IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, vs. WARREN JUSTIN HARDY, Defendant and Appellant.	No. S113421 ~~S111342~~ Los Angeles County Sup.Ct. No NA039436-02

Automatic Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment following trial and a judgment of death which disposes of all issues between the parties and is authorized by Penal Code[1] section 1239, subdivision (b), and the California Rules of Court, rule 8.600, subdivision (a).

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[1] All future statutory references are to the Penal Code unless otherwise noted.

INTRODUCTION

The night of December 28, 1998, in Long Beach changed lives forever. It began with a chance, late night, drunken encounter between appellant Warren Hardy, his two companions, and Penny Sigler. Hardy, his younger brother Jamelle Armstrong and Kevin Pearson, all young black men who had been drinking earlier throughout the evening, walked a Long Beach street late at night. They saw Sigler, a middle-aged, white woman, walking towards them. She yelled and cursed the young men, calling them "niggers." Hardy and his companions crossed the street to confront Sigler. The situation escalated violently out of control. Sigler was left dead after being raped, penetrated with a wooden stick, beaten, and her property taken. Three young men were sent to death row.

An all-white jury found Hardy guilty based almost entirely on his own statements to police. There were no percipient witnesses who testified, and very little forensic evidence. The jury found Hardy was an aider or abettor, not the principal. Jurors were unconvinced Hardy personally used the wooden stick used to beat Sigler and penetrate her. Yet, jurors sentenced Hardy to death following a penalty trial where the prosecution argued Hardy was the leader of the three men who attacked Sigler. Hardy's leadership role was speculation, and unlikely to say the least. Hardy dropped out of the tenth

grade, has an I.Q of only 83, and had been a lifelong follower. His age of 22 years hardly gave Hardy seniority over his companions Pearson and Armstrong, who were 21 and 18, respectively.

Not only was Hardy dwarfed mentally, he also was physically dwarfed by the other two men. Pearson was about six feet tall and weighed around 175 pounds. Armstrong was five feet, 10 inches tall, weighing about 160. Hardy came in at a diminutive five feet, four and 150 pounds. Hardy's height, weight, age, and low intelligence, along with his history of being an underdog, made him the most improbable of leaders. Hardy was an unwanted child of an unwed teenage mother, whose own grandmother threatened to cut Hardy from his mother's body. Hardy suffered from congenital, physical deformities, including skin abnormalities and crossed eyes, and learning disabilities. Hardy's stepfather rejected him preferring his own son (Armstrong). Hardy's parents frequently abused alcohol, drugs, and each other in young Hardy's life. As a young adult, Hardy suffered depression and attempted suicide.

Errors in the trial began early during jury selection, and continued through the penalty phase. Jury selection in Hardy's trial, like that of co-defendant Pearson,[2] was marked by the erroneous excusal of prospective jurors

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[2] *People v. Pearson* (2012) 53 Cal.4th 306, 327, reversed former co-defendant Pearson's capital conviction based on the improper exclusion of qualified jurors by the same prosecutor in Hardy's separate trial.

who had concerns over the death penalty, yet were qualified. The prosecutor exercised peremptory challenges against every black prospective juror who made it into the jury box, and achieved a jury without a single black juror. In this classically charged racial case where three, young, black men attacked, sexually assaulted, and killed an older white woman, the prosecutor successfully and systematically excluded blacks from the jury.

During the guilt trial, Hardy was prevented from introducing evidence that Sigler was under the influence of alcohol and methamphetamine when she encountered him and his companions, calling them "niggers." The prosecution emphasized the vicious attack and penetration, relying on the testimony of a deputy coroner. But the testifying coroner was not the one who actually retrieved and catalogued the evidence of a splinter embedded in Sigler's cervix. Nor could he identify who had. The trial court gave legally incorrect and confusing instructions in multiple instances. At the penalty phase, the prosecution introduced improper aggravation of gang affiliation and activity, and an incident when Hardy's own son had been stabbed. Evidence of the stabbing incident included police suspicion that Hardy stabbed his own son. The prosecutor successfully prevented Hardy from introducing the results of the police and child agency investigations into the incident, which did not

result in charges or the boy's removal from the home. Hardy was portrayed as a hardened gangster and abuser when competent evidence supported neither.

In addition to the issues touched on by this introduction, the brief discusses numerous, additional reasons why the guilt and penalty phases of Hardy's trial detract from the reliability of the verdicts and sentence and require reversal of the judgment against him. The events on Wardlow Road on December 28, 1998, were horribly violent and shocking. Yet Hardy was entitled to fair trials on guilt and punishment based on competent evidence, and he did not receive them.

STATEMENT OF THE CASE

On January 8, 1999, the Los Angeles County District Attorney filed a felony complaint against co-defendant Kevin Pearson, and later amended the complaint on January 11, 1999, to add appellant Warren Hardy and Jamelle Armstrong. (1CT 1-10.) A preliminary hearing was held on July 29, and 30, 1999, after which all three defendants were held to answer. (1CT 40-193.) An information was filed on August 12, 1999, against all three defendants (1CT 195-201), and was later amended on November 10, 1999 (1CT 214-219), and March 6, 2002 (2CT 368-379). On April 24, 2002, the final amended information was filed charging Hardy and Pearson with eight violations of the Penal Code.[3] All offenses occurred on the same date, and involved the same victim, Penny Sigler. (2CT 394-403.) Count 1 charged Hardy with the first degree murder of Sigler. (§ 187, subd. (a).) Count 1 also alleged as special circumstances that the murder was committed during the following offenses: a robbery (§ 190.2 (a)(17)(A)); a kidnapping (§ 190.2 (a)(17)(B)); a kidnapping for the purpose of rape (§ 190.2 (a)(17)(B)); a rape (§ 190.2 (a)(17)(C); and rape by foreign object (§ 190.2(a)(17)(K)). Count 1 additionally alleged the murder was intentional and involved infliction of torture. (§ 190.2(a)(18)). Count 2 charged second degree robbery. (§ 211.)

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[3] Armstong was not named in this amended information. (2CT 394.)

Count 3 charged kidnapping to commit rape. (§ 209, subd. (b)(1).) Count 4 charged forcible rape while acting in concert. (§ 264.1.) Count 5 charged forcible rape. (§ 261, subd. (a)(2).) Count 6 charged sexual penetration by foreign object while acting in concert. (§§ 289, subd.(a)(1), 264.1.) Count 7 charged sexual penetration by foreign object. (§ 289, subd. (a)(1).) Count 8 charged torture. (§ 206.) Counts 1 through 8 alleged as an enhancement that Hardy personally used a dangerous and deadly weapon. (§ 12022, subd. (b)(1).) Counts 3, and 5 through 7, alleged as an enhancement that Hardy was armed with, and used a dangerous and deadly weapon. (§ 12022.3, subds. (a) and (b).) Counts 4 through 6 alleged as enhancements that Sigler was kidnapped and tortured (§ 667.61, subds. (a) and (d)); and kidnapped and a deadly weapon was used (§ 667.61, subds (a), (b), and (e)). The amended information alleged Hardy had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12 (a)-(d)), and was ineligible for probation (§ 1203 (e)(4)). (3CT 393-403.)

The three defendants were severed for trial, and each was tried separately. (2RT 48E, 50-51; 5RT 791-792.) On October 22, 2002, the trial court bifurcated trial on Hardy's strike prior, instructed prospective jurors and distributed questionnaires. (6RT 895-897.) On October 31, 2002, voir dire commenced, and the jury and alternates were impaneled on November 12,

2002. (7RT 1084; 9RT 1862-1863, 1879-1876.) Hardy made a *Batson/Wheeler* motion, which the court heard and denied. (9RT 1876-1885; 2CT 499.)

Trial testimony commenced on November 13, 2002. (10RT 1925.) The jury began deliberations on the guilt phase on November 19, 2002. (11RT 2422; 2CT 587.) On November 22, 2002, the jury handed up guilty verdicts on all eight counts, finding Hardy guilty of murder as an aider and abettor. (12RT 2528-2534; 3CT 597-605.) The jury found true the special circumstances. (12RT 2528.) The jury made not true findings on the enhancements to Counts 2 through 5, and was unable to reach findings on the personal use enhancement to Counts 1, and 6 through 8. (12RT 2528-2534; 3CT 597-605.) The jury found true the enhancement allegation to Counts 4 through 8 that the victim was kidnapped and tortured (§667.61, subds. (a) and (d)), and was unable to reach findings on whether there was kidnapping with use of a deadly weapon (§667.61, subds. (a), (b) and (e)). (12RT 2528-2534; 3CT 597-605.) Hardy admitted his prior strike. (12RT 2537-2538.)

The penalty phase commenced on December 2, 2002. (12RT 2541; 3CT 608.) The jury began penalty deliberations on December 10, 2002. (14RT 3177; 3CT 640.) The jury returned a verdict of death on December 11, 2002. (14RT 3179; 3CT 643.) On January 23, 2003, the trial court heard and

denied Hardy's motion to modify the judgment of death. (14RT 3191-3203.) The trial court imposed sentence on counts 2 through 8 as follows: count 2 (robbery) a concurrent middle term of three years, doubled to six; stayed imposition on count 3 (kidnapping for rape); a concurrent middle term of seven years on count 4 (rape in concert), doubled to 14 years; a concurrent term 25 years to life on count 5 (forcible rape), doubled to 50 years to life; a concurrent middle term of six years on each of counts 6 and 7 (penetration by a foreign object in concert, and penetration by a foreign object), doubled to 12 years each; and a concurrent term of life with the possibility of parole on count 8 (torture). (14RT 3205-3206.)

STATEMENT OF FACTS

A. Guilt Phase.

1. Prosecution Evidence.

a. The Three Defendants.

Hardy and Armstrong were half brothers. At the time of the incident, Hardy was 22 years old; Armstrong was 18; and Pearson was 21. (11RT 2238, 2250.) The prosecutor brought both Pearson and Armstrong before the jury for identification. (11RT 2273, 2278.) Pearson was about six feet tall, and weighed around 170 or 175 pounds. (11RT 2252, 2278-2279.) Armstrong was about five feet, 10 inches tall, and weighed about 160 pounds. (11RT 2252, 2274, 2278.) Hardy was about five feet, four inches tall and about 150 pounds. (11RT 2252, 2256.) Sigler was five feet, four inches tall, and weighed 113 pounds. (11RT 2238.)

b. Initial Discovery of the Crime Scene.

In 1998 and 1999, George Bark worked for Caltrans. In January 1999, Bark was working along the 405 freeway west of Long Beach Boulevard near Wardlow Road. (10RT 2025.) Bark's job was picking up debris and repairing fences along the freeway embankment. While doing so, Bark found a woman's body. (10RT 2025.) Bark felt for a pulse, but the body was cold. He left the body and notified his supervisor, who contacted the California

Highway Patrol (CHP). (10RT 2026.) When he found the body, Bark was at an upper area along the freeway, looking down towards a fence along a ditch. (10RT 2027.) The fence was black screen, held in place by large stakes, some of which were down. (10RT 2026.) Exhibit 3A looked like one of the stakes. Exhibits 3B and 3C looked like broken stakes. (10RT 2027.) The wind broke the stakes. Bark picked up the bad ones, and replaced unbroken ones. (10RT 2028.)

Detective Brian McMahon of the Long Beach Police Department (LBPD) arrived at the crime scene on December 29, 1998, around 3:30 p.m. It was at the rear of 3395 Long Beach Boulevard, a small shopping center complex, at the intersection of Wardlow Road where Interstate 405 passed over the streets. (11RT 2221, 2223.) Wardlow Road ran east to west. Long Beach Boulevard ran north to south. (11T 2225.)

A small retaining wall ran from the drainage ditch to the sidewalk of Wardlow, separating the parking lot and stores from a small, triangular shaped area adjacent to the sidewalk. The crime scene was a triangular area. (11RT 2222-2223.) There was a lot of leaves, debris, bushes and eucalyptus trees. A chain link fence ran along the drainage ditch and the rear of the buildings to Long Beach Boulevard. (11RT 2223.) The drainage ditch from Long Beach Boulevard to Wardlow Road was about 410 feet. (11RT 2231.) The fence

was about a foot away from the back wall of the businesses. (11RT 2227.) The fence and the cinder block wall intersected. (11RT 2223.) The fence that separated the parking lot was about six feet high. Right next to the fence was the cinder block wall, which was about three and a half to four feet high. (11RT 2239.) A portion of the chain link fence had been pulled back. Someone could have squeezed through, but it would have been difficult. (11RT 2240; Exh. 16A.) The fence was bent down in different areas along its entire length. (11RT 2240.) The fence had black mesh nylon, held up by wooden stakes, that kept debris from washing down the embankment. (11RT 2224.) Photographs of the area taken by LBPD personnel on December 29, 1998, showed the body and a broken wooden stake. (11RT 2224, 2226 -2229; Exh. 16 [photo board], 23.) The body was approximately 150 feet south of Wardlow Road, approximately in the mid-building area. (11RT 2231.) The body was about 35 feet from the chain link fence, and about the same distance from the wall. (11RT 2238.)

Placard 27 in one photograph (Exh. 16H) marked the location of a shoe. (11RT 2230.) It was a very dark area, even in the late afternoon when the photographs were taken. (11RT 2231.) There were no lights in the back of the businesses. There were no street lights on either Wardlow Road or Long Beach Boulevard. There was lighting in the parking lot that illuminated only

the lot, not the back of the businesses or the embankment. (11RT 2233.) A group of photographs depicted the body the way it was found. (11RT 2242; Exh. 11.) It was difficult to see the body because of the location, the lighting, and the mulch on top of it. (11RT 2242-2243.) Two photographs (Exh. 23C, 23D) showed several small areas of blood splattering on the wall. There also was blood on the bushes that was difficult to photograph. (11RT 2235-2236.) The closest blood splatter to the body was about 10 to 12 feet away. (11RT 2249, 2247.) There was a large amount of splatter in the drainage area, and drag marks over the mesh fencing and through the mulch. (11RT 2249.) The splatter in the drainage ditch was about 12 feet from the body. (11RT 2228.) The body had been deposited with mulch piled on top. (11RT 2249.)

Later, McMahon found and picked up a stake that was later introduced as evidence. He did not believe it was the weapon used, but was a similar item to what could have been used. McMahon found the stake on the embankment after the prosecutor requested one. It was just for demonstration, but was not the instrument used in the crime. (11RT 2251.)

Sigler's death occurred around 11:00 p.m. to midnight on December 28, 1998. (11RT 2250.) Sigler lived about one half to three quarters of a mile away, at 342 Main. (11RT 2237.)

c. The Food Stamp Booklet.

At some time before the homicide, a shipment of 2,000 Los Angeles County food stamps was sent to the Nix check cashing store at 6583 Atlantic Boulevard, number 106, in Long Beach, California. The shipment included food stamps with the serial number F02520550V. (10RT 2034.) Joseph O'Brien had been with Sigler earlier on the night of her death. The parties stipulated if O'Brien had been called to testify, he would have testified that on December 29, 1998, he gave Sigler a $10 food stamp coupon book containing $5 and $1 coupons to buy soda and candy. O'Brien had obtained the food stamps from Nix check cashing store on Atlantic Boulevard. Sigler left home between 10:00 and 11:00 p.m. That was the last time O'Brien saw Sigler. (10RT 2065.)

Los Angeles Police Department (LAPD) Detective Paul Edwards assisted other detectives assigned to the case. On January 6, 1999, Edwards returned to the crime scene after receiving information that Sigler was in possession of food stamps at the time of her death. (10RT 2050-2052.) He went to the crime scene along the south side of 3395 Long Beach Boulevard, a small strip mall. Edwards scoured the area of the small, triangular, wooded area that was the crime scene. He found a single white sock. (10RT 2054.) At the opposite end of the building, on the southeast side, there was a ladder

leading to the roof. At the foot of the ladder, he found the cover of a food coupon book. (10RT 2054.) The inside cover bore the serial number F02520550V. (10RT 2057.)

The Lorena Market was located at 6625 South Broadway, Los Angeles, California. (10RT 2036.) Efrain Garcia managed the family run business. (10RT 2035.) Approximately 30 percent of the market's business was in food stamps. Usually, if a customer had a food stamps book, Garcia did not look at the customer's face. (10RT 2036.) Garcia recognized Hardy though, and remembered seeing him in the market between Christmas 1998 and New Year's Eve 1999. (10RT 2046.) Hardy came into the market and bought food for children with food stamps. (10RT 2044, 2046.) Garcia also recognized photographs of other individuals as customers who came to the market. Those photographs Garcia recognized included those of Damion Monson, Maurice McDaniel, and co-defendant Armstrong. (10RT 2047.) Garcia also viewed a photograph of co-defendant Pearson. Garcia thought he recognized Pearson, but was not sure. (10RT 2049.)

Police came to the market, and asked Garcia about food stamps. The market deposited food stamps once a month. (10RT 2037.) Although the market had made a deposit just before the police came, it still had food stamps received between December 23, and 30, 1998. (10RT 2037-2038.) Garcia's

father retrieved the stamps from their home. (10RT 2038.) Two of the food stamps bore the serial number F02520550V. (10RT 2038-2039; Exh. 18A-B.) Garcia recognized the market's stamp and account number on the food stamps. (10RT 2040.)

d. Search and Seizure at Hardy's Home.

Edwards executed a search warrant at 1:15 a.m. on January 7, 1999, to search 335 ½ West 69th Street, where Hardy lived. (10RT 2057-2058.) Edwards seized a gray gym bag from the north closet of the master bedroom. Inside the gym bag were a brown checked shirt, Nautica blue jeans, and a green long sleeved sweater with a blue stripe. In the same closet, Edwards found a brown rimmed hat, a white T-shirt, and American Eagle blue jeans. Under the bed, Edwards found black Guess jeans, and shoes with an unusual circular pattern on the soles. (10RT 2058, 2062.) The same unusual pattern on the soles of the shoes appeared in a photograph taken at the crime scene. (10RT 2059.) Next to the bed, Edwards found a shoe box containing a PacBell telephone bill in Hardy's name. (10RT 2058.) In a tin can on the television in the master bedroom, Edwards found a food stamp coupon with a different serial number from the booklet found at the crime scene. There were several black leather jackets in the master bedroom. One leather jacket hung on the

door to the bedroom, and appeared to have blood stains on it. (10RT 2059; Exh. 13A.)

Edwards searched a second bedroom in the northwest corner of the house, which appeared to be the children's room. The room had two beds. Edwards found a blue Travel-Lite gym bag underneath the pillow at the head of the bed closest to the door. The bag contained a North Carolina sweatshirt, a tan Dickies shirt, tan Dickies pants, a football jersey, white shirt, blue jeans, Arizona brand overalls, and black Redwood boots. (10RT 2059-2061, 2063.) Hardy later identified the overalls as belonging to Armstrong, and the boots as belonging to Pearson. (11RT 2166-2167.)

There was an employment application in Hardy's name on the televison stand in the living room. (10RT 2059-2060.)

e. Hardy's Statements.

LBPD Detective Steven Prell questioned Hardy on January 7, 1999, at the police station. (10RT 2067.) Hardy was in custody, then transported to the interview room where he remained from 2:00 to 5:00 a.m., and was advised of his rights at 5:10 a.m. (11RT 2172.) The interview concluded at 1:15 p.m. the following day. (11RT 2173.) At the start of the interview, Prell and his partner Brian McMahon introduced themselves. (10RT 2067, 2069.) Taping of interviews was not the normal protocol. A visible tape recorder made

people inhibited and nervous. Generally, Prell interviewed people off tape to avoid covert recording. (10RT 2069-2070.) At 5:10 a.m., Prell advised Hardy of his rights using a form (Exh. 25). (10RT 2071.) Hardy wrote his name on the form, initialed each of six phrases, and signed. (10RT 2073-2075.) Prell printed his name on the form, and McMahon signed it. (10RT 2075.) Prell told Hardy the detectives were investigating a murder that occurred on December 30, 1998, but he did not initially disclose the location of the murder. (10RT 2076-2077.)

Hardy made three unrecorded statements, and one recorded statement about the incident. (10RT 2076, 2152; 11RT 2175.) The first and second statements were made during a single session lasting about an hour and 25 minutes. (10RT 2090.) In the first statement, Hardy denied any involvement whatsoever. He said on the night of the incident he was at his mother's house near Seventh and Redondo, at Monte Gmur's house, and then took a bus to his own residence on 69th Street. (10RT 2076, 2079.) Hardy said Gmur's house was in the area of Anaheim and Cedar in Long Beach. Prell estimated this was two to three miles from the crime scene. (10RT 2077.) Hardy awoke at his home. His friend Shawn drove Hardy to his mother's house in the area of 7th and Redondo where Hardy picked up some clothes. Shawn then drove Hardy to an adult bookstore in Long Beach, then back home to Los Angeles. (10RT

2079-2080.) While at the adult bookstore, Hardy bought edible panties, and Shawn bought a dildo. The two went to a fish market in South Central Los Angeles at 120th and Avalon, then back to 69th Street. (10RT 2080.) The two ate something from Burger King. (10RT 2081.)

When Hardy was not forthcoming, Prell asked if Hardy had heard about a murder, or watched the news about a woman found on the side of the freeway. (10RT 2081-2082.) There were newscasts and newspaper articles about the murder. The newscasts attempted to identify the woman. (10RT 2082-2083.)

Hardy then made a second unrecorded statement. He said he received a call at his home on 69th Street informing him about the newscasts. (10RT 2083.) His fiancé's mother, Trisha Gartner, called. (10RT 2084.) After the call, Hardy's fiancé turned on the television to watch the newscast. Prell had searched Hardy's residence on 69th Street before questioning Hardy. (10RT 2085.) An inventory of items seized had been prepared although Prell had not seen it. He learned from other officers what items were seized. (10RT 2085-2086.)

Prell asked about the clothing seized from Hardy's residence because he was trying to determine whose clothes they were. (10RT 2085.) Prell asked Hardy whether he owned a leather jacket. Hardy said he owned a black

leather jacket that was hanging on the door knob behind the bedroom door. Prell thought Hardy said there was one leather jacket, and it belonged to Hardy. (10RT 2086.) Prell thought Hardy said co-defendant Armstrong had borrowed Hardy's leather jacket. Hardy said that on the day he went to the adult bookstore, he first went to his mother's house. He retrieved the jacket from his mother's house where Armstrong had left it. (10RT 2087-2088.) Prell asked about shoes, and Hardy admitted he had shoes at the 69th Street residence, and that he wore a size nine. Hardy said the last time he had been in Long Beach was on December 29, 1998, around 7:30 p.m. It was after he left the adult bookstore in Long Beach. (10RT 2088.) This was the day after the murder. (11RT 2165.)

During the second statement, Hardy provided no other information about his whereabouts on the night of the murder.[4] (10RT 2089.) Hardy said he left Gmur's house, and rode buses back to his home in Los Angeles. He admitted he might have the dates wrong, and could have been confused by one or two days. Prell testified that Hardy was going back and forth in his statement because he was getting dates confused. At one point, Hardy said he

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[4] Prell's initial testimony on this point was inconsistent with his later testimony when he described details Hardy provided during his second unrecorded statement. (See e.g., 11RT 2164-2168.)

was on a bus, or buses. When told he had been seen on buses and identified, Hardy denied riding a bus that night. (10RT 2089-2090.)

Following a 15 minute break, Hardy made a third unrecorded statement. In an attempt to prompt Hardy, Prell informed Hardy the platforms areas of the rail system in Los Angeles had video surveillance cameras. (10RT 2091.) Prell told Hardy that his brother, Armstrong, was in custody. (10RT 2092.) Hardy became visibly shaken and upset. Hardy asked Prell to prove Armstrong was in custody, then Hardy would tell the truth. Hardy wanted to see Armstrong. Instead, Prell wrote the date on a piece of paper, and gave it to Hardy to write whatever he wanted on it. (10RT 2093.) Hardy wrote, "I love you." (10RT 2094; 11RT 2245-2246; Exhs. 26, 28.) McMahon took the paper into Armstrong while Prell remained with Hardy. McMahon returned with the paper and a developing Polaroid. Hardy watched the picture develop. (See 10RT 2133, 2134; Exh. 29.) He was visibly upset and crying. Hardy said he would tell the truth. (10RT 2095.)

Hardy began his final statement, which Prell ultimately recorded. Hardy talked about the activities at Gmur's house with the music studio in Long Beach. (10RT 2096.) Hardy and Pearson went to a liquor store and bought Night Train, Thunderbird, Cisco, and Old English. (11RT 2178.) They mixed all the liquor together, and began drinking. (11RT 2178.) Hardy,

Armstrong, Pearson, Chris, and a man Hardy knew only as Boulevard, left Gmur's house around 11:00 or 11:30 p.m. and went to the Metro rail platform. (10RT 2099, 2101.) Chris and Boulevard boarded southbound. Hardy, Pearson and Armstrong went north to Wardlow station in Long Beach. (10RT 2100.) From the station, the three walked to a bus stop. They walked east on Wardlow, on the north sidewalk, toward Long Beach Boulevard. (10RT 2101-2102.)

When Hardy and his two companions reached the other side of an overpass, there was a white female on the south sidewalk of Wardlow. She yelled, "fuck you, niggers," at them out of the blue. They did not provoke her. (10RT 2102-2103; 11RT 2178, 2179.) The three men crossed the street together toward her. (10RT 2102-2103; 11RT 2179.) Hardy suspected she made the remark because she was drunk or on drugs. (11RT 2184.) Hardy reported that something just "clicked" when she made the racial slur. He said he heard voices, but did not know whose voices. (11RT 2180.) After crossing the street, all three men approached the woman. Hardy asked, "who the fuck you calling nigger?" Everyone began yelling at one another. The next thing Hardy remembered the woman was on the ground. Hardy did not know how the woman got on the ground. (10RT 2103.) The woman was lying on the ground on her back. Hardy removed her shoes. He began to climb up an

embankment alongside the freeway. He intended to throw her shoes on top of a building, but he lost his footing and slipped. The woman was lying on the ground nude and on her back. The next thing Hardy knew he was down on the ground next to her. She was nude and bloody. Hardy did not know how she got bloody. He just realized she had a bloody face. The woman asked for help in a faint voice, and extended her hand to him. (10RT 2104; 11RT 2180.) She used the words, "help me." (11RT 2174.) He did nothing when she asked for help. She was lying there nude, bloodied, and asking for help. Pearson told Hardy to collect the clothes, and Hardy did so. He gathered clothes from around the woman's body, and placed them into a brown grocery bag. He collected one shoe. (10RT 2105.) The shoe was near the woman's head. (10RT 2106.)

As Hardy picked up the shoe, Pearson and Armstrong jumped over a wall or fence. (10RT 2106.) Hardy followed them over a wall to the other side of the fence. (10RT 2105, 2106.) The three men then crossed the street to the bus stop on Long Beach Boulevard, north of Wardlow. All three boarded bus number 60 to Los Angeles. (10RT 2106-2107.) Pearson had the bag with the woman's clothing. (10RT 2107.) While on the bus, Hardy argued with another passenger. (10RT 2107, 2134.) Hardy, Pearson and Armstrong exited the bus near Florence Avenue to transfer to another bus.

After they were on the second bus, Hardy noticed Pearson no longer had the bag of clothing. (10RT 2134.) They exited the bus at Grand, then went to Hardy's house on 69th Street. (10RT 2135.)

Prell and McMahon talked to Hardy about getting a court order for a dental impression from him, Pearson and Armstrong. The detectives told Hardy a test would show whether a sex act had occurred with the woman. Hardy denied having sex with the woman, but admitted he bit her once on the "chest area." (10RT 2136.) Hardy said he touched the woman three times: once when he bit her on the chest area, twice when he punched her in the jaw, and when he checked her pulse or her neck to see if she was breathing. (11RT 2167, 2185.) He bit her on the chest before she was on the other side of the fence. (11RT 2168.) Hardy did not remember biting her anywhere else. (11RT 2185.)

Hardy reviewed the statement he made. He confirmed the portions about Gmur's house, going to the Metrorail, to Wardlow station, and walking east on Wardlow were correct. (10RT 2137.) Hardy confirmed the accuracy of his being on the north curb of Wardlow when the woman was on the south curb, and that she yelled the racial remark at them. (10RT 2137.) Hardy then added details to his earlier statement. After the three men crossed the street, the woman grabbed at Hardy, and he bit her on the left breast in self-defense.

(10RT 2137-2138.) The woman slapped him in the face after he bit her. Pearson directed Hardy and Armstrong to get the woman over the fence. (10RT 2138-2139.) He repeated that he could not recall how they got the woman over the fence that ran along the freeway. (10RT 2142.) Pearson, and perhaps Armstrong also, had ordered the woman to lie down. (10RT 2139; 11RT 2169.) They were along the embankment on the other side of the fence. (10RT 2139.) Pearson told Hardy to remove the woman's shoes, which he did. Hardy could not recall if the woman wore socks. Hardy saw Pearson unbutton the woman's pants. Hardy turned and walked up the embankment toward the freeway while carrying the shoes. He planned to throw the shoes on top of an adjacent building. (10RT 2139.)

As Hardy walked up the freeway embankment, he saw the woman's pants pulled down around her knees. Hardy was paying attention to several things as he was walking. Hardy lost his footing and slipped, so he was not paying total attention when he walked up the embankment. Prell suspected Hardy slipped or tripped, fell a bit, and dropped one of the shoes. (10RT 2141-2142.) Hardy was angry about falling. (10RT 2144.) Hardy saw Pearson on top of the woman, moving up and down in a thrusting motion. Pearson was in a push-up position over the woman. She was on her back. Pearson got up, and ordered the woman to orally copulate him. (10RT 2142;

11RT 2188.) Prell did not recall if Hardy used the word "rape." Hardy watched and estimated Pearson had intercourse with the woman for about a minute. It was after Hardy fell that he saw Pearson get up and order the woman to orally copulate him. (10RT 2143.) It sickened Hardy to watch. (10RT 2145; 11RT 2188.) The woman was nude. He saw no injuries at that time. (10RT 2145.) Initially, Hardy said Pearson was the only one who had sex with the woman, and only for a short time before Pearson moved and had oral sex with her. (11RT 2191.) Later, Hardy said only that Armstrong had not had sex with the woman to Hardy's knowledge. (11RT 2192.)

Hardy saw Pearson was looking for something. (10RT 2147; 11RT 2188.) Hardy continued to be angry. Hardy went to the woman, and punched her in the jaw twice with a closed fist. (10RT 2147; 11RT 2169.) The woman was on her back, and Hardy was close enough to punch her. (10RT 2146.) He used the right side of her body to support himself as he stood. (11RT 2171.) The woman reached out with her hand and asked for help. She used profanities, saying "you mother fuckers." Hardy did nothing. He ignored the woman as he stood next to her. (10RT 2147.) Pearson was still in the area, but Hardy was not clear about Pearson's exact location. (10RT 2146.) Armstrong appeared out of the dark carrying a wooden stick. (10RT 2148.) The stick was 36 inches long and an inch and half wide. (11RT 2189.)

Armstrong gave the stick to Pearson who used it to hit the woman numerous times in the face. (10RT 2148; 11RT 2189.) Pearson then stomped on the woman with his boots. (10RT 2148.) The Redwood boots in Hardy's bedroom belonged to Pearson who wore them on the night of the murder. (11RT 2166-2167.) Hardy then gathered the clothing and one shoe. (10RT 2148.) He found a brown, plastic grocery bag in the ditch next the embankment. (10RT 2149.)

Hardy climbed over the fence with Armstrong and Pearson. Hardy looked back and saw that the wooden stick Armstrong had given to Pearson was protruding from the woman's vagina. (10RT 2149.) Pearson was the last person Hardy saw with the stick. (11RT 2190.) Hardy asked Armstrong to go back and get the stick. Armstrong refused. (10RT 2149.) Hardy climbed back over the fence, went to the woman, and jacked the stick from her vagina. He had to twist the stick to remove it. The woman was bloody. (10RT 2150.)

Hardy made inconsistent statements about the stick. Hardy said he threw the stick into the parking lot. He did so after he climbed over the fence and into the parking lot. Hardy also said he gave the stick to Armstrong. (10RT 2150.) Later, Hardy said he threw the stick into a dumpster. (11RT 2190.) Hardy also said that Armstrong carried the stick while the three men walked across Long Beach Boulevard. He said Armstrong carried the stick

while Pearson carried the bag with clothes. They walked to the east side of Long Beach Boulevard. (10RT 2150.) Hardy said Armstrong put the stick into a dumpster behind the businesses on the east side of Long Beach Boulevard just north of Wardlow. The three men boarded the bus and rode to Florence where they switched to another bus. (10RT 2151.)

Hardy said he was wearing a short-sleeved, light brown shirt, darker brown pants, three-quarter length high, black leather shoes, and a black leather jacket. (10RT 2151.) The jacket he wore was the one that had been hanging behind the bedroom door. (10RT 2152; 11RT 2165.) The black leather shoes also were in the bedroom. (11RT 2165.)

After Hardy made this third unrecorded statement, Prell asked Hardy to record a statement. (10RT 2152.) Hardy gave a 44-minute long recorded statement, repeating his third unrecorded statement. (10RT 2152; Exh. 29.) Transcripts of the recording were provided to jurors. (10RT 2156; Exh. 29A.) The tape recording was played to jurors. (10RT 2159.)

Hardy said he had trouble sleeping because of the vision of the woman's hand reaching to him. He told no one about the incident. (11RT 2182.) He did not talk to Armstrong about it. All three of the men had been at Hardy's house on 69th Street after the incident, and left their clothing there. Hardy threw away his shirt and pants, but the jacket and boots Pearson wore

were still at the house. (11RT 2183-2184.) Hardy began to cry. Pearson threatened to kill Hardy if he talked. (11RT 2186.)

f. Forensic Evidence.

i. The Autopsy.

Raffi Djabourian, a deputy medical examiner for the Los Angeles County coroner, had performed approximately 1,000 autopsies. On January 1, 1999, he performed autopsy number 98-08891 on Penny Sigler. Djabourian's procedure was first to photograph the body, and, if there were clothes, he examined the clothing. Next, he performed an external examination on the autopsy table. (10RT 1925.) Finally, he performed an internal examination looking for evidence of injury or disease, and collecting evidence. (10RT 1926.) In Sigler's autopsy, there were no clothes to examine. (10RT 1926.)

Exhibit 1A-H were coroner's photographs. Exhibit 1A depicted an abrasion to the lower left thigh. Exhibit 1B depicted an abrasion to the lower back. (10RT 1927.) Exhibit 1C depicted a long linear scrape on the left arm and elbow. Exhibit 1D depicted abrasions, scrapes, bruising, and contusions to the neck. Exhibit 1E depicted an eyelid with pinpoint hemorrhages. Exhibit 1F depicted an eyelid with pinpoint hemorrhages and lacerations. Djabournian explained that a laceration, contusion, or abrasion was caused by blunt force

traumatic injury. That meant impact with a hard object. (10RT 1928.) Exhibit 1G depicted the back right hand with bruising at the little finger. Exhibit 1H depicted the left hand with extensive bruising, lacerations, and tearing between the webs of the fingers. (10RT 1929.)

