heard, "This *isn't* that Paul went out and did something." (15 RT 3327-3328.)

[30] Although Griffith said Mr. Henderson used the words "kill him," the transcript of that portion of the interview indicates that what Mr. Henderson said was "unintelligible."(15 RT 3324-3325; Court Exh. 3 [39 CT 10546].)

given *Miranda* warnings; he agreed to speak. (15 RT 3362; 16 RT 3623-3624; People's Exh. 155)

According to Wolford, Mr. Henderson said that, on June 22, he had been at his brother Dominick's house in Cathedral City, where he smoked two or three marijuana cigarettes laced with methamphetamine. (15 RT 3364-3365.) He left and walked down Dinah Shore Drive intending to steal a car. The Canyon Mobile Home Park is about a quarter mile from his brother's house. He stopped at the park, looked through the fence and saw a white vehicle. He jumped the fence and tried to break the ignition on the car with a tool. (15 RT 3367.) He was unsuccessful at stealing the car and then walked to the Bakers' place. (15 RT 3368.) After smoking another marijuana cigarette containing methamphetamine, he went inside with the tool. (15 RT 3369.) He wore gloves the entire time. (15 RT 3370.) He announced that he was there to rob them and demanded the keys to the car. He put a hand on Mr. Baker's shoulder and tried to calm down Mrs. Baker who was crying and appeared to be having trouble breathing. (15 RT 3371.)

He took the Bakers into a bedroom where he tied Mr. Baker with neckties. (15 RT 3373.) For some reason, he did not want to tie up Mrs. Baker in the same manner and so he used bed sheets. (15 RT 3373.) He got a knife from the kitchen and stuck it in a pillow. At that point, Mrs. Baker told him

that Mr. Baker had a heart problem. He took Mrs. Baker into a bathroom because he could not "watch her." (15 RT 3374-3377.)

Mr. Henderson initially said he did not remember hurting Mr. Baker. Eventually, he said that it "had to be" him because he was the only person in the house who could have done it. (15 RT 3377-3378.) At one point, he thought that Mr. Baker was having a heart attack and he saw blood on Mr. Baker's neck and shirt. He checked Mr. Baker's vital signs and put a sheet over his face because he thought that he was dead. (15 RT 3379-3380.)

Asked if he hurt Mrs. Baker, Mr. Henderson said that he did not recall doing so, but later said that it "had to be me." (15 RT 3380.) He put a sheet over her face because she looked so bad and he thought she might be dead. (15 RT 3380-3381.) He saw blood on her face and on his glove. (15 RT 3382.) Before leaving, he tried to steal the television, but could not handle it. He took nine or ten dollars, left the house, got in the Bakers' car and drove away. (15 RT 3382.)

He drove to the Noble Ranch area in Indio because he wanted to buy drugs. (15 RT 3383.) While there, he met up with Latesha Wasson, who was at Dana Flowers's house. He asked Wasson to go with him to get something to eat. He picked up two men on his way to the area known as Nairobi to buy drugs. (15 RT 3384.) They stopped at a 7-Eleven store where he bought a soft drink. Wasson had followed him, but then went on her way. He went by

himself back to Indio to his parents' place, but parked the car some distance away. (15 RT 3386.)

The following morning he had a job interview in Desert Hot Springs. Rather than go to the interview, he headed to Wasson's house instead. (15 RT 3387.) While he was driving a deputy tried to pull him over. (15 RT 3388.) He jumped from the car and ran away. As he was running through the desert, he threw away his gloves. (15 RT 3389.) Once he had gotten away, he went to Michael White and Tamara Elam's house. He left White's place around 7 p.m. and then went to his brother's house to spend the night. (15 RT 3390.) Either the following day or the next, he took a bus to downtown Los Angeles and checked into the Weingart Center. The tool he had tried to use to steal the car, and the clothes he wore the night of the crime, were stolen at the bus station. (15 RT 3391.)

The interrogation was taped at police headquarters which, at that time, was next door to a church where a service was under way. (15 RT 3393.) The "power microphone" on the recorder was not working. (15 RT 3394.) Mr. Henderson spoke very softly and would not make eye contact. The interrogators had to ask him repeatedly to speak up. (15 RT 3394.) They moved the microphone very close to him. Even so, Wolford stated that, "I couldn't even hear him from where I was sitting." (15 RT 3408.) As a result of these factors, the recording was very poor. (15 RT 3394.) The police and

prosecution made efforts to enhance the recording, including sending it to the FBI crime lab, to a defense forensics lab and to the Aerospace Corporation. (15 RT 3395; 16 RT 3606.) In 2000, they obtained a version of the tape they could use. (16 RT 3490.) The more often he listened, the better he understood what was being said and he attempted to make a transcript that was as accurate as possible. (15 RT 3395-3396; 16 RT 3485, 3606-3610.) Nevertheless, many segments of the tape remained inaudible. (15 RT 3396; 16 RT 3491.) People's Exhibits 154A-C are all copies of the tape that had been put on CD-ROM disks. According to Wolford, the CDs accurately reflected the tape and the tape accurately represented the interview. (15 RT 3398-3399.) The transcript in the record as Court Exhibit 8 contained his most recent corrections to the transcript after listening to the tape one final time. (16 RT 3632.)

Various portions of People's Exhs. 154A-C were played for the jury and were not transcribed by the court reporter. (15 RT 3404-3408; 5 CT 1184-1196, 1210-1211, 1213, 1217-1218; 16 RT 3632 [Court Exh. 8; 39 CT 10598-10611].)

On cross-examination, Wolford said that, following the arrest, Mr. Henderson slept during the ride back to Los Angeles and had breakfast about an hour and a half prior to the interview. (15 RT 3430, 3487.) At the time of the interview, the police had no leads suggesting possible involvement of others in the crime, the only physical evidence was footprints near the crime

scene, and the police had received several tips from potential witnesses that did not identify any suspect. (16 RT 3524.)

The interview began at 10:07 a.m. on Sunday, July 5. (15 RT 3429.) Only Mr. Henderson, Wolford, Herrera and Luna were present during the interview, and Luna stayed for only a short time. (15 RT 3429; 16 RT 3488.) The church service next door to the station involved a great deal of singing at the beginning of the interview and that may have made the tape difficult to hear. (16 RT 3487-3488.) The portions of the interview played for the jury on direct examination came from the middle of the interview. (15 RT 3409.)

Defense counsel handed out a transcript which the trial court and counsel had reviewed and corrected out of the presence of the jury. (15 RT 3410-3424. *See* Court Exhs. 6 and 7 [39 CT 10552-10564, 10585-10597].) During the part of the interview reflected in the transcript, Mr. Henderson said little. Wolford was having difficulty getting him to talk. (16 RT 3493.) Mr. Henderson spoke with his head down and in a very low voice. He had a remorseful attitude and cried during the interview. (16 RT 3486, 3525, 3553, 3636.)[31]

[31] On re-direct, Wolford said that when he described Mr. Henderson as remorseful he was referring to Mr. Henderson's remark at the end of the interview when he said, "I'm sorry I did it." (16 RT 3635.)

Defense counsel questioned Wolford nearly line by line to determine the accuracy of the transcripts in evidence as Court Exhibits 6 and 7.[32] According to Wolford the following segments were accurate.

HERRERA: . . . We know when it happened, we wanted to just know what happened before then, what your state of mind was what was going on with you, okay? *That's what you said you were going to talk to us about, right*?

HENDERSON: (No response)

HERRERA: Paul. Paul were you in Cathedral City, uh, you were in Cathedral City that night? Before this happened were in Cathedral City, is that true?

* * *

HERRERA: How'd you get to this, how did you get to the trailer park? Did you walk to the trailer park?

HENDERSON: (No response)

HERRERA: This ain't easy Paul, *this is all about what we were talking about earlier.*

WOLFORD: Paul, how did you get to the trailer park? Come on.

HENDERSON: (No response)

(16 RT 3504-3507; 39 CT 10558-10559, 10591-10592 [emphasis added].)

With respect to Herrera's reference to "what we were talking about earlier," Wolford agreed there had been no prior conversation during the interview about how Mr. Henderson had gotten to the trailer park. He claimed

[32]The discussion below focuses only on certain portions of the transcripts.

not know to what Herrera was referring, and disagreed that one inference to be drawn from Herrera's comment was that there had been a prior, unrecorded conversation. (16 RT 3507.)

Defense counsel questioned Wolford about the following portion of the transcript:

HERRERA: Don't try to think one step ahead of us, we're not trying to screw you over, we're not trying to be unfair, trying to do our job and we're gonna try to do it in a way that's gonna be helpful. (Inaudible)

HENDERSON: Uhm, there's some things that happened, uhm, uh . . .

WOLFORD: Did you go into the trailer park, that night?

HENDERSON: What uh, I *want to speak to, speak to an attorney first*, because, I, I'd accept responsibility for them, but this is other people that. . .

HERRERA: What do you . . .

HENDERSON: . . . *I need to find out.*

HERRERA: Paul.

HENDERSON: . . . *I need to find out.*

HERRERA: Paul, what do you accept responsibility for?

HENDERSON: (*No response*)

HERRERA: You're going to accept responsibility for what happened to that man? And to that woman? *We just talked about that*, we just talked about that okay?

* * *

HERRERA: Okay, but, I mean, do you just take responsibility, because, you say you take responsibility, or with what happened and, when, what you say is responsibility, is there something you have to do? . . . *Because taking responsibility is what we've been talking about all night*, what we need you to do . . . . Tell me what happened.

(16 RT 3512-3521, 3522-3523, 3530-3531; 39 CT 10560, 10562, 10593, 10595 [emphasis added].)

When Mr. Henderson said, "I need to find out," Wolford believed that he meant he needed to find out something from an attorney. (16 RT 3518.) The only inaccuracy in the foregoing portion of the transcript was that Mr. Henderson said "I'd take responsibility for *me*," not "them." (16 RT 3514-3515; 39 CT 10560, 10593, line 8.) Mr. Henderson never spoke about "us" or "they" on the tape; he always referred to himself. (16 RT 3515; see also 16 RT 3534.) However, Mr. Henderson's comment, "this is other people" was accurate and Wolford understood him to be referring to other people. (16 RT 3516, 3519.) He and Herrera did not try to follow up on Mr. Henderson's reference to other people. (16 RT 3519.)

With respect to Herrera's question whether Mr. Henderson took responsibility for what happened to the Bakers, and his comment, "We just talked about that" (39 CT 10560, 10593, lines 19-20), Wolford acknowledged that up to that point in the interview there had been no discussion about what happened to the Bakers. (16 RT 3522.) Herrera's statement that they had been

"talking . . . all night" referred to the interview itself which, Wolford acknowledged, actually took place in the daytime. (16 RT 3531.)

Wolford was then asked about the following section of transcript.

HERRERA: Come on, Paul. come [sic] on man.

HENDERSON: I don't remember it anyway. When I came, I came to, when I saw what was happening myself, he was, he was dead and she was on the ground and . . .

(16 RT 3535; 39 CT 10563, 10596, lines 20-23.) Wolford said that Mr. Henderson did not say "I came to."[33] He agreed that this exchange was the first incriminating statement that Mr. Henderson had made and that it came *after* he had asked for a lawyer and after he had mentioned other people. (16 RT 3535.)

Defense counsel also questioned Wolford about an early version of the interview transcript which had been prepared for and filed by the prosecution. (16 RT 3539; 5 CT 1172 *et seq.*; see also Court Exh. 9 [39 CT 10632 *et seq*].)[34] According to Wolford the following portion of the transcript accurately reflected the questions and answers at the interview.

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[33]The words "I came to" can be clearly heard on the recording. (See People's Exh. 154A [CD-ROM of tape recording].).

[34] It does not appear that the precise transcript from which counsel questioned Wolford was made a part of the record. For the Court's convenience, we have cited to either or both of the transcripts in the record in which the questions that counsel asked about can be found.

HERRERA: Paul, Paul, do you remember anything about what happened. You don't remember hitting her? You don't remember slashing the old man's throat?

HENDERSON: I wish I knew cause that is not the type of person I am.

HERRERA: That's not the type of person you are?

HENDERSON: And I know I couldn't do something like that just (inaudible).

***

HERRERA: Are you blocking that out in your mind?

HENDERSON: I don't know but uh . . .

WOLFORD: You can't see it happening, hap, happening in your memory uh for being hit and her, his throat being slashed?

HENDERSON: No, I ain't even, I ain't even never had a fight on the street dispute, the only time I ever fight (inaudible) because I know, I know (inaudible) I've never had (inaudible) I know that ain't me.

(16 RT 3550-3552; 39 CT 10641-10642; see also 5 CT 1193-1194.)[35]

Mr. Henderson said that when he saw that Mrs. Baker seemed to be having trouble breathing, he tried to calm her down and that he tied the Bakers' hands so they could not call the police. (16 RT 3543; 5 CT 1187; 39 CT 10635-10636.) The transcript and Wolford's own notes reflected that Mr. Henderson did not say that he put the sheet over Mrs. Baker because he thought she was

[35] At one point in the interview, Herrera asked Mr. Henderson, "What did you think . . . ?" and he answered, "What the fuck did I do?" (16 RT 3558; 5 CT 1210; 39 CT 10657.)

dead. (16 RT 3540, 3541-3543, 3553-3554; 5 CT 1195-1196; 39 CT 10643-10644.) Mr. Henderson stated that he took the "sheets off her cuz [he] thought it might be hurting her." (16 RT 3544; 5 CT 1188; 39 CT 10636.)

During the interrogation, Mr. Henderson said that he picked up the two men who were present with Ms. Wasson. Wolford spoke with both Wasson and Flowers about the two men, but was never able to identify them. He managed to get the first name of one of them, but otherwise failed to obtain any identification. (16 RT 3586-3588.)

On re-direct, Wolford testified that, contrary to his testimony on cross-examination, the first time that Mr. Henderson made an incriminating statement was when he said, "I take responsibility for me." If Mr. Henderson had mentioned anyone else during the interview, Wolford would have investigated it. But he had no credible information that others were involved with the crime. (16 RT 3592-3593.)

Wolford and the others did not interrogate or question Mr. Henderson about the crime at any time until the interview. (16 RT 3603.) Herrera was not alone with Mr. Henderson except for a brief period at the end of the interview, by which time he had already told them what happened. (16 RT 3604.) He understood Herrera's comment during the interview that, "This ain't easy Paul. This is all about what we were talking about earlier" (39 CT 10592), to refer to discussions immediately following the *Miranda* warnings. (16 RT 3601-3605.)

B. Defendant's Case-In-Chief

Mr. Henderson testified in his own defense. (17 RT 3788.)[36] On the night of June 22, 1997, two men, "Knuck" and "Leon," whom he had not seen in several years, picked him up at his brother's house on Wishing Well Drive. He understood that they were going to a party to meet some women. (17 RT 3792-3793.) They pulled into the Canyon Mobile Home Park instead and Knuck got out of the car. (17 RT 3793, 3802.) Knuck went into one of the mobile homes and was there for quite awhile. Meanwhile, Leon started talking to Mr. Henderson about stealing a car. (17 RT 3803.) Mr. Henderson was unhappy because he thought they were going to a party. Leon picked up a dent puller from the floorboard of the car, got out and went over to another car. (17 3803.) Leon asked Mr. Henderson to tell him how to steal the car. Mr. Henderson saw that the ignition in the car was "all jacked up" and told Leon that this was not what he understood they would be doing. He wanted to find Knuck and leave. (17 RT 3804.)

He and Leon began walking around, looking for Knuck. (17 RT 3805.) Mr. Henderson saw Knuck approach from a mobile home. Knuck asked them to help him steal a television and other items. (17 RT 3806.) Mr. Henderson told them he did not want to be involved and asked for the keys of the car they

[36]At defense counsel's request, Mr. Henderson's testimony on direct, with some exceptions, was in narrative format. (17 RT 3800, 3814.)

had driven there. (17 RT 3806.) Knuck and Leon went back into the mobile home. (17 RT 3806.) He could hear through a window that Knuck was hitting a woman and heard her ask "Why are you doing this?" (17 RT 3806-3807.)[37] Mr. Henderson did not go in to help, but stood there "like a coward." (17 RT 3807.) When Knuck and Leon came out, they got into the Bakers' car. (17 RT 3807.) Mr. Henderson drove the Nissan Sentra in which they had driven to the mobile home park. (17 RT 3807.) They all went to his parents' place so he could change out of his church clothes. He went in alone because he did not want Knuck and Leon to come into his parents' home. (17 RT 3807.)

After he changed clothes, the three of them went to Indio, their original destination. (17 RT 3808.) Mr. Henderson drove the Nissan; Knuck and Leon took the Bakers' car. They stopped at a 7-Eleven and got something to drink. (17 RT 3808.) They sat together in the Bakers' car and Knuck described what happened inside the mobile home. (17 RT 3808.) He said that he "roughed up" Mr. Baker, who had tried to defend himself. Mr. Henderson knew he was lying because he had heard Knuck beating up *Mrs*. Baker. (17 RT 3808.) Mr. Henderson got back in the Nissan and drove to Noble's Ranch, where they found Latesha Wasson and Dana Flowers, the women they had originally planned to meet. (17 RT 3809.) Mr. Henderson got out of the car and gave the

[37] Wolford testified that when he arrived at the scene the windows in the bedroom of the Bakers' home were closed and the blinds were drawn. (19 RT 4120.)

keys to Knuck. They made plans to go to Denny's; all the while Knuck continued to describe hitting Mr. Baker and about what he had done. (17 RT 3809-3810.) The group then "caravanned" to the Nairobi area, where Knuck bought some drugs. (17 RT 3810-3811.) Wasson wanted to leave, so they gave her some of the drugs and she left. Mr. Henderson then left because he had a job interview the next day. (17 RT 3811.)

On his way home, he thought about how everything had been going well, he had jobs he was being considered for and he was going to church. (17 RT 3815-3816.) He was supposed to be moving in with a dying uncle to care for him. (17 RT 3816.) He thought that the crimes that had been committed were assault and auto theft, knew he could not be involved, and wanted to "extricate" himself. (17 RT 3816.)

In the morning, he had a bad headache and asked his dad for some aspirin. (17 RT 3816.) He got dressed for his job interview and by the time he was ready to leave, his parents had left. (17 RT 3816.) He caught a bus into Desert Hot Springs, stopped at a convenience store, and called Michael White, because White owed him a favor. The woman who answered the phone did not know him and hung up. (17 RT 3817.)

He then went to Knuck's house (which also happened to be Wasson's place). (17 RT 3817.) Although frightened of Knuck, he asked Knuck if he could use the Bakers' car to go to the store. Knuck reluctantly agreed. (17 RT

3817.) Mr. Henderson did not want to leave any fingerprints in the car, so he wore some gloves that belonged to Leon. (17 RT 3817.) He stopped and began wiping down the car. A police officer drove by and saw him, so he drove away. He went to the home of an acquaintance and called Michael White again. (17 RT 3818.)

He spoke to the same woman and told her that he was running from the police. (17 RT 3818.) She agreed that he could come to the house. (17 RT 3818.) He spent about three or four hours at White's house before White arrived. (17 RT 3818.) He tried to tell White (who is related to Knuck) what Knuck had done, but White did not want to get involved because he was on parole. (17 RT 3819.) They left to find Knuck and, after they had located him, White left the two of them together for 15-20 minutes. (17 RT 3820.) Mr. Henderson asked Knuck why he had put him in this situation. Knuck told him not to worry because it was "just a robbery." (17 RT 3820.) Mr. Henderson still did not know that Mr. Baker had died. (17 RT 3820.) White returned and picked him up. They spent some more time together and then White took him to his brother's place. (17 RT 3821.)

Two days later, on June 25, he went to Los Angeles to find Knuck because he had learned that Knuck had gone there. (17 RT 3821.) Mr. Henderson met Clayton at the Weingart Hotel on June 26 in the cafeteria. (17 RT 3821.) He and Clayton began to talk. They each learned that the other

was on parole. (17 RT 3822.) A couple of days later he located Knuck. (17 RT 3823-3824.) By this time, he knew that Mr. Baker had died. (17 RT 3823.) Knuck had left him messages to "shut up" about the crime. (17 RT 3823.) He knew he would go back to prison if caught. Unlike Knuck, he did not belong to a gang; he had no one to rely upon to protect him if he returned to prison. (17 RT 3824.)

When he returned to the hotel he called his grandmother and spoke to her about the crime. He was crying during the conversation. (17 RT 3823-3824.) He spoke again with Clayton and told him what happened, but did not tell Clayton that he had committed the crime. (17 RT 3824-3825.) Clayton suggested he call the police, but Mr. Henderson refused because he was not an informant. (17 RT 3825.) Later that evening, in Clayton's room, they talked again about the crime. (17 RT 3825.)

On July 4, Mr. Henderson went to a church in West Los Angeles to hear Jim Bakker preach; the event lasted all day. (17 RT 3825.) He returned to the Weingart Center at around 9-10 p.m. and met up with Clayton. (17 RT 3825.) He told Clayton that his family was going to give him some money not to leave the area. Clayton asked if he could borrow some and Mr. Henderson agreed. (17 RT 3825-3826.) He then gave Clayton some clothing that he intended to wear the next day so that Clayton could launder them for him. In the early morning hours the next day, the police arrived and arrested him. (17 RT 3827.)

Under questioning by his counsel, Mr. Henderson testified that he was born in 1969 and moved to San Diego when he was eleven years old. (17 RT 3828-3831.) In 1983, he was convicted of stealing a van from a group home. Someone else was driving the van when he was arrested. (17 RT 3831.) The following year he was convicted of stealing a station wagon from another group home. In 1989 and again in 1990, he was convicted of grand theft auto. (17 RT 3834.) He was twice convicted of auto theft in 1993. In 1991, he was convicted of being a felon in possession of a firearm and, in 1993, he was convicted of a robbery in which he had used a toy gun. He admitted that he had stolen quite a few things in his life. (17 RT 3834-3835.)

On cross-examination, he admitted he had been released from prison only two weeks before the Baker crime and knew he could have been sent back for the smallest infraction. (18 RT 3920.) At the time of the crime he was 27 years old, without a job, and dependent on others for transportation. (17 RT 3852.) Prior to the incident, he had been at his brother's house. Knuck and Leon picked him up from outside the house. They knew he was there because they had seen him earlier that day. (17 RT 3852.)[38]

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[38] He acknowledged that he never told Wolford that Knuck was the real culprit or otherwise tried to implicate Knuck. (18 RT 3919-3920.) When asked to reveal Knuck's last name, he declined. (17 RT 3851-3853; 18 RT 3919, 3921.) The judge threatened to strike his testimony if he refused to reveal Knuck's last name. Mr. Henderson said that he understood the risk, but he knew he was going to prison under any circumstances and wanted "to be able to walk the

When Leon wanted him to help steal the car, it "bothered" him; he wanted to see if he could resist even the urge to steal the car. (18 RT 3920-3921.) He knew he could have walked away, but did not. He admitted that his shoe prints were at the scene, and acknowledged that, while looking for Knuck, he walked through a vacant lot before he figured out that Knuck was at the Bakers' home. (18 RT 3922.) He admitted that he had lied to Wolford that the shoes he wore that night had been stolen. (18 RT 3922-3923.)

When Knuck asked him to go in and help steal the TV, he knew a burglary was in process. (18 RT 3924.) He knew Mrs. Baker was being beaten because he could hear what was being said inside. He then went and got in Knuck's car so that they could leave, even though he knew a burglary and assault had occurred. (18 RT 3924-3925, 3927.)

When they eventually went to Indio, he drove the Nissan and followed them. Wasson was telling the truth that she saw him in the Bakers' car that evening. (18 RT 3927-3929.) In describing what he did that evening, Knuck wanted everyone to know how tough he was. Mr. Henderson told Knuck that, "It was cool; you did what you had to do." (18 RT 3929.) Although he knew

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yard." (17 RT 3853-3855.) Eventually, the judge determined that the appropriate sanction was to instruct the jury that Mr. Henderson's refusal to reveal Knuck's last name could be considered in evaluating his credibility. (18 RT 3865, 3919. *See People v. Miller* (1990) 50 Cal. 3d 954, 999.)

crimes had been committed, he thought the crimes were auto theft and assault. (18 RT 3930.)

The following day, he rode a bus to Desert Hot Springs to go to Knuck's house and then borrowed the Bakers' car to drive to the store to get cigarettes. (18 RT 3930.) Later he went to White's house and White took him back to Knuck's to talk. (18 RT 3930-3931.) He even went to Los Angeles to follow Knuck so he could talk with him again. (18 RT 3931.) He told his grandmother about what had happened with Knuck, that Knuck had committed the crime and that he was running from Knuck. (18 RT 3934.) He testified that he was not a gang member and therefore had no "juice" in prison. (18 RT 3934.)[39]

He told Clayton what he had described to the jury, but not in detail. (18 RT 3943.) In particular, he told Clayton that Mr. Baker had died and that Mrs. Baker had been beaten, but did not tell him that the crime had been committed in Cathedral City. (18 RT 3944.) Nor did he tell Clayton that Mr. Baker's throat had been slit; he thought Mr. Baker had been stabbed. (18 RT 3944.)

The prosecutor questioned Mr. Henderson about the accuracy of portions of the transcript of his interrogation by Wolford and Herrera, and whether he had said what was reflected there. He confirmed the essential accuracy of the

[39] He denied that he told a correctional officer in 1994 that he was a member of the Inland Empire ("IE") Mafia and insisted that the correctional officer was mistaken in claiming that he was a member of that group. (18 RT 3934-3943.)

transcript. (18 RT 3970-3974.) When he was asked about the transcript of his conversation with his mother and aunt, he agreed that the transcript was accurate and that he had made the incriminating statements reflected in it. (18 RT 3974-3976; 39 CT 10543-10547.) He also agreed that he made the statement which Lt. Griffith heard and in which he apparently admitted responsibility for Mr. Baker's death. (18 RT 3976.) Finally, he admitted the truth of his prior convictions, including a bank robbery in which he used a BB gun and the carjacking of a woman named Heather Teed which led to a police car chase and a crash of the vehicle he stole. (18 RT 3986.)

On re-direct, he testified that, at the time of the crime, he wore a mustache and had some facial hair on his chin. (18 RT 3992.) He also testified that he never physically harmed anyone in any of the prior offenses to which he admitted. (18 RT 3987.) In fact, during the bank robbery he used a BB gun because he did not want to hurt anyone. (18 RT 3985.) In the course of the carjacking, he discovered that Heather Teed's infant child was in the car and he told her to take the baby and the baby's things from the car. (18 RT 3987-3988.)

He was in the custody of the California Youth Authority when he was 14 and only 4'11." (18 RT 3988.) Most of the boys were bigger than he was and he got pressure to join a gang because it is safer. (18 RT 3988.) He never affiliated with a gang, because inmates are sometimes pressured to join gangs

so they can be used for a variety of purposes, including sex. (18 RT 3989.) Tattoos are common among gang members and are sometimes used to identify them as gang members. His own tattoos are not signs of gang affiliation. (18 RT 3988-3990.)[40]

Officer Wolford was called by the defense to testify and was shown a portion of a transcript of Mr. Henderson's interview, which was made part of the record as Court's Exhibit 10.[41] It reads:

HERRERA: Mr. Henderson, do you remember hitting…

HENDERSON: Yeah, cause, yeah, I can remember most of what we did, but um, I just (inaudible) on the floor. Man I was so fucking scared. I was scared crazy. I, I stopped, I'm supposed to be.

WOLFORD: Yeah, I bet, I bet it just tore you up inside, didn't it?

(39 CT 10663.)

Wolford said that Court Exhibit 10 was incorrect to the extent that it reads, "I remember most of what we did." Mr. Henderson never used the word "we" during the interview. He could not recall what Mr. Henderson said, but knows he did not say "we." (18 RT 4002-4004.)

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[40] With regard to the prosecutor's questions directed at whether he had admitted to being a gang member (see fn. 39, *supra*), he said that if a correctional officer were to testify that he admitted being a member of the IE Mafia and informed on 15 other gang members, the officer would be lying. (18 RT 3993-3994.) The judge eventually ruled that the prosecutor could not argue that Mr. Henderson was a gang member as there was no evidence before the jury that he was. (19 RT 4217-4222.)

[41] Court Exhibits 10 and 11 were taken from the original transcript prepared by the prosecution and filed with the Court. (See 39 CT 10662-10665).

Defense counsel then showed Wolford a portion of a transcript of the interview marked as Court Exhibit 11. (39 CT 10664-10665.) It reads:

WOLFORD: Where did it happen?

HENDERSON: My friend Leon was standing right there, and I was standing there, next to a, street light, street light. I noticed a back room.

____?____: What room was that?

HENDERSON: . . . and he had, he had blood on his head (Inaudible)

WOLFORD: Uh hmm.

According to Wolford, Mr. Henderson never mentioned anyone by the name of Leon in the interview. Instead, he believed that Mr. Henderson's answer began "was standing right there." (18 RT 4009-4010.)

Gregg Stutchman was called as an expert witness. (18 RT 4011.) After a career in law enforcement, Stutchman began working in the field of electronics, audio and video. (18 RT 4012-4013.) He had done more than 1000 analyses of recorded material, had lectured regularly on the subject and had qualified as an expert witness on 25 occasions. He also regularly performed audio forensic work for law enforcement agencies. (18 RT 4013-4014.)

His audio analysis work includes enhancing the quality of recordings, determining if material has been edited out of or deleted from recordings, and determining the timing or sequence of events, such as gunshots, that have been recorded. (18 RT 4015.) In addition, he prepares transcriptions of audio

recordings. For poor quality audio recordings, he utilizes sensitive digital audio restoration software to enhance the sound through various digital filters and to create loops so that the same segment can be listened to repeatedly. (18 RT 4016.)

Stutchman was given a CD-ROM of recordings that were labeled as having been prepared for the CCPD by the National Law Enforcement Center and a transcript of the recording prepared by the CCPD. (18 RT 4017.) He listened to certain portions of the tape and compared them to the transcript. (18 RT 4017.)

He reviewed a portion of the tape that began with the words "Mr. Henderson, do you remember hitting." (18 RT 4021.)[42] He prepared his own CD of those portions to which he listened, and which was admitted into evidence as Defendant's Exhibit Q. (18 RT 4022.) He enhanced that portion of the tape which corresponded to Court Exhibit 11 where Mr. Henderson said, "My friend, Leon." (18 RT 4023.) He looped that portion of the recording, played it through a speed filter to slow it down slightly and put it on a separate CD, which was marked Defendant's Exhibit R. (18 RT 4025.) (This segment was played for the jury.)

On July 4, 1997, Officer Laura Hanlon spoke with Gregory Clayton. He indicated that he would provide information about the crime, but his primary

[42] This segment was played for the jury.

motivation was to get a reward. (18 RT 4045, 4049.) Once she learned a reward was available, she told him so and that it was negotiable. (18 RT 4048.) He then provided details about his conversations with Mr. Henderson. She told him he should contact Lt. Griffith to discuss the reward. (18 RT 4047.)

On July 10, 1997, Officer David McGowan met with Clayton to give him a $1,000 reward. (18 RT 4069-4070.) McGowan never gave him any additional money nor did they discuss the possibility of additional funds. (18 RT 4071.) McGowan also questioned Clayton further about what Mr. Henderson had told him. (18 RT 4073-4075.) Clayton said that Mr. Henderson had not told him that the victims were old; Clayton learned that from the newspapers. (18 RT 4071.)

Patrice Henderson, Mr. Henderson's aunt, testified that a photograph of Mr. Henderson taken shortly before the crime (Def. Exh. M) accurately depicted how he appeared. It showed, and she recalled, that he wore a goatee and mustache at the time. (18 RT 4103-4104.)

C. Other Guilt Phase Evidence.

Mr. Henderson admitted to the truth of each of the prior offenses alleged. (19 RT 4179-4184.) The parties stipulated that Defense Exh. U, a registration form showing that Clayton was at the Weingart Center from June 26-July 31, 1997, should be in evidence. (19 RT 4207-4209, 4213, 4217, 4227.)

D. Prosecution Case-In-Chief At the Penalty Phase.

1. Car theft and bank robbery

On January 29, 1993, a white 1983 Toyota Celica belonging to Joaquin Mota, license number 3AYL288, was stolen. (20 RT 4594-4597.) About two weeks later, on February 9, 1993, an African-American man, dressed in dark clothing, sunglasses and a cap, robbed the California Federal Bank in Rancho Mirage. (20 RT 4598-4606.) The robber pointed a gun at the bank employees and instructed them to put money in a white plastic bag. He took about $2,000 and left. One of the bank employees got a description of the getaway car and the license number (which matched the Toyota Celica). (20 RT 4606-4627.)

The police located the Toyota Celica near the border of Cathedral City and Rancho Mirage. (20 RT 4634; 21 RT 4656-4657.) Police officers went to a nearby apartment complex to look for the suspect. (20 RT 4634; 21 RT 4656-4657.) They saw a man in a crowd of onlookers who fit the description of the suspect and who was acting nervous. (21 RT 4657-4660.) The man was holding a white plastic bag, which appeared to have money in it. A police officer called to the man and the suspect ran. (21 RT 4661-4662.) A foot chase ensued. The suspect got away, and may have stolen an unmarked car used by one of the officers. (21 RT 4663.) An officer identified Mr. Henderson in court and in a lineup as the man carrying the white bag. (21 RT 4663-4664.)

A search of the Toyota Celica produced a number of items, including a Social Security card and an eyeglass case which had Paul Henderson's name written on them. (21 RT 4667-4668.) Clothing that matched a description of the clothes worn by the bank robber was also recovered from the car. (21 RT 4668-4669.) The police also recovered from the car a Crossman 357 style pellet gun, which held lead pellets. (21 RT 4665-4671, 4681-4682.)

2. Heather Teed incident

On February 20, 1993, Heather Teed lived in Desert Hot Springs with her husband and 18 month old daughter, Taylor. She owned a 1983 Mercedes Benz 300 HD with Oregon plates. About 4 p.m. that day, she drove to a K-Mart. Taylor was in a car seat in the back. (21 RT 4683-4684.) When she got out of the car, a man with a gun approached and told her to get into the car. (21 RT 4685.) The man was African-American, about 5'9" and wearing a stocking cap. (21 RT 4688.) She told him to take the keys instead, at which point he told her take the baby from the car and walk away. (21 RT 4684-4685.) He asked for her purse and she complied. She showed him which key started the car and he left. She then went into the store and had the manager call the police. (21 RT 4689.)[43]

[43] She was very frightened by the incident. As a result of the incident, she is still vigilant when she is alone or with her daughters. (21 RT 4689.)

Police officers responding to the incident spotted the Mercedes on Interstate 10 and gave chase. (21 RT 4693-4700.) After several miles, the driver of the car lost control, the car hit a light pole and overturned twice. (21 RT 4700-4701.) The driver jumped out and ran. He was eventually taken into custody. The driver was Paul Henderson. (21 RT 4701-4704.) The Mercedes was a total loss. (21 RT 4704.) Among the items collected from the Mercedes by police was a .177 caliber pellet gun with a brown wooden handle that closely resembled a real gun. (21 RT 4758-4765.)

3. Incidents in prison

On October 20, 1990, Mr. Henderson was seen fighting with another inmate in a sally port at Avenal State Prison. Both inmates stopped fighting when told to do so. (21 RT 4705-4711.) The fight occurred because of a basketball game and Mr. Henderson pleaded guilty to the fight during prison disciplinary proceedings. (21 RT 4716.)

On December 23, 1990, while housed at Corcoran State Prison, Mr. Henderson and another inmate got into a fight in their cell. (21 RT 4719-4720.) After officers responded, the fight was broken up. (21 RT 4717-4721.) On September 16, 1996, while housed at Calipatria State Prison, Mr. Henderson was in a fight with another inmate on the basketball court. (21 RT 4722-4726.)

On September 22, 1992 at Calipatria State Prison, Mr. Henderson was escorted to a visit with a psychiatrist at the prison clinic. Mr. Henderson and

the doctor got into an argument, the doctor terminated the interview and Mr. Henderson lunged at him. Correctional officers had to restrain him. (21 RT 4727-4733.)

On December 28, 2000, while held at the jail in Indio, Mr. Henderson asked him if another inmate, Mr. Cook, could cut his hair because he (Paul) was starting trial and wanted a close haircut with a razor. (21 RT 4737.) The request was approved. When Cook entered the holding cell, he asked Mr. Henderson, "What's up?" At that point, Mr. Henderson punched him and kept on punching him. He would not stop until restrained. The jury was shown photos of Cook's injuries. (21 RT 4735-4746.)

4. Duane Baker

The Bakers' son, Duane, testified that Mr. Baker, who was his mother's second husband, adopted him when he was five years old. (21 RT 4767.) He and Mr. Baker were close. Even after he became an adult and moved away, he remained close to his parents and tried to visit them often. (21 RT 4770-4772.) Mr. Baker was a loving and supportive husband to Mrs. Baker and a loving and attentive grandfather to Duane's children. (21 RT 4771-4773.)

The Bakers moved to the mobile home park because it was a retirement community and Mr. Baker's brother and wife also lived there. (21 RT 4774.) The Bakers were active in the community and remained so even after retirement. (21 RT 4775.) Mr. Baker was a member, for example, of the

volunteer emergency services committee in the retirement community. (21 RT 4775.) Mrs. Baker participated in a singing group, directed a musical group of seniors and volunteered at the Senior Center. (21 RT 4775-4776.) Both parents ran the bingo games at the mobile home park. (21 RT 4775-4776.)

He learned of his father's death on the day after his twelfth wedding anniversary. (21 RT 4777.) He was shocked and numb. When he saw his mother, who was badly beaten and bruised, she broke down and cried. (21 RT 4778.) After his father's funeral, his mother stayed with him for several weeks. During the period immediately after the crime, she was afraid and did not want to go back home because she feared the assailant would come back and "finish the job." (21 RT 4779-4780.) She eventually moved back and stayed there through her initial treatments for ovarian cancer. Subsequently, she moved closer to him. (21 RT 4780.)

Over the long term, his mother lost interest in singing and community activities. (21 RT 4781.) She missed his father greatly. She was lonely and did not have his father to support her during her illness. (21 RT 4784-4785.) Duane expressed anger that his father's death deprived his children of a grandfather. (21 RT 4785.) It was a very difficult for him as well because, two months after the crime, his wife left him and he had no one to whom he could turn. Mr. Baker had been a happy person and Duane missed his smile. (21 RT 4786.)

E. Defense Case-in-Chief

Mr. Henderson rested without the introduction of any evidence. (21 RT 4787-4790.)

ARGUMENT

PRE-TRIAL AND JURY SELECTION ISSUES

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO DISTRIBUTE A QUESTIONNAIRE TO FIVE JURY VENIRES TO DETERMINE WHETHER AFRICAN-AMERICANS WERE ADEQUATELY REPRESENTED AMONG JURORS APPEARING FOR SERVICE AT THE INDIO COURT.

To show that the areas from which jurors were selected for the superior court in Indio resulted in the systematic underrepresentation of African-Americans, Mr. Henderson brought a motion seeking permission to distribute a questionnaire to five venires of 100 jurors each. The questionnaire would have solicited information on race and ethnicity of the prospective jurors. The trial court denied the motion, thereby preventing Mr. Henderson from obtaining the information necessary to show that his right to a jury drawn from a representative cross-section of the community was violated. Mr. Henderson made the requisite showing to obtain the information and therefore the trial court committed reversible error.

A. Facts

Mr. Henderson brought three related motions pertaining to jury composition in the Indio court: a motion to distribute a questionnaire to 500

prospective jurors to determine the percentage of African-Americans among the group, a motion to quash the jury panel based on underrepresentation of African-Americans in Riverside County venires called to the Indio courthouse and a motion for a change of venue to a court in which no such underrepresentation existed. (1 RT 13-28; 3 CT 649-666.) The trial court held an evidentiary hearing before ruling on the motions. (1 RT 202 *et seq.*)

Royann Nelson, the acting Executive Officer of the Riverside County Superior Court, testified regarding jury selection procedures in the county courts. Local Rule 1.0056 prescribes the communities from which jurors are drawn for the various judicial districts in the county. (1 RT 207; 2 Supp. CT 12.) Riverside County draws jurors from DMV and voter registration lists. (1 RT 206.) The list is checked by outside vendors for accuracy of addresses and scrubbed to eliminate duplications. (1 RT 210-211.) A contractor then obtains an estimate from the court of the number of jurors needed over the next three months and selects jurors randomly using the Marsagila Random Generator System. (1 RT 214.) If a summoned juror fails to appear, the court sends the juror a postcard with the telephone number to call to obtain necessary information about jury service. (1 RT 215) If the juror still does not appear, court personnel double check the address and then request that the sheriff serve the jury summons. (1 RT 216.) Ms. Nelson was unaware of any surveys that

had been done to determine the percentage of African-Americans who appeared for jury duty at the court. (Id.)

Riverside County permits jurors an exemption if they live more than 75 miles from the court. (1 RT 219.) The cities of Beaumont and Banning, which are about 45 miles from Indio/Palm Springs, historically sent jurors to the Riverside court. (1 RT 233-234.) Those two cities are in the Mt. Jacinto judicial district and jurors from those two cities also serve that court. (1 RT 232.) The Indio/Palm Springs district never drew jurors from Banning or Beaumont. (1 RT 237.) Ms. Nelson agreed that, given their proximity to Indio, Banning and Beaumont could be included in the pool for Indio. (1 RT 218.)

The city of Blythe, although located about 100 miles from Indio, is within the same district as Indio/Palm Springs. (1 RT 209.) The Blythe court historically handled only municipal court matters. (1 RT 237-238.) With consolidation of the municipal and superior courts about two years before Ms. Nelson's testimony, Blythe had a superior court for the first time. (1 RT 238.) In part because of the creation of the Blythe superior court and in part because of the potential distance exemption, Blythe jurors were thereafter assigned to Blythe and no longer to Indio. (1 RT 208, 216, 239.) However, while a preliminary hearing in a felony case might be held in Blythe, the defendant would be tried in Indio. (1 RT 240.)

The parties stipulated to the admission of a report by Steven Day, a statistician, regarding the demographic characteristics of the Indio/Palm Springs judicial district where the case was being tried. (1 RT 203; 2 Supp. CT 1 *et seq.*) The report revealed that African-Americans comprised approximately 2.71% of the population in the judicial district as a whole, but only 1.83% of the jury-eligible population. (2 Supp. CT 3-4.) If the cities of Banning, Beaumont and Blythe, which do not provide jurors to the Indio/Palm Springs court, were added to the totals African-Americans would comprise 3.59% of the population as a whole and 3.17% of the jury-eligible population. (2 Supp. CT 5.)

To assist in determining whether the system for selecting jurors in the Indio/Palm Springs district was fair, Mr. Day proposed sampling five venires[44] of 100 jurors each and then calculating the percentage of African-Americans in those panels. (2 Supp. CT 7.) If "5 random 100-member venires were to include no more than 1 African-American member each, this would provide strong evidence of a biased selection process. The probability of selecting 5 100-member venires and none of them having more than 1 African-American

[44] "'The jury "pool" is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A "venire" is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a "panel." A "panel" is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case.'" (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1193 n. 2 quoting *People v. Bell* (1989) 49 Cal. 3d 502, 520.)

member . . . is approximately 0.02, which is a very small probability... . . [I]f the process is fair, we should rarely see 5 such venires." (2 Supp. CT 7.)

Day noted that if the Indio/Palm Springs district were to include the cities of Blythe, Banning and Beaumont "then it will have a significantly greater chance of including African-Americans than if it is selected fairly from the Indio/Palm Springs District as presently defined." (2 CT Supp. 7.)

The trial court ruled that the defense had failed to make the particularized showing necessary to obtain additional statistical data about jury venires or to broaden the area of the juror summons to include cities not normally served by the Indio court. The trial court denied all three motions. (1 RT 14-28, 275.)

B. Appellant Made A Particularized Showing Of Need Sufficient To Require The Trial Court To Distribute A Questionnaire To Jury Venires Appearing At The Indio Court To Determine The Percentage Of African-Americans Within Those Venires.

Although Mr. Henderson made three motions pertaining to the demographic composition of jurors at the Indio court, the motions to quash the jury panel and to change venue were dependent on the outcome of the motion to distribute questionnaires to five jury venires. (1 RT 244-246.) Without the information to be obtained from the questionnaires, appellant lacked the data to make the showing required on the other two motions.

"'In order to establish underrepresentation, and thus denial of an impartial jury drawn from a fair cross-section of the community, a defendant

must make a prima facie showing: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.'" (*People v. Harris* (1989) 47 Cal. 3d 1047, 1077 quoting *Duren v. Missouri* (1979) 439 U.S. 357, 364.) A "cognizable group" for analytical purposes "is one whose members are distinctive in that they share a common perspective arising from their life experiences in the group, a perspective gained because they are members of that group and one that cannot be properly represented by jurors who are not members of the group. Only when a defendant demonstrates a significant disparity between the demographics of the panel or venire from which jurors are to be selected and that of the community does the question of whether the disparity results from systematic exclusion arise." (*Id.* at 1077-1078 [citations omitted].)[45] The community for cross-section purposes is the "community of qualified jurors in the judicial district in which the case is to be tried." (*Williams v. Superior Court* (1989) 39 Cal. 4th 736, 742.)

[45] There is no dispute that African-Americans are a cognizable group for fair cross-section purposes. (*People v. Harris* (1984) 36 Cal. 3d 36, 51.)

Here, as in *People v. Jackson* (1996) 13 Cal. 4th 1164, the threshold question is not whether the "defendant has made a prima facie case, but the prior question of whether defendant was wrongly denied the discovery of information necessary to make such a case." (*Id.* at 1194.) In *Jackson*, this Court held that a "defendant who seeks access to this information is obviously not required to justify that request by making a prima facie case of underrepresentation. Rather, upon a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion, the court must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent." (*Id.* at 1194.) A reasonable belief "is simply a 'conviction of mind . . . arising by way of inference,' a 'belief begotten by attendant circumstances, fairly creating it, and honestly entertained.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74, 93 [citations omitted].)

1. Mr. Henderson made a particularized showing sufficient to support a reasonable belief that Riverside County policy resulted in systematic underrepresentation.

Mr. Henderson's showing below was sufficient to support a reasonable belief that underrepresentation of African-Americans was occurring at the Indio court. Riverside County apparently did not keep data on the ethnic and racial makeup of the jurors who appeared for service in the Indio court. (1 RT 216.)

But the limited data available to Mr. Henderson showed that African-Americans made up a very small percentage of the population from which the Indio jurors were drawn. (2 Supp. CT 3-4.)

The percentage of African-Americans in the city of Blythe, which was in the Indio judicial district, was substantially greater than in the Indio district as a whole. (2 Supp. CT 4.) Although Blythe and Indio were in the same judicial district as Indio, jurors from Blythe were no longer sent to Indio following consolidation of the municipal and superior courts two years before. (1 RT 208, 216, 238-239.) Blythe's distance from Indio also contributed to the decision to no longer send jurors from Blythe to Indio. (1 RT 208-209.) However, felonies occurring in and around Blythe were still tried in Indio. (1 RT 240, 254-255.) In short, African-Americans in Blythe were apparently excluded as a matter of policy from felony juries in Indio, even if an African-American from Blythe was to be tried there. This alone suggests a systemic bias in the jury selection procedures in Riverside County. Moreover, African-Americans from Blythe were in the Palm Springs district and thus would have been counted in deriving the percentage of African-Americans in the district as a whole. But because they were excluded from serving in Indio, their absence likely drove down the percentage of African-Americans actually appearing for service in Indio.

The manner in which the judicial districts were drawn in the county also indicated the possibility of a systemic bias that removed African-Americans

from the potential jury pool in Indio and thus that Mr. Henderson could satisfy the third prong of the *Duren* test. The cities of Banning and Beaumont each had African-American populations in a greater percentage than the Indio judicial district as constituted and each city was well within the 75 mile radius from the Indio court established for determining whether a juror could exercise a distance exemption. (1 RT 233-234; 2 Supp. CT 4-5.) And yet those cities were allocated, by Riverside County policy, to another district and did not send jurors to the Indio court. (1 RT 232-234, 237.)

Together, the combination of the county policy excluding African-Americans in Blythe from serving in Indio together with manner in which judicial district lines had been drawn potentially operated to reduce the numbers of African-American jurors appearing for duty in Indio. This information was certainly sufficient to support a reasonable belief that systematic underrepresentation of African-Americans was occurring at the Indio court.

2. The proposed questionnaire would have generated relevant evidence to demonstrate whether underrepresentation of African-Americans was actually occurring while imposing a minimal burden on the court.

Without information on the makeup of the actual venires at the Indio court, Mr. Henderson had no way to determine whether Riverside County policy was unconstitutionally skewing the juror population. The proposed questionnaire would have provided information "to potentially verify, prove or

document [Mr. Henderson's] claim." (*Roddy v. Superior Court* (2007) 151 Cal. App. 4th 1115, 1139-1140.)

Undoubtedly, if any or all of the cities of Blythe, Beaumont and Banning contributed jurors to the venires appearing in Indio, there was a greater likelihood of jury eligible African-Americans being available in Indio. Furthermore, whether Riverside County's policies for assigning jurors to the various courts were having the effect of minimizing the number of African-Americans appearing for jury duty in Indio could only have been determined by sampling the actual venires to determine if they reflected appropriate representation of African-Americans. Without that data, defense counsel could not determine whether there was "a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community." (*People v. Ramos* (1997) 15 Cal. 4th 1133, 1155.) Had that data shown that Indio venires were under-representing African-Americans, the trial court could have ordered that jurors be summoned from any or all of the cities of Blythe, Beaumont and Banning in an effort to increase the pool of jury eligible African-Americans.

The burden on the court would have been minimal. The venires were being called to the court in any event and, as this case and others demonstrate, juror questionnaires – even lengthy ones – are regularly provided to prospective jurors and commonly request ethnic and racial data about the jurors. (*E.g.*,

People v. Booker (2011) 51 Cal. 4th 141, 162). There was no reason the sampling could not have been done. The trial court's refusal was an abuse of discretion requiring reversal.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A DEFENSE REQUEST FOR DISCOVERY INTO WHETHER THE DISTRICT ATTORNEY ENGAGED IN RACIAL BIAS IN SEEKING THE DEATH PENALTY IN THIS CASE.

A. Facts.

In order to determine whether racial bias infected the decision to seek the death penalty in this case, Mr. Henderson brought a motion seeking discovery into the charging policies and practices of the Riverside County District Attorney in capital cases. (3 CT 680-689; 1 RT 43-55.) Specifically, Mr. Henderson requested:

- The district attorney's charging guidelines, procedures and practices in this case;
- The same information for all death eligible cases for the previous 10 years;
- The disposition of all death eligible multiple murder and robbery murder cases handled by the Indio branch of the Riverside County District Attorney's office for the previous 10 years; and,
- The disposition of all other death eligible multiple murder and robbery murder cases handled by the District Attorney's office.

(3 CT 680.)

In support of the motion, defense counsel provided evidence that, in the 10 years preceding the motion, the Riverside District Attorney had alleged special circumstances in 11 cases in the "Eastern Section of Riverside County." (3 CT 685.) Of those 11, nine of the defendants were African-American and two were white. (3 CT 685.) The district attorney ultimately declined to seek the death penalty in the two cases involving white defendants. (3 CT 685.)

The judge denied the motion, concluding that, while Mr. Henderson had shown an apparent disparity in charging practices, he had failed to make any other showing of discrimination. (1 RT 55.)

B. The Defense Made A Showing Sufficient To Obtain Discovery Pertaining To The Prosecution's Charging Practices In Capital Cases And The Trial Court's Failure To Order Discovery Was Reversible Abuse Of Discretion.

1. To justify discovery to support a claim of unlawful discrimination in charging practices, the defendant need only provide "some evidence" of discrimination.

Although prosecutors have wide discretion regarding whether, when and whom to prosecute, that discretion "is 'subject to constitutional constraints.'" (*United States v. Armstrong* (1996) 517 U.S. 456, 464 quoting *United States v. Batchelder* (1979) 442 U.S. 114, 125.) Thus, it is a violation of a defendant's right to equal protection under the state and federal constitutions if the decision to prosecute was based on "an unjustifiable standard such as race, religion, or

other arbitrary classification." (*Oyler v. Boles* (1962) 368 U.S. 448, 456; see also *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373; *Murgia v. Municipal Court* (1975) 15 Cal. 3d 286, 290, 297.) An "accused may show by direct or circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious discrimination in his case*." (*People v. Keenan* (1988) 46 Cal. 3d 478, 506 [emphasis in original].) Similarly, the defendant "may show a 'constitutionally unacceptable' risk that an irrelevant and invidious consideration is systematically affecting the application of a facially valid capital-sentencing scheme." (*Id.* citing *McClesky v. Kemp* (1987) 481 U.S. 279.) To establish a claim of discriminatory prosecution based on race, the defendant must demonstrate that the "prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" (*Armstrong, supra*, 517 U.S. at 465.) Accordingly, the defendant "must show that similarly situated individuals of a different race were not prosecuted." (*Id.*) "[B]ecause a claim of discriminatory prosecution generally rests upon evidence completely extraneous to the specific facts of the charged offense, . . . the issue should not be resolved upon evidence submitted at trial, but instead should be raised . . . through a pretrial motion to dismiss." (*Murgia v. Municipal Court*, *supra*, 15 Cal. 3d at 293 n. 4; see also *Baluyut v. Superior Court* (1996) 12 Cal. 4th 826, 831.)

A defendant seeking discovery to support the claim is "'not required to meet the standard of proof requisite to the dismissal of a discriminatory prosecution.'" (*People v. McPeters* (1992) 2 Cal. 4th 1148, 1171 quoting *People v. Municipal Court (Street)* (1979) 89 Cal. App. 3d 739, 748.) Instead, under state law, the motion for discovery must "'"describe the requested information with some degree of specificity and . . . be sustained by plausible justification."'" (*Id.* quoting *Griffin v. Municipal Court* (1977) 20 Cal. 3d 300, 306.) To justify discovery to support a discriminatory prosecution claim under federal law, the defendant must "produce some evidence of differential treatment of similarly situated members of other races or protected classes." (*Armstrong, supra*, 517 U.S. at 470.)

Mr. Henderson made a showing sufficient to justify the discovery under both the state and federal law standards. This Court reviews the trial court decision denying discovery for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal. 4th 900, 953; *People v. Ashmus* (1991) 54 Cal. 3d 932, 980.)

2. Mr. Henderson met his burden of producing some evidence of discrimination and, therefore, the trial court abused its discretion in denying the request for discovery.