Exhibit 2 was a front and back rendition of Sigler, showing injuries to the right side of the face. (10RT 1930.) The injuries were to the right side of the scalp above and at the ear, with multiple lacerations from blunt force trauma. The right ear was torn off. The left side of the face had injuries to the chin and cheeks, including some evulsion. (10RT 1930.) There was bruising on the front and back of the body, including the right shoulder, left shoulder and neck. There was a bite mark on the inside of the left nipple. The right side abdomen had a rectangular abrasion. Both thighs showed bruising. The left thigh had bruising, abrasions and scrapes. Both lower legs had smaller bruises. Above the knee of the right thigh, there was a lesion or bite, similar to the lesion or bite on the left breast. (10RT 1931.) The back showed bruising to the scalp and back, and abrasions. There were scrapes to the upper and lower back, above the left buttocks and hips. Microscopic examination showed bleeding into underlying tissues suggesting injuries occurred around the time of death or just before death. There was no indication the bruising

was from older injuries. Any hard object could have inflicted the bruises. (10RT 1932.)

Exhibit 3A-C were pieces of a wooden stake. (10RT 1933.) The exhibit was consistent with Sigler's injuries, that is, the abrasions on the abdomen, thigh, and the linear injury to the back. (10RT 1934.) Exhibit 4A-J were photographs of Sigler. Exhibit 4A depicted the front and left side of the face with lacerations on the left cheek, forehead, scalp, mouth and chin. (10RT 1935.) An abrasion to the right neck was also visible. (10RT 1936.) Exhibit 4B was similar to 4A, except white bone was visible. Also, the upper lip was folded back to show tearing insider the mouth. A tooth on the left side was uneven, showing possible recent chipping. Exhibit 4C depicted abrasions to the right neck, and light yellow areas, which were insect bites. (10RT 1936.) Exhibit 4D showed lacerations to the left face. Exhibit 4E showed the right face, with hair shaved to reveal lacerations and bruising to the right ear area, cheek and neck, and the torn right ear. Exhibit 4F depicted lacerations to the top of the scalp. Exhibit 4G depicted contusions to the top of the scalp. (10RT 1937.) Exhibit 4H, taken during the autopsy of neck muscles, showed some hemorrhaging, more prominent to the right side, with bleeding into the tissue. Djarbourian dissected the neck muscles, but could not tell if the injury

was from blunt force trauma or manual strangulation. (10RT 1938.) Exhibit 4J depicted the broken hyoid bone, located under the larynx. (10RT 1039.)

Exhibit 5 was a rendition of the neck area. Several areas showed bruising. Some deeper muscles showed hemorrhaging. (10RT 1943.) The hyoid and lower cartilage of the larynx sustained horn fractures and showed hemorrhaging. Lacerations to the face and head were depicted. (10RT 1944.) All injuries shown in Exhibit 5 were sustained while Sigler was alive. The petechia shown in Exhibit 1E was bleeding into the white of the eye. This could occur during manual strangulation, sudden heart attack and some diseases. (10RT 1945.) The bruising to the right face could have related to the petechia. Application of a stake could cause this injury if enough pressure were applied. Petechia was not commonly the result of a hit, but it could occur. (10RT 1946.)

Exhibit 6A-F were photographs of the genital area before and after autopsy. (10RT 1946-1947.) Exhibit 6A depicted bruising to both sides of the outer genitalia. Exhibit 6B depicted a laceration and some bruising to the external genitalia. Exhibit 6C depicted lacerations, abrasions and bruising to the perineum. (10RT 1947.) Exhibit 6D depicted two lacerations to the anus. Exhibit 6E was a post autopsy photograph of the genitalia depicting areas of prominent bleeding, which indicated pre-death injury. Exhibit 6F depicted the

internal genitalia, including the cervix, which had a laceration and bruising. (10RT 1948.) The vagina near the cervix showed extensive tearing with some hemorrhaging. A splinter type object was recovered. (10RT 1949.)

Exhibit 7 was a rendition of the external genitalia depicting lacerations and bruising. (10RT 1949-1950.) There was a laceration to the vaginal area, and a splinter was well embedded into vaginal tissue. There were lacerations to the anus, approximately four inches from the vaginal opening. The injuries to the genitalia and anus were from a foreign object. (10RT 1951, 1952.) A male penis could not cause these types of injuries except in a young child or the elderly. Sigler was 43 years old. (10RT 1952.) Exhibit 3A-C (pieces of a wooden stake) were consistent with the injuries, especially Exhibits 3B and 3C, which were smaller pieces and tapered. (10RT 1952-1953.) Exhibit 3A was quite large, and Djabourian could not exclude it, but Exhibits 3B and 3C were more likely. (10RT 1953.) Djabourian expected the injuries to the genital area were pre-death because of the amount of bleeding. All injuries occurred in a very narrow time frame. (10RT 1976.)

Exhibit 8 was two envelopes containing small, approximately two millimeter specks or splinters, other loose debris and a larger piece of wood. (10RT 1953-1955.) Djabourian did not know where these items were recovered. (10RT 1954-1955.) He could not read the handwritten report,

which he wrote. (10RT 1954, 1956.) He did not know from the report who recovered these items from Sigler. Dr. Pena supervised Djabourian during the autopsy. It was possible Pena recovered one. (10RT 1954-1955.) Djabourian recalled only the smaller, approximately two millimeter pieces. (10RT 1956.) Djabourian and Pena both examined the genital tissue. (10RT 1957.)

Exhibit 9 was a rendition of the right, left, and front of the head. It showed multiple lacerations to the forehead, a scrape to the right side, the torn right ear, bruising, and scrapes and lacerations to the chin. (10RT 1957-1958.) The middle rendition depicted the front face, head, upper chest and neck. There were bruises on the right side neck with abrasions. There were lacerations to the left side cheek and left temple. The chipped left tooth was depicted. (10RT 1958.) These injuries were consistent with the pieces of the wooden stake. (10RT 1959; see also Exhibit 3.) The third rendition depicted the left side of the face with bruising to the scalp and left cheek, lacerations to the left forehead, and exposed bone on the upper left cheek. (10RT 1958.) The injuries in Exhibits 7 and 9 appeared to be pre-death injuries. (10RT 1961.)

Exhibit 10 was a rendition of injuries noted during the autopsy. The skull bone was fractured on the right side, pushed and broken into several pieces. (10RT 1959.) The right orbit, cheek bones and jaw were fractured and

pushed inward. Bones at the base of the skull were fractured, including a long linear fracture. (10RT 1960.) The linear fracture showed significant force to the right side of the skull. The left lobes of the back and middle brain were bruised. These bruises were consistent with an injury to the base of the skull. The injuries in Exhibit 10 appeared to be pre-death injuries. (10RT 1961.)

Exhibit 10 depicted injuries that were the cause of death. While the bleeding was relatively small, when brain tissue has tremendous trauma it can cause death in various ways. The brain short circuits, and prevents normal functioning when the covering to the brain is torn. These injuries caused the brain to stop functioning. The brain did not send messages to the heart or lungs. That was one mechanism to explain death. (10RT 1962.) Several mechanisms were involved. Djabourian could not determine which injury caused death. The cause of death was multiple injuries to the head and neck. (10RT 1963.) The head injuries would have been relatively rapidly fatal. (10RT 1976.) If Sigler had been hit to the head and neck with a big stick (Exh. 3), this could have rendered her unconscious, similar to a concussion, but more severe. (10RT 1974.) The blunt force injuries were the predominant factors causing death, but it was difficult for Djabourian to exclude manual strangulation with possible asphyxiation. While there were no finger marks on the neck, a stick could have been squeezed onto the neck, or stomping on

the neck could have caused asphyxiation. (10RT 1975.) There would not necessarily be fingerprints with manual strangulation. (10RT 1976.)

Exhibit 11A-D depicted the right thigh. (10RT 1963.) The lesion to the right thigh (Exh. 11D) was consistent with a bite mark. There were 114 total wounds: 94 of which were external, and 20 of which were internal. It was difficult to conclude how long Sigler lived, but death would have been rapid, that is, within minutes of her injuries. (10RT 1964.) Djabourian did not know the order of the injuries. He did not count the fractures, but there were at least 10 to the skull and one to the right rib. There were defensive wounds to the backs of the hands and forearms. There was bruising to the left little finger, and the left hand at the knuckles, the wrists, and back of the left middle finger. (10RT 1965.) There were lacerations to the webs between the index and ring finger, and the ring and little finger. These were defensive wounds. (10RT 1966.) Other injuries to the hands could have been defensive, Djabourian was not sure. (10RT 1967.)

The defensive injuries occurred while Sigler was conscious. Other injuries posed a difficult question as to whether they occurred during consciousness. Nothing about the injuries indicated whether Sigler was conscious. (10RT 1972.) Djabourian could determine pre-death injuries from bleeding, but could not determine consciousness. His opinion, that some

injuries were pre-death, was based on microscopic viewing of the tissues. (10RT 1973.) It was very difficult to conclude which injuries occurred first. (10RT 1976.) The long linear scrape (Exh. 1C) may have been scraped along the sharp portion of a fence. Other injuries were consistent with being thrown over a fence, specifically the multiple abrasions. (10RT 1967; Exh. 1B.)

The petechia (Exh.1E) was consistent with compression to the neck by someone who had a heavy shoe. (10RT 1968.) Any blunt force could be painful. The two bite marks showed bleeding into the underlying tissue, which meant they were pre-death. The bites could have been close to the time of death. (10RT 1968.) The injuries to the genitals were consistent with blunt force trauma. The genital area is sensitive, with numerous nerve endings right under the skin. Djabourian did not know the amount of pain these injuries caused, but believed they would have been extremely painful. The location of the splinters would have been painful. (10RT 1971.) This was similar to something in the eye, except the eye was much more sensitive. (10RT 1972.)

ii. DNA Evidence.

Paul Colman, a criminalist with the Los Angeles County Sheriff's Crime Laboratory, was primarily responsible for the forensic analysis of DNA evidence. (10RT 1979-1980.) DNA was the same throughout life and throughout all parts of the body. (10RT 1982.) DNA evidence had been used

forensically since 1985. (10RT 1982.) Except for identical twins, everyone's DNA was unique.[5] (10RT 1981.) The DNA of brothers shared some patterns, but were not identical. Colman did not know when he conducted his analysis that two samples (from Hardy and Armstrong) were from half brothers. (10RT 2013.)

On March 7, 2000, Colman received four reference samples and 12 unknown samples for analysis. (10RT 1986.) Colman analyzed samples taken from overalls and brown pants (Exh. 12) and from a leather jacket (Exh. 13). (10RT 1992-1993.) The parties stipulated to the chain of custody. (10RT 2031-2032.) Colman compared the samples from these exhibits to known samples from Hardy, the other two co-defendants, and Sigler. (10RT 1995.) The leather jacket had a mixture of DNA, with major and minor contributors. (10RT 1995-1996.) Sigler was a major contributor. Codefendant Armstrong was a possible donor for the minor types on the leather jacket. (10RT 1996.) The brown pants contained a DNA sample that was a clear match to Sigler. (10RT 1999.) Colman also swabbed a bite mark on Sigler and analyzed that sample. (10RT 1999-2000.) This sample revealed a mixture with contributors from two sources. Colman could not identify a major or minor contributor, but

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[5] Colman testified analysis of acquired DNA can be used to distinguish the DNA of identical twins. (10RT 2019-2020.)

concluded the sample consisted of Hardy's and Sigler's DNA. (10RT 2000, 2006.) Based on two different methods of calculations, each based on different assumptions, Colman concluded the bite mark was made by Hardy. (10RT 2006-2012.)

Hardy waived his constitutional rights to trial, and admitted his prior conviction on December 9, 1997, for attempted robbery (§§ 664, 211) in case number NA030710. (12RT 2538.) Defense counsel joined, and agreed there was a factual basis for Hardy's admission. (12RT 2538.)

B. Penalty Phase.

1. Prosecution Evidence.

a. The 1996 Robbery Prior.

Cory Garro testified he and his wife Grace Garro were vacationing in Long Beach, California on December 8, 1996. (12RT 2566.) The Garros went to dinner at the Hyatt, then walked back along the boardwalk to their hotel. (12RT 2566.) Cory Garro noticed three black men to the couple's left as they walked. (12RT 2566–2567.) The three men came within 10 feet of the Garros, approaching them on the left and the right. Cory Garro felt a gun pressed into his chest, and he was asked for his wallet. Garro handed over his wallet while the man with the gun remained in front. Garro's hands were up. His wife was to his side. (12RT 2567.) Garro could see out of the corner of

his eye that one of the men grabbed his wife's purse. She screamed loudly. The man trying to take the purse gave up, and all three men ran away from the hotel. They were unable to take Garro's wife's purse. (12RT 2568.)

A security guard heard Garro's wife's screams. Police arrived within a few minutes. (12RT 2568.) Later that evening, Garro attended a field show-up that was about a five-minute drive from the hotel. He observed the show-up from a distance of about 47 feet, and was unable to make an identification. At trial, Garro did not recognize Hardy. (12RT 2569.)

Karl Mouchan, an LBPD detective received a radio dispatch call just after dusk. While proceeding to the location, Mouchan saw a person running who met the description of one of the suspects. (12RT 2572-2573.) Mouchan was driving a black and white patrol car, which he stopped. The suspect was Hardy, who hid under a parked van. (12RT 2574.) After another officer arrived, Mouchan persuaded Hardy to come out from under the van. Hardy made the statement, "I bet he said I wasn't the one with the gun." (12RT 2574.) Hardy offered to take Mouchan to another suspect. (12RT 2577.)

At Hardy's direction, Mouchan drove to a house in west Long Beach. The house was vacant. Hardy said it was "Eddie" they were looking for, and maybe he had moved. (12RT 2578.) Hardy told Mouchan about "Chocolate," but Hardy wanted a deal before saying more. Hardy said he was not the one

with the gun. (12RT 2579.) He wanted to be released. Mouchan told Hardy he would be booked. (12RT 2579.) Hardy told Mouchan he, Eddie and Chocolate were walking when Chocolate said, "let's get some." That meant get some love from females. Hardy told the others as long as there was no gun, he was okay. When they said "break," Hardy ran. Chocolate had the gun. (12RT 2581-2582.) Hardy directed Mouchan to a second location, which was supposed to be Chocolate's residence. (12RT 2580, 2583.) Chocolate was not there. (12RT 2583.)

Garro's wallet was recovered near the robbery site. (12RT 2583.) At around 2:00 a.m. on December 9, 1996, Mouchan went to Garro's hotel lobby to show Garro photographs of suspects. (12RT 2569.) Garro identified Reginald Wilson as the man who held the gun to Garro's chest. (12RT 2570, 2583.) Garro's wallet was returned to him around the same time. His money was missing. Garro's wife was shaken and hysterical, and had been affected ever since. (12RT 2570.)

b. 2006 Injury to Hardy's Son.

On April 11, 2006, LBPD police officers Jacinto Ponce and Philip Cloughsey responded to a 911 call from Hardy's residence in Long Beach. (12RT 2586-2587, 2598.) The 911 call consisted of screaming, followed by a hang up. (12RT 2626.) Ponce had been to the residence several hours

earlier, but was not sure of the time. The 911 called concerned a child who had been stabbed. (12RT 2587.) When Ponce and Cloughsey arrived, Hardy was holding his four- or five-year old son with a bandage on the steps of the apartment trying to comfort him. (12RT 2588, 2598, 2624.) Hardy told the child to say it was an accident. (12RT 2588, 2626.) Hardy held the boy the whole time. Paramedics arrived. Hardy would not release the boy, who had to be forcibly removed from Hardy's hold. Hardy repeated about four times the instruction to the boy to say it was an accident. (12RT 2589.) The boy reported to police that his injury was an accident. (12RT 2598, 2619.)

Ponce spoke to Hardy about the incident. (12RT 2589.) Hardy said he had keys in his pocket, and the keys stabbed the child. Ponce thought there would have been blood on Hardy, but there was not. (12RT 2590.) Cloughsey recalled Hardy said he had only keys in his pants pocket. (12RT 2625.) Later, Hardy said he picked up his son, and his son was impaled on the knife. (12RT 2592.) Hardy said he had a knife in his front pants pocket with the blade upward facing. Hardy's son was in Hardy's lap, and the boy's left thigh was stabbed. (12RT 2612.) When Ponce told Hardy he had no holes in his pants, Hardy changed his story. (12RT 2592, 2613.) Hardy said he had a knife in his front pants pocket for protection. Ponce read Hardy his *Miranda* rights. (12RT 2592.) Hardy said he picked up his son, and his son screamed. Hardy

then gave another, final, story concerning the kitchen table. Hardy said his son had fallen on the table and cut himself. (12RT 2593, 2613.) Hardy had picked up his son, lost his balance, and fell against the table. Then his son ran to the bedroom screaming, and Hardy saw the boy was bleeding. (12RT 2600, 2613.)

Hardy's son had a large cut to his leg that appeared to be a knife wound. (12RT 2590.) The cut was on the back of his thigh. (12RT 2594.) It was a bleeding puncture wound, not a slice. (12RT 2596.) Ponce looked for a knife. (12RT 2592.) He found a knife with a five-inch blade in a kitchen drawer. It had blood and a piece of tissue on it, but had been wiped. (12RT 2594.) The knife was a steak knife, and Ponce believed it had a serrated edge. (12RT 2596.)

Ponce smelled alcohol on Hardy. (12RT 2598.) His blood alcohol level tested at .10, which was over the .08 legal limit for driving. (12RT 2598, 2618.) Ponce investigated the knife and the pocket of Hardy's pants. (12RT 2615.) The pocket was sufficient to conceal almost all of the knife completely. (12RT 2615.)

Meanwhile, Cloughsey went to the hospital where paramedics had transported Hardy's son by ambulance. (12RT 2627.) The boy's injury was a puncture wound about two inches in diameter to the back of the leg. The boy

received stitches, but Cloughsey could not recall how many. (12RT 2628.) In the emergency room, Hardy's son told Cloughsey that Hardy had come home and picked up some things. Hardy called the boy into the kitchen where Hardy picked him up. When the boy wrapped his legs around Hardy, he felt stabbing and screamed. Hardy put the boy down, grabbed a tissue, and called 911. Hardy held the boy until police arrived. (12RT 2629.) Cloughsey contacted Child Protective Services. (12RT 2630.)

Gary Hodgson was a police officer with the Long Beach Police Department on April 11, 1996. (12RT 2642.) Hodgson went to Hardy's residence and assisted in the investigation into child cruelty. Hodgson arrived after the emergency medical personnel and other officers already were at the scene. He searched the residence for a sharp object. (12RT 2643.) Hodgson found a knife with a five-inch blade with blood on it inside a kitchen drawer. (12RT 2644.)

Thomas Rodriguez was a detective with the child abuse detail of the LBPD in 1996. (12RT 2645.) The day after Hardy's arrest, Rodriguez questioned Hardy about the injury to his son. (12RT 2645, 1249.) Hardy said it was an accident. (12RT 2651.) Hardy said he had argued with his wife or girlfriend, and was gathering items to leave. (12RT 2646.) Rodriguez could

not remember the woman's name, but thought it was Tiyare Felix. (12RT 2651.)

Hardy said he asked permission to kiss the two children. (12RT 2646.) Hardy had a knife in his pocket with the blade pointing upward. He lifted the children, and placed the two children on his hips. (12RT 2647.) Hardy was standing, walked into the kitchen and sat down. The knife poked Hardy. He shifted. He then said goodby, and put the children down onto the floor. His son cried. His leg was cut. Hardy's wife entered the kitchen. They put gauze, Kleenex, and toilet paper on the wound. Hardy's wife called 911. (12RT 2648.) Hardy had forgotten about the knife. (12RT 2651.)

Hardy admitted to Rodriguez that he initially had lied to police because he was scared. (12RT 2649.) Rodriguez asked about the pants Hardy wore at the time his son was injured. (12RT 2649.) Hardy was wearing the same pants. There were no holes in the pants. (12RT 2650.)

c. Events Just Before the Crime.

Monte Gmur lived on Cedar Avenue in Long Beach on December 29, 1998. (12RT 2652.) He had a music studio in his home. (12RT 2656.) Gmur knew Hardy. (12RT 2653.) Hardy went to Gmur's house in December 1998 in the early evening, around 6:30 p.m. (12RT 2654, 2655.) Hardy arrived with his brother, another man, and a neighbor. Hardy's companions included

former co-defendants Armstrong and Pearson. They wanted to work in Gmur's studio. (12RT 2655.) After about 45 minutes, Hardy left. (12RT 2656.) He returned with three bottles of alcohol: Cisco, Thunderbird and Night Train. (12RT 2657, 2659.) Hardy mixed drinks, and drank. They were at Gmur's house three to four hours total. (12RT 2656.) During this time, Gmur was in another part of the house for two and a half to three hours. (12RT 2660.) He was not in the studio unless there was a sound problem. (12RT 2660.)

After three to four hours, all four men left, and returned within about 20 minutes. They returned to make a telephone call, and asked to use Gmur's phone. (12RT 2657.) Hardy spoke clearly, and Gmur could understand Hardy's speech fine. (12RT 2658.) Hardy walked without any problem. (12RT 2658.) There were signs of intoxication. The four men were loud, but not staggering. (12RT 2661.) Gmur believed they had been drinking. (12RT 2661.) He saw Hardy drink, but did not know how much. (12RT 2660.) When the four men left, all the alcohol bottles were empty. (12RT 2660.)

d. Sigler's Son's Impact.

Ted Keptra, the victim's son testified. The last time he saw his mother was about four years before the trial. (12RT 2662.) Exhibit 30A-D were four photographs that included his mother. Exhibit 30A was his parents on their

wedding day. Exhibit 30B was Keptra and his mother on his fifth birthday. Exhibit 30C was the family together on Thanksgiving. Exhibit 30D was Keptra's mother in their backyard. (12RT 2663.)

Keptra was 16 years old when his mother was killed. She did not work. He had just started high school. She was home every day when he came home from school. After her death, holidays had passed. Initially, it was really rough without his mother. He was not accustomed to coming home from school to a quiet house. After school, they used to talk together about his school day. After her death, it was rough without her there. (12RT 2664.) The house was empty. Keptra had no brothers or sisters at home. He did not finish high school. He had no motivation. (12RT 2665.)

Keptra still resided in the same house where he had lived with his mother. (12RT 26645.) They had lived there five years before her death. (12RT 2669.) She did special things for him at Thanksgiving and Christmas. She prepared dinner. She was not the best cook, but she tried. (12RT 2665.) Recently, when the family celebrated Thanksgiving, Keptra thought of his mother. Every Christmas, he thought of her. The murder was around the holidays. He felt angry, upset and enraged. (12RT 2670.)

Keptra's mother did the best she could for Keptra and his father, who still lived in the same house also. (12RT 2665.) Now Keptra's father was

home during the day. Sometimes he was there when Keptra got home from school, and sometime he was at work. Keptra always got along better with his mother than his father. Keptra could talk with his mother, but not his father. (12RT 2666.)

Keptra did not make the funeral arrangements for his mother, but he attended the funeral. It was very rough. Keptra learned about his mother's death when the detective knocked on their door. (12RT 2666.) Before his mother's death, Keptra had a job. After her death, he lost interest and quit. He recently had been working about four months. A good portion of the reason he did not work was his mother's death. (12RT 2667.)

Keptra planned to go to high school or earn a G.E.D. He was still affected, sad and lonely. He and his mother shared the same birthday: March 5th. On his birthday, Keptra now stayed to himself, said nothing, did not celebrate, and locked himself in his room. (12RT 2668.) He thought of his mother daily, and was very angry. He was a little relieved by the verdicts, but not really. His mother was not back. (12RT 2669.)

e. Hardy's prior.

The parties stipulated to Hardy's prior conviction. (12RT 2671.) Exhibit 31 was a certified copy of the conviction. (12RT 2670.)

2. Defense Evidence.

Hardy did not testify. (11RT 2267-2268.)

a. Forensic Expert Testimony.

Gordon Plotkin was a medical doctor who earned his B.S. and Ph.D. in biochemistry from University of California, Los Angeles. He earned his medical degree from the University of Miami, and completed his residency in psychiatry at University of California, Irvine. (12RT 2688.) Plotkin had testified for both the prosecution and the defense in other cases. He also had been a court-appointed expert in other cases. (12RT 2689.)

Plotkin examined the victim's medical records. (12RT 2689.) The records included a toxicology report from the medical examiner. (12RT 2690.) There were fewer than 20 pages of records. Plotkin never questioned Sigler or spoke with her while she was alive. (12RT 2700.) The parties stipulated the autopsy report showed Sigler's levels were .73 of methamphetamine, and .22 blood alcohol. (12RT 2690.) Plotkin also examined the autopsy report and Sigler's medical records, including a hospital admission in May 1998. (12RT 2690.) In May 1998, Sigler also had .3 micrograms per milliliter of methamphetamine, and .22 blood alcohol, which was two and a half times the legal limit for driving. (12RT 2691.) Methamphetamine at .73 was the lowest level at which a person was likely to be intoxicated from methamphetamine.

It was not a huge amount, but it was enough for effect. (12RT 2691.) A blood alcohol level of .22 was a significant level. (12RT 2692.)

Sigler's diagnosis at the time of her admission in May 1998 was adjustment order with depression. (12RT 2692.) The diagnosis was in the records. Plotkin considered Sigler's symptoms, and other medical opinons. (12RT 2701.) There were different levels of depression: major and dysthymia, which was a reaction to life. (12RT 2692.) The disorder was like stress. There was stress in paying property taxes, but most taxpayers did not end up in a psychiatric hospital. (12RT 2701.) Sigler was not adjusting in a healthy way. (12RT 2693.)

Plotkin could tell some things about the night of the incident. There was a host of methamphetamine and alcohol symptoms. A .22 blood alcohol level for a chronic alcoholic could be a functioning level. Someone naive to alcohol use would be stuumbling at that level. The legal limit for driving was .08, and Sigler's level of .22 was much greater. (12RT 2693.) Plotkin did not know the legal limit for drinking in public. (12RT 2702.) The autopsy showed that Sigler's liver was normal. (12RT 2703.)

Alcohol was a central nervous system depressant. It was not a mood depressant. (12RT 2701.) Alcohol was like valium. The effects were worse if the user was depressed. (12RT 2706.) Methamphetamine was a stimulant

and was highly addictive. (12RT 2693.) It was 180 degrees different from alcohol, but there was no balancing effect between the two. (12RT 2702.) Methamphetamine was similar to the caffeine in coffee except it was many times more potent. Over the counter precursors to methamphetamine caused irritability, jitters and sleeplessness. These symptoms were multiplied with methamphetamine. (12RT 2494.) A stimulant increased aggression. (12RT 2704.)

The combination of all three: a disorder, methamphetamine, and alcohol, resulted in poor impulsivity. (12RT 2494.) After a few drinks, a person became "lubricated." Sigler was much more. For example, if one saw a person on the street who looked peculiar, a normal person would not say anything. A person under the influence would, or might, comment. (12RT 2695.) Sigler, being high on methamphetamine and alcohol, was probably more sedated and suffered loss of judgment. (12RT 2705.) Plotkin did not know if Sigler was sedated or aggressive. He extrapolated based on her blood alcohol level of .22. (12RT 2705.)

Plotkin considered a hypothetical situation where Sigler saw the three, young, black defendants and allegedly made the racial epithet, "fuck you niggers." Plotkin could not opine whether Sigler might have said something like that if she were high. He could not speculate about the methamphetamine

and alcohol effects. (12RT 2695.) A disorder would cause a racial epithet if a person were prone. Then there would be a increased likelihood of the behavior, but the person would have to be prone. The person would have to have a propensity. (12RT 2696.) Stimulation causes aggression, irritability and maybe violence. With alcohol a person would be more likely to fight and have poor judgment. The disorder in May 1998 was not what the victim had in December 1998. (12RT 2696.)

Plotkin reviewed Hardy's medical records, which showed no major mental disorder. (13RT 2861.) Plotkin considered Hardy's alcohol abuse. There was a report that Hardy was intoxicated at the time of the offenses. Plotkin reviewed transcripts of interviews on January 7, 1999, investigator notes, and the LBPD reports. (12RT 2697.) Hardy was impaired himself. Hardy's comments about missing parts of his memory about circumstances surrounding the offenses were self-reporting. There was no verification. It sounded like part of an alcoholic blackout. Three bottles of alcohol was consistent with being under the influence. Based on experience, Hardy drank only for intoxication. (12RT 2698.)

On the night of the offenses, Hardy was intoxicated to the point that his memory was missing. It was twilight sleep intoxication. (12RT 2699.) The effects were the same for Hardy as for Sigler. Hardy's judgment was

impaired. (12RT 2699.) Hardy remembered some details of the offenses, and remembered more in later interviews. (13RT 2856-2858.) When there was a blackout, there were no memories. Information disclosed later during the interviews could have meant Hardy was not forthcoming. It also could have meant he floated in and out of the blackout state. (13RT 2858.) Events with strong stimulus were more likely to be remembered, such as beating the victim, or committing rape. Events below a threshold could occur without memory. (13RT 2858-2859.) It was similar to surgery: as it lightened, the person awakened. (13RT 2860.) There was a relationship between drunkenness and violence. Amnesia was possible. A person who was prone to violence could misread the circumstances. (12RT 2699-2700.) Also, there were changes in impulse control. It was like pouring gas onto a fire. (12RT 2700.)

Carl Osborn was a forensic psychologist. (13RT 2906.) He was a therapist for 15 years, and was on the superior court panel. He was contacted two years earlier to evaluate Hardy for issues at the guilt and penalty phases. (13RT 2907-2908.) Osborn worked with Hardy for about a year and a half, for more than 40 hours, and examined him 13 times. (13RT 2908.) Osborn obtained in-depth information about Hardy from birth to the time of the incident. (13RT 2909.) He reviewed the "murder book." (13RT 2910.) He reached three conclusions. First, the crimes were completely out of character

for Hardy if he had been sober. (13RT 2911; 14RT 3020.) Second, Hardy participated, but was dominated by the co-defendants. (13RT 2911.) Third, it was a crime of passion because Hardy was intoxicated. Intoxication played a significant part in the events. (13RT 2912.) Hardy had no instances of any prior sex offense or extreme violence. If Hardy drank, he "clicked." He pushed, shoved or became suicidal. The offenses were something else entirely. They were crimes of passion. (13RT 2954.)

From birth through childhood, Hardy was a tool by his mother to win back his father. When Hardy's mother was in high school, she learned a friend was pregnant by Hardy's father. (13RT 2912.) She decided to get pregnant also. For the father, it was a "fling." He refused to acknowledge Hardy. He abandoned them, joined the military, and provided nothing. (13RT 2913.) Hardy had not seen his father in 20 years until the father visited Hardy in jail. Hardy said his father was "phony." It was too little, too late. (13RT. 2915.)

When Hardy's mother was pregnant with him, his grandmother threatened her. There were accusations about the father, shame and embarrassment. About four or five months after he was born, Hardy's mother attempted suicide by overdosing. (13RT 2916.)

Hardy had birth defects: his eyes turned inwards and he saw upside down. (13RT 2916.) He always had trouble learning. Neither his mother nor

the school addressed Hardy's learning problems. He repeated kindergarten. Everyone failed Hardy. Federal law requires an individualized programming, but there was none for Hardy. (13RT 2917.) He continued to fail, and not to learn. (13RT 2918.)

Hardy's stepfather, James Armstrong[6] entered Hardy's life when he was about one year old. James was a poor role model. His friends were gangsters. He was a heavy drinker and drug user. Hardy's mother drank through her pregnancy, and drank heavily when Hardy was two to three years old. It was a household of substance abusers. Hardy's mother Pamela admitted it affected her ability to parent. James admitted there was domestic abuse. He was physically abusive. He beat Hardy's mother every other day over a long period of time. (13RT 2919-2920.)

During Osborn's interviews, Hardy broke down and cried at least six times. The first was when they discussed James beating Hardy's mother. She was passive and cried. Hardy's job was to comfort her. (13RT 2920.) Hardy became a caretaker to his mother. Hardy had different problems with James. His mother sided with James, and Hardy was blamed. He had no support. It was a life long theme. Hardy believed he was a burden that James did not

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[6] James Armstrong was the father of co-defendant Armstrong. To avoid confusion, Hardy will refer herein to the father as James.

want. Hardy was blamed for everything. It started when he was young, and his mother started drinking. (13RT 2921.)

Osborn repeatedly requested Hardy's school records for the seventh and eighth grades. These were very important time periods. Osborn received the records for seventh grade only. Hardy dropped out the first term of tenth grade. (13RT 2922.) Hardy's grades were D's and F's. He earned an A in physical education and some sports, but academically his grades were terrible. His achievement tests were at a sixth to eighth grade level, maybe ninth. In most areas, Hardy was in the lowest 20 percent. During a three year period, however, Hardy received one-to-one mentoring, and thrived. He earned A's. (13RT 2923.) Hardy desperately sought a role model, which was very important for a young male. (13RT 2924.)

Hardy regularly witnessed violence in his daily life. His mother and stepfather were violent. He lived in a very violent area. He saw a man gunned down in front of his house. Hardy's aunt was raped. His mother and aunt were involved in a knife fight when they were intoxicated. (13RT 2926. 2930.) James reported the family lived in the Carmalitas project from 1989 to 1995. The children saw several killings, including police shootings. The area was a drug haven with many weapons. That environment was what Hardy expected daily. (13RT 2930.)

Hardy's family saw the effects of drug and alcohol addiction. His maternal grandparents died from liver sclerosis. Both were alcoholics. His mother Pamela became an alcoholic when Hardy was two years old. James was on the streets with women shooting dope. James attempted recovery in 1999. (13RT 2932.) Alcohol dependence had genetic and social factors. The Diagnostic and Statistical Manual (DSM) recognized a familial pattern of 40 to 60 percent of the risk being genetic. Hardy was an alcoholic. He had the genetics. (13RT 2932.) Additionally, he had the environmental factors. During his whole life, he never felt like he belonged. He did not fit in at home or school. He was a small, poor student. He was picked on by others. His mother was poor. He dressed poorly and was ashamed. He searched for a place to fit it. (13RT 2933.) At ages 12 and 13, he showed athletic gifts. He was fast and involved in football. He also was involved in choir, and had a deep baritone voice. (13RT 2934.)

There was a molestation incident with a pastor when Hardy was 13. There was a conflict between football and choir. Pastor Jackson told Hardy if he chose choir, they would go on day trips to Disneyland. (13RT 2935.) Hardy hated home, and spent nights with the pastor. The pastor molested him. He fondled Hardy and the pastor ejaculated. Hardy's mother learned of the incident. Hardy cried when he told Osborn about the molestation. (13RT

2936, 2939.) Osborn received the same information from Hardy's mother and his girlfriend, the mother of Hardy's two children. Osborn did not accept what a patient reported as true. Osborn determined whether it was reasonable. Other reports provided a level of credibility. (13RT 2940.)

Hardy began a downward spiral after being molested. Hardy hid behind alcohol, and was marginally involved in a gang. Before the molestation, Hardy tried in good faith. He sought a healthy place and healthy people. (13RT 2941.) The gang provided a different home. He had a perverse kind of worth with the gang. (13RT 2942.)

Osborn administered tests to Hardy, and determined his I.Q. was 83, which was "pretty weak." An I.Q. of 70 represented mental retardation. Hardy was in the thirteenth percentile, which meant 87 percent of people were smarter than Hardy. That meant almost all people, that is, four fifths, were smarter than Hardy. Most people were smarter and could trick Hardy. (13RT 2943.) The testing for I.Q. was completely revised in 1997, with changes to the sample size and norm. Circumstances at the time of testing, including sleeplessness and depression, could effect results. (14RT 2999.) Osborn's opinion was that Hardy was dominated by the other two defendants. (13RT 2952.) People who knew him, such as, Albert Scales (the family pastor), James Johnson (Hardy's former employer) and Tiyare Felix (his girlfriend),

said Hardy was a follower. (13RT 2952.) On the street, one needed horsepower, and Hardy did not have it. (13RT 2944.)