Mr. Henderson met his burden to obtain discovery into the District Attorney's charging practices in capital cases. In *Armstrong*, the African-American defendant, who had been indicted on drug conspiracy charges

involving crack cocaine, sought discovery to establish that he had been charged because of his race. In support of his request, he offered information to the effect that in every one of the 24 cases involving similar drug charges and closed by a federal public defender's office during the prior year, the defendant had been black. He also offered affidavits from a drug counselor and a criminal defense attorney to the effect that crack cocaine users included people who were not black and that non-black users were prosecuted in state court. Finally, he offered a newspaper article which reported that defendants in federal crack cocaine prosecutions – most of whom were black – were prosecuted more severely than those possessing powder cocaine. (*Armstrong*, 517 U.S. at 459-461.) The Supreme Court held that this showing was insufficient to justify discovery relating to the selective prosecution claim. The evidence "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." (*Id.* at 470.) Instead, the Court held that a defendant must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not." (*Id.* at 469.)

In *People v. McPeters*, *supra*, the defendant sought discovery into whether there was racial bias in the Fresno County District Attorney's charging practices in capital cases. The defendant's motion was supported by a study which "purported to compare, by race of victim, those Fresno County cases in

which defendants were sentenced to death or life in prison without possibility of parole with other Fresno County cases of willful homicide." (2 Cal. 4th at 1170.) This Court held the showing was insufficient to justify the discovery because

> [t]he study did not describe or analyze the facts or circumstances of any case, other than the sentence and the race of victim. For example, it did not attempt to distinguish between single and multiple homicide cases, nor did it attempt to account for nonracial factors that could have explained differences in charging and sentencing.

(*Id.*)

On the other hand, in *People v. Superior Court (Baez)* (2000) 79 Cal. App. 4th 1177, the defendant sought discovery to show that he had been selectively prosecuted for theft of housing assistance funds from the Santa Clara County Housing Authority ("SCCHA") because he was the executive director of a medical marijuana dispensary. The defendant was eligible for SCCHA assistance because he suffered from AIDS and had verified his income and assets to receive assistance. As part of a police investigation of the medical marijuana dispensary, the defendant's personal records were seized and were used to show that he had received income which he had not reported to SCCHA. (79 Cal. App. 4th at 1179-1181.)

In support of his discovery motion, he supplied evidence that "'[s]ubstantially similar allegedly fraudulent claims have been disposed of without prosecution in other cases'" and that SCCHA generally did not seek to

prosecute such cases unless there was "'a purposeful attempt by a recipient to hide material information from the Housing Authority.'" (*Id.* at 1181-1182.) The motion was also supported by evidence that other cases in which aid recipients had underreported income to SCCHA were not criminally prosecuted, but were handled through administrative proceedings. (*Id.* at 1183-1184.) The trial court permitted the discovery and the court of appeal affirmed.

With respect to discriminatory effect, the court concluded that the defendant's showing included some evidence "of 'different treatment of similarly situated persons.'" (*Id.* at 1191.) And, the defendant had shown some evidence of discriminatory intent because the district attorney had shared the defendant's financial records with SCCHA and the IRS. This supported a "reasonable inference" that he had been prosecuted for financial impropriety to bolster the drug charges with "inflammatory evidence of a profit motive." (*Id.* at 1192.)

These authorities establish that the trial court erred in refusing Mr. Henderson's request for discovery. To begin with, the defense motion adequately described the information sought (*People v. McPeters, supra*, 2 Cal. 4th at 1171) and the prosecution below did not argue otherwise. The motion requested information pertaining only to robbery murder or multiple murder cases in which special circumstances had been alleged by the District Attorney during the 10 years prior to this case. (3 CT 680.) The request was limited to

cases which were truly comparable, and did not seek to rope in every potentially capital murder.

In addition, the motion was supported by some evidence of disparate treatment in capital charging decisions. The evidence showed that the prosecutor's decision-making had a discriminatory effect: 81% of the capital cases involving robbery murder or multiple murder of which counsel was aware involved African-American defendants whereas 100% of the actual death penalty prosecutions involved African-Americans.[46]

The evidence also suggested discriminatory intent because it demonstrated that there were two white defendants who could have been charged capitally but as to whom the prosecutor eventually decided not to seek the death penalty. (3 CT 685.) The evidence supported a "reasonable inference" (*People v. Superior Court (Baez), supra*, 79 Cal. App. 4th at 1192), that unlawful bias infected the charging practices in Riverside County generally and in this case in particular and met the requirements under *Armstrong, supra*, by identifying individuals who were not black, but otherwise similarly situated, as to whom the prosecutor refrained from seeking the death penalty. (See 517 U.S. at 470.) The trial court's failure to order discovery was, therefore, an

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[46] Unlike *McPeters*, for example, in which the defendant sought discovery into the capital charging practices based on the ultimate sentence actually imposed, the motion below focused on the actual charging decisions by the prosecutor. (3 CT 685.)

abuse of discretion which foreclosed Mr. Henderson from making an equal protection challenge to the decision to seek the death penalty in his case. That requires reversal of at least the special circumstances findings and sentence.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A DEFENSE REQUEST FOR DISCOVERY OF INFORMATION IN THE POSSESSION OF THE POLICE AND PROSECUTION REGARDING SIMILAR CRIMES IN THE AREA AT OR ABOUT THE TIME OF THE CRIME IN THIS CASE.

A. Facts.

Mr. Henderson brought a motion to discover evidence in the possession of the prosecution and law enforcement pertaining to "home invasion burglaries or robberies at mobile home parks in Palm Springs and Cathedral City that took place at night after dark, where the automobile was stolen or there was an attempt to steal the automobile, from June 1996 to the present." (1 CT 158, 165.) The request was supported by a declaration to the effect that "similar crimes involving very similar methods of operation took place in Palm Springs and Cathedral City in the year prior to this crime and since this crime. In essence this crime is only one in a string of home invasion robberies and auto thefts that took place at mobile home parks in the area, after dark. Several of these other crimes involved homicides. These crimes were highly publicized and were covered by the local news agencies in detail." (1 CT 164-165.)

Other evidence showed that local law enforcement "in the scope of their employment, create and maintain records and statistics from police reports

which group and classify similar crimes and methods of operation." (1 CT 164.) Defense counsel also stressed at oral argument that Mrs. Baker had not picked Mr. Henderson from a lineup and gave a description of the assailant that did not match Mr. Henderson and that the investigating officer had stated that similar crimes had been committed in the area around the same time as the crime in this case. (1 CT 278.) Because Mr. Henderson had been incarcerated until three weeks prior to the crime in this case and had been incarcerated since his arrest, it was possible that the perpetrators of the similar crimes committed during the periods of his incarceration were "responsible for this crime." (1 CT 164.)

The prosecution opposed the request on the grounds that the material was not adequately described, no plausible justification for discovery had been shown, the discovery might violate the privacy interests of third parties and the request was unduly burdensome. (1 CT 215- 220, 276-278.) The trial court denied the motion, concluding that the defense had not made a sufficient showing. (1 CT 278-279.)

B. The Trial Court Abused Its Discretion When It Denied Mr. Henderson Discovery Into Similar Crimes Committed In The Vicinity During The Period Just Before And Just After The Commission Of The Crime In This Case.

"The defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of

adverse witnesses." (*People v. Jenkins, supra*, 22 Cal. 4th at 953; *People v. Memro* (1985) 38 Cal. 3d 658, 677, overruled on other grnds, *People v. Gaines* (2009) 46 Cal. 4th 172, 181 n. 2.) A criminal defendant "'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.'" (*People v. Kaurish* (1990) 52 Cal. 3d 648, 686 quoting *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, 536.) A motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure. (*People v. McPeters, supra*, 2 Cal. 4th at 1171.) The court's ruling on a discovery motion is subject to review for abuse of discretion. (*People v. Jenkins, supra*, 22 Cal. 4th at 953.)

Specifically with respect to discovery into evidence of similar crimes, the court in *City of Alhambra v. Superior Court* (1988) 205 Cal. App. 3d 1118 stressed that

> the evaluation of a claim of plausible justification, in a case such as this one where the defendant seeks evidence of third party culpability, should be made in light of the broad evidentiary rule announced by the Supreme Court in *People v. Hall* (1986) 41 Cal. 3d 826, 829 [226 Cal.Rptr. 112, 718 P.2d 99]. There the court held that any relevant evidence is admissible at trial if it "raises a reasonable doubt as to a defendant's guilt, including evidence tending to show that a party other than the defendant committed the offense charged . . . . [Evidence] of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. [*T*]*here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*" (*Id.*, at pp. 829, 833) (Italics added.) ¶

> The lowered evidentiary threshold set forth in *Hall* has an obvious impact on the scope of discovery available to the criminal defendant.

(*Id.* at 1133-1134.)

In *City of Alhambra*, the court held that the defendant had sufficiently established the need for discovery into 12 identified crimes from 1984-1985 in the Los Angeles area and articulated a list of factors for courts to consider in determining whether a defendant had met his or her burden of showing a plausible justification for discovery.

> [T]he court should review (1) whether the material requested is adequately described, (2) whether the requested material is reasonably available to the governmental entity from which it is sought (and not readily available to the defendant from other sources), (3) whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest, (4) whether the defendant has acted in a timely manner, (5) whether the time required to produce the requested information will necessitate an unreasonable delay of defendant's trial, (6) whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and (7) whether the defendant has shown a sufficient plausible justification for the information sought.

(*Id.* at 1134 [footnotes omitted].) Consideration of these factors demonstrates that Mr. Henderson made a limited request with sufficient specificity and which was necessary to the development of his defense. The trial court abused its discretion in denying the request.

1. The prosecution conceded that Mr. Henderson met certain of the *City of Alhambra* factors.

In opposing the motion, the prosecution conceded that Mr. Henderson had made a timely request "and that the time required to produce the requested information . . . will not necessitate an unreasonable delay of the trial." (1 CT 216.) Nor did the prosecution dispute that the requested information was in the possession of the Cathedral City and Palm Springs police departments and was not readily available to Mr. Henderson or his counsel, absent an order compelling discovery. (1 CT 164, 216; *cf.* 1 CT 221, 222 [declarations indicating that police departments maintained files on robberies and burglaries during the periods indicated].) Thus, those *City of Alhambra* factors clearly weighed in favor of granting the discovery request.

2. Mr. Henderson demonstrated a plausible justification for the discovery.

Contrary to the prosecution's claim below (1 CT 216-217), Mr. Henderson articulated a plausible justification for the discovery. At the time of the motion, just as at trial, there was no physical or forensic evidence which tied Mr. Henderson to the crime, and the prosecution cited none. The evidence before the court was that Mrs. Baker had failed to identify Mr. Henderson in a line up and had given a description of the perpetrator which did not fit Mr. Henderson. (1 CT 278.) In addition, the investigating officer had noted that other, similar crimes had been committed in the area. (1 CT 278.) The trial

court acknowledged that this evidence gave force to the defense showing. (1 CT 278.) The evidence also showed that Mr. Henderson had been out of prison for only a short period of time, and that the similar crimes had occurred while he was incarcerated. (1 CT 164.)

The motion raised the legitimate inference that this crime was but "one in a string of home invasion robberies and auto thefts that took place at mobile home parks in the area, after dark." (1 CT 164-165.) The equally plain inference was that this crime may have been perpetrated by the same person or persons who had committed the other crimes while Mr. Henderson was incarcerated.

The purpose of the information sought was "to allow a comparison to be made between the facts of the defendant's case and the different cases." (*City of Alhambra v. Superior Court, supra,* 205 Cal. App. 3d at 1136.) Discovery of the results of police investigations in the similar cases or of potential leads revealed by the files could have provided fruitful areas of inquiry for the defense in developing its strategy as well as material for possible cross-examination of police witnesses at trial. (*Cf.* 16 RT 3592-3593, 3638-3639 [cross-examination of Officer Wolford at trial regarding possible third party involvement in the crime].)

The defense showing sought evidence which entailed "more than a mere motive or opportunity for another person to have committed the crime." (*City*

of Alhambra v. Superior Court, supra, 205 Cal. App. 3d at 1134.) It sought evidence which had the potential for identifying the perpetrators of the crime at issue. The facts presented on the motion demonstrated a reasonable likelihood that the material for which discovery was requested was, or might have led to, "direct or circumstantial evidence which *link[ed]* a third person to the actual crime." (*Id.* [emphasis in original].)

3. The requested discovery was adequately described.

The information sought was adequately described. It pertained to home invasion robberies specifically in mobile home parks after dark in the same geographic area in a limited period of time before and after the crime in this case, at least some of which had been reported in the press. (1 CT 165.) The request contained a more narrowly tailored description of the crimes involved than did the description in *City of Alhambra*, where the defendant sought discovery of "crimes which bore *some* similarities to the crimes with which the defendant was charged, i.e., the victims were lone females, the attacks were associated with stabbing/bludgeoning/sex, and took place in a relevant time period in the same geographic area." (205 Cal. App. 3d at 1136 [emphasis added].) The requests were not so vague or unspecific that the police and prosecution were without guidance where to look. (See *id.* at 1134 n. 16 [indicating that a request for "'all similar crimes' or 'all crimes [e.g., murders] committed during [a certain time frame] with a similar modus operandi" would

be too vague].) The evidence below showed that in Cathedral City there had been only 178 nighttime robberies and burglaries during the time period at issue. (1 CT 221.) Of the 178 cases, the discovery requests pertained only to those involving auto thefts at mobile home parks. Surely that was sufficient to narrow the class of responsive files to a manageable amount.

Even if the trial court properly concluded that the request was insufficiently narrow with respect to the larger volume of case files in Palm Springs, the court could have granted the motion only with respect to Cathedral City or required defense counsel to limit the request further with respect to Palm Springs before granting the motion.

4. The request for discovery did not threaten any confidentiality or privacy interests.

This Court has stressed that "'[absent] some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.'" (*People v. Memro, supra*, 38 Cal. 3d at 677 quoting *People v. Riser* (1956) 47 Cal. 2d 566, 586.) Courts have held, however, that a request for discovery of similar crimes evidence may be denied if the discovery sought

would violate the official information privilege embodied in California Evidence Code § 1040 or would interfere with the privacy rights of victims and witnesses. (See *People v. Jackson* (2003) 110 Cal. App. 4th 280, 287-288; *People v. Littleton* (1996) 7 Cal. App. 4th 906, 911.)

The appropriate balance between the defendant's interests and those of the government and third parties can generally be found by limiting discovery requests for similar crimes evidence to cases which have been solved or in which a suspect has been charged. The "government's interest in maintaining confidentiality in a case of an ongoing investigation is far greater than in a case where the suspect has been charged and the matter has entered the public view through the court system." (*People v. Jackson, supra*, 110 Cal. App. 4th at 288.)

The prosecution's opposition to the motion sought to invoke these principles, stating that "[m]any of those crimes may be unsolved, and disclosure may compromise on-going police investigations. Furthermore, all of the victims, witnesses and suspects mentioned therein have a right to privacy and confidentiality.'" (1 CT 219.) This argument had no factual support and swept too broadly in any event.

First, the only *evidence* before the trial court on the motion was that the requested information was "not confidential or protected." (1 CT 165.) The prosecution presented no contrary evidence and instead speculated that the

requests "may" have involved unsolved crimes or ongoing investigations. (1 CT 219.) Second, to the extent that the discovery request did implicate ongoing investigations, the trial court could easily have limited the discovery to solved crimes or to those in which a suspect had been charged or conditioned any discovery on the entry of an appropriate protective order. That would have adequately balanced any confidentiality or privacy interests against the defendant's interest in discovering evidence which would have aided his defense.

5. The request was not overly burdensome.

The primary thrust of the prosecution's objection to the discovery request was that it would have been unduly burdensome and time-consuming to respond. (1 CT 221, 222.) But this concern could easily have been addressed by an order limiting the scope of the discovery or requiring that it be conducted in phases or by other mechanisms intended to reduce the impact on law enforcement staff. Instead, the prosecution merely took the position that no discovery was appropriate and the trial court agreed. The more measured response would have been to consider ways in which the defendant's right to "discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses" (*People v. Jenkins, supra*, 22 Cal. 4th at 953) could have been balanced against the burden on law

enforcement personnel in the Cathedral City and/or Palm Springs police departments.

6. The outright denial of the motion was an abuse of discretion.

Mr. Henderson made a showing sufficient to justify the discovery and the motion should have been granted. The trial court did not sufficiently consider the defendant's need for the information in developing a defense strategy and was too quick simply to deny the motion. To the extent that the trial court considered the request to be overly broad, to threaten privacy interests or to place too great a burden on law enforcement personnel, the trial court had available to it mechanisms to limit the manner and scope of the requests or to condition an order on agreement by the parties to a protective order. In failing even to consider such methods in the interest of balancing the defendant's right to develop a defense with the legitimate needs of the government, the trial court's outright denial of the motion was an abuse of its discretion.

C. Denial Of The Motion For Discovery Of Similar Crimes Evidence Was Prejudicial.

The trial court's denial of the discovery motion resulted in prejudice to Mr. Henderson. (See *People v. Memro, supra*, 38 Cal. 3d at 684 [noting that defendant must show prejudice from error in denying discovery].)

By precluding the discovery into other, effectively identical crimes, the trial court hobbled the defense from the outset. The defense had two strategic

arrows in its quiver: based on the lack of any eyewitness identification of him as the perpetrator and the lack of any forensic evidence to connect him to the crime, Mr. Henderson sought to raise a reasonable doubt that he had any role in the crime. Alternatively, he hoped to avoid a penalty trial by convincing the jury that others were responsible for the crime, that he was, at most, an accomplice, and that he did not intend for Mr. Baker to die.. (See *People v. Anderson* (1987) 43 Cal. 3d 1104, 1145.) Given the problematic state of the prosecution evidence against Mr. Henderson, either of these results was certainly possible if the defense had the opportunity to suggest that others were involved.

There was no forensic or physical evidence that tied Mr. Henderson to the crime. (13 RT 2835-2989; 14 RT 3104-3128; 15 RT 3176-3224, 3261-3280.) All of the blood, hair, fiber, fingerprint, footprint and DNA evidence that had been collected and tested resulted in nothing which indicated that Mr. Henderson was in any way involved in the crime. Mrs. Baker, the lone eyewitness to the crime, could not and did not identify Mr. Henderson as the perpetrator, despite the fact that she observed the perpetrator for a substantial amount of time. (2 CT 447, 454, 455-456, 457.) Indeed, she described the assailant as clean shaven even though other evidence indicated Mr. Henderson had a mustache or goatee on the evening of the crime. (2 CT 455-456; 11 RT 2484-2485.) The composite drawing of the assailant which Mrs. Baker helped

complete did not resemble Mr. Henderson. (Compare People's Exhs. 131, 132 [composite] with People's Exh. 114 [photo #5 of Mr. Henderson] and Def. Exh. E; 3 Supp. CT 15-16, 21-24, 62-63.)[47] Deputy Elders, who stopped the driver of the Bakers' car the day after the crime, likewise failed to select Mr. Henderson from People's Exh. 114. (12 RT 2706.) What the prosecutor did have were alleged admissions memorialized on largely indecipherable tape recordings and testimony from a snitch.[48]

Without the discovery to provide plausible evidence that this crime was, as the motion put it, "only one of a string of home invasion robberies and auto thefts that took place at mobile home parks in the area" (1 CT 164), the defense was relegated to cobbling together what it could from the existing evidence to suggest that others were involved. That evidence consisted of Mr. Henderson's statements to Clayton regarding two other men (*e.g.*, 14 RT 3029-3030), Wasson's ambiguous references to two men who were with Mr. Henderson when he met up with her on the evening of the crime (11 RT 2562-2566) and garbled comments during Mr. Henderson's taped interrogation that referred to the presence of "Leon" at the scene and that may have said "I remember most of what we did." (16 RT 3567-3570; 18 RT 3900-3911; Def. Exh. 10 [39 CT

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[47] For the Court's convenience, People's Exhs. 131 and 132 and Defense Exh. E have been included in the Appendix at the end of this brief.

[48] At the time of the discovery motion, the admissibility of the confession had not been determined.

10663]; Def. Exh. 11 [39 CT 10664-10665]; Def. Exhs. Q, R.) This evidence was hardly overwhelming and flatly contradicted by Officer Wolford, who repeatedly testified that Mr. Henderson never referred to anyone else during the interrogation. (16 RT 3515, 3534-3536; 18 RT 4002-4004, 4009-4010, 4029-4031.) Furthermore, on cross-examination, Wolford deflected questioning into whether he had pursued leads about the potential involvement of others, claiming that the few leads were dead ends. (16 RT 3514-3515, 3534, 3592-3593, 3638-3639; 18 RT 4002-4004, 4009, 4029-4030.) Even so, this meager evidence was apparently important to the jury. During jury deliberation, the judge commented to counsel that they "might be talking prematurely about a penalty phase. I saw a couple of jurors writing furiously every time there was a mention of a possibility of a second person." (20 RT 4426-4427.) Had Mr. Henderson been permitted actually to investigate and develop the evidence of a third-party culpability, the result might have been entirely different.

But because the actual evidence in the record suggesting that others were involved was not likely, standing alone, to overcome the prejudice from the confession, Mr. Henderson was faced with a Hobson's choice: he could decline to testify and run the risk that the thin evidence of others' involvement would not be persuasive or testify to the involvement of the others, and subject himself to cross-examination. He obviously concluded that his only alternative was to testify.

Had he been granted the discovery he requested, he could potentially have avoided the dilemmas over whether and how to testify. The discovery would have permitted inquiry into whether others, including perhaps Knuck and/or Leon, had been arrested or charged with the similar crimes. If the other crimes evidence proved sufficiently strong, it could have been introduced and Mr. Henderson could have avoided altogether the need to testify.

Indeed, the other crimes evidence would have provided important corroboration even for the testimony which Mr. Henderson eventually gave because it could have placed this crime in the context of "a string" of robberies in the area. Since Mr. Henderson had indisputably been in prison until shortly before and then soon after the crime in this case, he could not have committed the other, similar home invasion robberies at mobile home parks. That, in turn, would have lent credence to his testimony that Knuck and Leon picked him up, that they had other plans that evening besides meeting up with women and that he was an unwitting accomplice to the crime.

At a minimum, the evidence would have provided potentially fruitful material for cross-examination of Officer Wolford regarding his paltry investigative effort at following leads suggesting the involvement of others. All of these avenues for the defense were foreclosed at the outset, however, because the discovery motion was denied. Without the discovery, there was scant evidentiary meat to put on the bones of the defense theories. Mr. Henderson

suffered the consequences. The denial of the discovery motion was prejudicial and the conviction and sentence should be reversed.

IV. THE TRIAL COURT ABUSED ITS DISCRETION DURING DEATH QUALIFICATION OF THE JURY BY EXCUSING A JUROR FOR CAUSE WHO COULD NOT HAVE BEEN EXCUSED UNDER THE *WITT-WITHERSPOON* STANDARD.

A juror may be challenged for cause based on his or her views regarding the death penalty only if the juror's views "would 'prevent or substantially impair the performance of his [or her] duties as a juror.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 ["general objections to the death penalty" insufficient as basis to challenge for cause].) During the death qualification process, the prosecution challenged a juror for cause who, the prosecutor acknowledged, could not have been challenged under the *Witt-Witherspoon* standard. The trial court's decision to grant the challenge cannot be justified as an exercise of its discretion to excuse jurors for cause. Instead, this Court should view the challenge for what it was – an end run around the principles governing exclusion of jurors based on their views of the death penalty. The excusal for cause requires reversal of the judgment and sentence of death.

A. Facts.

During the death qualification voir dire of prospective juror N., the following lengthy exchange occurred.

THE COURT: Ma'am, your questions regarding the death penalty, you almost consistently all the way through say you don't believe in it and you wouldn't vote for it. Am I right?

PROSPECTIVE JUROR N.: Oh, I didn't mean to leave that impression. I don't believe in the death penalty. I have always or the one time when we had that on the ballot in California, I voted against it. But if I felt that any defendant was guilty, I would have to vote guilty.

THE COURT: Now, I'm not talking about guilt or not guilty. I'm talking about imposing the death penalty or not. . . . You have to be convinced beyond a reasonable doubt of guilt and you have to find a special circumstance to be true, in this case committed during the commission of a robbery or burglary, before you even start talking about now what punishment should we impose. ¶ For example, on question 145 you say pretty flat out, "I don't believe in the death penalty and have voted against it." That's at the top of page 29. What does it mean to you, ma'am, to tell me "I don't believe in the death penalty."

MS. N.: Well, I don't believe in the death penalty because I feel it's a waste of life.

THE COURT: So does that mean since you don't believe in it that you could never vote for it?

MS. N.: No, it does not mean that.

THE COURT: So you could vote for something you don't believe in?

MS. N.: If it were the law, yes, sir, I could do that.

THE COURT: The law, ma'am, is never going to tell you you have to vote for a death penalty.

MS. N.: No. I understand.

THE COURT: That is not an option.

MS. N.: I understand.

THE COURT: . . . So since the law isn't going to tell you that, and you say that you're against the death penalty, can you ever, can you envision a circumstance under which you would vote to impose it?

MS. N.: If I felt that any defendant was guilty of premeditated murder which I am assuming is what would be a referral to the -- for the death penalty.

THE COURT: Let me stop you there. That assumption is incorrect . . . There's an entirely separate concept in the law called a felony murder and in California that concept says a way of getting a first-degree murder is if during the course of the commission of certain enumerated felonies somebody dies, and you've committed that felony, you are also guilty of murder and in fact first-degree murder. That applies, ma'am, even whether you intended they die or not. . . . ¶So to get to even talking about penalty, either life without possibility or death, you have to find a first-degree murder and a special circumstance to be true. Once you and the fellow jurors have found both of those things to be the case, then both sides start putting on evidence about what should your vote on the penalty be. And the D.A. is going to bring in everything bad they can think of or aware of, the defense is going to bring in everything good they can think of, and you are going to listen to those and then weigh those two things and say, I think given all the facts and circumstance, the death penalty is warranted or death penalty isn't warranted. Does that help understand the process a little better?

MS. N.: Yes, it does, your Honor.

THE COURT: Now we've discussed all that, you have indicated you don't believe in the death penalty. Can you imagine any circumstance in which you say I found a person guilty of first-degree murder, I found a special circumstance to be true. I and the other jurors have listened to all the evidence in the penalty phase, both the bad and the good, and in my own individual mind I believe in this case the bad so substantially outweighs the good that I believe the death penalty is appropriate and I am going to vote for the death penalty. Can you ever envision yourself coming to that situation?

MS. N.: Yes, your Honor, I can.

(7 RT 1619-1624.)

At Ms. N.'s request, the questioning then continued in the judge's chambers. (7 RT 1624.)

MS. N.: Okay. Sorry. . . . [B]ut today when you said, you know, there could be a mistrial declared if, if there were anything found out about any of the jurors. I do need to let everyone know that there are times when I get information psychically. I have been giving psychic readings since the late sixties and I do need also to let you know that I don't just walk into a room and pick up information about people. *The only time I get information about anyone is when they ask me to give them a psychic reading.* In this case it would not affect my being a juror because I wouldn't be getting any information that anybody else wouldn't be getting. I would be listening very carefully to testimonies and evidence and what have you. I just [sic] be another one of the boys. So I'm not a mind reader. People's thoughts are not something that I read.

THE COURT: When you say, ma'am, that you only acquire this information when somebody asks you to give them a reading, how then do you go about acquiring that information?

MS. N.: Just with putting myself in a relaxed state and concentrating. I don't use any particular props like cards or palmistry or anything like that.

THE COURT: By putting yourself in that relaxed state, sometimes that gives you information about a particular situation?

MS. N.: Uh-huh.

THE COURT: Okay. I do appreciate your telling us that and I'm sure that is something counsel would want to know. You say though because nobody is going to ask you in this case for such a reading, you think it wouldn't be a problem?

MS. N.: Yeah.

THE COURT: Counsel have any inquiry?

MS. CARTER: Just a quick question. Ms. N., sometimes evidence can be so dry that sometimes it's kind of hypnotic. I can imagine a scenario where you might be sitting on the jury. It's kind of dry and you are kind of

following along. If you find yourself in that relaxed state and if something comes through to you -- some information comes through to you, whatever that might be, of course you don't have any way of knowing and nor do I whatever that information might be, is that something then you think that you would consider with all the other things that you have heard in making a decision?

MS. N.: *No. I would not.*

MS. CARTER: Okay.

MS. N.: *Because that information was not asked for and would not even maybe be relevant to the time that is involved in this particular trial.*

MS. CARTER: . . . But what if the impression you got was an impression that had to do with the exact facts we're talking about. ¶For instance, what if a police officer were testifying and he was saying I'm collecting this evidence and then I collected that evidence, et cetera, et cetera, and you got a flash of what you think might have happened during that time that he was collecting evidence. . . . ¶Is that flash that came to you or that impression that came to you about what that officer said and did, *is that going to factor in then to how you evaluate what he said about what he did*?

MS. N.: *No*, I don't believe so because I think that my time here on the jury is a learning experience for me and *I would have to disregard any particular strong feelings that I got about anything.*

MS. CARTER: Okay.

MR. HEAD: I just understood you to say that you have to be asked for this information before it comes. . . . Was that correct? *So it's not likely that you would have, hear such information and in the course of a trial not having been asked for -- is that right or not?*

MS. N.: Yeah. When -- *yes, that is correct.* I wouldn't be. People's thoughts are their private thoughts unless they ask you to tell them about them and I don't. *I'm not a mind reader and I don't pick those things up.*

(7 RT 1624-1628 [emphasis added].)

The prosecutor challenged Ms. N. for cause, defense counsel objected and the trial court granted the challenge. (7 RT 1688.)

> MS. CARTER: Finally, Ms. N., *not because she didn't answer I suppose all the questions with the magic words* but I don't suppose I have to tell the Court of my concern of her indicating psychic impressions coming to her. Only when she calls upon them. I think it's going to substantially impair her in every part of her ability to deliberate and I am going to challenge her for cause.
>
> THE COURT: Did you wish to be heard?
>
> MR. HEAD: Yes, your Honor. Being a psychic does not mean you're a nut, does not mean you're a crazy. The police use psychics to try to find people. Her answers were intelligent, they were logical and in my view I don't think she's anywhere not even as nutty as the lady that was in the 8:30 panel this morning who based everything on the Ten Commandments and that sort of thing. So I object.
>
> THE COURT: Okay. Frankly, I'm surprised. . . . It just seems to me though, Mr. Head, that we're taking such a chance that Ms. N.'s reaction to the evidence is going to be -- *we're taking such a chance that that reaction is going to be affected by things we can't control that I am inclined to believe she could not conform her conduct to the requirements of law as a fair juror. In other words, we don't know how her brain system is going to filter the evidence she hears from the witness stand*, and I think we're taking too much of a chance that even though she says she only gets psychic information when she is asked to – I don't think I've been presented before with the question of is the Court required to leave a psychic on the jury. I will say *that's the only concern that I have about her.* If she -- *the other answers I thought she did answer.* . . . I am going to bite the bullet. *I don't believe Ms. N. can follow the requirements of basing her judgment only on the evidence she hears from this witness stand and nothing else. I will grant the challenge.*

(7 RT 1689-1691 [emphasis added].)

B. The Trial Court Committed Reversible Error When It Granted The Challenge To Ms. N.

1. There was no statutory basis to excuse prospective Ms. N.

A juror is subject to challenge for cause on the basis of "[a]ctual bias--the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc. § 225(b)(1)(C).) A juror is also disqualified for "[i]mplied bias--as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc. § 225(b)(1)(B).) Grounds for implied bias are set forth in Code of Civil Procedure § 229.[49] Section 229 limits the challenges for implied bias to those set forth in that section "and for no other."

The trial court did not state with any clarity whether it had found that Ms. N. was excused for implied or actual bias. (7 RT 1691.) None of the bases set forth in Section 229 for a challenge based on implied bias even remotely apply in this case. Thus, the trial court necessarily must have found actual bias. But nothing in the record supports such a finding.

There is no dispute that Ms. N., though harboring scruples against the death penalty, could not have been challenged under the *Witt-Witherspoon*

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[49] Due to its length, and for the Court's convenience, the text of Section 229 is included in the Appendix at the conclusion of this brief.

standard. The prosecutor reluctantly acknowledged as much and the trial court agreed. (7 RT 1689-1690, 1691.) Ms. N. made it clear that, despite general opposition to the death penalty, she could follow the law and could impose the death penalty in an appropriate case. (7 RT 1619-1624.) But then, Ms. N. – out of a sense of civic duty – volunteered that she was a psychic. She did so for the express purpose of dispelling at the outset any misunderstanding about what that meant and to avoid any possibility of a mistrial should she be chosen as a juror. (7 RT 1625.) There is no certainty that this information would have been discovered otherwise and, had it not been, Ms. N. would surely have remained in the jury pool. The judge's "only concern" about her was that:

> we're taking such a chance that Ms. N.'s reaction to the evidence is going to be – *we're taking such a chance that that reaction is going to be affected by things we can't control that I am inclined to believe she could not conform her conduct to the requirements of law as a fair juror. In other words, we don't know how her brain system is going to filter the evidence she hears from the witness stand . . . .*

(7 RT 1690-1691 [emphasis added].)

The trial court's reason for excusing Ms. N. does not withstand analysis. If the "chance" that a juror will be "affected by things" which cannot be controlled was the standard for removing jurors for cause, jury trials would come to a screeching halt. No court can know how any juror's "brain system is going to filter the evidence." All jurors come to the jury box with a unique and individual body of knowledge, preconceptions, misconceptions, biases,

prejudices, assumptions and beliefs which affect the way they filter and understand the evidence. It is precisely because all jurors bring their individual emotional, intellectual and cultural baggage to the courtroom that they are – and the jurors here were – admonished that they must be guided only by the evidence and the law as the judge instructs them in making their decisions. (CALJIC 0.50; 10 RT 2425-2426.) They are instructed to ignore and leave behind information and beliefs from outside the courtroom. And since the legal system can never truly know whether any particular juror has been "affected by things we can't control," jurors are presumed to have followed the instructions given them, unless there is evidence to the contrary. (*People v. Thomas* (2011) 51 Cal. 4th 449, 489.) The "presumption that jurors understand and follow instructions [is] '[t]he crucial assumption underlying our constitutional system of trial by jury.'" (*People v. Yeoman* (2003) 31 Cal. 4th 93, 139.)

Nor was there anything Ms. N. said which suggested she could not be fair and impartial. (Compare *People v. Thomas*, *supra*, 51 Cal. 4th at 470 [juror who gave conflicting testimony as to her capacity for impartiality properly excused].) To the contrary, Ms. N. showed a particularly keen understanding that she was required to decide the case based solely on the evidence presented. (7 RT 1625-1628.) The irony is that Ms. N. brought up the subject of being a psychic specifically to assure the court and the parties that she a) was not a "mind reader," b) did not receive unsolicited information psychically and, most

important, c) understood her duty as a juror was to base her decision making only on the facts and law presented to her in the courtroom. (7 RT 1624-1628.) There was no more reason to disbelieve her than there was to disbelieve any other juror who agreed that she/he could set aside what they knew from elsewhere and listen only to facts and the law in the particular case.

While Ms. N. might have been somewhat eccentric, that is no disqualifier for jury service. She understood her duties and responsibilities as a juror and exhibited no actual bias that would disqualify her. There was no statutory basis upon which to excuse her for cause and her excusal was error.

2. Granting the challenge to Ms. N. violated Mr. Henderson's rights under *Witt-Witherspoon.*

The trial court's decision to exclude Ms. N. was doubly erroneous because of the context in which it occurred. Her allegedly disqualifying information came to light only because she chose to volunteer it during the death qualification process – none of the lawyers or the court had solicited it. The prosecutor knew and the trial court agreed that there was no basis to challenge her under *Witt-Witherspoon*. (7 RT 1689-1690, 1691.) Indeed, it is not too much to say that Ms. N.'s answers to questions demonstrated that she embodied the principle that a juror "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to [her] by the state and can thus obey the oath [she] takes as a juror." (*Witherspoon, supra*,

391 U.S. at 519.) She "state[d] clearly" that she was "willing to temporarily set aside [her] own beliefs and follow the law." (*People v. Avila* (2006) 38 Cal. 4th 491, 529; 7 RT 1624.) The prosecutor took advantage of Ms. N.'s honesty about her occupation to challenge a juror who was otherwise not excludable based on her views of the death penalty.

In fact, the grudging acknowledgement by the prosecutor that Ms. N. was not excludable under *Witt-Witherspoon* exposes that the prosecutor's real reason for making the challenge was to get rid of a juror with generalized scruples against the death penalty. The prosecutor said she was challenging Ms. N., "not because she didn't answer I suppose all the questions [regarding the death penalty] *with the magic words,"* but purportedly because she considered herself to be a psychic. (7 RT 1689-1691 [emphasis added].) The pejorative use of the term "magic words" to describe Ms. N.'s answers to questions regarding her willingness to listen to the evidence and follow the law pertaining to the death penalty revealed that, contrary to her stated reasons, the prosecutor's challenge was in fact based on the risk that Ms. N. might be a vote against the death penalty. Had the trial court excluded Ms. N. on *that* basis the error would have been reversible *per se*. (*Witherspoon*, *supra*, 391 U.S. at 522.) The law ought not to permit the state to do "indirectly what it cannot do directly." (*People v. Tilekooh* (2003) 113 Cal. App. 4th 1433, 1446.)

Appellant acknowledges that in most cases """the qualifications of jurors challenged for cause are 'matters within the wide discretion of the trial court, seldom disturbed on appeal'""" (*People v. Carpenter* (1999) 21 Cal. 4th 1016, 1036, quoting *People v. Holt* (1997) 15 Cal. 4th 619, 656), and that '"the general rule [is] that an erroneous exclusion of a juror for cause provides no basis for overturning a judgment.'" (*People v. Holt, supra*, 21 Cal. 4th at 656.) If the erroneous exclusion of a single, somewhat unusual juror were all that was at stake, then this case would undoubtedly be governed by the general rule quoted above. Mr. Henderson submits, however, that this case presents an exception to that rule.

The circumstances here demonstrate that the prosecutor saw an opportunity to rid herself of a juror who was generally uncomfortable with the death penalty, but not excludable on that basis. To view the facts otherwise is to elevate form over substance. The elimination of Ms. N. – ostensibly because of her chosen profession, but in reality because of her views about the death penalty – had the effect of "produc[ing] a jury uncommonly willing to condemn a man to die." (*Witherspoon, supra*, 391 U.S. at 521.) The sentence of death should be reversed.

V. THE TRIAL COURT PERMITTED THE PROSECUTOR TO EXERCISE A PEREMPTORY CHALLENGE IN VIOLATION OF THE DEFENDANT'S RIGHTS PROTECTED BY *BATSON/WHEELER.*

Mr. Henderson is African-American. One of the prospective jurors was Ms. D. B., an African-American woman. She was the lone African-American to be seated in the jury box and the prosecutor exercised a peremptory challenge to remove her. (10 RT 2392.) Defense counsel objected on the grounds that Ms. D. B. had been excluded on the basis of her race in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal. 3d 258. The trial court denied the challenge at the first step of the *Batson* analysis, concluding that the Mr. Henderson had not shown a "strong likelihood of bias." (10 RT 2396-2398.) The "strong likelihood" standard under which the trial court considered the objection was subsequently struck down by the U.S. Supreme Court as inconsistent with the principles enunciated in *Batson*. (*Johnson v. California* (2005) 545 U.S. 162, 168.) That alone is sufficient to compel reversal. In addition, the evidence before the trial court was more than sufficient to support a legitimate inference of discriminatory purpose and thus to establish a prima facie case of group bias. As a result, this Court must reverse.

A. Facts.

1. Questioning of Ms. D. B.

According to her juror questionnaire, Ms. D. B. believed that the most important quality in a juror was "[s]omeone with an open mind who will listen and wait until everyone have [sic] been able to speak." (27 CT 7392.) Conversely, the attitude she believed should disqualify a juror from serving was "[s]omeone who will not have an open mind and thinks guilty before the case is over." (27 CT 7392.) She had friends in the Palm Springs Police Department and served on a community board that met regularly with the representatives of the police department. (27 CT 7387-7388, 7393; 7 RT 1568-1569.) She emphasized that she would not be swayed improperly for or against the prosecution because of her experiences with law enforcement personnel. (7 RT 1546, 1568-1569; 27 CT 7393.)

Active in her community, Ms. D. B. belonged to the NAACP and the Black History Month Board. (27 CT 7387.) She identified *Ebony* magazine as one of the publications she read (2 CT 7388) and stated that the accomplishment of which she was most proud was "when I set up the first Eastern Star chapter in Palm Springs for Blacks." (27 CT 7389.) She tried hard to be "color-blind" in her dealings with others, had white family members, and believed strongly not only that race should be irrelevant in matters of crime and

punishment, but that race was not necessarily an impediment to achievement in American society. (See 27 CT 7404-7406.)

She did not believe that being under the influence of drugs diminished responsibility for the commission of a crime; that was an "easy way out." (27 CT 7398.) Nor did she express an opinion against the death penalty. Instead, she agreed that she would listen to the evidence before deciding on the penalty and "[i]f without a doubt they are guilty, and this is what has to be then I will go with [the death penalty]." (27 CT 7409.) Alternatively, she agreed that if she were persuaded by mitigating factors that life without parole was the appropriate punishment, she would vote for that. (7 RT 1512 [explaining her answer at 27 CT 7414].)

The voir dire of Ms. D. B. was dominated by questioning focused on her prior marriage – which ended in the 1970s – to a former Palm Springs police officer who was prosecuted for a violent crime many years after the marriage ended. She stated repeatedly that her former husband's prosecution would have no bearing on how she listened to the testimony of law enforcement personnel.

> THE COURT: . . . Ma'am, where was your previous spouse a policeman?
>
> PROSPECTIVE JUROR. D. B.: Palm Springs Police Department.
>
> THE COURT: May I ask what his name was.
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> MS. D. B.: John Parker.

THE COURT: Anything about that fact, ma'am, that you believe would affect any decision you might be asked to make in this case?

MS. D. B.: No.

THE COURT: Or again that wouldn't affect the manner in which you judge the believability, the credibility of a law enforcement witness as opposed to the way you will do that with anybody else?

MS. D. B.: No.

THE COURT: So again in other words, a law enforcement witness is going to have neither a leg up nor a strike against them in your book. Would that be correct?

MS. D. B.: Correct.

THE COURT: And you did note that you mentioned [that you know] some of the witnesses I think?

MS. D. B.: Yes.

THE COURT: Some of them are law enforcement related and some are not. Same question about the law enforcement. Again are you going to automatically assume what that person says is true or automatically assume that it is not true because he is a police officer if he testifies?

MS. D. B.: No, I won't.

(7 RT 1510-1511.)

THE COURT: . . . There was just a question that I had . . . and it has to do with your being married to an ex P.S.P.D. officer. . . . . There was an Officer Parker who within the last couple of years was charged with a very serious crime at P.S.P.D. Is that the John Parker you are married to?

MS. D. B.: No. No. No. That is my ex. Ex. I was married to him first.

THE COURT: But that is my question. That is that same person?

MS. D. B.: Yes, it is.

THE COURT: You are not the victim in that case?

MS. D. B.: No. *I was married to John back in 1967 many, many years ago*, and then he remarried someone else.

THE COURT: When were you divorced?

MS. D. B.: *In the seventies.*

THE COURT: And I assume when it was in the papers that you read about that incident?

MS. D. B.: With John?

THE COURT: Yes.

MS. D. B.: No. I try not to read things like that. I just don't want to get involved with it, and so I tried very much to stay, keep my focus on something else, but I knew of it, yes, I did.

THE COURT: Is there anything about that situation and the fact that it involved your ex-husband or anything at all that you can think of that would affect in any way any decision you might be asked to make in this case?

MS. D. B.: *No, it would not.*

THE COURT: Counsel have any inquiry?

[PROSECUTOR] MS. CARTER: . . . Obviously, you probably know he was prosecuted, and that [he] would have been prosecuted by the D.A.'s office who is also prosecuting Mr. Henderson. Is there anything, do you have any feelings, positive or negative or anything about that that you think is going to affect maybe the way you look at our handling of this case?

MS. D. B.: No, I don't. I don't have any feelings on it. No, I don't.

MS. CARTER: Do you have a feeling about the court system or the way they may have handled Mr. Parker's matter that gives you some concern?

MS. D. B.: *I have no concerns over the outcome of John's case whatsoever*, and I might say that at one time I thought I would have had to have been a witness for that case, but I was not called.

THE COURT: Do I take it, ma'am, that you are aware of whatever that outcome was?

MS. D. B.: Yes, I am.

THE COURT: All right. Anything else?

MS. CARTER: I just want to say we don't mean to pry. I am sure it is an uncomfortable topic.

MS. D. B.: I knew when I put it down you would probably ask questions on it, and if you hadn't of, I would have wondered why, so it is okay.

(7 RT 1515-1518 [emphasis added].)

2. Peremptory challenge and objection.

Shortly after Ms. D. B. was seated in the jury box, the prosecutor exercised a peremptory challenge to excuse her and defense counsel objected on *Batson/Wheeler* grounds. (10 RT 2392.) In support of the motion, defense counsel stressed that of the more than 100 jurors in the panel who had potentially qualified for service, only three were African-American. (10 RT 2392.) Both the prosecutor and defense counsel knew the order in which the jurors would be called to the jury box (10 RT 2253, 2372) and the two remaining African-Americans, Ms. G. and Ms. B—n were "back in the hundreds. . . . Miss B[--]n is 110. Miss G[.] is 116. . . . We all know that there is no possible way, I mean I guess it is conceivable, but it is a million to one

that we would ever get to those jurors. . . ." (10 RT 2392.) In fact, both the defense and the prosecution used their allotted 20 peremptory challenges and neither potential Juror G. nor potential Juror B—n was called to the jury box. (10 RT 2413.)

In connection with the objection, defense counsel also stated:

> If it wouldn't be too much trouble, I would like to look at her questionnaire.[50] I do recall some things. I believe that she is a teacher. I believe that she stated that she would vote for the death penalty in an appropriate case, and if -- and that situation with her previous husband, she was questioned about that I think in here and indicated that that wouldn't present any problems for her, and I think her overall questionnaire, it would qualify her for jury service, and *if it wasn't for the fact that she is the only black person as a potential juror, I would question whether or not she should [sic] be challenged.*

(10 RT 2395 [emphasis added].)

He stressed that Ms. D. B. "had no position on the death penalty. I think . . . she stated that she thought the death penalty accomplished some things. She was not morally or philosophically necessarily opposed to it." (10 RT 2395.) Furthermore, "her answers to the inquiry about her marriage to that man w[ere] that she was married to him I believe long before the incidents occurred, and she had some knowledge of it, but she stated that it wouldn't affect her in any way." (10 RT 2398.) He asked to "incorporate by reference here her

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[50]Her juror questionnaire was not in the courtroom. (10 RT 2394.) It appears that neither defense counsel nor the trial court actually viewed the questionnaire during the hearing, but the trial court permitted defense counsel to incorporate Ms. D. B.'s answers on the questionnaire as part of his showing on the motion. (10 RT 2397.)

answers to her jury questionnaire and her responses to the voir dire that we conducted out of the presence of the jury as well as her entire voir dire." (10 RT 2396.) The trial court granted that request. (10 RT 2397.)

The trial court gave the prosecutor an opportunity to offer an explanation for the challenge, but in doing so, the judge emphasized that he had not made "any particular finding" that defense counsel had established a prima facie case of discrimination. (10 RT 2393.) Rather than offer a legitimate, race-neutral basis for the challenge, the prosecutor opted to argue only that defense counsel had failed to make out a prima facie case of bias. (10 RT 2393-2394, 2395-2396.)

In denying defense counsel's motion under *Batson/Wheeler*, the trial court stated:

> I have had the opportunity now to review [*People v.*] *Christopher* and [*People v.*] *Trevino*, and *Trevino* cites the [*People v.*] *Howard* case cited to me by the prosecution. Based on the review of those cases, I am going to find that the defense has not carried their burden of establishing a prima facie case. It is the case that Miss B[.] is African-American, however, *there is a requirement*, according to these cases, *of a strong likelihood that the challenges were the result of the potential juror's membership in the cognizable group*. . . .
>
> ***
>
> [T]he reason I am thinking I need make no further inquiry is that I can see a reasonable, constitutionally-permissible reason why the People might seek to excuse Miss B[.], and that is her former marriage to a police officer. Just as it is the case that sometimes folks are biased for the police, being divorced from police officers, particularly police officers who have themselves been charged with violent crimes, might

> cause a person to be biased against police and police witnesses, and therefore, *I can find, without even inquiring of the prosecution,* that there certainly is at least one constitutionally-permissible reason for the exercise of a peremptory, and having found no other basis other than that, it is the defense's assertion that she gave good answers, to paraphrase, and the fact that she is African-American. I don't believe the presumption that an exercise of a peremptory challenge has been made in a constitutionally-permissible manner has been overcome, and therefore I will deny the challenge.

(10 RT 2396-2398 [emphasis added].)

The jury that was impaneled consisted of 11 non-Hispanic white jurors and one Hispanic juror.[51] The alternates consisted of three non-Hispanic white jurors and two Hispanic jurors.[52]

B. The Trial Judge Used The Discredited "Strong Likelihood" Standard In Finding That The Defendant Had Not Established A Prima Facie Case Of Impermissible Racial Bias.

A "prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias – that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds' – violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. . . . Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment." (*People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1008.) The procedure trial courts must follow in the

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[51]See 5 CT 1336, 1374; 6 CT 1452; 14 CT 3813, 3852; 15 CT 3931, 4008; 25 CT 6756, 6834, 6873, 6912; 37 CT 9976.

[52] See 5 CT 1413; 14 CT 3774, 3891; 15 CT 3969; 25 CT 6795.

face of motions objecting to peremptory challenges on the basis of group bias is settled.

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations]. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination."

(Johnson v. California (2005) 545 U.S. 162, 168. See also *People v. Taylor* (2009) 47 Cal. 4th 850, 885-886.)

1. The trial court impermissibly excused Ms. D. B. on the grounds that defense counsel had not shown a "strong likelihood" of bias.

In *Johnson v. California, supra*, the Supreme Court expressly overruled the "strong likelihood" standard previously applied by this Court for determining whether a defendant has established a prima facie case under *Batson*. Under the standard prevailing in California at the time of the trial below, the defendant's burden at the *first* step of the *Batson* framework was to show that there was a "strong likelihood" that a juror had been challenged on the basis of group bias. (545 U.S. at 166-168; *People v. Hawthorne* (2009) 46 Cal. 4th 67, 79; s*ee Wheeler*, 22 Cal. 3d at 280.) In *Johnson* itself, this Court held that the defendant could meet that burden by demonstrating that "it is more likely than not the other party's peremptory challenges, if unexplained, were

based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal. 4th 1302, 1318.) The high court rejected the test articulated in *People v. Johnson* and prior cases, emphasizing that in *Batson* and its progeny the Supreme Court

> did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination. Instead, 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*, 545 U.S. at 170; see also *People v. Hawthorne, supra*, 46 Cal. 4th at 79.)

The court below expressly utilized the "strong likelihood" standard for *Batson-Wheeler* challenges later rejected by the Supreme Court in *Johnson*. The trial court stated: "It is the case that Miss [D. B.] is African-American, however, there is a requirement, according to [the] cases, of a *strong likelihood that the challenges were the result of the potential juror's membership in the cognizable group* . . . ." (10 RT 2396 [emphasis added].) The trial court also expressly absolved the prosecutor of offering any race-neutral explanation for the challenge. (10 RT 2398.) In requiring Mr. Henderson at the first *Batson* step to show a strong likelihood – rather than merely evidence sufficient to support an inference – of group bias, the trial court short-circuited the entire *Batson* framework, relieved the prosecutor of any obligation to produce a race-

neutral explanation for the challenge and imposed on Mr. Henderson a burden of persuasion that arises only at the third, and final, step.

The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the third step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Johnson*, 545 U.S. at 171. See also *Miller-El v. Dretke* (2005) 545 U.S. 231, 240.)

The trial court indisputably used the wrong standard to evaluate the challenge. That compels reversal. (*Johnson*, 545 U.S. at 173.)

2. *Johnson* prohibits a trial court from substituting its own speculation for the prosecution's failure to offer a race neutral explanation of the challenge.

Whether the prosecutor actually had a race-neutral reason for excluding Ms. D. B. is unknown because, though given the opportunity to proffer such an explanation, the prosecutor declined and rested entirely on the grounds that defense counsel had not shown a "strong likelihood" of bias. (*See generally* 10 RT 2393-2396.) Ironically, had the trial court utilized the correct legal standard in evaluating the challenge, the prosecutor's failure to proffer a race-neutral explanation would itself have been evidence of potential racial bias. (*Johnson*, 545 U.S. at 171 n. 6.)

The trial court attempted to come to the aid of the prosecution by suggesting as a purportedly race-neutral reason for the excusal Ms. D. B.'s "former marriage to a police officer. Just as it is the case that sometimes folks are biased for the police, being divorced from police officers, particularly police officers who have themselves been charged with violent crimes, might cause a person to be biased against police and police witnesses . . . ." (10 RT 2396.) Such speculation by the trial court is not properly considered at the first *Batson* step and does not relieve the prosecutor of its burden at the second *Batson* step. (*Johnson*, 545 U.S. at 172.)

In *Johnson,* as here, the prosecutor had offered no explanation for the challenges and, like the trial court here, the trial court in *Johnson* reviewed the record and offered a purportedly race-neutral explanation. The Supreme Court reversed. The reason is clear: it is the prosecutor's actual reasons for the challenge, not what those reasons might have been, which are at issue. (545 U.S. at 172. Compare *People v. Booker, supra*, 51 Cal. 4th at 163 (trial court's reasons for denying challenge adopted by prosecutor as race-neutral basis for challenge).)[53]

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[53] Even if the trial court's speculation about the prosecutor's reason for the challenge was correct, the record should have put those concerns completely to rest. Ms. D. B. said repeatedly that her prior marriage to the officer would not cause her to be biased against the police. (7 RT 1515-1518; *see also* 27 CT 7393 [her relationships with police officers, including her ex-husband, would not "affect[], in any way, [her] views about police-related subjects"].) When

The trial court here used the wrong legal standard to test the objection to the challenge, the prosecutor offered no race-neutral explanation and the trial court could not come to the prosecution's rescue to offer a justification. The trial court's ruling was unlawful under *Johnson*, and the conviction must be reversed.

C. Mr. Henderson Produced Evidence Sufficient To Permit The Trial Judge To Draw An Inference That Group Bias Infected The Peremptory Challenge To Ms. D. B.

The trial court's use of the incorrect standard to evaluate the challenge should end the inquiry and compels reversal. But even if the Court reviews the record, the evidence below plainly "supported an inference that the prosecution excused a prospective juror for an improper reason." (*People v. Lancaster* (2007) 41 Cal. 4th 50, 75; see also *People v. Hartsch* (2010) 49 Cal. 4th 472, 487.) Since the trial court impermissibly truncated the *Batson* inquiry at the first step in the face of a proper showing, this Court must reverse.

1. The objective evidence in the record supported an inference of group bias.

The evidence below was sufficient to support an inference of discrimination in the prosecutor's peremptory challenge to Ms. D. B. First, and

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questioned specifically about her ex-husband's legal problems, she stressed that they would have no bearing on her service as a juror, in part because his prosecution occurred *decades after their marriage ended.* (7 RT 1515-1518.) As a result, the trial court's speculative reason for the excusal simply does not hold water and is "logically implausible." (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1182.)

foremost, the evidence was clear that only three African-Americans were included among the more than 100 prospective jurors remaining in the pool. (10 RT 2392.) Second, Ms. D. B. was the only African-American actually to be summoned to the jury box. Counsel stated for the record, without contradiction, that the two other African-Americans among the more than 100 jurors in the jury pool were too far down the numerical list for there to be any realistic chance that they would be seated. (10 RT 2392.) Since the order in which jurors would be called had been fixed in advance (10 RT 2253, 2372), the prosecutor knew when she exercised the challenge to Ms. D. B. it was highly unlikely the other two African-American jurors would ever be seated. And, as defense counsel predicted, neither of the other African-American jurors was called to the box by the time all peremptory challenges had been exhausted. (10 RT 2413.) Practically speaking, therefore, there was only one African-American in the jury pool and the prosecutor used a peremptory challenge to exclude her. (Compare *People v. Taylor* (2010) 48 Cal. 4th 574, 614 [no inference of discrimination from excusal of single African-American juror where another African-American was sitting in jury box].)

While Ms. D. B.'s status as the lone African-American juror to reach the jury box may frustrate a statistics-based argument at the first *Batson* step, it does not foreclose the challenge. "The exercise of even a single challenge based on race is constitutionally proscribed." (*People v. Howard, supra*, 42 Cal. 4th

at 1018 n. 10.) What is critical is that, by rejecting Ms. D. B., the prosecutor effectively ensured the jury would not include any African-American members – with the added benefit that she did not have to use any other peremptory challenges to achieve that result. (Compare *People v. Hawthorne*, *supra*, 46 Cal. 4th at 79-80 [*Batson/Wheeler* motion properly denied where counsel did not allege that prosecutor used challenges "to strike most or all African-American prospective jurors" and record silent as to "the number of African-American prospective jurors, if any, who were included in the entire jury venire or in the jury panel" at time motion made]; *People v. Bell* (2007) 40 Cal. 4th 582, 599, 600 [no prima facie case where record failed to show how many members of challenged groups "were in the venire and were not challenged by the prosecution"]; *cf. People v. Avila* (2006) 38 Cal. 4th 491, 555 [no prima facie case where several prospective African-American jurors were in venire at time of challenge to only African-American in jury box].)

Third, both Mr. Henderson and Ms. D. B. are African-American and the victims were white. As the ultimate composition of the jury revealed, the majority remaining jurors were white. If, as here, the defendant is "a member of the excluded group . . . and especially if in addition his alleged victim is a member of the group to which the majority of remaining jurors belong, these facts may be called to the court's attention" in support of an inference of group bias. (*People v. Bell, supra,* 40 Cal. 4th at 597; *People v. Neuman* (2009) 176

Cal. App. 4th 571, 581 [defendant white and not a member of any of groups to which excused jurors belonged].)

Fourth, and related to the last point, the ultimate composition of the jury is a factor to be considered in evaluating a *Batson/Wheeler* objection. (*People v. Ward* (2005) 36 Cal. 4th 186, 203; *People v. Turner* (1994) 8 Cal. 4th 137, 168; *see, e.g., People v. Lancaster, supra*, 41 Cal. 4th at 76 [three of four African-Americans on panel at time of challenge ultimately served on jury]; *Johnson,* 545 U.S. at 164-165, 173 [of 43 eligible jurors, only three were black; prosecutor challenged all three and defendant tried by all-white jury].) As indicated above, Mr. Henderson was tried by a jury of 11 non-Hispanic whites and one Hispanic juror. (See fn 51, *supra*.) While the ultimate jury composition was not known at the time of the challenge to Ms. D. B., the prosecutor knew to a virtual certainty that the challenge would result in no African-Americans being empanelled.

2. Ms. D. B.'s answers to questions demonstrated that she was well-qualified to serve as juror.

Defense counsel asked that the judge take Ms. D. B.'s answers on voir dire and in her juror questionnaire into consideration as part of his prima facie case. (10 RT 2396, 2397; compare *People v. Taylor, supra*, 48 Cal. 4th at 614 [no prima facie case, in part, where defendant relied on race of challenged juror "alone, without referring to the juror's questionnaire or voir dire answers."].)

Ms. D. B.'s answers during voir dire and on her juror questionnaire demonstrate that there was no meaningful basis to challenge her and, indeed, the prosecution should have perceived her to be a model juror. For example, in Ms. D. B.'s opinion, the most important quality in a juror was "[s]omeone with an open mind who will listen and wait until everyone have [sic] been able to speak." (27 CT 7392.) And she believed that "[s]omeone who will not have an open mind and thinks guilty before the case is over," should not sit as a juror. (27 CT 7392.)

She stated that she tried hard to be "color-blind" in her dealings with others, had white family members, and believed that, not only should race be irrelevant in matters of crime and punishment, it was not necessarily an impediment to achievement in American society. (See 27 CT 7404-7406.) In her opinion, the contention that being under the influence of drugs diminished responsibility for the commission of a crime was an "easy way out." (27 CT 7398.) And her views about the death penalty reflected that she was even-handed and had no strong predilection for or against it. She agreed that she would listen to the evidence before deciding on the penalty and could vote to impose death or life without possibility of parole. (7 RT 1512 [explaining her answer at 27 CT 7414].)

Furthermore, in the area that the trial court considered critical, *i.e.*, whether prior relationships with law enforcement would bias her, Ms. D. B.'s

consistently stated she would not be swayed for or against the prosecution or the defense. She had friends in the Palm Springs Police Department and regularly met with police representatives as part of a community service board, but emphasized repeatedly that she would not be biased for or against the prosecution because of her experiences with law enforcement personnel. (27 CT 7393; 7 RT 1546, 1568-1569.) During voir dire, she was questioned specifically and at length by the trial judge about her former marriage – which had ended 30 years earlier. She emphatically stated that her former husband's prosecution would not bias how she weighed the testimony of law enforcement personnel. (7 RT 1510-1511, 1515-1518.) She had "no concerns . . . whatsoever" about his felony conviction. (7 RT 1517.)

By any measure, Ms. D. B. would have been an ideal juror.

3. The evidence from Ms. D. B.'s voir dire and juror questionnaire is sufficient to raise an inference that she was challenged for constitutionally impermissible group bias.

The wealth of evidence showing that Ms. D. B. was well-qualified to act as a juror is sufficient itself to raise at least an inference that her race was the deciding factor behind the challenge. But any doubt is dispelled by additional evidence in the record.

Among the organizations in which Ms. D. B. participated were the NAACP and the Black History Month Board. (27 CT 7387.) She identified

Ebony magazine as a publication she read (27 CT 7388) and stated that the accomplishment of which she was most proud was "when I set up the first Eastern Star chapter in Palm Springs for Blacks." (27 CT 7389.) These answers revealed Ms. D. B. to be an active and proud member of the local African-American community. When coupled with the evidence demonstrating she otherwise would have been a model juror, her community activities and preferences for reading material suggest strongly that the prosecutor must have decided that, solely because of her race, Ms. D. B. "[would] be unable impartially to consider the State's case against a black defendant." (*Batson*, 476 U.S. at 90.) That was unlawful. The evidence below was sufficient to meet the defendant's burden at the first *Batson* step of raising an inference of group bias.

4. A comparison of Ms. D. B.'s answers on her juror questionnaire to those of seated jurors also supports an inference of bias.

As part of his showing, defense counsel incorporated by reference Ms. D. B.'s juror questionnaire and stated, "I think her overall questionnaire, it would qualify her for jury service, and if it wasn't for the fact that she is the only black person as a potential juror, I would question whether or not she should be challenged." (10 RT 2395.) Counsel's comment was an implied request to compare Ms. D. B.'s answers to the answers offered by others who the prosecution did not challenge.

Mr. Henderson acknowledges that this Court has yet to endorse a comparative juror analysis at the first *Batson* step. (See *People v. Taylor, supra*, 48 Cal. 4th at 617; see also *People v. Hawthorne*, *supra*, 46 Cal. 4th at 69; *People v. Howard, supra*, 42 Cal. 4th at 1019-1020). Other courts have, however, utilized comparative analysis at the first step in determining whether a prima facie case has been made. (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 956; *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149.) Indeed, in circumstances such as those here, where only a single prospective juror and a single challenge are at issue because the effective composition of the venire includes no other members of the excluded group, a comparative juror analysis may be the most compelling, perhaps the only, means of showing an inference of bias since the "challenge of one or two jurors, *standing alone*, can rarely suggest a pattern of impermissible exclusion." (*People v. Howard, supra*, 42 Cal. 4th at 1018 n. 10 [emphasis added]) If the challenge is unlikely to be sustained on the fact of exclusion alone in such circumstances, comparative analysis can provide the additional evidence necessary to demonstrate bias and to shift the burden to the prosecutor to explain the challenge. (*Crittenden, supra*, 624 F.3d at 956.)

If Ms. D. B.'s prior relationship with her ex-husband and knowledge of his legal problems had been real concerns – despite her answers during voir dire – then at least two of the seated jurors should also have been challenged. Juror

numbers two and four – both of whom were white and both of whom were questioned before Ms. D. B. – each had had direct and unpleasant experiences with law enforcement, and yet they were permitted to sit. Question number 82 on the juror questionnaire asked: "Have you ever had ANY unpleasant experience with a law enforcement officer working for any agency listed above, or any other law enforcement agency (including traffic stops or as a crime victim)?" Juror numbers two and four each answered "*Yes*." (14 CT 3864; 5 CT 1386.) Ms. D. B. answered "*No*." (27 CT 7393.)

Juror number two explained: "While on the way home from work, pulled over by several police cars/officers who been following me for a couple of miles (including a helicopter)[.] My car matched a description of a stabbing [sic] that had just taken place." (14 CT 3864.) The experience would not, however, "affect [her] attitude toward a law enforcement officer as a witness." (14 CT 3864.) Neither the trial court nor counsel questioned juror number two during voir dire about the experience. Instead, they accepted her response at face value. (5 RT 1158, 1189-1183, 1193.)

Juror number four revealed that she had been accused of child abuse and had been jailed briefly. (5 CT 1389.) The child abuse charges against her were eventually dismissed. Her spouse was accused, but found not guilty, of sexual molestation. (Id.) As a result of the experience, she "was not fond of the social service system." (5 CT 1386.) She was questioned briefly by the trial court and

the prosecutor regarding the matter and stated that the experience would not bias her consideration of the evidence or witnesses.

> MS. CARTER: . . . I just want to know, that experience, as disturbing as it must have been, is that going to do you think in any way have anything to do with the way you feel about anything in this case?
>
> PROSPECTIVE JUROR [4]: I don't believe so.
>
> MS. CARTER: Okay. Again, do you think it in any way might make you more sympathetic to the defendant than you otherwise would be coming in here without that experience in your background?
>
> PROSPECTIVE JUROR [4]: I don't believe so.
>
> MS. CARTER: Okay.

(4 RT 887-888, 890-891.) She said her experience would not affect her attitude toward a law enforcement officer as a witness. (5 CT 1386.)

These two jurors – each of whom had been detained by law enforcement and, in the case of juror number four, prosecuted for crimes – were seated. On the face of it, they had even more reason to be biased against law enforcement, but their statements that they would not be biased were accepted with little or no inquiry.

Like Ms. D. B., jurors two and four knew and had personal relationships with law enforcement personnel. (5 CT 1385-1386; 14 CT 3863-3864.) Juror number two had a social friend in the Riverside County Sheriff's Department. Like Ms. D. B., juror number two agreed that her personal relationship with law enforcement personnel would not affect her judgment. (5 RT 1181-1182.)

Juror number four's son was a police officer and, in a kind of mirror image of Ms. D. B.'s circumstances, juror number four's husband, who was subsequently accused of child molestation, had been a police officer before she met him. (5 CT 1386, 1389.) She, too, stated that her personal relationships with law enforcement personnel would not bias her consideration of police officer testimony. (4 RT 864-865.) Surely jurors two and four's *current* relationships with law enforcement personnel raised the potential for bias at least as great, and arguably greater, than Ms. D. B.'s divorce from a police officer 30 years before the trial. And yet, their representations that they would not be biased were accepted and hardly explored at all during voir dire. They were seated and Ms. D. B. was challenged.

The answers from jurors two and four to other questions underscore how otherwise similarly situated they were to Ms. D. B. In response to the question, "What qualities do you feel are most important in serving as a juror in a criminal case?" juror number two wrote, "Being open minded – a good listener – be objective." (14 CT 3863.) Juror number four wrote, "To be open minded. Consider only the facts given." (5 CT 1385.) Ms. D. B. answered that question in language virtually identical to that used by jurors two and four: "Someone with an open mind who will listen and wait until everyone have [sic] been able to speak." (27 CT 7392.)

Responding to the question, "What attitudes do you feel should disqualify someone from serving as a juror in a criminal case?" juror number two wrote, "If there [sic] in court or arrested, they must be guilty." (14 CT 3863.) Similarly, Ms. D. B.'s answer was "[s]omeone who will not have an open mind and thinks guilty before the case is over." (27 CT 7392.)

Jurors two and four, like Ms. D. B., each agreed that being charged with a crime did not equate to guilt and that guilt had to be determined by the evidence. (5 CT 1395; 14 CT 3873; 27 CT 7402.) All three stated that they could be fair and impartial in judging the defendant or witnesses, even if they "disagree[d] with the type of lifestyle" the defendant or witness lived. Indeed, their responses were strikingly similar. Juror number two said, "[i]t is their life – not mine." (14 CT 3874.) Juror number four wrote, "[e]veryone has a right to their own way of living even if we do not support it." (5 CT 1396.) Ms. D. B. wrote, "it is there [sic] choice to live the way they want to." (27 CT 7403.)

The responses Ms. D. B. and jurors two and four gave to a series of questions regarding the continued existence of racism in American society and their own racial attitudes were remarkably similar despite the fact that Ms. D. B. was African-American and the other two were white. (Compare responses to Question nos. 143, 144 at 5 CT 1398-1400 and 14 CT 3876-3878 with 27 CT 7405-7407.)

Finally, while Ms. D. B.'s answers on the questionnaire may have suggested that she was slightly less supportive of the death penalty than jurors two and four, all three indicated that they could listen to the evidence and would not vote automatically for death or life without parole. (7 RT 1512; 27 CT 7409-7414 [Ms. D. B.]; 5 RT 1182-1183, 1193; 14 CT 3880-3885 [juror no. two]; 4 RT 866-867, 890; 5 CT 1402-1407 [juror no. four].) Nor were Ms. D. B.'s answers regarding her attitude toward the death penalty dramatically different from those expressed by other seated jurors. Like jurors three, five, seven and eight, Ms. D. B. indicated that she "had no position for or against the death penalty, however, would consider the imposition of the death penalty in some cases." (25 CT 6785 (juror no. three); 15 CT 3959 (juror no. five); 14 CT 3842 (juror no. seven); 6 CT 1481 (juror no. eight); 27 CT 7410 (Ms. D. B.).)

In sum, unlike jurors two and four, Ms. D. B. did not have any negative experiences with law enforcement which might have called her impartiality into question. And yet, jurors two and four, both of whom said that their negative experiences would not affect their judgment, were seated and Ms. D. B. was not. Ms. D. B., like jurors two and four, said that her personal relationships with law enforcement would not affect her decision making. Jurors two and four were seated and Ms. D. B. was not. As the high court said in the context of a *Batson* challenge at the third step, "[t]he fact that [a proffered] reason [for a challenged juror] also applied to these other panel members, most of them

white, none of them struck, is evidence of pretext." (*Miller-El,* 545 U.S. at 248.) Had this case gone to the third *Batson* step, the comparative evidence would have been powerful support for a finding of unlawful group bias. It should have no less impact at the first step where the defendant need only raise an inference of bias.

In other areas, such as her attitude toward the death penalty, Ms. D. B.'s attitudes were very similar to, and certainly not markedly different from, those expressed by seated jurors. They were seated and she was not. The only difference between Ms. D. B. and the other jurors that stands out is the difference which should have been irrelevant: her race.

5. Taken as a whole, the evidence below leads to one inference, and one inference only: unlawful group bias led to the challenge to Ms. D. B.

The evidence below supporting Mr. Henderson's *Batson-Wheeler* objection is far from the cursory evidentiary showing found insufficient by this Court in other cases which sought to establish an inference of bias at the first *Batson* step. (See, e.g., *People v. Taylor, supra,* 48 Cal. 4th at 614; *People v. Hawthorne, supra,* 46 Cal. 4th at 80; *People v. Yeoman, supra,* 31 Cal. 4th at 115; *People v. Farnam* (2002) 28 Cal. 4th 107, 136-137.) Instead, viewed from every angle, the clear inference – indeed, the overwhelming conclusion – to be drawn from the evidence is that the challenge to Ms. D. B. was impermissibly based on her race. The record evidence raises *at least* an inference of racial

bias by the prosecutor in the challenge to Ms. D. B. In relying on the incorrect legal standard for considering the challenge, the trial court relieved the prosecutor of her burden to offer a race-neutral explanation, unfairly and improperly required Mr. Henderson to prove bias at the first step of the *Batson* framework and failed to eliminate the risk that this cross-racial conviction and death sentence was tainted by racial bias. That was error which requires reversal.

GUILT PHASE ISSUES

VI. THE TRIAL COURT ERRONEOUSLY ADMITTED INTO EVIDENCE MR. HENDERSON'S STATEMENTS TO THE POLICE WHICH HAD BEEN OBTAINED IN VIOLATION OF HIS RIGHTS PROTECTED BY *MIRANDA* AND *EDWARDS.*

The trial court permitted the prosecution to offer into evidence incriminating statements made by Mr. Henderson during a custodial interrogation. Mr. Henderson made the statements after he had unequivocally invoked his right counsel before continued interrogation, but the police interrogators ignored his invocation of his rights and continued to question him until he made the incriminating statements. Admission of Mr. Henderson's statements – easily the most incriminating evidence against him – was reversible error.

A. Facts.

Mr. Henderson was arrested in Los Angeles between 4 a.m. and 5 a.m. on the morning of July 5, 1997. (2 CT 500.) The arresting officers, Wolford and Herrera, did not advise him of his *Miranda* rights at the time of his arrest. (2 CT 504.) At around 10 a.m., five or six hours after taking him into custody, they commenced an interrogation. At that point, Mr. Henderson was read and then waived his *Miranda* rights. (10 RT 2275-2279; 5 CT 1172-1173; People's Exh. 55.) The interrogation was tape recorded, but the quality of the tape was extremely poor. (10 RT 2276; 16 RT 3597.) In the course of the interrogation, Mr. Henderson expressed a desire to speak with counsel. (16 RT 3529-3531; 5 CT 1177-1178.) The interrogation did not cease at that point. (5 CT 1178-1179.) Following further interrogation, Mr. Henderson made statements that implicated him in the burglary and robbery of the Bakers' home, the beating of Mrs. Baker and the death of Mr. Baker. (5 CT 1181, 1185-1190, 1193-1195, 1196-1208.)

At the preliminary hearing, defense counsel brought a motion to exclude any evidence of the confession. (2 CT 513.) Officer Wolford testified at the preliminary hearing that Mr. Henderson had requested an attorney before answering any questions about where and with whom he had been prior to the crime, but had not expressed a desire to have an attorney present otherwise. (2 CT 509-511.) The trial court denied the motion to suppress on the grounds that,

based on the interrogating officer's testimony, the evidence showed "only a reluctance to talk about a particular area . . . and I'm not aware of any case that if a defendant says I'll talk to you about this but I wouldn't talk to you about that, and the officer doesn't talk about the second 'that,' I'm not aware of any requirement that questioning must cease." (2 CT 514.) Defense counsel then moved to set aside the information on the same grounds and the same record pursuant to PC § 995. The trial court denied that motion as well. (3 CT 600 *et seq.;* 4 CT 1145 *et seq.*)

Prior to trial, substantial efforts to enhance the quality of the tape recording of the interrogation were at least partially successful. (See 16 RT 3605-3609.) At trial, defense counsel renewed the motion to exclude evidence of the confession on grounds that the defendant's rights under *Miranda* and *Edwards v. Arizona* (1981) 451 U.S. 477 had been violated and that new evidence, in the form of a transcript of the interrogation, was then available that had not been available at the preliminary hearing. (4 CT 999 *et seq.*; 10 RT 2256 *et seq.*; 10 RT 2332-2334; 38 CT 10471.) In connection with the suppression motion, the trial court had before it a transcript of the interrogation submitted by the prosecution, as well as a transcript provided by the defense. (5 CT 1171 *et seq.*; 36 CT 9951 *et seq.*)

After reviewing both transcripts, listening to the tape recording, and hearing testimony from Officer Wolford, the trial court concluded that the

prosecution transcript more accurately reflected the portion of the tape that was relevant to the motion. (10 RT 2290.) The relevant portion is as follows:

> DET. WOLFORD: You, you, we've lost track here, because I don't, I don't understand what, what you're saying, what you're talking about.
>
> HENDERSON: Uhm, you said, you said that I was lying about, certain people that (inaudible) and that in fact in criminals [sic] someone else, and uh (inaudible) statements, somebody, uh this person made, (inaudible).
>
> DET. WOLFORD: Okay.
>
> HENDERSON: I don't want her to be in trouble (inaudible).
>
> DET. WOLFORD: You don't want to talk about that person, is that what you're talking about?
>
> OFFICER HERRERA: Or do you want to know if she said something to us?
>
> HENDERSON: I don't know. I'm contemplating, I don't want to (sigh).
>
> OFFICER HERRERA: Paul, Paul. . . this ain't gonna help you to try to like think one step ahead of us, okay? This isn't helping trying to think one step ahead of us, okay? We're not trying to involve anyone else, drag anybody else down with you, or anything like that, okay? We're just trying to do our job and piece this thing together, okay? The only reason I come up with that date is just because, we know when it happened, we wanted to know what happened before then, the state of mind was going on with you, okay? That's what you said you were going to talk to us about, all right?
>
> HENDERSON: (No response).
>
> OFFICER HERRERA: Paul. Paul, were you in Cathedral City, uh, you were in Cathedral City that night? Before this happened you were in Cathedral City, is that true?
>
> HENDERSON: (No response).

OFFICER HERRERA: Okay, you were in Cathedral City, right?

HENDERSON: That Sunday.

OFFICER HERRERA: Okay, that Sunday and that night you were in Cathedral City, obviously.

HENDERSON: Yes.

OFFICER HERRERA: How'd you get to this, how did you get to the trailer park? Did you walk to the trailer park?

HENDERSON: (No response).

OFFICER HERRERA: This ain't easy Paul, this all about [sic] what we were talking about earlier.

DET. WOLFORD: Paul, how did you get to the trailer park? Come on.

HENDERSON: (No response).

DET. WOLFORD: Did you drive over there? Did you walk over there?

OFFICER HERRERA: Don't try to think one step ahead of us, we're not trying to figure out where you walked over there from, okay? We're not trying to do that. That doesn't concern us right now, what were concerns [sic] us right now is about you, about your family and about doing what we have to do, which is just getting the basic stuff done, okay? This ain't gonna be easy, this is, it certainly ain't gonna be easy. Don't try to think one step ahead of us, we're not trying to screw you over, were [sic] not trying to be unfair, trying to do our job and were [sic] gonna try to do it. (Inaudible). You gotta be helpful.

HENDERSON: Uhm, there's some things that *I, uhm, want uh* . . .

DET. WOLFORD: Did you go into the trailer park, that night?

HENDERSON: *Want*[54] *uh, want to, speak to an attorney first*, because I, I take responsibility for me[55], but there's other people that. . .

OFFICER HERRERA: What do you. . .

HENDERSON: . . . *I need to find out. . .*

OFFICER HERRERA: Paul.

HENDERSON: . . . *I need to find out.*

OFFICER HERRERA: Paul, what do you accept responsibility for?

HENDERSON: (No response).

OFFICER HERRERA: Do you accept responsibility for what happened inside that trailer park? Is that what your [sic] talking about? Do you accept responsibility . . .

HENDERSON: I never.

(5 CT 1176-1178 [emphasis added].)

The interrogation continued a bit longer and then stopped to permit Mr. Henderson to use the restroom. (10 RT 2354-2356; 5 CT 1179.) When Mr. Henderson returned a few minutes later, questioning resumed without any further *Miranda* warnings. Eventually he incriminated himself.[56]

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[54] The transcript actually reads "What, uh," but, the trial judge stated for the record that he heard the word "want," not "what." (10 RT 2292.)

[55] The defense transcript stated, "I take responsibility for them." (10 RT 2992.) While the court adopted the prosecution transcript, the court stated that the difference between the two transcripts (*i.e.*, whether Mr. Henderson said "me" or "them") was ***not*** a factor in its decision to permit evidence of the confession. (10 RT 2363.)

[56] The incriminating statements occurred at various points in the interrogation. Much of what Mr. Henderson said was unintelligible and the transcript so

During the suppression hearing, Wolford acknowledged that when Mr. Henderson twice said "I need to find out," he believed that Mr. Henderson meant he "wanted to talk to an attorney about something." (10 RT 2324.) But Wolford also testified that he believed the "something" was that Mr. Henderson "wanted to talk to an attorney [about] the persons that before he told me whose house he was at that night." (10 RT 2324; see also10 RT 2330.)

The prosecutor argued that Mr. Henderson's invocation of his right to counsel was "ambiguous enough that it is not clear-cut and it's not reasonable to expect the officers to have taken that as an invocation as to all topics. It is reasonable for them to have taken that as an invocation possibly to what he was doing before that night and whose house he was at. Things he needed to clear up about that before he talked about that." (10 RT 2338.)

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reflects. Nevertheless, the transcript does indicate that Mr. Henderson said, "I don't remember anything anyway. When I came, when I saw what was happening myself, he was bleeding, he was dead and she was on the ground. . . . I remember all the blood. Blood on his face, blood on the floor. Man, I was scared. . . ." (5 CT 1181.) He confirmed various particulars of the crime and its aftermath. (5 CT 1185-1189, 1194-1195, 1196-1208.) At one point, he says of Mrs. Baker, "I think I beat her," and thought so because "[t]here's blood on my gloves." (5 CT 1190, 1193.) Elsewhere, in answer to the question "Was it you that committed the crime?," the transcript reads, "(Illegible) nobody else could, nobody else there." (5 CT 1209.) Nowhere in the transcript, however, is there any admission that he cut Mr. Baker's neck. At one point, he expressed disbelief that he could have committed the acts of which he was accused. (5 CT 1209, 1210.)

The trial court agreed and denied the suppression motion, concluding that the prosecution had met its burden "by a slim but significant margin" (10 RT 2355) and that Mr. Henderson's invocation was not unequivocal.

> It may be also that he might have wanted an attorney before he said anything further to Detective Wolford and Detective Herrera, but that is not clear that that was his position. It may also have been that he simply wanted to talk to an attorney about the issue of incriminating others at some point in time before he would answer any such of those questions. The bottom line to the court is that there are several reasonable interpretations that can be placed on Mr. Henderson's statement about an attorney, and that choice of reasonable interpretation suggests to me that his comment was not at all unambiguous or unequivocal as defined in the *Davis* [*v. United States* (1994) 512 U.S. 452] case.
>
> . . . Mr. Henderson did ask at one point to go to the restroom . . . and Mr. Head's words were, and I wrote it down, "He wants to think about it some more." I agree. *Mr. Henderson wanted to think about whether he wanted to continue to voluntarily speak to the police or not at that point in time, and I draw the inference that he came back and had decided that yes, he would continue with his decision to talk freely to them.* I do also interpret the statement about an attorney as being part of a longer statement that begins with . . . "There's some things that I, um, want, um," and that's interrupted by, "Did you go into the trailer park that night," and Mr. Henderson continues, "Want to speak to an attorney first," so even though it is true, as Mr. Head points out, that the absolute last question posed to Mr. Henderson before his reference to an attorney is, "Did you go into the trailer park that night," that statement is really an interruption of Mr. Henderson's remark about, "There's some things that I, um, want," et cetera, and I infer from the totality of circumstances in this transcript that the police did believe Mr. Henderson's reluctance centered around incriminating others, and I further find that it was reasonable for them to believe that.
>
> It seems clear to me that they did believe that was his reluctance. They say, as has been pointed out several times, "You don't want to get, you think that you can incriminate or get somebody else all caught up in this mess" or something or what. "You don't want to drop no names or you just. You don't remember." Again later they say, "You're at

somebody's house that you don't want to disclose that night." Mr. Henderson himself says something about incriminating someone else. Defendant Wolford again says, "You don't want to talk about that person. Is that what you're talking about." Officer Hererra says, "We're not trying to involve anybody else, dragging anybody else down with you." Again Officer Hererra says, "We're not trying to figure out where you walked over there from, okay. We're not trying to do that." All of those remarks are made before the reference to an attorney, and then after the reference to an attorney, very shortly thereafter Officer Herrera says, "Then let's just talk about that, okay. We aren't going to talk about nothing else but just that. That's the only thing that affects you. That's all we can talk about. Not every question here is going to be something you want to be asked, okay. They're not going to be nice, but this is what we have got to do." Officer Herrera then says, "Do you think being concerned about who you were with before or who you were with afterwards or any of that matters." Clearly, they are accepting and inferring from Mr. Henderson's remark that his reluctance to talk is merely a reluctance to talk about possibly incriminating other people.

. . . [A]lthough *I grant that it is a fairly close call*, I am satisfied the People have carried their burden of persuading me by a preponderance of the evidence. I will deny the motion to exclude the defendant's statement.

(10 RT 2355-2358, 2359-2360 [emphasis added].)

At trial, Wolford summarized in his own words what he heard Mr. Henderson say, including statements in which he incriminated himself. (16 RT 3363 *et seq.*) Despite the poor quality of the audiotape, the jury also listened to portions of the recording and were given transcripts to review. (People's Exhs. 154A, 154B, 154C; 15 RT 3404; Court Exh. 8 [39 CT 10605-10611].)

B. The Trial Court Erred When It Failed To Exclude The Defendant's Statements Made To The Police Made After He Had Invoked His Right To Counsel.

1. The relevant legal principles.

"In *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation. The Court observed that 'incommunicado interrogation' in an 'unfamiliar,' 'police-dominated atmosphere,', involves psychological pressures 'which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" (*Maryland v. Shatzer* (2010) __U.S.__, 130 S. Ct. 1213, 1219 [citation omitted].) To eliminate the risk of a coerced confession, the interrogation must cease until counsel is present "if the suspect states that he wants an attorney." (*Id.*, citing *Miranda*, 384 U.S. at 474.)

In *Edwards, supra,* 451 U.S. 477, the high court held that traditional waiver analysis "was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel." (*Shatzer*, *supra*, 130 S. Ct. at 1219.) *Edwards* imposed a "'second layer of prophylaxis,'" (*id.*, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 176), holding:

> [W]hen an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

(451 U.S. at 484-485.)

The *Edwards* rule presumes the defendant's "postassertion statements to be involuntary, 'even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.'" (*Montejo v. Louisiana* (2009) 556 U.S. 778, 129 S. Ct. 2079, 2085-2086. See *Edwards*, 451 U.S. at 484-485.) "In the absence of such a bright-line prohibition, the authorities through '[badgering]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." (*Smith v. Illinois* (1984) 469 U.S. 91, 98; *Montejo*, *supra*, 129 S. Ct. at 2085.)

> The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect."

(*Shatzer, supra*, 130 S. Ct. at 1219, quoting *Arizona v. Roberson* (1988) 486 U.S. 675, 681.)

The implicit assumption of the *Edwards* rule is that continued interrogation following the accused's invocation of the right to counsel poses a significant risk of coercion. "That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated – pressure likely to 'increase as custody is prolonged.' The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of 'prolonged police custody,' by repeatedly attempting to question a suspect who previously requested counsel until the suspect is 'badgered into submission.'" (*Id.* at 1220 [citations omitted].)

To invoke the right to counsel after it has been waived, and thereby halt further police questioning, "the suspect must unambiguously request counsel." (*Davis, supra,* 512 U.S. at 459.) "It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda, supra,* 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether." (*People v. Stitely* (2005) 35 Cal. 4th 514, 535 [citations omitted; emphasis in original].) But "a suspect need 'not speak with the discrimination of an Oxford don.'" (*Davis, supra,* 512 U.S. at 459.) All that is required is "'some statement that can reasonably be construed to be an

expression of a desire for the assistance of an attorney.'" (*Id.*) "'If a suspect indicates "in *any* manner and at any stage of the process," prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated.'" (*People v. Cunningham* (2001) 25 Cal. 4th 926, 992 [emphasis added].)

The inquiry into whether the right to counsel has been invoked is "objective." (*Id.*) Accordingly, interpretation of the defendant's invocation of the right to counsel "is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529.) On appeal, this Court accepts the "the trial court's determination of disputed facts if supported by substantial evidence, but [] independently decide[s] whether the challenged statements were obtained in violation of *Miranda*." (*People v. Davis* (2009) 46 Cal. 4th 539, 586.) Where, as here, what was said during the relevant portion of the interrogation is undisputed, this Court will undertake "de novo review of the legal question of whether the statement at issue was ambiguous or equivocal." (*People v. Bacon* (2010) 50 Cal. 4th 1082, 1105.)

2. Mr. Henderson's invocation of the right to counsel was clear and unequivocal.

Tested by the foregoing standards, it is apparent that Mr. Henderson's invocation was clear and unequivocal and that the trial court erred in

concluding otherwise. In concluding that Mr. Henderson's statement that he "want[ed] to speak to an attorney first" before answering any further questions was equivocal, the trial court strained to find an ambiguity where none existed. No reasonable person could conclude that Mr. Henderson wanted anything other than "to speak to an attorney first" before questioning continued. (*Cf.*. *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 789-790 [criticizing trial court's effort to find ambiguity in defendant's statement, "I plead the Fifth"].)

What about the words "want to speak to a lawyer first" is "unclear, ambiguous, or confusing to a reasonable officer?" (*Id.* at 789.)[57] Mr. Henderson's invocation surely met the low threshold under *Miranda* and *Edwards* of "'some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" (*Davis*, *supra*, 512 U.S. at 459; see also *People v. Cunningham, supra,* 25 Cal. 4th at 992].) The accused need only "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis*, *supra*, 512 U.S. at 459.)

Not only did Mr. Henderson speak clearly, Wolford – who was presumably a "reasonable police officer" – knew and understood that

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[57] Although the *Anderson* case involved invocation of the right to silence, this Court has held that the same rules apply to invocation to the right to silence and to the right to counsel under *Miranda*. (*People v. Martinez* (2010) 47 Cal. 4th 911, 949.)

Mr. Henderson "wanted to talk to an attorney about something" (10 RT 2324); there was no doubt about Mr. Henderson's wishes. Wolford's subjective understanding was thus consistent with the objective meaning of Mr. Henderson's words. But despite the clarity of Mr. Henderson's invocation, the officers continued to question him until he made incriminating statements.

Where "the suspect has been arrested for a particular crime and is being held in uninterrupted pretrial custody while that crime is being actively investigated. . . . [The suspect] remains cut off from normal life and companions, 'thrust into' and isolated in an 'unfamiliar,' 'police-dominated atmosphere,' where his captors 'appear to control his fate.'" (*Shatzer*, *supra*, 130 S. Ct. at 1220.) "It is easy to believe that a suspect [in such circumstances] may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel." (*Id.*)

So it was here. Mr. Henderson had been awakened in the middle of the night, arrested, and then held in custody for four or five hours before he was advised of his *Miranda* rights. (10 RT 2275-2279, 2292; 2 CT 495-496.) The transcript of the interview reflected that prior to the point at which he invoked his right to counsel, he had answered few questions, reflecting his reluctance to cooperate notwithstanding his signed waiver. The interrogating officers questioned him persistently and ignored his invocation of the right to counsel. Instead, they took "advantage of the mounting coercive pressures of 'prolonged

police custody'" (*Shatzer, supra,* 130 S. Ct. at 1219), repeatedly questioning him until he was "'badgered into submission.'" (*Id.*) The officers had a duty to stop questioning him when he made his desire for counsel clear. Because they failed to do so, everything following his invocation should have been suppressed.

3. The trial court's determination that a reasonable police officer would have considered Mr. Henderson's invocation to be ambiguous is not supported by substantial evidence and was unreasonable as a matter of law.

To justify continued questioning in the face of his clear invocation of the right to counsel – an invocation they understood to be just that – the officers concocted the story that what they thought he really meant was that he "wanted to talk to an attorney [about] the persons that before he told me whose house he was at that night [sic]." (10 RT 2324.) This conclusion is without support in the facts or the law and the trial court's adoption of it as the basis for admitting the evidence was error.

Even if it is true that Mr. Henderson wanted to discuss with counsel the implications of incriminating others, it was apparent from the course of the interrogation that the officers' questions specifically and expressly addressed only Mr. Henderson and what *he* was doing that evening. *Before* Mr. Henderson invoked his right to counsel, Officer Herrera admonished him that, "We're not trying to involve anyone else, drag anybody else down with you, or

anything like that, okay?" and "[W]e're not trying to figure out where you walked over there from, okay? We're not trying to do that. That doesn't concern us right now . . . ." (5 CT 1176, 1177.) If the trial court was satisfied that Mr. Henderson understood the *Miranda* admonitions sufficiently to render his initial waiver voluntary, knowing and intelligent (10 RT 3623-3626), then there is no reason to suppose that he had any less understanding of the admonition that the officers wanted only to talk about him and his activities.

Each question they asked after those admonitions was directed only at him and *his* conduct that evening. The officers asked if he was in Cathedral City and how he got to the trailer park. (5 CT 1176, 1177.) He was plainly reluctant to answer. They asked whether he drove or walked there and, then after a long explanation from Herrera about why they were questioning him, Mr. Henderson said "Uhm, there's some things that I, uhm, want uh." (5 CT 1177.) Without letting him finish, Officer Herrera asked him point blank: "Did you go into the trailer park, that night?" (5 CT 1177.) In response, Mr. Henderson stated that he "want[ed] to speak to an attorney first, because I, I take responsibility for me, but there's other people that. . . ." (5 CT 1177.) Again they interrupted him with further questioning. Mr. Henderson then twice said "I need to find out." (5 CT 1178.)

Rather than respect his repeated attempts to invoke his right to counsel, the officers persisted in the kind of badgering that the *Edwards* rule is designed

to prevent. (*Shatzer*, *supra*, 130 S. Ct. at 1219; *Montejo, supra,* 129 S. Ct. at 2085-2086; *Smith*, *supra*, 469 U.S. at 98; *see also Anderson*, *supra*, 516 F.3d at 788-789.) They heard him utter the word "responsibility," concluded that they had the fish hooked and were determined to land it, Fifth Amendment rights and prophylactic rules be damned.[58]

Officers may continue to question a suspect where "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel." (512 U.S. at 459 [emphasis in original].) There is no dispute here, nor could there be, that Mr. Henderson actually invoked the right to counsel. He said, "I, uhm, want uh . . . want to speak to an attorney first." (5 CT 1177.) His words did not suggest equivocation or that he

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[58]Other evidence suggests the officers were, to be charitable, less than scrupulous about respecting Mr. Henderson's Fifth Amendment rights. They arrested him and drove with him from Los Angeles to Cathedral City all without reading him *Miranda* rights. (10 RT 2275-2279; 2 CT 495, 504.) He was not given the *Miranda* warnings until five or six hours after he was arrested. (2 CT 495-497, 500-504.) On three separate occasions during the interrogation, Officer Herrera made statements which referred to prior conversations that were not reflected in the transcript. (16 RT 3507; 39 CT 10559, 10592, lines 1-2, 16-17; 16 RT 3522, 3531; 39 CT 10560, 10593, lines 20-21.) All this suggests that the officers had engaged in the increasingly common police tactic of taking suspects into custody and interrogating them for a period time before advising them of their rights, hoping to get a confession that can later be used. (*E.g., People v. Jablonski* (2006) 37 Cal. 4th 774, 816.) As such, the evidence indicates at least the possibility that the confession should have been suppressed on grounds of a separate and independent *Miranda* violation. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 604.) While Mr. Henderson recognizes that the record on appeal is insufficient to address these probable violations of the law, they nevertheless ought to give the Court pause.

was merely pondering the need for a lawyer. It was an affirmative statement of a present desire: "I want to speak to an attorney first." That was followed by his statements: "I need to find out. I need to find out" – words the officers understood to be a desire to speak with counsel. (10 RT 2324.)

Mr. Henderson's words were not like the statements in other cases which have been held to be equivocal or ambiguous: "Maybe I should talk to a lawyer" (*Davis, supra,* 512 U.S. at 455); "I think it'd probably be a good idea for me to get an attorney" (*People v. Bacon, supra,* 50 Cal. 4th at 1104); "I think I should talk to a lawyer before I decide to take a polygraph" (*People v. Martinez, supra*, 47 Cal. 4th at 952); "Well then book me and let's get a lawyer and let's go for it man, you know" (*People v. Davis, supra,* 46 Cal. 4th at 587); "'Did you say I could have a lawyer?'" (*People v. Crittenden* (1994) 9 Cal. 4th 83, 123, 130-131); "'Maybe I ought to talk to my lawyer, you might be bluffing, you might not have enough to charge murder'" (*People v. Johnson* (1993) 6 Cal. 4th 1, 27, 30, overruled on other grnds, *People v. Rogers* (2006) 39 Cal. 4th 826, 878-879); "How long would it take for a lawyer to get here for me?" (*People v. Simons* (2007) 155 Cal. App. 4th 948, 955, 958); "Can I call a lawyer or my mom to talk to you?" (*People v. Roquemore* (2005) 131 Cal. App. 4th 11, 24, 25).)

In each of the foregoing examples, it was unclear whether the accused had asserted his right to counsel, was simply considering the possibility of

speaking with counsel, was seeking information that might bear on that decision or was making his "request contingent on an event that ha[d] not occurred." (*People v. Martinez, supra*, 47 Cal. 4th at 952. See also *People v. Nelson* (2012) 53 Cal. 4th 367, 381 [suspect's unwillingness to take polygraph without first speaking to his mother or an attorney not unequivocal invocation of right to counsel].) In contrast, Mr. Henderson did not ask whether counsel could be appointed, did not state that he was merely pondering whether he should speak with a lawyer and did not make his request contingent on any future event. He said, "[I] want to speak to an attorney first. I need to find out. I need to find out." (5 CT 1177.) He wanted to speak with counsel about the questioning he was then facing and the officers understood him to be asking to speak to a lawyer about the ongoing interrogation. There is, and was, nothing equivocal here.

Mr. Henderson's statement is clearer even than invocations in cases in which the Supreme Court gave "broad effect to requests for counsel that were less than all-inclusive." (*Barrett*, 479 U.S. at 529. See *Edwards*, 451 U.S. at 479 ["I want an attorney before making a deal"]; *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1041-1042 ["I do want an attorney before it goes very much further"].) The trial court's finding that, although interrupted by a question, Mr. Henderson's full statement was, "There's some things that I, um, want, um, . . [w]ant to speak to an attorney first" (10 RT 2290-2291), far from rendering the

statement ambiguous, actually underscores that he was attempting to exercise his immediate right to speak with counsel before he answered any other questions.

"'[A] statement either is such an assertion of the right to counsel or it is not.'" (*Smith, supra*, 469 U.S. at 97-98 [internal brackets omitted].) And as *Edwards* and *Bradshaw* demonstrate, even if an affirmative invocation contains words of some kind of qualification ("before making a deal;" "before it goes very much further"), it is no less an assertion of the right. Understanding Mr. Henderson's clear statements "I want to speak to an attorney first," followed by "I need to find out," requires neither speculation nor interpretation. (*Barrett, supra*, 479 U.S. at 529.) Objectively understood, Mr. Henderson wanted to talk to a lawyer before he answered more questions because he needed to "find out" information that only counsel could provide. His "unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation." (*Roberson, supra,* 486 U.S. at 684.) The trial court's determination that Mr. Henderson's words were ambiguous is unsupported by the record and was erroneous as a matter of law.

4. The trial court erred by confusing the interrogating officers' subjective belief about why Mr. Henderson wanted to speak with a lawyer with the objective inquiry into whether Mr. Henderson wanted to speak with counsel.

The trial court's analysis of whether Mr. Henderson's words were equivocal went off the rails because the court confused the officers' professed subjective belief regarding why Mr. Henderson wanted counsel with the objective inquiry into whether he wanted counsel. As the high court emphasized in *Davis, supra*, the "applicability of the '"rigid" prophylactic rule" of *Edwards* requires courts to 'determine whether the accused *actually invoked* his right to counsel.' [Citations.]. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry." (512 U.S. at 458-459.) Accordingly, the court must determine whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Id.* at 459.)

In addressing application of the *Miranda* rule in a variety of settings, courts have consistently held that the interrogating officers' subjective beliefs are not the proper focus of inquiry. (*People v. Peevy* (1998) 17 Cal. 4th 1184, 1199-1200.) And yet, the trial court relied heavily on the officer's own subjective beliefs as to why Mr. Henderson was invoking his right to counsel in reaching the erroneous conclusion that objectively understood the request was equivocal. The trial court stated that

> *the police did believe* Mr. Henderson's reluctance centered around incriminating others, and I further find that it was reasonable for them to believe that.
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> It seems clear to me that *they did believe* that was his reluctance. They say, as has been pointed out several times, "You don't want to get, you think that you can incriminate or get somebody else all caught up in this mess" or something or what. . . . Again later they say, "You're at somebody's house that you don't want to disclose that night.". . . All of those remarks are made before the reference to an attorney, and then after the reference to an attorney, very shortly thereafter Officer Herrera says, "Then let's just talk about that, okay. We aren't going to talk about nothing else but just that. That's the only thing that affects you. That's all we can talk about. . . ." Officer Herrera then says, "Do you think being concerned about who you were with before or who you were with afterwards or any of that matters." Clearly, *they are accepting and inferring from Mr. Henderson's remark that his reluctance to talk is merely a reluctance to talk about possibly incriminating other people.*

(10 RT 2357-2358 [emphasis added].)

Just as the accused's subjective intent when making an otherwise objectively equivocal invocation is irrelevant (*People v. Nelson*, *supra*, 53 Cal. 4th at 376), an officer's subjective belief that a suspect has equivocated is equally irrelevant; the inquiry is an objective one. Whatever Mr. Henderson's underlying motives for requesting counsel may have been, the issue to be decided is *whether* the right has been unequivocally invoked, not *why* it has been invoked. (*Davis, supra,* 512 U.S. at 459 [questioning may continue where "reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel"].)

Absent statements that objectively and expressly condition or limit the circumstances under which the defendant wishes to consult counsel (*Barrett, supra*, 479 U.S. at 525; *People v. Nelson*, *supra*, 53 Cal. 4th at 381; *People v. Bacon, supra*, 50 Cal. 4th at 1105), the police must presume that the invocation applies to every subject about which the police could question the defendant. "[A] suspect's request for counsel should apply to any questions the police wish to pose . . . . [U]nless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific." (*Roberson, supra,* 486 U.S. at 684.) Nothing that Mr. Henderson said conditioned his invocation or expressed any limitation on his request for counsel. (Compare *People v. Martinez, supra*, 47 Cal. 4th at 952 ["a defendant does not unambiguously invoke his right to counsel when he makes that request contingent on an event that has not occurred"]; *People v. Gonzalez* (2005) 34 Cal. 4th 1111, 1126 ["defendant's statement [that] he wanted a lawyer *if* he was going to be *charged"* conditional and, therefore, ambiguous and equivocal].)

Here, Mr. Henderson "*want[ed]*" to speak to a lawyer "*first*," because there was something he needed "to find out." (*Cf. People v. Jablonski, supra*, 37 Cal. 4th at 811 [acknowledging that accused's statements that he would not speak to police "until" or "before" he talked with counsel is unequivocal invocation of right to counsel].) If Mr. Henderson was not required to "'speak with the discrimination of an Oxford don'" (*Davis*, *supra*, 512 U.S. at 459),

then nothing he could have said would have been clearer, more direct or more affirmative about his immediate desire for counsel.

Even assuming that the interrogating officers' subjective belief about why Mr. Henderson wanted to speak with counsel was correct, the request was objectively unequivocal. Unless Mr. Henderson expressly conditioned his request for counsel, his reasons for wanting to speak to a lawyer are not and were not the state's business; they would be protected by the attorney-client privilege in any event. All that matters is that Mr. Henderson invoked his right to counsel.

By analyzing the suppression motion from the perspective of the officers' subjective beliefs about Mr. Henderson's motives, the trial court failed to comprehend that Mr. Henderson could legitimately have wanted the advice of counsel regarding questions about the role of others in the evening's events in preparing his defense. For example, he might have wondered whether he could safely mention others without incriminating himself or whether, if he mentioned others, he might lessen his own culpability. Or he might have been concerned about how to put the police on the trail of others without being labeled a "snitch." In short, Mr. Henderson's "need to find out" could have resulted in material assistance to his subsequent defense strategy that he was not the assailant. All of this was foreclosed, though, because the officers did not cease

questioning when he requested counsel, but improperly continued to interrogate him until he incriminated himself.

5. The trial court erred by relying upon the defendant's post-invocation participation in the interrogation to support its finding of ambiguity.

The trial court compounded its error by relying on Mr. Henderson's post-invocation participation in the interrogation to support its conclusion that he had not unambiguously invoked his right to counsel. After Mr. Henderson's assertion of his right to counsel had been ignored by the interrogators, he asked to use the restroom. (5 CT 1179.) When he returned, the interrogation continued and eventually Mr. Henderson made incriminating statements. The trial court stated that when he went to the restroom, "Mr. Henderson wanted to think about whether he wanted to continue to voluntarily speak to the police or not at that point in time, and I draw the inference that he came back and had decided that yes, he would continue with his decision to talk freely to them." (10 RT 2356.) This was plainly an error.

First, other than a stray comment by defense counsel at the hearing (10 RT 2344, 2356), there was no evidence to support the notion that during the break Mr. Henderson "wanted to think about" whether to speak to the police without counsel. Mr. Henderson did not testify at the suppression hearing and there was nothing in the transcript of the interrogation which reflected any

statement by Mr. Henderson that he went to the restroom to think about whether he would continue to talk. (See generally 5 CT 1178 *et seq.*)

Second, Mr. Henderson's post-invocation participation in the interrogation cannot be used to justify a finding that he had not unequivocally invoked his right to counsel. A violation of the *Edwards* rule always involves the accused's continued participation in the interrogation after he or she has invoked the right to counsel. As a result, subsequent answers to questions cannot be used as a basis to infer that the invocation was itself ambiguous. In *Smith v. Illinois*, *supra*, the Supreme Court rejected the use of post-invocation statements as a basis for inferring that the accused had made an equivocal request for counsel.

> The courts below were able to construe Smith's request for counsel as "ambiguous" *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, "considered in total," Smith's *statements* were equivocal. [Citations omitted.] This line of analysis is unprecedented and untenable.
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> ***
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> Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable. "No authority, and no logic, permits the interrogator to proceed on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all."

(469 U.S. at 97, 99 [emphasis in original; citation omitted].) Here the trial court erroneously construed Mr. Henderson's continuing participation in the

interrogation as somehow suggesting that his request for counsel was not unequivocal.

Third, and closely related to the previous point, in concluding that, when he returned from the restroom, Mr. Henderson had "decided that yes, he would continue with his decision to talk freely" (10 RT 2356), the trial court confused an analysis relevant only to waiver of the right to counsel with whether Mr. Henderson had unequivocally invoked his right to counsel. The *Smith* Court criticized this same mixing of legal issues by the lower court in that case.

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant *only* to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

(469 U.S. at 98 [emphasis added].)

Even if the trial court was actually attempting to determine that Mr. Henderson had voluntarily waived his invocation of the right to counsel, the court still got it wrong. Under *Edwards*, "a valid waiver of that right cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights." (451 U.S. at 484.) Absent a significant break in custody, further statements by the accused during the interrogation are considered presumptively involuntary. (*Shatzer, supra*, 130 S. Ct. at 1220.) In these circumstances, the accused can

waive the request for counsel only if *he* "initiates further communication, exchanges or conversation with the police." (*Edwards, supra*, 451 U.S. at 485.)

Mr. Henderson's brief trip to the restroom following his request for counsel was not a "break in custody." (See *Shatzer, supra*, 130 S. Ct. at 1223 [establishing 14-day period as a "break in custody" for incarcerated defendant].) And the transcript clearly reveals that as soon as Mr. Henderson returned, it was the officers who resumed questioning. (5 CT 1178.) Mr. Henderson initiated no conversation. The trial court thus erred in relying upon the continued interrogation itself in concluding that Mr. Henderson had not unequivocally invoked or had waived his right to counsel. All of Mr. Henderson's incriminating statements came after he invoked his right to counsel, were therefore presumptively involuntary and should have been suppressed.

C. The Trial Court's Error Was Prejudicial.

Evidence obtained in violation of the defendant's Fifth Amendment rights requires reversal unless admission of the wrongfully obtained evidence "was harmless beyond a reasonable doubt." (*People v. Cunningham, supra*, 25 Cal. 4th at 994, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 and *Chapman v. California* (1967) 386 U.S. 18, 24.) Under the *Chapman* standard, the prosecution bears the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at 24.)

"To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on other grounds, *Estelle v. McGuire* (1991) 502 U.S. 62, 72 n. 4.) The Court must consider "what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Neal* (2003) 31 Cal. 4th 63, 86 quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) "[E]rror in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." (*Chapman, supra,* 386 U.S. at 24.)

Improperly admitted confessions are particularly damaging to the defendant. Because confessions "'[a]lmost invariably' will provide persuasive evidence of a defendant's guilt. . . [they] often operate 'as a kind of evidentiary bombshell which shatters the defense'. . . [and therefore] the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ." (*People v. Cahill* (1993) 5 Cal. 4th 478, 503 [citation omitted]; accord: *People v. Neal, supra*, 31 Cal. 4th at 86.)