Hardy's urge to fit in was desperate. His only structure and family became the gang. He put on a good show. He was an "also ran." He did what he was told. The same was true with the offenses. (13RT 2953.) At the time of the offenses, Hardy was driven by emotion, not thought. He was drunk. He drank all day, beginning in the morning. The racial slur was the precipitating event. When the victim yelled "nigger," it was aggressive, and Hardy clicked. If Hardy had been alone, probably there would have been punching. The offenses were so different from the way Hardy behaved. He was not the leader. (13RT 2955.) But he could not walk away. It was the rule of gangs. Hardy could not say no to people he perceived as being in authority. Additionally, there was fear. If one did not do as one was told, it was serious. In prison, disobedient people could be killed. Hardy's rage was unleashed by alcohol, and it could have continued throughout the incident. (13RT 2956.)

Hardy was not without conscience. (13RT 2962.) He cared about people, and strongly for children. When Osborn asked Hardy about a time he had been happy, Hardy was dumbstruck and could not answer. Later, Hardy said he thought he was happy when his two sons were born. He was in the

delivery room. (13RT 2962.) His sons gave Hardy a sense of purpose. (13RT 2963.)

Hardy had two disorders. He was dysthymic, which meant he was down all of the time. The disorder significantly depressed the person, who struggled with life. (13RT 2947.) Hardy was quiet and withdrawn. Osborn did not recall Hardy being happy about anything. There is no major depressive episode with the disorder, no clinical depression. Greater depression followed. Hardy had two suicide attempts, but there was limited data. From the age of 13 or 14, Hardy was constantly sad and depressed. He turned to daily alcohol use in his teens. (13RT 2948.) After he left home, he drank and tried drugs. Marijuana made him paranoid. He drank from early morning throughout the day until he vomited, passed out, or both. Alcohol and dysthemia were a "very nasty reaction." Alcohol initially acted as a stimulant and made the user feel better. (13RT 2949.) It was also a central nervous system depressant. Hardy became more depressed. The individual response to alcohol varied. If a person was depressed and drank, initially he felt better, then a lot worse. A person with dysthemia was "seriously depressed." Some dysthymics were violent. Others were not. (13RT 2950-2951.) The "clicking" description Hardy described was "explosive disinhibition." Alcohol was a lubricant that caused impulsive emotions to come out. (13RT 2951.)

b. Hardy's Cooperation in a 1997 Gang Murder Prosecution.

Robert Grace was a Los Angeles County Deputy District Attorney. In 1997, he was assigned to the hard core gang unit. (13RT 2729.) He prosecuted gang murders, including the murder case *People v. Johnson/Amado*, case number TA037534. (13RT 2730.) In 1997, Crips gang members stopped and boarded an MTA bus. High school students were on the bus. The high school was in a Blood neighborhood. The Crips were a rival gang. (13RT 2731-2732.) The Crips boarded to identify Bloods. A third person fired at, and into, the bus. A high school student was killed, and her friend was wounded. The incident occurred around the same time Bill Cosby's son was killed. (13RT 2733.) Hardy was visiting in the area. There was a meeting of Crips, during which they discussed what to do about Bloods riding through the Crips neighborhood. Two of the defendants in *People v. Johnson/Amado* attended the meeting. The discussion was about stopping a bus, and dragging Bloods from the bus to beat or kill them. (13RT 2733.)

The prosecution contacted Hardy, who eventually provided information and testified. The information Hardy provided was necessary to obtain conspiracy to murder convictions. (13RT 2734.) Hardy was a Bloods gang member. (13RT 2741.) The Bloods were the gang the Crips were trying to eradicate. That could have been a motive for Hardy to testify. (13RT 2742.)

While witnesses in gang cases often changed their stories (13RT 2742), Hardy cooperated with the prosecution, and did not recant or change his testimony. (13RT 2747.) Grace was an experienced gang prosecutor. (13RT 2735.) In gang prosecutions, witnesses were reluctant to testify because they feared retaliation. (13RT 2736.) Hardy was in the area when the shooting occurred. He saw a suspect running, and he identified people. (13RT 2738.) Hardy's life was in jeopardy because he testified. (13RT 2736.) Testifying was a risk. Grace had been so concerned about witness safety that he had not released the names of witnesses during discovery. (13RT 2738.)

Victor Corella was an LAPD detective in the case where Hardy testified. (14RT 2975.) The information Hardy provided helped lead to the arrest. Corella met Hardy at midnight away from Hardy's home. It was a gang killing, and everyone involved was scared. Hardy was scared for his safety, and did not want to be seen with police. He provided key information. (14RT 2976.)

c. Hardy's Family Life.

Hardy's mother, Pamela Armstrong, testified. Co-defendant Armstrong was her second son. (13RT 2770.) By the time of trial, Hardy was 25 and Armstrong was 22. Her sons had different fathers. Pamela was 19 when she became pregnant with Hardy. She was not married to Hardy's father. The

couple had been together three years, then broke up. Hardy's father was having a baby with another girl. Hardy's mother was jealous. She wanted a baby to get back together with Hardy's father. (13RT 2771.) She became pregnant on purpose. Hardy's father abandoned her and Hardy. (13RT 2772.) While pregnant with Hardy, Pamela had daily stress. After she told Hardy's father of her pregnancy, he denied paternity. Pamela's mother threatened to cut Hardy out of Pamela. (13RT 2790.)

Hardy had birthmarks all over his body. (13RT 2772.) The brown spots on his skin were not tested. (13RT 2801.) His eyes turned in or to the side. (13RT 2772.) In one of Hardy's eyes, only the eye white was visible. He had eye surgery when he was in kindergarten or elementary school, but still had problems. Pamela married James Armstrong when Hardy was a year old. (13RT 2773.) Before marrying James, Pamela lived with her mother in Pasadena. From ages two through four, Hardy was clumsy, but sweet and loved. (13RT 2774.) He had been a happy baby, but with James in the picture, things changed. James jumped on Pamela and beat her around the fourth of July when Hardy was around two years old. Hardy was there, but Pamela could not recall if he was in the living room when it happened. (13RT 2775-2776.) Pamela suffered a black eye and bruising. (13RT 2776.)

When Hardy was older, Pamela became suspicious because she found needles and a powdery substance. She suspected James was on drugs. He would not keep a job. He worked only sporadically. (13RT 2777.) Mostly, James was unemployed. (13RT 2779.) He and Pamela argued constantly about money, food, and the children. Hardy was present during the arguments. He attended kindergarten while Pamela worked. She left at 5:00 a.m., and returned home at 5:00 or 6:00 p.m. (13RT 2778.) Other people watched Hardy. Then when Hardy was four or five, Pamela had Jamelle (Armstrong). There was no improvement in their lives. (13RT 2780.)

After (Jamelle) Armstrong was born, things were the same. Pamela and James argued, and she drank heavily. Initially, things were good between Hardy and James. (13RT 2780.) Hardy and young Armstrong played together. Hardy had to repeat kindergarten. He had problems learning and wrote backwards because of his eyes. He had poor writing and could not read. (13RT 2781.) His learning disability was not tested or investigated. (13RT 2801.) Hardy liked others and was friendly, but other shied away from him. He tried hard. After his eye surgery, his clumsiness improved, but he still had learning problems. (13RT 2782.)

The brothers got along well, but James treated the boys differently. At first, he took both boys out together. Then he began taking only Armstrong.

It was like Cinderella when Hardy was older. (13RT 2783.) It was "pure hell." They went to church because Pamela wanted something better. She was afraid her sons would be taken away from her. (13RT 2784.) Hardy liked church, and was involved in Sunday school, choir, picnics, and plays. (13RT 2788.)

Pamela and James were drinking and using drugs. James would break in and steal from the family. (13RT 2784.) Pamela's own drinking worsened. She was afraid of James and physical abuse. James was like Tarzan or a roaring lion. He bit out a chunk of Pamela's arm. (13RT 2785.) Pamela drank to inebriation weekly. There was physical abuse that still haunted her. She did not know if the abuse happened in front of Hardy and Armstrong, but they were there. She took her sons into the bedroom if she knew abuse was going to occur. (13RT 2786.) When Hardy was older, he tried to intercede between James and Pamela. When Hardy was around 11 and a half years old, he told James not to hit her. (13RT 2788.) Sometimes Hardy tried to hit James. Hardy turned away from James, and was always in trouble. His grades, which were always bad, became worse. He stayed away from home increasingly. (13RT 2789.)

By the time Hardy was 13 years old, he did not want to attend school or stay at home. (13RT 2794.) The situation between Hardy and James was

bad. Hardy would not listen to anything. He was unhappy. At the age of 13, he spent time with gang members. (13RT 2795, 2804.) He attended school up to the tenth grade, then quit. (13RT 2805.) There was some counseling at the church, but suddenly Hardy refused to go. (13RT 2796.) At 16, Hardy ran away. (13RT 2797.) Hardy wanted to commit suicide. The police brought him back home. (13RT 2798.) He said he wanted to die because no one cared about him. (13RT 2798-2799.) Pamela never sought professional help for Hardy. (13RT 2802.)

At the age of 19, Hardy reported he had been molested after the pastor took Hardy home. (13RT 2796-2797.) When he was 19 or 20, and had been drinking, Hardy fought with his girlfriend, Tiyare Felix. (13RT 2800, 2818.) He was violent and called her names. Then he went into the middle of the street because he wanted to get hit by a car. (13RT 2800, 2808.) This was the only time Pamela ever saw Hardy act violently. (13RT 2815.) Tiyare already had two children when she met Hardy, and they had two more children together. Hardy loved all four children, and treated them as equals. (13RT 2813.)

On cross-examination, Pamela said she taught Hardy right from wrong. She taught him it was wrong to rob, rape, or kill. (13RT 2805.) It was wrong

for Hardy to commit crimes or violate the law. (13RT 2805, 2811.) Hardy also learned right from wrong at church. (13RT 2810.)

Tiyare Felix met Hardy when he was almost 19 years old. She was a few months older. She had two sons, who were three and four years old when she met Hardy. (13RT 2818-2819.) They had been together four years. (13RT 2838.) The couple lived together in Long Beach after Hardy moved in with Felix. They had two sons together. At the time of trial, Hardy's sons were five and six years old. He was a good father: loving and caring. He treated all four boys equally. All four called Hardy "dad." (13RT 2821.)

Felix was there when her son was stabbed. She had fought with Hardy, who had been drinking. She told him to leave. Hardy took their son into the kitchen to explain the situation. Felix heard a scream, and saw her son bleeding. (13RT 2822.) She talked to her son immediately, and the boy said it was an accident. (13RT 2823.) The boy said he was on Hardy's lap when the knife cut through the pants to the back of his leg. The boy's story never changed. (13RT 2824.)

Felix and Hardy lived together in Long Beach, then in Los Angeles. He worked intermittently. His last job was registering voters. (13RT 2824.) When Hardy drank there were problems. When he was sober, he was sociable. When he drank, the couple argued. Hardy would black out, and remember

nothing. (13RT 2825.) Sometimes he was violent. (13RT 2825.) There was pushing and shoving, but no blows. (13RT 2826.) He had shoved her on two or three occasions. (13RT 2841.) He was never violent with the children. (13RT 2841.) There were continuing problems with Hardy's behavior and moods. He was easygoing except when he drank. Then he became crazy. Something clicked when he drank, and he became violent. (13RT 2932.) In November 1998, the couple fought and Felix asked Hardy to stop living with her. This argument happened just before Hardy was arrested. (13RT 2845.) After he moved out, he moved back or visited more and more frequently. He stayed until the children went to bed, then left. (13RT 2846.)

In 1996, Hardy tried to kill himself. (13RT 2834.) The couple had argued. Hardy put a cord around his neck and pulled it tight. He went to the closet and pretended to be dead. He was there about an hour. Felix called the paramedics. (13RT 2835.) Then again in 1996, he had been drinking and threatened suicide. He put a gun to his head, and told Felix to give Hardy's car to Armstrong. (13RT 2836.) At Thanksgiving in 1997, the couple attended a family get together. Felix and Hardy argued. She went to the car. Hardy followed her and pushed her. He threw himself in front of the car. He wanted to go to jail. (13RT 2833.) Hardy's mother came out for him, and Felix left. (13RT 2933.)

The couple had a healthy sex life. They did nothing perverted. Hardy told Felix about an incident when he was 19. (13RT 2827.) He had been hurt and held it inside. (13RT 2827.)

Felix said Hardy got along with his brother Armstrong. (13RT 2827.) Hardy was a follower. His gang involvement was through his half-brother Curtis. (13RT 282.) Hardy was known in the gang as Little No Good. (13RT 2844.) Hardy never led anyone except the children. (13RT 2828.) Hardy tried unsuccessfully several times to contact his biological father. (13RT 2829.) Felix met co-defendant Pearson twice. She usually did not affiliate with Hardy's friends. (13RT 2930.)

d. Hardy's Work and Church Activities.

Albert Scales was a doctor, and the overseeing bishop for Victory Center Community Churches of Visions Anew Community. He was a pastor, and had known Hardy since he was four or five years old. Scales saw Hardy and his family two to three times a week. (13RT 2683.) Hardy's family lived close to the church. There were drinking problems when Hardy was a child. (13RT 2865.) Scales counseled Hardy's mother and stepfather for over 20 years. (13RT 2866-2867.) James was unemployed. He lived in an alley with drugs, violence, gang and fighting. (13RT 2867.) Pamela worked, but was drinking. James was involved with drugs, and came to church under the

influence. The kids were not cared for. James was jealous of Hardy. (13RT 2868.) There was spousal abuse. (13RT 2870.) Once James came to the church, and pulled Pamela outside. He was violent. James and Hardy were yelling at each other. (13RT 2872.) When Hardy was older, Scales learned Hardy was in gangs. Scales told Pamela, and told Hardy to avoid gangs. (13RT 2869-2870.) Scales never saw Hardy act mean-spirited. (13RT 2872.)

James Johnson knew Hardy because Johnson worked with Hardy's mother. (13RT 2751-2752.) Johnson went to the Hardy house for Christmas dinner. Hardy was 12 or 13 years old when Johnson met him. Later, they became close. When Hardy was 18 years old, he was in a training program. Johnson was the instructor and a job developer with the Century Community Training Program. The program found men in the neighborhood and taught them construction skills. (13RT 2752.) Hardy participated in the program and completed the course. Hardy was different from others in the program. He only did what he was told to do. He lacked initiative to complete a job. (13RT 2753.) Johnson pushed Hardy, who wanted to learn, but was not fast at learning. Hardy needed a little more help than others. (13RT 2754.)

Johnson continued his relationship with Hardy after he completed the eight week program. Hardy seemed to want a job; he had two children. He had no car, and that made it very difficult. (13RT 2753-2754.) Johnson met

Hardy's wife. He obtained a refrigerator and stove for them. Johnson had a business installing low-flow toilets. It was a small business without employee benefits. Hardy worked daily for Johnson for about a year in 1994 and 1995. (13RT 2755, 2758, 2761.) Johnson either picked Hardy up for work, or Hardy rode the bus. (13RT 2755.) Hardy worked well. He watched others and learned. Hardy never made the first move. Johnson tried hard to get Hardy to take the initiative, but Hardy was a follower, not a leader. After a while, when Hardy knew the routine, then he took the initiative. (13RT 2756.) Johnson's company went out of business. Johnson had no work of this type when Hardy stopped working for Johnson. (13RT 2765.) Johnson did not contact Hardy when Johnson started a new business because the new jobs required greater skills than what Hardy possessed. Hardy's only skill was installing toilets. He did not know plumbing. (13RT 2768.)

Hardy had no alcohol problems on the job, but he had alcohol tendencies. Johnson was a 17-year recovering alcoholic. Hardy did things to himself and caused problems with his girlfriend. Hardy drank to the point he was unable to care for himself. He made wrong choices. (13RT 2757.)

C. Prosecution Rebuttal.

Monte Gmur was at home on December 29, 1998. (14RT 3036.) Hardy came to Gmur's house with Pearson and Armstrong. Gmur heard Pearson and

Hardy debating, including the comment, "you ask him." (14RT 3037.) Hardy stood in the hall behind Pearson. (14RT 3038.) Pearson asked to use the room, saying they wanted to put Chris on the block to initiate him in a gang. (14RT 3042, 3084.) Gmur said no. The men went into the room for about 20 minutes, then left with Chris. (14RT 3042.) Hardy asked to use Gmur's telephone, and called "Capone." Hardy said they had just put Chris on, he was cool, and he was "Playboy." Then all four left. (14RT 3043.) There was nothing unusual about Chris. He was not injured. They were all "stupid drunk" when they left. (14RT 3044.) In January 1999, Gmur reported to police that Hardy could carry on a conversation. He was loud and obnoxious. Gmur could understand what Hardy was saying on the phone, but he was "very intoxicated." Gmur would not have ridden in a car with Hardy driving. He was under the influence. (14RT 3045-3046.)

On December 29, 1998, Terri Aitken operated the MTA bus on route 60 from Long Beach to downtown Los Angeles from 8:00 p.m. to 4:00 a.m. The bus stopped near Wardlow Road and Long Beach Boulevard around 12:30 or 2:00 a.m., Aitken could not recall. (14RT 3048.) At the time, Aitken gave a statement to police about a gang incident on the bus. He picked up three, black male gangsters at Willow, not Wardlow. The first one argued over the fare. Aitken told the passenger to pay and sit. When Aitken picked up the

phone, the others told the first one to pay. (14RT 2049.) The three were arguing among themselves about Crips and Bloods. (14RT 3051.) All three exited the bus at Florence. (14RT 2049.)

Brian McMahon was the detective who interviewed Aitken on January 5, 1999. Aitken reported to McMahon that three black males, who had been drinking, had a dispute with a fourth male over gangs. (14RT 3053, 3056.) Aitken was unable to identify any of the males from photographs. (14RT 3056.) McMahon also questioned Hardy, who said the dispute was over Crips, Bloods and gang colors. Hardy did not tell McMahon he had been drinking the entire day of the incident. He said they went to the liquor store after leaving Gmur's house, which was about two and a half miles from the murder site. (14RT 3054.) It would take about 10 minutes to walk to the bus. Then the bus ride was about 10 or 15 minutes. The trip would have taken 30 minutes or more. (14RT 3055.)

McMahon arrested Hardy on January 7, 1999. McMahon taped a statement. His testimony was based on that. (14RT 3090.) Hardy told McMahon he had been molested, and provided a litany of molestation, drinking, and his stepfather's beating Hardy's mother. (14RT 3091.)

Millard Jackson was the pastor at First John Baptist Church in Long Beach. At the time of trial, he was ill, which caused him to speak slowly and

use a wheelchair. (14RT 3066.) Jackson knew Hardy and his mother Pamela. He knew Hardy between the ages of seven and 10. (14RT 3067.) Jackson spoke with Pamela about Hardy's accusations of molestation. She called Jackson, and said Hardy was on the phone and wanted to talk. (14RT 3068.) Hardy asked Jackson, "why did you do that to me?" Jackson was surprised. Hardy said Jackson had taken Hardy to his house, told him to strip and bathe, then masturbated. Jackson asked Hardy why was doing this. Hardy commented, "See, mom, I told you he would lie." (14RT 3069.) On cross-examination, Jackson admitted he had counseled Hardy as a young teenager. (14RT3073.) Hardy sang in the choir, and they went to Magic Mountain. Hardy spent the night with Jackson because the pastor was working with Hardy. (14RT 3075.) Hardy stayed if he wanted to, and other children were there also. Hardy did not stay over many times. When he did, Hardy used the spare bedroom. (14RT 3076.) Jackson was very close to Hardy's family. The entire family had stayed with Jackson. (14RT 3078.) The last time Hardy spent the night, he was 16, but claimed he was 13. Jackson denied molesting Hardy. (14RT 3079-3080.)

Steve Newman was a sergeant with the Los Angeles County sheriff who worked the gang unit for 14 years. (14RT 3083.) Newman explained that jumping in was the gang initiation. Unless escorted, a new member was

beaten for one to three minutes. No blood or broken bones were required. (14RT 3084.) Usually the new member was down and kicked in the body or torso. Hardy had the tattoo "CK," which meant Crip Killer. (14RT 2981.) The tattoo CK showed allegiance to the gang. It meant the person was willing to be a Crip killer. (14RT 3085.) The Crips gang color was blue; the Bloods red. If a Blood member was on a bus and saw a blue bandana, the Blood would challenge. It concerned pride. If a Blood testified against a Crip, it would be frowned upon, but tolerated. A snitch was a snitch. (14RT 3087.) If a new member had been jumped in, Newman would expect torn clothing and dirty, tossled hair. (14RT 3088.) The new member received a moniker after being jumped in. (14RT 3089.)

JURY SELECTION ARGUMENTS

ARGUMENT

I

REVERSAL OF THE JUDGMENT OF DEATH IS REQUIRED BECAUSE TWO PROSPECTIVE JURORS WHO WERE ABLE TO CONSIDER ALL SENTENCING ALTERNATIVES AND FOLLOW THE TRIAL COURT'S INSTRUCTIONS WERE IMPROPERLY EXCUSED FOR CAUSE, IN VIOLATION OF HARDY 'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, A REPRESENTATIVE JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND DUE PROCESS.

A. Summary of Argument.

A prospective juror may be constitutionally excused for cause when the juror's position on imposing the death either prevents, or substantially impairs, that juror's ability to follow the trial court's instructions, apply the law to the facts, or impose a sentence of death. Here, the trial court excused two prospective jurors based on the prosecutor's challenges for cause. (7RT 1101, 1132, 1256, 1270, 1308.) The prosecutor also challenged for cause other jurors who expressed concerns or scruples about the death penalty. While the trial court denied those challenges, the prosecutor later exercised peremptory challenges to remove those jurors also. Thus, the overall conduct of voir dire resulted in removing qualified jurors who merely harbored reservations, or concerns, about capital punishment. The responses of the two prospective

jurors excused for cause, on their written questionnaires and during oral voir dire, revealed they were able to consider all sentencing alternatives, follow the court's instructions, apply the law to the facts, and impose a sentence of death. Accordingly, excusing those prospective jurors for cause violated Hardy's rights to be tried by a fair and impartial jury, to due process of law, and the prohibition against cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, and under article I, sections 7, 15, 16 and 17 of the California Constitution. Therefore, reversal is required. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581]; *Gray v. Mississippi* (1987) 481 U.S. 648, 658 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [208 S.Ct. 546, 98 L.Ed.2d 568]; *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412; *People v. Mickey* (1991) 54 Cal.3d 612, 679-680; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

B. Under Controlling Legal Authorities, Granting Challenges for Cause Against Two Jurors Was Error Because Those Jurors' Views on the Death Penalty Did Not Prevent, or Substantially Impair, Any One of Them from Considering or Imposing a Sentence of Death.

Witherspoon v. Illinois (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], held that prospective jurors in a capital case may not be excused for

cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) Rather, proper excusal of jurors is limited to only those jurors "who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Id.* at pp. 522-523, fn. 21[emphasis omitted].)

As *Witherspoon* explained, "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 518-519.)

Adams v. Texas (1980) 448 U.S. 38,45, [100 S.Ct. 2521, 65 L.Ed.2d 581], clarified the *Witherspoon* standard in a capital case involving the murder of a police officer. *Adams* explained *Witherspoon* "establish[ed] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially

impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas, supra*, 448 U.S. at p. 45.) Rather, the requirement for death penalty qualification is only "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*)

Wainwright v. Witt, supra, 469 U.S. 412, 421, later reaffirmed, and further explained the *Adams* standard: A juror may be excluded only if his views on capital punishment "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Ibid.* quoting *Adams v. Texas, supra*, 447 U.S. at p. 45; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting same standard].) Under *Adams*, a prospective juror who opposes capital punishment may be discharged for cause *only* where the record shows the juror is unable to follow the law as instructed by the trial court. (*Adams v. Texas, supra*, 448 U.S. at p. 48.) *Wainwright* later made clear that the prosecution bears the burden to prove a juror whom the prosecution challenges for cause, meets the criteria for dismissal. (*Wainwright v. Witt, supra,* 469 U.S. at p. 423; *People v. Stewart* (2004) 33 Cal.4th 425, 445.) This substantial impairment standard remains the test for determining constitutional juror excludability.

Since *Wainwright*, this Court has repeatedly held the substantial impairment standard is the proper standard, and has applied the standard in reviewing a trial court's decision to discharge a juror based on opposition to the death penalty. (See e.g., *People v. Holt* (1997) 15 Cal.4th 619, 650; *People v. Avena* (1996) 13 Cal.4th 394, 412.) *People v. Kaurish* (1990) 52 Cal.3d 697, 699, held a prospective juror's personal opposition to the death penalty was an improper ground to excuse the prospective juror for cause. More recently, *People v. Cunningham* (2001) 25 Cal.4th 926, 975, held a prospective juror properly can be excluded only if the juror is unable to consider conscientiously all of the sentencing alternatives, including the death penalty. Even a prospective juror's "equivocal" views, such as vague, indefinite, or unformed views on the death penalty, will not disqualify a prospective juror "so long as [the juror] could follow [the] oath to conscientiously consider the death penalty." (*People v. Pearson* (2012) 53 Cal.4th 306, 331.)

The erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi, supra*, 481 U.S. at p. 658; accord *In re Anderson* (1968) 69 Cal.2d 613, 619-620 [applying reversal per se standard].) Reversal of Hardy's death sentence is required because the trial court in this case excused two jurors erroneously under the standards stated above.

C. Relevant Voir Dire Proceedings.

Hardy will discuss each of the two prospective jurors who were improperly excused for cause separately, and in the order in which the challenges were made and granted below.

1. Prospective Juror DD, Number 6840.

The prosecutor challenged prospective Juror DD for cause, and the trial court excused DD. (7RT 1268-1270.) DD was a 48-year old, married writer with one child and interests in politics and literature. (21CT 5446.) Born in Texas, DD had lived in California for 47 years, and in the same Los Angeles home, which he owned, for nine years. (21CT 5446-5448.) He was a successful, self-employed, college graduate. (21CT 5450-5452.) He considered himself an independent thinker, who was neither a leader nor a follower. (21CT 5450, 5457.)

The voir dire questioning of DD, quoted *post,* demonstrated he could follow the court's instruction, and vote to impose the death sentence. While DD considered the death penalty barbaric, he repeatedly stated he could vote to impose death if required by law. DD did not believe the death penalty was a deterrent, but nevertheless could vote to impose it for retribution. Even after the trial court explained the law would *never* require imposition of a death sentence, DD said he could vote to impose the death penalty. Indeed, DD

maintained he would listen to other jurors, and deliberate with them. In the past, he had served on a jury where he disagreed with other jurors, and those other jurors persuaded DD to their point of view during deliberations.

Hardy's defense counsel, and the court, questioned DD as follows:

> THE COURT: All right. Now, the questioning today is going to be primarily focused on your ability to keep an open mind on the penalty phase. If we get to the penalty phase of the trial. There are two phases in a death penalty case. The first is the guilt phase, and if the jury finds one or more of the circumstances to be true, then we would go to penalty phase. There are two phases, one is the death penalty, the other is life in prison without possibility of parole. All right?
>
> PROSPECTIVE JUROR NO. 6840: I understand.
>
> THE COURT: Can you keep an open mind on the penalty phase?
>
> PROSPECTIVE JUROR NO. 6840: I believe I can.
>
> MR. YANES: Good morning, sir. I just have very few questions to ask you, but I want to make sure that we are clear, in terms of the way this trial would work. The jury first hears the evidence of guilt and they decide whether my client is guilty or not guilty of the charges. If the jury finds him guilty and finds some of the things, the special circumstances to be true, some of the more horrible things involved in this case, then we go on to a second phase and that's where the jury decides the penalty.
>
> Okay, there are only two choices once we get there and that is death or life without the possibility of parole. Are you with me?
>
> PROSPECTIVE JUROR NO. 6840: Yes..

MR. YANES: Now, what we need to know is not what you would decide, but the fact that you could sit in that phase of the trial, listen to the evidence that will be presented and make a rational decision.

PROSPECTIVE JUROR NO. 6840: I believe I could.

MR. YANES: Okay, and what you are going to hear is aggravating evidence and mitigating evidence in other words, bad things and good things, reasons why you should give him the death penalty and reasons why you should give life without the possibility of parole. We consider life to be the lesser. You may differ with that philosophically, but for our purposes death is the worse. Life without the possibility of parole is the lesser.

PROSPECTIVE JUROR NO. 6840: I understand.

MR. YANES: Would you be able to accept that death is worse?

PROSPECTIVE JUROR NO. 6840: Yes, I do.

MR. YANES: And you are going to hear evidence of aggravation, the factors of this aggravation. Other things he may have done in his life could be factors in aggravation. And then you will hear factors in mitigation maybe things which would cause you to have sympathy for him, things about an abusive childhood, mental issues, that sort of thing. At the end of listening to that the judge is going to tell you that if you find that the aggravating factors substantially outweigh the mitigating factors, then you can vote for death. If you don't, then you must vote for life, could you follow that?

PROSPECTIVE JUROR NO. 6840: Yes.

MR. YANES: I'm not asking you if you would enjoy it. I want to know if you could do it.

PROSPECTIVE JUROR NO. 6840: Yes, I could.

(7RT 1256-1258.)

The prosecutor and the court then questioned DD:

MS. LOCKE-NOBLE: Thank you. In reviewing your questionnaire you indicate on question 178, "what are your general feelings regarding the death penalty?" and you say, you abhor it.

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: You are strongly against the death penalty?

PROSPECTIVE JUROR NO. 6840: I am.

MS. LOCKE-NOBLE: And you say the execution of persons in the past has strengthened your feelings against the death penalty?

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: And you feel that the death penalty is cruel and unusual?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: And that you hold these beliefs also very strongly?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: Now, what is important here is that if you cannot impose the death penalty because you feel that you have these strong convictions, then it wouldn't be fair either to the defendant or to the people of the State of California for you to sit on this jury, would it?

PROSPECTIVE JUROR NO. 6840: No, it would not.

MS. LOCKE-NOBLE: So, honestly, can you ever impose the death penalty, based on your feelings and convictions?

PROSPECTIVE JUROR NO. 6840: I'm not sure. I think I have to sit in that jury room and make that decision at the time of the deliberations.

MS. LOCKE-NOBLE: But you feel that it is barbaric?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: How could you impose something that is barbaric?

PROSPECTIVE JUROR NO. 6840: If it was necessary to follow the law, and the law said this was the only answer to this case, I believe I could do it.

MS. LOCKE-NOBLE: But on question 193 you state that life without the possibility of parole is the only acceptable alternative to the death penalty, isn't that how you feel?

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: Wouldn't it be correct to say that you would vote life without the possibility parole because you actually believe it's worse for the defendant to spend the rest of his life in prison than the death penalty?

PROSPECTIVE JUROR NO. 6840: No, I feel the death penalty is a worse fate than life in prison.

MS. LOCKE-NOBLE: And it's your opinion that not only is the death penalty out of step with modern society, it doesn't deter crime and is not applied evenly?

PROSPECTIVE JUROR NO. 6840: That is correct. I don't feel that the death penalty does anything to make our world better.

MS. LOCKE-NOBLE: And you feel its only purpose is for revenge?

PROSPECTIVE JUROR NO. 6840: I -- I -- Yes.

MS. LOCKE-NOBLE: How can you impose the death penalty?

PROSPECTIVE JUROR NO. 6840: The only way I could impose the death penalty is if it was clear-cut that the law -- the law made it very clear that the death penalty had to be imposed. I don't feel that I'm above the law. However, I hold these convictions very strongly. I think if I sat in the jury room and it became very clear there was only one answer, I believe I could impose the death penalty. I won't know that until I sit in the jury room.

MS. LOCKE-NOBLE: Okay, but there are two options here.

PROSPECTIVE JUROR NO. 6840: Uh-huh.

MS. LOCKE-NOBLE: Yes? You understand there are two options, only two options that are provided, that guilt has been determined already and that is what we are assuming in these questions.

PROSPECTIVE JUROR NO. 6840: Okay.

MS. LOCKE-NOBLE: So in your particular case because there are two options, wouldn't you always vote for life without the possibility of parole, based on your convictions?

PROSPECTIVE JUROR NO. 6840: Again, I don't feel that I would, if the law made it very clear that death was called for in this case.

MS. LOCKE-NOBLE: But the law -

PROSPECTIVE JUROR NO. 6840: And I'm maybe I don't understand the law. Is it clear-cut to when the death penalty has to be imposed or when life imprisonment -

THE COURT: No, you would be telling -- you are saying if the law was that you have to impose, the law doesn't say that you

have to impose the death penalty. I won't be telling you. You will be telling me. Basically, the court will be asking what is the appropriate penalty.

PROSPECTIVE JUROR NO. 6840: So it becomes an objective decision at that point. It's not cut and dry.

MS. LOCKE-NOBLE: It's not an objective decision. It's subjective, it's a subjective decision as counsel explained there will be mitigating and aggravating factors. The court will not tell you how to weigh those factors. You, as an individual, will have to determine what weight you want to give to each of the factors. And based on the weight that you provided to each one of the factors, you have to determine if the aggravating factors substantially outweigh the mitigating factors. And that's how you would arrive at voting for death, based on your conviction. And the court is not going to tell you it's clear-cut in this circumstance. You vote for death in this circumstance or you vote for life. It is subjective. Do you believe that you can impose death?

PROSPECTIVE JUROR NO. 6840: I believe -- I believe I could. It would be very difficult for me. I would have to have the almost everyone on the jury trying to convince me that it would be essential or necessary to impose death.

MS. LOCKE-NOBLE: Would you prefer not to sit as a juror in this particular case?

PROSPECTIVE JUROR NO. 6840: I would prefer not to.

MS. LOCKE-NOBLE: Is that based on your convictions?

PROSPECTIVE JUROR NO. 6840: Yes. In the questionnaire I think I made it clear that I would not like to sit on this jury.

MS. LOCKE-NOBLE: How would you feel if everyone on the jury was voting for death except you?

PROSPECTIVE JUROR NO. 6840: I would feel under intense pressure. I would do everything I could to convince the jury that death was not appropriate.

MS. LOCKE-NOBLE: And didn't that happen to you once before in terms of being on a jury?

PROSPECTIVE JUROR NO. 6840: I have been on a jury before, and the jury went against the way I wanted to go. The verdict went the against the way I wanted it to go.

MS. LOCKE-NOBLE: And you felt at that point in time you caved in to the majority?

PROSPECTIVE JUROR NO. 6840: I did. Yes, I do.

MS. LOCKE-NOBLE: And knowing that and knowing this is a much more serious situation, do you feel that you would, as a result of your previous experience, not listen to the other jurors and hold to your convictions?

PROSPECTIVE JUROR NO. 6840: I would listen to the other jurors. I would hold to my convictions and I would stand up for my convictions. I would be much more difficult to be persuaded to vote for the death penalty in this case. I think the last experience made me a stronger person towards my convictions.

MS. LOCKE-NOBLE: And is there anything -- when you go into the jury room for the penalty phase, if you are selected as a juror and when you first walk in there, would you be leaning towards life without the possibility of parole?

PROSPECTIVE JUROR NO. 6840: Yes.

(7RT 1258-1264.)

Hardy's defense counsel and the court had the following additional questions for DD:

MR. YANES: Let me put it to you very bluntly. We do appreciate your honesty telling us how you really feel. As you know, you don't get to this point until you have convicted Mr. Hardy of the crime.