The categories of cases in which an erroneously admitted confession will not be prejudicial are, therefore, limited. A confession might be found harmless

"(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime . . . ." (*People v. Cahill, supra,* 5 Cal. 4th at 505; accord: *People v. Neal, supra*, 31 Cal. 4th at 86.) Tested against these standards, it is apparent that the erroneous introduction of Mr. Henderson's confession in the prosecution's case-in-chief was highly prejudicial. This case did not fall into any of the three types of cases which this Court identified where introduction of a confession might be considered harmless. To the contrary, the confession was the centerpiece of the prosecutor's case. The erroneous introduction of the confession requires reversal of the conviction and sentence of death.

1. Absent the confession, the jury could have reached a range of verdicts from acquittal to conviction.

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most . . . damaging evidence that can be admitted against him." (*Fulminante, supra*, 499 U.S. at 296 [internal quotation marks omitted].) The Supreme Court's statement in *Fulminante* is particularly apt here.

Mr. Henderson's incriminating statements were far and away the most damning evidence against him and their importance to the prosecution's case cannot be minimized. The confession provided crucial, and detailed, evidence that Mr. Henderson was present and solely responsible for the events that led to Mr. Baker's death. It purported to describe how the crime occurred from beginning to end and his role in it. There was nothing which the prosecution claimed occurred which was not confirmed or described in the confession as presented by Wolford. The confession, simply put, *was* the prosecution's case.

Indeed, the confession was so significant that the entire case was delayed for months while efforts were made to enhance the tape recording. (1 CT 245; 2 CT 301-303.) Multiple and competing transcripts of the interrogation were created by both sides in the case; portions of the transcript were made exhibits and provided to the jury. (2 CT 1171 *et seq.*; Court Exhs. 6, 7, 8, 9, 10 and 11.)

The prosecutor described the confession in her opening statement to the jury. (11 RT 2463-2464.) During her case-in-chief, the prosecutor played the recording of the confession to the jury and questioned Wolford at length about the interrogation and Mr. Henderson's responses to the officers' questions. (15 RT 3364-3408; 16 RT 3462; People Exhs. 154A-C.) She relied heavily upon it during her cross-examination of Mr. Henderson. (18 RT 3945-3974.) During her closing argument, she returned again and again to the confession as the basis upon which the jury should convict. Thus, she emphasized that the

confession established the necessary specific intent to commit robbery or burglary for the felony murder conviction (19 RT 4236 ["Mr. Henderson had the specific intent to commit robbery or burglary. . . ., Mr. Henderson told you that he announced to the Baker's [sic] this is a robbery. That's about as close to direct proof of specific intent that you're ever going to get."]); the intent to steal on the various non-capital counts (19 RT 4255 ["he told Officer Wolford a couple things. One was I wanted a car, . . . I tried to steal [Mrs. Brune's] car and that didn't work, so I saw the Bakers' car, and I wanted that car, so I went in to get the keys so I could take that car, so did he, when he entered there, did he intend to take their things?"]); and attempted theft of Mrs. Brune's car in Count VI (19 RT 4259 ["He saw Mrs. Brune's car. He liked it. He wanted to take it. He tried, but, you know, he was just a little out of practice and he couldn't get it."]).

Equally important, the prosecutor used the confession to hammer away at Mr. Henderson's veracity and credibility, repeatedly asking the jury "why" Mr. Henderson would have made a "bold confession" if he were innocent. (19 RT 4268-4270; see also 19 RT 4278-4280.) And, finally she used the confession to overwhelm the single greatest flaw in her case, *i.e.*, Mrs. Baker's rejection of Mr. Henderson as the perpetrator both in the lineup and in court.

> Again, here's Mrs. Baker under the kind of stress that we've talked about, the terror we've talked about, . . . and we're going to say because she didn't recognize on this particular man that he had a little mustache

> and she couldn't say, in fact she thought that he didn't. Well, let's just throw this case out that window and Mr. Henderson's confession out the window because, you know, clearly that tells us the defendant wasn't there."

(15 RT 4319.) There can be no dispute that the confession was the key piece of evidence upon which the prosecution built its case.[59]

Defense counsel spent even more time with Wolford, attempting to suggest that Wolford's understanding of the tape and his recollection of the interrogation were faulty. (16 RT 3486 *et seq.*; 18 RT 4002-4010.) The defense also called an expert witness, Gregory Stutchman, to suggest that the confession indicated other participants in the crime. (18 RT 4011-4029; Def. Exhs. Q, R; Court Exhs. 10, 11.) The time, energy and effort that the parties expended with regard to the confession underscore that it "functioned as the veritable 'centerpiece of the prosecution's case in support of . . . conviction.'" (*People v. Neal, supra*, 31 Cal. 4th at 87 quoting *People v. Cahill, supra*, 5 Cal. 4th at 505.)

Absent the confession, the evidence against Mr. Henderson was weak and ambiguous. Mrs. Baker testified under questioning that her assailant was "Caucasian," even though her erroneously admitted written account described him as African-American. (Compare 2 CT 437 with 2 CT 442.) Mrs. Baker

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[59]During closing argument at the penalty phase, she returned yet again to the confession when arguing the circumstances of the crime as an aggravating factor. (21 RT 4871.)

saw her intruder throughout the time he was in her mobile home and yet she rejected Mr. Henderson as the intruder when she reviewed photo line-ups. (2 CT 453-457.) At trial, she looked around the courtroom while Mr. Henderson sat at the defense table and concluded that her assailant was not present. (2 CT 447.) Her recollection that the assailant was "clean shaven" conflicted with the testimony of several witnesses that Mr. Henderson had a mustache and/or goatee at the time of the crime. (Compare 2 CT 455-456; with 11 RT 2548 [Wasson]; 18 RT 4103-4104 [Patrice Henderson]; 18 RT 3992 [Mr. Henderson]; see also 14 RT 3083 [Clayton].) The composite drawing she assisted did not resemble Mr. Henderson. (See People's Exhs. 131, 132; Def. Exh. E.) Deputy Elders – who chased the driver of the Bakers' car the day after the crime – rejected Mr. Henderson as the driver of the car when he reviewed a photo lineup. (12 RT 2706.) Gregory Clayton testified that when he first spoke to police and described Mr. Henderson, the police told him that the description did not fit the suspect for whom they were looking. (14 RT 3038.) No blood, no hair, no fingerprints and no DNA placed Mr. Henderson at the scene of the crime or connected him to Ms. Brune's or the Bakers' cars.

The testimony of other prosecution witnesses was deeply suspect and hardly conclusive of guilt. Clayton, who testified to incriminating statements that Mr. Henderson allegedly made to him, admitted to being a snitch, admitted to calling the police because he was looking for a reward, admitted to having

initially lied to police (14 RT 2985), admitted that he obtained much of his information from the media and, frankly, told such a convoluted and inconsistent story that his credibility was in tatters by the conclusion of his testimony. His testimony, even if believed, offered the jurors no less than three versions of the events to choose from: one in which Mr. Henderson admitted sole responsibility for the crimes (*e.g.*, 13 RT 2927-2928), another in which Mr. Henderson acknowledged being present, but in which the two men he was with were responsible for the robbery and killing (*e.g.*, 13 RT 2963-2964; 14 RT 3046), and still another in which all three jointly committed the crimes. (*E.g.*, 13 RT 2965.)

The testimony of Lt. Griffin, who listened in on Mr. Henderson's conversation with his mother and aunt, Patrice Henderson, and testified that Mr. Henderson confessed to the crime, was flatly contradicted by Ms. Henderson. (15 RT 3318; Court Exh. 3 [39 CT 10543 *et seq.*].) She said she did not recall him admitting the crime. (14 RT 3290-3295.) The tape recording of that conversation was even less intelligible than the recording of Mr. Henderson's interrogation. And, with respect to the critical, allegedly incriminating statement to which the officer testified, the transcript of the tape reads: "Inaudible." (Compare 15 RT 3318, 3324-3325 ["I didn't mean to kill him"] with Court Exh. 3 [39 CT 10546].)

Michael White and Tamara Elam had a motive to tie Mr. Henderson to the crime because of the threat that White would be returned to prison for associating with him; even so, their testimony – without more – tended to prove only that Mr. Henderson was driving the Bakers' car the day after the crime, not that he was present at the crime scene or was the person responsible for Mr. Baker's death. (12 RT 2709-2726, 2731-2734, 2750-2757.) Wasson's testimony established only that she saw Mr. Henderson on the evening of the crime and he was with two men. (11 RT 2541-2542, 2564-2565.) Ronald Brown's testimony and the transcript of his interview with police established, at most, that Mr. Henderson was not home the evening of the crime. (12 RT 2787; Court Exh. 4 [3 Supp. CT 25-29].)

Without the confession in evidence, the jury could easily have acquitted. Undoubtedly, there was evidence upon which the jury could convict – notably, Clayton and Lt. Griffin's testimony – but that testimony was not particularly strong and was not corroborated by physical evidence or eyewitness testimony. To the contrary, it was effectively contradicted by such evidence.

Alternatively, absent the conviction, the jury could have decided that the only way to sort through the contradictions in the evidence was to convict Mr. Henderson as an aider and abetter based on Clayton's testimony and other evidence, such as Wasson's testimony, that two other men were involved. (See 11 RT 2562, 2564-2565; 13 RT 2950; 19 RT 4355-4356; 39 CT 10775 [jury

instructed per former CALJIC 8.27 on aider and abetter liability].) But for the special circumstance of killing in the commission of a felony to be found true with respect to an aider and abetter, there must be evidence that the accomplice intended for the victim to die. (*People v. Anderson*, *supra*, 43 Cal. 3d at 1145; see 19 RT 4168-4170, 4365-4366; 39 CT 10777 [jury instructed per former CALJIC 8.80.1 re intent requirement for special circumstance to be found true for aider and abetter].) There was no such evidence in this case.

That the prosecution case was by no means open and shut is demonstrated by the fact that, even with the confession in evidence, the jury struggled to sort through the contradictions in the case. The trial court noted that the jurors were especially attentive to references to the possible participation of others in the crime (20 RT 4426-4427) and the jury requested during deliberations to view Mrs. Baker's testimony. (20 RT 4401-4407.) Jury deliberations were lengthy, consuming almost eight hours over two days, a sure sign that the jury had concerns about the strength of the evidence. (29 CT 10723-10724, 10818. See *People v. Woodard* (1979) 23 Cal. 3d 329, 341 [six hours of deliberations demonstrated that issue of guilt was not "open and shut" and strongly suggested that errors in admission of evidence were prejudicial]; *see also People v. Cardenas* (1982) 31 Cal. 3d 897, 907 [twelve-hour jury deliberations were "graphic demonstration of the closeness of [the] case"]). Absent the confession, there is a substantial likelihood the jury would have

rejected first degree murder or would not have found the special circumstances to be true.

Where, as here, the prosecution evidence, other than the unlawfully obtained confession, could lead to a reasonable doubt as to guilt or the confession supplies a critical element of the prosecution's case, it is highly likely introduction of the confession will be prejudicial. (See, e.g., *People v. Bradford* (2008) 169 Cal. App. 4th 843, 854-856.) The confession offered the jury a way out of the inconsistencies and holes in the prosecution case. The prejudice from admission of the confession is apparent. As this Court said in *People v. Neal, supra*:

> Certainly, defendant was not "apprehended by the police in the course of committing the crime"; neither were there "numerous"--or indeed *any*—"disinterested reliable eyewitnesses to the crime whose testimony [was] confirmed by a wealth of uncontroverted physical evidence." [Citation.] As a result, we cannot say that the confession[was] "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra,* 500 U.S. at p. 403.) Nor can we say that the "verdict actually rendered in *this* trial was surely unattributable" to the confessions. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

(31 Cal. 4th at 87 [emphasis in original].) The convictions on all counts and the sentence of death must be reversed.

2. The erroneous admission of the confession was prejudicial notwithstanding Mr. Henderson's testimony during the defense case-in-chief.

The fact that Mr. Henderson testified in his own defense does not dispel the prejudice from introduction of the confession. At the outset, Mr. Henderson's testimony should not be considered in the prejudice analysis. Had the confession been suppressed, the prosecution case was otherwise so weak and self-contradictory that it is highly doubtful Mr. Henderson would have felt compelled to testify in his own defense. Although the jury might have convicted Mr. Henderson of the crimes and might have found the special circumstances to be true based on the other evidence, such an outcome was at least doubtful and by no means assured. The confession, on the other hand, pegged him as the sole perpetrator of the crimes. The confession corroborated in detail Mrs. Baker's written narrative of the crime. In the face of the confession and the impact it unquestionably had on the jury, Mr. Henderson had little choice but to get on the stand and attempt to tell his side of the story, *i.e.*, that he was not the perpetrator even if he had been present at the scene. In short, "[w]ithout the confession[], defendant would not have been impelled to testify." (*People v. Neal, supra,* 31 Cal. 4th at 87.)

Even if Mr. Henderson's testimony is factored into the prejudice analysis, the error in introducing the confession was not harmless beyond a reasonable doubt. Mr. Henderson's testimony may have confirmed his presence at the

mobile home park, and described facts that would have permitted the jury to convict him as an aider and abetter, but his testimony was pointedly inconsistent with prosecutor's theory of the crime and "more favorable" to a result other than capital murder. (*People v. Bradford, supra*, 169 Cal. App. 4th at 856.) Mr. Henderson clearly testified that he was not alone that evening, that his companions were the perpetrators of the robbery and killing, that he never set foot inside the mobile home, that he wanted no part of what occurred and that he had not known that Mr. Baker had died. (17 RT 3792 *et seq.*)[60] Other evidence introduced at trial was consistent with Mr. Henderson's testimony: Mrs. Baker's rejection of him as the man who invaded her home; her testimony that she formed the impression her assailant was not alone (2 CT 463-464); the absence of any forensic evidence in or around the Bakers' home to tie Mr. Henderson to the crimes; and Wasson's testimony that Mr. Henderson was with two men when she met him that evening. (11 RT 2541, 2564-2565.) Even Clayton's description of what Mr. Henderson told him about two other men

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[60] While the prosecutor sought to impeach Mr. Henderson's testimony with his unlawfully obtained confession (*Harris v. New York* (1971) 401 U.S. 222, 224-226; *People v. DePriest* (2007) 42 Cal. 4th 1, 32), that has no bearing on the prejudice analysis. Assuming, *arguendo,* that the confession was properly used as impeachment, the jury could not consider it as substantive evidence of guilt. (*Harris, supra,* 401 U.S. at 224, 226.) Only evidence other than the confession can be considered in the determination of prejudice. (See, e.g., *People v. Bradford, supra,* 169 Cal. App. 4th at 856.)

committing the crimes was generally consistent with Mr. Henderson's testimony. (*E.g.*, 14 RT 3045-3046.)

Had the jury concluded that Mr. Henderson aided and abetted the crimes, it could have convicted him of felony murder, but could not have concluded that he harbored the requisite intent to permit the special circumstances to be found true. There was no evidence introduced that, as an aider and abetter, he intended Mr. Baker to die. To the contrary, Mr. Henderson testified to his shame as he stood outside the mobile home "like a coward" and did not intervene to stop the violence against Mrs. Baker and that he did not know until days later that Mr. Baker had died. (17 RT 3802-3807, 3815-3821.)

Mr. Henderson's acknowledgement during cross-examination that he made the incriminating statements attributed to him during his tearful jailhouse meeting with his mother and aunt were and are undoubtedly damaging. (18 RT 3976.) Even if those statements would alone have been sufficient to convict, they must be understood in context. If Mr. Henderson had not been "impelled to testify" by introduction of his confession (*People v. Neal, supra*, 31 Cal. 4th at 87), the jury would not have had occasion to hear this testimony.

Furthermore, what he acknowledged saying, while inculpatory, reflected his remorse, confusion and disbelief over what had occurred. He admitted, for example, saying to his mother and aunt, "It had to be me, it had to be me. I can't believe it was me" and "I didn't mean to kill him, I didn't mean to kill

him. I'm sorry." (18 RT 3975, 3976.) Patrice Henderson testified that she did not recall Mr. Henderson saying these things. (15 RT 3290-3295.) These statements, unlike the unlawfully obtained confession, did not describe the crime in detail from beginning to end nor did they answer the central puzzle at the heart the case, *i.e.*, whether Mr. Henderson alone was the perpetrator and, if so, how that could be squared with Mrs. Baker's rejection of him as the perpetrator and the absence of any eyewitness or forensic evidence tying him to commission of the crimes.

The jury could have concluded that his statements on cross-examination were sufficient evidence of guilt, notwithstanding the inconclusive prosecution evidence and his testimony on direct. Or the jury could have concluded in the face of the confusing and contradictory record that the prosecution had proven only that Mr. Henderson was present and somehow involved: enough for guilt on the crimes with which he was charged, perhaps, but only as an accomplice and insufficient to justify proceeding to the penalty phase.

Other cases in which courts have held that the introduction of an unlawfully obtained confession was harmless in light of the defendant's own testimony have involved significantly stronger evidence of guilt. For example, in *People v. Lujan* (2003) 92 Cal. App. 4th 1389, the court of appeal concluded that introduction of a confession obtained in violation of *Miranda* was harmless because the "contents of [defendant's] testimony were virtually the same as

those of his confession. Nothing defendant said in his confession added to the quantum of guilt on any issue beyond that contained in his in-court testimony before the jury." (*Id.* at 1403.) That is plainly not the case here.

The bulk of Mr. Henderson's testimony stood in stark contrast to the confession obtained in violation of *Miranda*: he testified that he was outside the Bakers' home, heard what was occurring, but did not enter the mobile home and wanted to "extricate" himself from the situation. (17 RT 3815-3821.) His admissions to his mother and aunt were cryptic and, although incriminating, were by no means "virtually the same" as the unlawfully obtained confession, nor did they clearly indicate that he alone was the perpetrator of the crimes that evening, as the prosecution alleged and sought to prove. Even considering his statements to his aunt and mother, the evidence, apart from the unlawfully obtained confession, could have supported a verdict other than capital murder. (*See People v. Bradford, supra,* 169 Cal. App. 4th at 855.) Despite his testimony, therefore, it cannot be said that the verdict in this case was "'surely unattributable to the error.'" (*People v. Neal, supra,* 31 Cal. 4th at 86.) Without the unlawfully obtained confession in evidence, the jury would have had to confront the deep contradictions in the evidence in reaching a verdict. With the detailed and lengthy confession in evidence, the jury could simply ignore, and surely did ignore, those conflicts.

The convictions and sentence must be reversed.

VII. THE TRIAL COURT VIOLATED STATE EVIDENCE LAW AND MR. HENDERSON'S RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM WHEN IT PERMITTED MRS. BAKER TO READ INTO THE RECORD A WRITTEN ACCOUNT OF THE CRIME AS PAST RECOLLECTION RECORDED.

Over defense objection, Mrs. Baker was permitted to read to the jury a written, narrative account of the crime as past recollection recorded. This was error. The prosecutor failed to lay the proper foundation for introduction of the evidence under Evidence Code § 1237 because she failed to show that Mrs. Baker lacked recall of the facts contained in her written narrative.

Even if the proper foundation had been laid, introduction of the evidence violated Mr. Henderson's right under the Sixth Amendment to the U.S. Constitution and art. I, § 15 of the California constitution to confront and cross-examine the witnesses against him. Because introduction of the evidence was prejudicial, the conviction must be reversed.

A. Relevant Facts.

Mrs. Baker was called to testify by way of a videotape of her preliminary hearing testimony.[61] Just prior to her testimony, the prosecutor revealed that Mrs. Baker had brought with her a written account of the crime which the prosecutor anticipated offering into evidence as past recollection recorded under § 1237. (2 CT 426.) Defense counsel requested a continuance because this was

[61] The videotape was shown to the jury because Mrs. Baker had passed away in the interim. (11 RT 2491.)

the first time he had been provided the document. The trial court denied the continuance on the grounds that the written account was only four pages in length and the evidence was potentially being offered at the preliminary hearing, rather than at trial. (2 CT 427-428.)

During Mrs. Baker's testimony, after some initial questioning, the following lengthy exchange occurred:

Q (MS. CARTER): How old was Mr. Baker right before he died? If you remember.

A (MRS. BAKER): Seventy something. I -- I -- I just had it in my book and I've forgotten. 71 or so.

Q Is he similar age to you?

A He's five years difference.

Q Is he older or younger?

A He was older than I.

Q So he's five years older than you?

A Yes.

Q It seems to me you are having a little bit of problem with your memory. Is that an accurate statement?

A Yes.

Q Can you tell me why you are having some memory problems?

A I've had chemotherapy and that, I understand, makes your memory a little shorter.

Q Have you found that chemotherapy has made your memory a little short?

A Yes.

Q When did you have chemotherapy? Has that just been recently?

A It's been about two or three months ago.

Q Okay.

A Because my memory is short, I don't know if it's that long or not.

Q Is it fair to say that in the past year you've had several chemotherapy treatments?

A Yes.

Q I'm going to ask you, Mrs. Baker, if you can, to turn your memory to the date of June 22nd, 1997. So now we're talking couple years ago.

A Okay.

Q Evening time. Do you remember an incident that happened that evening?

A A gentleman came in the house while my husband and I were sitting there watching TV, and all I remember at first that he said, "If you don't yell or scream, you'll be all right."

Q Let me stop you for a minute. You and Reggie were watching TV?

A Yes.

Q Now, this is going to sound like a silly question, so obviously at that point Reggie was alive; is that correct?

A Yes.

Q The gentleman that came in your house, can you remember anything about what he looked like?

A No.

Q Do you remember of what race he was?

A Caucasian -- well, California's got so many races, I just -- if you're White, you're Caucasian. If you're Black, you're colored. That's all.

Q Okay. When the man came into your house and told you if you cooperated you wouldn't get hurt, do you remember what happened after that?

A Yes. Asks us to go in the bedroom.

Q And did you?

A Yes.

Q And did Mr. Baker also go into the bedroom?

A Yes.

Q Then what happened?

A Told us to sit on the beds and tied, tied up my hands and my ankles and I presume tied up my husband's.

Q Do you remember anything about him tying up your husband now as we sit here today?

A No. I just remember him tying me up and then kind of discu -- . . . disgustedly I think he untied me but I just know I was firstly tied up.

Q Okay. Is it your memory of the order of the events that evening, is it a very clear memory as you sit here today?

A Sometimes yes and sometimes no, but I did write everything down if I can –

Q Before you pull that out, let me just ask you a couple questions about the writing.

A Okay.

Q I take it you brought something with you to court today.

A Yes.

Q You talked about writing it down?

A Yes.

Q Did at some point you write, I guess, a description of what happened on the evening of June 22nd, 1997?

A Yes.

Q When, if you recall, did you write that?

A I think the next morning.

Q When, when you wrote the description of what happened -- . . .was it fresh in your memory at that time?

A Yes.

Q When you wrote the description of what happened, had you had any chemotherapy treatments or did that come later?

A That came later.

Q So you didn't have the problem with your memory that chemo is now giving you?

A That's right.

Q When you wrote it down, I take it you wrote in your own handwriting?

A Yes, I did.

Q As opposed to having someone else write it for you?

A No, I wrote it myself.

Q And when you wrote it, did you write down the truth about what you remember that evening to the best of your recollection?

A Yes.

Q I think that you indicated that you brought that writing with you; is that correct?

A Yes, I did.[62]

Q . . . I'm going to ask you to read what you wrote, the events that you described that happened to you on the evening of June 22nd, 1997. May we proceed, your Honor?

THE COURT: Yes.

MR. HEAD: Is she going to read to herself or into the record?

MS. CARTER: Actually I will ask her to read it out loud. That will be my request.

MR. HEAD: Under 1237.

MS. CARTER: Pursuant to 1237 of the Evidence Code.

MR. HEAD: Objection on the grounds that it doesn't come within the requirements of 1237.

THE COURT: I will overrule the objection. I believe the foundation has been laid. Ms. Baker, the book that you are holding there now, ma'am, is that the book in which you wrote the account?

THE WITNESS: Yes.

THE COURT: I will overrule the objection.

(2 CT 436-441 [emphasis added].)

Mrs. Baker then read into the record a written narrative in which she stated that an African-American man came into her home that evening and in which she described the crime in chronological detail from beginning to end. (2 CT 442-445.) She then testified further to the events of that evening, including that the intruder took her car without her permission. (2 CT 446-447.) When asked if she saw the intruder in the courtroom, she said no. (2 CT 447.)

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[62] At this point in the record, the prosecutor showed the document to defense counsel. (2 CT 440.)

On cross-examination, and without benefit of her written narrative, she recalled that the intruder came into her home "around 10:15, 10:30," but her recollection was refreshed by review of the police report that she had originally indicated the time was 10:40 or 10:50 p.m. (2 CT 449-450.) The intruder was dressed all in black, wore a stocking cap and spoke in a "level tone." (2 CT 456.) She could see the intruder's face throughout the crime. (2 CT 457.) The intruder went outside at one point and she heard talking about her television set. Eventually, the intruder returned and put her in the bathroom. (2 CT 458.) She remembered hearing a car door slam and her back door open and close; she had the impression the intruder was not alone. (2 CT 463-464.) She recalled that she was struck by the intruder, the phone lines in the house had been ripped out, the house had been ransacked and some money had been taken. (2 CT 461-462.) Finally, she recalled that she was interviewed by police that evening, taken to the hospital and then assisted the police in making a sketch of the intruder; she identified the sketch. (2 CT 448-449, 450-452.)

B. The Prosecutor Failed To Lay An Adequate Foundation For Past Recollection Recorded Because She Failed To Show That Mrs. Baker Lacked Recollection Of The Facts Contained In Her Written Narrative.

Evidence Code § 1237(a) describes the foundational requirements for the introduction of past recollection recorded as an exception to the hearsay rule. It states:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter *as to which the witness has insufficient present recollection to enable him to testify fully and accurately*, and the statement is contained in a writing which:
>
> **(1)** Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> **(2)** Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> **(3)** Is offered after the witness testifies that the statement he made was a true statement of such fact; and
>
> **(4)** Is offered after the writing is authenticated as an accurate record of the statement.

(Emphasis added.)

As the statute makes clear, the initial, and most important, foundational requirement is that the witness must be unable to recall the events which are the subject of the past recollection recorded. (See *People v. Cowan* (2010) 50 Cal. 4th 401, 465 ["first requirement" of the statute is insufficient independent recollection to testify fully and accurately about events in question]; see also *People v. Cummings* (1993) 4 Cal. 4th 1233, 1293; Wegner et al., *California Practice Guide: Civil Trials and Evidence* (2010 rev.) ¶¶ 8:1364-1365 ["Wegner"]; 3 Witkin, *California Evidence* (4th ed. 2000) "Presentation At Trial" §182, p. 245.) If the witness lacks such recollection (and assuming the

other foundational requirements are met) then the witness may read the prior statement into evidence.

The court in *People v. York* (1966) 242 Cal. App. 2d 560 described the proper procedure for laying the foundation for past recollection recorded. In that case, the witness testified she could not remember the events in question, but recalled that she had previously testified about the events and had testified truthfully. Although shown a transcript of her prior testimony, she stated that it did not refresh her recollection. The court in *York* held that her prior testimony was properly admitted.

> The required foundation was laid in this case. The witness clearly indicated she could not recall the events in question. *After being shown the transcript of her former testimony as to those events, she still had no recollection.* She did remember that she had testified and that what she said was true.

(*Id.* at 566-567 [emphasis added]; see also *People v. Butcher* (1959) 174 Cal. App. 2d 722, 729 [" witness may testify from such a writing though he retains no recollection of the particular facts. This means that he must testify first that he is unable to refresh his memory or testify independently therefrom."]; *People v. Keelin* (1955) 136 Cal. App. 2d 860, 877 [same].)

In contrast, in *People v. Hefner* (1981) 127 Cal. App. 3d 88, the court held that it was error for the trial court to have permitted the prior testimony of the complaining witness in a sexual molestation case to be read into the record as past recollection recorded. Specifically, it was error to admit "the previous

testimony in its entirety" where the prosecutor failed to show that the witness had a failure of recollection "as to all the matters" contained in the prior testimony read to the jury. (*Id.* at 99.)

The error below is thus manifest. Mrs. Baker did not testify that she could not remember the events of June 22, 1997. To the contrary, she recalled the evening of the crime and began to testify to those events. (2 CT 436-438.) She did not say on direct that she could not recall anything about the crime. To the contrary, she testified without prompting. And although her memory may have been somewhat hazy as to certain details, at no point prior to the reading of her written narrative did she testify to a complete failure of recollection as to any fact about which she was questioned.

Significantly, it was only after Mrs. Baker testified to facts inconsistent with the prosecutor's theory of the case, notably that the assailant was "Caucasian," not African-American, that the prosecutor asked her to read the written narrative. But Mrs. Baker did not say that she could not recall the race of the intruder – the only testimony which would have justified reading the portion of the narrative pertaining to the race of the intruder. Undoubtedly, the prosecutor did not relish the prospect of having to impeach her star witness with the statements in the written account regarding the race of the intruder, and undoubtedly, the prosecutor was concerned that Mrs. Baker might testify to other aspects of the events that were inconsistent with her written narrative.

But inconsistency between the witness's testimony and a prior written statement is not a failure of recollection and is not a ground for allowing the witness to testify by reading the prior account into the record. (*See People v. Hefner, supra,* 127 Cal. App. 3d at 99.)

Nothing in Section 1237 or the cases construing it suggests that inconsistency between a witness's live testimony and prior statements, or generalized "memory problems," in and of themselves, are a sufficient basis upon which to admit past recollection recorded. To the contrary, the witness must exhibit a present lack of recall of the specific facts as to which the past recorded recollection is pertinent before a written account is admissible. (*People v. Cowan, supra*, 50 Cal. 4th at 465.)

Had Mrs. Baker failed to recall the facts about which she was questioned, the prosecutor could have used the written narrative in an attempt to refresh her recollection. In fact, the relevant authorities indicate that an effort to refresh recollection is a necessary prerequisite to a determination that there has been a complete failure of recollection. (*People v. Butcher*, *supra*, 174 Cal. App. 2d at 729; *People v. Keelin*, *supra*, 136 Cal. App. 2d at 877; *People v. York*, *supra*, 242 Cal. App. 2d at 566-567; Wegner, *supra*, ¶ 8:1362.) If efforts to refresh her recollection were unsuccessful, then the written narrative was available to be read into the record with respect to the particular facts as to which she claimed a lack of recall, but not as to all information in the written account. (*People v.*

York, *supra*, 242 Cal. App. 2d at 566-567; *People v. Hefner, supra,* 127 Cal. App. 3d at 99.)

Rather than establish that Mrs. Baker could not remember particular details and that her memory could not be refreshed, the prosecutor rushed to the other foundational requirements for past recollection recorded. She was plainly in such a hurry to get into the record facts she feared Mrs. Baker could not remember that she failed to satisfy the most important foundational requirement of all: an actual failure of recollection with respect to the specific matters about which Mrs. Baker was being questioned. (*People v. Cowan, supra*, 50 Cal. 4th at 465.) Indeed, Mrs. Baker did not have a demonstrated failure of recollection as to anything which she read into the record.

That the prosecutor was unduly hasty in asking her to read the narrative is underscored by the fact that, after Mrs. Baker read from her written narrative, she testified further on direct examination and on cross-examination in some detail to the events that evening and their aftermath – a sure sign that either she did not have a complete failure of recollection or her recollection could be refreshed. (2 CT 446-464.) As in *Hefner*, the prosecutor here failed to lay the foundation that Mrs. Baker lacked recollection "as to *all* the matters to which [she] testified." (127 Cal. App. 3d at 99 [emphasis added].) In permitting Mrs. Baker simply to read her entire written narrative, without first requiring a

showing that she could not remember the events described in the narrative, the trial court erred.

C. Even If The Prosecutor Laid A Proper Foundation For The Admission Of The Written Narrative Into Evidence As Past Recollection Recorded, Permitting Mrs. Baker To Read The Narrative Violated Appellant's Right To Confront And Cross-Examine Witnesses Protected By The Sixth Amendment And Article I, Section 15 Of The California Constitution.

Even if Mrs. Baker's testimony was properly admitted as past recollection recorded, it nevertheless violated Mr. Henderson's right, guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, section 15 of the California Constitution, to confront and cross-examine the witnesses against him.[63] In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at 53-54; accord: *Bullcoming v. New*

[63] Mr. Henderson acknowledges that this Court addressed this same issue most recently in *People v. Cowan, supra*, 50 Cal. 4th at 465, and concluded that, so long as the declarant is available for cross-examination, past recollection recorded does not violate a defendant's Confrontation Clause rights. Mr. Henderson also candidly acknowledges that every case from other courts which he has found that has considered the question has resolved it as did this Court in *Cowan*. Nonetheless, Mr. Henderson submits that this Court should reconsider the issue and decide it differently.

Mexico (2011) __U.S.__, 131 S. Ct. 2705, 2713.)[64] The Court noted, however, that "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to *defend or explain* it. . . ." (*Crawford, supra,* 541 U.S. at 59, fn. 9 [emphasis added].)

While the Supreme Court in *Crawford* did not undertake to define the boundaries of what makes a statement "testimonial" or "non-testimonial," it provided guidance which bears on this case. "Testimony" for purposes of the Confrontation Clause includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at 52 [emphasis added].) More recently, in *Davis v. Washington* (2006) 547 U.S. 813, the Court provided additional insight into the term "testimonial hearsay":

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is *no such ongoing emergency, and the primary*

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[64] The *Crawford* Court rejected much of the reasoning of *Ohio v. Roberts* (1980) 448 U.S. 56 which had permitted the use of hearsay statements under the Sixth Amendment if they met an established exception to the hearsay rule or otherwise were inherently reliable. (*Crawford, supra,* 541 U.S. at 61 ["Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"].)

> *purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*

(*Id.* at 822 [emphasis added].) And in a footnote to the foregoing text, the Court hastened to add that:

> [t]his is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

(*Id.* at 822 n. 1.)

Elsewhere in *Davis*, the high court emphasized that the Confrontation Clause exclusionary rule does not apply solely to "prior court testimony and formal depositions." (*Id.* at 826.) Instead, post-incident statements made to the police or even to others which "perfectly align with their courtroom analogues" can be considered testimonial and subject to the Confrontation Clause. (*Id.* at 828 [noting again Lord Cobham's letter and an English case involving an out-of-court description of a crime made by the victim to her mother]; see *People v. Cage* (2007) 40 Cal. 4th 965, 984 (outlining factors to be considered in determining whether a statement is testimonial).)

While the high court has struggled to articulate the parameters of testimonial statements (*e.g., Bullcoming, supra*, 131 S. Ct. 2705), this much is

clear: unsworn statements which "deliberately recount[]" the circumstances of the crime, which take "place some time after the events described [are] over" and which are not made in the heat of an ongoing emergency can be considered testimonial "because they do precisely *what a witness does* on direct examination." (*Davis, supra,* 547 U.S. at 830 [emphasis in original]; see also *id.* at 828; *People v. Cage, supra,* 40 Cal. 4th at 984.)

1. The written narrative was "testimonial."

Mrs. Baker's written account was testimonial in nature. In it, she "deliberately recount[ed]" the events on the evening of June 22, 1997. The narrative was four pages in length and described the events in precise, chronological detail. (2 CT 442-445.)

The circumstances under which the narrative was written also emphasize its testimonial nature. There was no ongoing emergency; the statement was written "some time" after the crime had occurred (the next morning) and after the investigation had begun. (2 CT 439.) Of particular importance, Mrs. Baker had already been interrogated by the police and had given them a statement. She was the only witness to the events and surely knew she might need to use the written narrative in future. In fact, she brought it with her to the meeting with the prosecutor to prepare for her testimony. (2 CT 425-426.) The potential that the narrative itself could be testimony was so apparent to the prosecutor that she anticipated using it as past recollection recorded even before

Mrs. Baker began to testify, and specifically asked Mrs. Baker to bring it with her on the day of her testimony. (2 CT 425-427.)

The tone and detail of the narrative also reflect a degree of seriousness in its preparation which rendered it effectively testimonial. The narrative is written in complete, factual declarative sentences and describes the events in chronological order. (2 CT 442-445.) It is not comprised of mere notes or sentence fragments. This strongly suggests that Mrs. Baker knew and understood that it was important that the narrative be carefully crafted.

Nor does the fact that the account was unsworn when written render it non-testimonial. (*Bullcoming, supra*, 131 S. Ct. 2717; *Crawford*, *supra*, 541 U.S. at 52-53.) Like Lord Cobham's letter in *Raleigh's Case*, Mrs. Baker's written account, though not formally or directly solicited as part of an investigation or interrogation, was plainly intended for future use at a trial and was understood as such by Mrs. Baker. Her written account of the crime was prepared "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (*Crawford*, *supra*, 541 U.S. at 52) and, it was apparent from when Mrs. Baker prepared the narrative and from the fact that she brought it with her when she met with the prosecutor that the "primary purpose" of the narrative was not to assist the police in their investigation, but to assist herself should she be called to testify. (See *Michigan v. Bryant* (2011) __U.S.__, 131 S. Ct. 1143,

1155) Her goal was to "to establish or prove some past fact for possible use in a criminal trial." (*People v. Cage*, *supra*, 40 Cal. 4th at 984 [emphasis in original].)

Moreover, the foundational requirements for past recollection recorded are intended to, in effect, render the written statement testimonial. The witness must say that it was prepared at or about the time of the events, that it reflected the witness's own words and was true when written. (Cal. Evid. Code § 1237.) Such representations are the functional equivalent of an attestation under penalty of perjury. As a result, Mrs. Baker's written account was an "out-of-court analog[], in purpose and form, of the testimony" which she would otherwise have been expected to give. (*Id.*) It was prepared and then used for "*what a witness does* on direct examination." (*Davis, supra,* 547 U.S. at 830 [emphasis in original].)

2. Practically speaking, the "declarant" was unavailable at trial and had not previously been subjected to cross-examination.

"If a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation "'complete."'"' (*Bullcoming, supra*, 131 S. Ct. at 2716 quoting *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146.) Past recollection recorded is, at best, an imperfect substitute procedure for live testimony because the "witness" is effectively a document

created at another time and place. The traditional forms of cross-examination designed to challenge the accuracy of the witness's recollection or to suggest the witness's bias, and the jury's ability to assess the witness's demeanor in giving testimony about the events, are necessarily compromised by the reading of a previously prepared document intended to replace testimony of the witness on the stand.

"Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford*, *supra*, 541 U.S. at 59.) However, unlike hearsay exceptions requiring unavailability of the witness, such as prior testimony under Evidence Code § 1292, past recollection recorded is prepared in the absence of, and cannot be tested by, cross-examination. There is no doubt that if Mrs. Baker had given her written narrative to her son, and she had passed away before the preliminary hearing, he could not have gotten on the stand and read from it – even if he could say from his own knowledge that it was written at or about the time of the events, was in his mother's own words and was true when written. Even though he was available to be cross-examined, the author of the account was unavailable and not subject to cross-examination. In such circumstances, Mr. Henderson's confrontation rights clearly would have been violated. (*Bullcoming, supra*, 131 S. Ct. 2714-2715; *Davis, supra*, 547 U.S. at 826.)

Similarly, the "author" of the written narrative here – the Mrs. Baker from 1997 – remained functionally unavailable, while the testifying witness – the Mrs. Baker in 2001 who ostensibly did not recall, and did not testify to, the events – was nothing other than a mouthpiece for her prior account. Were it otherwise, and she *could* recall the events, then the written narrative would have been inadmissible under Section 1237 in the first instance.[65]

Nor is this situation analogous to cross-examination of a witness who simply professes a lack of recollection, like that discussed in *United States v. Owens* (1988) 484 U.S. 554. That case involved the prosecution of an inmate for assaulting and seriously injuring a correctional counselor at a federal prison. While hospitalized, the counselor described the attacker to an FBI agent, named the attacker and identified him from a photographic array. At trial the counselor, whose skull had been fractured in the beating, causing severe memory loss, testified he remembered identifying the defendant as his assailant

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[65]It is no answer to say that on cross-examination she apparently did recall a good deal of what happened that evening. (See 2 CT 448-466.) A violation of the defendant's Confrontation Clause rights cannot be cured because some other procedure arguably mitigated the impact of the violation. (*Bullcoming, supra*, 131 S. Ct. at 2716 ["no substitute procedure can cure the violation" and "'[n]o additional showing of prejudice is required to make the violation "complete"'"].) The fact that Mrs. Baker was able to testify about some of the events without reference to her written narrative simply underscores that a proper foundation was not laid for the past recollection recorded and that it should never have been admitted. As this Court has suggested, admission of past recollection recorded without a proper foundation raises at least the potential for a Confrontation Clause violation. (*People v. Cummings, supra,* 4 Cal. 4th at 1292 n. 32.)

when speaking to the FBI agent, but admitted on cross-examination he could not remember actually seeing his assailant during the attack, did not recall that he had had numerous visitors other than the agent while he was in the hospital and did not know whether any of his visitors had suggested the defendant had committed the assault.

The Court concluded that the defense's opportunity to cross-examine the witness about his professed failure to recall the basis for his earlier belief that the defendant was the attacker was sufficient to satisfy the Confrontation Clause. "If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness'[sic] past belief is introduced and he is unable to recollect the reason for that past belief. In both cases the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available." (*Id.* at 559.)

In contrast, the *sine qua non* for the admissibility of past recollection recorded is that the witness cannot recall what she previously believed. Because the witness can neither recall nor testify to the facts, but rather reads the testimony into the record, both the basis for the witness's past belief in the substantive evidence and the substantive evidence itself are effectively walled off from cross-examination. Practically speaking, the declarant – the person

who wrote out the account – is not "present at trial to defend or explain" the hearsay. (*Crawford*, *supra*, 541 U.S. at 59, n. 9.) Instead, the defendant is relegated, at best, to cross-examining the witness about the circumstances under which the account was written, and is foreclosed entirely from cross-examining about what was written.

If a central mission of the Confrontation Clause is to advance "the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement'" (*Dutton v. Evans* (1971) 400 U.S. 74, 89), then past recollection recorded fails the test. The jury is left with no way to assess the credibility of the witness with regard to the substantive evidence since the witness has merely read that evidence into the record. To say, then, that permitting Mrs. Baker to read her diary into evidence did no violence to Mr. Henderson's rights under the Sixth Amendment simply because she was present in the courtroom to read it "reduces the right of confrontation to a hollow formalism." (*United States v. Owens*, *supra*, 484 U.S. at 572 [Brennan, J., dissenting].) Use of her past recollection recorded violated Mr. Henderson's Sixth Amendment right to confront a key witness against him.

D. The Admission Of Mrs. Baker's Diary As Past Recollection Recorded Was Prejudicial.

The admission of Mrs. Baker's written narrative was prejudicial to the defendant under any standard. (*Chapman*, *supra*, 386 U.S. at 24) [harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal. 2d 818, 836 [whether more probable than not that error contributed to the verdict].)

Her written account was entirely consistent with the prosecution's theory of the case, since it placed a lone African-American suspect at the scene. And the significance of her testimony cannot be disputed because the jury asked to watch the videotape of her testimony again during deliberations (20 RT 4401-4407); this was the only testimony which the jury asked to review. It is unknown whether Ms. Baker would have told a different story if she had not been permitted to read the narrative, and had been questioned only about what she recalled. That there may have been material differences between her live testimony and the written account is suggested, however, by the most important fact to which she testified without aid of the document: she recalled that her assailant was white. (2 CT 437.) Because she *answered* the question regarding the race of the assailant, and did not state that she could not recall the assailant's race, she should not have been permitted to read as past recollection recorded the written statement that the assailant was African-American. (*Hefner, supra*, 127 Cal. App. 3d at 99.)

Her failure, in court and in police lineups, to select Mr. Henderson as the assailant was important in its own right, but if her testimony that the assailant was white had not been overwhelmed by the written account, the failure of her in-court identification would have assumed even greater significance. The evidence would have been that she did not see the *white* assailant in the courtroom, a much more serious blow to the prosecution's case than that she did not see the same African-American assailant.

If Mrs. Baker had not been permitted to read into the record the single detail regarding the race of the assailant, the prosecutor would have been faced with the difficult choice of whether to impeach Mrs. Baker with the account as a prior inconsistent statement. (Cal. Evid. Code § 1235.) Had she chosen not to do so, the jury would have been presented with testimony from Mrs. Baker that the assailant was white and that she did not see him in the courtroom. In addition, the jury would also have heard the evidence that the Defendant had a mustache and goatee (11 RT 2548; 14 RT 3067-3068, 3083; 18 RT 3992, 4104), whereas Mrs. Baker – who admitted to getting a good, long look at her assailant (2 CT 457) – said he was clean shaven. (2 CT 456; 11 RT 2484-2485.) Again, no physical evidence, no blood, no fingerprints, no DNA, no footprints, put the Defendant at the scene or in the Bakers' car. (See pp. 26-27, *supra*.)

The evidence of the Mr. Henderson's own incriminating statements was undoubtedly significant, but even that evidence was suspect. Gregory Clayton was a thief and a felon who was clearly motivated to lie in order to get a reward; his story about what he learned from Mr. Henderson changed so often that by the end it was impossible to say what he learned from Mr. Henderson, what he learned from the press, what he learned from police and when he learned the "facts" to which he testified. Similarly, the jury could easily have believed that Tamara Elam gave up Mr. Henderson to the police because she feared that her boyfriend, Michael White, would otherwise be sent back to prison. Latesha Wasson testified only that she saw Mr. Henderson on the evening of the crime. Ronald Brown's testimony did not establish Mr. Henderson's presence at the crime scene.

Despite the evidence of his own statements, had the jury heard only what Mrs. Baker recalled, then Mr. Henderson's defense – that he was not alone, and stood outside while the real perpetrator attacked the Bakers – could have assumed substantially more credibility in the jury's eyes. Her rejection of Mr. Henderson as the perpetrator shortly after the crime or in the courtroom could well have been understood by the jury to be a truthful statement that he was *not* the assailant.

Had the prosecutor elected instead to impeach her testimony regarding the race of the intruder, the jury would have had to struggle with whether, and

to what extent, that testimony could be credited. It is unknowable how the jury might have perceived Mrs. Baker's testimony had she been required actually to testify to the facts, and had the prosecutor been put to the difficult choice of whether to use the written account to impeach any inconsistencies between it and her testimony. What is clear, though, is that Mrs. Baker's testimony, purportedly by way of past recollection recorded, upended the ordinary manner in which evidence is presented and tested at trial. Because her narrative was admitted wholesale, the jury heard a detailed, factual account of the crime uninterrupted by questions or objections. Any uncertainty in the witness's ability to recall, any lack of clarity in answers to questions, any cues suggesting bias in or fabrication of the testimony – all of which are critical to a jury's determination of credibility – were effectively swept away by the manner in which the evidence was offered.

The manner of presentation of the evidence also underscores why admission of the evidence as past recollection recorded, even if proper, eliminated any meaningful opportunity by the defense to cross-examine Mrs. Baker. The narrative was presented as a whole, without interruption, and the defense was foreclosed from testing her recollection of the facts or of identifying and exploring potential contradictions between what should have been live testimony and her written narrative. Permitting her testimony to be offered by way of written statement disrupted the defense's ability to cast doubt

upon it. Given the centrality of that testimony to the case against Mr. Henderson, the prejudice from its admission in written form is apparent. The conviction should be reversed.

VIII. MR. HENDERSON'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM WAS VIOLATED WHEN THE PROSECUTOR CALLED AN EXPERT TO TESTIFY TO THE RESULTS OF THE AUTOPSY PERFORMED ON MR. BAKER BY ANOTHER PATHOLOGIST.

The prosecutor called Dr. Joseph Cohen to testify to the findings made by Dr. Darryl Garber, the forensic pathologist who performed the autopsy on Mr. Baker. Relying on those findings, Dr. Cohen gave his opinion concerning the cause of Mr. Baker's death. Because Dr. Garber was not called to testify, Mr. Henderson's Sixth Amendment right to confront and cross-examine him regarding the autopsy was violated. (See *Bullcoming, supra*, 131 S. Ct. 2705; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S. Ct. 2527; *Crawford v. Washington*, *supra*, 541 U.S. 36.) The error was not harmless because the cause of death was an essential component of the prosecution's felony murder theory of the case. Therefore, the murder conviction, special circumstances findings and sentence of death must be reversed.

A. Facts.

The forensic pathologist who performed the autopsy on Mr. Baker was Dr. Garber. (2 CT 522 *et seq.*; 15 RT 3228, 3231.) Wolford, the investigating

officer, and a police photographer attended the autopsy and took photographs of the body. (15 RT 3225-3228; People's Exhs. 90, 91, 92, 105, 118.)

Dr. Garber did not testify at the trial. (11 RT 2597.)[66] Instead, the People called Dr. Joseph Cohen, the chief forensic pathologist for Riverside County, to testify concerning the autopsy. (15 RT 3229.) Prior to Dr. Cohen's testimony, defense counsel asked whether the autopsy protocol would be admitted into evidence as a business record because he wanted to ask questions regarding it and expressed some concern that Dr. Garber would not be a testifying witness. (11 RT 2597.) The trial court told defense counsel that he would "certainly be permitted to cross-examine" Dr. Cohen regarding the findings in the autopsy report, including any possible inconsistencies between Dr. Cohen's testimony and the autopsy findings. (11 RT 2597-2598.)

Dr. Cohen had a copy of the autopsy with him during his testimony (15 RT 3244), but it was not offered in evidence. He testified that autopsies are initiated by a referral from the deputy coroner. (15 RT 3229.) The forensic pathologist performs autopsies "on most unnatural deaths[,] meaning accident, suicides and homicides." (15 RT 3229.) The purpose of the autopsy is to "certify the cause of death and the manner of death." (15 RT 3229.)

Dr. Cohen reviewed the autopsy protocol and associated paperwork pertaining to the autopsy performed on Mr. Baker. (15 RT 3231.) He

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[66] Dr. Garber testified at the preliminary hearing. (2 CT 522-529.)

explained that the autopsy protocol is "the information that the pathologist gives as part of the medical record . . . that describes the findings of the autopsy, the external examination, the internal examination, and oftentimes there is an opinion." (15 RT 3231.) Dr. Cohen noted that Dr. Garber included a paragraph in the report which "stated his opinion with respect to the death." (15 RT 3231.) The report also includes the notes made by the pathologist as he performed the autopsy. (15 RT 3232.) Dr. Cohen reviewed these autopsy notes, as well as the police report and various photographs taken by police investigators. (15 RT 3232, 3233-3235.)

Dr. Cohen then relayed to the jury what "Dr. Garber did and what he found." (15 RT 3235.) He described the findings in the autopsy report from Dr. Garber's external and internal examination of the body. The external examination showed that Mr. Baker

> had a long scar that spanned his chest and abdomen . . . from the neck all the way down to the public bone. That was from previous bypass cardiac surgery.

(15 RT 3235.) The internal examination revealed

> evidence of natural disease, primarily heart disease. The heart was markedly enlarged. It weighed 525 grams which is about 150 grams higher than the upper limit of normal, so that's usually from hypertension. . . . It is part of the aging process, so the heart was enlarged.¶ In addition, the arteries of the heart were significantly narrowed or occluded with atherosclerosis. That is the hardening of the arteries that you hear about, so there was 75 percent narrowing of one of the arteries, 90 percent narrowing of another and 99 percent narrowing of a third. . . . ¶ In addition, there were four bypass grafts from his previous

> surgery, and two of those four grafts were occluded. They were blocked completely.

(15 RT 3237-3238; see also 2 CT 524-526 [Dr. Garber's preliminary hearing testimony describing findings regarding internal and external examination].) Mr. Baker's heart condition indicated that "even without any stress [he was] a set-up for sudden death." (15 RT 3238.) Based on the condition of Mr. Baker's heart, Dr. Cohen opined that, "death could have occurred yesterday or tomorrow or next week or six months down the road." (15 RT 3238.)

The examination of Mr. Baker also showed that he had a knife wound to the neck. Dr. Cohen stated that

> The description of that injury was that of an incised wound. That is a sharp force or cutting wound across the front of the neck. It measured four inches in length. It was horizontally oriented. . . . It was side to side, and it made it to a depth of about a third of an inch according to Dr. Garber's report.

(15 RT 3236.) He learned that a knife taken into evidence had been compared to the wound during the autopsy. (15 RT 3234.) The internal investigation of the neck wound showed that the knife only cut "through the skin and into the subcutaneous tissue." (15 RT 3237.) Nothing was

> significantly injured. That is the major veins and arteries in the neck as well as the airway . . . were intact. There was no injury to those items. So that this incised wound was relatively superficial. It didn't injury any of the major organs internally.

(15 RT 3236.)

Dr. Cohen opined that a "healthy person" would have survived the neck wound. (15 RT 3237.) Mr. Baker "died primarily from his heart disease." (15 RT 3239.) However, because Mr. Baker "was a set-up for sudden death," the stress from the crime, including any pain caused by the knife cut, was "plenty to tip Mr. Baker over the edge thereby leading to his death." (15 RT 3240, 3241.) Had it not been for the stress he experienced, "it is probable that he would have survived." (15 RT 3240.) Dr. Cohen acknowledged that it was possible Mr. Baker died before his neck was cut. (15 RT 3237, 3244, 3246.)

B. The Court Must Decide The Merits Of Mr. Henderson's Confrontation Claim.

While defense counsel expressed concern that Dr. Garber would not testify (11 RT 2597), he did not object to Dr. Cohen's testimony regarding Dr. Garber's findings. However, that is not a procedural bar, and the Court must decide the constitutional issue on the merits. Defense counsel could not have anticipated the significant change in the law wrought by *Crawford v. Washington* and its progeny, including *Melendez-Diaz* and *Bullcoming*.

This Court has made clear that

> although challenges to procedures or to the admission of evidence normally are forfeited unless timely raised in the trial court, "this is not so when the pertinent law later changes so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."

(*People v. Black* (2007) 41 Cal. 4th 799, 810-11, quoting *People v. Turner* (1990) 50 Cal. 3d 668,703; see also *People v. Chavez* (1980) 26 Cal. 3d 334, 350, n. 5.)

Appellant's trial was held in 2001. In 1992, this Court had held that the testimony of a pathologist regarding the contents of an autopsy report prepared by another pathologist, who had since passed away, did not violate the Confrontation Clause because it was admitted "under a firmly rooted exception to the hearsay rule that carries sufficient indicia of reliability to satisfy the requirements of the confrontation clause." (*People v. Clark* (1992) 3 Cal. 4th 41, 158, see also *People v. Beeler* (1995) 9 Cal. 4th 953, 979 [testimony of prosecution witness regarding autopsy findings of another pathologist did not violate confrontation clause].) Although the autopsy report itself was not introduced into evidence, Dr. Cohen testified to the specific autopsy findings before relying upon them in giving his opinion. (*Cf.* Cal. Evid. Code § 801(b) [expert may rely upon evidence "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion"].)