PROSPECTIVE JUROR NO. 6840: The penalty phase.

MR. YANES: Right you don't get to that until you have convicted him.

PROSPECTIVE JUROR NO. 6840: Right.

MR. YANES: In this case, you have convicted him of some of the charges or all of the charges of having taken a woman off the street, kidnapped her, robbed her, raped her, tortured her and raped her with a foreign object, killed her. In this case when you are going to hear other evidence which could convince you beyond a reasonable doubt, okay, of the guilt of Mr. Hardy, DNA-type evidence, statements from his own mouth.

PROSPECTIVE JUROR NO. 6840: I understand that.

MR. YANES: So now you are in that state of mind when you are going into the jury room to decide to go to the penalty phase.

PROSPECTIVE JUROR NO. 6840: Correct.

MR. YANES: You know that you have been convinced overwhelmingly that he is guilty of these charges, all right? Now, you would agree that there are some cases where a person should get the death penalty, that they deserve it, wouldn't you? In order for you to say you could impose it at times, you would have to say you feel there are times when a person deserves it?

PROSPECTIVE JUROR NO. 6840: That's a hard question to answer.

MR. YANES: I'm saying in general.

THE COURT: Let me ask you was your answer to that question based on the belief that, under certain situations, the law compels you or instructs you?

PROSPECTIVE JUROR NO. 6840: That's what I was thinking. The only way I could impose the death penalty is if the law compels you to impose the death penalty. I'm talking about if it's -- if this mitigating circumstance took place and the death penalty is called for, I would to stay within the law. I would have to impose the death penalty.

MR. YANES: The only thing the judge is going to tell you, in terms of the law, is if the aggravating circumstances occurred, what the defendant did to the victim, that sort of thing, are so much worse than any good things you hear about him, then you can vote for the death penalty. That's what the court is going to tell you, but you have to then decide if those things are so much worse than the mitigating. The court doesn't tell you to vote death. The judge says you have a choice. You have heard all the evidence. You heard the bad thing and good. Now, you decide the bad things outweigh the good things then you can vote for the death penalty. If you don't think so, then you must vote for life. So the question is if you find that those aggravating things are so much worse would you, on your own, without the court telling you what to do, be able to vote for the death penalty?

PROSPECTIVE JUROR NO. 6840: I understand that my answer to this question is probably going to determine if I sit on this trial or not.

MR. YANES: Whether you are eligible. There is still another process we are going to eliminate people. Just answer this question if whether your are eligible to go on to this stage don't do it -- don't do it for that. Do it to be honest.

PROSPECTIVE JUROR NO. 6840: I'm trying to figure out. This is a huge question. Can I have a couple days to think about it?

MR. YANES: No. We need to know now, I'm sorry.

> THE COURT: The fact of the law is the law would never, in a death penalty case, never tell you that you shall return the death penalty, if certain factors are here, anything like that. That's never the law. The law is simply if the aggravating factors substantially outweigh the mitigating factors then you can return a verdict of death, otherwise you can't. If the mitigating circumstances outweigh the aggravating you wouldn't return a death verdict. If you wanted to return life without the possibility of parole you can return that period. You can return that verdict you can only. You only have the option of returning a death verdict if the aggravating factors substantially outweigh the mitigating. So knowing that would be the charge, basically, to you, would you be able to vote for the death penalty knowing the court is never going to tell you that you should or shall or anything like that?
>
> PROSPECTIVE JUROR NO. 6840: I think I could, yes.

(7RT 1264-1268.)

Thereafter, the prosecutor challenged DD for cause, explaining DD had "hesitated numerous times" about whether he could impose the death penalty, and would do so only if other jurors convinced him. (7RT 1269.) The prosecutor argued DD abhored the death penalty, and even "if the law compels him, he's asking for someone else to be the judge . . . that other people have to convince him . . . ." (7RT 1269.) She argued, "He can't do it." (7RT 1269.) That argument contradicts DD's answers, which stated numerous times he could follow the law, and vote for a sentence of death. Hardy's defense counsel argued DD stated he "believes he can set aside personal beliefs and he did emphasize he would follow the law." (7RT 1269-1270.) Counsel added,

"the fact that [voting to impose a death sentence is] a very difficult decision should not be a reason to exclude him." (7RT 1270.)

The court granted the prosecutor's challenge for cause, ruling:

> THE COURT: I sort of have a two-fold problem with this juror. One is based on his answers, at least initially, it certainly appeared that his views would prevent or substantially impair his performance as a juror, in accordance with the law.
>
> So it would seem at the outset, that he probably could not impose the death penalty no matter the circumstances. The second problem that I have, if he was a juror and if the jury did impose death, I'm not sure that that verdict would be worth much because he told us repeatedly if it comes back with the death verdict that means 11 people voted for death and so did he. So I don't think he will be helpful or useful to us in this case. So I'm going to grant the people's challenge for cause.

(7RT 1270.)

Uttecht v. Brown (2007) 551 U.S. 1, 10 [127 S.Ct. 2218, 167 L.Ed.2d 1014], instructed a reviewing court should consider the entire voir dire when determining a *Witherspoon* issue. Hardy, therefore, presented all the questioning of DD during voir dire. Hardy additionally will address DD's written answers.

The court used a 53-page, written questionnaire, with 237 questions, many with subparts. Pages 42 through 53 contained questions 177 through 237 that concerned the death penalty exclusively. (21CT 5445-5498.) The prosecutor specifically asked about only two of DD's written answers: to

questions 178 and 193. (7RT 1258-1259.) DD answered that he abhorred the death penalty, felt it was "cruel and unusual," and that life without the possibility of parole was the only acceptable alternative to the death penalty. (21CT 5487.) DD viewed the purpose of the death penalty as revenge (21CT 5487), which is a recognized and permissible penological purpose. (*Graham v. Florida* (2010) ___ U.S. ___ [130 S.Ct. 2011, 2028-2030, 176 L.Ed.2d 825].) When asked in writing, "Do you feel it would be impossible for you to vote against death under any circumstance?" DD's written answer was "no." (21CT 5488.) His written answers also revealed DD was unsure whether he would automatically vote for life imprisonment in every case. (21CT 5489.) When asked in writing if he could "set aside religious, social or philosophical convictions and decide the penalty based solely upon the aggravating and mitigating factors presented . . . .?" DD answered he was "not sure," explaining, "I believe I can." (21 CT 5491.)

DD's answers during voir dire established his ability to follow the court's instructions on the law concerning sentencing. Despite abhorring the death penalty personally, DD repeatedly stated he could, and would, follow the law, and vote for a sentence of death. DD's use of the words "cruel and unusual" cannot be interpreted to mean constitutionally cruel and unusual either under the federal or California constitutions. It is a common usage, and

colloquially means harsh and extraordinary, which is a correct description of the death penalty. Likewise, as DD correctly stated on his questionnaire, the only other alternative punishment is life without the possibility of parole. This sentencing fact was reestablished several times during voir dire when both defense counsel and the court told DD there were only two sentencing choices.

In excusing DD for cause, the court identified two problems. First, the court stated DD's "answers, at least initially, it certainly appeared that his views would prevent, or substantially impair his performance as a juror. . . ." (7RT 1270.) As the court's comment inherently recognized, upon further questioning DD consistently and repeatedly answered he could follow the law, deliberate with other jurors, and vote for the death sentence if appropriate. Second, the trial court noted that if DD were on the jury, and it imposed the death penalty, it would not "be worth much" because it would mean only 11 other jurors "voted for death and so did he." (7RT 1270.) That is what any death sentence means. Further, the court's second point recognized DD would be able to vote for death. The second point went to DD's ability to deliberate with other jurors while standing firm under pressure to change his decision. The trial court's comment revealed there was no foundation to the court's conclusory statement that DD was substantially impaired. Thus, neither stated

reason was a proper ground, or provided substantial evidence, to excuse DD for cause.

DD's thoughtful hesitation about the death penalty did not rise to the level of justifying a challenge for cause. To the contrary, DD exemplified a death-qualified juror who would listen and apply the law, deliberate with other jurors, and be susceptible to persuasion. As *Witherspoon* explained,

"a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522.) "[T]he most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed." (*Id.* at p. 522, fn.21 [italics in original].)

2. Prospective Juror KF, Number 4283.

The prosecutor challenged prospective Juror KF for cause, and the trial court excused KF. (7RT 1320.) The prosecutor failed to show that KF met the criteria for dismissal. (*Wainwright v. Witt, supra,* 469 U.S. at p. 423.) KF was a 28-year old mechanical engineer who had resided in Norwalk for two years. (20CT 5230-5233.) KF's written answers on the questionnaire showed he was

more than willing to impose a death sentence. He wrote that his empathy for the victim would make a sentencing decision difficult. (20CT 5270.) He noted that while it was a "hard" decision, "some crimes offer no other meaningful response" (except death). (20CT 5270.) KF wrote that when he "was younger [he] was for the death penalty," and as he grew older he became "more unsure." (20CT 5270.) He wrote that he recognized the death penalty "was needed and will continue to be needed in this society." (20CT 5270.) He wrote that he "may not be able to make the final decision for the penalty." (20CT 5271.) KF saw the purpose of the death penalty as "to remind people that prison is not the only consequence of their actions." (20CT 5271.) In explaining how he would choose penalties, KF wrote he "would need to see the details and the level of involvement as compared to the others." (20CT 5274.) In this regard, KF wrote that death would be appropriate when the defendant had "main responsibility for the actions that lead to the victim's death." (20CT 5274.) KF's attitude was consistent with the prosecutor's theory that Hardy deserved the death penalty because he was the leader. (14RT 3144.) KF also thought "it . . . possible" he would vote for life instead of death "if the defendant was not the main responsible person." (20CT 5274.)

During voir dire, KF stated he would try to keep an open mind when deciding the penalties. (7RT 1309.) Indeed, if anything, KF appeared to favor slightly the death penalty over life in prison based on the charges. He admitted he felt "more strongly more about the death penalty" based on what he had seen about Hardy's case. (7RT 1309.) Even so, KF agreed he could keep an open mind and follow the law. (7RT 1310.) KF was raised as Lutheran, but no longer practiced actively. He initially stated he thought the Lutheran church opposed capital punishment. (7RT 1318.) When pressed by the prosecutor, KF answered her leading question affirmatively (and incorrectly[7]) that the Lutheran church opposed capital punishment. (7RT 1319.) He had answered in writing, however, that he belonged to no group or organization that opposed or favored the death penalty. (20CT 5270.)

Hardy's defense counsel and the court questioned KF as follows:

> THE COURT: The questioning now is going to be primarily focused on whether you would be able to keep an open mind on the subject of penalty or punishment. There are two phases in a death penalty trial. The first phase would be the guilt phase, and if the jury voted guilty and if the jury found one or more of

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[7] KF's response to the prosecutor was incorrect. A Lutheran church website explained: "In 1967, The Lutheran Church—Missouri Synod stated its position 'that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions.'" Resolution 2-38 states, in part, "Whereas, The Lutheran Confessions support capital punishment . . . , and capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions." (www.deathpenaltyinfo.org/capitalpunishment.pdf.)

the special circumstances to be true, then we would go to the second phase. At the second phase, you would be determining the appropriate punishment. There are two possible penalties, if we get to that phase, and that is the death penalty or life in prison without the possibility of parole.

All right. Do you think that you could keep an open mind and decide between those two penalties?

PROSPECTIVE JUROR NO. 4283: I would try to.

THE COURT: Okay. Is there some hesitancy? Do you feel like you would almost invariably vote one way or the other?

PROSPECTIVE JUROR NO. 4283: Of what I've seen of the case so far, I feel strongly more about the death penalty, but -

THE COURT: By what you've seen of what?

PROSPECTIVE JUROR NO. 4283: Well, just what I've read about it and the way -- also some of the - the questions on that questionnaire. As I went through it, when I started looking at it, I guess I don't really feel like I have an open mind about it. I think I might already have some thoughts already about it.

THE COURT: You mean the questionnaire in this case?

PROSPECTIVE JUROR NO. 4283: Well, yeah. Just the way I started to look at the questionnaire and the things that was presented about the case.

THE COURT: OKAY. You're not talking about reading about the case any other place?

PROSPECTIVE JUROR NO. 4283: No, not about that.

THE COURT: Well, no one is going to dispute that the facts in this case are horrific, all right? No one is going to say anything other than that.

But what we need for you to do, see, if we get to the penalty phase, you would have to weigh mitigating factors, that is, factors that are in the defendant's favor, against aggravating factors, that would be factors that are against the defendant, and you could only vote for the death penalty if the aggravating factors substantially outweigh the mitigating factors.

Now, that decision would be based on, amongst other things, on the circumstances of the crime. But we're just, today, you know, we're going to be making sure that -- you haven't firmly fixed in your mind what the penalties would be, right, because you haven't heard, actually, the evidence?

PROSPECTIVE JUROR NO. 4283: Right.

THE COURT: And you'll be able to keep an open mind, and if the aggravating factors don't substantially outweigh the mitigating factors, you would vote for life in prison, right?

PROSPECTIVE JUROR NO. 4283: Yes.

THE COURT: Okay. Questions?

MR. YANES: Good morning, sir.

PROSPECTIVE JUROR NO. 4283: Good morning.

MR. YANES: You know, we're asking you these questions as to not would you enjoy doing this or would it be something pleasant, but could you just, as a man in society, be able to do your duty to your country, basically. And so we need to know if you can do it, all right?

PROSPECTIVE JUROR NO. 4283: (no audible response)

MR. YANES: So if you got into the penalty phase of the case, my client had been convicted, all right?

PROSPECTIVE JUROR NO. 4283: Yes.

MR. YANES: Would you be able to weigh the factors and decide whether the death penalty was appropriate, or life without the possibility of parole was appropriate?

PROSPECTIVE JUROR NO. 4283: I would try to do that.

MR. YANES: Well, not try, would you be able to do it? Could you do it?

PROSPECTIVE JUROR NO. 4283: Well, just looking at like the survey, just some of the beliefs I had before this case, I don't know for sure what I would be able to do in the case.

MR. YANES: Well, we're not asking you what verdict you'd come to or result, what I'm asking you is would you be able to follow the law that the judge gives you about penalty. He's going to tell you what he just told you just now, basically, that you're going to hear evidence in the penalty phase of aggravating factors, which would be some of the horrible things that he did to this woman, things in his prior life that he did, bad things, and then you're going to hear mitigating evidence, good things he's done in his life, may be issues for sympathy, may be issues of mental illness or abuse when he was a kid, things to make you not want to give the death penalty.

Okay. And then you have to weigh those. And the way you have to weigh it, it isn't a test of what is equal or what's a little bit more, it's got to be the aggravating, the worse stuff, the bad stuff has to substantially outweigh the mitigating, and then and only then can you vote death, if you want to -- you still don't have to, but you can at that point.

But if the aggravating doesn't substantially outweigh the mitigating, then you must vote for life; that's the law. That's the reason I tell you.

Would you be able to follow that?

PROSPECTIVE JUROR NO. 4283: I would try to - again, I don't know what I'd -- I think I understand what you're saying, but -

MR. YANES: You wouldn't throw your hands up and say, "I just can't follow the law?"

PROSPECTIVE JUROR NO. 4283: No. No. I would try to follow the law as much as possible.

MR. YANES: Okay. What part of that is bothering you? What is it that's making you say "try" and not "you can." What is it you're concerned about?

PROSPECTIVE JUROR NO. 4283: It's just that I've never been faced with trying to make this decision before, and I've never really thought about where my position would be -

MR. YANES: Uh-huh.

PROSPECTIVE JUROR NO. 4283: -- on the death penalty.

MR. YANES: Okay. In your questionnaire you stated that you understand the death penalty is something California should have.

PROSPECTIVE JUROR NO. 4283: (no audible response.)

MR. YANES: You're not crazy about it, but you understand that it has its purpose?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: Correct. And you indicated also that you could vote for it if you felt it was the appropriate case.

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: Okay. Is that what you are telling me today?

PROSPECTIVE JUROR NO. 4283: Yes.

MR. YANES: We're not asking you if you'd do it lightly or if you'd like to do it -

PROSPECTIVE JUROR NO. 4283: No.

MR. YANES: -- Just could you do it. And this is a first time for everybody, you know, for the jurors.

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: This is their first time doing this kind of thing, and so no one knows, exactly, what they're going to do or how they're going to react until they get into the actual situation. I guess it's like going into combat, whether you're going to run away scared or fight, until it happens. So it's like that; no one knows for sure. But we do need to get some assurance from you that you can follow the law and that you'd be impartial, whether or not you like the death penalty or don't like it. Could you follow the law and vote for it, in the appropriate case, and vote for life, in the appropriate case?

PROSPECTIVE JUROR NO. 4283: I understand the law and I understand, I guess, the details and instructions that will be given to me. I guess I don't know. Like you're saying, I don't know what will happen when I actually try to make the decision, whether I'll just look at what is there or my personal beliefs will -

MR. YANES: What are your personal beliefs that you're concerned about?

PROSPECTIVE JUROR NO. 4283: I guess, like I said, I was brought up in a conservative home, and I went to Lutheran High School for six years, so I'm not -- I don't -- I'm not practicing my religion now, but in the past I've had beliefs, when I was growing up and stuff like that. So it's kind of -- I guess it's kind of uncertain for me. I don't know, exactly, where I stand.

MR. YANES: What is it about your beliefs? What beliefs are there that might cause you problems? What kind of beliefs? Beliefs about what?

PROSPECTIVE JUROR NO. 4283: I'm trying to get to it. Really, taking someone else's life or making that decision to take another person's life.

MR. YANES: All right. So what we need to know is -- let's assume that you have some religious issues or doctrine which causes you to feel that it's a problem taking someone's life, even in this kind of - even in a legal way. We need to know if you can set that aside and be willing to consider the death penalty, when you go into the penalty phase, we need to know that you can do that.

PROSPECTIVE JUROR NO. 4283: I would try to consider it. I just don't know, at the end, what factor that would play.

MR. YANES: Sure. So what you're telling us is you think you can do it and you'd give it your best shot, but you don't know, 100 percent sure, if you can do that?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: OKAY. Let me give you a little bit to help you.

Let's suppose that you've heard evidence which was overwelming [sic] of guilt. Okay. It's not whether you're going to have any doubt, you're really not going to have a problem, you're going to have an overwelming [sic] conviction of physical evidence, confessions, that kind of thing.

PROSPECTIVE JUROR NO. 4283: Uh-huh.

MR. YANES: And you're going to hear horrible stuff, you're going to see horrible photos, things that were done to this woman. And then you've got to go in there and decide life or death. Okay? Do you think that you'd be able to evaluate those

things fairly, both to the prosecution and to the defense, and make a fair decision?

PROSPECTIVE JUROR NO. 4283: Again, I would try to.

MR. YANES: Okay.

PROSPECTIVE JUROR NO. 4283: Again, I don't know what will happen at the end. I mean -

MR. YANES: Right. But you can't tell me for sure?

PROSPECTIVE JUROR NO. 4283: Not for sure, because I don't know. Before this case I had never thought about these issues.

MR. YANES: But you're telling me that you think you can or you'd do your best?

PROSPECTIVE JUROR NO. 4283: I'd do my best.

MR. YANES: And you can follow the law?

PROSPECTIVE JUROR NO. 4283: Right.
MR. YANES: Okay. You say that some of the factors that you would have to know in deciding whether you could vote for death or not, would be the defendant's involvement in the crime and the things that he did, right?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: So if you heard things that were terrible that he did and/or horrible that he did, and you found the aggravating factors and mitigating, that you'd consider that and follow the law?

PROSPECTIVE JUROR NO. 4283: I would consider it . I guess the only concern that I have is just with everything that goes on in our legal system -- I wasn't there, I wasn't the person there. So even, I guess, in the back of my mind, I'd always

worry, how do I make sure that I know for sure, you know? I mean it can't be 100 percent, it's always secondhand

.

MR. YANES: Okay. Well, I agree with you that in some cases that is the case. All right? This case isn't like that.

PROSPECTIVE JUROR NO. 4283: Okay.

MR. YANES: There is going to be physical evidence, DNA evidence, confessions -

PROSPECTIVE JUROR NO. 4283: Okay.

MR. YANES: -- coming out of the mouth of my client as to what he did, and about his involvement. This is not going to be that kind of case where you go, oh, maybe the witness was lying and maybe really he wasn't there, or that kind of thing. It's not going to be that kind of case.

PROSPECTIVE JUROR NO. 4283: Uh-huh.

MR. YANES: So try to think of it in removing any doubt about the actual guilt, now we're just talking strictly about the penalty. With that removed and just thinking about penalty, would you be able to make a decision considering death or life?

PROSPECTIVE JUROR NO. 4283: Yes. If I was comfortable with that; yes.

(7RT 1308-1318.)

The prosecutor and the court then questioned KF:

MS. LOCKE-NOBLE: You indicated that you attended Lutheran High School for six years?

PROSPECTIVE JUROR NO. 4283: Right.

MS. LOCKE-NOBLE: Although you're not practicing at this moment, you still have a lot of those beliefs; is that right?

PROSPECTIVE JUROR NO. 4283: Partially because, I guess, my parents weren't very religious, but they were very conservative. So it goes hand-in-hand, I still have some of the beliefs of -- I guess I'm not as structured as I once was.

MS. LOCKE-NOBLE: Okay. And does the Lutheran faith believe in imposing the death penalty? They're against it, aren't they?

PROSPECTIVE JUROR NO. 4283: I think so.

MS. LOCKE-NOBLE: You know so?

PROSPECTIVE JUROR NO. 4283: Yes.

MS. LOCKE-NOBLE: Okay. Now, you've indicated several times, both on the questionnaire and here in court, that you don't know whether or not you can set aside your personal beliefs; is that correct?

PROSPECTIVE JUROR NO. 4283: Right.

MS. LOCKE-NOBLE: And part of your personal beliefs include the Lutheran faith; is that correct?

PROSPECTIVE JUROR NO. 4283: Yes.

MS. LOCKE-NOBLE: And their belief is that you cannot impose the death penalty on someone else, that that is god's right; is that correct?

PROSPECTIVE JUROR NO. 4283: Correct.

MS. LOCKE-NOBLE: And you believe that, don't you?

PROSPECTIVE JUROR NO. 4283: Yes. I mean to a certain extent.

> MS. LOCKE-NOBLE: And at this point in time, you cannot say for certain that you can set aside those beliefs, while you're in the jury room; is that correct?
>
> PROSPECTIVE JUROR NO. 4283: Yes.
>
> MS. LOCKE-NOBLE: And would it be a fair statement to say that it would be best if you were not a juror on this case?
>
> PROSPECTIVE JUROR NO. 4283: Yes.

(7RT 1318-1319.)

At this point, the prosecutor asked if the court wanted to hear more, and the court asked KF to wait outside. (7RT 1319.) The court then excused KF for cause, ruling:

> THE COURT: Okay. It would appear that the juror's views on capital punishment would prevent or substantially impair the performance of his duties if he was a juror, in accordance with the law. So we'll excuse that juror.

(7RT 1320.)

Voir dire revealed KF's reservations about serving as a juror. KF had not before considered the death penalty, because he had "never been faced with trying to make this decision" (7RT 1312), and the fact that "before this case [he] had never thought about these issues." (7RT 1316). Even so, KF told the court he would "be able to keep an open mind." (7RT 1310.) When asked directly if he would throw his hands up, and refuse to follow the law, he said he would not do so, and "would try to follow the law as much as possible." (7RT 1312.) He reaffirmed he could vote for the death penalty "if

[he] felt it was the appropriate case." (7RT 1313.) Having not ever given the death penalty much thought previously, he explained, "I don't know, exactly, where I stand." (7RT 1314, 1316 ["I had never thought about these issues"].) He did not know what the result would be, but KF agreed he would give it his "best shot," and do his best, even though was not 100 percent sure. (7RT 1315, 1316.) KF affirmed that if guilt were established he could make the sentencing decision. (7RT 1318.) He considered himself qualified to sit on the jury because he was "educated and observant." (20CT 5260.)

The foregoing answers and exchanges demonstrated that KF was willing to consider the case before him, and could vote for death in the appropriate case if he were convinced of Hardy's guilt. Of course, as a juror, KF would never have had to decide about sentencing unless he already had decided Hardy's guilt beyond a reasonable doubt. KF made clear he believed the death penalty had a place in California's sentencing scheme, and served the accepted penalogical purpose of deterrence. (20CT 5270, 5271.) Indeed, he thought the death penalty was imposed "too seldom." (20CT 5270.) While KF preferred not to sit on Hardy's jury, and agreed with the prosecutor that it "would be best if [he] were not a juror," that sentiment was not a basis for excusing him. *People v. Riccardi* (2012) 54 Cal.4th 758, 782, held that a pro-death penalty juror who "feared that actually being on a death jury would

be difficult or uncomfortable" was "not disqualifiable under *Witherspoon-Witt.*"

D. Reversal Is Required Because Two Prospective Jurors Who Merely Viewed the Decision to Impose Death as an Awesome Responsibility Were Improperly Excluded.

Two jurors who could follow the court's instructions, and impose a death sentence if appropriate, were improperly excluded because each had scruples about the death penalty, and correctly viewed the decision as an "awesome responsibility." (*Caldwell v. Mississippi* (1980) 472 U.S. 320, 330 [105 S.Ct. 2633, 86 L.Ed.2d 231].) Viewing the entire voir dire, as *Uttecht v. Brown, supra,* 551 U.S. 1, 10, instructs, reveals the prosecutor systematically, and impermissibly, excluded death-scrupled jurors through cause and peremptory challenges.

In addition to DD and KF, discussed *ante,* the prosecutor also challenged prospective jurors 8100 and 6750 for cause after each had expressed thoughtful hesitation concerning the death penalty. (7RT 1089-1100, 1325-1347.) The trial court denied each of these challenges for cause (7RT 1110, 1347.) Later, however, the prosecutor exercised peremptory challenges to exclude prospective jurors 8100 and 6750. (8RT 1844, 1863.) The prosecutor also successfully challenged for cause prospective juror 0256 who stated he "probably" would not be able to vote to impose the death

penalty based on Catholic religious grounds. (8RT 1382, 1387; see also Argument II, *post.*)

It is well settled that the prosecution's "power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering harconstitutional capital sentencing schemes by not following their oaths.'" (*Gray v. Mississippi, supra,* 481 U.S. at pp. 658-659, quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 423.) Here, however, challenges for cause were misused to "stack the deck" against Hardy. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 658-659.) It is unsurprising that prospective jurors expressed concern and hesitation about imposing a death sentence. These sentiments represent accurately the "conscience of the community." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 519; see also *People v. Gamache* (2010) 48 Cal.4th 347, 389.) Just less than half of Californians who voted in the November 2012 election, voted in favor of repealing California's death penalty altogether.[8]

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[8] Poll data revealed 48 percent of voters (5,974,243 voters) favored eliminating the death penalty; while 52 percent of voters (6,460,264 voters) favored retaining the death penalty. (http://ballotpedia.org/wiki/index.php/.) California_Proposition_34,_the_End_the_Death_Penalty_Initiative_(2012). Even back in 1968, when the Court decided *Witherspoon*, it noted, the "divergence of belief between the juries we select and society generally." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 520, fn. 19.)

The excusal of DD and KF was not "fairly supported by the record" *Wainwright v. Witt, supra*, 469 U.S. at p. 434), and should be rejected. (*People v. Tate* (2010) 49 Cal.4th 635, 666.) For example, the trial court concluded any verdict reached by DD would not "be worth much" because it would mean only 11 other jurors "voted for death and so did he." (7RT 1270.) DD's responses that he ultimately could vote to impose death, and could be persuaded to do so, were consistent with all that is required: that DD would be able to affirm the sentence if polled. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1235, and fn. 6.) The caution expressed by DD and KF was similar to a juror who, although death-qualified, was reluctant to serve as the foreman. (*People v. Chacon* (1968) 69 Cal.2d 765, 772, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) Despite this caution, DD and KF, like the juror in *Chacon* were not substantially impaired, and should not have been excused for cause.

People v. Stewart, supra, 33 Cal.4th at page 446, recognized that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled - indeed, duty bound - to sit on a capital jury" unless "he or she were unwilling or unable to follow the trial court's instructions." Certainly, DD's and KF's answered reflected their recognition of the difficulty of imposing a death sentence. Nevertheless, each stated he would be able to

follow the trial court's instructions. The "special seriousness" (*Adams v. Texas, supra*, 448 U.S. at pp. 50-51), with which DD and KF viewed their duties did not disqualify them. To the contrary, it qualified them to sit as jurors, and indeed would have guarantied that Hardy's jury met constitutional standards. "Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed [the United States Supreme] Court to view sentencer discretion as consistent with - and indeed as indispensable to - the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 330 [citation omitted].) Because DD and KF could follow the court's instructions, despite their concerns about the death penalty, the challenges for cause should have been denied. (Cf., *People v. Stewart, supra*, 33 Cal.4th at p. 446; see also *People v. Pearson, supra*, 53 Cal.4th at p. 332.) Indeed, the State has no legitimate interest in capital juries composed of jurors who would impose a death sentence without solemn consideration. Thus, this Court recognized that even a juror who "personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (*People v. Stewart, supra*, 33 Cal.4th at p. 446, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

E. The Error in Excusing Two Qualified Jurors Requires Reversal of Hardy's Death Sentence.

The excusal of DD and KF for cause, based on only their personal concerns and hesitancy about the death penalty, and not on their inability to follow the law on sentencing as instructed by the trial court, was unwarranted. The prosecution failed to carry its burden that excusal for cause was supported by substantial evidence. (See e.g., *People v. Pearson, supra*, 53 Cal.4th at p. 333.) Accordingly, Hardy's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to an impartial and representative jury, reliable sentencing, and due process were violated. Hardy's case, like *Witherspoon* and *Gray*, involved the systematic exclusion of death-scrupled jurors being excused through cause and peremptory challenges because of their personal concerns and reservations about the death penalty. "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" (*Gray v. Mississippi, supra*, 481 U.S. at p. 658, quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 423.) As in *Pearson*, none of DD's or KF's "answers . . . suggested views that would substantially impair [their] ability to perform [their] duties by voting to impose the death penalty in an appropriate case." (*People v. Pearson, supra*, 53 Cal.4th at p. 330.) DD's and

KF's seeming equivocation did not equate to views that made either unable to vote for death in every case. (*Id.* at p. 331.) Mere "vague, indefinite or unformed" views are insufficient to support a challenge for cause. (*Ibid.*)

Excusing DD and KF for cause represented an unconstitutional return to Illinois' "conscientious scruples" standard rejected half a century ago in *Witherspoon.* "To permit the exclusion for cause of other prospective jurors unnecessarily . . . 'stack[s] the deck,'" and violates due process. (*Gray v. Mississippi, supra*, at pp. 658-659, quoting *Witherspoon v. Illinois, supra*, 391 U.S. at p. 523.) Hardy's sentence of death must be reversed under federal and California law based on the erroneous dismissal of even a single prospective juror. (See e.g., *Gray v. Mississippi, supra*, 481 U.S. at pp. 665-668; *People v. Pearson, supra*, 53 Cal.4th at p. 333.) Based on the foregoing, the judgment of death should be reversed.

II

REVERSAL OF THE JUDGMENT OF DEATH IS REQUIRED BECAUSE APPLICATION OF THE SUBSTANTIAL IMPAIRMENT STANDARD TO DETERMINE DEATH-QUALIFICATION OF PROSPECTIVE JURORS VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, A REPRESENTATIVE JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND DUE PROCESS.

A. Summary of Argument.

Argument I argued the prosecution failed to carry its burden of demonstrating by correct standards that prospective jurors DD and KF were substantially impaired to serve as jurors. As an additional issue, those two prospective jurors, along with a third prospective juror, were improperly removed for cause based on religious or moral beliefs, in violation of the Sixth Amendment, which requires the re-examination of the *Witherspoon/Witt* standard in light of evolving United States Supreme Court Sixth Amendment jurisprudence. Accordingly, excusing these three prospective jurors for cause violated Hardy's rights to be tried by a fair and impartial jury and to due process of law, and the prohibition against cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, and under article I, sections 7, 15, 16 and 17 of the California Constitution. Therefore, reversal is required.

B. Substantial Impairment Standard for Death-qualification of Jurors.

Hardy set forth the law governing the substantial impairment standard for jurors in Argument I, *ante*, and incorporates those authorities fully by this reference for the sake of brevity.

C. Relevant Background Information of Prospective Jurors.

1. Prospective Jurors DD and KF.

Hardy set forth the relevant information contained in the jury questionnaires and voir dire of DD and KF in Argument I, *ante*, and incorporates those summaries fully by this reference for the sake of brevity. Additionally, the questionnaire and voir dire of prospective juror 0256, ML, is provided.

2. Prospective Juror ML, Number 0256.

ML was a 41-year old, married, but divorcing, self-employed electrician/engineer. (23CT 6192-6193.) He was Catholic, and considered himself a religious person. (23CT 6199.) He attended church regularly, and selected "very important" to describe how important his religion was to him. (23CT 6200.) He previously sat as a juror in a murder trial that reached a verdict. (23CT 6200.) The prior murder case involved pictures of someone who had died in a traumatic manner. (23CT 6213.) ML considered himself both a leader and a follower, noting he believed a person needed to be both.

(23CT 6203.) ML would have not believed, or disbelieved, the testimony of a law enforcement officer based on the person's status as an officer. ML's judgment of credibility would "depend on if [the officer] act[ed] believable or not." (23CT 6209.) ML was currently going through a divorce. (23CT 6222.) He wrote he would have no difficulty keeping an open mind until he had heard all the evidence and arguments, and been instructed by the court. (23CT 6226.) ML wrote he would be able to follow the court's instructions even if he did not agree with them, explaining, "it is the duty of the jury to follow the instructions of the court." (23CT 6228.)

Some of ML's written responses on the questionnaire that specifically concerned the death penalty were:

< He had mixed feelings about the death penalty. (23CT 6232.)

< He previously had thought about the death penalty. Although his faith was against the death penalty, ML believed there were "instances where it might apply." (23CT 6232.)

< Although he was Catholic, ML did not share the Roman Catholic Church's opposition to the death penalty. He did not know how strongly he held these views. (23CT 6232.)

< ML believed California should have the death penalty. (23CT 6233.)

< He did not believe California should abolish the death penalty. (23CT 6233.)

When asked on the questionnaire, "Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way." ML answered, "no." (23CT 6233.) He identified "mass murders" as a type of case/offense where the death penalty should be imposed. (23CT 6233.) When asked, "Do you feel it would be impossible for you to vote for death under any circumstances?" He answered, "no." (23CT 6233.) ML responded "depends on the facts," when asked about whether murderers should be sentenced to death, and swiftly executed. (23CT 6234.) He recognized his Catholicism would "preclude . . . or make it difficult . . . to impose the death penalty." (23CT 6234.) ML wrote he could "set aside religious . . . , or philosophical convictions and decide the penalty based solely upon the aggravating and mitigating factors . . . and the law as given . . . by the judge." (23CT 6235.) "In the appropriate case," ML could envision rejecting life in prison, and voting for the death penalty. (3CT 6236 [underlining in original].) He would not automatically vote either for life in prison, or the death penalty. (23 CT 6237.)