In 2004, the Supreme Court issued its decision in *Crawford v. Washington*, *supra*, 541 U.S. 36. *Crawford* "abandoned" the indicia-of-reliability standard used by this Court in *People v. Clark*. (See *People v. Geier* (2007) 41 Cal. 4th 555, 597.) Because of this wholesale change in the law, courts have held that a *Crawford* claim is not waived or forfeited by the failure

to make a Sixth Amendment objection in the trial court. (See *People v. Saffold* (2005) 127 Cal. App. 4th 979, 984 ["Any objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal. App. 4th 1409, 1411 n. 2 ["the failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

Thus, the Court should decide the merits of appellant's claim.

C. Dr. Cohen's Description Of, And Reliance Upon, The Hearsay In The Autopsy Report Violated Mr. Henderson's Sixth Amendment Right To Confront And Cross-Examine Witnesses Against Him.

Prior to *Crawford*, an out-of-court statement could be admitted over a Confrontation Clause objection if the witness was unavailable to testify and the statement carried adequate "indicia of reliability." (*Ohio v. Roberts, supra,* 448 U.S. at 66.) In order to meet this test, the evidence had to "fall within a firmly rooted hearsay exception" or "have particular guarantees of trustworthiness." (*Id.*) *Crawford* expressly overruled *Ohio v. Roberts* and divorced the law of hearsay from the Court's Confrontation Clause jurisprudence. As a result, following *Crawford*, the fact that evidence falls within a firmly rooted hearsay exception or has guarantees of trustworthiness is not germane to the Confrontation Clause analysis.

As discussed previously, in *Crawford*, the high court held that a defendant's Sixth Amendment right to confront and cross-examine witnesses is

violated by the admission of testimonial statements of a witness who was not subject to cross-examination at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. at 68.) The Court emphasized that testimony is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" and confirmed that the "core class" of testimonial statements includes affidavits, custodial examinations, prior testimony not subject to cross-examination, and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at 51-52.)

Although the Court has yet to articulate the full scope of "testimonial" statements, it has recently decided two cases which plainly indicate that the autopsy report must be considered a "testimonial" statement and, therefore, that permitting Dr. Cohen, rather than Dr. Garber, to testify to the autopsy findings violated Mr. Henderson's confrontation right.

In *Melendez-Diaz, supra,* 129 S. Ct. 2527, the defendant in a drug prosecution objected to the admission of three "certificates of analysis" that showed the seized substances contained cocaine. (*Id.* at 2531.) Massachusetts law required a forensic analyst to test seized evidence for the presence of illegal drugs and required the analyst to provide the police with his or her findings on a signed certificate under oath. (*Id.* at 2530-2531.) The certificate could then be

admitted in court as prima facie evidence of the composition, quality, and net weight of the substance at issue in the prosecution. (*Id.* at 2531.) The high court held that these certificates, which it described as "quite plainly affidavits," were testimonial statements because they were made under oath and under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial; indeed, the Court noted that the sole purpose of the certificates was to provide prima facie evidence at trial. (*Id.* at 2532.) The Court further observed that the certificates "are incontrovertibly a '"solemn declaration or affirmation made for the purpose of establishing or proving some fact,"'" namely that the substance in question was cocaine. (*Id.*, quoting *Crawford, supra,* 541 U.S. at 51.)

The Court rejected the argument that a lab analyst's report was not testimonial because it contained "near-contemporaneous" observations of a scientific test, rather than statements by lay witnesses of events observed in the past. (*Melendez-Diaz, supra,* 129 S. Ct. 2535.) It also rejected a related argument that there is a difference between testimony recounting past events, "which is 'prone to distortion or manipulation,'" and testimony that is the result of '"neutral, scientific testing."' (*Id.* at 2536.) The Court explained that "[f]orensic evidence is not uniquely immune from the risk of manipulation. . . . A forensic analyst responding to a request from a law enforcement official may feel pressure--or have an incentive--to alter the evidence in a manner favorable

to the prosecution." (*Id.*) The Court added that, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Id.* at 2537.)

More recently still, in *Bullcoming*, *supra*, 131 S. Ct. 2705, the defendant was convicted of driving while intoxicated. Because the defendant refused to take a breath test, the police obtained a warrant authorizing a blood-alcohol content ("BAC") analysis. His blood was drawn at a hospital and the BAC was determined by testing performed by the New Mexico Department of Health, Scientific Laboratory Division (SLD) using gas chromatography. The test report presented the "certificate of analyst," completed and signed by Curtis Caylor, the SLD forensic analyst assigned to test the blood sample. The certificate attested that he had followed the protocol in handling the sample and recording the results. The SLD examiner who reviewed Caylor's analysis further certified that Caylor was qualified to conduct the BAC test, and that the "'established procedure'" for handling and analyzing Bullcoming's sample "'ha[d] been followed.'" Caylor did not testify. Instead, the State introduced Caylor's finding as a "business record" during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis, but who was qualified to perform the testing himself. (*Id.* at 2710-2711.) The New Mexico Supreme Court acknowledged that, in light of *Melendez-Diaz*, the certification was testimonial in nature. It concluded,

however, that the defendant's confrontation rights were protected, stating "Razatos could substitute for Caylor because Razatos 'qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures.'" (*Id.* at 2715.)

The Supreme Court held that the certified report was undoubtedly testimonial.[67]

> Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. Like the *Melendez-Diaz* certificates, Caylor's certificate is "formalized" in a signed document, headed a "report". Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses. ¶ In sum, the formalities attending the "report of blood alcohol analysis" are more than adequate to qualify Caylor's assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance.

(*Id.* at 2717 [citations omitted].)

The Supreme Court held that the testimony violated the defendant's rights under the Confrontation Clause, stressing that "surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (*Id.* at 2716.) The Court

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[67] On certiorari, New Mexico had argued, contrary to the opinion of the New Mexico supreme court, that the report was not testimonial. (*Id.* at 2717.)

emphasized that "when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way." (*Id.*)

As discussed below, the autopsy report in this case was testimonial and Dr. Garber thereby "became a witness [Mr. Henderson] had the right to confront." (*Id.*)

1. Dr. Garber's autopsy report is testimonial.

Given the Supreme Court's holdings in *Melendez-Diaz* and *Bullcoming* there can be little doubt that Dr. Garber's autopsy report was testimonial. The purpose of an autopsy is to determine the circumstances, manner, and cause of death. (15 RT 3229; Cal. Gov't. Code, § 27491; *Dixon v. Superior Court* (2009) 170 Cal. App. 4th 1271, 1277 ["It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstances, manner, and cause' of criminally related deaths."].)[68] The autopsy findings must be "reduced to writing" or otherwise permanently preserved. (Cal. Gov't. Code, § 27491.4.) Upon determining that there are reasonable grounds to suspect that a death "has been occasioned by the act of

[68]Government Code § 27491 provides, in pertinent part: "It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; ... known or suspected homicide . . . ; death in whole or in part occasioned by criminal means; . . . deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another . . . ."

another by criminal means," the coroner must "immediately notify the law enforcement agency having jurisdiction over the criminal investigation." (Cal. Gov't. Code, § 27491.1) "[O]fficially inquiring into and determining the circumstances, manner and cause of a criminally related death is certainly part of a law enforcement investigation." (*Dixon v. Superior Court, supra,* 170 Cal. App. 4th at 1277.) As this Court has observed, the primary purpose of a coroner's inquest "is to provide a means for prompt securing of information for use of those who are charged with the detection and prosecution of crime." (*Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4.) Thus, autopsies in Riverside County are commenced only after a deputy coroner investigator makes a referral to the forensic pathologist. (15 RT 3229.)

Coupled with the fact that Dr. Garber's report was prepared in the midst of a homicide investigation – a circumstance of which he was undoubtedly aware given that the investigating officer attended the autopsy (15 RT 3225) – the investigatory purpose behind the autopsy establishes that Dr. Garber's autopsy report was testimonial. As with the certificates at issue in *Melendez-Diaz* and *Bullcoming*, the autopsy report constitutes a """solemn declaration or affirmation made for the purpose of establishing or proving some fact""" (*Melendez-Diaz, supra,* 129 S. Ct. at 2532; see also *Bullcoming*, *supra*, 131 S. Ct. at 2717), namely the "circumstances, manner and cause" of Mr. Baker's death. Moreover, the autopsy report was plainly "'made under circumstances

which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.'" (*Melendez-Diaz, supra,* 129 S. Ct. at 2532.)[69] As one commentator has stressed, an autopsy report really

> does squarely fit into the category of the testimonial. This cannot and should not be doubted. It is created as part of an ongoing investigation in order to produce evidence. It is prepared with an eye toward future criminal prosecution. Though we may not know at the time, it is conducted against whom it will serve as testimony, it is meant to serve as testimony against someone in particular, the perpetrator of the murder.

(Mnookin, *Expert Evidence And The Confrontation Clause After Crawford v. Washington* (2007) 15 J.L. & Pol'y 791, 852 ["Mnookin"].)

So it was here. The primary purpose of Dr. Garber's autopsy report was to establish or prove some past fact, *i.e.*, the circumstances, manner, and cause of Mr. Baker's death, for possible use in a criminal trial.[70]

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[69]Following *Melendez-Diaz*, courts in other states have found autopsy reports prepared in cases of suspected homicide to be testimonial statements. (See, e.g., *State v. Locklear* (N.C. 2009) 681 S.E.2d 293, 304-305; *Martinez v. State* (2010 Tex. App.) 311 S.W.3d 104, 111; *Wood v. State* (Tex. App. 2009) 299 S.W.3d 200, 210; see also *State v. Johnson* (Minn. App. 2008) 756 N.W.2d 883, 890 [pre-*Melendez-Diaz* case holding that autopsy report prepared during pendency of homicide investigation was testimonial]; *State v. Bell* (Mo. App. 2009) 274 S.W.3d 592, 595 [same].)

[70]This Court granted review in *People v. Rutterschmidt*, S176213, *People v. Gutierrez (Hugo),* S176620 and *People v. Dungo*, S176886 in light of *Melendez-Diaz* and *Bullcoming*. Those cases were argued on June 6, 2012 and taken under submission. Then, following *Williams v. Illinois* (June 18, 2012) 567 U.S.__, 2012 U.S. LEXIS 4658 (see fn. 71, *infra*), this Court vacated the submissions in and ordered supplemental briefing.

2. The trial court erred in admitting Dr. Cohen's testimony based on the contents of Dr. Garber's report.

Unlike the certificates at issue in *Melendez-Diaz* and *Bullcoming*, Dr. Garber's autopsy report was not admitted into evidence. Instead, Dr. Cohen described the findings in Dr. Garber's report before giving his opinions concerning the cause of death. (15 RT 3235-3240.) Although defense counsel had the opportunity to cross-examine Dr. Garber at the preliminary hearing (2 CT 528-529), the People made no showing at trial that Dr. Garber was unavailable to testify. Accordingly, Dr. Cohen's hearsay recitation of the autopsy findings quite plainly violated the principles enunciated in Crawford and its progeny. (*Crawford, supra*, 541 U.S. at 68.)

The People may contend that Dr. Cohen's testimony did not run afoul of the Confrontation Clause because the information in Dr. Garber's report was not offered for its truth, but only as a basis for Dr. Cohen's opinion under Evidence Code § 801(b), and Mr. Henderson had an opportunity to cross-examine Dr. Cohen concerning the contents of Dr. Garber's report. Any such contention does not withstand analysis.

To begin with, even though Evidence Code section 801(b) generally allows an expert witness to offer opinions based on matters made known to him, whether or not admissible, if such material is reasonably relied upon by experts in the field, that does not resolve the Confrontation Clause issue.

Where testimonial hearsay is involved, the Confrontation Clause trumps the rules of evidence. (*Crawford, supra,* 541 U.S. at 51 ["Leaving the regulation of out-of-court statements to the law of evidence would render the confrontation clause powerless to prevent even the most flagrant inquisitorial practices."].)

Moreover, the autopsy report here was formally prepared in anticipation of a prosecution. This is the sort of evidence – cloaked in the authority of a medical examiner and inherently designed to aid criminal prosecution – that the United States Supreme Court has warned against exempting from Sixth Amendment protections. (See *Melendez-Diaz, supra,* 129 S. Ct. at 2543, quoting *White v. Illinois* (1992) 502 U.S. 346, 365 (Thomas, J. concurring) ["'[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in *formalized testimonial materials*, such as affidavits, depositions, prior testimony, or confessions.'" (Emphasis added)].)[71]

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[71] The U.S. Supreme Court's most recent effort to address what constitutes a "testimonial statement" has generated more heat than light. (See *Williams v. Illinois, supra,* 567 U.S.__, 2012 U.S. LEXIS 4658.) In *Williams*, a rape case, a lab report on DNA taken from vaginal swabs of the victim was not introduced into evidence, but was relied upon by an expert who opined that the defendant's DNA matched the DNA in the lab report. The Illinois supreme court concluded that evidence of the report of did not violate the Confrontation Clause because the report itself had not been offered into evidence for its truth. The high court affirmed, but without an opinion shared by a majority of the Court. The plurality concluded that the Confrontation Clause was not offended because the DNA report was not offered for its truth, but was used for a legitimate non-hearsay purpose as the basis for an expert opinion. The plurality found it significant that the defendant had opted for a bench trial rather than a jury trial. A jury, unlike a trial court, might have had difficulty understanding the

distinction between evidence offered for its truth and evidence offered as the basis for an expert opinion. (*Id.*, 2012 U.S. LEXIS at pp. **34-35.) Furthermore, the Confrontation Clause is primarily concerned with out-of-court statements which have as their primary purpose accusing a targeted individual with criminal conduct and formalized statements such as affidavits, depositions, prior testimony or confessions. The DNA report was neither of these. Justice Thomas, concurring in the judgment, concluded that the report had to have been offered for its truth, since the expert opinion would have had no purpose unless the evidence upon which it was based was assumed to be true. Instead, he stated that the Confrontation Clause was not violated because the report lacked the requisite "formality and solemnity" to be considered "'testimonial." (*Id.*, 2012 U.S. LEXIS at p. *88 [Thomas, J., concurring].) The four dissenting justices agreed with Justice Thomas that the DNA report had been offered for its truth and that it could not be meaningfully distinguished from the laboratory analysis in *Bullcoming, supra*, which the Court had determined was a testimonial statement. (*Id.*, 2012 U.S. LEXIS at p. *121 [Kagan, J., dissenting].)

Despite the disagreements among the justices, *Williams* does not alter the conclusion that the autopsy findings in this case were testimonial. First, and most simply, the autopsy undoubtedly met Justice Thomas's requirement of "formality and solemnity." It is a formal written analysis of the cause of death performed in connection with an ongoing criminal investigation. Second, the autopsy findings were offered for their truth, *i.e.,* that Mr. Baker had "severe, severe" heart disease and that he had suffered a neck wound. These were the necessary factual predicates for Dr. Cohen's opinion that Mr. Baker died from heart failure triggered by the stress of the crime. Moreover, unlike in *Williams*, this was a jury trial and the contents of the report were described to the jury by Dr. Cohen. The jury was not instructed to consider the description of the autopsy only for the purportedly non-hearsay purpose that it served as the basis for Dr. Cohen's opinion. Dr. Cohen plainly offered the evidence for its truth and the jury was expressly told that Dr. Cohen's opinion was only as good as the facts underlying it and that it was up to the jury to decide whether those facts were true. (19 RT 4353-4354.) There was, therefore, no meaningful difference between the autopsy findings and the testimonial statements in *Bullcoming* and *Melendez-Diaz*. In short, under any of the opinions in *Williams*, the autopsy findings were testimonial statements and Mr. Henderson should have been given the opportunity to cross-examine the report's author, Dr. Garber.

Of particular significance here, the high court stressed in *Bullcoming* that "surrogate testimony" of an expert could not substitute for the testimony of the analyst who performed the work and prepared the testimonial report. (131 S. Ct. at 2716.) "'[T]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.' . . . Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Id.* [citations omitted].)

The jury below was instructed that "[i]n determining what weight to give to any opinion expressed by an expert witness you should consider . . . the facts or materials upon which each opinion is based and the reasons for each opinion. *An opinion is only as good as the facts and reasons on which it is based.* . . . In permitting such a [hypothetical] question, the Court does not rule and does not necessarily find that all the assumed facts have been proved. . . . *It is for you to decide from all of the evidence whether or not the facts assumed in a hypothetical question have been proved.*" (19 RT 4353-4354 [emphasis added]; 39 CT 10758 [CALJIC 2.80].)

In evaluating Dr. Cohen's opinions, the jury was required to evaluate the truth and accuracy of Dr. Garber's autopsy findings. The weight of Dr. Cohen's opinions was entirely dependent upon the accuracy and substantive

content of Dr. Garber's report. (See Mnookin, *supra*, 15 J.L. & Pol'y at 822-823 ["[T]o pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand."]; Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Geo. L.J. 827, 847-848 ["[I]f the [expert's] opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to 'demonstrate the underlying information [is] incorrect or unreliable.'"].)

Where an expert bases his opinion on testimonial statements and discloses those statements to the jury, *Crawford* requires that the defendant have the opportunity to confront the individual who issued them. Substituted cross-examination is not constitutionally adequate. (See *Bullcoming*, *supra*, 131 S. Ct. at 2176.) As the court observed in *Melendez-Diaz*, the prosecution's failure to call the lab analysts as witnesses prevented the defense from exploring whether the analysts lacked proper training or had poor judgment and from testing their "honesty, proficiency, and methodology." (*Melendez-Diaz, supra,* 129 S. Ct. at 2538; see also *Bullcoming*, *supra*, 131 S. Ct. at 2715 & n. 7.) Similarly, the prosecution's failure to call Dr. Garber as a witness prevented

Mr. Henderson from exploring the possibility that his report suffered from incompetence, bias or was otherwise suspect. Because the autopsy report was testimonial, and there was no showing Dr. Garber was unavailable to testify, Mr. Henderson was entitled to "'be confronted with'" him at trial. (*Melendez-Diaz, supra,* 129 S. Ct. at 2532.)

D. The Admission of Dr. Cohen's Testimony Based on Dr. Garber's Report Was Not Harmless.

Confrontation Clause violations are subject to federal harmless error analysis under *Chapman v. California, supra,* 386 U.S. at 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Cage, supra,* 40 Cal.4th at pp. 991-992.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.) The answer here is no.

Dr. Cohen described Dr. Garber's findings and, based on those findings, opined that Mr. Baker's fatal heart attack was brought on by the stress of the crime, including specifically as a result of the pain inflicted from the knife wound to his neck. (15 RT 3239-3241.) This evidence was essential to the prosecution's case. The prosecutor's felony murder theory, and her arguments for why the special circumstances should be found true, all rested on Dr. Cohen's testimony, which in turn rested on the autopsy findings. During oral argument, she made these points repeatedly. (See 19 RT 4234 ["Dr. Cohen told

you that Mr. Baker died primarily of a heart attack, and that heart attack was due to the stress, the extreme terror and fright that he suffered because in his own home he was invaded, he was tied up, his throat was cut, and he died of a heart attack, *so is there any doubt in this case that a killing occurred*[?]." (Emphasis added)]; 19 RT 4239-4240 ["[I]t was the fear that was caused by all of these actions, by the binding, by the gagging, by the ransacking, by the cutting of the throat that caused Mr. Baker to die, *so was this killing committed in order to carry out the crime*? Obviously." (Emphasis added)]; 19 RT 4251 ["The taking was accomplished by either force, hands-on force or fear. And we know that absolutely because that's what ultimately killed Mr. Baker. He was terrorized to death."]; 19 RT 4337-4338 ["[H]e knew he couldn't leave any witnesses so he viciously slashed Mr. Baker's throat and he so terrorized Mr. Baker that Mr. Baker had a heart attack. The defendant . . . terrorized him to death."].)

Had Dr. Garber been available for cross-examination, the defense could have challenged his "proficiency, the care he took in performing his work, and his veracity." (*Bullcoming, supra*, 131 S. Ct. at 2715 n. 7.) If, through cross-examination, the crime-induced heart attack theory had been called into question, then the prosecution's theory of the case would simply have collapsed. There were at least two ways that cross-examination of Dr. Garber might have challenged the prosecution case. First, Dr. Cohen's opinion rested

upon autopsy findings of "severe, severe" heart disease, including an enlarged heart and occluded arteries. (15 RT 3237.) If these findings were incorrect for any reason – whether as a result of incompetence or worse – then that would have raised a question about the actual cause of death and whether something other than a heart attack brought on by stress, fear and the wound to the neck was responsible for Mr. Baker's death. Second, even if the findings of heart disease were correct, Dr. Garber may simply have missed or omitted from the report some other factor unrelated to the crime which triggered the heart attack. That this was possible was even suggested by Dr. Cohen's testimony. He noted that "even without any stress [Mr. Baker was] a set-up for sudden death" (15 RT 3238) and acknowledged that Mr. Baker may have been dead even before the knife touched his neck. (15 RT 3237, 3244, 3246.) Indeed, Mr. Baker's "death could have occurred yesterday or tomorrow or next week or six months down the road." (15 RT 3238.)

Under either scenario, Mr. Baker may have died without regard to the crime. But whether either scenario is likely or unlikely cannot be determined since Dr. Garber was not called upon to explain and defend *his* methods, assumptions, procedures and biases under the crucible of cross-examination. "Forensic evidence is not uniquely immune from the risk of manipulation. .. . . A forensic analyst responding to a request from a law enforcement official may feel pressure--or have an incentive--to alter the evidence in a manner favorable

to the prosecution." (*Melendez-Diaz, supra,* 129 S. Ct. at 2536.) And, even if all that is involved is error or oversight, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Id.* at 2537.)

The prosecutor needed the link between the alleged stress engendered by the crime and Mr. Baker's death to argue that Mr. Henderson should be found (1) guilty of felony murder and (2) death-eligible because of the robbery/burglary special circumstances. Dr. Cohen's testimony, based on *Dr. Garber's* findings, was the essential ingredient which made this a capital case. Because Dr. Garber did not testify, the defense had no opportunity to question him regarding those findings. (*Bullcoming, supra*, 131 S. Ct. at 2716.) That was error which requires reversal.

IX. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. HENDERSON'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED EXPERT TESTIMONY THAT WOULD HAVE ASSISTED THE JURY IN DETERMINING THAT MRS. BAKER'S FAILURE TO IDENTIFY MR. HENDERSON AS THE PERPETRATOR WAS RELIABLE.

Mr. Henderson's defense was he that was not the intruder who beat Mrs. Baker and caused Mr. Baker's death. Mrs. Baker said that the intruder was clean shaven, did not select Mr. Henderson from a photo lineup and then did not make a courtroom identification of him. Mr. Henderson presented evidence that at the time of the crime he wore a mustache or goatee, and had a mole on

his forehead. In support of his defense, he proposed to call an expert witness to testify to research showing that eyewitnesses recall distinctive visual cues, such as facial hair or unique facial features, with an extremely high rate of accuracy, even under stressful conditions, and specifically mention these cues when asked to describe a person they have seen. Jurors tend to believe, however, that stress reduces recall generally, including recall of distinctive cues. In addition, the expert would have testified to research showing that an eyewitness's rejection of a suspect in a lineup is as reliable as a selection of the suspect. Jurors generally believe that a selection is more reliable than a rejection.

The proposed testimony would have provided the jury with a basis upon which to conclude that Mrs. Baker told the truth when she described the intruder as clean shaven and reliably did not select Mr. Henderson from the lineup or identify him in court. In short, the expert testimony was central to the defense case and would have made it more likely that the jury would have concluded that Mr. Henderson was not the intruder.

The trial court refused to permit the expert testimony and, in doing so, stripped Mr. Henderson of his right to present a meaningful defense. In a demonstration of the prejudice from the trial court's ruling, during closing argument, the prosecutor made the very arguments to the jury which the expert's testimony was intended to address and rebut. Exclusion of the testimony was an abuse of discretion and violated Mr. Henderson's

constitutional right to present witnesses in his defense. The convictions and sentence should be reversed.

A. Facts.

1. Evidence supporting the defense theory.

There was substantial evidence introduced below that Mr. Henderson was not the person responsible for Mr. Baker's death and Mrs. Baker's injuries. Several witnesses testified that he wore a mustache or goatee at the time of the crime and had a prominent mole on his forehead. (11 RT 2548, 2565 [Wasson recalled he had mustache, possibly goatee, and mole]; 14 RT 3067-3068, 3083 [Clayton recalled Mr. Henderson having mustache and mole]; 18 RT 4104 [Patrice Henderson recalled he had goatee and mustache]; see also 18 RT 3992 [Mr. Henderson said he had mustache and facial hair on chin].) Mrs. Baker – who saw her assailant clearly and for a lengthy period of time – testified that the perpetrator was clean shaven and rejected Mr. Henderson as the intruder in a photo lineup and in court. (2 CT 447, 453-457; 11 RT 2484.) Deputy Elders, who saw the driver of the Bakers' car the day after the crime, did not select Mr. Henderson from the lineup. (12 RT 2706.) When Gregory Clayton first called the police, he described Mr. Henderson and was told that the description did not fit the suspect for whom they were looking. (14 RT 3038.)

Mrs. Baker acknowledged that she heard the assailant talking outside her home and formed the impression that he was not alone. (2 CT 463-464.)

Latesha Wasson testified that Mr. Henderson was with two men when he met up with her after the crime. (11 RT 2562.) Gregory Clayton testified that Mr. Henderson told him that others were involved in the crime. (14 RT 3004, 3029-3030, 3054-3055.) Mr. Henderson offered into evidence segments of his interrogation that included references to others at the scene and testified that his acquaintances, Leon and "Knuck," picked him up and drove him to the mobile home park and that it was Knuck who committed the crimes at the Baker residence. (17 RT 3792-3793, 3802-3807; Court Exhs. 10, 11 [39 CT 10662-10665].) Based on the evidence, the jury could have concluded that Mr. Henderson was not involved at all or, at most, was guilty as an accomplice to the crime.

2. Proposed testimony of Dr. Scott Fraser and ruling excluding the testimony

Mr. Henderson sought to call as an expert witness, Dr. Scott Fraser, a psychologist who has studied the factors that affect the reliability of eyewitness testimony. Dr. Fraser was called to testify (1) to the high degree of accuracy with which eyewitnesses recall distinctive cues such as the presence or absence of facial hair or marks; and (2) that an eyewitness's rejection of a potential suspect in a lineup is as reliable as a selection.

The trial court held a hearing under Evidence Code § 402 to determine the admissibility of the testimony. (17 RT 3652-3719.)[72] Dr. Fraser testified that he provides information for jurors to consider in assessing the accuracy of eyewitness testimony, but does not testify to the accuracy or inaccuracy of any particular witness's observation. (17 RT 3654, 3663.) Scientific research has shown that the first description an eyewitness gives of an individual is generally the most accurate, particularly regarding distinctive features such as facial hair, a shaved head, tattoos, limps or stutters. (17 RT 3664.) Neuroanatomical research reveals that the brain and eyes are programmed to pick out the unusual; people can do this in milliseconds with a high degree of accuracy. (17 RT 3674.)

Distinctive cues, which are any unique, odd or unusual characteristics, are a "separate class of feature description" and are the most accurate aspects of human description. (17 RT 3667, 3670.) Even if eyewitnesses have faulty memories regarding peripheral characteristics or clothing, they recall distinctive cues, such as facial hair, tattoos, facial abnormalities, unusual hairstyles or scars, with a high degree of accuracy. (17 RT 3668-3669.)

While recognition may decrease with stress, recognition is different from recall of distinctive features. (17 RT 3667.) Distinctive features are encoded in

[72] The prosecutor stipulated for purposes of the Section 402 hearing that Dr. Fraser was an expert in the area of eyewitness testimony and identification procedures. (17 RT 3652.)

memory even in times of stress and are quite likely to be recalled. The research has shown that the rate of misdescription for such distinctive features is near zero, even among witnesses under high stress. (17 RT 3664, 3667-3668.) And if the witness has had a significant amount of time to see and interact with the assailant, even the stress of the crime itself or such things as weapons focus are mitigated. (17 RT 3702-3703.)

In our society, a mustache or other facial hair, in particular, is a distinctive feature that eyewitnesses recall with great accuracy. (17 RT 3670, 3694.) If the eyewitness had the opportunity to observe the perpetrator and speak with him, and the eyewitness reported that the assailant had a mustache, there is a high likelihood that the description is accurate. The research also indicates that if the assailant had had a mustache, Mrs. Baker would have reported it. (17 RT 3674-3675, 3700.) Similarly, if an eyewitness first reported that an assailant was clean shaven, there is a very high likelihood that the assailant was, in fact, clean shaven. (17 RT 3665.) Depending upon its placement, a facial feature such as a mole can be a distinctive cue that a witness would tend to recall. (17 RT 3703-3704.)

Scientific research on facial recognition has been ongoing for 60-70 years. (17 RT 3670.) Three types of research have shown that distinctive cues are reported with high degree of accuracy: lab research to compare the subject's descriptions with what was actually shown to the subject; studies of

actual crimes, comparing the eyewitness description to the features of the actual perpetrator, *e.g.*, in instances in which the crime has been caught on videotape; and archival studies of actual crimes that have gone to trial and verdict which compare, *e.g.*, photos taken of the perpetrator at or about the time of the crime and descriptions by eyewitnesses. (17 RT 3671-3762.)

Studies have shown that the research findings regarding recall of distinctive cues are beyond the common knowledge of jury eligible adults. Jurors generally do not understand the accuracy with which eyewitnesses report distinctive cues. (17 RT 3673.)

Research also shows that rejections are equally as reliable as selections when eyewitnesses view lineups. (17 RT 3679.) Because Mrs. Baker did not select Mr. Henderson from the lineup in which he was depicted (People's Exh. 114), particularly after she simulated putting a cap on each of the photos, her rejection of him has reliability. (17 RT 3677-3678.) Jurors tend to think, however, that selections are more reliable than rejections; in fact, juries tend to "devalue" rejections as compared to selections. (17 RT 3679, 3698.) Furthermore, if the witness does not select a suspect from a lineup, but describes another member of the same lineup as looking similar to the perpetrator, that is not a "selection," but should be considered a rejection. Studies show that jury eligible adults also do not understand that distinction. (17 RT 3680.)

The trial court declined to permit Dr. Fraser's testimony under Evidence Code § 352, concluding that the prosecution did not intend to rely on eyewitness identification testimony for proof of guilt and, therefore, Dr. Fraser's testimony would not be helpful to the jury and could lead to a "parade of expert witnesses." (17 RT 3722-3725.)

3. The portions of the prosecutor's closing argument which the excluded testimony would have rebutted.

During her rebuttal argument, the prosecutor made lengthy arguments which Dr. Fraser's anticipated testimony was intended to rebut. She sought to explain Mrs. Baker's description of the assailant as clean shaven, rather than as having a mustache or goatee, as caused by the stress she was under during the crime.

> No doubt about it, ladies and gentlemen, Mrs. Baker did not identify the defendant from the lineup. . . . [T]he intruder . . .according at least to Mrs. Baker, came in with a butcher knife and we know probably from the way that the evidence of it, that Mrs. Baker is mistaken. She probably is. Logic will tell you . . . that what Mr. Henderson came in with is not a butcher knife but that dent puller thing which may or may not even look very much like the butcher knife.
>
> . . . So what can we conclude from that? Well, she . . . was mistaken about that detail. *And I submit to you that she was also because of the stress of the situation unable to make an identification.*
>
> . . . It's not at all like we're sitting here, all of us calm, all of us focused, all of us in a nonthreatening situation. . . . ¶ That is not the setup that Mrs. Baker had before she had an opportunity to see this intruder. . . . She's in the room with someone who is at first threatening her life and safety with what she firmly believes is a butcher knife. He's intruded in her home totally unexpected, totally what she didn't think was going to happen. Can you imagine her terror? Can you imagine how stressful that

situation was for her? . . . *She focused no doubt on that weapon which she thinks is a butcher knife and is probably a dent puller. What do you focus on when you are in a stressful situation? The thing that threatens you, the knife, the butcher knife, the dent puller. So is it really all that hard to imagine why she couldn't identify the defendant? Could any of us do any better in that kind of situation?*

. . . Peggy Baker did tell us that she thought that the defendant didn't have a mustache. . . . ¶ However, let's assume for a minute he had the little mustache, the little pencil mustache all along. Again, *here's Mrs. Baker under the kind of stress that we've talked about, the terror that we've talked about, the beating and the assault that we've talked about, and we're going to say because she didn't recognize on this particular man that he had a little mustache and she couldn't say, in fact she thought that he didn't.* Well, let's just throw this case out the window and Mr. Henderson's confession out the window because, you know, clearly that tells us the defendant wasn't there.

Remember Deputy Elders also doesn't remember any facial hair and again we're talking six hours later, trained observer and he does not remember any facial hair. So if there is facial hair there and, you know, maybe there is, maybe there isn't, it's obviously not very prominent. I don't think it's a reason to think that somehow Mrs. Baker told you that someone other than defendant was in that house that night.

(19 RT 4315-4319 [emphasis added].)

The prosecutor also sought to turn Mrs. Baker's rejection of Mr. Henderson when she viewed the lineups into a selection because Mrs. Baker pointed to a photograph that looked similar to Mr. Henderson.

Let's look for a minute at the photo lineups Mrs. Baker looked at. . . . ¶ This is the very first photo lineup we looked at before we know anything about Mr. Henderson, and remember what the testimony is regarding this. She looks at it. She says: I don't think the perpetrator is there. Pretty sure it's not. . . . She does tell us of all of them, number 4 looks closest. It's not him but this guy looks closest except he's dark skin. And now look – I'm -- I will show it to you. I will ask you when you have a better chance to sit and look at it under the light, look at number 4. Who does that look like of all the people in that lineup? Don't you think

number 4 does really actually resemble Mr. Henderson. She's pretty close in what he looks like.

(19 RT 4320-4321.)

B. By Excluding Dr. Fraser's Proposed Testimony, The Trial Court Violated Mr. Henderson's Right Guaranteed Under State And Federal Law To Call Witnesses And To Present A Defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [citations omitted]; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324.)

"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 in the due process of law." (*Washington v. Texas* (1967) 388 U.S. 14, 19; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) A defendant has a constitutional "'right to put before the jury evidence that might influence the determination of guilt.'" (*Taylor v. Illinois* (1988) 484 U.S. 400, 408, quoting *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) And, if state evidentiary rules excluding evidence are "'arbitrary' or 'disproportionate to the purposes they are designed to serve'" (*United States v. Scheffer* (1998) 523 U.S. 303, 308), they

may violate a defendant's federal constitutional right to a fair trial. An evidentiary rule will be deemed disproportionate where it "has infringed upon a weighty interest of the accused." (*Id.*)

State law also recognizes that exclusion of evidence which is important to the defense may constitute reversible error. Thus, "trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight." (*People v. Murphy* (1963) 59 Cal. 2d 818, 829; see, e.g., *People v. Wright* (1985) 39 Cal. 3d 576, 584-585 [error to exclude evidence of victim's heroin use to bolster defense claim that victim acted irrationally and defendant therefore killed in self-defense].) Even though, "as a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense" (*People v. Boyette* (2002) 29 Cal. 4th 381, 414), if a key element of the defense is gutted because evidence is excluded under Evidence Code § 352, as occurred here, the exclusion may be a prejudicial abuse of the trial court's discretion. (*People v. McDonald* (1984) 37 Cal. 3d 351, 373, 375-377; *People v. Cegers* (1995) 7 Cal. App. 4th 988, 1000-1001.)

Dr. Fraser's testimony was plainly admissible under Evidence Code § 801. In excluding that testimony under Evidence Code § 352, the trial court misconstrued the purpose of the testimony and hobbled the defense, even as it advanced no legitimate interest in the control and presentation of evidence at

the trial. The exclusion of the evidence was a prejudicial abuse of discretion, requiring reversal.

1. Dr. Fraser's proposed testimony met the modest evidentiary threshold for the admission of expert testimony.

The foundational requirements for the admissibility of Dr. Fraser's testimony were easily met. All that is required for the admission of expert testimony is a showing that the testimony is "sufficiently beyond common experience" and will assist the trier of fact. (Cal. Evid. Code § 801(a).) As this Court emphasized in *People v. McDonald, supra*, 37 Cal. 3d 351, expert testimony is admissible to assist the jury even where jurors may have some general knowledge or understanding of the subject matter. (*Id.* at 367.) Particularly where ordinary jurors lack a complete understanding of the subject of the testimony, and may even harbor beliefs inconsistent with accepted scientific wisdom, expert testimony is admissible to assist them in their deliberations. (*Id.*)

In fact, expert testimony is particularly useful to rebut "'widely held misconceptions'" and thereby to assist the jury in evaluating witness testimony and conduct. (*People v. McAlpin* (1991) 53 Cal. 3d 1289, 1301.) In *McAlpin*, for example, this Court held that it was permissible for the prosecution in rebuttal to offer expert testimony as to why a parent might decline to report possible sexual abuse of her child.

> Most jurors, fortunately, have been spared the experience of being the parent of a sexually molested child. Lacking that experience, jurors can rely only on their intuition or on relevant evidence introduced at trial. It is reasonable to conclude that on the basis of their intuition alone many jurors would tend to believe that a parent of a molested child, naturally concerned for the welfare of the child and of other children, would promptly report the crime to the authorities, just as a parent would be likely to do if the child complained of someone who had beaten him or stolen his pocket money. Yet here the prosecution had evidence to the contrary -- the expert opinion of Officer Miller that in fact it is not at all unusual for a parent to refrain from reporting a known child molestation, for a number of reasons. Such evidence would therefore "assist the trier of fact" (Evid. Code, § 801, subd. (a)) by giving the jurors information they needed to objectively evaluate [the mother's] credibility.

(*Id.* at 1302; see also *People v. Brown* (2004) 33 Cal. 4th 892, 906-907.)

Specifically with respect to expert testimony pertaining to eyewitness identification evidence, the *McDonald* court stated that:

> It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance, and duration. It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most.

(37 Cal. 3d at 367-368.)

Dr. Fraser's testimony met the threshold requirements of Evidence Code § 801. Here, Mrs. Baker described the assailant as clean shaven and repeatedly declined to identify Mr. Henderson as the perpetrator. Deputy Elders likewise declined to identify Mr. Henderson in a lineup. Dr. Fraser's testimony would have provided the jurors with the benefit of years of scientific research

indicating the reliability of eyewitness recall of visual cues, such as the presence or lack of facial hair, and the reliability of rejections in the viewing of lineups.

That Dr. Fraser's testimony was beyond jurors' common knowledge and would have assisted the jury is clear. Dr. Fraser testified – and the prosecution did not dispute – that studies have shown that jurors are unaware of the reliability of eyewitness recall of distinctive cues, even in stressful situations, and are unaware that eyewitness rejections during lineups are equally as reliable as eyewitness selections. (17 RT 3679.) Contrary to the science, jurors tend to believe that stress adversely affects recall of distinctive cues, much as it adversely affects overall recognition. Similarly, jurors tend both to believe that lineup selections are more reliable than rejections and to devalue lineup rejections, although they are no less reliable than selections. (17 RT 3679, 3698.) Since the research shows that these commonly held beliefs are "misconceptions," Dr. Fraser would have imparted to the jury information that is "beyond the common experience" of jurors within the meaning of Evidence Code § 801. (*People v. McAlpin, supra*, 53 Cal. 3d at 1300-1302; *People v. McDonald, supra*, 37 Cal. 3d at 369.)

Dr. Fraser's testimony would have assisted the jury in evaluating whether Mrs. Baker's description of the assailant was accurate, and would have helped explain why she repeatedly stated that Mr. Henderson was not the person she

saw that night. Dr. Fraser was careful to say that he would not invade the province of the jury by opining that either Mrs. Baker's description of the assailant or her and Deputy Elders's rejection of him in the lineup was reliable (17 RT 3664), but his testimony would have given the jury a scientific framework within which to "objectively evaluate" the credibility of that testimony and then to conclude that it was reliable. (*People v. McAlpin, supra*, 53 Cal. 3d at 1302.) In sum, Dr. Fraser's testimony met the modest threshold of admissibility set forth in Section 801 of the Evidence Code.

2. The trial court's ruling gutted the defense without serving any legitimate trial management purpose.

The trial court excluded Dr. Fraser's testimony under Evidence Code § 352, concluding that the testimony would not assist the jury because the prosecutor did not intend to rely upon eyewitness identification and would require a "parade of experts" before the jury. The trial court just got it wrong and, in the process, hobbled the defense.

In the typical case involving psychological factors in eyewitness identification, the issue is whether the identification of the defendant as the perpetrator was faulty. (See, e.g., *People v. McDonald, supra*, 37 Cal. 3d at 375-376.) In such a case, the trial court abuses its discretion in excluding expert testimony if "eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence

giving it independent reliability." (*Id.* at 377; see also *People v. Jones* (2003) 30 Cal. 4th 1084, 1111-1112.)

The trial court treated this case as if it were a typical *McDonald* eyewitness identification case and stated that because the prosecution was not relying on eyewitness testimony to demonstrate that Mr. Henderson was the perpetrator, Dr. Fraser's testimony would not assist the jury. (17 RT 3725.) But this is not the typical case and the trial court's assumption that the *McDonald* framework applied demonstrates how badly it misconstrued the purpose of Dr. Fraser's proposed testimony.

Rather than rebut weak prosecution eyewitness testimony, the expert evidence here was intended to illuminate the significance and enhance the veracity of Mrs. Baker's eyewitness testimony in particular. She rejected Mr. Henderson as the intruder in lineups and in court and testified that the perpetrator – who she observed for quite a long time – was clean shaven. Other witnesses testified that Mr. Henderson had facial hair at the time of the crime. The prosecutor surely hoped that the jury would discount or disregard, and expressly asked the jury to discount or disregard, both Mrs. Baker's testimony that the assailant was clean shaven and her rejection of Mr. Henderson as the perpetrator. (19 RT 4315-4317.) It was precisely because the prosecution did *not* intend to rely on Mrs. Baker's eyewitness identification testimony, and

suggested that the jury ignore that testimony in significant respects, that Dr. Fraser's testimony was critical to the defense.

Mr. Henderson wanted the jury to believe Mrs. Baker's description of the assailant as clean shaven and wanted them to believe her when she declined to identify him in lineups and in court. Dr. Fraser's testimony provided a scientific explanation for why Mrs. Baker's description was reliable and thus would have made it more likely that the jury would conclude that Mr. Henderson was not the perpetrator. In excluding that testimony – which otherwise met all the criteria for admissibility under Evidence Code § 801 – the trial court erroneously prevented the jury from considering "evidence that might [have] influence[d] the determination of guilt." (*Ritchie*, *supra*, 480 U.S. at 56.) Since the evidence was plainly admissible, and its importance to the defense is manifest, the trial court's decision to exclude it was inexplicable.

Nor did the trial court's exclusion of Dr. Fraser's testimony advance any legitimate trial management goals. According to the trial court, the testimony allegedly would have required "a parade" of expert witnesses before the jury. (17 RT 3725.) There was no support for this statement in the record. The prosecutor had not argued that it would be necessary to call a multitude of experts to rebut Dr. Fraser and the trial court did not explain why it believed a "parade" of experts would have been required. (See generally 17 RT 3724-3726.).

The trial court was incorrect as a matter of law in any event. Evidence "that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it. Rather, it should be accompanied by instructions clearly explaining to the jury the purpose for which it is introduced. . . . [A]ny excess in the quantity or complexity of such testimony can be controlled by the court's power to limit the presentation of evidence." (*People v. McDonald, supra*, 37 Cal. 3d at 372; see also *People v. Walker* (1986) 185 Cal. App. 3d 155, 163.) Because the demonstrable importance of the evidence to the defense outweighed the merely *hypothetical* burden on the trial process, excluding Dr. Fraser's testimony was "'disproportionate to the purpose [exclusion was] designed to serve.'" (*Scheffer, supra*, 523 U.S. at 308.) It was error for the trial court to exclude Dr. Fraser's testimony.

C. The Exclusion Of Dr. Fraser's Testimony Was Prejudicial.

Whether this Court considers the prejudice from the exclusion of Dr. Fraser's testimony from the vantage point of state law (*People v. Watson, supra,* 46 Cal. 2d at 836 [no reasonable probability of a more favorable verdict]) or the harmless beyond a reasonable doubt standard for constitutional trial error under federal law (*Chapman, supra,* 386 U.S. at 24), the result is the same: the exclusion of Dr. Fraser's testimony was prejudicial to the defense.

1. Dr. Fraser's testimony was central to the defense case.

No forensic evidence tied Mr. Henderson to the crime. Despite substantial investigative efforts, the police had not obtained any hair, blood, DNA or fingerprint evidence to connect him to the crime. The prosecution's case rested instead on incriminating statements Mr. Henderson may have made, which had been recorded on virtually indecipherable audio tapes, and on the testimony of Gregory Clayton, a snitch whose convoluted and confusing testimony had been constructed from newspaper accounts of the crime and purchased for a reward of $1,000.

The one witness who could have identified the assailant – Mrs. Baker – repeatedly declined to identify Mr. Henderson as the perpetrator and testified to a distinctive visual cue, notably that the assailant lacked facial hair, which was inconsistent with the testimony from other witnesses that Mr. Henderson wore a mustache or goatee at or near the time of the crime. (11 RT 2548, 2565 [Wasson]; 14 RT 3067-3068, 3083 [Clayton]; 18 RT 4104 [Patrice Henderson]; see also 18 RT 3992 [Mr. Henderson].) Wasson, in particular, who saw Mr. Henderson the evening of the crime and testified for the prosecution, had no reason to fabricate her testimony on this point.

Dr. Fraser's proposed testimony was intended to put this evidence in context and to help the jury understand the significance of Mrs. Baker's description of the assailant as clean shaven. Based on the research that

Dr. Fraser cited, the jury likely – and erroneously – believed that Mrs. Baker's description of the assailant as clean shaven was simply an insignificant detail or the result of the stress of the events. (17 RT 3701-3703.) Dr. Fraser's proposed testimony was directed specifically at the common misconception that stress affects recall of distinctive cues. He would have testified that the scientific research shows that stress does not have such an effect. (17 RT 3664, 3667-3668.) Had the jurors heard Dr. Fraser's testimony, they would have understood that there was a very high likelihood that Mrs. Baker's recollection that the assailant was clean shaven was correct. Similarly, the jury would have heard that Mrs. Baker's rejection of Mr. Henderson in the lineups was equally as reliable as if she had selected him. Dr. Fraser's testimony would, therefore, have provided the jury with a credible explanation for why Mrs. Baker did not identify Mr. Henderson as the intruder. Without Dr. Fraser's testimony in evidence the jury lacked a scientific basis for concluding that Mr. Baker's description of the intruder was likely accurate and that her repeated rejections of Mr. Henderson as the perpetrator were reliable.

2. The prosecution made closing arguments to the jury which Dr. Fraser's testimony was intended to rebut.

Underscoring the significance of Dr. Fraser's testimony, and thus the prejudice from its exclusion, the prosecutor made a lengthy argument to the jury about the very subjects which Dr. Fraser's testimony was intended to address.

The prosecutor expressly told the jury that the stress of the events had clouded Mrs. Baker's memory about "detail[s]" such as facial hair (19 RT 4318), and urged the jury to try and imagine how difficult it would be to recall important features of the assailant in such a situation.

> . . . Peggy Baker did tell us that she thought that the defendant didn't have a mustache. . . . Do we know he didn't shave that night? We don't. No proof he didn't.
>
> However, let's assume for a minute he had the little mustache, the little pencil mustache all along. Again, *here's Mrs. Baker under the kind of stress that we've talked about, the terror that we've talked about, the beating and the assault that we've talked about, and we're going to say because she didn't recognize on this particular man that he had a little mustache and she couldn't say, in fact she thought that he didn't.* Well, let's just throw this case out the window and Mr. Henderson's confession out the window because, you know, clearly that tells us the defendant wasn't there.

(19 RT 4318-4319 [emphasis added].)

The prosecutor thereby sought to conflate the factors impacting recognition of the perpetrator with recall of distinctive cues. Dr. Fraser's proposed testimony was specifically intended to explain the critical difference between these two distinct concepts. (17 RT 3667.) He emphasized that jurors are unaware of the high degree of accuracy with which eyewitnesses recall distinctive cues such as the presence or absence of facial hair, even when their ability to recognize the individual or recall peripheral information, such as clothing, may have been impaired. (17 RT 3664.)

The prosecutor also argued that Mrs. Baker's focus on the "weapon" in the assailant's hands undermined her ability to recall facial hair or otherwise to identify Mr. Henderson as the perpetrator.

> She focused no doubt on that weapon which she thinks is a butcher knife and is probably a dent puller. What do you focus on when you are in a stressful situation? The thing that threatens you, the knife, the butcher knife, the dent puller. So is it really all that hard to imagine why she couldn't identify the defendant? Could any of us do any better in that kind of situation?

(19 RT 4317.) Dr. Fraser would have testified that distractions, such as "weapons focus," are a less significant factor in the eyewitness's ability to recall of distinctive features. (17 RT 3666-3672.)

And the prosecutor argued that Mrs. Baker's "selection" of someone from the lineup who looked somewhat like Mr. Henderson was close enough to his appearance to serve as the functional equivalent of an identification.

> Let's look for a minute at the photo lineups Mrs. Baker looked at. . . . ¶ This is the very first photo lineup we looked at before we know anything about Mr. Henderson, and remember what the testimony is regarding this. She looks at it. She says: I don't think the perpetrator is there. Pretty sure it's not. Again, I'm only paraphrasing her, I'm not quoting. She does tell us of all of them, number 4 looks closest. It's not him but this guy looks closest except he's dark skin. And now look – I'm -- I will show it to you. I will ask you when you have a better chance to sit and look at it under the light, look at number 4. Who does that look like of all the people in that lineup? Don't you think number 4 does really actually resemble Mr. Henderson. She's pretty close in what he looks like.

(19 RT 4320-4321.)

Dr. Fraser's testimony would have directly rebutted this argument. He would have testified that the failure to select Mr. Henderson was, in fact, a *rejection* of his photograph in the lineup and that such rejection was as reliable as a selection. (17 RT 3679.) Jurors do not understand that rejections are equally as reliable as selections and believe, instead, that selections are more reliable. Indeed, Dr. Fraser would have testified that the amount of time that Mrs. Baker spent with the assailant would have increased the likelihood that her failure to identify him was reliable. (17 RT 3702-3703.) Moreover, Dr. Fraser would have testified that cross-racial identifications, such as that here, often result in false positives. That Mrs. Baker observed the intruder for as long as she did and then rejected Mr. Henderson as the intruder in photo lineups and in court suggested strongly that any cross-racial effect enhanced the reliability of her rejection of him as the intruder. (17 RT 3683.) But the jury heard none of this.

The prosecutor's closing argument demonstrates the importance that Dr. Fraser's testimony could have assumed. She made the very arguments which Dr. Fraser's testimony would have addressed and rebutted. Without his testimony, however, the jury was left to its own devices when considering Mrs. Baker's eyewitness testimony, and did not have before it a scientific explanation that her failure to identify Mr. Henderson – rather than being merely a function of stress – was in fact highly reliable. The jurors attached

particular importance to Mrs. Baker's testimony; they asked to watch the videotape of her testimony again during deliberations. (20 RT 4401-4407.) Had the jury heard Dr. Fraser's testimony, it is much more likely the jurors would have concluded that her description of the perpetrator was reliable and thus substantially more likely that the jury would have acquitted Mr. Henderson or convicted him of a lesser charge.

3. At a minimum, Dr. Fraser's testimony would have made it much more likely that the jury would not have found the special circumstances to be true.

Mr. Henderson was tried and convicted on a felony murder theory and the two special circumstances found true were based on felony murder: killing during the commission of a robbery and during the commission of a burglary. (20 RT 4461-4463.) Dr. Fraser's testimony could easily have led the jury to conclude that the special circumstances were not true, and thus that Mr. Henderson was not eligible for the death penalty.

There was substantial evidence introduced at trial that Mr. Henderson was not alone that evening. Mrs. Baker testified that she heard her assailant speaking with someone and formed the impression that he was not alone. (2 CT 463-464.) Gregory Clayton testified that Mr. Henderson had mentioned other participants in the crime. (*E.g.*, 14 RT 3003-3004, 3029-3030, 3045-3046.) Latesha Wasson told police that Mr. Henderson was with two men when she met him on the evening of the crime. (11 RT 2562, 2564-2565.) The only

forensic evidence even arguably tying Mr. Henderson to the events was a single, ambiguous shoe print *outside* the Bakers' home. (12 RT 2654.) Mr. Henderson testified that one of his two accomplices, Knuck, had gone into the Bakers' home and committed the crimes, and that he had never entered the Baker residence. (17 RT 3806-3807.) The defense offered other evidence, including portions of the taped interview with the police, intended to suggest that others were involved. (Def. Exhs. 10, 11 [39 CT 10663-10665].) Based on this evidence, the jury was given instructions on aiding and abetting, and was instructed that if it found Mr. Henderson guilty as an accomplice to the crime, the special circumstances could be found true only if he intended for Mr. Baker to be killed. (19 RT 4365-4366; 39 CT 10775, 10777.)

Had Dr. Fraser's testimony been added to the evidentiary mix, it could have explained Mrs. Baker's inability to identify Mr. Henderson as the assailant, and provided a framework within which the jury could consider the evidence that others were involved. As it was, the trial court noted that the jurors paid particular attention to references to others being involved. (20 RT 4426-4427.) Mrs. Baker's failure to select Mr. Henderson from lineups within days of the crime and her description of the assailant as having no facial hair at a time when Mr. Henderson was wearing a moustache or goatee would not have been just otherwise inexplicable discrepancies in the evidence. Instead, Mrs. Baker's testimony could have been convincing affirmative evidence that Mr.

Henderson was telling the truth – he did not go into the Bakers' home and he did not commit the crimes with which he was charged.

In short, Dr. Fraser's testimony would have provided the jury with a way out of the evidentiary thicket: Mr. Henderson was there that evening, but someone else was the intruder. Had the jury reached that conclusion, it could not have found the special circumstances to be true because there was no evidence of any kind that Mr. Henderson – as an accomplice – had any intent that Mr. Baker be killed.

In the context of the evidence presented at this trial, the trial court's failure to permit the testimony of Dr. Fraser was a prejudicial abuse of discretion. "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald, supra*, 37 Cal. 3d at 376.) In light of the whole record, this Court should conclude that exclusion of the testimony violated Mr. Henderson's Sixth Amendment right to call witnesses and present a defense and that the error cannot be said to be harmless beyond a reasonable doubt. In addition or alternatively, the Court should conclude that it is reasonably probable that a result more favorable to defendant would have been reached had Dr. Fraser's testimony not been excluded. (*People v. Watson, supra,* 46 Cal. 2d at 836.) The convictions and special circumstance findings should be reversed.

X. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE CALJIC 2.92 PERTAINING TO FACTORS THE JURY MUST CONSIDER IN EVALUATING EYEWITNESS TESTIMONY.

Mrs. Baker – the only eyewitness to the crime – provided the foundation of Mr. Henderson's defense. She (1) described the perpetrator as "clean shaven" despite evidence that Mr. Henderson had a mustache or goatee at the time of the crime; (2) assisted in a composite drawing of the perpetrator which did not resemble Mr. Henderson; (3) did not identify Mr. Henderson in a lineup she was shown shortly after the crime; and (4) did not identify him in court during the preliminary hearing. Mr. Henderson sought to convince the jury that Mrs. Baker's eyewitness accounts of the perpetrator were reliable and believable and that he should be acquitted as a result. Because her eyewitness testimony was central to the defense, the judge should have, but failed, to read CALJIC 2.92 to the jury, despite a defense request for the instruction. That was error and it was prejudicial.

A. Facts.

Mrs. Baker was the only eyewitness to the crime. Immediately after the events, she described the perpetrator as "clean shaven" and light-skinned. (2 CT 455-456; 11 RT 2484-2485.) Within 24 hours of the events, she assisted in a composite drawing that did not resemble Mr. Henderson. (2 CT 450-451; compare People's Exhs. 131, 132 with People's Exh. 114 [photo #5] and Def.

Exh. E.) Several days after the crime, she viewed a photographic lineup (People's Exh. 114) which contained a photo of Mr. Henderson; she rejected him as the perpetrator. (2 CT 453-454; see also 19 RT 4208-4209.) During the preliminary hearing, she was asked if the assailant was in the courtroom. Mr. Henderson was present, but she said she did not see the perpetrator. (2 CT 446-447.) Deputy Elders, who chased the suspect the day after the crime, likewise failed to select Mr. Henderson from the lineup in evidence as People's Exh. 114. (12 RT 2706-2707.)

During proceedings to settle the jury instructions, defense counsel asked the trial court give CALJIC 2.91 and 2.92, which together would have instructed the jury on the variety of factors to consider in evaluating eyewitness testimony. (19 RT 4189.) Although the prosecutor initially objected to both instructions, she ultimately agreed to CALJIC 2.91. (19 RT 4189, 4191.) The trial court refused to give CALJIC 2.92, however, because "there simply is no eye witness identification testimony in this case." (19 RT 4190, 4191-4192.)[73]

B. The Trial Court Erred In Refusing To Give CALJC 2.92 Because The Reliability Of Eyewitness Testimony Was At The Heart Of The Defense Case.

This Court has held that "'it is error to refuse to give an instruction requested by a defendant which "directs attention to evidence from . . . which a

[73] Due to its length, and for the Court's convenience, the text of CALJIC 2.92 is included in the Appendix at the end of this brief.

reasonable doubt of guilt could be engendered." [Citation.] This applies with equal force to a refusal to give a requested instruction which deals with identification in the context of reasonable doubt.'" (*People v. Wright* (1988) 45 Cal. 3d 1126, 1140 quoting *People v. Hall* (1980) 28 Cal. 3d 143, 159. See also *People v. Fudge* (1994) 7 Cal. 4th 1075 [trial court erred when it failed to give defendant's special jury instruction regarding factors affecting eyewitness identification; error harmless in light of other evidence, defense counsel's closing argument, and court's standard instructions to the jury on the issue of witness credibility].) This Court has expressly authorized CALJIC 2.92 for cases involving eyewitness testimony, holding that, "with appropriate modifications to take into account the evidence presented at trial, will usually provide sufficient guidance on eyewitness identification factors." (*People v. Wright, supra,* 45 Cal. 3d at 1141.)

The trial court below rejected CALJIC 2.92 because it concluded there was no eyewitness identification testimony in the case. (19 RT 4190.) The court was stunningly incorrect. While no prosecution eyewitness identified *Mr. Henderson* as the perpetrator, eyewitness identification testimony was essential to the defense's effort to raise a reasonable doubt. Mrs. Baker did not and would not select Mr. Henderson as the perpetrator based on her lengthy observation of the man in her home that evening. The primary theory advanced by the defense was that Mrs. Baker's eyewitness testimony, and her subsequent

rejection of Mr. Henderson as the perpetrator, were reliable. That was the purpose, for example, of Dr. Fraser's proposed expert testimony about eyewitness recall of distinctive visual cues. (See pp. 229-254, *supra*.)

The applicability of CALJIC 2.92 to this case should have been patently obvious to the trial court. Nothing in CALJIC 2.92 requires that eyewitness testimony assist only the prosecutor before the instruction may be read to the jury. The essential purpose of CALJIC 2.92 is to guide the jury when considering the *reliability* of eyewitness testimony generally. The factors listed in the instruction focus the jury on three main areas relevant to the evaluation of eyewitness identification testimony: 1) the witness's ability to observe the perpetrator at the time of the crime; 2) the reliability of the witness's subsequent identification of the suspect; and 3) inconsistent or erroneous identifications the witness may have made before trial. (*People v. Wright, supra*, 45 Cal. 3d at 1139.) While the instruction may most often apply when the defendant has been identified by an eyewitness, the factors in the instruction apply equally where, as here, the eyewitness has rejected the defendant as the perpetrator. This case provides an ample illustration of the point. For example, CALJIC 2.92

- instructs the jurors that they should consider the "opportunity of the witness to observe the alleged criminal act and the perpetrator of the act." Here, defense counsel questioned Mrs. Baker about the

length of time which she observed the perpetrator and elicited testimony that she was able to observe him throughout the crime, a period of time that seemed like "forever." (2 CT 449-450, 457.)

- provides that jurors should consider the "witness' ability, following the observation, to provide a description of the perpetrator of the act" and the "extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness." Mrs. Baker described the perpetrator as "clean shaven" (*e.g.*, 2 CT 455-456), and the defense elicited testimony from other witnesses that Mr. Henderson had a mustache and/or goatee at the time of the crime. (11 RT 2548 [Wasson]; 14 RT 3083 [Clayton]; 18 RT 3992 [Mr. Henderson]; 18 RT 4102-4104 [Patrice Henderson].) In addition, within hours after the crime, Mrs. Baker assisted the police in developing a composite drawing of the suspect which was offered in evidence as Defense Exh. A/People's Exhs. 131, 132. (2 CT 450-452; 12 RT 2774-2776; 17 RT 3747; 19 RT 4208-4209.) The composite drawing does not resemble Mr. Henderson. (Compare People's Exhs. 131, 132 with People's Exh. 114 [Photo # 5] and Def. Exh. E [3 Supp CT 15-16, 21-25, 62-63].)

- instructs the jury to consider "[w]hether the witness was able to identify the alleged perpetrator in a photographic or physical lineup." The evidence was undisputed that neither of the eyewitnesses to any of the events – Mrs. Baker and Deputy Elders – selected Mr. Henderson from the photo lineup in evidence as People's Exh. 114. (2 CT 453-454, 455-456; 12 RT 2706-2707.)
- provides that the jury should consider the "period of time between the alleged criminal act and the witness' identification." The evidence below was that Mrs. Baker viewed the photo lineups within a few days after the crime. (2 CT 453-454; 12 RT 2772; 13 RT 2825.)
- instructs the jury to consider the "extent to which the witness is either certain or uncertain of the identification" and [w]hether the witness' identification is in fact the product of [his][her] own recollection." Here, the evidence did not indicate that Mrs. Baker was unsure of her rejection of Mr. Henderson as the perpetrator or the description of the perpetrator. To the contrary, Mrs. Baker was confident, for example, that the perpetrator was clean shaven. (2 CT 455-456; 11 RT 2484-2485.)

In short, a number of the factors outlined in CALJIC 2.92 were as relevant to the Mrs. Baker's rejection of Mr. Henderson as the perpetrator as

they would have been in a more typical eyewitness identification case. In declining to give CALJIC 2.92, the trial court failed to appreciate that the reliability of Mrs. Baker's eyewitness testimony was in issue and central to the defense effort to raise a reasonable doubt in the jurors' minds and that the factors in the instruction were relevant to the jury's consideration of her testimony.[74]

Moreover, in seeking to rebut the defense reliance on Mrs. Baker's observation and testimony, even the prosecutor implicated certain of the instruction's factors during her closing argument. For example, and most important, CALJIC 2.92 instructs the jury to take into consideration the "stress, if any, to which the witness was subjected at the time of the observation." The prosecutor argued at length that the stress to which Mrs. Baker was subjected adversely affected her ability to recognize Mr. Henderson in the lineup or to recall whether he was wearing a mustache. (19 RT 4315-4319.)

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[74] Even if not all of the CALJIC 2.92 factors were relevant, that is not a justification for the trial court to have refused the instruction in its entirety. In *People v. Hall, supra*, This Court emphasized the general proposition that the defense is entitled to instructions which "'direct[] attention to evidence from . . . which a reasonable doubt of guilt could be engendered.'" (28 Cal. 3d at 159.) And, in *People v. Wright*, the Court noted that, even if a requested instruction is not precisely applicable as written, trial courts "should delete the inappropriate factors from the instruction and give a properly tailored instruction . . . ." (45 Cal. 3d at 1140; see also *id.* at 1141.) Accordingly, the trial court could have and should have tailored CALJIC 2.92 to fit the circumstances "rather than deny the instruction outright." (*People v. Fudge, supra*, 7 Cal. 4th at 1110.)

In addition, the prosecutor's argument called into play the instruction in CALJIC 2.92 that the jury must consider the "extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness." The prosecutor argued that Mrs. Baker had, for all practical purposes, identified Mr. Henderson when she selected from one of the lineups (People's Exh. 130) a photo which the prosecutor contended resembled Mr. Henderson. She said:

> Let's look for a minute at the photo lineups Mrs. Baker looked at. . . . ¶ This is the very first photo lineup we looked at before we know anything about Mr. Henderson, and remember what the testimony is regarding this. She looks at it. She says: I don't think the perpetrator is there. Pretty sure it's not. Again, I'm only paraphrasing her, I'm not quoting. She does tell us of all of them, number 4 [from People's Exh. 130] looks closest. It's not him but this guy looks closest except he's dark skin. And now look – I'm -- I will show it to you. I will ask you when you have a better chance to sit and look at it under the light, look at number 4. Who does that look like of all the people in that lineup? *Don't you think number 4 does really actually resemble Mr. Henderson. She's pretty close in what he looks like.*
>
> . . . [N]ow look at the photo lineup she looked at a couple days later. . . . Look at number 5. That is the picture of course of Mr. Henderson. He is perhaps the darkest person on this photo lineup just because of photography. Unfortunately it does not always work the way it's going to. And remember that Officer Wolford told you, this is the picture he had. This -- he didn't know what Mr. Henderson looked like. He only could get what he had and put it in a photo lineup. Unfortunately the circumstances are he happened to have a very dark photo of Mr. Henderson. Mrs. Baker is focused on the fact this is a light-skinned individual. Is it any real surprise she can't pick anybody out of that lineup? I don't think so.

(19 RT 4320-4322.)

Finally, CALJIC 2.92 also instructs the jury to take into account the "witness' capacity to make an identification." The prosecutor argued that the jury need not be particularly concerned with Mrs. Baker's statement that the perpetrator was clean shaven, because Deputy Elders, a "trained observer," did not recall any facial hair on the suspect. (19 RT 4319.)

As the foregoing demonstrates, at least nine of the twelve factors listed in CALJIC 2.92 were applicable to the jury's consideration of eyewitness testimony in this case. The trial court's statement that "there simply is no eye witness identification testimony in this case" (19 RT 4190) was, therefore, conceptually just dead wrong. Mrs. Baker's eyewitness testimony, including her description of the assailant, the composite drawing she assisted and her rejection of Mr. Henderson in the lineup and in court, were all essential to the defense effort to raise a reasonable doubt. (See 19 RT 4292-4293, 4295, 4296, 4307.) The trial court should have given CALJIC 2.92 – with any modifications as appropriate – and its failure to do so was error. (*People v. Wright, supra*, 45 Cal. 3d at 1143.)

C. The Error Was Prejudicial.

In determining the prejudice from a failure to instruct the jury on the factors to consider when evaluating eyewitness testimony, this Court has considered (a) the overall strength of the evidence; (b) whether the jury was apprised of the relevant factors through examination of the witnesses, the

arguments of counsel and other instructions given; and (c) the presence or absence of jury confusion or uncertainty over the guilt of the defendant. (45 Cal. 3d at 1144-1145; see also *People v. Fudge, supra*, 7 Cal. 4th at 1110-1111.) Applying these same factors to the this case demonstrates that the error was prejudicial. (*People v. Watson, supra*, 46 Cal. 2d at 836.)

The evidence was conflicting and, in important respects, contradictory. No forensic or physical evidence placed Mr. Henderson at the scene or otherwise indicated his involvement in the crime. Mrs. Baker's testimony, in particular, did not implicate Mr. Henderson. To the contrary, her testimony tended to exonerate him. She did not identify him in the lineup or in court and the descriptions she gave of the perpetrator immediately after the crime ("clean shaven;" People's Exhs. 131, 132) were inconsistent with Mr. Henderson's appearance generally and with his appearance specifically at the time of the crime. (E.g., Def. Exh. E and testimony of various witnesses that Mr. Henderson wore a mustache or goatee.) Deputy Elders likewise did not select Mr. Henderson from a lineup. Gregory Clayton – a prosecution witness with a financial incentive to implicate Mr. Henderson – testified that when he first described Mr. Henderson to the police, they said that the description did not fit the person they were seeking. (14 RT 3038.) The evidence also suggested that others were involved in the crime. (*E.g.*, 11 RT 2562, 2564-2565; 14 RT 3029-3030, 3045-3046.) Even Mr. Henderson's testimony, which was otherwise

incriminating, specifically discussed in detail the participation of others. (17 RT 3792 *et seq.*) Based on this evidence, the jury could have chosen one of several possible verdicts, including acquittal. The evidence was by no means so overwhelming that the failure to instruct on eyewitness testimony could be considered harmless.

To be sure, the jury was not without some information pertaining to the evaluation of the eyewitness testimony. The trial court instructed the jury in the words of CALJIC 2.20 (as modified), 2.21.1, 2.81 and 2.91, which together informed the jury generally about assessing credibility and the prosecution's burden to prove that the defendant committed the crime. (19 RT 4347, 4348, 4353-4354, 4355; 39 CT 10744, 10759, 10762; see *People v. Fudge, supra*, 7 Cal. 4th at 1111; *People v. Wright, supra*, 45 Cal. 3d at 1149-1150.) Defense counsel cross-examined Mrs. Baker about the length of time she saw the perpetrator, about the lineups she viewed and the composite drawing. (2 CT 450-457.) Her failure to identify Mr. Henderson in court occurred during direct examination, however. (2 CT 446-447.) Similarly, Deputy Elders, who likewise did not select Mr. Henderson from a lineup, was briefly cross-examined about his ability to see the suspect he chased the day after the crime. (12 RT 2707.) Other witnesses were examined about whether Mr. Henderson had a mustache or goatee at the time of the crime. (11 RT 2548; 14 RT 3083; 18 RT 3992; 18 RT 4102-4104; see also Def. Exh. E.)

The closing arguments of counsel also discussed the eyewitness testimony. The prosecutor argued that the jury should disregard the eyewitness testimony or at least treat it as of little significance because of the stress Mrs. Baker was under during the commission of the crime. (19 RT 4317, 4319, 4320-4322.) Defense counsel's argument skipped around, but did note that Mrs. Baker did not select Mr. Henderson, that Mrs. Baker saw the assailant close-up and for a lengthy period of time and that neither her description of the assailant as clean shaven nor the composite drawing were consistent with Mr. Henderson's appearance. (19 RT 4292-4293, 4295, 4296, 4307.) Based on these discrepancies, he argued for acquittal. That said, defense counsel's argument was by no means as pointed, "thoroughly detailed" or sustained as the defense closing arguments in *People v. Wright* and *People v. Fudge,* where this Court found no prejudice from failure to instruct on factors pertaining to eyewitness testimony. (See *People v. Fudge, supra*, 7 Cal. 4th at 1111; *People v. Wright, supra*, 45 Cal. 3d at 1148.) Furthermore, although he was not precluded from stressing the specific factors in CALJIC 2.92 (19 RT 4191-4192), defense counsel did not engage in any systematic argument that called the jury's attention specifically to those factors.

Finally, but most important, the record indicates that the jury was uncertain or possibly confused about Mr. Henderson's responsibility or the extent of his responsibility for the crime. The jury specifically asked to view

the videotape of Mrs. Baker's testimony again during deliberations. (20 RT 4401-4407.) This was the only testimony which the jury asked to revisit. (See *People v. Coates* (1984) 152 Cal. App. 3d 665, 671-672 [failure to give eyewitness factors instruction prejudicial, even though jury given CALJIC 2.90, 2.91, where jury requested rereading of testimony and instructions]; compare *People v. Wright, supra*, 45 Cal. 3d at 1150 [the fact that jury never "asked for clarification of instructions or rereading of transcripts" indicated jury had no "problem reaching a verdict as to the defendant"].) In addition, the trial judge saw several jurors "writing furiously every time there was a mention of a possibility of a second person" involved in the crime, which he thought might mean the jury would reject a verdict of guilty of capital murder. (20 RT 4426.) The jury then took more than seven hours over two days to reach a verdict in a case involving a single defendant, and despite the evidence in the record of Mr. Henderson's incriminating statements.

In summary, the evidence was conflicting and pointed to multiple possible verdicts. The jury exhibited confusion over Mr. Henderson's responsibility, even to the point of requesting that key eyewitness testimony be revisited during deliberations. Although the jury did have before it some of the considerations relevant to evaluation of the eyewitness testimony, nothing in the examinations, arguments of counsel or other instructions focused the jury specifically on the relevant factors or impressed upon the jury the importance of

those factors. As a result, the trial court's failure to give CALJIC 2.92 in any form, was prejudicial error.

XI. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING THE GUILT PHASE OF THE TRIAL.

A. The Prosecutor Engaged In Misconduct During Closing Argument By Manufacturing Evidence, Making Gratuitous And Disparaging Remarks About The Defendant And Arguing A Theory Of The Crime As To Which The Jury Was Not Instructed.

1. The principles applicable to claims of prosecutorial misconduct during closing argument.

In *People v. Hill* (1998) 17 Cal. 4th 800, this Court set forth the principles that govern the consideration on appeal of claims of prosecutorial misconduct.

> "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'
>
> Regarding the scope of permissible prosecutorial argument, we recently noted '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence . . . . "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets . . . .'"' [Citation omitted.]"
>
> . . . . A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the

> state. As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"

(*Id.* at 819-820 [citations omitted]; see also *People v. Martinez, supra*, 47 Cal. 4th at 955-956, 963-964.) As discussed below, the prosecutor repeatedly violated these principles, requiring reversal of the guilty verdict.

2. The prosecutor manufactured evidence and made unnecessarily disparaging remarks about the Defendant.

During her closing argument, the prosecutor made the following remarks to which defense counsel objected.

> Now, [Mr. Henderson's] scared of Knuck. He tells you that. But he seeks him out affirmatively three times in his version. This is a guy he's scared of and he looks him up three times. Not only does he go in the morning to talk to Knuck about the crime, hey, why did you do this, and borrows the car, he even goes back and searches for Knuck and finds him after he loses the victim's car to the police. And at that point Knuck reassures him that it's all cool. There's nothing to worry about. It's not the other way around.
>
> Imagine what that conversation must have sounded like. Here's this big tough Knuck guy, okay. He's a big, scary guy. We know that. And against his better judgment he lends his car so the defendant can take it down to get cigarettes. It's a stolen car. Knuck clearly knows that. After all, he's the one that took it in a home-invasion robbery . . . .
>
> The defendant takes that car. He wrecks it in front of the cops. Now the cops have the car with Knuck's prints in it. And this dope comes back to big ole mean Knuck and he says: Hey, Knuck, how are you going to get me out of this? And how does big ole mean Knuck respond? Does he grab the defendant by the short hairs and say: Listen you stinking punk, now I'm really in trouble. The cops got --

MR. HEMMER: Your Honor, I am going to object to this. . . . This has now been made a melodramatic soap opera with Ms. Carter saying things that were never said on the stand. She is making up this big ole mean Knuck. He says this; he says that. That is totally inappropriate, your Honor.

THE COURT: No, I disagree. Counsel are given wide latitude in their representation to the jury of what they believe the evidence shows. Obviously Ms. Carter is engaging in sarcasm and hyperbole, but I don't believe it's beyond the bounds of legitimate argument.

MR. HEAD: I want to throw in, your Honor, I think she referred to Mr. Henderson as a dope, this dope. I think that is inappropriate to make disparaging remarks like that to the defendant.

THE COURT: Well, in the context of the remark, it is this hypothetical conversation between this alleged person Knuck and the defendant, and again she's suggesting a hypothetical conversation that may have occurred between them. I don't think, on that ground alone I don't think it's objectionable.

(19 RT 4264-4266.)

The trial court erred in overruling the objection to the prosecutor's statements. The prosecutor may be allowed leeway in commenting on the evidence, but manufacturing conversations as to which there is no evidence whatsoever goes well beyond the bounds of what is permissible. "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations omitted.] A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (*People v. Hill, supra*, 17 Cal. 4th at 823.) The prosecutor's manufactured conversation amounted to "deceptive" conduct intended to direct the jury's attention away

from the actual evidence and to encourage the jury to speculate about what may have happened.

Moreover, in calling the defendant a "dope," the prosecutor crossed the line of "'appropriate conduct'" and undermined the role and responsibility of the prosecutor as the representative of the state. It is one thing for the prosecutor to call attention to evidence which suggests the credibility of the defendant is open to question, but quite another to hurl an epithet at him intended subtly to dehumanize him in the jury's eyes.

3. The prosecutor engaged in misconduct by arguing a theory of the crime which was inconsistent with the evidence.

During discussions regarding jury instructions, the prosecutor requested CALJIC 3.31.5, the instruction regarding premeditation and deliberation as a basis for first degree murder, because she planned to argue premeditation and deliberation in addition to felony murder. (19 RT 4157.) The judge stated that if she did so, he would instruct the jury on the lesser included offense of second degree murder. (19 RT 4157.) Thereafter, the prosecutor withdrew her request for CALJIC 3.31.5 (19 RT 4162-4163) and the jury was not instructed on either premeditation and deliberation or second degree murder with respect to Count I. (19 RT 4361-4368.)

During closing argument, ostensibly in the context of discussing the evidence necessary for the special circumstances of killing during the commission of a robbery and burglary, she stated:

> What [Mr. Henderson] did was he bound him in order to facilitate the commission of his robbery, in order to facilitate the commission of his burglary, and it was the fear that was caused by all of these actions, by the binding, by the gagging, by the ransacking, *by the cutting of the throat that caused Mr. Baker to die*, so was this killing committed in order to carry out the crime? Obviously.
>
> . . . We don't have to get to intent to prove the special circumstances as long as you are satisfied beyond a reasonable doubt that the defendant actually caused the death, killed this human being. . . . *I think the evidence is clear that Mr. Henderson intended to kill Mr. Baker*, but you don't have to find that. . . .
>
> Why else would he tie these people up, so they couldn't get to help, if it wasn't to facilitate his escape from the crime scene or to avoid detection at the crime scene. *Why else would he kill Mr. Baker other than to leave no witnesses alive*, so in terms of the special circumstance, those are the two things you have to find.

(19 RT 4239-4241 [emphasis added].)

The prosecutor's argument amounted to serious misconduct. First, and foremost, there was no evidence to support the prosecutor's claim that Mr. Baker died as a result of being bound and gagged or from the wound to his neck or that Mr. Henderson intended to kill Mr. Baker. The testimony of the state's own forensic pathologist was that the stress of the events generally caused Mr. Baker's heart attack. He could not say that Mr. Baker died before or after he was bound and gagged or before or after his neck was cut. (15 RT 3244, 3246.) The prosecutor's argument that Mr. Baker died specifically from

stress from being bound and gagged and from "the cutting of the throat" is simply unsupported by the evidence. The prosecutor was entitled to make """fair comment on the evidence""" (*People v. Williams* (1997) 16 Cal. 4th 153, 221), but she was not entitled to make up and misstate the evidence. (*People v. Bittaker* (1989) 48 Cal. 3d 1046, 1104-1105.)

Second, the prosecutor acknowledged that the jury did not have to find that Mr. Henderson intended to kill for the special circumstance to be found true if they concluded he was the perpetrator. (19 RT 4241; see *People v. Anderson, supra*, 43 Cal. 3d at 1145.) What then was her purpose in misstating the evidence to argue that he had intended to kill the victim? The answer is that she was engaged in a campaign – which she continued at the penalty phase (see *infra*, p. 353-360) – of attempting to recast the very nature of the crime itself so as to inflame the jury and ensure a conviction and sentence of death. Her goal was to have the jury conclude that, despite the lack of any instruction on premeditation and deliberation, Mr. Henderson was, in fact, guilty of premeditated murder. Surely the prosecutor knew that there was a greater likelihood the jury would not convict the defendant of capital murder, or sentence him to die, if the jurors did not believe Mr. Henderson intended Mr. Baker to die.

Furthermore, the prosecutor must have felt she had to overcome whatever doubt may have been planted in the jurors' minds about the participation of

third parties in the crime. Mr. Henderson had acknowledged during his testimony that he had been present that evening, but said that he had stood outside "like a coward," and did not intervene to stop the attack on the Bakers. (17 RT 3807.)

And even if the jury believed that Mr. Henderson was the lone assailant, they could have believed that he did not mean for Mr. Baker to die. The evidence was undisputed that Mr. Henderson showed great remorse for what had occurred. He cried during his interrogation and sobbed when he met with his mother and aunt, repeatedly saying he was sorry. (15 RT 3301; 16 RT 3486, 3525, 3553, 3636.) In the face of this evidence, the prosecutor clearly concluded that the jury had to be led away from felony murder if she wanted to get both a first degree murder conviction and sentence of death.

Thus, the question "Why else would he kill Mr. Baker other than to leave no witnesses alive?" (19 RT 4241) necessarily presupposed that Mr. Henderson intended to and then did kill Mr. Baker, when all the evidence established that the death was accidental. The knife wound to Mr. Baker's neck was not fatal, and indeed, may have been inflicted *after* he had already died. Nevertheless, the prosecutor's unsupported statement that Mr. Baker died as a result of being bound and gagged and having his throat cut, and her question about "why" Mr. Henderson would have killed Mr. Baker, singly and in combination, were

designed to convince the jury that the Defendant premeditated and deliberated, and then intentionally murdered the victim.

The prosecutor withdrew CALJIC 3.31.5, presumably because she did not want to risk the possibility that the jury would be instructed on and opt for second degree murder. But neither did she want to lose the opportunity to prejudice the jury by arguing a theory of premeditation and deliberation. As a result, she used the special circumstances as a ruse to inject premeditation and deliberation into the case.

The prosecutor's argument "substantially misstate[d] the facts [and went] beyond the record." (*People v. Dennis* (1998) 17 Cal. 4th 468, 522.) If the prosecutor was charged with the duty to ensure "that justice shall be done" *(Berger v. United States* (1935) 295 U.S. 78, 88), then she violated that duty. She misled the jury by arguing "facts" which were contradicted by the evidence and by slyly arguing a theory of the crime as to which she asked that the jury not be instructed. The effect was to recast the crime from a tragic, and essentially accidental, case of felony murder into a brutally intentional killing, while avoiding the risk that the jury might return a verdict of second degree murder. The Court should not permit the prosecutor to have it both ways: her argument distorted the evidence and amounted to "deceptive [and] reprehensible methods of persuasion" (*People v. Dennis, supra*, 17 Cal. 4th at

522) intended to, and which undoubtedly did, mislead the jury. That was misconduct which should compel reversal.

Mr. Henderson concedes that his counsel did not object to the prosecutor's argument described above, that the trial court was not given an opportunity to admonish the jury with a curative instruction and that typically the failure to object will foreclose consideration of the issues on appeal. (*People v. Bradford, supra*, 15 Cal. 4th at 1378.) Mr. Henderson submits, however, that any objection would have been futile and an admonition would not have cured the harm, in any event. (See *People v. Martinez, supra*, 47 Cal. 4th at 963-964.) By overruling defense counsel's objection to both the prosecutor's imaginary conversation between Mr. Henderson and Knuck and her disparaging reference to Mr. Henderson as a "dope" the trial court demonstrated that it would give the prosecutor near *carte blanche* to say anything during closing argument. The trial court thus sent the message that any objection would be futile. Nor is it clear what admonition could have been given to the jury to cure the harm from the prosecutor's effort to recharacterize the crime. Trial counsel's failure to object should, therefore, be excused in this instance.

B. The Prosecutor's Misconduct Prejudiced The Defendant And Requires Reversal.

Prosecutorial misconduct is cause for reversal when it is "'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant.'" (*People v. Milner* (1988) 45 Cal. 3d 227, 245.)

The prosecutor was faced with a dilemma in this case. No fingerprints, no hair or other fibers, no blood and no DNA connected Mr. Henderson to the crimes committed inside the Bakers' residence. Mr. Henderson's self-incrimination was hardly direct and the tapes were of extremely poor quality, even after they had been enhanced. The only other incriminating evidence came from Clayton whose story was so convoluted, inconsistent and fraught with bias that the jury easily could have rejected everything he said. To top it off, the defendant got on the stand and, although acknowledging his presence at the crime scene, gave testimony which provided a plausible explanation for why the only forensic evidence of his presence was a single, ambiguous footprint outside the Bakers' residence: *he never went inside the mobile home.*

There was a substantial chance that Mr. Henderson could have been convicted of felony murder only, based on the aiding and abetting instruction which the jury received. The prosecutor could not risk that the jury might choose that option or even an acquittal. So, she plainly decided that the only

way to ensure a conviction, and as discussed below, a death sentence, was to manufacture evidence, dehumanize the defendant and argue a theory of the crime which was unsupported by the evidence and as to which the jury had neither instruction nor guidance. Had she stayed within the bounds of permissible argument, there is at least a reasonable probability that the jury would have returned a different verdict. The conviction should be reversed.

XII. ABSENT THE TRIAL COURT'S ERRORS AT THE GUILT PHASE, IT IS REASONABLY PROBABLE THAT THE JURY WOULD HAVE REACHED A DIFFERENT RESULT.

Even if this Court concludes that the trial court's errors at the guilt phase were not individually prejudicial, together those errors stacked the deck against the defendant. Absent those errors, it is reasonably probable that the jury would reached a different result. (*People v. Watson, supra,* 46 Cal. 2d at 836.)

Because no eyewitness identified Mr. Henderson as the perpetrator and no forensic evidence tied him to the crime, the defense had two possible theories to present to the jury: first, that Mr. Henderson did not commit the crimes with which he was charged; and second, that if he was guilty of anything, it could only have been as an accomplice because others were the actual perpetrators. The first would have resulted in an acquittal. The second would have avoided a penalty trial since there was no evidence that, as an accomplice, Mr. Henderson intended Mr. Baker to die. (See *People v. Anderson*, *supra*, 43 Cal. 3d at 1145.) At each turn, the trial court made rulings

which crippled these defense theories, assisted the prosecution and made it much more likely that the jury would convict Mr. Henderson and find the special circumstances to be true.

Prior to trial, the trial court denied Mr. Henderson the opportunity to obtain discovery into other home invasion robberies at mobile home parks in the Cathedral City area around the time of this crime and which had been committed while Mr. Henderson was incarcerated. From the inception, then, Mr. Henderson was hobbled in his effort to develop a credible defense that would cast responsibility for the crime onto others and diminish any responsibility which he may have had. Things only went downhill from there.

At trial, the court made critical evidentiary errors which paved the way for the prosecution. There can be no serious question that had Mr. Henderson's confession been excluded – as it should have been – the likelihood of a conviction would have declined drastically. "[C]onfessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt . . . [C]onfessions often operate 'as a kind of evidentiary bombshell which shatters the defense.' . . . [T]he improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ." (*People v. Cahill, supra*, 5 Cal. 4th at 503 [citations omitted].)

The erroneous admission of the confession, undeniably damaging in its own right, was made all the more prejudicial by the trial court's other erroneous rulings. The trial court permitted Dr. Cohen to testify to the autopsy findings which formed the foundation for his opinion that stress killed Mr. Baker. Mr. Henderson was thereby foreclosed from cross-examining Dr. Garber, the author of the autopsy report. Permitting Mrs. Baker to read her narrative account into the record was another windfall to the prosecution. The ruling that the narrative was a past recollection recorded resulted in the jury hearing a carefully crafted, written account of the crime without interruption, without intervening objection and, most importantly, without cross-examination. Standing alone, Mrs. Baker's narrative was harmful to the defense because it largely supported the prosecution's theory of the crime. But standing alone, it did not mark Mr. Henderson as the perpetrator because Mrs. Baker could not and did not identify him as the man who entered her home that evening. The narrative and unlawfully obtained confession together, however, produced an evidentiary tsunami which threatened to overwhelm the defense.

The trial court removed a powerful obstacle from the path of that tsunami by inexplicably excluding of the testimony of Dr. Fraser. His proposed testimony formed the centerpiece for both defense theories since it sought to enhance the credibility and veracity of Mrs. Baker's testimony that her assailant was clean shaven, while other evidence showed that Mr. Henderson wore a

mustache or goatee, and of her rejection of Mr. Henderson as the perpetrator when she viewed the lineup. Dr. Fraser's testimony would have also helped explain why the composite drawing created from Mrs. Baker description did not resemble Mr. Henderson. (Compare People's Exhs. 131, 132 with People's Exh. 114 [Photo #5] and Def. Exh. E; 3 Supp. CT 15-16, 21-24, 62-63.)

His proposed testimony was intended to offer the jury a sound scientific basis upon which to conclude that Mr. Henderson either was wholly innocent of the crimes or, at a minimum, was not the man who entered the Bakers' home that evening. Indeed, the potential significance of Dr. Fraser's proposed testimony was underscored by the prosecutor's closing argument in which she articulated the very misconceptions about Mrs. Baker's eyewitness identification testimony which Dr. Fraser would have rebutted. The prosecutor told the jury to ignore or downplay those aspects of Mrs. Baker's testimony – her description of the assailant and her rejection of Mr. Henderson as the perpetrator – which Dr. Fraser's testimony would have shown were both reliable and credible. Without his testimony, the Prosecutor's baseless arguments went unchallenged. And to top it off, the trial court failed even to instruct the jury on the considerations relevant to eyewitness testimony.

Particularly if the confession had been excluded and Dr. Fraser's testimony had been admitted, the evidentiary balance would have tilted sharply in Mr. Henderson's favor. The jury might still have convicted him on the basis

of other evidence, but the odds of that occurring would have been drastically diminished. The prosecution's case that Mr. Henderson was the lone perpetrator would have rested solely on the convoluted, purchased testimony of Gregory Clayton and eavesdropping by Lt. Griffith during Mr. Henderson's conversation with his mother and aunt. The forensic evidence did not implicate Mr. Henderson – indeed, the lack of any forensic evidence bolstered his defenses. The remaining witnesses (Latesha Wasson, Tamara Elam, Michael White and Ronald Brown) did no more than suggest that Mr. Henderson was involved somehow in the events at issue, but were by no means conclusive that he was present at the mobile home park or had anything to do with the crime itself. Had the confession been suppressed and had Dr. Fraser testified, acquittal was a real possibility. Alternatively, the jury might well have concluded that Mr. Henderson was an accomplice only, did not enter the mobile home that evening and did not have the requisite intent to justify the special circumstance findings.

In the end, the prosecution was permitted to offer powerfully incriminating, but inadmissible, evidence in the form of the confession and Mrs. Baker's written narrative, which articulated precisely the prosecution's theory that Mr. Henderson was alone responsible for the crimes that evening. That was bad enough. But the prosecution's theory went largely untested because the trial court refused the defense the opportunity to develop evidence

that would have shown that others were involved and, most importantly, refused to permit Dr. Fraser to testify to facts that would have strongly supported the defense theories of the case. Singly, and particularly in combination, the trial court's errors pointed the jury ineluctably in the direction of a conviction. Even if this Court concludes that the individual errors, by themselves, were not prejudicial, it must conclude that together they produced a result which was unreliable and fundamentally unfair. The conviction should be reversed.

PENALTY PHASE ISSUES

XIII. MR. HENDERSON'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY REQUIRED HIM TO WEAR A STUN BELT DURING THE PENALTY TRIAL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE FREE OF UNREASONABLE PHYSICAL RESTRAINTS AND THEREBY IMPAIRED HIS RIGHTS TO BE PRESENT AND PARTICIPATE AT TRIAL AND TO A RELIABLE PENALTY PHASE TRIAL.

While the jury was deliberating during the guilt phase, and over vigorous and sustained objection by defense counsel, the prosecutor brought a successful motion to require Mr. Henderson to wear a stun belt in the courtroom. (20 RT 4407-4408, 4446.)[75] The trial court's ruling was reversible error.

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[75] Although the record is silent as to the precise type of belt used, we assume that it was substantially similar to the stun belt described by this Court in *People v. Mar* (2002) 28 Cal. 4th 1201. The stun belt

> will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is

In *People v. Duran* (1976) 16 Cal. 3d 282, this Court reaffirmed the rule that "'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.'" (*Id.* at 290-291.) Subsequently, in *People* v. *Mar, supra,* 28 Cal. 4th 1201, this Court held that the "manifest need" test applicable to shackling and other physical restraints imposed on a defendant while in the jury's presence applies equally to stun belts, without regard to whether the jury is aware of the restraint. (*Id.* at 1216). In addition to the state law limits set forth in *Mar,* the unnecessary use of any physical restraints on a state criminal defendant violates his right to due process under the Fourteenth Amendment. (*Holbrook* v. *Flynn* (1986) 475 U.S. 560, 569-570; *Deck v. Missouri* (2005) 544 U.S. 622, 631-632.)

The trial court's ruling below was not based on any showing and the trial court made no finding of "manifest need" for the restraint as required by *People v. Mar.* (See 28 Cal. 4th at 1217-1222.) In fact, the trial court ignored or downplayed the potentially devastating psychological impact the stun belt would have on Mr. Henderson at the penalty trial, the risk that the stun belt

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> generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures.

(*Id.* at 1215.)

would prejudice the penalty jury and the availability of alternate, less obtrusive and less onerous security measures. As a result, the order was an abuse of discretion and violated Mr. Henderson's rights to due process and to participate in his own defense and undermined his right to a reliable penalty determination. The sentence of death must be reversed.

A. Facts.

Just prior to the prosecutor's final argument, and outside Mr. Henderson's presence, the trial judge informed counsel that "[i]t has come to my attention apparently Mr. Henderson is very upset with the prosecutor for remarks made in argument to the extent of making a statement something to the effect of, 'Well, there are worse ways to commit suicide than by attacking a D.A.'" (19 RT 4311.) The judge did not want to reveal the source of the information (19 RT 4313),[76] but noted that he had been informed that a reference to Mr. Henderson's grandmother in the prosecutor's initial closing argument had upset him and asked counsel to consider not telling Mr. Henderson that he had shared the information. (19 RT 4311-4313.) The trial court acknowledged that "[t]here is absolutely the very real possibility [Mr. Henderson's] blowing off steam. I don't discount that. On the other hand, there's the other possibility." (19 RT 4314.)

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[76] The record later revealed that the source of the information was the defense investigator, Nancy Kilday. (20 RT 4416.)

The following day, while the jury was deliberating, the prosecutor made a motion that a stun belt be placed on Mr. Henderson. (20 RT 4408.) She based the motion on the information relayed by the trial court the previous day and on information she had just learned that "a week or so" previously, "madam bailiff found a razor blade near the desk where Mr. Henderson sits." (20 RT 4408.) Her review of Mr. Henderson's prison file revealed that he had apparently attempted suicide in prison more than once and she believed that the comment reported by the judge suggested a desire to commit "suicide by cop." (20 RT 4408-4409.) She added that she had also learned that Mr. Henderson reportedly had said at some point "something to the effect of before I go to prison, I am going to take out one of the deputies, or I am going to lay my hands on one of the deputies." (20 RT 4410.) She revealed subsequently that Mr. Henderson's custody file actually quoted him as saying that "'when he gets sentenced, he is going to reach out and touch someone.'" (20 RT 4437.) She also brought to the court's attention that the custody file also mentioned that Mr. Henderson had had an altercation with another inmate (Cook) in December 2000. (20 RT 4437.) She thought they would "all" "be a lot safer" if Mr. Henderson wore a stun belt. (20 RT 4410.)

With respect to the razor blade, Deputy Smith, the bailiff, explained that during Gregory Clayton's testimony, as Mr. Henderson was returning to the holding cell, he pointed out a razor blade to her. (20 RT 4419-4420.) The razor

blade was "very, very thin" and appeared to have been "broken out of a plastic shaving razor that is provided to the inmates." (20 RT 4420.) She asked Mr. Henderson if it was his and he said no. (20 RT 4420.) He also told her that it was not the type of razor provided to inmates at the jail, a statement she "did not verify." (20 RT 4420-4421.) The deputy told the judge about finding the razor blade and that Mr. Henderson had called it to her attention. (20 RT 4419, 4421.) While the judge "had some initial concerns" upon learning of the razor blade, he ultimately concluded that he lacked sufficient information to determine that Mr. Henderson had anything to do with the razor blade and then "forgot all about it." (20 RT 4411-4412; see also 20 RT 4416-4417.) Indeed, neither the prosecutor nor defense counsel had known about the razor blade at the time. (20 RT 4407-4408, 4411.) While the judge did not recall Deputy Smith telling him that Mr. Henderson spotted the razor, he had

> a rather strong recollection that there was something about what she told me to cause me to not make any bigger deal of it and to at least not draw the conclusion that Mr. Henderson was responsible for it . . . . I don't want to say that I drew a conclusion that he wasn't, but I didn't draw a conclusion that he was responsible. It may very well have been her statement that he was the one who pointed it out to her that caused me to not take any further action.

(20 RT 4422.) The judge noted that he was "less concerned about the razor blade" than he was "about the [alleged] threat" to the prosecutor which triggered the motion. (20 RT 4424.)

With respect to the alleged threat, Nancy Kilday, the defense investigator who was the source of the information, stated that:

> What I actually said was [Mr. Henderson] was unhappy with the way things were, and he was kind of antsy, and then I [was?] asked specifically what was said, so then I said specifically what was said. . . . [I]t was the deputy's feeling also that he was on edge, was not happy, that kind of thing. . . . *I didn't perceive it as a threat, and I said I don't think there is anything to this, and I prefaced it with that, and I didn't think that at the time, nor do I still, but it was still something said.*

(20 RT 4433-4434 [emphasis added].)

Mr. Henderson explained to the court that, "[y]esterday when the comment was made, I was venting to Ms. Kilday. . . . [T]hat's when I made the comment about there are *better* ways to commit suicide than jumping on a D.A., you know. I was trying to let her, anyway, take away the fact that that she thought that's what I was talking about. That wasn't what I was talking about. I just wanted to express how I felt about Ms. Carter talking about my grandmother." (20 RT 4449 [emphasis added].)

In opposing the motion, defense counsel repeatedly objected that placing the stun belt on Mr. Henderson would violate his state and federal constitutional rights, and "drastically affects his right to a fair trial, and not only for the remaining portion of this trial, but if we go to a penalty phase." (20 RT 4450.) A stun belt was "pretty obtrusive" (20 RT 4412), "psychologically coercive" (20 RT 4414), and would "affect [Mr. Henderson's] demeanor. It is going to

affect his expression. It is going to affect his emotions, and that is obvious." (20 RT 4418.) He emphasized:

> I think the jury can see it. I mean it is a big old box, you know, and if he gets up in any way, you can see it, and not only that, . . . here he is, you know, with 40,000 volts or whatever it is waiting to be, you know, at the first time he blinks the wrong way, I mean that's coercive, and it is something the jury can see, and if they come back in and see that . . . that could affect their verdict, not only now, but also specially at the penalty phase. I mean you have a guy over here we are going to talk about . . . that he may not be a danger in prison, and you have a . . . 40,000 volt stun belt on him. If the jury gets any wind of that at all, that is going to have a terribly prejudicial affect on the penalty trial.

(20 RT 4427; see also 20 RT 4438.)

Defense counsel told the court that he could "read Mr. Henderson's emotions" (20 RT 4424), that he is "fine now" (20 RT 4424) and if he sensed Mr. Henderson becoming agitated, he would inform the court or the bailiff. He emphasized that Mr. Henderson "has been behaving himself . . . every time we have been in court." (20 RT 4413; see also 20 RT 4438.) "[S]ince this trial started, this is really the first act of flare-up" which had occurred. (20 RT 4424.) The judge acknowledged that "Mr. Henderson up to this point has not been a problem, and I do understand the difficulties that will be entailed in a penalty phase, if there is one, with him wearing a belt." (20 RT 4426; see also (20 RT 4413 [trial court agrees with defense counsel that Mr. Henderson had been "behaving himself"]; 20 RT 4445 [trial judge "never had reason to be concerned about Mr. Henderson's behavior up until" information that led to the

motion].) Nonetheless, the judge felt he needed to "err on the side of caution." (20 RT 4426.)

Defense counsel suggested as an "alternative" to a stun belt that additional deputies be assigned to the courtroom or even that Mr. Henderson be fitted with leg braces. (20 RT 4429-4430, 4445-4446.) The judge believed there were no less restrictive alternatives and granted the motion, observing that "as long as a defendant isn't doing something that requires the button to be pushed, there is really nothing oppressive, as you say, about a stun belt. It is a piece of equipment to wear around your waist. The jury is probably not going to see it. It is only if the defendant acts up in a manner inappropriate in the courtroom that there is a problem." (20 RT 4446.)

In imposing the stun belt, the court relied on the statement which Mr. Henderson had made, the alleged fight with inmate Cook and the alleged statement that, following sentencing, he would "'reach out and touch someone.'" (20 RT 4442, 4444.) The judge was not persuaded that Mr. Henderson was responsible for the razor blade. (20 RT 4444.)

Following the guilt verdict and immediately prior to commencement of the penalty trial, defense counsel objected again, in effect requesting reconsideration of the trial court's ruling. He expressed his concern that if the jurors became aware Mr. Henderson was wearing the belt it would cause them to "perceive [Mr. Henderson] as some sort of wild animal, you know, that is

getting ready to kill somebody at any minute." (20 RT 4483.) The trial court disagreed, noting that *People v. Garcia* (1997) 56 Cal. App. 4th 1349 "holds that the stun belt use does not have with it the psychological factors the shackles and other restraints do." (20 RT 4483.) The trial court declined to change its ruling. (20 RT 4484.)

B. There Was No Showing Of A Manifest Need For Imposition Of The Stun Belt And The Trial Court Abused Its Discretion In Ordering It.

1. Before a stun belt may be imposed, there must be a showing of manifest need based upon a factual record that the defendant has attempted escape or has engaged in violent, disruptive or other nonconforming behavior in the courtroom.

As indicated above, in *People v. Mar, supra*, this Court concluded that the principles articulated in *People v. Duran, supra,* 16 Cal. 3d 282, which established "the limited circumstances under which the defendant may be subjected at trial to physical restraints such as shackles or manacles, apply as well to the use of a stun belt." (28 Cal. 4th at 1204-1205.) In *People v. Duran*, this Court reaffirmed that "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of manifest need for such restraints." (16 Cal. 3d at 290.) "[I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*Id.* at 291.)

Similarly, the U.S. Constitution "forbids the use of visible shackles . . . unless that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." (*Deck v. Missouri, supra,* 544 U.S. at 624; see also *Gonzalez* v. *Pliler* (9th Cir. 2003) 341 F.3d 897, 899-900 [before a stun belt is used there must be compelling circumstances showing the need for physical restraints, and the court must pursue less restrictive alternatives]; *United States* v. *Durham* (11th Cir. 2002) 287 F.3d 1297, 1304-1306 ["a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints"].)

To demonstrate a "manifest need" for a restraint the "showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record, and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Duran, supra,* 16 Cal. 3d at 291-292; see also *People v. Gamache* (2010) 48 Cal. 4th 347, 367 [factors court may consider include "evidence establishing that a defendant poses a safety risk, a flight risk, or is

likely to disrupt the proceedings or otherwise engage in nonconforming behavior"].)

Under *Duran*, the trial court is "'obligated to base its determination on *facts*, not rumor and innuendo even if supplied by the defendant's own attorney.'" (*People v. Mar, supra*, 28 Cal. 4th at 1218 quoting *People v. Cox* (1991) 53 Cal. 3d 618, 651-652 [emphasis in original].) The court "may not simply rely upon the judgment of law enforcement or court security officers *or the unsubstantiated comments of others*." (*Id.* at 1221 [emphasis added].) To the contrary, the "record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that 'there existed a manifest need to place defendant in restraints.'" (*Id.*)

In *Mar*, this Court specifically rejected the reasoning of the court of appeal in *People v. Garcia, supra*, 56 Cal. App. 4th 1349, relied on by the trial court below (20 RT 4443, 4483), which held that a stun belt is not a restraint subject to the considerations set forth in *Duran*. The court in *Garcia* "concluded that a stun belt should not properly be considered a physical restraint within the meaning of *Duran*, because the belt is not seen by the jury and does not restrain the wearer's physical movement and because, in that court's view, the belt 'does not diminish courtroom decorum, is less likely to discourage the wearer from testifying, and should not cause confusion,

embarrassment or humiliation.' Accordingly, the court in *Garcia* held that the rigorous 'manifest need' standard imposed in *Duran* was not applicable to the use of a stun belt, and that the use of such a belt instead could be justified under a less demanding 'good cause' standard." (*People v. Mar, supra*, 28 Cal. 4th at 1218-1219 [citations omitted].)

Contrary to the conclusion of the court of appeal in *Garcia*, *People v. Duran* clearly was not limited to restraints upon a defendant that are visible to the jury. Although the court in *Duran* emphasized the adverse effect that visible restraints might have upon a jury, it also relied upon the circumstance . . . that the imposition of such a restraint upon a defendant during a criminal trial 'inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense . . . .' Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury – especially while on the witness stand." (*Id.* at 1219-1220 [citations omitted].) Accordingly, "before the compelled use of such a belt can be justified for security purposes, the general standard and procedural requirements set forth in *Duran* must be met." (*Id.* at 1220.)

Applying the *Duran* standards to the case before it, the Court in *People v. Mar* concluded that there had been no showing of manifest need for the stun belt. No restraints had been placed on the defendant at the commencement of the trial and law enforcement personnel gave no explanation for why they unilaterally placed the stun belt on the defendant. The trial court referred to an incident which had happened a month before in which the defendant "'got crossways with somebody in the security detail'" but about which the trial court had no information. (*Id.* at 1222.) This Court stressed that the "trial court never required the security officers to present an on-the-record showing of the specific facts or details of the incident, and no such showing appears in the record." (*Id.*) Most important, the trial court failed to make any determination that there was a manifest need to impose the stun belt on the defendant because he posed a serious security threat in the courtroom. (*Id.*) Therefore, the trial court abused its discretion in requiring the stun belt.

Finally, this Court set forth a number of considerations to guide trial courts in future trials when faced with a request to impose a stun belt on a defendant. First, "[t]he psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may

impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*Id.* at 1226.) Thus, "a trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures--such as chains or leg braces--or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." (*Id.* at 1228.)

Second, a trial court must take into consideration that accidental activation of the stun belt is a distinct possibility and thus "renders even more suspect the general assumption that a stun belt is a less onerous or restrictive alternative to traditional security measures." (*Id.* at 1229.) Third, because stun belts are particularly dangerous to people with certain health conditions, trial courts should ensure that defendants are medically examined prior to imposition of a stun belt. "Particularly when the risk of accidental activation is considered, use of a stun belt without adequate medical precautions is clearly unacceptable." (*Id.*) Finally, in determining if a stun belt is the least restrictive security measure, the court should consider whether a stun belt which delivers a shorter or weaker shock would provide sufficient protection. (*Id.* at 1229-1230.)

Considered in light of *People v. Mar* and *People v. Duran*, it is apparent that the trial court abused its discretion when it ordered a stun belt placed on Mr. Henderson.

2. There was no "manifest need" to restrain Mr. Henderson with a stun belt and, therefore, the trial court abused its discretion in granting the prosecutor's motion.

a. The record below was insufficient to establish a manifest need for the restraint.

The prosecutor bore the burden of establishing the manifest need for a restraint. (*People v. Miller* (2009) 175 Cal. App. 4th 1109, 1114.) There was no showing "as a matter of record" of any "nonconforming behavior" sufficient to justify imposition of the stun belt. (*People v. Mar, supra*, 28 Cal. 4th at 1220; *People v. Cox, supra*, 53 Cal. 3d at 649-652.)

(i) The trial court repeatedly acknowledged, but inexplicably disregarded, that Mr. Henderson had not shown any "nonconforming behavior" at any point during the trial.

It bears emphasizing that the prosecutor's motion was made while the jury was deliberating at the guilt trial. There had been no cause to restrain Mr. Henderson at any point during the many months of the pre-trial, jury selection and guilt trial phases of the case. (*Cf. People v. Mar, supra*, 28 Cal. 4th at 1222 [noting lack of restraints on defendant at earlier stages of trial].) The trial court acknowledged more than once during proceedings on the prosecutor's motion that Mr. Henderson had never been disruptive or a security concern. (20 RT

4413, 4426, 4445.) Even the prosecutor was forced to agree that Mr. Henderson had shown no proclivity for disruptive behavior in the courtroom. (20 RT 4424.) (Compare *People v. Lomax* (2010) 49 Cal. 4th 530, 562 ["defendant's unprovoked attack" on deputy in courthouse holding cell sufficient justification for stun belt]; *People v. Gamache, supra*, 48 Cal. 4th at 368-370 [defendant who developed and, and took steps to carry out, multiple escape attempts properly restrained with stun belt].) Nevertheless, the trial court gave little or no weight to the fact that Mr. Henderson had not exhibited disruptive conduct. And the trial court inexplicably discounted defense counsel's observations, first, that Mr. Henderson's display of unhappiness with the prosecutor's argument was the first "flare-up" at any time during the trial and, second, that Mr. Henderson was "fine now" and had "calmed down." (20 RT 4424, 4427.)

The absence of any misconduct by Mr. Henderson throughout the trial provides the context for considering the information upon which the trial court relied in ordering the stun belt and underscores the insufficiency of that information.