Three weeks after ML completed the questionnaire, voir dire was conducted. By that time, ML had thought more about the case, and the death

penalty. During voir dire, he stated he understood that if the defendant were found guilty, the same jury that decided guilt also would decide between the two penalties of life in prison or death. (8RT 1387-1383.) The court explained the law recognized what aggravating and mitigating factors jurors could consider, "and if the aggravating factors substantially outweigh the mitigating factors, then you can impose the penalty of death." Then the following exchange took place:

> THE COURT: Would you be able to do that?
>
> PROSPECTIVE JUROR NO. 0256: I'm not sure. I've been thinking about it for the last three weeks, since we filled out the questionnaire, and I've been talking to several people, the priest of my church, and I'm not 100 percent sure that I could make the decision.
>
> THE COURT: Okay. Do you understand that we need to find out if you can now, because it's too late once you're a juror? Because the decision as to penalty, in order to fix the penalty at death, all 12 jurors have to vote for death as the penalty.
>
> PROSPECTIVE JUROR NO. 0256: I remember that from the questionnaire.
>
> THE COURT: So it - - and as far as you're concerned, it would focus down to your vote.
>
> So you need to tell us now, because we need a jury who can, when it gets - - it if gets to the penalty phase, can keep an open mind and can fix the penalty of death, if that's justified or warranted.
>
> PROSPECTIVE JUROR NO. 0256: And I'm not sure that I can. I think I indicated that, somewhat, on my questionnaire, by

checking some of the boxes yes or no, depending on the circumstances. But I have been thinking about it and soul searching, and I don't know that I can affix the penalty of death.

THE COURT: Okay. Well, there's two ways to interpret that. One is "I'm not sure," and the other interpretation is "I don't think that I could affix the penalty of death." Which interpretation would be more accurate?

PROSPECTIVE JUROR NO. 0256: I guess I'm still not 100 percent sure.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 0256: I'm leaning towards that I couldn't do it, but I couldn't absolutely say that I couldn't do it, if that makes any sense. I don't know if that makes any sense.

THE COURT: Right.

PROSPECTIVE JUROR NO. 0256: I'm still unsure in my mind.

THE COURT: See, sometimes when an attorney makes a request, I will say to the attorney, you know, "I'm not sure that I can grant that request, counsel." And what I'm really saying is no. So I need to know if that's what you're telling us.

Are you giving me the polite version of no?

PROSPECTIVE JUROR NO. 0256: Maybe I guess I am.

THE COURT: Do you think you are?

PROSPECTIVE JUROR NO. 0256: Yes. Because from talking with the priest, you know, he says that it's not moral to kill other people. And I don't know that, you know, I wouldn't be doing it directly, but indirectly - -

THE COURT: Uh-huh. All right. So do you think that it would conflict with your religious beliefs?

PROSPECTIVE JUROR NO. 0256: Yes.

THE COURT: Do you have any questions that you want to ask?

MR. YANES: In reading your questionnaire - - I know you've thought about it more since you filled out the questionnaire - - you indicated that you felt that you could be part of the penalty decision. So what that means is you'd have to set aside, I guess, whatever religious issues there were, or thoughts you had, in order to do that. Do you think that you could do that?

PROSPECTIVE JUROR NO. 0256: I'm not sure. At times it's hard, because I'm Roman Catholic, it's hard being - - living within the rules of the church. And before this questionnaire, I hadn't really thought about it much.

MR. YANES: Right.

PROSPECTIVE JUROR NO. 0256: And I've had some time to think about it, and I don't know that I could set aside my religious views.

MR. YANES: All right. Do you follow all of the dictates of the church? Do you violate any of the rules of the church?

PROSPECTIVE JUROR NO. 0256: I try not to.

MR. YANES: But you do in life, not adhere to all of them, correct?

PROSPECTIVE JUROR NO. 0256: Maybe involuntarily, but I try my best.

MR. YANES: Okay. Basically, what we need to ask you is this. If you heard the facts of the case, which you felt warranted the death penalty, if the person was beyond life imprisonment

without the possibility of parole, if they were so bad they deserved death, okay - -

PROSPECTIVE JUROR NO. 0256: Uh-huh.

MR. YANES: - - could you, along with 11 other jurors, vote for it, or would you just say even though I think he deserves it, I couldn't do it?

PROSPECTIVE JUROR NO. 0256: I think I - - even though I thought he deserved it, I probably wouldn't be able to - - I wouldn't be able to vote for it.

MR. YANES: You wouldn't? Okay. I'll submit.

THE COURT: All right. We'll go ahead and have you go back up to the jury assembly room to turn in your badge, okay?

(8RT 1383-1387.)

D. Sixth Amendment Jurisprudence Requires a Re-examination of the *Witt* Standard to Further a Process of Capital Jury Selection That Will Result in a Jury That Is a Cross-section of the Community, and Represents the Conscious of the Community.

Two factors indicate that a re-examination of the "substantially impaired" test is appropriate. Hardy will discuss each separately.

1. The Substantial Impairment Test of *Witt* Has Proven Inconsistent with the Rationale of the Decision, and Fails to Result in Capital Juries That Represent the Conscience of the Community.

In the area of jury selection for capital cases, in the years following *Witherspoon*, the High Court has repeatedly expressed concerns over the systematic exclusion of death scrupled jurors. Recently, the Court explained

that *Witherspoon* must be understood "in the context of its facts," and noted, "the trial court had excused half the venire-every juror with conscientious objections to capital punishment." (*Uttecht v. Brown, supra*, 551 U.S. at p. 6, citing *Wainwright v. Witt, supra*, 469 U.S. 412, 416.) The Court cited that its earlier decision in *Gray v. Mississippi, supra*, 481 U.S. 648, "involv[ed] not the excusal of a single juror but rather systematic exclusion. The State had lodged for-cause or peremptory challenges against every juror who 'expressed any degree of uncertainty in the ability to cast . . . a vote' for the death penalty." (*Uttecht v. Brown, supra*, 551 U.S. at p. 8, quoting *Gray v. Mississippi, supra*, 481 U.S. at p. 652.) In such cases, "the systematic removal of those in the venire opposed to the death penalty had led to a jury 'uncommonly willing to condemn a man to die,'and therefore was a jury that was "woefully short of that impartiality [required] . . . under the Sixth and Fourteenth Amendments." (*Uttecht v. Brown, supra*, 551 U.S. at p. 6, quoting *Witherspoon v. Illinois, supra*, 391 U.S. at pp. 514-515, 518, 521.)

A half-century of *Witherspoon* selected capital juries reveals these juries are *not* representative of the community conscience as envisioned, and required, by the Sixth Amendment. For example, one commentator noted, that "[o]n a twelve-person jury, . . . , anywhere from two to eight of the members seated are likely to be automatic death penalty jurors, while less than one will

be an automatic life penalty juror." (Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation* (2006) 38 Ariz. St. L.J. 769, 789 [footnote omitted].) This skewing impacts sentencing in capital cases in two ways. Research shows that people who strongly support the death penalty also hold general pro-prosecution tendencies, including less willingness to consider and give effect to mitigating evidence. (Butler & Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials* (2007) 25 Behav. Sci. Law 57-68.) Thus, capital juries are more predisposed to impose a death sentence at the onset, and also less likely to consider mitigation.[9]

The substantial impairment test in *Witherspoon* results in capital juries that are decidedly *not* representative of the community conscience. As of 2012, Gallup polling showed approximately one third of United States citizens

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[9] As one commentator wrote, "What happens is you have a jury from which everyone who opposes the death penalty is excused for cause, from which everyone who waivers on it (if it was Bin Laden, I could do it, but it would have to be that bad) gets excused peremptorily by the prosecution. It's been my experience that people who oppose the death penalty tend to be pretty honest about it, but people who support it tend to . . . say . . . 'oh, sure, I'll consider mitigation if the judge tells me to.'" (Lyon et al., Panel Two-The Capital Jury: The Negative Effects of Capital Jury Selection (Winter 2005) 80 Ind. L.J. 47, 53.)

opposed the death penalty, although the actual percentage was slightly lower at the time of Hardy's trial. (http://www.gallup.com/poll/1606/death-penalty.aspx.) ML was a member of the Roman Catholic Church, which like many other religions,[10] opposes capital punishment. California has the most Roman Catholic citizens of any state. (http://en.wikipedia.org/wiki/Demographics_of_California#Religion.) In 2000, around the time of Hardy's trial, there were 10,079,310 Californians who were Roman Catholic.[11] Statistics compiled by the University of Southern California for 2000 in Los Angeles County, where Hardy was tried, showed 40 percent of the population was Roman Catholic, with 3,806,377 adherents. (http://www.prolades.com/glama/CRCC%20demographics%20%20Los%20Angeles.htm) Each of those nearly four million adherents to Catholicism, assuming they admitted following their faith, would be automatically excluded from capital jury service in California.

The systematic exclusion of Catholics (or others who oppose the death penalty on religious or moral grounds) from capital juries runs afoul of the

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[10] Religions with significant followings in the United States that reject capital punishment, include the Presbyterian, Episcopal, American Baptist, Methodist, Eastern Orthodox churches, and also some Jewish sects. (http://www.religioustolerance.org/execute.htm.)

[11] U.S. Census Bureau statistics for 2009 showed Catholic churches reporting 68,503,456 members. (http://www.census.gov/compendia/statab/2012/tables/12s0077.pdf.)

Supreme Court dictates that juries represent the conscience of the community. The substantial impairment test conflicts with the jury's constitutional task of "express[ing] the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois*, *supra,* 391 U.S. at p. 519.) The substantial impairment test prevents jurors from bringing to capital sentencing deliberations those "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" (*Peters v. Kiff* (1972) 407 U.S. 493, 503 [92 S.Ct. 2163, 2168, 33 L.Ed.2d 83], but that are constitutionally mandated.

The Supreme Court's decisions have repeatedly protected the principle that juries are more attuned (than judges or legislators) to "the communities moral sensibility." (*Spaziano v. Florida* (1984) 468 U.S. 447, 481 [104 S.Ct. 3154, 82 L.Ed.2d 340] [conc. and dis. op. of Stevens, J.].) It is the jury that must "'express the *conscience of the community on the ultimate question of life or death.*'" (*Ring v. Arizona* (2002) 536 U.S. 584, 615-16 [122 S.Ct. 2428, 2447, 153 L.Ed.2d 556], quoting, *Witherspoon v. Illinois*, *supra,* 391 U.S. at p. 519 [emphasis added].) Excluding 40 percent of Californians, and nearly four million Los Angelinos, from capital jury service if they follow the tenets of their Catholic religion results in capital juries that fail to represent the conscience of the community, or even closely approximate it. James Wilson,

who signed both the Declaration of Independence and the Constitution, and who served as one of the original Supreme Court justices, considered juries as substitute representatives for the entire community, which realistically could not sit to judge a defendant. Unanimity in criminal trials was required because juries were only small, representative samplings of the community. To ensure the judgment truly represented the conscience of the community, unanimity of the smaller-than-the-entire community was required. (2 James Wilson (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007) *Collected Works* 958-959, 961.)

2. Evolving Sixth Amendment Jurisprudence Requires a Re-examination of the Substantial Impairment Standard.

Evolving Sixth Amendment jurisprudence demonstrates the High Court's focus on historical context and the Framers' intent. From the *Witherspoon* decision forward, the High Court repeatedly has expressed concern about the systematic exclusion of death scrupled jurors. (See e.g., *Uttecht v. Brown, supra*, 551 U.S. at p. 6, citing *Wainwright v. Witt, supra*, 469 U.S. 412, 416 ["the trial court had excused . . . every juror with conscientious objections to capital punishment."].) Recent Sixth Amendment decisions show a focus on effecting and revitalizing the historic role of juries, which the High Court views as a critical check and balance on the executive and the judiciary.

In 1999 and 2000, with *Jones v. United States* (1999) 526 U.S. 225, 245 [119 S.Ct. 1215, 143 L.Ed.2d 311], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the Court expressly focused on the historic role of juries to not only determine facts, but also to provide a necessary check on the powers of the executive and the judiciary. *Apprendi* spoke of the jury's historic role to "guard against a spirit of oppression and tyranny on the part of rulers," and also "as the great bulwark of [our] civil and political liberties." (*Apprendi v. New Jersey*, *supra,* 530 U.S. at p. 477, quoting 2 Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) 540-541.)

In 2002, two years after *Apprendi*, the Court reversed its own precedent, and invalidated Arizona's practice of permitting a trial judge alone to determine the presence or absence of aggravating factors in death penalty cases. (*Ring v. Arizona* (2002) 536 U.S. 584, 608 [122 S.Ct. 2428, 153 L.Ed.2d 556].) *Ring* did so based on the Court's focus on the historical right to a jury trial. *Ring* considered the role of juries in 1791 when the Sixth Amendment was enacted. At the time the Bill of Rights, the jury's role was to determine, "'which homicide defendants would be subject to capital punishment . . . .'" (*Id.* at p. 608, quoting White (1989) *Fact Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial* 65

Notre Dame L. Rev. 1, 10-11.) This role for the jury was "unquestioned." (*Ibid.*) As *Ring* explained, the Sixth Amendment right to a jury:

> does not turn on the relative rationality, fairness, or efficiency of potential factfinders. "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free."

(*Ring v. Arizona, supra*, 536 U.S. at p. 607, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p 498 [conc. op. of Scalia, J.].)

In 2004, the High Court issued two Sixth Amendment decisions, each based on an historical analysis. *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], overruled Supreme Court precedent that had not considered and applied the historic underpinnings of the Sixth Amendment's Confrontation Clause. *Crawford* again looked to the historical record concluding that in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial." (*Id.* at pp. 53-54.) *Crawford* identified the error in its own precedent: it had failed to honor the historical role of the jury. The now-overruled precedent had created an unconstitutional framework that did not "provide meaningful protection . . . ." (*Id.* at p. 63.)

The second 2004 decision impacting Sixth Amendment jurisprudence was *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d

403], which struck down Washington's sentencing law because it was based on fact-finding not presented to the jury. *Blakely* acknowledged the historic role of juries in American jurisprudence as bridging the written law to the community affected by the law. *Blakely* noted the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure [the people's] control in the judiciary." (*Id.* at pp, 305-306.)

Blakely explained the jury acts as a "circuitbreaker in the State's machinery of justice." (*Blakely v. Washington, supra,* 542 U.S. at p. 306.) Citing to Blackstone, *Blakely* explained every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbors." (*Id.* at p. 301, quoting, 4 William Blackstone, *Commentaries on the Laws of England* at p. 343.) *Blakely* cited to the Framers' distrust of the government in defining, limiting, or controlling the role of juries. *Blakely* stressed that, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id.* at pp. 306-308.) *Blakely* cited a diary entry by John Adams, stating, "the common people, should have as complete a control in every judgment of a court of judicature." (*Ibid.*) In 2005, the High Court

continued to look to historical roots to define Sixth Amendment rights in *United States v. Booker* (2005) 543 U.S.220 [125 S.Ct. 738, 160 L.Ed.2d 621]. *Booker* examined the federal sentencing guidelines, and recognized the tension between a jury's role and the goal of consistent sentencing. *Booker* endorsed the jury's important role even at the expense of consistent sentencing. (*Id.* at pp. 243-244.) The aspirational goal of consistent sentencing had to be limited by the sometimes conflicting requirement that the citizenry, through active participation in the jury process, apply the law to the individual defendant. *Booker* explained the jury must "stand between the individual and the power of the government under the new sentencing regime." (*Id.* at p. 237.)

The foregoing case authorities from the Supreme Court demonstrate a clear, unwavering trend to define Sixth Amendment guaranties by historical standards. The *Witherspoon* substantial impairment standard cannot withstand this historic analysis. *Witherspoon* sought to achieve a balance between the State's interest in obtaining death sentences while simultaneously rejecting juries that were a stacked deck in favor of imposing death. The High Court recognized the substantial impairment standard sought to balance the interests of the State and the defendant, without contemplating whether the Sixth Amendment right to an impartial jury permitted such a "balancing." (See *Uttecht v. Brown, supra,* 551 U.S. at p. 9, fn. 2.) In fact, the *Witherspoon*

balancing is inconsistent with the historical definitions of an impartial jury. History makes clear the Framers intended juries, including capital juries, to represent the community as a whole. Neither *Witherspoon* itself, nor its progeny, cited to any historical basis for the substantial impairment standard. For good reason: there is none. Not only is there no historical foundation for a balancing approach, but also the balance is not achieved by the *Witherspoon* standard.

Justice Stevens recognized that the balancing *Witherspoon* sought to achieve is not accomplished by the substantial impairment standard at all. In his *Uttecht* dissent, Justice Stevens wrote the substantial impairment standard operates to exclude "citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases." (*Uttecht v. Brown, supra,* 551 U.S. at p. 35 [dis. op. of Stevens, J.]. More recently, in 2008, Justice Stevens expressed concern that a death-qualified jury "deprive[s] the defendant of a trial by jurors representing a fair cross section of the community," and "is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84 [128 S.Ct. 1520, 170 L.Ed.2d 420] [conc. op. of Stevens, J.].)

The substantial impairment standard, permitting prospective jurors to be excused because of their religious (or moral) opposition to the death

penalty, is inconsistent with the Framers' understanding of an impartial jury, which necessarily represented community values and the community conscience. The Framers envisioned that each of the 12 jurors would consult their individual conscience to render decisions. For example, Blackstone identified only three grounds for excluding a prospective juror from service,[12] none of which was a religious or moral opposition to a particular sentence. In the Framers' view, the jury's role was to render a judgment reflecting the jury's conscience.

In view of the demonstrated failings of the *Witherspoon* substantial impairment standard to achieve a constitutional balance, and the Supreme Court's decisions requiring an historical analysis in Sixth Amendment analysis, which requires a jury as representative of the whole community's conscience, the *Witherspoon* substantial impairment standard is inconsistent with the High Court's decisions on Sixth Amendment rights, and must be re-examined, rejected, and reformulated. Accordingly, the judgment of death should be reversed.

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[12] The three grounds for exclusion were: (1) *propter honoris respectum,* on the basis of nobility; (2) *propter delictum,* based on prior convictions; and (3) *propter defectum,* based on personal defects, such as, if the prospective juror was an alien or slave. (Blackstone, *Commentaries on the Laws of England, supra,* at pp. 361-364.)

III

HARDY'S CONVICTIONS, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO APPLY THE CORRECT STANDARD TO HARDY'S *BATSON*[13]/*WHEELER*[14] MOTION AND ERRED IN CONCLUDING THAT THE CIRCUMSTANCES DID NOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES DESPITE THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES AGAINST THREE AFRICAN AMERICAN JURORS. THE COURT'S RULING VIOLATED THE REPRESENTATIVE CROSS-SAMPLE GUARANTEE OF THE CALIFORNIA CONSTITUTION, AND HARDY'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AN IMPARTIAL JURY, A FAIR TRIAL, A TRIAL BY JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, A RELIABLE FINDING OF GUILT AND SENTENCE, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Summary of Argument.

Hardy, a young black man, was convicted and sentenced to death by an all white jury.[15] The prosecutor made five peremptory challenges, three of which were to black prospective jurors. The result was the exclusion of

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[13] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69].

[14] *People v. Wheeler* (1978) 22 Cal.3d 258.

[15] There were no black jurors who decided Hardy's fate. There was only one black alternative juror. (See e.g., 14RT 3183 [juror number 6169].)

prospective black jurors in a case with undeniably heavy racial overtones. The victim was an older, white woman who called Hardy and his two, young black male companions "niggers." The three young, black males committed violent sexual crimes on the white woman who was walking alone at night in a fairly deserted, and unlit area.

Defense counsel objected that the prosecutor had removed prospective jurors on the basis of race, in violation of *Batson v. Kentucky, supra,* 476 U.S. 79, and *People v. Wheeler, supra,* 22 Cal.3d 258. (9RT 1876-1880.) The prosecutor challenged the only two blacks, one male and one female, who made it into the jury pool for consideration as jurors. Then the prosecutor challenged a third black female who was considered for a seat as an alternate juror. (9RT 1877.) The trial court questioned whether *Batson/Wheeler* applied to alternate jurors at all (9RT 1885), and denied the defense challenge at the first stage, finding no prima facie showing was made. (9RT 1884.) The prosecutor nevertheless stated her reasons for the challenges. (9RT 1881-1884.) Without comment on the prosecutor's stated reasons, the trial court further found that even assuming a prima facie showing, the prosecutor's explanations were race neutral. (9RT 1884.)

The prosecutor's use of peremptory challenges to remove prospective jurors because of their race violated both the federal and state constitutions,

specifically the equal protection and due processes clause of the Fifth and Fourteenth Amendments to the United States Constitution, and Cal. Constitution, Art. 1, § 16. (*Batson v. Kentucky, supra,* 476 U.S. at p. 89; *Miller-El v. Dretke* (2005) 545 U.S. 231[125 S.Ct. 2317, 162 L.Ed. 2d 196]; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130–131 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277.) The race-based jury selection process also violated Hardy's state and federal constitutional right to an impartial jury drawn from a representative cross-section of the community. (*Batson v. Kentucky, supra*, 476 U.S. at p. 89; *People v. Lenix* (2008) 44 Cal.4th 602, 612; see also *People v. Fuentes* (1991) 54 Cal.3d 707, 714 [exercise of peremptory challenges to remove prospective jurors on basis of group bias violates fundamental right to trial by representative jury].) Moreover, because this is a capital case, Hardy's Eighth Amendment right to a reliable and non-arbitrary finding of guilt, death eligibility, and the appropriate punishment, was violated as was his right to be tried by an impartial jury under the Sixth Amendment. (Cf., *Turner v. Murray* (1986) 476 U.S. 28, 35 [106 S.Ct. 1683, 90 L.Ed.2d 27].) The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is per se error of constitutional magnitude requiring reversal. (*People v. Fuentes,*

supra, 54 Cal. 3d 707, 716, fn. 4; *People v. Howard* (1992) 1 Cal. 4th 1132, 1158.) Accordingly, reversal of the judgments of guilt and death are required.

B. Standard of Review.

This Court reviews the record de novo to resolve the legal question "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Cornwell* (2005) 37 Cal.4th 50, 73; *People v. Gray* (2005) 37 Cal.4th 168, 187.)

C. Law Governing Exclusion of Jurors Based on Race.

1. Introductory and Procedural Matters.

The Sixth Amendment guarantees the defendant in a criminal case is entitled to a fair and impartial jury. (U.S. Const, 6th Amend.) The California Constitution likewise guarantees the accused the right to trial by a fair and impartial jury. (Cal. Const., art. I, § 16.) Additionally, California Code of Civil Procedure, section 231.5, provides that a peremptory challenge may not be used to remove a potential juror on the basis of race, color, religion, sex, national origin, sexual orientation, or similar ground. A criminal defendant also has a right to trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler, supra*, 22 Cal.3d at p. 272.)

The exercise of peremptory challenges to remove prospective jurors on the basis of group bias is a violation of the fundamental right to trial by a

representative jury. ((*People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Group bias is "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

Batson clarified that the federal constitution protects the rights of both defendants who are on trial, and citizens who desire to participate in the administration of the law as jurors. (*Johnson v. California* (2005) 545 U.S. 162, 171-72 [125 S.Ct. 2410, 162 L.Ed.2d 129].) The basis for this principle is the "overriding interest in eradicating discrimination from our civic institutions . . . ." (*Id.* at p. 172.) The discriminatory exclusion of people from serving on juries adversely affects society as a whole by "undermin[ing] public confidence in the fairness of our system of justice." (*Ibid.*, quoting *Batson v. Kentucky, supra*, 476 U.S. at p. 87.)

Preliminarily Hardy addresses: (1) the trial court's questioning whether *Batson/Wheeler* applies to alternate jurors (9RT 1885); and (2) the prosecutor's implied argument that Hardy could not complain about the racial composition of the jury when defense counsel had failed to use peremptories to make more black prospective jurors available for impaneling (9RT 1881). It cannot seriously be questioned that *Batson/Wheeler* covers the selection of both jurors and alternate jurors. (See e.g., *Johnson v. California, supra*, 545 U.S. at p.

165] [noting final composition of both jury and alternate jury]; see also *People v. Lenix*, *supra*, 44 Cal.4th at p. 610 [expressly considering jury composition, and stating, "No Blacks served as jurors or alternates."].) It would make no sense to apply *Batson/Wheeler* only to jurors, and not to alternates who ultimately could replace seated jurors. The trial court considered an alternate's service "unlikely" (9RT 1885), but the likelihood of service does not determine the extent of *Batson/Wheeler* protections. In any event, in Hardy's case, an alternate was substituted during the course of the trial. (12RT 2536.)

The prosecutor's argument/comment, that defense counsel could have exercised peremptory challenges to negate the prosecutor's use of peremptories, not only lacks legal support, but also is contrary to the spirit of *Batson/Wheeler*. The prima facie showing is made by demonstrating a party improperly challenged jurors based on group bias. The purpose of *Batson/Wheeler* is to identify this impermissible discriminatory conduct and obviate its effect. As such, the conduct of the defense attorney, and whether or not he peremptorily challenged to neutralize the prosecutor's peremptories, has no rational relationship to the *Batson/Wheeler* objectives. Even if the defense attorney had counter-challenged jurors based on group bias (because they were white), that would not cure the prosecutor's discriminatory challenges. It would merely reduce *Batson/Wheeler* to a race between which

party used up their peremptories first. The purpose of *Batson/Wheeler* is not to get a certain number of black jurors on the jury, or in the jury pool, as the prosecutor's argument/comment suggests. The purpose is to eliminate using peremptory challenges to effect an unconstitutional group bias. Further, for defense counsel to have peremptorily challenged white jurors, on the ground they were white, merely to effect access to more prospective black jurors, would have been an additional violation of *Batson/Wheeler*. (*Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33].)

2. The Three-stage Analysis of *Batson/Wheeler*.

United States v. Collins (9th Cir. 2009) 551 F.3d 914, 919, summarized the three-stage analysis required by *Batson* as follows:

> [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." [Citation.] When a defendant alleges a *Batson* violation, a three-part burden shifting test is used to determine if the potential juror was challenged on the basis of impermissible discrimination. At the outset, the defendant must make a prima facie showing that the challenge was based on an impermissible ground, such as race. [Citation.] "This is a burden of production, not a burden of persuasion." [Citations.] "Second, if the trial court finds the defendant has made a prima facie case of discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case." [Citations.] "Third, if the prosecutor offers a race-neutral explanation, the trial court must decide whether the defendant has proved the prosecutor's motive for the strike was purposeful racial discrimination." [Citations.]

"Ideally, a trial court faced with a *Batson* challenge undertakes a clearly-delineated three step inquiry." (*Derrick v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) In the first step, when a challenge is made, the trial court determines whether there is a prima facie showing of purposeful discrimination. (*Batson v. Kentucky, supra*, 476 U.S. at pp. 96-97; *People v. Wheeler, supra,* 22 Cal.3d at 278-280.) "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.' [Citation.]." (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; in accord *People v. Lewis* (2008) 43 Cal.4th 415, 469.) A trial court's request for an explanation of contested peremptory challenges establishes at least an implicit finding that a prima facie case has been made. (*People v. Lewis, supra*, 43 Cal.4th at pp. 470-471; *People v. Hayes* (1990) 52 Cal.3d 577, 605.

At the first stage, the trial court ruled Hardy had failed to make a prima facie showing. (9RT 1884.) However, the prosecutor nevertheless provided reasons for the use of her peremptory challenges against the three black prospective jurors. (9RT 1881-1884.) At the end of the trial, the prosecutor provided more reasons. (14RT 3182-3184.)

Hernandez v. New York (1991) 500 U.S. 352, 358-359 [111 S.Ct. 1859, 114 L.Ed.2d 395], concerned a case where the trial judge had not ruled on

whether the defendant made a prima facie showing, and the prosecutor stated reasons for the peremptory challenges. The High Court recognized that once the prosecutor has offered a reason for a particular challenge, and the trial court has ruled on the ultimate question of intentional discrimination, the issue regarding whether a prima facie showing was made is moot. The Court explained: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Id.* at p. 959.) Under *Hernandez*, the same analysis arguably applies here to the three black prospective jurors since the prosecutor provided her explanations for the peremptory challenges. However, Hardy will address the first stage because this Court has held that when the trial court expressly refused to find a prima facie case, then the first step analysis is not moot. (*People v. Howard* (2008) 42 Cal. 4th 1000, 1018.)

At the second stage, after the trial court finds a prima facie showing of discrimination, the burden of proof shifts to the prosecutor to justify the peremptory challenges with a race-neutral explanation. (*Johnson v. California, supra*, 545 U.S. at 168; *Batson v. Kentucky, supra*, 476 U.S. at 96-98; *People v. Lewis, supra,* 43 Cal.4th 469; *People v. Wheeler, supra*, 22 Cal.3d at

280-282.) Unless a discriminatory intent is apparent from the explanation, the reason offered will be deemed race-neutral. (*Derrick v. Lewis, supra*, 321 F.3d at 830.)

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, supra*, 545 U.S. at p. 168; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477 [128 S.CT. 1203, 170 L.ED. 2d 175]; *Miller-El v. Dretke, supra*, 545 U.S. at p. 239.) The trial court must evaluate the explanation offered by the prosecution to satisfy itself that the explanation is genuine. In this regard, the court must make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; see also *Batson v. Kentucky, supra*, 476 U.S. at p. 98.)

As part of its evaluation at this final stage of the analysis, the court must necessarily take the step of asking whether the reasons proffered by the prosecutor actually applied to the particular jurors challenged. (*People v. Fuentes, supra*, 54 Cal.3d at p. 721.) "[T]he critical inquiry in determining

whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Dretke, supra*, 537 U.S. at pp. 338-339.) All of the circumstances bearing upon the issue of racial animosity must be considered. Among other things, a court must consider the strike of one juror for the bearing it might have on the strike of another. (*Snyder v. Louisiana, supra*, 552 U.S. at pp. 472, 478.) "The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*People v. Lewis, supra*, 43 Cal.4th at p. 469, quoting *Miller-El v. Dretke, supra*, 537 U.S. at p. 339.) In addition, the trial court "should not attempt to bolster legally insufficient reasons offered by the prosecution with new or additional reasons drawn from the record." (*People v. Ervin* (2000) 22 Cal.4th 48, 77.)

Finally, in evaluating the sufficiency of the prosecutor's explanations, a reviewing court should compare the reasons given for excusing the challenged jurors with the characteristics of those jurors who were allowed to serve. As explained by the United States Supreme Court: "More powerful than [] bare statistics [] are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's

proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke, supra*, 545 U.S. at 241.) A comparative juror analysis is appropriate where the record is sufficient to permit the comparisons. (*People v. Lenix, supra,* 44 Cal.4th at p. 687.) An appellate record, which includes a transcript of the voir dire, is sufficient to permit review of this legal issue, even where a comparative analysis was not expressly undertaken below. (*Miller-El v. Dretke, supra*, 545 U.S. at 241, fn. 2.)

D. Analysis of the Juror Questionnaires, and Voir Dire, of the Three Black Prospective Jurors That the Prosecutor Peremptorily Challenged Demonstrates an Unconstitutional Discriminatory Purpose.

Hardy is black. Blacks are a cognizable group under *Batson*. (*Batson v. Kentucky, supra,* 476 U.S. at p. 89; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077; *People v. Wheeler, supra,* 22 Cal.3d at pp. 282-283.) The Supreme Court has held that a criminal defendant may object to the race-based exclusion of jurors whether or not the defendant and the excluded jurors are of the same race. However, the fact that Hardy is a member of that same race weighs in favor of finding impermissible discrimination. (*Powers v. Ohio,* 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Bonilla* (2008) 41 Cal.4th 313, 342.)

The prosecutor exercised a total of five peremptory challenges, three of which were exercised to excuse two black males and one black female as prospective jurors or alternates. (14RT 3183.) Thus, the prosecutor effectively used 60 percent of her peremptory challenges to remove every black person from sitting as one of the 12 jurors. As a result, there was not a single black juror on Hardy's jury, and only one black served as an alternate juror. (14RT 3183.)

Statistical disparity can show a prima facie of group bias even if the disparity can be rebutted by other circumstances. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091, 1097.) This Court explained in *People v. Motton* (1985) 39 Cal. 3d 596:

> As one method of proving a prima facie case, *Wheeler* noted that the moving party "may show that his opponent has struck most or all the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." [] [Fn. Omitted] In *Wheeler* itself we found a prima facie case based on a showing that the prosecutor had used seven peremptory challenges to exclude all Blacks from the jury. (Our opinion did not state the total number of peremptory challenges exercised by the prosecutor.) A prima facie case was found in *People v. Hall, supra*, 35 Cal. 3d 161, 169, when five of eight challenges were used to remove all Black jurors; in *People v. Clay* (1984) 153 Cal. App. 3d 433, 456, when four of ten challenges removed all Blacks; in *Holley v. J & S Sweeping Co.* (1983) 143 Cal. App. 3d 588, 590, when three of six challenges removed three out of four Black jurors; and in *People v. Fuller, supra*, 136 Cal. App. 3d 403, 415, when three challenges were used to remove the only three available Black jurors. The figures in the present case are equally persuasive.

> At the time of the initial *Wheeler* motion, the prosecutor had used five of eight challenges to remove all Black jurors (or four of eight to remove all Black women jurors). By the close of jury selection he had used seven of thirteen challenges to eliminate Black jurors.

(*Id.* at p. 607.) While the total number of peremptories used in Hardy's case was fewer than in *Motton*, there were also fewer black prospective jurors to challenge. The result was the same, peremptories removed all black men from the 12 juror seats, and represented a statistically significant exclusion.

Hardy will discuss each of the three black prospective jurors challenged peremptorily by the prosecutor in the order they were challenged and excluded.

1. FG: Prospective Juror 2041.

a. FG's Questionnaire.

Prospective juror number 2041, FG, was a 68-year old black man who worked as a unit supervisor for Hertz Corporation, and who had lived in Long Beach for 13 years. (11CT 2896, 2899, 2901.) He supervised five senior claims examiners. (11CT 2901.) He had served as an enlisted soldier in the Air Force for 10 years, from 1952 to 1962. (11CT 2900.) He was prepared to serve as a juror if selected (11CT 2905), believed it was his duty as a citizen to do so, and expected to be fair, impartial and listen to the evidence. (11CT 2906). He believed prosecutors were "not always truthful and tend[ed] to exaggerate." (11CT 2906 [question 42].) FG believed the same of defense

counsel. (11CT 2906 [question 44].) FG "sincerely respect[ed] judges" based on "the enormity of their responsibilities in presiding over a trial." (11CT 2907.) In his job, FG spoke with lawyers on a daily basis, and knew about 50 to 60 attorneys. (11CT 2914.) He had appeared before "many judges" in civil matters, but knew no judges personally. (11CT 2914.) FG had once been falsely accused of stealing a rental car, and was treated fairly by police concerning the accusation. (11CT 2920.) He was jailed in connection with the accusation. (11CT 2921.)

FG favored hiring more law enforcement personnel, and did not "believe in too many mitigating factors." He explained that was because "people have choices." (11CT 2922.) He believed in strongly enforcing current laws, and thought the criminal justice system was "slow but in most cases fair." (11CT 2923.) Question number 116 asked FG to state whether he would lean towards the prosecution or defense. He responded, "I would not lean one way or the other until all the evidence is heard." (11CT 2924.) FG discussed his biases, writing he was "biased against drug + alcohol abusers and gang activity." (11CT 2926.) He believed he would be a good juror because he was "a good listener and observer." (11CT 2927.) However, FG stated a reluctance to sit on the jury "due to the nature of the alleged crimes." (11CT 2927.) He found it "difficult to understand the killing of another human

being." (11CT 2927.) The charges of murder and rape caused him to wonder whether he could be impartial. (11CT 2928.)