(ii) The incidents referred to by the trial court did not satisfy the substantive and procedural requirements for a showing of manifest need for the restraint.

Despite Mr. Henderson's unblemished behavioral record during the trial, the court referred to four isolated, and unrelated, incidents in connection with the stun belt motion. Neither singly nor in combination did they justify the restraint.

First, the trial court considered, and properly rejected, the incident involving the razor blade. At the time the incident occurred, the judge concluded there was insufficient evidence to show that Mr. Henderson had anything to do with the presence of the razor blade in the courtroom. (20 RT 4411-4412.) The incident was so insignificant that the judge "forgot all about it" (20 RT 4411) and had not seen fit even to mention it to counsel. (20 RT 4408.) Indeed, the deputy who told the judge about the razor blade explained that it was Mr. Henderson who pointed it out to her and that he had denied that it was his. (20 RT 4420.) At various points during the proceedings on the stun belt motion, the judge reiterated his lack of concern about the incident (20 RT 4424, 4444), and effectively rejected it as grounds for imposing the stun belt. (20 RT 4444.)

The two incidents reported in Mr. Henderson's custody file which the judge did rely upon as a basis for imposing the stun belt each fail to satisfy the

substantive and procedural protections required by *People v. Duran* and *People v. Mar*. Mr. Henderson was alleged to have said something to the effect that following his sentencing he would "reach out and touch someone." (20 RT 4442.) And the file reflected that in December 2000, Mr. Henderson was alleged to have assaulted inmate Cook. (20 RT 4442.)

Both alleged incidents occurred outside the courtroom and long before the stun belt motion. (20 RT 4437, 4442-4444.) Where, as here, "the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, *sufficient evidence of that conduct must be presented on the record* so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints." (*People v. Mar, supra*, 28 Cal. 4th at 1221[emphasis added].) The trial court did not comply with these requirements.

Like the trial court in *People v. Mar*, the court below "never required the security officers to present an on-the-record showing of the specific facts or details of the incident[s], and no such showing appears in the record." (28 Cal. 4th at 1222.) Why the court must make a record is evidenced by the trial court's improper reliance on the alleged comment about "reaching out and touching someone." This cryptic hearsay statement – if made – was patently ambiguous and amounted to nothing other than an "unsubstantiated comment"

which could not support the trial court's ruling. (*Id.* at 1221.) The trial court failed to ask the security officers or even Mr. Henderson whether, to whom and under what circumstances the statement had been made and what it may have meant. There was no on-the-record showing sufficient to permit the trial court to rely upon the comment in deciding whether to impose the stun belt.

The alleged altercation with inmate Cook, if true, was undoubtedly more serious. But once again, the trial court failed to question security personnel or Mr. Henderson to make a record of whether, when, where and why the altercation may have occurred. Instead, the trial court took at face value both the *prosecutor's* characterization of the incident and the file report. (20 RT 4437, 4442.) It need hardly be said that the prosecutor had no personal knowledge of the incident and that the file report was unauthenticated hearsay. The trial court's reliance on this unsubstantiated "evidence" is alone a sufficient basis to demonstrate that the court abused its discretion. (See *People* v. *Sandoval* (2007) 41 Cal. 4th 825, 847 ["a trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision"].)

Furthermore, even if the incident with inmate Cook happened as reported, the alleged attack was not directed at law enforcement personnel or court staff and occurred outside court, months before the stun belt motion. (20 RT 4437; compare *People v. Lomax, supra*, 49 Cal. 4th at 562 ["defendant's

unprovoked attack on the deputy clearly justified the imposition of restraints to prevent a recurrence of such behavior in the courtroom"].) Nor was the incident inconsistent with the perception of everyone concerned – defense counsel, the trial court and even the prosecutor – that Mr. Henderson had exhibited no behavior to suggest that "he posed a threat of violence *in the courtroom*." (*People v. Mar, supra*, 28 Cal. 4th at 1222 [emphasis added]; see also *Gonzales v. Pliler, supra,* 341 F. 3d at 902 ["The record is completely devoid of any action taken by the defendant in the courtroom that could be construed as a security problem"].)

Finally, with respect to the "threat" which precipitated the prosecutor's request for the stun belt, the judge created a record as required by *Duran* and *Mar*, but he then proceeded to disregard it. The evidence revealed that what the judge believed was a potential threat – "There are worse ways to commit suicide than by attacking a D.A." (20 RT 4426, 4442) – was no threat at all. Mr. Henderson said that he was simply "venting to Ms. Kilday" and did not intend the statement as a threat. (20 RT 4449.) Even more important, he said, "I made the comment about there are some *better* ways to commit suicide than jumping on a D.A." (20 RT 4449 [emphasis added].) Read this way, it is apparent that he was expressing that he had been angry, but would *not* direct that anger at the prosecutor. Trial counsel expressly pointed this distinction in

meaning out to the trial court (20 RT 4449), but the court either ignored or failed to appreciate its significance.

The record otherwise demonstrated the accuracy of the trial court's initial observation that "[t]here is absolutely the very real possibility he is blowing off steam." (19 RT 4314; see also 20 RT 4442, 4444 [trial court twice more acknowledged possibility that statement not intended as a threat].) Thus, even though Ms. Kilday decided to report Mr. Henderson's statement, she "didn't perceive it as a threat, *and I said I don't think there is anything to this, and I prefaced it with that, and I didn't think there was at the time, nor do I still*, but it was still something that was said." (20 RT 4434 [emphasis added].) Her belief was entirely consistent with Mr. Henderson's own characterization of his statement as "venting to Ms. Kilday" that was not intended as a threat. (20 RT 4449.) Finally, defense counsel assured the court that Mr. Henderson had gotten over the comment which had angered him. (20 RT 4424.)

Despite the meager and insufficient record before the trial court, despite all of the indicators that Mr. Henderson was not a threat to the prosecutor or anyone else in the courtroom, and despite the trial judge's repeated acknowledgements that the statement may not have been intended as a threat, the trial judge imposed the stun belt. The record below – such as it was – fell far short of demonstrating a manifest need for imposition of the stun belt. The trial court's order was, therefore, an abuse of discretion.

b. The trial court failed to make a finding of manifest need for the restraint.

As in *People v. Mar*, the trial court below "never made, nor purported to make, a finding or determination that there was a 'manifest need' to impose the stun belt upon the defendant because he posed a serious security threat in the courtroom. Indeed, there is nothing in the trial court's extended comments . . . that indicates it was aware that the procedural and substantive requirements established in *Duran* governed its consideration and defendant's objection to the use of the stun belt." (*Id.* at 1222.)

Significantly, the record below reveals that the trial court believed it was *not* constrained by the *Duran* requirements. Twice the trial court referred to *People v. Garcia, supra*, 56 Cal. App. 4th 1349, as authority for the imposition of the stun belt. (20 RT 4443, 4483.) But the *Garcia* court's conclusion that stun belts were not governed by the requirements articulated in *Duran* was explicitly rejected by this Court in *People v. Mar, supra.* (See 28 Cal. 4th at 1218-1219.) Any doubt that the trial court did not consider *Duran* controlling was dispelled when the judge stated that, in considering whether to impose the restraint, his responsibility was to "err on the side of caution." (20 RT 4426.) This was simply incorrect and required the prosecution to meet far too low a threshold. A mere possibility of violence is insufficient to justify a restraint; there must be a *manifest need* for the restraint. (*People v. Mar, supra*, 28 Cal.

4th at 1221.) The trial court either did not know or did not understand the appropriate standard that had to be met. Its decision to impose the stun belt on Mr. Henderson was, therefore, an abuse of discretion.

c. The trial court erroneously concluded that imposition of a stun belt was the least obtrusive form of restraint.

Even if the record had been sufficient – and it was not – to justify some kind of restraint, the trial court erred in ordering a stun belt placed on Mr. Henderson. When a restraint is justified, the trial judge must choose the "least obtrusive or restrictive restraint" that will ensure effective security. (*People v. Mar, supra*, 28 Cal. 4th at 1226; *People v. Duran, supra*, 16 Cal. 3d at 291; see also *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636.

The trial court failed to appreciate or give sufficient consideration to the very real potential for adverse impact on Mr. Henderson and on the jury's deliberations in deciding to order the stun belt. Defense counsel repeatedly called the trial court's attention to the deleterious psychological impact wearing a stun belt would have on Mr. Henderson. (20 RT 4414 ["it is psychologically coercive. I think it is obtrusive"]; 20 RT 4418 ["even though [jurors] might not be able to see the actual belt, it is going to affect his demeanor. It is going to affect his expression. It is going to affect his emotions, and that is obvious"]; 20 RT 4425 ["And having him sitting there under the psychological constraint

of a stun belt, and if the jury were to get wind of that in any way, I think that would be really prejudicial and unfair to him"].)

In addition, defense counsel repeatedly expressed his grave concern that the jury would become aware that Mr. Henderson had been outfitted with the stun belt and that the knowledge would have an overwhelmingly prejudicial effect on the jurors, particularly at the penalty phase. He stressed:

> I had a trial where the person had that stun belt, and I don't care. I think the jury can see it. I mean it is a big old box, you know, and if he gets up in any way, you can see it, ... and if [the jurors] come back in and see that . . . that could affect their verdict, not only now, but also specially at the penalty phase. I mean you have a guy over here we are going to talk about . . . that he may not be a danger in prison, and you have a . . . 40,000 volt stun belt on him. If the jury gets any wind of that at all, that is going to have a terribly prejudicial affect on the penalty trial.

(20 RT 4427; see also 20 RT 4412-4413 [the stun belt "is pretty obtrusive, I think. . . you can see it"]; 20 RT 4447 ["I think [the jury] can see it"].)

The judge did not give serious consideration to either of defense counsel's objections to use of the stun belt as a form of restraint. Although acknowledging the possibility of some psychological impact on Mr. Henderson from use of restraints (20 RT 4444), the trial court, relying in part on the now discredited reasoning in *People v. Garcia, supra*, 56 Cal. App. 4th 1349, erroneously concluded that a stun belt was less obtrusive and psychologically coercive than other forms of restraint. (20 RT 4443, 4446, 4483; see *People v. Mar, supra*, 28 Cal. 4th at 1219.) As this Court has stressed, however, "any

presumption that the use of a stun belt is always, or even generally, less onerous or less restrictive than the use of more traditional security measures is unwarranted." (*People v. Mar, supra*, 28 Cal. 4th at 1228.) Nevertheless, convinced that a stun belt was not particularly coercive or obtrusive, the trial court dismissed defense counsel's objections and concerns, stating:

> But as long as a defendant isn't doing something that requires the button to be pushed, there is really nothing oppressive, as you say, about a stun belt. It is a piece of equipment to wear around your waist. The jury is probably not going to see it. It is only if a defendant acts up in a manner inappropriate in the courtroom that there is a problem.

(20 RT 4446.)

Once again this Court's discussion in *People v. Mar* exposes the flaws in the trial court's reasoning.

> [A]lthough the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability fully to participate in his or her defense than would be the use of more traditional devices such as shackles or chains. The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.

(28 Cal. 4th at 1226.)

Finally, in addition to downplaying the impact of the stun belt as a restraint, the trial court gave short shrift to consideration of other forms of restraint. Defense counsel was so concerned about the possible effects of the stun belt on both Mr. Henderson and the jury that he urged the trial court to use other alternatives, including adding deputies to the courtroom and even leg braces. (20 RT 4429-4430, 4446.) The trial court rejected these suggestions out of hand. (20 RT 4446.)

The trial court's refusal even to consider counsel's suggestions for other forms of restraint is particularly surprising since the trial court had already adopted one of them. Immediately after learning of the alleged threat, the judge added deputies to the courtroom. (19 RT 4312.) To be sure, the presence of the extra deputies was not exclusively in response to the information about Mr. Henderson's statement, but the judge did acknowledge that the statement was "one reason" he had beefed up security. (19 RT 4312.) And the judge had done so in a manner which defense counsel acknowledged was not particularly obtrusive. (19 RT 4314.) Had the judge been especially concerned about Mr. Henderson's statement, and had he believed that the additional deputies in the courtroom provided insufficient security, surely he would have moved more quickly to create an appropriate record for imposition of the restraint. Instead, the trial court revealed Mr. Henderson's statement to counsel and it was not until the next day that the issue about the stun belt arose, and then only at the

prosecutor's insistence. (20 RT 4407-4408.) Why the trial court rejected the simple, and less obtrusive, alternative of increased courtroom security – despite the fact that the judge had deemed it sufficient the day before and despite the fact that defense counsel assured the court that he had "calmed [Mr. Henderson] down" (20 RT 4424) – is simply inexplicable. The trial court's failure to give serious consideration to other forms of restraint was thus an abuse of discretion.

d. The trial court failed to consider the other factors required by this Court before a stun belt may be imposed.

As noted above, in *People v. Mar,* this Court articulated four factors to guide trial courts in future trials when considering whether to impose a stun belt as a restraint. Trial courts were admonished to (1) take the defendant's particular psychological makeup into consideration and then to "give considerable weight to the defendant's perspective in determining whether traditional security measures – such as chains or leg braces -- . . . constitute[] the less intrusive or restrictive alternative for purposes of the *Duran* standard." (28 Cal. 4th at 1228); (2) give consideration to the fact that stun belts could be accidentally activated, thereby rendering them particularly dangerous; (3) ensure that adequate medical precautions had been taken to protect the defendant from unreasonable harm resulting from activation of the stun belt;

and (4) consider whether the stun belt had been or could be altered to deliver a weaker or shorter shock. (*Id.* at 1226-1230.)

The trial court considered none of these factors in reaching its decision to impose the stun belt. While the trial court in this pre-*Mar* trial may not have been expected to anticipate this Court's guidance in every respect (*People v. Gamache, supra*, 48 Cal. 4th at 367 n. 7), that does not absolve the trial court in this instance. Defense counsel specifically brought to the trial court's attention the first of the four factors in *Mar*. He repeatedly pointed out the potential adverse psychological effects on Mr. Henderson from use of the stun belt and suggested that more traditional forms of restraint were preferable. (20 RT 4414, 4418, 4425, 4429-4430, 4446.) The prosecution had called to the court's attention that Mr. Henderson had twice attempted suicide – a sure sign of deep depression and psychological fragility. (20 RT 4408-4409.) But the trial court gave no weight to Mr. Henderson's psychological health in ordering the stun belt.

Nor did the court consider the risk of accidental activation of the stun belt or that Mr. Henderson might suffer from a medical condition that made him particularly susceptible to serious injury or death if the belt were activated. It is worth noting in this regard that trial courts in other pre-*Mar* cases had seen fit to have defendants medically examined before deciding to impose the stun belt. (See, e.g., *People v. Lomax, supra*, 49 Cal. 4th at 562.)

Nothing prevented the trial court for making an inquiry to determine if Mr. Henderson was a psychologically and physically appropriate candidate for the stun belt as a restraint. The trial court's failure to delve more deeply into whether a stun belt was proper in this case underscores that there was no showing of a manifest need for use of the stun belt and that the trial court abused its discretion in ordering the restraint.

C. The Death Sentence Must Be Reversed Because Mr. Henderson Was Prejudiced By Being Forced To Wear The Stun Belt At The Penalty Trial.

This Court has yet to decide the proper test for prejudice for the erroneous imposition of a stun belt. (See *People v. Howard* (2010) 51 Cal. 4th 15, 30 [without deciding prejudice standard to be used, finding no prejudice from use of a stun belt under *Chapman v. California, supra,* 386 U.S. 18]; *People v. Mar, supra*, 28 Cal. 4th at 1225 n. 7 [noting that federal courts have tested prejudice from use of stun belts under *Chapman*, but declining to decide issue and finding prejudice even under *Watson* standard for state law error].) Mr. Henderson submits that improper use of a stun belt should be considered structural error which is reversible *per se* and not subject to harmless error analysis. At a minimum, the error should be subject to the *Chapman* prejudice standard. (*Chapman v. California, supra,* 386 U.S. at 23-24). Indeed, under any standard of prejudice, the trial court's erroneous imposition of a stun belt on Mr. Henderson during the penalty phase requires reversal of death sentence.

1. Erroneous imposition of a stun belt should be considered structural error which is reversible *per se.*

In *United States* v. *Gonzalez-Lopez, supra*, 548 U.S. 140, the U.S. Supreme Court explained that in *Arizona* v. *Fulminante, supra,* 499 U.S. 279, it had "divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' These include 'most constitutional errors.' The second class of constitutional error we called 'structural defects.' These 'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" (*Gonzalez-Lopez, supra,* 548 U.S. at 148 [citations omitted].) Such structural errors include, but are not limited to, "those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable." (*Id.* at 148 n. 4 [emphasis in original].) The Court emphasized that, notwithstanding its discussion of two categories of constitutional error in *Fulminante*, in fact:

> *we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.* See *Waller* v. *Georgia,* 467 U.S. 39, 49, n. 9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez* v. *Hillery,* 474 U.S. 254, 263, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required

> reversal of the conviction because the effect of the violation cannot be ascertained").

(*Id.* [emphasis added].)

For example, in *Riggins* v. *Nevada* (1992) 504 U.S. 127, the Court reversed a murder conviction and sentence of death obtained against a defendant who was involuntarily medicated at his trial without an adequate showing that the order was justified by an essential interest. The defendant was not required to show how the trial would have proceeded differently if he had not been given the drug, nor was the state given the option of disproving prejudice. (*Id.* at 137.) As the Court explained:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. [Citation.] Like the consequences of compelling a defendant to wear prison clothing, [citation], or of binding and gagging an accused during trial, [citation], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. . . .

(*Id.* at 137 [emphasis added].) The Supreme Court would "not ignore . . . a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." (*Id.*) Indeed, even if the Nevada supreme court was correct in holding that expert testimony allowed jurors to assess Riggins's demeanor

fairly, "an unacceptable risk of prejudice [from administration of the drug] remained." (*Id.* at 138.)[77]

Though *Riggins* concerns antipsychotic medication and not a stun belt, its analysis is particularly apt because, in *People v. Mar*, this Court analogized use of a stun belt to involuntary medication.

> Because its psychological consequences pose a significant risk of impairing a defendant's ability to participate and assist in his or her defense, *a court order compelling a defendant to wear a stun belt at trial over objection bears at least some similarity to the forced administration of antipsychotic medication to a criminal defendant in advance of, and during, trial.*

(28 Cal. 4th at 1227-1228 [emphasis added].)

Although recognizing there were "obvious differences" between the administration of antipsychotic drugs and the use of a stun belt, this Court nevertheless found guidance in the Supreme Court's decision in *Riggins, supra,* 504 U.S. 127. Specifically, *Riggins* dealt with "concerns that arise from the circumstance that *the state's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial."* (*People v. Mar*, *supra*, 28 Cal. 4th at 1228 [emphasis added].) This Court stressed that

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[77] Although the *Riggins* Court did not expressly invoke the categories of structural error and trial error the Court outlined in *Fulminante, supra,* 499 U.S. 279, its analysis was entirely consistent with, and in effect was, a determination of structural error.

> [t]he psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and *in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.*

(*Id.* at 1226 [emphasis added].)

Defendants forced to wear stun belts may remain physically present in the courtroom, but "[p]resence at trial is meaningless if the defendant is unable to follow proceedings or participate in his own defense. Mandatory use of a stun belt implicates 'this right, because *despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense.*" (*United States v. Durham, supra,* 287 F. 3d at 1306 n. 7 [emphasis added].) As defense counsel pointed out to the trial court below, use of the stun belt would "affect [Mr. Henderson's] demeanor. It is going to affect his expression. It is going to affect his emotions, and that is obvious." (20 RT 4418; see also 20 RT 4427 ["[H]ere he is, you know, with 40,000 volts or whatever it is waiting to be, you know, at the first time he blinks the wrong way, I mean that's coercive . . . ."].)

Mr. Henderson acknowledges that this Court has concluded that improper use of a stun belt is not structural error. (*People v. Howard, supra*, 51 Cal. 4th at 30 n. 6.) Mr. Henderson submits, however, that this Court should revisit the

issue for all the reasons discussed above. Just as with the wrongful involuntary administration of antipsychotic medication, the erroneous imposition of a stun belt on a criminal defendant in violation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment is highly likely to have harmful effects on the defense, "the precise consequences" of which "cannot be shown from a trial transcript." (*Riggins, supra,* 504 U.S. at 137). The stun belt effects a constructive denial of a criminal defendant's right to be personally present at his trial. This in turn impairs his ability to participate effectively in his defense, to confront the witnesses against him, to respond and react to the evidence and to consult with counsel. The Supreme Court has consistently held that due process and confrontation principles guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." (*United States* v. *Gagnon* (1985) 470 U.S. 522, 526-527; *Illinois v. Allen* (1970) 397 U.S. 337, 338.) Because the erroneous imposition of a stun belt in violation of due process and Sixth Amendment guarantees leads to injury that cannot be reliably quantified or described, reversal of the penalty judgment is required.

2. In any event, reversal is required at the penalty phase without a prejudice inquiry.

Even assuming, without conceding, that the unconstitutional imposition of a stun belt on a criminal defendant at an ordinary guilt trial does not amount

to structural error that is reversible *per se*, this Court should alternatively hold that the erroneous imposition of a stun belt on a defendant at the penalty phase of a capital case – as occurred below – is reversible *per se.*

As discussed above, unconstitutionally requiring a defendant to wear a stun belt at a criminal trial brings with it a heightened yet unquantifiable risk of serious prejudice. Indeed it may, *inter alia,* eviscerate a defendant's ability to take a meaningful part in the proceedings. (*People* v. *Mar, supra,* 28 Cal.4th at 1226-1227; *United States* v. *Durham, supra,* 287 F.3d at 1306 n. 7.) This is a particularly serious concern where, as here, the defendant has represented himself at the penalty trial. Anything which hampers a *pro se* defendant from fully participating in the proceedings raises an unacceptable risk that a death sentence is unreliable.

There is an additional compelling, and related, reason to find the erroneous imposition of a stun belt at a penalty phase trial is reversible *per se.* At the sentencing phase of a capital trial, the jury can and does consider all aspects of the defendant's character and background. This inevitably includes observations of the defendant in the courtroom while he is on trial for his life – as the defendant reacts to evidence and rulings, consults with his counsel, occupies himself during downtime, and otherwise comports himself in public, under pressure. This Court has squarely held that the prosecutor may comment in argument on the demeanor of a death penalty defendant during trial, and the

jury may properly consider that demeanor. (*People* v. *Navarette* (2003) 30 Cal. 4th 458, 516 ["a defendant's demeanor at trial – which, like the demeanor of witnesses, is rarely reflected in the record – is relevant at sentencing."].) Indeed, a prosecutor may argue that, based in part on his demeanor at trial, a defendant deserves death. (*People v. Cunningham* (2001) 25 Cal. 4th 926, 1023; *People v. Beardslee* (1991) 53 Cal. 3d 68, 113-114.)

As Justice Anthony Kennedy explained, with reference to involuntary medication, in his concurring opinion in *Riggins, supra:*

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. *The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.*

(504 U.S. at 143-144 [Kennedy, J., concurring (citation omitted; emphasis added)].)

It can be especially prejudicial to the defense for the defendant to remain passive while horrific descriptions of the crime are presented to the jury. Yet if the stun belt – which is designed to achieve "total psychological supremacy" over its subjects *(People v. Mar, supra,* 28 Cal. 4th at 1226) – works as advertised, a defendant will be removed, for the duration of the penalty phase trial, from a condition in which he may react and interact normally into a state

of abject psychological domination that all but guarantees he will not respond appropriately or in a manner that a jury might conclude reflects remorse. This is not a mere theoretical concern. The prosecutor below specifically called attention to Mr. Henderson's passive demeanor, contrasting the flatness of his affect in the courtroom with his "Bengal tiger-like" behavior in his "natural habitat."

> [D]o not let this artificial courtroom setting with its order of rules and civility imposed by the judge and enforced by a deputy with a gun fool you. *This is not his natural habitat. Just like a Bengal tiger in a zoo as you look at him across the moat overfed, under exercised, lolling in the grass like an overgrown house cat, you ask yourself how could such a kitty cat have a fierce reputation, but if you encountered that same Bengal tiger in the jungle in his natural habitat, hungry and on the prowl, long teeth glistening as he licked his chops at you, you would see a far different side of that animal. . . . Those victims encountered the defendant in his natural habitat in the jungle,* and they saw a very different side of him than you have. They became his prey.

(21 RT 4876- 4877 [emphasis added].) In addition, she went on to argue that his courtroom demeanor was devoid of normal emotion: "he still to this day *has no real feeling* for what he did to the Bakers" and "has *shown* no mercy, and he deserves no mercy from you." (21 RT 4876, 4881 [emphasis added].) There is a substantial risk that Mr. Henderson's subdued demeanor was a function of the psychological domination under which he operated, lest he make one false move and suffer devastating consequences.

The use of the stun belt greatly magnifies the chance one or more jurors will perceive, based on a defendant's in-court reactions and behavior at the

penalty phase – as the prosecutor attempted to drive home in this case – that the defendant in fact lacks all remorse, and therefore deserves to die. (See *Riggins, supra,* 504 U.S. at 143-144 [Kennedy, J. concurring].) This is an unacceptable risk for a system of justice that values due process. For these reasons, this Court should hold that, under the Eighth and Sixth Amendments, the federal Due Process Clause, and their California Constitutional counterparts, the unlawful imposition of a stun belt on a capital defendant at the penalty phase trial is structural error, warranting reversal without an actual prejudice inquiry.

3. Even assuming the erroneous use of a stun belt is subject to harmless error review, reversal is required under both the *Chapman* and the *Brown* standards.

Even if imposition of a stun belt at a penalty trial does not require reversal as structural error, this Court should hold that the *Chapman* standard applies in determining whether the erroneous use of a stun belt requires reversal. The same standard in substance and effect applies to penalty phase error under state law. (*People v. Brown* (1988) 46 Cal. 3d 432, 448; see *People v. Ashmus* (1991) 54 Cal. 3d 932, 965.) Under *Chapman,* the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at 24.) The prosecution will not be able to meet this burden.

The timing of the stun belt ruling must be kept in mind. The trial court ordered the stun belt placed on Mr. Henderson at the conclusion of the day on

February 28, 2001 and the jury returned its verdict on the morning of March 1, 2001. (20 RT 4449-4450 [ruling on motion]; 20 RT 4451 [notice to court that jury had returned its verdict].) In short, at virtually the same moment that the trial court ordered that henceforth he was to be outfitted with the belt he learned he was convicted and would face a penalty trial. (20 RT 4449-4450.) The emotional and psychological impact of these simultaneous developments must have been overwhelming.

Even before the jury's verdict, the record showed that the use of the stun belt would have enormous psychological impact on Mr. Henderson. As defense counsel stated, "it is going to affect his demeanor. It is going to affect his expression. It is going to affect his emotions, and that is obvious." (20 RT 4418.) There was nothing to the contrary in the record. (Compare *People v. Howard, supra*, 51 Cal. 4th at 29 [no prejudice from stun belt where "defendant expressed no discomfort with a stun belt. Nor did defense counsel alert the court to any apprehension on his client's part"].) The combination of the verdict and the ruling on the motion had the predictably devastating psychological effect. Immediately thereafter, Mr. Henderson sought permission to represent himself at the penalty trial so that he could "get this over with." (20 RT 4473.) His choice of words – in the face of evidence that he had contemplated, and even tried to commit, suicide – is telling. (See 13 RT 2950;

20 RT 4409, 4438.) Mr. Henderson was giving up and shutting down, a psychological state that can only have been exacerbated by the stun belt ruling.

The passivity, numbness and resignation which Mr. Henderson exhibited during the penalty trial – he called no witnesses, he offered no instructions, he made no meaningful argument to the jury (see generally 21 RT 4655-4794, 4883-4884) – can likely be explained, at least in part, by the fact that he was under threat of being incapacitated by 50,000 volts of electricity at any moment, without warning, for the slightest of wrong moves. That he was electronically tethered and subject to a debilitating and potentially deadly jolt could only have deepened the depression and overwhelming sense of doom which he would have been experiencing in any event. As this Court said in *People v. Mar* concerning the defendant's testimony while wearing a stun belt:

> From the cold record before us, it is, of course, impossible to determine with any degree of precision what effect the presence of the stun belt had on the substance of the defendant's testimony or on his demeanor on the witness stand. . . .[B]ut in view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict, it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial.

(28 Cal. 4th at 1224.) What this Court said in *Mar* could apply equally to Mr. Henderson's decision not to take any steps to defend himself at the penalty trial. The anxiety, fear and depression that wearing the belt surely engendered could

have led him to conclude that he could do nothing, indeed that he best do nothing, to contest further proceedings.

Without diminishing the seriousness of the crimes introduced as aggravating evidence, there can be no real dispute that the evidence in aggravation was not overwhelming and was notable for its lack of violence. Had Mr. Henderson felt he could contest the case in aggravation, there is a substantial chance that the jury would have rejected a death sentence. Instead, what the jury saw was someone who did not respond at all. His passivity in the face of the prosecution's penalty case meant that the aggravating evidence went untested and unchallenged, while at the same time potentially conveying to the jury that he lacked feeling or remorse. (*Riggins, supra*, 504 U.S. at 143-144 [Kennedy, J., concurring].)

On the other hand, there is a very real risk that the jury was prejudiced by seeing that Mr. Henderson was wearing the stun belt during the penalty trial. During proceedings on the stun belt motion only defense counsel could speak with any authority on the impact on the jury from use of the stun belt. (20 RT 4444 [trial court notes never having "imposed a stun belt" previously]; 20 RT 4427 [defense counsel discusses previous experience of client with a stun belt]; 20 RT 4447[same].) Based on that experience, he disputed that the jury would be unaware that Mr. Henderson was wearing the belt. (20 RT 4427 ["I think the jury can see it. I mean it is a big old box, you know, and if he gets up in any

way you can see it"]; 20 RT 4447 ["I had one experience with a client that had one of those on. I think they can see it"].)[78] Since Mr. Henderson represented himself at the penalty trial there was a greater chance that he would have been up and moving about in the courtroom and thus a greater chance that the jury would see that he was wearing the restraint. In fact, the trial court specifically mentioned this risk to Mr. Henderson. (20 RT 4542.)

And if, as is likely, the jurors were aware of the stun belt, then the prosecutor's argument at the penalty trial was especially prejudicial. It is plain enough that the prosecutor's goal during her penalty phase argument was to inflame the jury, and to re-characterize the crime as a cold-blooded, premeditated murder. (See *infra*, pp. 353-357.) Added to that was her comparison of Mr. Henderson's "kitty cat" behavior in the courtroom with his allegedly vicious nature, like that of a "Bengal tiger" in his "natural habitat," outside the courtroom. (21 RT 4876-4877.) She encouraged the jury not to be fooled by his courtroom demeanor, because his true character was hidden from view. (21 RT 4876.) The jury could easily have concluded that his passive "kitty cat" behavior was a function only of the electronic restraint at his waist and that, indeed, all that stood between them and the "Bengal tiger" was the stun belt. If so, little wonder that the jury took only 90 minutes to reach its

[78] But, because he could not be certain of it, defense counsel did not dare risk asking that the jury be admonished to ignore the "big old box" lest that bring it to their attention. (20 RT 4427, 4483.)

penalty verdict. (21 RT 4911-4915.) The trial court's ruling permitting Mr. Henderson to be restrained by a stun belt was a prejudicial abuse of discretion which requires reversal of the penalty verdict and sentence of death.

XIV. THE DEATH SENTENCE SHOULD BE SET ASIDE AS UNRELIABLE BECAUSE THE TRIAL COURT FAILED TO APPOINT SPECIAL COUNSEL TO PRESENT AVAILABLE MITIGATING EVIDENCE TO THE JURY.

Following the guilty verdict, the trial court granted Mr. Henderson's request that he be permitted to waive counsel and to represent himself at the penalty trial. At the request of defense counsel, the trial court permitted counsel to make a comprehensive offer of proof which summarized the specific mitigating evidence which counsel had developed and would have offered at the penalty trial. Although this evidence had been developed and was available, Mr. Henderson offered no evidence at the penalty trial.

Once it became apparent that Mr. Henderson did not intend to present a defense, the trial court could and should have appointed special counsel to present the available mitigating evidence to the jury. Had the trial court done so, it would have furthered the state's interest in a reliable penalty determination under the Eighth Amendment while still respecting Mr. Henderson's autonomy interest in representing himself. The trial court's failure to appoint such special counsel effectively insured a verdict of death, and because the record was clear that mitigating evidence was available which

could have resulted in a sentence of less than death, the sentence did not meet the heightened reliability required under the Eighth Amendment.

A. Facts.

1. Mr. Henderson's motion to relieve counsel and represent himself at the penalty trial.

The trial court set March 12, 2001 as the date on which the penalty trial would commence. (20 RT 4465-4466.) On March 1, immediately after the jury returned a guilty verdict, Mr. Henderson brought a motion to dismiss his attorneys. (20 RT 4467.) The basis for doing so was that he did not want to contest the penalty phase and, therefore, a "conflict" existed between him and his attorneys. (20 RT 4467, 4472-4473, 4502-4506.) Mr. Henderson wanted to "get this over with." (20 RT 4473.) Although he later vacillated (20 RT 4475-4476), Mr. Henderson continued to insist that he wanted to represent himself. (20 RT 4493.) He stated that he did not intend to "throw in the towel" and would present a defense (20 RT 4503-4504), but later declined to answer the trial court's question specifically directed at whether the dispute with his counsel was over whether to present *any* mitigating evidence or just over *which* evidence to present. (20 RT 4524-4525.)

The judge suggested that counsel could remain to present witnesses as to whom there was agreement and that Mr. Henderson could renew his self-representation motion if counsel tried to call witnesses with whom he disagreed;

Mr. Henderson declined. (20 RT 4525.) The trial judge suggested the appointment of advisory counsel, but Mr. Henderson once again declined. (20 RT 4529-4530.) Mr. Henderson did not request a continuance and indicated he was "ready to go," claiming to understand the consequences of his decision. (20 RT 4473, 4517-4520, 4532-4536.) The trial court granted the motion to relieve counsel. (20 RT 4543-4544.)

2. Defense counsel's offer of proof of the mitigating evidence which had been developed and would have been offered at the penalty trial.

Prior to being relieved, trial counsel requested and received permission to make an offer of proof as to the evidence which they would have presented at the penalty phase. (20 RT 4539-4540, 4548-4558.) Outside the presence of the prosecutor, defense counsel represented that, in summary, the evidence in mitigation would have shown the following.

Wilma Ellis, Mr. Henderson's maternal grandmother, and Patrice Henderson, his aunt, would have testified about their family history. That testimony would have shown that Ms. Ellis had been successful in life and held a high ranking position in the Baha'i faith. (20 RT 4549.) She had worked in the administrations of several colleges and universities. She began at Cal Poly Pomona and then moved on to Stanford at the request of a faculty member. She worked at Stanford for 7 years. That same professor then offered her a job at the University of Massachusetts at Amherst. She relocated and worked in

Department of Education at the U. Mass. Amherst had few people of color and it was difficult for her children, which included Mr. Henderson's mother, Kathleen, and her siblings, Patrice and Robert. (20 RT 4549-4950.)

In the 1960s, when she was 15 years old, Kathleen became involved with a man, Donald Byas, and ran away with him. There were times when Ms. Ellis had to go in search of Kathleen at night. Kathleen became pregnant with Paul, returned home, and had the baby at 17. One time Byas tried to come and take Paul away. Ms. Ellis convinced Byas to give him back. Byas left and they never saw him again. Mr. Henderson apparently tried to contact Byas in later years, but was rejected and it was devastating to him. (20 RT 4550-4551.)

After Byas left, Kathleen felt like her life was over and was very depressed. (20 RT 4551.) She then met Ronald Brown, who was 11 years her senior. She ran away to California with him, and took Mr. Henderson with her. The family did not know where they were. Occasionally, Kathleen would call her family. She and Ronald became addicted to drugs, including heroin. (20 RT 4551-4552.)

Mr. Henderson's family moved frequently. He moved 10 times in the first five or six years of his life. Between the ages of 6 and11, he was constantly on the move between Indio, Los Angeles and San Francisco. He lived in several different places in San Francisco. (20 RT 4548-4549.) When Mr. Henderson was two or three years old, Ms. Ellis learned that they were in

San Francisco. She asked her son Robert, who was in college, to try and locate them. He did so and took them to Los Angeles where Kathleen's elderly grandparents lived. School records reflected that Mr. Henderson was held back in kindergarten because he missed 35 days of school. He attended three or four grammar schools in Indio. (20 RT 4548.)

The family moved to Indio because that is where Ronald's mother, Lula, lived. Ronald was a musician and often gone for long periods. He was never really there to act as a parent to Mr. Henderson. By the time they relocated to Indio, Kathleen had two more children (Rhonda and Dominique) and was trying to raise them in abject poverty. A cousin, Anita Strange, would have testified that at times Mr. Henderson and his family had no food and that he was often abandoned while his mother went off with friends and others. (20 RT 4552-4553.)

For a period of about a year, Mr. Henderson stayed with Lula. His sister Rhonda would have testified that, if you "did anything, she [Lula] didn't tell you what you did, she would pick up the closest thing and hit you with it." (20 RT 4553.) She hit Paul in the head with a hammer on one occasion. (20 RT 4553.) On another occasion, she beat him with an electrical cord so severely that he lost control of his bladder. (20 RT 4553.)

During this period, Mr. Henderson's mother remained addicted to heroin and the family was still very poor. Mr. Henderson's maternal grandmother tried to get his mother into treatment, but without success. (20 RT 4554.)

At around age 10 or 11, Mr. Henderson began stealing cars. (20 RT 4554.) He stole and subsequently wrecked more than one automobile. (20 RT 4553-4554.) When Mr. Henderson was 11, he was sent to live in San Diego with another family and to attend a parochial school. He stole the car belonging to the family with whom he was living and tried to drive home. (20 RT 4554.) He was caught and his family had him committed to a psychiatric hospital for several months. (20 RT 4554.) He was then placed in foster care, but promptly ran away. He lived alone on the streets in San Diego at the age of 12 or 13. Eventually, a friend let him live in a camper parked next to the friend's house. He stole items from the camper, sold them for food, got caught and was convicted of burglary. (20 RT 4554.) Shortly thereafter, he returned home, but was caught for petty theft. He was placed in a juvenile group home. He and a friend at the group home stole the group home van. He was caught and sent to another group home, where he promptly stole another vehicle. (20 RT 4555.)

He was tried in juvenile court. The judge gave his mother the choice to take him home or let him be held by the California Youth Authority ("CYA"). She opted to leave him in custody with the CYA. (20 RT 4555.) From that time on, he had been incarcerated, punctuated by brief periods of freedom. He

completed high school while in the CYA. (20 RT 4555.) He "underwent some horrors" at the CYA. (20 RT 4556-4557.)

Nellie Hernandez, a counselor at the Charlie Family Group facility, would have testified that Mr. Henderson would act out like all the kids there, but then would suddenly hug the counselors as "a sign of approval." (20 RT 4555-4556.) She said that Mr. Henderson did not hurt others when he was angry; instead, he inflicted injury on himself. (20 RT 4556.) He had a "heart" and would befriend newly incarcerated juveniles who appeared lost and afraid. He did chores at CYA and even volunteered for extra chores. The counselors liked him, and joked with him. She said that Mr. Henderson was not someone "we should throw away." (20 RT 4556.)

Defense counsel located other witnesses including, Sean Donovan, Ronald Hewey, Richard Russell, Diane Ducate, Larry Bloom, Frank Sanchez, all of whom would say positive things about Mr. Henderson. (20 RT 4556.) Adrian Davis, a psychologist, took a family history and would have opined that, given his background, it was not surprising that he committed crimes. She would have diagnosed him as "antisocial" with a predisposition to commit property, but not necessarily, violent crimes. (20 RT 4557.)

Finally, defense counsel would have called Mr. Estrin, a correctional consultant, who had 20 years of experience with the Department of Corrections as a classification expert. He would have testified that Mr. Henderson had had

three fist fights in prison, none of which resulted in criminal charges or required medical care, that good time credits originally taken from him as a result of the fights were restored and that he would not have presented a danger in prison. (20 RT 4557.)

3. Mr. Henderson's failure to present a defense at the penalty trial.

Despite his representation to the trial court that he intended "to fight this" (20 RT 4476), Mr. Henderson presented no mitigating evidence of any kind. He asked fewer than a dozen questions to only two prosecution witnesses at the penalty phase and rested without presenting a single witness or piece of evidence. (21 RT 4787.) He suggested no jury instructions. (21 RT 4788-4789, 4794.)

His statement to the jury at the conclusion of the evidence consisted of a few sentences which comprised less than a page of Reporter's Transcript, and in which he effectively invited a death sentence. He stated that he was not trying "to gather sympathy or anything" and knew "wrong from right. . . . [U]ltimately I was there that night, therefore I am responsible. I chose to discharge my attorney so they don't present any mitigating circumstances, arguments or whatever because this is how I feel. Now, whether you want to believe it or not, that is your choice. Ultimately I really just go on down the way and deal with this in my own way. Whatever your decision is is going to be the right

thing to do, *not right by me, but by the Bakers because I do think about them.* You know. And *I owe them.* And that's all I have to say." (21 RT 4883-4884 [emphasis added].)

At the hearing on the automatic motion to modify the verdict, the trial court reviewed the evidence in light of the statutory factors in PC § 190.3 and found that no mitigating evidence had been introduced at either the penalty or guilt phase of the trial. (21 RT 4971-4975.) With respect to factor (k), the trial court stated that no evidence had been introduced at the penalty phase, and emphasized that because counsel's offer of proof was not evidence presented to the jury, he did not consider it. (21 RT 4975.) As a result, the judge found that the aggravating evidence substantially outweighed any mitigating evidence and declined to modify the verdict. (21 RT 4975.)

B. Reliability In The Sentencing Determination Presupposes Meaningful Adversarial Testing Of The Prosecutor's Case – Adversarial Testing Which Was Absent At The Penalty Trial Below.

In *Woodson v. North Carolina* (1976) 428 U.S. 280, a plurality of the Supreme Court set out what are, by now, well-known words:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(*Id.* at 305 [opinion of Stewart, Powell and Stevens, JJ.].)

Because death is "different," the high court has stressed that capital sentencing must be "'controlled by clear and objective standards so as to produce nondiscriminatory application'" (*California v. Brown* (1987) 479 U.S. 538, 544 [O'Connor, J., concurring]) and that "a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." (*Id.*) The requirement that the sentencing jury must be permitted to consider "any mitigating evidence relevant to a defendant's background and character" is designed to "ensure the 'reliability in the determination that death is the appropriate punishment in a specific case.'" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 327-328. See also *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

"[A] capital jury is required to do more than simply find facts that determine the penalty decision. The jury must make a moral assessment of those facts as they relate to whether death is appropriate for the individual defendant, and must be free to reject death on the basis of any constitutionally relevant evidence. The jurors must, therefore, weigh the aggravating and mitigating factors, assigning whatever moral or sympathetic value each juror deems appropriate to each, and upon completion of the weighing process must decide if death is the appropriate penalty." (*People v. Clark* (1990) 50 Cal. 3d 583, 631.) It follows, therefore, that "the reliability required by the Eighth Amendment in death penalty cases can be assured *only* when the record on

which the verdict is based is 'complete,' i.e., when it does not lack 'any significant portion of the evidence of the appropriateness of the penalty' that counsel reasonably concludes '"makes the most compelling case in mitigation."'" (*People v. Deere* (1991) 53 Cal. 3d 705, 729 ["*Deere II*"] (Mosk, J., concurring).)

But the jury can consider, of course, only that evidence which is introduced by adversaries at the penalty trial. "'Manifestly, the penalty phase of a capital trial in this state is an adversary process.'" (*Deere II,* 53 Cal. 3d at 728 (Mosk, J., concurring).) Our criminal justice system proceeds from the premise "that partisan advocacy on both sides of a case will best promote the ultimate objective" (*Herring v. New York* (1975) 422 U.S. 853, 862) – here, a reliable penalty determination. A "fair trial is one in which *evidence subject to adversarial testing* is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." (*Strickland v. Washington* (1984) 466 U.S. 668, 685 [emphasis added].) "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." (*Polk County v. Dodson* (1981) 454 U.S. 312, 318.) At the penalty trial in particular, the adversarial process does more than protect the defendant's right to a fair trial, it also vindicates "the *state's* significant interest in a reliable penalty determination, *a determination best made by a fully informed sentencer. . . .*"

(*People v. Clark, supra,* 50 Cal. 3d at 617-618 [emphasis added]. See also *People v. Bradford* (1997) 15 Cal. 4th 1229, 1364.)

The prosecution's case at the penalty phase below was not tested by any process, much less an adversarial process, since Mr. Henderson did little more than sit at counsel table. Despite his statement that he did not intend to "throw in the towel" (20 RT 4503) and would present a defense, he also made it clear he wanted to "get this over with." (20 RT 4472.) To ensure that his attorneys were relieved, he agreed to proceed to trial a week after the guilt verdict with no preparation and without an investigator. (20 RT 4517-4520, 4532-4536.)[79] Of the 20 witnesses which the prosecutor called to testify at the penalty phase, Mr. Henderson asked only a handful of questions to all of two of those witnesses. Even those questions reflected no effort to challenge the penalty phase evidence. Mr. Henderson offered no jury instructions and his "argument" to the jury consisted of a few brief sentences which amounted to an invitation to the jury to select the ultimate penalty.

Most importantly, mitigating evidence – which indisputably existed, had been developed, and could have been presented – was not introduced before the jury. Far from being fully informed, the jury below was almost completely

[79] When Mr. Henderson inquired about obtaining the services of an investigator, the trial judge indicated that he would deny the motion for self-representation if Mr. Henderson requested funds for an investigator. (20 RT 4534-4535.) Mr.. Henderson did not pursue the request.

uninformed. The prosecution's case did not just go untested, the jury heard nothing which would have permitted it to undertake a meaningful weighing process and thereby determine if death was the appropriate penalty.

From the inception of the case, the jurors had known they would be expected to weigh aggravating and mitigating evidence at the conclusion of a penalty trial. The trial judge read each panel of prospective jurors a script during the death qualification process which attempted to explain their function at the penalty phase:

> The defense may, if any such evidence exists, put on mitigating evidence, evidence of good things to persuade you that the appropriate decision having found a defendant guilty of first-degree murder and the special circumstance to be true is life in prison without the possibility of parole.
>
> The prosecution may, if any such evidence exists, put on aggravating evidence, evidence of bad things to persuade you that the appropriate penalty having found a defendant guilty of first-degree murder and the special circumstances to be true is death and not life in prison without the possibility of parole. . . .
>
> Only if the aggravating or bad evidence is greater than the mitigating or good evidence do you have a choice. I will not tell you what decision to make and the law will not tell you what to do. You individually must weigh the two types of evidence. You can only vote for the death penalty when the aggravating evidence is so substantial compared to the mitigating evidence, that the bad is so substantial compared to the good that the death penalty is warranted.
>
> You must listen to the evidence and each of you must decide for yourself what is appropriate. Your decision must be individual and the decision must be unanimous.

(See, e.g., 4 RT 824-826.) At the conclusion of the penalty trial, the jury received the pattern instruction (CALJIC 8.88) governing its duty to weigh aggravating and mitigating circumstances. (See 21 RT 4833-4834, 4884-4910.)

Having been presented no mitigating evidence, the jury could easily have believed that nothing "good" could be said about Mr. Henderson and that only the "bad" weighed in the balance. Then, in the face of Mr. Henderson's statements that he was not asking for "sympathy" and "owed" the Bakers (21 RT 4883, 4884), the jury surely must have thought that its job was done. It had heard only "bad things," and the defendant himself all but begged for the ultimate punishment. As if to underscore the point, the jury took a mere hour and a half to reach its penalty verdict. (21 RT 4913-4914.)

There can be no serious dispute that had *trial counsel* failed to investigate, develop and present the sort of mitigating evidence described in the offer of proof, Mr. Henderson would have been deprived "of a fair penalty trial, that is, 'a trial whose result is *reliable*.'" (*In re Gay* (1998) 19 Cal. 4th 771, 826 [emphasis added]; see also *id.* at 807-808, 830; *United States v. Cronic* (1984) 466 U.S. 648, 659.) It would be strange indeed, then, to say that the result somehow became reliable merely because it was Mr. Henderson, rather than trial counsel, who failed to present such evidence. Whether it is ineffective counsel or the defendant who fails to develop or present mitigating evidence, the record before the jury is equally suspect.

C. The Trial Court Erred In Failing To Appoint Independent Counsel To Prepare And Present A Case In Mitigation.

1. Mr. Henderson's right to represent himself was not absolute.

A criminal defendant generally has a Sixth Amendment right to represent himself or herself at trial, including at the penalty trial. (*Faretta v. California* (1975) 422 U.S. 806; *People v. Windham* (1977) 19 Cal. 3d 121, 128; *People v. Blair* (2005) 36 Cal. 4th 686, 737-738.) This Court has recently stressed, however, that as a matter of state law, the defendant has neither a constitutional nor a statutory right to self-representation. (*People v. Johnson* (2012) 53 Cal. 4th 519, 526.) In fact, under state law a defendant in a capital case is entitled only to the "assistance" of counsel and to have counsel "present." (*Id.*, citing Cal. Const., art. I, § 15 and PC § 686.1.) "California courts should give effect to this California law when it [sic] can." (*Id.*)

Even a defendant's federal constitutional right to self-representation is not absolute. The defendant must request self-representation within a reasonable time prior to the commencement of trial, and the request must be knowing and voluntary. (*Faretta,* 422 U.S. at 835; *People v. Windham, supra,* 19 Cal. 3d at 128.) Of particular relevance here, Mr. Henderson's mid-trial request for self-representation was untimely. As a result, he had no constitutional grounds for the request and the decision whether to grant self-representation was "addressed to the sound discretion of the trial court."

(*People v. Bloom* (1989) 48 Cal. 3d 1194, 1220. See also *People v. Halvorsen* (2007) 42 Cal. 4th 379, 433.)

As discussed below, even if the trial court did not abuse its discretion in granting Mr. Henderson's request for self-representation, it nevertheless erred in not appointing special counsel to present mitigating evidence when it became apparent that Mr. Henderson neither intended to offer nor did offer mitigating evidence.

2. The state's interest in a reliable penalty determination should require a trial court to appoint special counsel to present a case in mitigation whenever a pro se defendant indicates that he or she does not intend to present such a case.

Mr. Henderson acknowledges that this Court has held that a defendant exercising his right to self-representation "'has no duty to "present a defense" but may simply "put the state to its proof" . . . [and] can presumably also take the stand and confess guilt.'" (*People v. Bloom, supra,* 48 Cal. 3d at 1222.) Moreover, a self-represented defendant may decide not to present mitigating evidence at a penalty trial and his failure to do so is not "in and of itself . . . sufficient to make a death judgment unreliable. . . ." (*Id.* at 1228 n. 9 [emphasis added]; see also *People v. Blair* (2005) 36 Cal. 4th 686, 737.) Similarly, such a self-represented defendant may not complain of ineffective assistance of counsel on appeal for failure to present mitigating evidence. (*Deere II*, 53 Cal. 3d at 716.)

In *People v. Bloom, supra*, 48 Cal. 3d 1194, this Court disapproved *People v. Deere* (1985) 41 Cal. 3d 353 ("*Deere I*"), which had held that to ensure a reliable penalty determination, defense counsel had an obligation to present mitigating evidence even over the objections of his client. The Court in *Bloom* reached its decision in part because the right to self-representation is sufficiently fundamental, even at the penalty phase, that the trial court may permit a defendant to exercise the right, even when his avowed purpose is to decline to put on a penalty defense. (48 Cal. 3d at 1222-1223.) Moreover, and in any event, a "rule requiring *a self-represented defendant* to present mitigating evidence would be unenforceable and self-defeating." (48 Cal. 3d at 1227 [emphasis added].) A court has "no means to compel *a defendant* to put on an affirmative defense." (*Id.* [emphasis added].) "A knowledgeable defendant desiring to avoid the death penalty could make a timely request for self-representation . . . and then decline to present any mitigating evidence at the penalty phase, secure in the knowledge that any death judgment would be reversed by this court, while a defendant genuinely desiring death could circumvent the rule by presenting a bare minimum of mitigating evidence." (*Id.*) Furthermore, the U.S. Supreme Court, though requiring heightened reliability under the Eighth Amendment, "has never suggested that this heightened concern for reliability requires or justifies forcing *an unwilling*

defendant to accept representation or to present an affirmative penalty defense in a capital case." (*Id.* at 1228 [emphasis added].)

In addition to the practical difficulties of compelling a self-represented defendant to present a mitigation case, the underlying or at least implicit principle motivating the Court in *Bloom* and its progeny was that the autonomy interest furthered by the defendant's Sixth Amendment right to conduct and control his defense is not and should not be trumped by the heightened reliability requirement under the Eighth Amendment. (See 48 Cal. 3d at 1227-1228; *People v. Bradford, supra,* 15 Cal. 4th at 1371-1372.) Mr. Henderson submits, however, that this is a false dichotomy.

If the issue is as framed by the *Bloom* Court, *i.e.*, whether the *defendant* can be compelled to present a mitigation case he has chosen not to present, then the tension between the self-representation right and the Eighth Amendment requirement is manifest. But the clash between the two doctrines inherent in a case such as this or *Bloom* is more apparent than real and can be resolved without requiring that one yield completely to the other.

Justice Broussard, concurring in *Deere I*, proposed an approach to accommodate the defendant's personal right to control his destiny and the state's obligation to ensure a reliable penalty determination: the appointment of special counsel who, at the trial court's request, prepares and presents mitigating evidence when the self-represented defendant declines to do so.

> The constitutional right to the effective assistance of counsel belongs to defendant personally. . . . Here counsel satisfied himself that his client was making a rational, knowing, and intelligent decision, and then acted in accord with his client's wishes. I do not believe his conduct violated any constitutional right of defendant.
>
> Although counsel in this case fulfilled his obligations to his client, he failed to perform a role assigned to him by the state, that of presenting the mitigating evidence necessary to assure the reliability of the penalty determination. But the fact that the state assigns defense counsel a role which may require him to act contrary to his client's wishes on a matter of such vital importance to the client presents a troubling picture. The defense of a capital case often requires a close and trusting relationship between counsel and client; yet our decision requires counsel to violate that trust, to take a position against his client, and perhaps to present evidence revealed to him in confidence by his client.
>
> Trial courts should explore methods of alleviating this conflict. In some cases it might be desirable for counsel, in addition to presenting mitigating evidence, to inform the jury of defendant's personal position. In other cases, the court might permit the defendant himself to address the jury. Alternatively, the court could call persons with mitigating evidence as its own witnesses, or *appoint new counsel to call them, and thereby place on the record the mitigating evidence essential to a careful, balanced penalty determination*
>
> In sum, both the state's need to assure the fairness and reliability of the penalty determination, and defendant's rights to personal choice and dignity, command respect. It is essential that the penalty trial constitute a balanced presentation of aggravating and mitigating evidence, but this goal should be achieved, as far as possible, with respect and accommodation for defendant's personal values and for his relationship with counsel.