FG favored the death penalty. (11CT 2937.) He believed "certain crimes deserve [the] death penalty." (11CT 2938.) By way of crimes deserving the death penalty, FG listed "multiple murder, kidnapping with great bodily harm." (11CT 2938.) He "disagree[d] somewhat" with the statement that "[a]nyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty." (11CT 2939.) He believed that life without parole was a worse punishment for a defendant than death (11CT 2939), but believed death was the more severe punishment. (11CT 2944). He would not automatically vote for death or life without the possibility of parole. (11CT 2942.) He possibly would consider a defendant's background in deciding the sentence. (11CT 2940.) He considered heinous crimes and torture as circumstances for rejecting a sentence of life without the possibility of parole. (11CT 2941.)

b. FG's Voir Dire Questioning.

The prosecutor asked FG to explain why he thought life without the possibility of parole was worse (than death) for a defendant. (7RT 1294.) FG explained because the defendant would have to think about what he had done, the crime committed, and that he would be locked up for life "with no

possibility of getting out, it could have a trying effect on a person's mind." (7RT 1294.) FG told the prosecutor he could weigh and determine whether aggravating factors outweighed mitigating ones. (7RT 1295.)

The prosecutor asked why FG had written in his questionnaire that he did not want to serve on the jury. FG explained, "Other than it's a big decision, is probably maybe the length of the trial. But I guess I can live with the length of the trial, as long as it's not more than 30 days." (7RT 1295-1296.) The prosecutor assured FG, the trial would not be more than 30 days. (7RT 1296.) The court confirmed the trial schedule, and that it would be November 12, through November 22. FG replied he could arrange his life to accommodate that trial schedule. (7RT 1296.) FG also informed the court about pending litigation involving his employer, and the fact he was on the witness list, expecting to testify on November 15, or November 18 in Santa Monica. (7RT 1296.) The court commented, "Well, fortunately, I'll have a great deal of influence with that Santa Monica court." (7RT 1297.) FG responded, "okay", and the court told FG to remind the court if FG was selected. Again, FG responded, "okay." (7RT 1297.)

c. Analysis of the Prosecutor's Peremptory Challenge.

The prosecutor did not challenge FG for cause (7RT 1297), and later challenged him peremptorily. (8RT 1856.) The prosecutor gave the following

explanations why she challenged FG: (1) he said police were not always truthful and they exaggerated; (2) he knew 50 to 60 attorneys, and spoke with them daily; (3) he did not want to be a juror on the case; and (4) he had been arrested in 1992 by the Los Angeles County Sheriff. (9RT 1881.) Of these stated concerns, the prosecutor asked about only one: FG's reasons for not wanting to be a juror in Hardy's trial. He explained reasonably that he was concerned about any trial that would go more than 30 days. (7RT 1296.) The prosecutor and the court each assured FG this trial would not last that long. The court even provided the two-week dates when the case would be tried. After learning this information, FG responded, "okay," and the prosecutor did not ask any further questions on this topic. (7RT 1297.) FG's written response on the questionnaire about his "thoughts or feelings" about being a juror were, "if selected, will serve." (11CT 2905.) He believed it was his "duty as a citizen to serve." (11CT 2906.)

The prosecutor asked no question about FG's arrest in 1992. The result of the case was that it was dismissed. (1CT 2920.) FG believed he had been treated fairly by the police, and that justice was served. (1CT 2920.)

Similarly, the prosecutor's two other stated concerns were not the subject of any of her questions to FG. The analysis of these stated concerns is limited to FG's written responses. His answers on the written questionnaire

revealed he had a healthy skepticism for prosecutors and criminal defense attorneys. His attitudes were completely balanced. FG thought *both* prosecutors and defense attorneys alike were "not always truthful and tend[ed] to exaggerate." (11CT 2906 [questions 42, 44].) This answer revealed FG neither favored, nor disfavored, either side's advocate, and was not a reason to challenge him. While FG knew many attorneys, and spoke with them regularly, there was nothing about these acquaintances that would make FG anything other than fair and impartial. He knew no attorney or judge connected to Hardy's trial.

2. DB: Prospective Juror 3747.

a. DB's Questionnaire.

Prospective juror number 3747, DB was a 33-year old, black, male attorney, born and raised in California, who had a six-year old daughter. (12CT 3056-3057, 3062.) He had previously been employed as a clerk in the prosecutor's office. (12CT 3062, 3071.) As part of his employment, he had been on a ride-a-long in a police car. (12CT 3072.) He viewed the ride along as "a learning tool, designed to show officer experiences." (12CT 3072.) He had friends who worked at the LBPD, and his friend and roommate worked for the Immigration and Naturalization Service. (12CT 3057, 3062.)

DB had two personal experiences with law enforcement. One was in 1990, that is, more than a decade before Hardy's trial. DB described the situation as "police roughed me up for no reason." (12CT 3072.) He called the police department about the incident, "but was unable to get [the] badge number thus no action [was] taken." (12CT 3072.) Even so, DB would neither believe, nor disbelieve, the testimony of a law enforcement officer simply because he was an officer. Instead, DB would "weigh the credibility of the declarant based on common sense." (12CT 3073.) More recently, on December 31, 1999, less than two years before Hardy's trial, DB was arrested for driving under the influence and pled. (12CT 3078.) He believed there had been a "just disposition considering [he] needed to learn[] a lesson." (12CT 3078.) He believed justice was served because he was taught a lesson. (12CT 3078.) He believed the outcome was "fair but extremely putative due to excessive fines." (12CT 3079.)

DB answered Question 30, asking him to "explain any thoughts or feeling you may have at the prospect of being called upon to judge the conduct of another." (12CT 3064.) DB responded, "I can be objective in judgment of another." (12CT 3064.) In response to Question 137, asking why he felt he could be an impartial juror, DB responded, he had the "ability to remain objective despite outside factors." He said he was an "analytical person who

will weigh the evidence fairly." (12CT 3086.) DB also expressed a desire to serve, stating he "would like to sit in order to see our legal system at work for a serious matter." (12CT 3086.) He could think of no reason he might not be an impartial juror. (12CT 3087, Question 140.)

b. DB's Voir Dire Questioning.

The prosecutor asked DB a total of 24 questions (8RT 1565-1570.) Five of those questions concerned DB's 1999 conviction for driving under the influence, for which he was still on probation at the time of Hardy's trial. (8RT 1565.) Four questions directly concerned DB's status as a law school graduate. (8RT 1865-1866.) One question concerned DB's Baptist faith. (8RT 1570.) The majority of the prosecutor's questions concerned DB's attitudes about the impact of mental defects on sentencing choices, and DB's concern about indigent defendants on death row who later were found innocent. (8RT 1566-1569.) The prosecutor specifically asked about DB's legal education and experiences and whether they could effect his sentencing decision. (8RT 1566-1569.)

When providing her explanation as to why she challenged DB, the prosecutor explained one reason was that DB was currently on probation, and had once been "roughed up" by police without cause. (9RT 1882.) The

prosecutor asked five total questions about DB's probation, and the reason for it:

> MS. LOCKE-NOBLE: I believe you indicated that you had a driving under the influence.
>
> PROSPECTIVE JUROR NO. 3747: Yes, '99.
>
> MS. LOCKE-NOBLE: Are you still on probation for that?
>
> PROSPECTIVE JUROR NO. 3747: The probationary period is what, three years. That was a little less than three years, yes.
>
> MS. LOCKE-NOBLE: So you are still on probation?
>
> PROSPECTIVE JUROR NO. 3747: Yeah.
>
> MS. LOCKE-NOBLE: How is that going to affect you in determining, you had some penalties and punishments imposed upon you. How is that going to affect you?
>
> PROSPECTIVE JUROR NO. 3747: Not at all.

(8RT 1565.)

The prosecutor did not ask DB a single question about the incident when police "roughed" him up.

The prosecutor initially asked four questions concerning DB's legal education or experience.

> MS. LOCKE-NOBLE: And I'm not sure, in reading your questionnaire, did you finish law school? Are you in law school.

PROSPECTIVE JUROR NO. 3747: Finished law school, passed the bar.

MS. LOCKE-NOBLE: Are you practicing as a lawyer?

PROSPECTIVE JUROR NO. 3747: I'm inactive right now. I work for a corporation.

MS. LOCKE-NOBLE: Not as a lawyer?

PROSPECTIVE JUROR NO. 3747: I'm not litigating, no.

MS. LOCKE-NOBLE: And are you seeking employment with a prosecutorial agency?

PROSPECTIVE JUROR NO. 3747: Currently, no.

(8RT 1565-1566.)

The prosecutor then questioned DB about his views about sentencing, including his written answer reflecting concern with indigent defendants on death row who later were exonerated.

MS. LOCKE-NOBLE: You indicated several concerns in your questionnaire about people who have little money and later are found innocent on death row?

PROSPECTIVE JUROR NO. 3747: Correct.

MS. LOCKE-NOBLE: Would that affect you personally, in making your decision in this case?

PROSPECTIVE JUROR NO. 3747: Not at all, just answering the question.

MS. LOCKE-NOBLE: Okay. I know there were a lot of questions. Now, as the court has indicated during, what we are talking about right now is the penalty phase. We are assuming

that the defendant has been found been guilty and the special circumstances, one or more have been found true. Then we are going to present additional evidence, aggravating and mitigating factors. It is a very subjective standard. For you in order for you to impose the death penalty, the aggravating must outweigh the mitigating. You can still impose life without the possibility of parole, you understand all of that?

PROSPECTIVE JUROR NO. 3747: Yes, I understand.

MS. LOCKE-NOBLE: And it's not a counting on one side or the other. You do you understand that you don't count up the mitigating and count the aggravating and arrive at verdict. Each juror, including yourself, will have to assign a weight to each one of the factors. You may decide that this particular factors gets no weight, and another juror may decide that factor has a lot of weight. You don't have to agree how much weight to give to each factor nor do you have to agree this is a mitigating one, and this is aggravating. You may say this is aggravating and one may say it is mitigating. You have taken several criminal procedures classes and criminal law?

PROSPECTIVE JUROR NO. 3747: Yes.

MS. LOCKE-NOBLE: In order for you to sit and be fair and impartial as a juror, you have to set aside all that training.

PROSPECTIVE JUROR NO. 3747: No problem.

MS. LOCKE-NOBLE: And all the -- I don't know if you did any litigation while you worked for the Long Beach city prosecutors office, and all the law and things you know as evidence, that's up to the judge, he's going to make those decisions.

PROSPECTIVE JUROR NO. 3747: I understand.

MS. LOCKE-NOBLE: And won't be able to tell them any of the knowledge that you have.

PROSPECTIVE JUROR NO. 3747: I promise not to do that.

MS. LOCKE-NOBLE: Okay. On Question No. 219, I'm sure you remember that one.

PROSPECTIVE JUROR NO. 3747: Oh, yeah.

MS. LOCKE-NOBLE: I'll read it to you. "Do you feel that someone convicted of murder during the commission of a robbery, torture or sexual assault during a robbery should be sent to death without the consideration of background information?" And then it says always, probably, possible, possibly, never or unsure and you checked, "never" and you explained.

PROSPECTIVE JUROR NO. 3747: Excuse me. I misread the answers. The answers weren't clear. I thought it said never unsure. I didn't see a box, "possibly."

MS. LOCKE-NOBLE: You are correct.

PROSPECTIVE JUROR NO. 3747: I know.

MS. LOCKE-NOBLE: There is a box for possible, but there is not a box for unsure.

PROSPECTIVE JUROR NO. 3747: Then possibly.

MS. LOCKE-NOBLE: And then it's really the explanation that I have question about.

PROSPECTIVE JUROR NO. 3747: Okay.

MS. LOCKE-NOBLE: You indicate mental defects may alter intent, thus making death unwarranted whether life without the possibility of parole would suffice.

PROSPECTIVE JUROR NO. 3747: Correct.

MS. LOCKE-NOBLE: What did you mean by that?

PROSPECTIVE JUROR NO. 3747: Meaning that I would have to look at the background circumstances regarding the defendant. If there was some mental defect, then life without the possibility of parole would be the most logical option.

MS. LOCKE-NOBLE: What do you consider a mental defect?

PROSPECTIVE JUROR NO. 3747: How do I define it?

MS. LOCKE-NOBLE: Yes.

PROSPECTIVE JUROR NO. 3747: I would have the hear the circumstances of the situation and weigh it from then with the experts and whatnot. I would define it as anything that would negate intent.

MS. LOCKE-NOBLE: Okay. Now, taking that into consideration, what you just said, that would go for the guilt phase. You would have to determine intent as the court instruction you for those crimes?

PROSPECTIVE JUROR NO. 3747: Right.

MS. LOCKE-NOBLE: But in determining penalty there is no intent issue.

PROSPECTIVE JUROR NO. 3747: I understand that.

MS. LOCKE-NOBLE: Okay.

PROSPECTIVE JUROR NO. 3747: Uh-huh.

MS. LOCKE-NOBLE: So we have -- the jury has already decided that he is guilty. We don't have the intent issue. Do you have a different definition for mental defect with regards to penalty issues?

PROSPECTIVE JUROR NO. 3747: No.

(8RT 1566-1570.)

c. Analysis of the Prosecutor's Peremptory Challenge.

The prosecutor did not challenge DB for cause (8RT 1570), and later challenged him peremptorily. (8RT 1870.) The prosecutor gave the following explanations why she challenged DB: (1) he was currently on probation, (2) police once "roughed" him up, (3) she suspected he had been arrested for indecent exposure, (4) he believed mental defects could alter intent, (5) he was concerned about the fairness of indigent defendants on death row who later were exonerated, and (6) he was an attorney. (9RT 1882-1883.) The prosecutor's reasons were baseless.

The prosecutor did not seek to explore DB's status as a probationer at all. She asked only five questions about his probation, only one of which went to his performance as a juror. The prosecutor asked how being a probationer would effect his decision on sentencing, and DB responded, "Not at all." (8RT 1565.)

The prosecutor did not ask DB a single question about the incident when police "roughed" him up. The only information about the incident is in his questionnaire. DB was forthright about an incident when he was roughed up by police, and had tried to report the incident. (12CT 3072.) Because he "unable to get [the] badge number . . . no action [was] taken." (12CT 3072.) DB maintained he would not prejudge the testimony of a law enforcement

officer, but rather would "weigh the credibility of the declarant based on common sense." (12CT 3073.)

The prosecutor also initially suspected, but could not find documentation to support, that DB had been arrested for "a 314." (9RT 1882[16].) Later in her explanation, the prosecutor corrected herself, and acknowledged DB had not been arrested for a 314 after all. She reiterated her earlier concerns about his probation and that police had roughed him up. (8RT 1883.) The prosecutor then added that she normally did not keep attorneys on the jury panel. (8RT 1883.) She also expressed concern that DB believed mental defects could alter intent, and life without the possibility of parole could suffice. (9RT 1883.) The prosecutor cited to question 219, which was:

> Do you feel that someone convicted of murder during the commission of a robbery, kidnap, torture, or sexual assault: (A) Should be sentenced to death without consideration of background information?
>
> ___Always ___Probably ___Possibly

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[16] While no explanation or discussion occurred concerning the prosecutor's suspicion, Hardy assumes she referred to Penal Code section 314, which proscribes lewd or obscene conduct, i.e., indecent exposure or exhibitions.

___ Never Unsure

Please explain:_____

_____

(B) Should be sentenced to life without the possibility of parole without consideration of background information?

___Always ___Probably ___Possibly

___ Never Unsure

Please explain:_____

_____

(12CT 3101 [emphasis in original].)

DB responded to the A portion of the question by checking "Never Unsure," and writing "mental defects may alter intent thus making death unwarranted when life w/no parole would suffice." (12CT 3101.) DB responded to the B portion of the question by checking "Never Unsure," without writing any explanation. (12CT 3101.) In a related question, number 206, which asked, "Would you consider the defendant's background in deciding whether the sentence should be death or life without the possibility of parole?" DB answered, "yes," and explained "mental defects would have an effect on my decision regarding death." (12CT 3099.) DB also explained

during voir dire that he had misread question 219. (8RT 1568.) The prosecutor questioned DB about the effect of mental defects on sentencing. He explained he would have to hear the circumstances, and consider expert testimony. (8RT 1569.) DB acknowledged he understood he would have to determine intent per the court's instructions. (8RT 1569.) He also understood intent was not an issue at sentencing. (8RT 1569.)

While the prosecutor expressed concern that DB was an attorney (9RT 1883), DB did not know the prosecutor, defense attorney or judge. (12CT 3089.) As DB's foregoing answers to the prosecutor's voir dire questions about his status as an attorney showed, neither his legal education nor experience should have posed any problem for the prosecutor.

3. MH: Prospective Juror 4826.

a. MH's Questionnaire.

MH, juror 4826, was a 40-year old black female who was raised in Long Beach. She worked as an audit clerk for Ralphs Grocery Company, and had served for three years as an enlisted soldier in the Army in the early 1980's. (8CT 2098, 2100-2102.) MH was a high school graduate who also had attended military training. (8CT 2104.) A friend of hers worked as a jailer for the LAPD. (8CT 2104.) MH noted that she found it difficult to judge another's guilt or innocence. She explained, "given all the facts I will do my

best as a jurist." (8CT 2106.) She had served twice before as a juror in two criminal cases; each of which went to the jury. Verdicts were reached by both juries. (8CT 2106.) As a juror, MH said she expected to hear all the evidence and determine guilt. (8CT 2107.) Because of her jury service in the past, she felt the courts and criminal justice system did a "good job." (8CT 2107.) She held no generalized opinions about either prosecutors or defense attorneys. (8CT 2107.)

b. MH's Voir Dire.

The prosecutor asked about MH's answer to question 186 where she wrote that she had "no opinion" about whether California should have the death penalty. (11CT 2139.) MH explained, "Depending on the crime, then, yes, you should. If it's a sufficient enough crime for it, yes." (7RT 1219.) The prosecutor explained California had the death penalty only for murder cases. MH said that did not affect her opinion. (7RT 1219.) She did not believe there were other types of crimes for which the death penalty should be imposed. (7RT 1219.) MH agreed the death penalty should be imposed only for murder. (7RT 1220.)

The prosecutor also asked MH about her response to question 231 where she stated she would prefer not to be a juror in the case. (7RT 1220.) MH had written, "It's a sad case. I [sic] will be really hard to sentence

someone to death." (11CT 2146.) The prosecutor asked MH if she could "vote to impose death?" (7RT 1220.) MH said, "If there was enough evidence towards it, yes, I could." (7RT 1220.)

The prosecutor asked MH about her difficulty in judging another person. MH agreed this was "based on religious or philosophical or moral reasons." (7RT 1220.) Nevertheless, MH believed she was able to make the decision on guilt or innocence, and on the death penalty. (7RT 1221 ["I believe that I can; yes."].)

c. Analysis of the Prosecutor's Peremptory Challenge.

The prosecutor did not challenge MH for cause (7RT 1221), and later challenged her peremptorily. (8RT 1876.) Stating she was not looking at her notes, the prosecutor gave the following explanations why she challenged MH: (1) she watched CSI (Crime Scene Investigation) and underlined that on questionnaire; (2) the prosecutor suspected MH had special knowledge about jails that could impact decision-making; (3) MH found it difficult to judge another, and did not want to be on the jury; and (4) it would be hard for MH to sentence someone to death (citing to question number 231). (8RT 1884.)

The prosecutor did not ask MH about her favorite television shows, or about the special knowledge the prosecutor suspected MH had about jails. On her written questionnaire, MH identified her (current) favorite television shows

as "Bernie Mac" and "Cedric The Entertainer." (11CT 2111.) MH did not identify CSI. She identified CSI as one of her three favorite shows of all time. CSI was listed second along with Cosby and Monk. (11CT 2112.) MH also checked that she watched CSI, and wrote, "I watch CSI all the time." (11CT 2125.) MH's answers about CSI were *not* underlined as the prosecutor stated. (11CT 2112, 2125.) Moreover, MH's answers was not surprising. CSI was a very popular and long-running program. Many people watched it, so it was not surprising MH did so and liked it.[17] While the prosecutor said she suspected MH had specialized knowledge about jails, the prosecutor never asked MH about this at all.

The prosecutor and the defense counsel both asked MH about her comment on this, undeniably, "sad case." (11CT 2146.) To defense counsel's questions, MH said she would be able to listen to the evidence fairly and impartially. (7RT 1206-1207.) MH answered similarly to the prosecutor's questions. MH could vote for death if the evidence warranted it. (7RT 1220.)

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17 (http://en.wikipedia.org/wiki/CSI:CrimeScene_Investigation. [recognized three times as the most popular dramatic series].)

E. The Record Shows a Clear Inference of Group Bias from the Prosecutor's Peremptory Challenges to Three Black Prospective Jurors, Which Resulted in No Black Person Being Seated on Hardy's Jury.

When the prosecutor challenged FG, she ensured that no black juror initially would sit in judgment on Hardy. Thereafter, the prosecutor challenged two more, black prospective jurors to eliminate them from serving as alternates. There is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.) The combination of circumstances, taken as a whole, must be considered. (*Id.* at p 698; *United States v. Bishop* (9th Cir.1992) 959 F.2d 820, 822 [prima facie case when two out of four black prospective jurors were excluded]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [prima facie case when one of two black jurors was excluded].) "The exercise of even a single challenge based on race is constitutionally proscribed." (*People v. Howard* (2008) 42 Cal. 4th 1000, 1018, fn. 10.) The effect of the prosecutor's challenging FG, DB and MH was to remove all blacks from Hardy's jury, and two blacks as alternates. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 79-80.)

1. There Was a Prima Facie Showing That the Prosecutor Systematically Used Peremptory Challenges to Remove Black Prospective Jurors.

There was a prima facie showing the prosecutor systematically excluded blacks from the jury because: (1) the challenged jurors were members of a cognizable group; (2) the prosecutor peremptorily challenged those jurors; and (3) the totality of the circumstances raises the inference the prosecutor's peremptory challenges were "motivated by race." (*Boyd v. Newland* (9th Cir 2006) 467 F.3d 1139, 1143.) "[T]he totality of relevant facts" relating to the prosecutor's challenges to black prospective jurors demonstrate a prima facie showing. (See *Miller-El v. Dretke, supra*, 545 U.S. at p. 239.) The totality of relevant facts includes the percentage of challenged prospective jurors in the cognizable group. (*Id.* at pp. 240-241; *United States v. Collins* (2009) 551 F.3d 914, 921.)

Here, every prospective black juror who could have sat as one of 12, or 100% of them, was challenged by the prosecutor peremptorily. Additionally, the prosecutor challenged two black prospective jurors who could have served as alternate jurors. (In retrospect, these challenges take on added significance since after the guilt phase, a sitting juror was replaced by an alternate. (12RT 2535-2536.) The ultimate composition of the jury should be considered in determining whether a *Batson/Wheeler* issue exists. (*People v. Ward* (2005)

36 Cal.4th 186, 203; *People v. Turner* (1994) 8 Cal.4th 137, 168.) As in *Johnson v. California, supra*, 545 U.S. at pages 164-165, and 173, the prosecutor challenged every one of the eligible black jurors. (*Ibid.* [prosecutor challenged all three black jurors, and defendant was tried by all white jury].)

The standard for establishing a prima facie case is a low one. All that must be shown is that "the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California, supra*, 545 U.S. at 168.) The entire purpose of the *Batson* framework was "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Id.* at p. 172.) A single inference of discrimination based on 'all [the] relevant circumstances' and the 'totality of relevant facts' is sufficient . . . ." (*United States v. Collins, supra,* 551 F.3d at p. 920 [citation omitted].) Here, there is more than a single inference, and a prima facie showing was made. It appears the trial judge did not recognize the inference of discrimination as a prima facie showing, in part, because the judge misunderstood *Batson*, and erroneously concluded *Batson* did not apply at all to alternates. (9RT 1885.)

2. The Prosecutor's Explanations for Using Peremptory Challenges to Remove Three Prospective Black Jurors Were Pretextual.

This Court explained a reviewing court's duty at step three of the *Batson/Wheeler* process includes an obligation to "be suspicious when presented with reasons that are unsupported or otherwise implausible." (*People v. Silva* (2001) 25 Cal.4th 345, 385.) Three facts in the record demonstrate the prosecutor's explanations of her challenges to the three prospective jurors were pretextual. First, the prospective jurors' written and oral responses showed they were thoughtful, diligent citizens who would have served well as jurors. Second, the prosecutor, in most instances, did not even question the prospective jurors about the prosecutor's claimed areas of concern, and when she did her questions were superficial. Third, the prosecutor did not challenge white prospective jurors with similar characteristics that the prosecutor said caused her to challenge the prospective black jurors. These last two factors belie the prosecutor's claimed race-neutral explanations.

The foregoing summaries of the questionnaires and voir dire of FG, DB and MH showed each of them was qualified to sit as a juror. The prosecutor's stated reasons for challenging them had no merit. The totality of their answers on the questionnaires and their responses during voir dire revealed them to be

well qualified and impartial. The prosecutor's near-total lack of questioning any of the black prospective jurors about the topics she later claimed as reasons for challenge them exposes the claimed reasons as pretextual. As set forth, *ante*, the prosecutor either never questioned prospective jurors about the areas of concern, or did so only cursorily. The prosecutor's disinterest in engaging in meaningful questioning of the challenged black jurors reinforces the conclusion the challenges were based upon group bias. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 246; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1079; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 905.)

The prosecutor's failure to challenge *white* prospective jurors on the same ground she challenged FG, DB and MH also demonstrates a pretextual motive. (*Caldwell v. Maloney* (lst Cir. 1998) 159 F.3d 639, 651.) This "comparative analysis" of struck and seated jurors is "a well-established tool [[18]] for exploring the possibility that facially race-neutral reasons are a pretext

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[18] *People v. Lenix, supra,* 44 Cal.4th 602, permits comparative juror evidence. *Lenix* explained,"Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." (*Id.* at p. 607.) Hardy seeks a "comparative analysis" of the record in this case.

for discrimination." (*Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251.) Doing so reveals the prosecutor's explanations for challenging FG, DB and MH applied only to black prospective jurors, not white ones.

It was reasonable for any prospective juror to express reluctance about serving on Hardy's jury due to the length of the trial, other obligations, and the nature of the offenses. Indeed, several seated jurors expressed similar concerns to the challenged black prospective jurors. Juror 3164 wrote this about jury service, "I don't look forward to it, but it is something I am willing to do. (5CT 1150.) Juror 4635 wrote, "don't want to [sit on the jury], the nature of the crime alone makes me sick." (4CT 901.) Juror 8868 also did not want to sit, explaining it "takes too long . . . ." (5CT 1386.) Juror 7421 did not want to sit because "The violent nature of this case is disturbing to me," and he "would experience anxiety" based on his work. (4CT 1011.) Juror 7421 also wrote he did not want to be a juror because it "takes me away for too long from my responsibilities at work . . . ." (4CT 1031.) Juror 5904 likewise did not want to sit because of "time out of work." (3CT 793, 813.) Juror 9343 wrote three times he did not want to sit a juror because of work. (6CT 1439, 1440, 1457.) FG, however, explained his reluctance and work commitments during voir dire, and was accepting of the schedule the court explained. (7RT

1296-1297.) The difference was FG was black. The seated jurors with similar, or greater reluctance, were white.

FG wrote prosecutors and the police exaggerated and were not always truthful. (11CT 2906.) He also believed the same about defense attorneys. (11CT 2906.) Rather than a reason to challenge, this showed a healthy skepticism that should be valued in a juror. FG admitted on the questionnaire he had been arrested in 1992. He explained he was falsely accused of stealing a rental car. Even so, he thought he was treated fairly by police concerning the accusation. (11CT 2920.) Similarly, DB was on probation for drinking and driving, and had been roughed up by police. He pled to the charge, believed there had been a "just disposition," and he had been taught a lesson. (12CT 3078.) DB was unable to identify the officer who roughed him up (12CT 3072), but would not disbelieve a law enforcement officer. (12CT 3073.) Significantly, Juror 4635 also had been arrested for drunk driving, but was not challenged by the prosecutor. (See 4CT 895.) Furthermore, Juror 4635 had witnessed two police officers beating someone. (4CT 892, 895). Objectively, Juror 4635 appeared more ripe for challenge than FG. Yet he remained unchallenged while FG, who was black, was excused.

FG knew attorneys, and DB was one, but there were a lot of attorneys in Los Angeles County, and knowing some of them, or even being one of

them, was not disqualifying. Juror 8868 also had a friend who was a city attorney. (3CT 833.) Yet again, the prosecutor's reason for challenging blacks did not apply to white jurors.

MH watched CSI, a reason the prosecutor cited for the challenge. (8RT 1884.) But Juror 9343 also watched CSI. (6CT 1436.) The prosecutor suspected MH possessed specialized knowledge about jails (8RT 1884), but Juror 3164 had "collaborated with numerous LA County sheriffs on community projects," and likely had some specialized knowledge also. (See 5CT 1157.) Juror 8868 had friends who included a CHP officer and a probation officer. (3CT 833.) MH found it difficult to judge others, a stated reason for the prosecutor's challenge. (8RT 1884.) Juror 7421 also wrote he "would feel uncomfortable" judging another. (4CT 989.) The prosecutor's pattern of discriminatory challenges was revealed in the fact that the reasons she gave were applied only to challenge black jurors, not white jurors.

Snyder v. Louisiana, supra, 552 U.S. 472, considered the foregoing type of comparison between challenged black prospective jurors and white ones who served and rejected the prosecutor's claimed, "race-neutral" explanation for challenging a black juror. (*Id.* at pp. 478-480; see also *People v. Kelly* (2007) 42 Cal.4th 763, 779 [challenged jurors heterogeneous as community in all respects other than race or gender].) As the Ninth Circuit has explained,

"The fact that [a proffered] reason also applied to . . . other panel members, most of them white, none of them struck, is evidence of pretext." (*Ali v. Hickman* (9th Cir 2009) 571 F.3d 902, 916, citing *Miller-El v. Dretke, supra*, 545 U.S. at p. 248.) An effective comparison requires only that the challenged and unchallenged jurors are "similarly situated." (See *Miller-El v. Dretke, supra*, 545 U.S. at p. 247, fn 6.) FG, DB, and MH were similarly situated to unchallenged white jurors whom the prosecutor did not challenge. Finally, it matters not that some of the prosecutor's reasons might have been good ones. *Johnson v. California* explained, "'It does not matter that the prosecutor might have had good reasons . . . what matters is the real reason they were stricken." (*Johnson v. California, supra,* 545 U.S. at p. 172, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [emphasis deleted by Supreme Court].) Here, the real reason was they were black.

F. Reversal Is Required.

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902.) The trial court's erroneous denial of Hardy's *Wheeler-Batson* motion is reversible per se. (*People v. Wheeler, supra*, 22 Cal. 3d at p. 283 ["[N]o inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."].) This Court need

not determine whether the trial court erred in denying the *Batson/Wheeler* motion as to all three of the challenged, black prospective jurors. The exclusion of a single juror by peremptory challenge on the basis of race is an error of constitutional magnitude requiring reversal. (*People v. Fuentes, supra,* 54 Cal. 3d 707, 716, fn. 4; *People v. Montiel* (1993) 5 Cal. 4th 877, 909.)

The prosecutor's improper use of peremptory challenges to purge blacks from the jury and from serving as alternates, in the trial of a young, black male defendant violated Hardy's fundamental right to a trial by jurors drawn from a representative cross section of the community and equally violated the prospective black jurors' rights and duties to serve. Undeniably, Hardy's case involved racial tension: three black males attacked a white woman who had called the young men "niggers." The prosecutor's peremptory challenges were a pretext to eliminate jurors on the basis of group bias. Like the fictional character Tom Robinson in Harper Lee's "*To Kill a Mockingbird*," Hardy was tried, convicted, and sentenced by an all-white jury.

The fictional Robinson was a vehicle for portraying the injustice of an all white jury sitting in judgment of a black man accused of victimizing a white woman. The Constitution prohibits that type of injustice for nonfictional defendants. Hardy's real-life case was tried before an all white jury in 2002,

not the Jim Crow era depicted in Lee's novel. The composition of Hardy's jury as a result of the prosecutor's race-based challenges and the trial court's ruling. The end result was an injustice that violated Hardy's constitutional rights, and requires reversal.

GUILT PHASE TRIAL EVIDENTIARY ISSUES

IV

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON ALL COUNTS SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCLUDED RELEVANT DEFENSE EVIDENCE OF THE VICTIM'S BLOOD LEVELS OF METHAMPHETAMINE AND ALCOHOL. THE ERROR VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

At the penalty phase, the parties stipulated the toxicology report on the victim showed she had blood levels of .73 methamphetamine and .22 alcohol at the time of death. (12RT 2690.) A blood alcohol level of .22 is two and a half times the legal limit for driving. (12RT 2691.) A blood methamphetamine level of .73 is the lowest at which a person would be intoxicated with methamphetamine. (12RT 2691.) This information, however, was never presented during the guilt phase. Before trial, defense counsel initially informed the court he did not intend to introduce the toxicology report during the guilt phase. (6RT 859-686.) Later, defense counsel advised the

trial court that the defense had reconsidered the use of the victim's toxicology report during the guilt phase. Defense counsel sought to introduce evidence of the toxicology report, noting the report corroborated Hardy's confession. (10RT 1891.) The trial court ruled the report could not be admitted. (10RT 1898, 1902.)

The toxicology report was relevant both to the credibility of Hardy's entire statements to police and to explain the victim's actions prior to her death. Hardy's statement to police included his description of Sigler's cursing at Hardy and his companions, and calling them "niggers." (See e.g., 10RT 2137.) A reasonable juror might have questioned whether a lone, white woman would curse and call three young black men "niggers." Sigler's levels of alcohol and methamphetamine supplied a reason. Hardy's jury never knew about these levels until the penalty phase because the trial court excluded them until the penalty phase. (10RT 1902.) Excluding the evidence violated Hardy's constitutional rights to trial, to due process, to confront witnesses and to present defense evidence. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 328-331 [126 S.Ct. 1727, 164 L.Ed.2d 503]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *LaJoie v. Thompson* (9th Cir. 2000) 217 F.3d 663, 668; *In re Martin* (1987) 44 Cal.3d 1, 29.) Excluding

the evidence deprived Hardy of due process and a fair trial, his Sixth Amendment right to a jury determination of the facts, his right of confrontation under the Sixth and Fourteenth Amendments and the California Constitution, and to violate the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and the California Constitution. The judgment of guilt and the penalty must therefore be reversed.

B. Procedural Background.

Before trial, the prosecutor sought to exclude evidence of the victim's toxicology report. (6RT 867-868.) At the time, the defense did not anticipate offering the evidence. (*Ibid.*) At a later hearing on November 13, 2002, however, defense counsel alerted the trial court that counsel had reconsidered the use of the victim's toxicology report during the guilt phase. (10RT 1891.) Defense counsel noted the toxicology report corroborated Hardy's confession (*ibid.*), which included his description of the victim making racial epithets to Hardy and his companions. (See e.g., 10RT 2137.) Hardy told police the victim yelled, "fuck you niggers" to him and his companions. (10RT 2102.) The prosecutor's opening statement acknowledged the victim had made "racial remarks." (10RT 1913.)