(*Deere I*, 41 Cal. 3d at 369 [Broussard, J., concurring; emphasis added]; see also *People v. Bloom, supra*, 48 Cal. 3d at 1241 [Mosk, J., dissenting].)

In fact, on remand from the reversal in *Deere I*, the trial court adopted the very approach suggested by Justice Broussard after trial counsel, at the

defendant's insistence, refused to introduce any evidence in mitigation. (*Deere II*, 53 Cal. 3d at 712.) Because a case in mitigation was presented by special counsel, the state's interest in a decision made by a "fully informed sentencer" (*People v. Clark, supra,* 50 Cal. 3d at 617-618) had been furthered and the resulting death sentence could be deemed reliable. (See *Deere II*, 53 Cal. 3d at 729 [Mosk, J., concurring].)

There is no dispute that a trial court has the authority to adopt the approach suggested by Justice Broussard. (*McKaskle v. Wiggins* (1984) 465 U.S. 168.177 n.7 [acknowledging trial court's authority to appoint "amicus counsel" where defendant is *pro se*].) The issue for decision, which this Court has never addressed, is whether the trial court – particularly in circumstances like those presented in this case – has an independent duty either under the Eighth Amendment or as a matter of state law to appoint independent counsel to ensure that mitigating evidence is presented.

Mr. Henderson submits that the solution proposed by Justice Broussard and adopted by the trial court in *Deere II* should be required in every instance where the self-represented defendant makes it clear that he will not present evidence in mitigation. The state's interest in a reliable penalty determination should demand no less. (*Cf. People v. Stanworth* (1969) 71 Cal. 2d 820, 834 [because PC § 1239 requires Court to review record on automatic appeal from

judgment of death to ensure defendant had fair trial, defendant may not abandon appeal: "state, too, has an indisputable interest" in whether trial was fair].)

Appointment of special counsel in such circumstances does no violence to the defendant's autonomy interest in self-representation at a capital trial. The defendant remains free to refuse to participate and even to contend that the mitigation evidence should not be believed or credited. His autonomy interest will thereby continue to be respected. (See *Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 162-163 [trial court may appoint special counsel to participate in a trial, even over *pro se* defendant's objection, provided it remains clear that defendant is representing himself and right of self-representation is respected]; see also *United States v. Davis* (E.D. La. 2001) 180 F. Supp. 2d 797, 798 n. 2, rev'd (5th Cir. 2002) 285 F.3d 378; *United States v. Davis* (5th Cir. 2002) 285 F.3d 378, 393 [Dennis, J., dissenting]; Reider, *The Right of Self-Representation in the Capital Case* (1985) 85 Colum. L.Rev. 130, 152-153.) At the same time, the state's evidence in aggravation will have been subjected to adversarial testing, ensuring that the penalty determination has been made by a fully informed sentencer and is therefore reliable. It will also further, albeit indirectly, the state's interest that capital defendants have the assistance and presence of counsel. (*People v. Johnson*, *supra*, 54 Cal. 4th at 526.)

The trial court below knew that mitigating evidence was not only available, but had been developed and could be presented. Although Mr. Henderson's equivocation regarding whether and to what extent he intended to present a case in mitigation, and his refusal to consider the trial court's suggested alternatives to full self-representation, should have made the trial court suspicious that he did not intend to present mitigation evidence, Mr. Henderson did represent that he would not simply "throw in the towel." (20 RT 9503.) Even if the trial court is not faulted for relieving counsel in the face of that representation, the picture radically changed when it became apparent that Mr. Henderson in fact would, and did, "throw in the towel."

When Mr. Henderson effectively failed to question any of the prosecution witnesses and then rested without calling a single witness in defense, the trial court could have and should have appointed special counsel to undertake to investigate and present a mitigation case. Since the trial court was aware of the available evidence and that witnesses were ready, willing and able to testify, the court could easily have selected counsel to follow the leads reflected in trial counsel's offer of proof. And in the unlikely event that trial counsel declined to turn over their work product to special counsel, the court could have required trial counsel to provide special counsel with contact information for the witnesses. Undoubtedly a short continuance would have been required to accommodate special counsel's efforts, but that would have

been a small price to pay in the interest of ensuring that the sentencer was sufficiently informed to make an appropriate, individualized determination.

Mr. Henderson's right to represent himself may have been respected by permitting him to fold up his tent and invite a death sentence, but the state's interest in a reliable determination made by a fully informed sentencer was utterly undermined in the process. In the face of available mitigating evidence that could have led the jury to select a sentence less than death, it elevates form over substance to say that the trial court could ignore what it knew and proceed as if no mitigating evidence existed or that the jury – which was denied the ability to consider the available mitigating evidence – nevertheless made an appropriate individualized determination that Mr. Henderson deserved to die. Under these circumstances, this Court should conclude that the trial court erred in failing to appoint special counsel to present the available mitigating evidence.

3. Courts from other jurisdictions have required or approved the appointment of special or standby counsel to present mitigating evidence where a self-represented defendant declines to do so.

Courts from other jurisdictions have faced this same dilemma and have held that trial courts should appoint special counsel to develop and present mitigation evidence when defendants decline to do so at the penalty phase. For example, in *Barnes v. State* (Fla. 2010) 29 So. 3d 1010, the Florida supreme

court held that appointment of special counsel to present mitigating evidence where the *pro se* defendant refused to do so did not violate the defendant's Sixth Amendment rights even as it furthered the Eighth Amendment requirement of reliability in sentencing determination.

> Appointment of mitigation counsel in this case, where Barnes essentially refused to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty. This was proper in order to ensure that the severe and irrevocable penalty of death, if imposed, would be justified and not be imposed in an arbitrary or capricious manner. . . .
>
> Because the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case. Mitigation counsel was appointed, not to supplant Barnes as his own counsel, but to assist the court by presenting mitigation evidence where Barnes refused to do so. The mitigation was not in conflict with any evidence presented by Barnes and was not in conflict with his mitigation theory that he confessed and took responsibility.

(*Id.* at 1025, 1026; *cf. Klokoc v. State* (Fla. 1991) 589 So. 2d 219, 220 [implicitly approving of trial court's appointment of special counsel to present mitigation].)[80]

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[80] In *Barnes* and an earlier decision, *Muhammad v. State of Florida* (Fla. 2001) 782 So. 2d 343, the Florida supreme court has largely, if silently, disavowed its decision in *Hamblen v. State* (Fla. 1988) 527 So. 2d 800, which this Court cited favorably in *People v. Bloom* and *People v. Blair* as support for the proposition that a defendant's decision not to offer evidence in mitigation does not render the sentence unreliable.

In *State v. Reddish* (N.J. 2004) 859 A.2d 1173, the New Jersey supreme court undertook an exhaustive discussion of whether a defendant had a Sixth Amendment right to represent himself at the penalty phase of a capital trial. After concluding that a defendant had such a right, the court nevertheless stressed that reliability in capital sentencing required that standby counsel be appointed for *pro se* defendants, and that such counsel would have an obligation to present mitigating evidence if the defendant refused to do so. The court first cautioned that:

> an inadequate and incompetent presentation by a pro se defendant in a penalty trial unacceptably poses a risk to the State of executing a defendant whose individual character and record do not warrant the ultimate punishment. The most "solemn business" of executing a human being cannot be "subordinate[d] . . . to the whimsical--albeit voluntary--caprice of every accused who wishes" unwisely to represent himself.

(*Id.* at 1200.) Accordingly, the court required that standby counsel be appointed in capital cases and held that such counsel would have an obligation to assist the court to ensure a reliable sentencing determination.

> Imposing a sentence of death requires that mitigating evidence be presented to the sentencers so that they may make an individualized determination that the defendant indeed deserves death. . . . Should standby counsel become aware that defendant does not intend to present exculpatory or mitigating evidence, counsel should bring that lapse to the attention of the pro se defendant and the court in order to ensure the fairness of the proceeding. *See ABA Standards, supra,* § 6-3.7 (standby counsel may "call the judge's attention to matters favorable to the accused").

(*Id.* at 1203-1204; see also *State v. Koedatich* (N.J. 1988) 548 A.2d 939, 997 [suggesting that trial court could call its own witnesses or appoint special counsel where *pro se* defendant refused to offer evidence in mitigation]; *cf. Morrison v. State* (Ga. 1988) 373 S.E.2d 506, 509 [noting trial court may have a duty to appoint special counsel to present mitigation, citing *Deere I*, 41 Cal. 3d at 369 (Broussard, J., concurring)].)

The Fifth Circuit Court of Appeals has held that appointment of special counsel to present mitigating evidence over the objection of a *pro se* defendant is a violation of the defendant's Sixth Amendment right to conduct and control the defense. (*United States v. Davis, supra,* 285 F.3d 378.) In *Davis*, the trial court appointed special counsel to present a case in mitigation over the objection of a *pro se* defendant and the defendant sought a writ of mandamus to overturn the order. Over a vigorous dissent, the majority issued the writ, emphasizing that the defendant had represented to the district court that he intended to present a defense and that the mitigating evidence offered by special counsel would have run headlong into that defense. (*Id.* at 384-385.) While Mr. Henderson submits that *Davis* was wrongly decided, this Court need not reach that issue because *Davis* is distinguishable.

The trial court below exercised its discretion to permit Mr. Henderson to represent himself, at least in part because he expressed the intent not to "throw in the towel." (20 RT 4503.) Had Mr. Henderson actually presented a case in

mitigation, then arguably a separate case in mitigation by special counsel would have interfered with Mr. Henderson's right to control the defense, as the *Davis* court held. (*Cf. State v. Arguelles* (Utah 2003) 63 P.3d 731, 754 [appointment of special counsel not required where appellant "did not refuse to present mitigating evidence, but merely limited the amount of such evidence"]; *People v. Burton* (Ill. 1998) 703 N.E.2d 49, 63 [appointment of special counsel not necessary where record reflected that sentencing judge reviewed and relied upon report prepared by mitigation specialist].) But here, unlike in *Davis*, Mr. Henderson did "throw in the towel" by putting on no defense. Appointment of special counsel to present mitigating evidence would not have interfered with his autonomy interest or contradicted his defense "strategy."

4. Conclusion

Under the circumstances presented in this case, where mitigating evidence was available and known to the trial court, but nevertheless not presented, the interest in reliability of the sentence should have led the trial court to appoint special counsel for the limited purpose of presenting such evidence to the jury. Mr. Henderson's right to represent himself would have been preserved, the jury would have had evidence in mitigation to weigh and consider and, on review, this Court would have had a complete record in deciding whether the sentence was reliable. The Court should conclude that the trial court erred.

D. The Trial Court's Error was Prejudicial.

Surely the sentence here cannot be considered reliable when the record reflects that mitigating evidence – indeed, substantial mitigating evidence – was available and could have been, but was not, presented to the jury. Nor can there be any real question that the mitigating evidence, if heard by the jury, might well have resulted in a different penalty verdict.

Had the jury heard evidence in mitigation similar to that which trial counsel had developed and wished to offer, the jury would have had to grapple with the story of a child who, from infanthood, had been repeatedly abandoned, literally starved and brutally beaten by his caregivers and yet, still found it within himself to care for others; of someone who, despite a life of crime, had endeavored to avoid physical harm to his victims; of someone who, according to correctional and psychological professionals, was not beyond redemption. It cannot be known with certainty whether this evidence would have resulted in a different verdict, but there is a "reasonable possibility" that it might have done so. (*People v. Brown, supra*, 46 Cal. 3d at 448.) The judgment should be reversed and the case remanded for a new penalty trial.

XV. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE PENALTY PHASE, REQUIRING REVERSAL OF THE DEATH SENTENCE AND A NEW TRIAL ON PENALTY.

A. The Prosecutor Falsely Argued To The Jury That The Victim Was Alive When His Neck Was Wounded And That Mr. Henderson Killed With Premeditation And Deliberation.

The prosecutor committed serious misconduct during closing argument at the penalty trial by misstating the evidence and arguing a theory of the crime which she had specifically disavowed at the guilt phase. In addition, she otherwise sought improperly to bias the jury by an argument that not only dehumanized the defendant, but strongly suggested an appeal to racism in the jurors.

1. The prosecutor argued that the killing was the product of premeditation and deliberation.

The prosecution's expert pathologist testified that Mr. Baker had "severe, severe" heart disease, and was a candidate for sudden cardiac arrest at any time and under any circumstances. (15 RT 3238.) While the stress of the crime generally was sufficient to have caused a fatal heart attack, the wound to his neck would not have killed him. (15 RT 3229-3242, 3246.) Significantly, *the examining pathologist could not say whether Mr. Baker's throat was cut before or after he died. Nor could he say whether Mr. Baker died before or after he was bound.* (15 RT 3242-3245.) Although Mr. Baker died as a result and in the

course of the crime, *when* he died during the commission of the crime was not shown by the evidence.

As discussed previously, the prosecutor withdrew her request for a premeditation and deliberation instruction (19 RT 4162-4163) and the jury was not instructed on premeditation and deliberation as a basis for a finding of guilt on Count I. (19 RT 4357-4358.) Despite the lack of any evidence that Mr. Baker was alive when the wound was inflicted on his neck and despite the lack of any instruction on premeditation and deliberation, the prosecutor repeatedly described the killing in a way which presupposed Mr. Baker was alive at the time his neck was cut and clearly described the killing as the product of premeditation and deliberation. She told the jury:

> 19 short days after [Mr. Henderson's] release from prison he invaded the home of Reginald and Peggy Baker, and *he committed cold blooded murder*. . . .

(21 RT 4855 [emphasis added].)

> He murdered Mr. Baker . . . to keep [him] from calling the police. . . . It was a senseless, gratuitous murder. . . . *He could have gotten everything he wanted without murdering poor Mr. Baker.*

(21 RT 4871 [emphasis added].)

> If he would have just robbed the Bakers that night, committed a home invasion robbery, *but left Mr. Baker alive*, if we would have caught him, we would have sent him home . . . .

(21 RT 4874-4875 [emphasis added].)

> He *by his own choice committed the ultimate crime* against a totally innocent and vulnerable victim. He deserves for you to choose the ultimate punishment.

(21 RT 4875 [emphasis added].)

The only way Mr. Henderson could have committed a "cold blooded," "gratuitous" murder designed to "keep Mr. Baker from calling the police," or could have committed the robbery, but "left Mr. Baker alive," would have been if Mr. Baker had been alive at the time the knife touched his neck. The prosecutor's argument presupposed that Mr. Henderson had control over when and whether Mr. Baker lived or died, made a conscious decision to kill him and then carried it out. Of course, the evidence contradicts any such characterization of the crime. On the state of the record it is just as possible that Mr. Baker died the moment he lay down on the bed as it is that he was alive until the knife touched his neck.

More to the point, the statements that he "could have gotten everything he wanted without murdering poor Mr. Baker" and could have robbed Mr. Baker, but "left [him] alive" were flatly false and misleading, in light of the uncontradicted testimony from the prosecution's own pathologist that the knife wound would not have killed a healthy person and there was no way to know whether Mr. Baker was alive or dead when the wound was inflicted. The prosecutor's statements did not just imply, they virtually told the jury, that but for the neck wound Mr. Henderson could have robbed and burglarized the

Bakers and Mr. Baker would have lived. The prosecutor's intent was plain: to paint the death of Mr. Baker as calculated and intentional, rather than accidental and unintended.[81]

The prosecutor's statements surely "went beyond the evidence." (*People v. Bittaker*, *supra*, 48 Cal. 3d at 1105.) Mr. Baker, who had severe heart disease, could have died at any time with or without Mr. Henderson's intervention. In fact, on the state of the evidence, Mr. Henderson could have done everything that he is alleged to have done – *and Mr. Baker might have lived, since the neck wound itself was not fatal.* Mr. Henderson need not have touched Mr. Baker at all – and Mr. Baker could have had a fatal heart attack. It is simply impossible to know, then, whether Mr. Henderson "could have gotten everything he wanted" without Mr. Baker's death or robbed him and yet left him alive. Indeed, given the severity of Mr. Baker's heart condition, he could have had a heart attack that night even if the crime had never been committed. (15 RT 3238 [Mr. Baker "was a setup" for sudden death].)

The prosecutor abandoned a theory of premeditated murder at the guilt phase (19 RT 4162-4163), and thus the jury did not decide whether the

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[81]The evidence that Mr. Henderson acted in a "cold blooded" manner was likewise belied by much of the evidence: he tied up the Bakers half-heartedly, loosened the gag in Mr. Baker's mouth, let Mrs. Baker go at one point and helped her out of her chair at the inception of the crime and tried to calm her down. (2 CT 442-444; 11 RT 3371.) There was no dispute that he was deeply remorseful; he cried during his interview with the police and expressed remorse and disbelief that he could have committed the crime. (16 RT 3553.)

prosecutor could have proven such a theory beyond a reasonable doubt. The prosecutor's arguments first at the guilt phase (19 RT 4243) and then at the penalty phase that the murder was the product of premeditation and deliberation injected an entirely new and untested theory of the crime into the mix and presented it as fact. She thereby sought "to [be] absolve[d] . . .from [the] prima facie obligation to overcome reasonable doubt on all elements." (*People v. Hill, supra*, 17 Cal. 4th at 829.) Having made the decision not to pursue a premeditated murder conviction she was not free at the penalty phase to ratchet up the emotional component of the crime by arguing a new – and unsupported – legal theory of the crime as to which the jury was not charged. By arguing inflammatory "facts" and a theory of the crime that had not been presented at the guilt phase, she was attempting to "'divert[] the jury's attention from its proper role [and] invit[ing] an irrational, purely subjective response . . . .'" (*People v. Jackson*, *supra*, 45 Cal. 4th at 692.) Her argument was "'"the use of [a] deceptive . . . method[] to attempt to persuade . . . the jury."'" (*People v. Hill, supra*, 17 Cal. 4th at 819.)

2. The prosecutor falsely implied that Mr. Baker was alive when his neck was wounded.

As part of her campaign to recast her theory of the crime, the prosecutor also told the jury that Mr. Baker was alive at the time his neck was wounded.

> As the defendant held Mr. Baker from the back as he must have done and coldly pull that dull blade across Mr. Baker's neck, *as Mr. Baker felt that*

> *cold steel bite into his flesh, the pain, the stress, the terror, it was just too much for him, and Mr. Baker hoped no more.*

(21 RT 4872 [emphasis added].)

> Now, imagine yourself tightening the grip on that knife as you prepare to cut him, and feel your hand force that knife into his flesh and drag it across his neck. *Can you hear Mr. Baker gasp in pain? Can you hear that sharp intake of air*?

(21 RT 4880 [emphasis added].)

There simply was no evidence to support the prosecutor's contention that Mr. Baker was alive at the time his neck was wounded and that he died at that moment as a result of the knife wound. The pathologist testified that no one could say whether he was or was not alive at that point; indeed, no one could say whether he was alive at the point he was being tied up. (15 RT 3244.) And, since the pathologist also testified that Mr. Baker could have died of a heart attack literally at any moment, it was just as possible that he died as he lay down on the bed, as when he was being tied up or at any time thereafter. All that the evidence showed is that Mr. Baker was alive when he was led into his bedroom and that he was dead by the time Mrs. Baker checked on him after the assailant had left.

The prosecutor may have been entitled to make """fair comment on the evidence""" (*People v. Williams*, 16 Cal. 4th at 221), but she could not manufacture evidence. (*People v. Bittaker*, *supra*, 48 Cal. 3d at 1104-1105.) As this Court stated in *People v. Hill, supra*, "[a]lthough prosecutors have wide

latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations omitted.] A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (17 Cal. 4th at 823.)

The only way to read the prosecutor's depiction of Mr. Baker's death was that he was alive as his neck was being cut and died as a result – not just from the overall stress of the crime, but specifically from the wound to his neck ("as Mr. Baker felt that cold steel bite into his flesh . . . it was just too much for him, and Mr. Baker hoped no more" [21 RT 4872]; "Can you hear Mr. Baker gasp in pain? Can you hear that sharp intake of air?" [21 RT 4880]).

Her statements cannot be squared with the expert testimony – testimony offered by the prosecution – that it was unknown whether Mr. Baker felt anything at that moment since he may have already been dead. While it may not be inappropriate at the penalty phase for the prosecutor to ask the jury to consider the crime from "'the victim's viewpoint'" (*People v. Jackson* (2009) 45 Cal. 4th 662, 691), the problem here is that the victim may have had no viewpoint because he had died before his neck was cut.

And it is this which made the statement so prejudicial to Mr. Henderson. There was ambiguity in the record as to when Mr. Baker died; and there was no dispute that the knife wound itself was not fatal. In framing the argument as

she did, the prosecutor distorted evidence that was otherwise arguably damaging to her case. (*People v. Hill, supra*, 17 Cal. 4th at 825-826.) If Mr. Baker was already dead at the time of the knife wound, then the prosecutor's argument that Mr. Henderson was a "cold blooded" killer who "could have gotten everything he wanted without murdering poor Mr. Baker" was substantially undermined. It would have been far more difficult for the prosecutor to portray Mr. Henderson as a vicious, deadly predator drawing a blade across the victim's neck if his victim was already dead. And the prosecutor's outright speculation about the "cold steel bit[ing] into [Mr. Baker's] flesh" and his "gasp[ing] in pain" would have been missing altogether from the argument. The prosecutor's portrayal of the crime would have been substantially less lurid if she had simply told the truth about the evidence: no one could say when Mr. Baker died.

3. The prosecutor improperly urged the jury to act out of unreasoning passion and prejudice and to consider the defendant's "true" character to be an aggravating factor and sought to appeal to racism among the jurors.

While it is permissible for the prosecutor in closing argument at the penalty phase to appeal to appeal to the jury's emotions, "'[n]evertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or

invites an irrational, purely subjective response should be curtailed.'" (*People v. Jackson, supra,* 45 Cal. 4th at 691-692, quoting *People v. Haskett* (1982) 30 Cal. 3d 841, 863-864; *People v. Bradford, supra*, 15 Cal. 4th at 1379.) The prosecutor overstepped the line and sought improperly to inflame the jury.

In addition to the lurid and misleading description of the crime itself, the prosecutor effectively called the defendant a wild animal.

> [D]o not let this artificial courtroom setting with its order of rules and civility imposed by the judge and enforced by a deputy with a gun fool you. *This is not his natural habitat. Just like a Bengal tiger in a zoo as you look at him across the moat overfed, under exercised, lolling in the grass like an overgrown house cat, you ask yourself how could such a kitty cat have a fierce reputation, but if you encountered that same Bengal tiger in the jungle in his natural habitat, hungry and on the prowl, long teeth glistening as he licked his chops at you, you would see a far different side of that animal. . . . Those victims encountered the defendant in his natural habitat in the jungle,* and they saw a very different side of him than you have. They became his prey.

(21 RT 4876- 4877 [emphasis added].)

This argument was improper on at least three fronts. First, it went far beyond any appropriate comment on evidence. The prosecutor used purely gratuitous and inflammatory imagery for no purpose other than to whip the jury into a rage, to divert the jury from its proper role and to invite a purely subjective response. (*People v. Jackson, supra*, 45 Cal. 4th at 691-692; accord: *People v. Gonzales* (2011) 51 Cal. 4th 894, 951-952.)

Second, the argument amounted to an improper use of factor (k) character or background evidence as an aggravating factor. As this Court has

said, "Section 190.3 factor (k) provides that the jury may consider in determining penalty '[any] other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.' Evidence of a defendant's character and background is admissible under factor (k) only to *extenuate* the gravity of the crime; it cannot be used as a factor in aggravation. [Citation omitted.] The prosecution may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidents or character traits on which the defendant seeks to rely [citation omitted] and may argue that this mitigating factor is inapplicable, but factor (k) evidence may not be used affirmatively as a circumstance in aggravation." (*People v. Edelbacher* (1989) 47 Cal. 3d 983, 1033.)

The jury heard evidence at both the guilt and penalty phases of crimes which the defendant committed beginning in childhood. The prosecutor could legitimately discuss any crimes involving violence as evidence of aggravation. (PC § 190.3(b).) But the prosecutor went further here. She argued that predatory criminal behavior was Mr. Henderson's true character, which showed itself only in his "natural habitat." This was not an argument which was intended to suggest that character evidence offered in mitigation was not really mitigating; there was no character evidence offered in mitigation. Instead, the prosecutor used the imagery of a predatory and vicious tiger to tell the jury that the defendant's criminal background demonstrated "a different side to him," the

real Mr. Henderson who was encountered only by his "prey." This was an improper attempt to argue that his character was that of a wild animal and that his character should have been considered an aggravating factor.

Finally, the context ought not to be lost here. Mr. Henderson is African-American, his victims were white. There were no African-Americans on the jury and all jurors save one were non-Hispanic and white; and the majority of those jurors were white women. The images of a predatory animal and references to the jungle surely were intended to appeal to any racism that may have existed amongst the jurors, and to play upon irrational fears of African-American men, grounded in racist stereotypes, that continue to persist.

Mr. Henderson acknowledges that this Court has previously rejected claims that the "Bengal tiger" argument is an improper appeal to racism. (*People v. Brady* (2010) 50 Cal. 4th 547, 585; *People v. Duncan* (1991) 53 Cal. 3d 955, 977.) In *Brady* and *Duncan*, however, the underlying facts of the crimes at issue were more egregious than those here. Thus, this Court in *Duncan* concluded that, "[l]ikening a vicious murderer to a wild animal does not invoke racial overtones." (53 Cal. 3d at 977.) Even if the tiger analogy could be considered appropriate argument in the context of that case, it cannot be squared with the facts here. The evidence in this case showed that the death here was essentially accidental and, without downplaying the seriousness of Mr. Henderson's criminal past, it is quite a stretch to characterize him as a "vicious

murderer." The argument below should be seen for what it was: an appeal to racism – conscious or unconscious – to inflame the jury and ensure a sentence of death. That was improper and should be strongly condemned by this Court.

B. No Objection Or Admonition Could Have Cured The Misconduct.

Mr. Henderson did not object to the prosecutor's misconduct and the trial court was not given an opportunity to admonish the jury with a curative instruction. While the failure to object will generally foreclose consideration of the issues on appeal (*People v. Bradford, supra*, 15 Cal. 4th at 1378), Mr. Henderson submits that any objection would have been futile and an admonition would not have cured the harm. (See *People v. Martinez, supra*, 47 Cal. 4th at 963-964.)

Prior to trial, defense counsel made a prophylactic motion to restrict the prosecutor's penalty phase argument only to those matters which are appropriate under the law. (3 CT 613 *et seq.*) The trial court denied the motion as premature. (1 RT 82 *et seq.*) As indicated above, at the guilt trial, the trial court had overruled an objection made by defense counsel to the prosecutor's argument to the jury in which the prosecutor described an imaginary conversation between Mr. Henderson and Knuck, who Mr. Henderson testified was the real perpetrator of the crime. (19 RT 4264-4266.) In overruling the objection, the trial court stated, "Counsel are given wide latitude in their

representation to the jury of what they believe the evidence shows." (19 RT 4266.) Then, defense counsel objected to the prosecutor's characterization of Mr. Henderson as a "dope." Once again, the trial court overruled the objection. (19 RT 4266.) In light of these rulings it was plain that the trial court would permit the prosecutor essentially free rein to misstate the evidence and to excoriate the defendant. Mr. Henderson could legitimately have concluded that an objection to the prosecutor's attempt to inflame the jury would have been futile.

But even if Mr. Henderson had objected to the various statements, any admonition would have been ineffective. An admonition pertaining to the prosecutor's argument that Mr. Baker was alive at the time his neck was wounded would have, at best, told the jury that the evidence was inconclusive as to when Mr. Baker died – thereby leaving the jury free to accept the prosecutor's speculation as fact. And there was no admonition that could have cured the prosecutor's attempt to portray the defendant's character itself as aggravating. Any such admonition either would have confused the jury or would have had the unintended effect of reemphasizing the prosecutor's point. (*Cf. People v. Morris* (1991) 53 Cal. 3d 152, 188 [stating that motion to strike in an effort to "unring the bell" may be "obviously futile"].)

C. The Prosecutor's Misconduct Requires Reversal Of The Death Sentence And A New Penalty Trial.

In evaluating the effects of improper argument at the penalty phase, this Court applies "the reasonable possibility standard of prejudice first articulated in *People v. Brown* [(1988)] 46 Cal. 3d [432,] 448, . . . which . . . is the same in substance and effect as the beyond-a-reasonable doubt test for prejudice articulated in *Chapman v. California* [1967] 386 U.S. 18." (*People v. Gonzales, supra*, 51 Cal. 4th at 894 [internal quotations omitted]; see also *id.* at n. 33; *People v. Dykes* (2009) 46 Cal. 4th 731, 786.)

There was at least a reasonable possibility that the result here would have been different had the prosecutor's argument stayed within the bounds of the law. The evidence before the jury – as distinct from the prosecutor's mischaracterization and misrepresentation of that evidence – could have led the jury to reject death even in the absence of a case in mitigation.

Mr. Henderson was deeply remorseful over the crime, even according to prosecution witnesses. Gregory Clayton said that Mr. Henderson was in tears during his description of the events and had mentioned suicide. (13 RT 2950.) Officer Wolford testified that Mr. Henderson sobbed during the interrogation after the arrest and expressed remorse. (*E.g.*, 16 RT 3553.) He cried during his meeting with his mother and aunt after his arrest, repeatedly saying that he was "sorry" for what had occurred. (15 RT 3302-3303.) The transcript of his

interrogation reflected instances in which Mr. Henderson expressed shock or disbelief at what occurred in the Bakers' home that night. (5 CT 1209, lines 1070-1080; 5 CT 1210, line 1103.)

Mr. Henderson was apparently under the influence of drugs during the crime (15 RT 3364-3365, 3369) and his behavior suggested an altered state of mind. His statements to the police during the interrogation indicate that he had trouble remembering what had occurred, that he was not fully conscious of his acts, and, indeed, only realized what he had apparently done after the fact. (5 CT 1181 ["When I came, when I saw what was happening myself . . . ."]; 5 CT 1210 ["What the fuck did I do?"].)[82] Mrs. Baker testified that the assailant said that if she and her husband were quiet, they would not be hurt. (2 CT 442.) She noted that when he tied them up, he intentionally tied them loosely and placed the gag in Mr. Baker's mouth only loosely because he knew that Mr. Baker might have trouble breathing. He cut the binding on Mrs. Baker's ankles. (2 CT 444.)

Mr. Baker died of heart failure, *not* the knife wound, and he may well have been dead by the time the wound was inflicted. Mr. Baker's heart condition was so serious that he could have died at any moment, *without* regard

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[82] Mr. Henderson offered evidence that he actually said, "When I came *to* . . . ." (Court Exh. 7 [39 CT 10596, line 21, emphasis added].) If that is what he said, then it only underscores that he may not have been aware of what he was doing.

to anything Mr. Henderson did. Mrs. Baker's injuries were undoubtedly serious, but they were not life threatening. (12 RT 2765.)

Mr. Henderson's prior criminal history was undoubtedly serious, but it was also noteworthy for its lack of actual physical violence. During the two most serious incidents – the Heather Teed carjacking and the bank robbery – he took care to ensure no one was hurt. (18 RT 3987-3988.) He permitted Heather Teed to remove her child and her child's belongings from the car before stealing it and used a fake gun in that crime as well as during the bank robbery. (18 RT 3985, 3987-3988.) None of the crimes for which he had been imprisoned involved physical injury, much less great bodily injury, to the victims. Even the fights in which he was involved while in prison were not particularly serious.[83]

The prosecutor's effort to recast the crime as a premeditated murder, her misrepresentation of the evidence regarding how and when Mr. Baker died, and her argument designed to create in the jury's mind the impression that Mr. Henderson had a character that was intrinsically vicious and animalistic were plainly directed at inflaming the jury. The prosecutor must have been concerned that the actual evidence might cause the jury to reject death. To avoid that prospect, she created an alternate version of reality intended to

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[83] There was no evidence, for example, that he was suffered any significant discipline or was prosecuted as a result of the fights.

enrage the jury. That the jury deliberated for barely an hour and a half before reaching a sentence of death is testament to her success.

Under these circumstances, the defendant's failure to object should not preclude review on appeal, the sentence should be overturned as a result of prosecutorial misconduct and a new penalty trial should be granted.

XVI. THE SENTENCE OF DEATH IS DISPROPORTIONATE TO THE DEFENDANT'S INDIVIDUAL CULPABILITY AND THEREFORE VIOLATES HIS RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT.

When requested by the defendant, this Court will engage in a "review of the particular facts of a defendant's case to determine whether the death sentence is so disproportionate to the defendant's personal culpability as to violate the California Constitution's prohibition against cruel or unusual punishment." (*People v. Leonard* (2007) 40 Cal. 4th 1370, 1426.) In making its determination, the court

> must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability", or, stated another way, that the punishment """shocks the conscience and offends fundamental notions of human dignity""", the court must invalidate the sentence as unconstitutional.

(*People v. Hines* (1997) 15 Cal. 4th 997, 1078 [citations omitted]; see also *People v. Jennings* (2010) 50 Cal. 4th 616, 686.)

Without seeking to diminish the seriousness of the offenses with which Mr. Henderson was charged and convicted, the severity of the punishment cannot be squared with the facts. To begin with, the crime itself appeared to have been largely opportunistic and motivated by the desire to steal a car. There was no evidence that the assailant targeted the Bakers *per se*. Despite the prosecutor's attempt to minimize Mr. Henderson's remorse over the crime, the record was replete with evidence that he felt extreme remorse. Prosecution witnesses, who had every reason to portray him as unfeeling or to downplay any remorse, nevertheless testified that Mr. Henderson exhibited great remorse. Gregory Clayton, for example, said that Mr. Henderson was crying during his description of the events and mentioned suicide. Sergeant Wolford testified that Mr. Henderson cried during the interrogation after the arrest and expressed remorse. The record revealed that Mr. Henderson was sobbing during his meeting with his mother and aunt after his arrest, repeatedly saying that he was "sorry" for what had occurred. And the transcript also reflected instances in which Mr. Henderson expressed shock and disbelief at what occurred in the Bakers' home that night.

The foregoing is consistent with facts that suggested that Mr. Henderson was not fully in control of his own mental faculties during the crime. The evidence was that he had smoked marijuana laced with methamphetamine prior to the crime. (15 RT 3363-3364, 3369.) His statements to the police during the

interrogation indicate that he had trouble remembering what had occurred, that he was not fully conscious of his acts, and only realized what he had apparently done after the fact (5 CT 1181 ["When I came, when I saw what was happening myself . . . I saw he was on the floor"].) That he may have actually been in a kind of "Jekyll and Hyde" state as a result of the drugs is suggested further by the odd swings of behavior during the crime. Mrs. Baker described her assailant as alternating between being polite and calm, and angry and violent. (2 CT 442-445, 456; 11 RT 2485.) The prosecutor admitted that, when the assailant first entered, he was not carrying a knife, but was holding a tool used to steal cars. (19 RT 4316; see, e.g., 15 RT 3369-3370.) Mr. Henderson told the Bakers that if they were quiet, they would not be hurt. (2 CT 442.) During the interrogation, he talked about his efforts to calm down both Mr. and Mrs. Baker. (15 RT 3371.) When he tied up the Bakers, he intentionally tied them loosely and placed the gag in Mr. Baker's mouth only loosely because he knew that Mr. Baker might have trouble breathing. He cut Mrs. Baker's ankle bindings and did not prevent her from leaving to check on her husband. (2 CT 444.)

Despite the prosecutor's effort to re-write history during her closing argument, Mr. Baker's death was not a "cold-blooded" killing. (21 RT 4855.) To the contrary, the prosecution evidence showed that Mr. Baker died of heart failure, not the knife wound, and that he may well have been dead by the time

the wound was inflicted. Mr. Baker's heart condition was so serious that he could have died at any moment, with or without Mr. Henderson's intervention. Mrs. Baker's injuries, though serious, were not life threatening. (12 RT 2765.)

Mr. Henderson's prior criminal history consisted largely of car thefts or other property crimes. In the two most serious crimes – the Heather Teed carjacking and the bank robbery – he ensured that no one was hurt. He permitted Heather Teed to remove her child from the car before stealing it. He used a fake gun during that crime and the bank robbery. His altercations while in prison were relatively minor.

In the end, the Court is left with a senseless and tragic – but nevertheless essentially accidental – death that occurred during the commission of a serious felony. Mr. Henderson felt deep remorse for the crime and nothing in his past suggests that he is a violent and heartless man. This Court has chosen not to undertake intercase proportionality review (*People v. Leonard, supra,* 40 Cal. 4th at 1426), but it cannot be lost on the Court that the result here is hard to justify in light of the evidence, particularly given the gruesome, and truly horrific, records the Court typically confronts in capital cases. (See, e.g., *People v. Gonzales, supra*, 51 Cal. 4th 894.) The only explanation for the jury's verdict was that, in the absence of a case in mitigation, the prosecutor took advantage of Mr. Henderson's *pro se* status and appealed improperly to jurors' passions and prejudice. This Court has an opportunity to, and should,

rectify this miscarriage of justice. Mr. Henderson surely deserves to be punished for his crimes, but equally surely, he does not deserve to die.

XVII. THE CUMULATIVE PREJUDICE FROM THE ERRORS AT THE GUILT AND PENALTY PHASES OF THE TRIAL DEPRIVED MR. HENDERSON OF HIS STATE AND FEDERAL RIGHTS TO DUE PROCESS, TO A FAIR TRIAL AND TO A RELIABLE PENALTY DETERMINATION.

Under both federal and state law, it is settled that the cumulative effect of errors at a trial may require reversal, even where those errors might not be considered prejudicial when considered individually. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 421, 440–41 [assessing prejudice/materiality cumulatively]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302–303 [cumulating errors and finding prejudice]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883–894 [combined prejudice of multiple errors deprived the defendant of a fundamentally fair trial and constituted a separate and independent basis for relief]; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1208 ["petitioner's claim of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence"]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 [even where no single error is prejudicial, the collective presence of errors throughout the trial is "devastating to one's confidence in the reliability of . . . [the] verdict" and, accordingly, requires reversal]; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 ["Where . . . there are a number

of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors"]; *People v. Hernandez* (2003) 30 Cal. 4th 835, 877 ["numerous and serious" errors at the penalty phase of defendant's trial, considered together, affected the jury's penalty determination and required penalty phase reversal]; *People v. Holt* (1984) 37 Cal. 3d 436, 459 [setting aside defendant's convictions after finding that it was reasonably probable that in the absence of the cumulative effect of the trial errors, the jury would have reached a more favorable result]; *People v. Kronemeyer* (1987) 189 Cal. App. 3d 314, 349 [noting that the cumulative error analysis "always applies," because the "litmus test is whether defendant received due process and a fair trial"].) These principles require reversal of the death sentence.

Viewed dispassionately, the death sentence meted out to Mr. Henderson can hardly be explained; it surely cannot be justified. Undeniably, the suffering the Bakers endured was serious and tragic. The Court is, however, confronted with

- An essentially accidental death in the midst of a felony; and,
- A defendant who exhibited extreme remorse for what occurred and whose background was devoid of violent crime.

Mr. Henderson may have been death-eligible once he was convicted, but the sentence is plainly disproportionate to the facts. What, then, accounts for the

jury's decision – after a mere 90 minutes of deliberation – to condemn Mr. Henderson to die? The answer has to be that the cumulative impact of the errors committed below pushed the jury irresistibly to that result.

Mr. Henderson will not recite again the litany of errors which occurred at the guilt trial; they have been adequately described and discussed above. Suffice it to say that those errors produced a racially homogenous jury, which heard profoundly damaging – but inadmissible – evidence, including a confession which formed the very centerpiece of the prosecution case.

Even so, the case was not a slam dunk. No physical evidence linked Mr. Henderson to the crime. And the lone eyewitness, Mrs. Baker, did not simply describe a perpetrator who did not resemble Mr. Henderson, she affirmatively rejected Mr. Henderson in open court as the man who committed the crime. The testimony of other witnesses who described Mr. Henderson's appearance in June 1997 underscored that Mrs. Baker's description *of someone else* was indeed accurate. The jurors therefore took a keen interest in any testimony suggesting that someone other than Mr. Henderson was involved, perhaps principally involved, in the crime. (20 RT 4426.) But the jury had little or no context within which to consider this evidence since the trial court's erroneous rulings prevented Mr. Henderson from developing and presenting powerful evidence in his own defense – including expert testimony which would have emphasized just how reliable Mrs. Baker's testimony was.

The prosecutor undoubtedly knew that a conviction was not assured, because she clearly decided her only option was to recast the crime in her closing argument as a vicious, premeditated and deliberate murder. And still the jury seemed to struggle before reaching its verdict: it requested that the videotape of Mrs. Baker's testimony be re-played and then took a number of hours before deciding that Mr. Henderson was guilty of capital murder.

It is easy enough to envision that had the deck not been stacked against the defense, the result at the guilt trial might have been substantially different and there would have been no penalty trial. The trial judge thought just such a result was possible even on the state of the record below. (20 RT 4426.) But whatever doubts the jurors may have harbored as they began deliberations had been erased entirely by the time they reached their verdict, in no small measure because the evidence had been skewed so strongly in the prosecution's favor by the trial court's erroneous rulings.

Once the jury became convinced, the errors following the guilt trial merely served to insure that the jurors would make quick work of Mr. Henderson. He sat before them during the penalty trial passive and placid – as would virtually anyone remotely tethered to a device designed to deliver an incapacitating shock of 50,000 volts of electricity at any moment, without warning – not reacting or showing any of the remorse he so clearly displayed following the crime. Surely that was not lost on the jury, and it undoubtedly

contributed both to the penalty verdict and the speed with which it was handed down. But the prosecutor was leaving nothing to chance, particularly since the evidence in aggravation was neither graphic nor especially compelling. Although she had no adversary in the courtroom, and no evidence in mitigation to rebut, she engaged in the prosecutorial equivalent of piling on, continuing her campaign of transforming the crime into a bloodthirsty, intentional killing and the defendant into predatory monster. It worked. The jurors met briefly, went to lunch for an hour and, 45 minutes after they returned, had completed their job.

Even if each of the errors individually caused no prejudice – a dubious proposition in its own right – it ought to be plain that together the errors below produced a result which does not withstand analysis and should not be permitted to stand. The death sentence must be reversed.

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

In *People v. Schmeck* (2005) 37 Cal. 4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with

these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, n. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304.)

Mr. Henderson has no wish to lengthen this brief unnecessarily. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions since then,[84] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

a. Factor (a): Section 190.3, subdivision (a) — which permits a jury to sentence a defendant to death based on the "circumstances of the crime" — is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and

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[84]See, e.g., *People v. Taylor* (2010) 48 Cal. 4th 574, 661-662; *People v. McWhorter* (2009) 47 Cal. 4th 318, 377-379. See also, e.g., *People v. D'Arcy* (2010) 48 Cal. 4th 257, 307-309; *People v. Mills* (2010) 48 Cal. 4th 158, 213-215; *People v. Martinez, supra,* 47 Cal. 4th at 967-968; *People v. Ervine* (2009) 47 Cal. 4th 745, 810-811; *People v. Carrington* (2009) 47 Cal. 4th 145, 198-199.

standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (21 RT 4895.) In addition, the jury was not required unanimously to determine which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny[85] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal. 4th 175, 260-261; *People v. Mills* (2010) 48 Cal. 4th 158, 213-214 ; *People v. Martinez*, *supra,* 47 Cal. 4th at 967; *People v. Ervine*, *supra*, 47 Cal. 4th at 810 ; *People v. McWhorter*

[85] *Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296.

(2009) 47 Cal. 4th 318, 378; *People v. Mendoza* (2000) 24 Cal. 4th 130, 190; *People v. Schmeck*, *supra*, 37 Cal. 4th at 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

b. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (21 RT 4895.) Evidence supporting this instruction had been admitted at the guilt phase, and the jury was authorized to consider such acts at the penalty phase pursuant to section 190.3, subdivision (b). The jurors were not told that they could not rely on this factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring*, *supra*, 536 U.S. 584 and its progeny, this omission violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, *supra,* 536 U.S. at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment.

This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308 ; *People v. Martinez*, *supra*, 47 Cal. 4th at 967, 968; *People v. Lewis and Oliver*, *supra*, 39 Cal. 4th at 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

c. In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision maker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal. 4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

d. Factor (c): During both the guilt and penalty phases, the state introduced evidence that Mr. Henderson had had prior felony

convictions. (19 RT 4174-4184; 21 RT 4896-4897.) This evidence was admitted at the penalty phase pursuant to section 190.3(c). The jurors were instructed they could not rely on these prior convictions unless they had been proven beyond a reasonable doubt. (21 RT 4897.) The jurors were never told that before they could rely on this aggravating factor, they were required to unanimously agree that Mr. Henderson had committed the prior crimes. In light of the Supreme Court decisions in *Ring, supra,* 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Taylor* (2010) 48 Cal. 4th 574, 662; *People v. Martinez*, *supra*, 47 Cal. 4th at 967; *People v. Schmeck*, *supra*, 37 Cal. 4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

e. Factors (b) and (c): At the penalty phase, the prosecution introduced evidence that Mr. Henderson had been convicted of a variety of felonies. (21 RT 4606 *et seq.*; 21 RT 4896-4897) The jury was told it could consider evidence of these crimes in deciding whether petitioner should live or die. (21 RT 4897.) The introduction of the facts pertaining to the prior crimes put Mr. Henderson in jeopardy a second time for these offenses in violation of the Double Jeopardy clause of the federal Constitution. This Court has rejected this argument. (See, e.g., *People v. Bacigalupo* (1992) 1 Cal. 4th 103, 134-135.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

f. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (21 RT 4896.) This aggravating factor is unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills, supra,* 48 Cal. 4th at, 213; *People v. Ray* (1996) 13 Cal. 4th 313, 358.) These decisions

should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

g. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (21 RT 4833, 4895-4896.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors; (2) it contained vague and ill-defined factors, particularly factors (a) and (k); (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial;" and (4) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken singly or in combination, violated Mr. Henderson's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson* (2010) 49 Cal. 4th 79, 143-144; *People v. Taylor*, *supra*, 48 Cal. 4th at 662; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308; *People v. Mills*, *supra*, 48 Cal. 4th at 214; *People v. Martinez*, *supra*, 47 Cal. 4th at 968; *People v. Schmeck*, *supra*, 37 Cal. 4th at

304-305; *People v. Ray*, *supra*, 13 Cal. 4th at 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

h. Failure to Narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal. 4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308; *People v. Mills*, *supra*, 48 Cal. 4th at 213 ; *People v. Martinez*, *supra*, 47 Cal. 4th at 967; *People v. Schmeck*, *supra*, 37 Cal. 4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

i. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently finds (1) that aggravating circumstances exist, (2) that the aggravating circumstances outweigh the mitigating

circumstances, and (3) that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring*, *supra*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Taylor*, *supra*, 48 Cal. 4th at 662-663; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308; *People v. Mills*, *supra*, 48 Cal. 4th at 213; *People v. Martinez*, *supra*, 47 Cal. 4th at 967 ; *People v. Ervine*, *supra*, 47 Cal. 4th at 810-811 ; *People v. McWhorter*, *supra*, 47 Cal. 4th at 379; *People v. Schmeck*, *supra*, 37 Cal. 4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

j. Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Thompson*, *supra*, 49 Cal. 4th at 143-144; *People v. Taylor*, *supra*, 48 Cal. 4th at 662; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308; *People v. Mills*, *supra*, 48 Cal. 4th at 213 ; *People v. Martinez*, *supra*, 47 Cal. 4th at 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

k. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a

death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, *supra*, 47 Cal. 4th at 379; *People v. Carrington* (2009) 47 Cal. 4th 145, 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

l. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (21 RT 4910) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, *supra*, 47 Cal. 4th at 199; *People v. Catlin* (2001) 26 Cal. 4th 81, 174; *People v. Mendoza* (2000) 24 Cal. 4th 130, 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

m. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Thompson*, *supra*, 49 Cal. 4th at 143-144; *People v. Taylor*, *supra*, 48 Cal. 4th at 662-663; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308-309; *People v. Mills*, *supra*, 48 Cal. 4th at 214 ; *People v. Martinez*, *supra*, 47 Cal. 4th at 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

n. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and that aggravation outweighed mitigation, and freedom from cruel and

unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Mills*, 48 Cal. 4th at 214; *People v. Martinez*, *supra*, 47 Cal. 4th at 968; *People v. Ervine*, *supra*, 47 Cal. 4th at 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

o. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal. 4th at 261; *People v. Taylor*, *supra*, 48 Cal. 4th at 663; *People v. D'Arcy*, *supra*, 48 Cal. 4th at 308; *People v. Mills*, *supra*, 48 Cal. 4th at 213; *People v. Martinez*, *supra*, 47 Cal. 4th at 968; *People v. Carrington*, *supra*, 47 Cal. 4th at 198-199; *People v. Schmeck*, *supra*, 37 Cal. 4th at 305.) The Court's decisions should be

reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

p. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, *supra*, 49 Cal. 4th at 143-144; *People v. Taylor*, *supra*, 48 Cal. 4th at 663; *People v. McWhorter*, *supra*, 47 Cal. 4th at 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

q. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the 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) 548 U.S. 163, 179, n. 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].) 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.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

CONCLUSION

For all the foregoing reasons, Mr. Henderson submits that his convictions on all counts and sentence of death should be reversed.

Dated: July 6, 2012

Respectfully submitted,

Martin H. Dodd
Attorney for Defendant/Appellant
Paul Nathan Henderson

CERTIFICATE OF COMPLIANCE

Case No. S098318

I certify that this brief complies with the type-volume limitation set forth in Rule 8.630(b)(1)(A) of the California Rules of Court. This brief uses a proportional typeface and 14-point font, and contains 100,729 words.

July 6, 2012

Martin H. Dodd

APPENDIX

CODE OF CIVIL PROCEDURE
Part 1. Of Courts of Justice
Title 3. Persons Specially Invested With Powers of a Judicial Nature
Chapter 1. Trial Jury Selection and Management Act

Cal Code Civ Proc § 229 (2012)

§ 229. Challenges for implied bias

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

CALIFORNIA

John M. Dinse, Ritchie E. Berger and Frederick S. Lane III

PART 2. EVIDENCE AND GUIDES FOR ITS CONSIDERATION
E. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

CALJIC 2.92

California Jury Instructions, Criminal, 7th Ed.

2.92 FACTORS TO CONSIDER IN PROVING IDENTITY BY EYEWITNESS TESTIMONY

Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

[The stress, if any, to which the witness was subjected at the time of the observation;]

[The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

[The cross-racial [or ethnic] nature of the identification;]

[The witness' capacity to make an identification;]

[Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

[The period of time between the alleged criminal act and the witness' identification;]

[Whether the witness had prior contacts with the alleged perpetrator;]

[The extent to which the witness is either certain or uncertain of the identification;]

[Whether the witness' identification is in fact the product of [his] [her] own recollection;]

[;] and

Any other evidence relating to the witness' ability to make an identification.

ARTHUR SIMS, EXECUTIVE OFFICER

BY M. Ramirez Deputy

Case No INF027515

Date 1-31-01

☒ Piff/Peo ☒ Exh# 131

☐ Deft

☐ Court ☒ Ident# 131

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Large-Size Composite Printout

Case Number: 970810068
Investigator: JAY HORN

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ARTHUR SIMS, EXECUTIVE OFFICER

BY M Ramirez Deputy

Case No INF027515

Date 1-31-01

☒ Piff/Peo ☒ Exh# 132

☐ Deft

☐ Court ☒ Ident# 132

000024

Large-Size Composite Printout

Case Number: 970810068
Investigator: JAY HORN

000062

ARTHUR SIMS, EXECUTIVE OFFICER

BY M. Ramirez Deputy

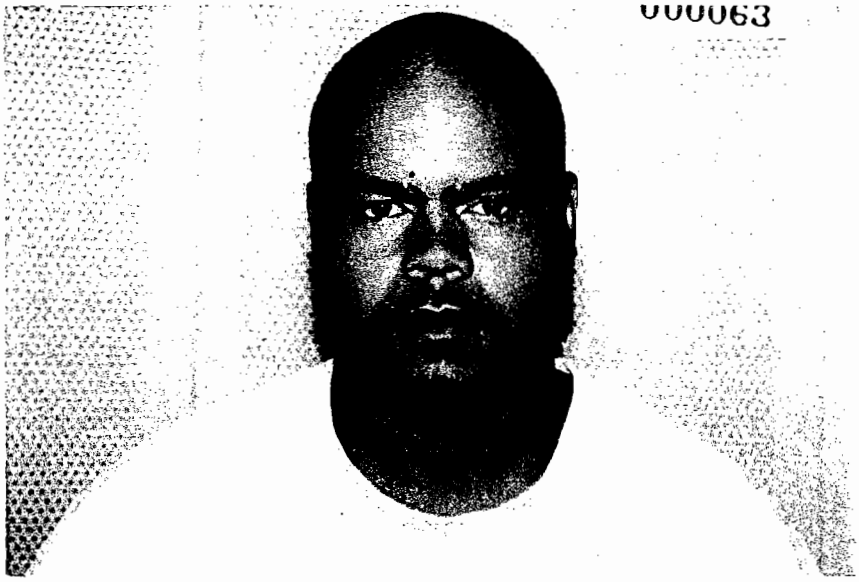
Case No. INF-027515

Date 1-30-01

☐ Piff/Peo ☒ 2-26-01 Exh# E

☑ Deft

☐ Court ☒ Ident# E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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman Dupree Dodd Croley Maier LLP, 180 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman Dupree Dodd Croley Maier LLP for the collection and processing of correspondence.

On July 6, 2012, I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with Futterman Dupree Dodd Croley Maier LLP's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

LEGAL MAIL Paul Nathan Henderson P.O. Box T-19123 San Quentin, CA 94974	Morey Garelick California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105
Riverside County Superior Court 46-200 Oasis Street Indio, CA 92201	Jennifer Anne Jadovitz *(2 copies)* Deputy Attorney General 110 W. "A" Street San Diego, CA 92101
Nisha Shah Miro Cizin Habeas Corpus Resource Center 303 Second Street, #400 San Francisco, CA 94107-1328	

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

Executed on July 6, 2012, at San Francisco, California.

Lori Dotson