Defense counsel wanted jurors to believe Hardy's entire confession, including that Hardy did not use the stick as a weapon, only Pearson did. (10RT 1894.) The trial court concluded the corroboration was minimal compared to the amount of time consumption the evidence required. (10RT 1894.) Defense counsel proposed a stipulation to the toxicology report. (10RT 1895.) Indeed, later during the penalty phase, the parties stipulated to the relevant contents of the report. (12RT 2690.) However, during the guilt phase, the trial court and the prosecutor refused a stipulation to the report. (10RT 1895.) Defense counsel pointed out the coroner would be in court testifying anyway, but the coroner would not testify about the toxicology report. (10RT 1895.) Defense counsel continued to press the point, arguing the medical examiner would be in court testifying for hours, and this additional topic would not significantly add to the time required. (10RT 1895.) Further, defense counsel argued that part of the autopsy report included the toxicology screening results. (10RT 1896.)

Ultimately, defense counsel planned to introduce Hardy's observations that the victim appeared under the influence through the statements Hardy made during interrogation. (10RT 1897.) The trial court ruled it would not preclude defense counsel from exploring this topic, but the toxicology report could not be admitted until the penalty phase. (10RT 1898, 1902.)

C. The Trial Court's Ruling Excluding Evidence of the Victim's Toxicology Report Was Error, and Deprived Hardy of His Right to a Fair Trial and Federal and State Due Process of Law, His Sixth and Fourteenth Amendments Right to a Jury Determination of the Facts, His Right of Confrontation under the Sixth and Fourteenth Amendments and the California Constitution, and Violated the Prohibition Against Cruel and Unusual Punishment in the Eighth and Fourteenth Amendments and the California Constitution.

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [87 S.Ct. 648, 17 L.Ed.2d 606].) A defendant's right to present his theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact. (*Davis v. Alaska* (1974) 415 U.S. 308, 317 [94 S.Ct. 1105, 39 L.Ed.2d 347].) Section 352 must "bow to the due process right of a defendant to present all relevant evidence of significant probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

In *Holmes v. South Carolina, supra,* the trial court excluded evidence a third party committed the murder and sexual assault based on a state statute which precluded the admission of such evidence when forensic evidence tied the defendant to the crime. The defendant in *Holmes* attempted to present the testimony of several witnesses who placed another individual near the crime scene around the time period of the victim's murder. The Court concluded the

exclusion of the evidence violated the defendant's fundamental constitutional right to present a defense. (*Holmes v. South Carolina, supra*, 547 U.S. at pp. 328-331.) The Court specifically rejected any rule allowing the trial court to exclude third party culpability evidence based on its own assessment of the strength of the prosecution case. (*Id.*, at p. 331; see also *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303 [due process violation based on trial court's exclusion of a confession to the charged crime by a defense witness because of the voucher rule].)

The trial court's ruling excluding Sigler's toxicology report denied Hardy his due process right to present a defense. It also denied Hardy his Sixth Amendment right to a jury determination of the facts determining his guilt. (*Ring v. Arizona* (2002) 536 U.S. 584, 609, [122 S.Ct. 2428, 153 L.Ed.2d 556] [holding that the Sixth Amendment requires Arizona's enumerated aggravating factors to be found true beyond a reasonable doubt because they operate as the functional equivalent of an element of a greater offense].) The prosecution presented multiple theories for Hardy's liability for first degree murder: deliberate and premeditated, torture murder, aider and abettor liability, or murder committed during the commission of one of the enumerated felonies. (11RT 2356 [aider and abettor], 2358 [premeditated and deliberate], 2359 [felony murder].) The jury was not required to unanimously

agree on, or report, the theory underlying the verdict. Thus, there is no way to know any theory upon which the jury based its verdict. However, the verdict of guilty on count 1 necessarily included a finding of malice.

Heat of passion or adequate provocation is not a complete defense to murder, but it is a circumstance that negates malice. Some words can constitute provocation that negates malice. Some words constitute provocation for heat of passion. (See e.g., *People v. Moye* (2009) 47 Cal.4th 537, 550; *People v. Valentine* (1946) 28 Cal.2d 121, 138-139.) Evidence of the toxicology report showing the victim's levels of methamphetamine and alcohol tended to prove, and explain, that Hardy did not search out, and hunt down a victim. Rather, the victim's intoxication with methamphetamine, and alcohol, tended to prove that she aggressively approached Hardy and his companions, who had no plan to confront or interact with her.

As defense counsel argued, the toxicology report corroborated Hardy's statements, which the jurors otherwise easily could disregard without the supporting toxicology reports that provided explanation for the victim's action. Without the report it was difficult for jurors to believe a petite, white woman alone on a dark street, would aggressively yell at three, young black males, and curse them using the word "nigger." The prosecutor argued Hardy was the first to cross the street and approach Sigler. (11RT 2379.) She specifically

argued Sigler's small size. The prosecutor argued Sigler was five feet, four inches tall, weighed 113 pounds, and was outnumbered three to one. (See e.g., 11RT 2376.) Jurors also heard evidence that Armstrong was five feet, 10 inches tall (11RT 2274), and Pearson was six feet.[19] (11RT 2279). The toxicology report explained the victim's actions, and Hardy's initial responses. Instead, jurors had the incorrect impression that Hardy simply crossed the street to attack the victim.

Under the Sixth and Fourteenth Amendments, and the California Constitution, Hardy had a meaningful right to confront witnesses. "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (*Davis v. Alaska, supra*, 415 U.S. at pp. 315-316.) The trial court impaired Hardy's ability to present his case fully for the jurors' consideration, and to conduct effective cross-examination of key defense witnesses, in violation of his right of confrontation. The ruling also resulted in the jury rendering its

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[19] McMahon testified Pearson looked about five feet, 10 inches tall (11RT 2278), but Pearson's booking sheet showed he was six feet (11RT 2279.)

verdict of death based on unreliable evidence, in violation of the requirement for heightened reliability in death penalty cases. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; Cal. Const., art. I, §17.)

One prosecution theory was felony murder, and jurors were instructed about felony murder. (See e.g., 11RT 2359, 2365 [prosecutor argued felony murder as one theory]; 2CT 550.) Felony murder requires the defendant have specific intent to commit the target felony, in this case either robbery, kidnapping for rape, rape in concert, rape, sexual penetration by a foreign object in concert, sexual penetration with a foreign object, or torture. (2CT 550.) Thus, specific intent had to be proved for these target felonies even if the target felony itself did not require special intent. (*People v. Hart* (1999) 20 Cal.4th 546, 608.) That is because the specific intent to commit the target felony is "imported" to become the specific intent for murder. (*People v. Sears* (1965) 62 Cal.2d 737, 745.) The toxicology evidence supported the defense theory that approaching Sigler was a spontaneous reaction to her shouting a racial slur. This toxicology evidence would have undercut the prosecution's theory that Hardy planned, or had the specific intent to commit any of the charged felonies when he first approached Sigler. Instead, he reacted to being cursed and called "nigger." The same is true for the special circumstances, which also required the prosecution prove Hardy's specific

intent to commit the target felonies. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1299.)

The prosecutor presented this possible scenario in argument: Hardy and his companions intended to rob Sigler, then upon learning she had only $6 worth of food stamps, were angered, and so raped and tortured her. (11RT 2356.) Besides being based on speculation, this theory required a preformed plan to rob Sigler - - in other words a proactive plan. Sigler's cursing and calling Hardy and his companions "niggers," belied that speculation, and showed the offenses were reactive. The toxicology report tended to prove the reactive nature of the chain of events. Another prosecution theory was premeditation and deliberation. The toxicology report would have provided support for the spontaneity of the events.

The toxicology report showing Sigler's methamphetamine and alcohol levels was relevant because it had some tendency in reason to prove or disprove a disputed fact. (Evid. Code, § 210.) The majority of the prosecution's case against Hardy derived from his own statements. Those statements revealed Pearson to be the primary actor, and often the only actor, in the direct aggression against Sigler. For the prosecution to succeed in obtaining a first degree murder conviction and a death sentence, however, the prosecution needed jurors to believe only the admissions, not the explanations

of Hardy's limited role. Torture provides just one example. Hardy's statements were that, after Pearson attacked and raped the victim (10RT 2140-2145), Pearson was looking for something. (10RT 2146.) Then Armstrong appeared with a stick and gave it to Pearson who used it to beat the victim in the face. (10RT 2148.) While the beating was ongoing, Hardy was gathering clothing. After the three had departed the area, and crossed over the fence or wall, Hardy looked back and saw the stick was protruding from the victim. (10RT 2149.) Only then did he return and extract the stick after Armstrong refused to do so. (10RT 2149.) He had to twist the stick to remove it. (10RT 2150.) From this evidence, there was little to show Hardy premeditated the murder, or had the specific intent to inflict pain required for torture by murder. (Cf., *People v. Steger* (1976) 16 Cal.3d 539, 549.)

The error violated Hardy's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to present evidence, and his rights to due process, a jury trial, and a reliable determination of guilt and imposition of a capital sentence. Therefore, this error requires reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) As the foregoing discussion demonstrates, the exclusion of the toxicology report during the guilt phase significantly reduced Hardy's ability to demonstrate the

reasonable doubt present in the prosecution's case. The prosecutor specifically argued jurors could find Hardy guilty of murder based on premeditation, felony murder, murder by torture, or as an aider and abettor. (11RT 2356-2359, 2365.) When the prosecution presents multiple theories of liability, and one is infirm, the conviction ought not stand unless it can be shown beyond a reasonable doubt jurors relied on a proper theory. (Cf., *People v. Howard* (2005) 34 Cal.4th 1129.) The excluded evidence explained the circumstances surrounding the initial encounter, and that it was a spontaneous reaction by Hardy. This also tended to show the absence of any specific intent to commit the target felonies, torture, to aid and abet, or to premeditate and deliberate, which would result in a fatal deficiency in the various theories. The error requires reversal.

V

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNTS 1, AND 3 THROUGH 8, SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED TESTIMONIAL HEARSAY BY PERMITTING ONE DEPUTY CORONER TO TESTIFY ABOUT PROCEDURES PERFORMED BY THE DEPUTY'S SUPERVISOR. THE ERROR VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, AND HIS RIGHTS TO CONFRONT WITNESSES AND TO EFFECTIVE ASSISTANCE OF COUNSEL AND A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

Raffi Djabourian was the prosecution's first witness. Djabourian, a deputy medical examiner who autopsied Sigler (10RT 1925), set the stage for the entire prosecution case by detailing injuries, and opining on the cause of death, how quickly death occurred, and when death likely occurred. Djabourian also opined that painful genital injuries occurred before the head injuries. He also opined the head injuries were rapidly fatal. (10RT 1971, 1976.) The pain Djabourian described to the genital area related directly to internal splinters removed during the autopsy. (10RT 1971.) However, mid-testimony, Djabourian revealed that: (1) his supervisor, identified only as Dr.

Pena, actually performed some of the autopsy, including the removal of internal wood splinters; and (2) another person, identified only by the initials C.L.H. performed autopsy tasks, apparently including the removal and cataloging of splinters from the body. (10RT 1954-1955; Exh. 8.) Indeed, Djabourian admitted he did not know from where some splinters, specifically the larger one, had been removed, or who had removed them. (10RT 1954-1955, 1971.) Nevertheless, Djabourian testified: (1) about the removal of the splinters (10RT 1954-1956); (2) that the location of one splinter was near the cervix (10RT 1949); (3) a splinter had been well embedded in vaginal tissue (10RT 1951); (4) the location of the splinter would have been painful (10RT 1971); and (5) that he recalled only two, smaller two millimeter splinters, which he did not recall removing. (10RT 1954-1965.)

Djabourian's testimony about portions of the autopsy, that he neither performed nor recalled, violated Hardy's constitutional rights to due process, a jury trial, confront witnesses and to effective assistance of counsel. (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610], and *Williams v. Illinois* (2012) ____U.S. ____ [132 S.Ct. 2221; 183 L.Ed.2d 89].)

The erroneous admission of the testimonial hearsay through the deputy coroner prejudiced Hardy. Key components to the prosecution's case on counts 1, and 3 through 8, were Hardy's participation with the co-defendants in raping Sigler with a foreign object, and torturing her, and that she was alive and conscious throughout. (See e.g., 11RT 2350 [based on autopsy, splinter, victim knew what was happening to her], 2382 [location of splinter as proof of count 6].) The admission of Djabourian's testimony violated Hardy's federal constitutional rights to due process and confrontation. The error was prejudicial, and reversal is mandated. (*Crawford v. Washington, supra,* 541 U.S. 36; *Bullcoming v. New Mexico, supra,* 131 S.Ct. 2705; *Williams v. Illinois, supra*, 132 S.Ct. 2221; but see *People v. Dungo* (2012) 55 Cal.4th 608, and *People v. Lopez* (2012) 55 Cal.4th 569, cert. den.)

The Confrontation Clause in the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause bars the admission in a criminal trial of testimonial statements of a witness who does not testify at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) The Confrontation Clause generally does not allow the prosecution to repeat one person's testimonial statement through the trial

testimony of another witness. (See e.g., *Davis v. Washington* (2006) 547 U.S. 813, 826.) When a non-testifying forensic examiner's testimonial statements are repeated for the truth of what is asserted, the examiner is a witness the defendant has a right to confront. (*Bullcoming, supra*, 564 U.S. at p. 131.) Hardy is aware of this Court's decisions in *People v. Dungo* and *People v. Lopez, supra,* and will explain why those decisions are distinguishable, should be reconsidered, and are not outcome determinative here. Because Hardy was prejudiced when he was denied his right to confront and cross-examine a key prosecution witness, the convictions and judgment of death must be reversed.

B. The Issue Is Cognizable on Appeal.

This issue is properly before this Court based on the significant, and unexpected, changes in the law on confrontation after Hardy's case was tried. While Hardy's defense counsel did not object to Djabourian's testimony about Pena's and C.L.H.'s autopsy examinations, counsel could not have predicted changes in the law on confrontation beginning with *Crawford v. Washington.* Hardy was tried in 2002. The controlling law at the time was that a pathologist could testify about the contents of an autopsy report prepared by another, unavailable pathologist without violating the Confrontation Clause. (See e.g., *People v. Clark* (1992) 3 Cal.4th 41, 158.) Admissibility was based on the standard at the time: "a firmly rooted exception to the hearsay rule that carries

sufficient indicia of reliability to satisfy the requirements of the confrontation clause." (*Ibid.*) In 2004, two years after Hardy's trial, *Crawford v. Washington* was decided. *Crawford* rejected the former indicia-of-reliability standard. (See *People v. Geier* (2007) 41 Cal. 4th 555, 597.) In view of this abrupt and major change in confrontation law, courts universally hold a confrontation claim is not waived or forfeited by the absence of a Sixth Amendment objection below. (See e.g., *People v. Pearson* (2013) 56 Cal.4th 393, 462 [*Crawford* "dramatically departed from prior confrontation clause law," was unforeseeable, and counsel's failure to object did not forfeit issue]; see also *People v. Black* (2007) 41 Cal. 4th 799, 810-11.) Accordingly, the issue is cognizable.

C. Standard of Review.

Arguably, this issue raises a pure question of law, but at a minimum it is a mixed question of fact and law implicating core constitutional rights, that is, the Sixth Amendment right of confrontation, and the Fourteenth Amendment's guarantee of due process. As such, appellate review of the trial court's ruling admitting this evidence is independent, de novo review rather than deferential review. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 136 [119 S.Ct. 1887, 144 L.Ed.2d 117] [a mixed question of law and fact implicating Hardy's Sixth and Fourteenth Amendment rights, means "independent review

is . . . necessary . . . to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."]; *People v. Cromer* (2001) 24 Cal.4th 889, 898; *Ornelas v. United States* (1996) 517 U.S. 690 [116 S.CT. 1657, 134 L.Ed.2d 911]; *Thompson v. Keohane* (1995) 516 U.S. 99 [116 S.Ct. 457, 133 L.Ed.2d 383].)

D. Djabourian's Testimony Was Inadmissible Testimonial Hearsay.

Djabourian testified about Exhibit 8, which was an envelope, containing two smaller envelopes that each held wood splinters. (10RT 1954-1955.) After cutting open the envelope, Djabourian identified a "small linear speck or splinter" from one of the smaller envelopes. He had recovered it from Sigler's "vaginal area." (10RT 1955.) The second small envelope contained "loose debris and . . . a somewhat larger piece of wood, appears to be a piece of a wood splinter that's recovered." (10RT 1955.) Djabourian did not know where the items in the second envelope were recovered. He testified, "I'm unable to determine where that was [they were recovered from]." (10RT 1955.) He could not read the label, and nothing in the report enabled him to determine from where the splinters, *including the larger one* had been recovered. Then Djabourian revealed he had not personally recovered the splinters:

Q: And did you recover both of these items that came out of the package marked People's No. 8?

A: There was a doctor supervising me, Dr. Pena, and it's possible he may have recovered one of these others. The only one I can recall is that smaller one that was two millimeters.

Q: And was that the one you referred to People's 7 that you circled in the upper right-hand rendition?

A: Yes, that's correct.

Q: And on that envelope that you are referring to, is that your handwriting?

A: The handwriting is Dr. Pena's.

Q: And that's the outside of the envelope?

A: Yes.

Q: Marked People's 8 and the small envelope that you recovered that indicated handwriting on it, whose handwriting is on that envelope?

A: That's not my handwriting. I don't recognize that. I recognize Dr. Pena's. It says "isolated by C.L.H." I'm not sure.

Q: Can you flip it over? I guess the writing was on the inside.

A: There are several numbers 00-129-0-6. There is possibly a date indicated 3-23-01 and initials C.L.H.

Q: And when you had the internal genitalia placed in formalin, did that go outside of the coroner's office or did that stay inside the coroner's office?

A: That was inside the coroner's office.

Q: Did someone else other than yourself do that?

A: We examined that specimen with Dr. Pena, so it was the two of us.

(10RT 1956-1957.)

Djabourian's testimony made clear that Pena performed some of the autopsy, including removal of some of the splinters. Pena examined the genitalia along with Djabourian. Someone else, whom Djabourian could not even identify, with the initials C.L.H, also participated in the autopsy, and wrote on the envelopes containing evidence.

E. Hardy's Right to Confrontation Was Violated by His Inability to Cross-examine Pena and C.L.H., Who Participated in the Autopsy, and Collected Evidence Presented at Trial.

1. Controlling United States Supreme Court Authorities.

Crawford v. Washington, supra, 541 U.S. at pages 50-56, held the Sixth Amendment right of confrontation prohibits the admission of "testimonial" hearsay against a defendant in a criminal trial if the declarant is unavailable to testify, and the defendant had no previous opportunity to cross-examine the declarant. The Confrontation Clause bars admission even if the hearsay falls within a state law exception to the hearsay rule, and even if the statement bears indicia of reliability. (*Id.* at pp. 60-69, overruling *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597].) "Involvement of government officers in the production of testimony with an eye toward trial presents unique

potential for prosecution abuse." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 56, fn. 7.) *Crawford* did not define what constituted testimonial hearsay, and left open the question whether statements could be testimonial if they were informal. *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224], formulated a primary purpose test. *Davis* clarified that statements are not testimonial if made to police in an ongoing emergency, but are testimonial if responding to inquiry, the primary purpose of which is to gain information that is potentially relevant in a future prosecution. (*Id.* at p. 822.)

Melendez-Diaz v. Massachusetts, supra, 557 U.S. 305, held the Confrontation Clause applies to reports, specifically, forensic "certificates of analysis." The Court held such reports are testimonial, and their admission violates defendants' confrontation rights. The plurality found that the documents were well within the "core class of testimonial statements" described in *Crawford* because they were declarations made to establish facts. Further, the facts they reflected amounted to "the precise testimony the analysts would be expected to provide if called at trial." (*Id.* at pp. 310-311.) Thus the 'certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation.]" (*Ibid.*) Justice Thomas voted with the majority and also wrote a separate

concurrence in which he asserted that the certificates fell "within the core class of testimonial statements" governed by the Confrontation Clause" because they were "quite plainly affidavits." (*Id.* 129 S.Ct. 2527, 2543.)

At issue in *Melendez-Diaz* were three certificates of analysis showing the results of forensic testing that revealed the substance the defendant possessed was cocaine. (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at pp. 2530-2531.) *Melendez-Diaz* held use of the sworn certificates, instead of live testimony or a previous opportunity for cross-examination, violated the Confrontation Clause. (*Id.* at pp. 2531-2532.) The certificates "fall within the 'core class of testimonial statements'" discussed in *Crawford.* (*Id.* at p. 2532.) The purpose of the sworn certificates was to provide evidence. Therefore, the certificates were testimonial statements for purposes of the Confrontation Clause. (*Ibid.*)

In *Bullcoming v. New Mexico, supra,* 131 S.Ct. 2705, the Court considered a forensic lab report certifying that the defendant, convicted of driving while intoxicated, had a blood alcohol concentration over the legal limit. The Court held the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not personally perform or observe the test

reported in the certification. The defendant had the right to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. (*Id.* at p. 2707.)

The Court explained, "Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations . . . ." (*Bullcoming v. New Mexico, supra,* 131 S.Ct. at p. 2717.) The Court also found the use of surrogate testimony by a technician who did not sign the certification, personally perform, or observe the test violated the Confrontation Clause. The surrogate's testimony could not convey what the person who performed the testing knew, or "expose any lapses or lies" by the other analyst. (*Id.* at p. 2715.) The Court reversed the New Mexico Supreme Court, which had held the testifying analysis was able to serve as a surrogate." (*Id.* at p. 2714.) The Court further found that whether or not the numbers provided by the gas chromatograph required interpretation was immaterial. The "comparative reliability . . . does not overcome the Sixth Amendment bar." (*Id.* at p. 2715.) "Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." (*Id.* at p, 2715, citing *Melendez-Diaz, supra,*

129 S.Ct. at p. 2537.) *Bullcoming* left open the question whether a forensic report by one analyst could be presented through the testimony of a different, expert witness. *Williams v. Illinois, supra,* 132 S.Ct. 2221, decided this question, with five justices rejecting the proposition that the Confrontation Clause prohibited the reports in that case from being introduced to show the basis of an expert's opinion.

Williams, however, raised more questions than it answered about what testimonial hearsay means. To paraphrase the dissent, the plurality garnered the five votes needed to approve admission of the challenged report, "but not a single good explanation" for the result. (*Williams v. Illinois, supra,* at p. 2265 (dis. op. of Kagan, J.).) *Williams* was a bench trial, not a jury trial, and the plurality expressly identified this as a factor in its opinion. (*Williams v. Illinois, supra,* 132 S.Ct. at pp. 2234-2235.) Even so, not all the justices in the plurality agreed. As Justice Thomas explained in his concurring opinion: "There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Williams v. Illinois, supra,* 132 S.Ct. at p. 2257.) Ultimately, however, the plurality in *Williams v. Illinois* concluded the report at issue, a DNA profile report, was not testimonial because, unlike the reports in *Melendez-Diaz* (certification of an incriminating

test result) and *Bullcoming* (certified forensic report), the report did not accuse a targeted individual, and the report appeared reliable. (*Id.* at pp. 2243-2244.) Justice Kagan, and three other dissenting justices[20] agreed with Justice Thomas that the report had been offered for the truth of the matter asserted. The four dissenters also found the report at issue in *Williams* was "identical to the one in *Bullcoming* (and *Melendez-Diaz*) in 'all material respects.' [Citation.]" (*Williams v. Illinois, supra,* at p. 2266 (dis. op. of Kagan, J.).) Further, as Justice Kagan commented in her dissent, the test used by the plurality, "primary purpose of accusing a targeted individual" "derives neither from the text nor from the history of the Confrontation Clause . . . and has no basis in our precedents." (*Williams v. Illinois, supra,* at p. 2273 (dis. op. of Kagan, J.).)

The decisions in *Melendez-Diaz*, *Bullcoming* and *Williams* stand for the proposition that formal forensic reports and evidence, such as drug testing, blood alcohol testing, ballistics and autopsies, that involve testing by one person, and are incriminating on their face, are inadmissible without either the testimony of the authors and testers, or a prior opportunity to cross-examine.

2. This Court's Decisions in *Geier, Dungo,* and *Lopez* Do Not Require a Different Result, and Should Be Reexamined.

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[20] Justices Scalia, Ginsburg, and Sotomayor joined Justice Kagan's dissent.

a. Analysis of this Court's Decisions.

In the wake of ever-changing precedent from the High Court, this Court's decisions have attempted not only to keep pace, but also to fill in the gaps in guidance and clarity. Following *Crawford* and *Davis,* this Court decided in *People v. Geier*, *supra,* 41 Cal.4th 555, that testimony relaying information in a report of contemporaneous scientific observation, recording raw data, was admissible. At issue was the testimony of a lab supervisor who testified about a DNA report she did not author. The supervisor opined based on the test results, and testified the report consisted of contemporaneously recorded observations. *Geier* held the reports and notes were nontestimonial. (*Id.* at pp. 593-595.) The *Geier* opinion concluded the technician who authored the report was not testifying, but rather had contemporaneously recorded her observations and analysis. Thus, the records and data were not accusatory. (*Id.* at p. 607.) *Geier* was decided before *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. 305.

The United States Supreme Court decisions cannot be reconciled with this Court's holding in *Geier.* (In accord *People v. Vargas* (2009) 178 Cal.App.4th 647, 659[21] [*Melendez-Diaz* inconsistent with primary rationale in

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[21] The question of the continuing validity of *Geier* to forensic testing is currently pending before this Court. (See e.g., *People v. Benitez* (S181137), and *People v. Bowman* (S182172).)

Geier].) *Melendez-Diaz* rejected the rationale in *Geier* that an analyst's reporting on "near contemporaneous observations" was not testimonial. *Melendez-Diaz* explained that in *Davis*, the statements to officers responding to a domestic violence call were testimonial even though they were "near contemporaneous" to the events reported. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) Any exception for witnesses making contemporaneous statements would eliminate a defendant's right to confront a police officer's on-the-scene description of what the officer observed when responding to the crime scene. (*Ibid.*) *Bullcoming* explained reasoning like that in *Geier* raises "red flags." (*Bullcoming, supra,* 131 S.Ct. at p. 2714.) The Court explained: "Could an officer other than the one who saw the number on the house or gun present the information in court--so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'" (*Id* at pp. 2714-2715.)

While *Geier* concluded a forensic report was not testimonial because the preparer's observations were not accusatory, *Melendez-Diaz* found "no authority" for the proposition that those who did not witness a crime " nor any human reaction to it" should not be subject to confrontation. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) The majority in *Melendez-Diaz* expressly rejected

the position that a forensic analyst, such as a coroner, should not be subject to confrontation because they are not accusatory witnesses. The High Court held such a position "finds no support in the text of the Sixth Amendment or in our case law." (*Id.* at p. 2533.) Thus, the conclusion in *Dungo* that significant portions of an autopsy report are not testimonial because they are akin to an objective diagnosis by a doctor, is contrary to *Melendez-Diaz*.

Dungo held those portions of an autopsy that recount the examiner's observations are "comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." (*People v. Dungo, supra,* 55 Cal.4th at p. 619-620.) Accordingly, the observations are not testimonial. (*Ibid.*) This conclusion was based on a quote in footnote two, in *Melendez–Diaz, supra*, 557 U.S. at page 312, that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." However, as Hardy pointed out, *ante*, *Melendez-Diaz, supra*, concluded that simply because a person had not witnessed a crime, or any human reaction to it, did not mean the witness was not subject to confrontation. *Dungo* extrapolated its holding from an example in *Melendez-Diaz* that was merely dicta. As the High Court has explained, "clearly established Federal law, as determined by the Supreme Court of the United States . . . refers to the

holdings, as opposed to the dicta, of this Court's decisions . . . ." (*Williams v. Taylor* (2000) 529 U.S. 362, 412 [120 S.Ct. 1495, 146 L.Ed.2d 389].)

Moreover, *Dungo* overlooked *Melendez-Diaz*'s rejection of the rationale that forensic witnesses need not be subject to cross examination because the testimony they provide is the result of "neutral, scientific testing." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) The High Court reiterated its holding in *Crawford*, that the reliability of the testing or evidence was irrelevant to confrontation rights. Indeed, the Court observed such testimony is far from neutral. "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.* at p. 2536.) The Court observed, "[l]ike expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." (*Id.* at p. 2537.)

The results of the autopsy in Hardy's case, along with the evidence seized, and associated reports and observations purporting to identify where splinters were extracted, were testimonial, and their introduction required confrontation. This required the testimony of Djabournian, Pena, and C.L.H. Only Pena had knowledge of some of the procedures conducted and evidence seized. Only C.L.H. had knowledge about certain splinters essential to the

prosecution's case; the point of extraction and their cataloging. *Crawford v. Washington, supra*, 541 U.S. at page 54, explained the right to confront "is most naturally read as a reference to the right of confrontation at common law, admitted only those exceptions established at the time of the founding." *Melendez-Diaz* discussed the dissent's point that there are other ways than confrontation, and sometimes better ways, to challenge or verify the results of a forensic test. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536.) However, the majority expressly identified autopsies as a specific example where confrontation was the only proper way to challenge the forensic testing. The majority noted that "forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated." Thus, confrontation remains the single, constitutional method "to challenge or verify the results" of testing, such as autopsies. (*Ibid.* and fn. 5.)

b. The Facts in *Dungo* Are Distinguishable, and Therefore the Decision Does Not Control the Outcome in this Case.

This Court's decision in *People v. Dungo* does not compel a different outcome, and is not outcome determinative on this issue. The issue decided in *Dungo* concerned whether the autopsy report was testimonial and had been prepared for a purpose of criminal prosecution. In *Dungo*, a second pathologist, who did not conduct or participate in the autopsy, testified as to

his own opinion at trial based on the report prepared by another pathologist and also based on photographs taken during the autopsy. Thus, it was clear in *Dungo* that the testifying pathologist reached his own, independent conclusions based on his personal review of the autopsy evidence. Further, the analysis in *Dungo* centered on the autopsy report, which was not introduced into evidence.

Here, however, Djabournian testified about Exhibit 8, which essentially was the equivalent of a formal, chain of custody document. Djabournian recognized Pena's handwriting, but could not identify the handwriting on Exhibit 8, read what it said, or identify whose initials were represented by C.L.H. Djaoubournian apparently also had no personal knowledge about anyone else's participation in the autopsy process. For example, he was unable to say where the items in the second envelope came from. (10RT 1955.) Thus, the testifying witness Djabournian was unable to provide his own opinion about the splinters in Exhibit 8, identify who had extracted them, or identify a third person who apparently participated in the autopsy.

The confrontation issue is not resolved by the fact that one of at least two (or three) doctors who participated in the autopsy testified and was subject to confrontation. The testifying witness, Djabournian, did not perform the extraction of the splinters in the second envelope, did not observe Pena or

anyone else doing so, and could not definitively testify Pena had, in fact, done so. The mystery initials "C.L.H." made that abundantly clear. Djabournian did not know whose initials they were, could not recall or identify anyone who participated in the autopsy with those initials, and did not recognize the handwriting.

The coroner and deputies were acting as police and prosecution agents when they conducted the autopsy. This Court has observed that the primary purpose of the coroner's autopsy "is to provide a means for the prompt securing of information for the use of those who are charged with the detection and prosecution of crime." (*Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4.) For whatever reasons, the coroner had more than one doctor and possibly a technician perform the autopsy on Sigler.[22] Therefore, it was the incumbent on the prosecution to produce all participating personnel for confrontation. Coroners and their deputies are charged with conducting inquests and investigations into violent deaths. (§ 830.35, subd. (c); Gov't Code, § 27491.)

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[22] There was no exploration at trial into why this practice was utilized for Sigler's autopsy. There was no evidence this might have been the standard practice of the coroner's officer. There was no explanation why Djabourian was being supervised. Djabourian testified he had performed approximately 1,000 autopsies. (10RT 1925.) He appeared not to have been a deputy coroner in training.

Dungo and *Lopez* reduced the *Williams v. Illinois* analysis to two components to determine whether a hearsay statement is "testimonial." The challenge arose from the High Court's own failure to define the term. *Lopez* concluded hearsay was testimonial only if it was: (1) "made with some degree of formality or solemnity;" and if (2) "its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Lopez, supra*, 55 Cal.4th at pp. 581-582.) The *Dungo/Lopez* definition of "testimonial" hearsay, however, falls short of constitutional requirements from the High Court for the reasons discussed *post*. Hardy provides this rationale both for this Court's reconsideration, and for the purpose of future federal review. Further, the *Dungo/Lopez* definition does not apply to the specific facts of this case. However, even if the *Dungo/Lopez* definition of "testimonial" hearsay is correct and does apply, the testimony here was "testimonial" under that definition.

The *Dungo/Lopez* definition of "testimonial" hearsay is irreconcilable with the precedent of the United States Supreme Court. Both *Davis v. Washington, supra*, 547 U.S. at page 822, and *Bullcoming v. New Mexico, supra*, 131 S.Ct. at page 2,714, footnote 6, articulated definitions of "testimonial" hearsay that are different from, and less demanding than, those articulated by *Dungo* and *Lopez*. The United States Supreme Court has held

a statement is "testimonial" if its "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 547 U.S. at p. 822; *Bullcoming, supra*, 131 S.Ct. at p. 2714, fn. 6.) *Bullcoming* also explained that evidence was "testimonial" if it served an "'evidentiary purpose' . . . in aid of a police investigation." (*Bullcoming, supra*, 131 S.Ct. at p. 2717, quoting *Melendez-Diaz, supra*, 557 U.S. at p. 311.) *Williams* did not change these definitions, because of the fractured nature of the holding in that case. (See *People v. Lopez, supra*, 55 Cal.4th at p. 576 (dis. opn. of Liu, J.) [*Williams* "produced no authoritative guidance beyond the result reached on the particular facts of that case"].) Thus, the broader *Davis/Bullcoming* definition applies to Djabourian's testimony, including that concerning the splinters in the envelope.

The *Dungo/Lopez* rule relied on, as a central component of confrontation clause analysis, the "formality and solemnity" language urged by Justice Thomas. However, this "formality and solemnity" approach has never commanded a majority in the United States Supreme Court – including in *Williams*. Indeed, in the High Court's decisions "solemnity has sometimes been dispositive [citations] and sometimes not." (*Bullcoming, supra*, 131 S.Ct. at p. 2725 (dis. opn. of Kennedy, J); see also *People v. Lopez, supra*, 55 Cal.4th at p. 579 (dis. opn. of Liu, J.) [solemnity is a factor "that the high court

has never held to be dispositive despite numerous entreaties by Justice Thomas to his colleagues over the past two decades"].) Thus, a "formality and solemnity" rule is both lacking in legal foundation and obviously unworkable as applied to real-world situations where confrontation is likely to be important.

By way of example, the "formality and solemnity" rule suggests the right to confrontation is not implicated if a witness simply testifies that, "I hear X fact is true," because the source of such knowledge is not "solemn" and "formalized." This makes no sense, has been explicitly rejected by the United States Supreme Court, and is a perspective that is endorsed, essentially, by Justice Thomas alone. (See *Davis, supra*, 547 U.S. at p. 826 ["we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policemen recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition," emphasis in original].) Moreover, as the dissent pointed out, *Dungo* conflated two factors in assessing testimonial character: formality and primary purpose. Doing so enabled the conclusion that observations were not formal, and conclusions or opinion were. (*People v. Dungo, supra*, 55 Cal.4th at p. 463, (dis. op. of Corrigan, J.).) Thus, the *Dungo/Lopez* definition of testimonial hearsay that requires "formality and solemnity" is incorrect.

Even assuming this Court retains the *Dungo/Lopez* "formality and solemnity" definition for testimonial hearsay Hardy's case is factually distinguishable from *Dungo* and *Lopez,* and is controlled by *Davis* and *Bullcoming*. Djabourian's testimony about the autopsy and splinters established critical facts for the truth of the matter asserted, which was not the case in *Dungo* or *Lopez*. In *Dungo*, the autopsy report, that was the subject of the dispute on appeal, was never admitted into evidence, and there was no dispute that the autopsy had actually occurred. (*Dungo, supra*, 55 Cal.4th at p. 622 (conc. opn. of Chin, J.) ["the question of whether the autopsy report itself was testimonial is thus not before us"].) Similarly, in *Lopez*, there was no dispute that vials of blood drawn from the defendant were, in fact, blood, and did in fact originate from the defendant. (See *Lopez, supra*, 55 Cal.4th at p. 574.) Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.) In contrast, Djabourian did not know how the splinters were extracted, from where they were extracted, or who extracted them. He did not know how certain splinters came to be in the envelope bearing C.L.H.'s initials. These items were introduced at Hardy's trial, unlike *Dungo* where the report was not introduced. *Lopez* and *Dungo* consequently do not purport to determine whether a given piece of admitted evidence should

be treated as "testimonial" when it is the sole basis for establishing a critical detail for the truth of the matter asserted, as is the case here.

Here, the only evidence concerning critical aspects of the autopsy, including the location and obtaining of certain splinter evidence came from C.L.H's notes on the envelopes. Djabourian did not know anything about where this evidence came from or how it was placed into the initialed envelope. The "fact" that certain splinters had been taken from the victim during the autopsy was established for the truth of the matter asserted by Djabourian's testimony, but he had no personal knowledge of those facts. Therefore, because of the unique and critical role of Djabourian's testimony, this Court should evaluate those statements according to the definition of "testimonial" hearsay previously articulated by the United States Supreme Court in *Davis* and *Bullcoming*, quoted above. Under that standard, the hearsay was "testimonial."

F. The Erroneous Admission of the Testimonial Hearsay Through Djabourian's Testimony about Pena's and C.L.H.'s Work During the Autopsy Prejudiced Hardy.

Hardy's right to confrontation was not satisfied by cross-examining Djabourian. Djabourian was not able to testify to the autopsy tasks performed by Pena or C.L.H. Pena was Djabourian's supervisor, which presumptively rendered Djabourian unqualified to judge Pena's work. Djabourian did not

even know, or recall, who C.L.H. was, or that person's role in the autopsy. Djabourian could not testify to the skill or judgment employed by Pena or C.L.H. Conducting an autopsy is a complicated task that "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2537-2538; Nat. Assoc. Of Medical Examiners, Forensic Autopsy Performance Standards, Am. J. Of Forensic Medicine & Pathology (Sept. 2006), vol. 27, issue 3, stds B4, B5, pp. 200-225 [pathologist performing autopsy exercises discretion to determine need for additional dissection, lab tests, and is responsible for formulating interpretations, opinions, and obtaining information].) The Confrontation Clause guaranteed Hardy the right to have jurors evaluate Pena's and C.L.H.'s work. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.)

Cross-examination of Djabourian concerning Pena's removal of the splinters in Exhibit 8 would have been useless. Djabourian could not act as Pena's surrogate. It was critical to the prosecution's case that jurors believed the victim was alive, conscious and suffered pain during the penetration with a wooden object. For example, the prosecutor argued to jurors that Sigler knew what was happening to her, and the location of the splinters proved count 6. (11RT 2350 [based on autopsy, splinter, victim knew what was happening to her], 2382 [location of splinter as proof of count 6].) When the prosecution

presented, and expressly relied on, evidence that Pena obtained, it was not enough that Hardy cross-examined Pena's underling. *Melendez-Diaz* and *Bullcoming* instructed that substitute cross-examination is inadequate to fulfill the protections of the Confrontation Clause. Simply put, "[t]he Sixth Amendment does not permit the prosecution to prove its case . . . *ex parte* . . . ." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542 [discussing affidavit presented].) The error violated Hardy's rights Sixth Amendment right to confront and cross-examine, and a concomitant right to due process of law under the Fourteenth Amendment. Therefore, this error requires reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; in accord *People v. Geier, supra,* 41 Cal.4th at p. 608.)

Djabournian's testimony, including the hearsay concerning Pena's and C.L.H.'s work during the autopsy, provided critical evidence about the manner in which Sigler had died. Critical to the prosecution's theory, and expressly argued by the prosecutor, was that Sigler was alive, conscious and sentient during the entire ordeal. Djabournian provided the evidence for the prosecution to present and argue this theory. The trouble was that not only were the majority of splinters removed by another coroner Pena, or by C.L.H. whose qualifications and identity remained unknown, but also Djabournian

could not recall observing the extraction or who had performed it. While Djabournian knew Pena supervised and participated in the autopsy, Djabournian could not recall whether Pena had performed the extraction of the splinters. The mystery initials on the evidence envelope that Djabournian could not identify only added to his incompetence as a witness to testify about the splinters. The participation of Pena and "C.L.H." in the autopsy is clear from Djarbournian's testimony. What is not clear, however, is what other tasks Pena and C.L.H. performed.

Djarbournian's testimony as a whole reveals that, as he described photographs and diagrams, he did not always use the first person to describe the autopsy procedures being conducted. Djarbournian did not extract, and did not remember evidence contained in the Exhibit 8 envelopes. Nevertheless, Djarbournian testified the location of the splinters revealed they were painful even though he had not removed the largest splinter. (10RT 1971.) The prosecution relied on the location and nature of the splinters in its case against Hardy. During argument, this approach was embellished when the prosecutor argued no one could hear Sigler's screams (even though there was no evidence of screaming), and the splinter from the autopsy showed Sigler knew what was happening. (1RT 2350.) As to count 6, the prosecutor identified the location

of the splinter, four inches into the vagina, as proof of an element. (11RT 2381.)

Based on the foregoing, the convictions in counts 1 and 3 through 8, and the judgment of death should be reversed.

VI

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCES UNDER PENAL CODE SECTION 190.2, SUBDIVISION (A)(17), AND THE JUDGMENT OF DEATH, SHOULD BE REVERSED BECAUSE THE EVIDENCE FAILED TO PROVE HARDY COMMITTED ANY OF THE SPECIAL CIRCUMSTANCE FELONIES FOR AN INDEPENDENT FELONIOUS PURPOSE IN VIOLATION OF HARDY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, TO A JURY TRIAL, A RELIABLE GUILT AND DEATH VERDICT, AND HIS RIGHTS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

A. Summary of Argument.

The jury found the special circumstances under section 190.2, subdivision (a)(17) and (18), true that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (12RT 2528; 3CT 597-598.) As a result, Hardy was eligible for the death penalty or imprisonment for life without the possibility of parole. (§ 190.2, subd. (a).) There was no substantial evidence that any of the felonies was committed with an independent felonious purpose. Under the *People v. Green* (1980) 27 Cal.3d 1, line of cases, the controlling law at the time of the crimes, the true findings to the felony special circumstances can be upheld only if Hardy had an independent felonious purpose for committing

each special circumstance felony, which was not merely incidental to the murder. Under controlling law, it was not enough the murder happened during a special circumstance felony, or vice-versa. For the felony-murder special circumstance to be satisfied, the murder had to have been intended to advance an independent felonious purpose. (*Id.* at pp. 59-63.) *Green* explained this element derives out of a constitutional necessity. (*Id.* at p. 61.) The requirement is "not mere state law nicety, for without this narrowing construction, the special circumstance would run afoul of [constitutional] requirements . . . ." (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476, citing *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], and *Gregg v. Georgia* (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859] [requiring states provide a rational basis for distinguishing between those who deserve to be considered for the death penalty].)

The evidence showed criminal liability for murder that involved the commissions of robbery, kidnapping, kidnapping for rape, rape, and rape by foreign object. All events occurred in a relatively short period of time, and there was no evidence the commission of any one of the special circumstance felonies was not merely incidental to the murder. In other words, there was no substantial evidence that Hardy had an independent purpose to commit the special circumstance felonies that was wholly independent of the principal's

purpose for the murder. Under the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the requirement of an independent felonious purpose constituted an element of the offense for purposes of determining Hardy's eligibility for the death penalty. Hence, the state and federal due process clause required the prosecution to prove beyond a reasonable doubt that Hardy had an independent felonious purpose relating to the special circumstance felonies. Because the prosecution failed to prove this required element, the true findings to the felony special circumstance allegations, and the judgment of death, must be reversed.

B. Legal Standards Governing True Findings to Special Circumstances.

Section 190.2, subdivision (a), specifies the special circumstances that make a defendant eligible for the death penalty. It was alleged the murder was committed during the following felonies listed in subdivision (a)(17): robbery (§ 211), kidnapping (§ 209), kidnapping for rape (§ 209), rape (§ 216), and rape by instrument (§ 289). Section 190.4, subdivision (a), requires the trier of fact to find true beyond a reasonable doubt the special circumstances alleged in the information. This Court has ruled that the commission of acts

listed in section 190.2, when merely incidental to a murder, cannot support true findings to special circumstances.

In *People v. Green* (1980) 27 Cal.3d 1, the defendant murdered his wife. The jury found the murder was willful, deliberate, and premeditated, and committed by the defendant during the course of a robbery and akidnapping. The defendant was sentenced to death. The defendant drove his wife to a secluded area where he had intercourse with her and then shot her. To support the robbery special circumstance finding, the prosecution argued the defendant had taken his wife's clothes, purse, and ring. The defendant challenged on appeal the sufficiency of the evidence to support the special circumstances findings. *Green* concluded the evidence was technically sufficient to support the defendant's robbery conviction, however, section 190.2 required the defendant to commit the murder "during the commission or attempted commission" of the crime constituting the special circumstances.[23] (*People v. Green, supra*, 27 Cal.3d at p. 59 [quoting former § 190.2, subd. (c)(3)].) The occurrence of a crime listed as a special circumstance and a murder does not

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[23] Similar language appears in section 190.2, subdivision (a)(17), which provides in pertinent part "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of . . . the following felonies: . . ."

necessarily satisfy the "during the commission or attempted commission" requirement of the statute:

> [I]n his closing argument the district attorney correctly told the jurors that in order to find the charged special circumstances to be true they must first find defendant guilty of the underlying crimes of robbery andkidnapping. After discussing the evidence bearing on those crimes, however, the district attorney in effect told the jurors that was *all* they needed to do: i.e., that if they found defendant guilty of the underlying crimes, the corresponding special circumstances were ipso facto proved as well. The latter reasoning was unsound, as it ignored key language of the statute: it was not enough for the jury to find the defendant guilty of a murder *and* one of the listed crimes; the statute also required that the jury find the defendant committed the murder "during the commission or attempted commission of" that crime. (Former § 190.2, subd. (c)(3).) In other words, a valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed "during the commission" of the underlying crime.

(*People v. Green, supra*, 27 Cal.3d at p. 59.)

In *People v. Green*, the evidence supported a reasonable inference the robbery may have been incidental to the murder. Also, the jury asked a question suggesting it believed the robbery was incidental to the murder. In order to be constitutional, *Green* imposed the following requirement for a special circumstances felony to be found true:

> The Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant

> committed a "willful, deliberate and premeditated" murder "during the commission" of a robbery or other listed felony. (Former § 190.2, subd. (c)(3).) The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim or witness to a holdup, a kidnapping, or a rape.

(*People v. Green*, *supra*, 27 Cal.3d at p. 61.) *Green* explained:

> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder -- "a second thing to it," as the jury foreman here said -- because its sole object is to facilitate or conceal the primary crime. In the case at hand, for example, it would not rationally distinguish between murderers to hold that this defendant can be subjected to the death penalty because he took his victim's clothing for the purpose of burning it later to prevent identification, when another defendant who committed an identical first degree murder could not be subjected to the death penalty if for the same purpose he buried the victim fully clothed -- or even if he doused the clothed body with gasoline and burned it at the scene instead. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg*. (428 U.S. at p. 189, [49 L.ED. 2d at p. 883].) We conclude that regardless of chronology such a crime is not a murder committed "during the commission" of a robbery within the meaning of the statute.

(*People v. Green*, *supra*, 27 Cal.3d at pp. 61-62.) *Green* thus found the evidence insufficient as a matter of law to prove the special circumstances. (*Id.*, at p. 62.)

People v. Green remains controlling authority, and has been consistently applied by this Court and the Legislature. (See e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 113-114; *People v. Michaels* (2002) 28 Cal.4th 486, 519; *People v. Reyes* (2004) 32 Cal.4th 73, 113-114; *People v. Raley* (1992) 2 Cal.4th 870, 902-903; *People v. Kimble* (1988) 44 Cal.3d 480, 501-503; *People v. Weidert* (1985) 39 Cal.3d 836, 842; *People v. Thompson* (1980) 27 Cal.3d 303, 322-323.) The holding of *People v. Green* was implicitly adopted and approved of by the Legislature when it amended section 190.2 in 1998 to create an exception to the *Green* rule for only kidnapping and arson by the enactment of subdivision (a)(17)(m). (Stats. 1998, ch. 629, §1; cf., *Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367, 381-382 [89 S.Ct. 1794; 23 L.Ed.2d 371] [applying the legislative- reenactment doctrine].)

The holding of *People v. Green* has also been incorporated in the second paragraph of CALJIC No. 8.81.7. (*People v. Horning* (2004) 34 Cal.4th 871, 907.) The instruction explains the requirement the jury find: "the murder was committed in order to carry out or advance" the special circumstance felony. The instruction explains the special circumstance felony "is not established if the [felony] was merely incidental to the commission of the murder." (CALJIC No. 8.81.17.) This instruction, however, was not used by the trial court. Instead, the trial court instructed only that:

> To find that the [sic] any of the special circumstances, referred to in these instructions as murder in the commission of robbery, kidnap kidnapping for rape, rape, or rape by a foreign object-a wooden stake, is true, it must be proved:
>
> 1. The murder was committed while [the] defendant was [engaged in] [or] [was a accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object [a wooden stake].

(2CT 555.) This was similar to the truncated version of CALJIC No. 8.81.17 at issue in *People v. Valdez*. (*People v. Valdez*, *supra,* 32 Cal.4th at pp. 113-114 [holding challenge to instruction was forfeited by defendant's failure to object or request the omitted language].)

In *People v. Thompson, supra*, 27 Cal.3d 303, the defendant entered the victim's residence. He shot and killed one victim, and injured a second victim, took car keys from one of the victims and drove the victim's car away from the scene. The jury found true the special circumstances of robbery and first degree burglary, and sentenced the defendant to death. According to this Court, "[t]he question presented under *People v. Green* is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such thefts were `merely incidental to the murder.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 324.) After reviewing the evidence, the Court concluded that "[w]hen the whole record is viewed in a light most favorable to the verdict, it establishes at most a suspicion that

appellant had an intent to steal independent of his intent to kill." (*Ibid.*) Hence, the evidence was insufficient as a matter of law to prove the true findings to the special circumstances.

In *People v. Ainsworth* (1988) 45 Cal.3d 984, the defendant kidnaped the victim, put her in his car, and let her bleed to death over several hours. This Court stated that "*Green* and *Thompson* stand for the proposition that when the underlying felony is merely incidental to the murder, the murder cannot be said to constitute a 'murder in the commission of' the felony and will not support a finding of felony-murder special circumstance." (*People v. Ainsworth, supra*, 45 Cal.3d at p. 1026.)

More recently in *People v. Michaels, supra*, 28 Cal.4th 486, the defendant murdered his girlfriend's mother. He presented evidence that he did so to protect his girlfriend from abuse by the mother. The murder scene showed signs of robbery. Before the robbery, the defendant claimed he was going to get jewelry from an old lady. Later, the defendant claimed he had furs and jewelry. (*Id.* at pp. 517-518.) The prosecution's theory was "that he defendant entered the apartment and killed [the mother] with the intention of stealing her property, but was interrupted when the police arrived and escaped without taking anything." (*Id.* at p. 518.) The concurrent intent of robbery, burglary and murder supported the felony special circumstances. Further,

unlike in Hardy's trial, "[t]he question whether the burglary and robbery in this case were 'merely incidental' to the murder was submitted to the jury under proper instructions, so the issue is simply whether substantial evidence supports the jury's verdict." (*Id.* at pp. 518-519.)

C. Application of Authorities to the Instant Case.

Under the rule in *People v. Green*, the true findings to the robbery, kidnapping, kidnapping for rape, rape, or rape by a foreign object can be upheld only if Hardy had an independent felonious purpose for each, respective felony during the commission of the murder. If the robbery, kidnapping, kidnapping for rape, rape, or rape by a foreign object was incidental to the principal's purpose in killing Sigler, the true findings cannot be upheld.

One of the prosecution's theories was that the defendants' original, criminal intent was to commit a robbery. The prosecutor argued to the jury that Hardy and his companions were going to rob the victim, then discovered she had nothing except $6 worth of food stamps. (11RT 2356.) Later, outside the presence of the jury, the prosecutor stated she did not want to commit to any single target crime. (See 12RT 2453 [parties discussion following jury question on whether torture was a natural and probable consequence].) The evidence was that Hardy engaged with Sigler after she yelled a racial slur at

Hardy and his companions. The altercation escalated from shouting to battery, and ultimately to murder. The prosecution was unable to present evidence of the order of events, except that the kidnapping followed the initial engagement, and the torture and murder likely were last in the time line. The robbery special circumstance illustrates the absence of any chronology. There is no evidence whether the food stamps were taken from Sigler while she was still on the street, during the commission of other felonies, or as an afterthought following some/all of the other felonies. The fact the food stamp cover was found closer to the body than where Sigler first had contact with Hardy supports the reasonable inference that the theft may have occurred later. That is because three young males easily could have taken the food stamps from Sigler while she was still on Wardlow. (See also Arguments VII [insufficient evidence of robbery during murder], XIII [failure to instruct jury on the lesser included offense of theft], *post.*.) Thus, the logical conclusion is the robbery was incidental to the murder. Similarly, the prosecution argued Sigler was kidnapped to a secluded spot, behind the closed businesses, where she was out of view from the street, and no passerby could hear her scream. (11RT 2349-2350, 2415.) It cannot be known whether jurors believed Sigler was moved to the embankment to be murdered, or whether Sigler was moved to the embankment for some other purpose, to be robbed or raped, and then

killed. Under the evidence, it was equally likely that each one of the special circumstance felonies (robbery, kidnapping, kidnapping for rape, rape, or rape by a foreign object) had no independent felonious purpose that was wholly independent from the murder. Each was related to the murder in that it was merely incidental to the murder, and committed to facilitate or conceal the murder itself. *People v. Green* concluded the robbery of the murder victim was incidental to her murder. Therefore, the murder was not committed during the commission of the robbery because the defendant's only objective was to murder the victim. Similar reasoning applies to the instant case. There was no independent purpose for the special circumstance felonies that was unrelated to the principal's purpose of killing Sigler. Accordingly, the true findings to the felony special circumstances must be reversed.

D. The Federal and State Due Process Clause Required the Prosecution to Prove Beyond a Reasonable Doubt That Hardy Had an Independent Felonious Purpose When He Committed Each of the Special Circumstance Felonies Alleged under Section 190.2, Subdivision (A)(17) and (18).

Under *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, each *supra,* and *United States v. Booker* (2005) 543 U.S.220 [125 S.Ct. 738, 160 L.Ed.2d 621] the requirement of an independent felonious purpose constituted an element of an offense which the prosecution had to prove

beyond a reasonable doubt. (Contra, *People v. Kimble, supra*, 44 Cal.3d at p. 501.)

In *People v. Kimble, supra*, 44 Cal.3d 480, the jury found true special circumstance allegations of robbery, burglary, and rape. On appeal, Kimble argued the special circumstances had to be reversed for instructional error and insufficiency of the evidence. Kimble argued the instructions should have been tailored to incorporate the holding of *People v. Green.* This Court rejected the defendant's argument, that the *Green* rule had become an element of special circumstance findings requiring instructions in all cases regardless of the evidence. (*People v. Kimble, supra*, 44 Cal.3d at p. 501; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767 [citing *People v. Kimble* for the proposition *People v. Green* did not add an element to felony-murder or special circumstance allegations, but clarified the scope of those doctrines]; *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204.)

The Ninth Circuit has not agreed with this Court's characterization of the "independent felonious purpose" requirement, and suggested that an "independent felonious purpose" is an element of a special circumstances finding. (*Williams v. Calderon, supra,* 52 F.3d at p. 1476 [stating that the requirement of an independent felonious purpose for a special circumstance finding provides the narrowing function required to make California's death

penalty statute constitutional].) The United Supreme Court decisions affirm the characterization in *Williams v. Calderon* of "independent felonious purpose" as an element of a crime which must be proved beyond a reasonable doubt was correct. Under *Apprendi v. New Jersey* and *Blakely v. Washington*, the trier of fact had to find beyond a reasonable doubt the facts which make the defendant eligible for the maximum sentence that may be imposed for the crime of which he was convicted. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490; *Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.)

Ring v. Arizona demonstrates the "independent felonious purpose" requirement constitutes an element of an offense with regard to the special circumstance allegation. *Ring* held special circumstance allegations that make a defendant eligible for the death penalty must be found by the jury, not a judge, beyond a reasonable doubt rather than the trial judge. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ibid.*) The special circumstance felony operated as the functional equivalent of a greater offense. The *Ring* Court concluded that an "independent felonious purpose" must be found in order for the aggravating circumstances to be found true. *Ring v.*

Arizona thus required the jury find beyond a reasonable doubt that Hardy had an "independent felonious purpose" for the special circumstance felonies in order to find true them true.

E. The Judgment of Death must Be Reversed.

Brown v. Sanders (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], eliminated the Court's earlier distinction between weighing and non-weighing states, and addressed appellate review of death sentences when an invalid sentencing factor was considered. While *Brown* simplified the analysis in one respect - - by eliminating the need for different analysis in weighing and non-weighing jurisdictions - - "*Brown* failed to clarify the role of appellate review under the new system." (Lamprey, Comment: Brown v. Sanders: *Invalid Factors and Appellate Review in Capital Sentencing* (2006) 84 Denv.U.L.Rev. 743.) *Brown v. Sanders* underscored the importance of harmless error review in weighing jurisdictions (*Brown v. Sanders, supra,* 546 U.S. at pp. 218-219), concluded California was a non-weighing state under the former classification (*id.* at p. 231), and also concluded that all jurisdictions require a weighing of aggravating and mitigating factors (*id.* at p. 216 ["in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence"]). This was Justice Breyer's point in his dissent: that the distinction between weighing and non-

weighing states did not determine the nature of appellate review. Rather, in each type of jurisdiction, the analysis was determined by whether the error was harmless. (*Id.* at p. 231(dis. op. of Breyer, J.).) Under *Brown v. Sanders*, the reversal of any of the aggravating circumstances found true by the jury should result in reversal of the judgment of death because the invalidated circumstance was weighed by jurors as an aggravating circumstances. Harmless error analysis is a component of appellate review in capital cases, and the jurors' consideration of this factor as an aggravating circumstance was not harmless. (*Zant v. Stephens* (1983) 462 U.S. 862, 890 [103 S.CT. 2733; 77 L.ED. 2d 235].)

In *Brown v. Sanders*, the defendant was convicted of attempted robbery, robbery, burglary, attempted murder and murder. Sanders and his companion invaded a home where they bound and blindfolded the male occupant and his girlfriend. Both individuals were struck in the head with a blunt object. The girlfriend died from the blow. The jury found four section 190.2 special circumstances true; robbery, burglary, the killing of a witness to a crime, and the commission of a murder in a heinous, atrocious, and cruel manner. This Court set aside two of the special circumstances: burglary and that the murder was especially heinous, atrocious, and cruel. Because the jury properly

considered the two remaining special circumstances, this Court affirmed the judgment of death.

The defendant argued in the United States Supreme Court that reversal of the two special circumstance findings also required reversal of the judgment of death. When deciding what sentence to impose, the jury was instructed to consider the existence of any special circumstances found to be true. The defendant argued that the jury's sentencing decision was erroneously skewed by the consideration of two aggravating factors that this Court later reversed. The United States Supreme Court considered whether "the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process." (*Brown v. Sanders, supra*, 546 U.S. at p. 214.) *Brown v. Sanders* explained the "weighing/non-weighing scheme" "now seems to us needlessly complex and incapable of providing for the full range of possible variations." (*Id.*, at p. 219.) *Brown v. Sanders* explained when a judgment of death that rests, in part, on invalidated factors, must be reversed:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Id.* at p. 220.)

Justice Breyer dissented, stating the sentencer's consideration of an invalid aggravator must be found by the reviewing court to be harmless beyond a reasonable doubt regardless of the form of the State's death penalty law. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 228 [dis. opn. of Breyer, J.].) The majority opinion in *Brown v. Sanders* addressed Justice Breyer's arguments. The Court first noted, "[I]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) The Court distinguished the situation in the case before it. "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Id.* at p. 221) The test for prejudice under that situation was as follows:

> [S]uch skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

(*Brown v. Sanders, supra*, 546 U.S. at p. 221.)

The Supreme Court applied the test, noting the special circumstances listed in section 190.2 are eligibility factors that satisfy *Furman v. Georgia* (1972) 408 U.S. 238 [192 S.Ct. 2736, 33 L.Ed.2d 346]. (*Brown v. Sanders,*

supra, 546 U.S. at pp. 221-222.)[24] Reversal of the judgment of death was not required for the following reason:

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

(*Brown v. Sanders, supra*, 546 U.S. at p. 224.) In response to the defendant's argument that the instruction to the jury to consider the special circumstances found true in determining the penalty placed prejudicial emphasis on the invalid eligibility factors, the Court concluded any such impact was inconsequential. (*Id.*, at pp. 224-225)

The jury in this case found true the special circumstances that the murder was committed during the commission of robbery, kidnapping, kidnapping for rape, rape, and rape by a foreign object. (12RT 2528-2529.) In determining the penalty, the jury was instructed to consider "[t]he circumstances of the crime of which the defendant was convicted in the

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[24] The Court concluded the instruction to the jury to consider the circumstances of the crime had, "the effect of rendering all the specified factors nonexclusive, thus causing California to be (in our prior terminology a non-weighing State." (*Brown v. Sanders*, supra, 546 U.S. at p. 222.) The Court analyzed prejudice, however, under the new standards it adopted in *Brown v. Sanders*.

present proceeding and the existence of any special circumstance[s] found to be true." (3CT 623.) Assuming this Court agrees the felony special circumstances must be reversed, the holding of *Brown v. Sanders* compels reversal of the judgment of death.

Brown v. Sanders concluded "[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) That is the situation in the instant case. The jury considered, in determining whether to impose the death penalty, the facts of the felony special circumstances. The jury's consideration of those felony special circumstances was especially prejudicial.

Due process requires reversal of a judgment of death when an invalid sentencing factor allowed the sentencer to consider evidence that would otherwise not have been considered. (*Brown v. Sanders, supra*, 546 U.S. at p. 218.) The Court discussed the situations when an invalid aggravating factor requires reversal of a judgment of death in a non-weighing state. Those situations are when the jury is allowed to draw adverse inferences from constitutionally protected conduct, and attached the label "aggravating" to

constitutionally impermissible or irrelevant factors or factors which should militate in favor of a lesser penalty. (*Ibid.*)

In the instant case, the label "aggravating" was attached to the constitutionally irrelevant factor of the special circumstance felonies. Those factors should not have been considered if the findings on the special circumstance felonies are reversed by this Court. *Brown v. Sanders* concluded it was inconsequential that the jury had considered as aggravating the special circumstances which were found to be invalid. The key difference between *Brown v. Sanders,* and the instant case, is the basis of the reversal of the special circumstances. In *Brown v. Sanders*, the first special circumstance reversed on appeal was burglary. It was reversed because of the merger doctrine and not because of an improper legal theory (failure to require a finding of an independent felonious purpose). The second special circumstance reversed on appeal was the commission of a murder in a heinous, atrocious, or cruel manner. It was reversed because of vagueness. Here, the special circumstance felonies represented an improper theory and should not have impacted whether the jury chose to sentence Hardy to death. In *Brown v. Sanders*, "all of the facts and circumstances admissible to establish the `heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the

crime' sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors." (*Brown v. Sanders, supra*, 546 U.S. at p. 224.)

In contrast to *Brown v. Sanders*, the reversal of special circumstances means the facts and circumstances incident to the allegation should not have been considered as a "circumstance of the crime," because it had not been properly found by the jury. The jury's findings of the felony special circumstances cannot be characterized as "inconsequential," (*Brown v. Sanders, supra*, 546 U.S. at pp. 224-225), when the jury was specifically told to consider those factual findings in determining the appropriate penalty.

The decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] also compel reversal of the judgment of death because of the reversal of the true findings to the special circumstances. This Court has consistently rejected the argument that California's capital sentencing scheme violates the holding of these cases. (See e.g., *People v. Ward* (2005) 36 Cal..4th 186, 219-220; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

Apprendi held, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise prescribed were by definition elements of a separate offense." (*Apprendi, supra*, 530 U.S. at p. 483, fn. 10.) In *Ring*, the jury found the defendant guilty of first-degree murder. The trial court, sitting without a jury, determined the presence or absence of aggravating factors and imposed the death penalty. *Walton v. Arizona* (1990) 497 U.S. 639, 649 [110 S.Ct. 3047, 111 L.Ed.2d 511], upheld the constitutionality of the Arizona sentencing scheme on the basis that the aggravating factors found by the trial court were sentencing factors and not elements of the crime. *Ring* overruled *Walton v. Arizona* and concluded "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' (*Apprendi*, 530 U.S. , at 494, n. 19, [120 S.Ct. 2348]), the Sixth Amendment requires that they be found by a jury." (*Ring supra*, 536 U.S. at p. 609; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 [122 S.Ct. 2428, 154 L.Ed.2d 588].)

In *Blakely*, the defendant pled guilty to kidnapping. The maximum sentence was 53 months in state prison. The trial court, after an evidentiary hearing, imposed a sentence of 90 months because the crime was committed with deliberate cruelty. *Blakely* concluded the Washington State enhancement

statute was unconstitutional because "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' *Bishop, supra*, §§ 87, at 55, and the judge exceeds his proper authority." (*Blakely, supra*, 452 U.S. at pp. 303-304.) Under Washington law, the facts justifying an exceptional sentence must be facts other than those used in computing the standard range for the sentence. Because "[t]he judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea," (*Blakely, supra*, 124 S.Ct. at p. 2537), the sentence enhancement for commission of the crime with deliberate cruelty was unconstitutional.

Under *Apprendi*, *Blakely*, and *Ring*, the aggravating factors found true by the jury in this case were elements of capital murder. Those cases hold there is no distinction between sentencing factors and elements of a crime when fact finding is necessary to trigger the defendant's eligibility for increased punishment. Here, the special circumstances found true by the jury were elements of the crime of capital murder because those findings made Hardy eligible for the death penalty. The jury, when it decided which sentence

to impose, considered those special circumstances. Because the aggravating factors constituted elements of the crime of capital murder, reversal of any one of the two special circumstances must result in reversal of the judgment of death. "[A] jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely, supra*, 542 U.S. at p. 328 [dis. opn. of Breyer, J.].)

Reversal of any one of the special circumstances means the jury did not reach unanimous agreement, within the meaning of the Sixth and Fourteenth Amendments, about how the principal, or Hardy as an aider and abetter, committed the crime, or how he should be punished. The jury elected to impose the death penalty based on the false belief that Hardy had committed all of the special circumstances found true. The jury's erroneous belief about how the murder was committed was not simply a matter of the jury erroneously considering sentencing factors. Rather, it was a constitutional defect in proof of the crime of capital murder. What distinguishes this case from *Brown v. Sanders* is the reversal of findings of fact concerning the special circumstance allegations. In *Brown v. Sanders*, the special circumstance allegations that were reversed were not findings of fact.

Reversal of the judgment of death is required, furthermore, even if the harmless beyond a reasonable doubt test of *Chapman v. California, supra,* 386 U.S. at page 24, is applied to the reversal of the special circumstance findings. The jury's belief that Hardy committed all of the special circumstance felonies was especially prejudicial. The offenses clearly were so closely interconnected to these special circumstances that the jury's consideration of an appropriate sentence necessarily would have included the special circumstances.

For the reasons above, the true findings on the special circumstances, and the judgment of death must be reversed.

VII

THE JUDGMENT OF GUILT TO COUNT 2, ROBBERY, SHOULD BE REVERSED, AND THE SPECIAL CIRCUMSTANCE FINDING OF A ROBBERY DURING THE COMMISSION OF A MURDER AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT HARDY TOOK THE VICTIM'S PROPERTY IN A ROBBERY, OR TOOK THE PROPERTY WHILE THE VICTIM WAS ALIVE.

A. Summary of Argument.

The jury found Hardy guilty in count 2 of robbery based on evidence that Sigler's food stamps were used at a market frequented by Hardy, Armstrong, and possibly Pearson. (10RT 2045-2049.) A food stamp booklet cover was next to the rear the building behind which Sigler's body was found. (10RT 2054.) The prosecution theory was Sigler was robbed of food stamps or clothing. (See e.g., 11RT 2353 [prosecutor's closing argument].) Sigler's clothes were taken at the end of the incident when Pearson told Hardy to collect the clothes. (10RT 2105.) There was no evidence when the food stamps were taken; only that they were used at a market sometime at the end of December 1998. (10RT 2038.)

There was: (1) no substantial evidence Hardy, or anyone else, formed an intent to take Sigler's food stamps or clothing before the use of force or fear; (2) no substantial evidence the amount of force or fear used to take

property was greater than that required merely to take the property; and (3) no substantial evidence the taking of the food stamps or clothing occurred while Sigler was still conscious or alive. Accordingly, the conviction on count 2, and the true finding of the robbery special circumstance violate due process and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

B. Standard of Review.

The due process clauses of the Fifth and Fourteenth Amendments safeguard Hardy from criminal liability "except upon evidence that is sufficient fairly to support a conclusion that every element . . . has been established beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314; see also *In re Winship* (1970) 397 U.S. 358, 364 [90 S.CT. 1068, 25 L.ED. 2d 368].) This Court explained the inquiry is twofold: (1) resolve the issue in the light of the whole record, not merely "isolated bits of evidence selected by the respondent;" and (2) judge whether the evidence of each of the essential elements is *substantial*. (*People v. Johnson* (1980) 26 Cal.3d 557, 576; in accord *People v. Green* (1980) 27 Cal.3d 1, 55.) "[I]t is not enough for the respondent simply to point to 'some' evidence supporting the finding . . . ." (*People v. Johnson, supra,* 26 Cal.3d at p. 576.) The question is whether the whole record, viewed in the light most favorable to the

judgment below, discloses substantial evidence that is reasonable, credible, and of solid value. (*Id.* at p. 578.)

"Substantial evidence" to affirm a conviction is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility, and inspires confidence that the ultimate fact it addresses has been justly determined. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; in accord *People v. Conner* (1983) 34 Cal.3d 141, 149.) Reasonableness is ultimately the standard underlying the substantial evidence rule. (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must determine whether any reasonable trier of fact could have found, upon the evidence presented, each essential element of the crime "beyond a reasonable doubt." The substantial evidence rule necessarily mandates consideration of the weight of the evidence considered by the trier of fact in determining whether it is sufficient. (*People v. Bassett* (1968) 69 Cal.2d 122, 139.) As the United States Supreme Court explained, "the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." (*Jackson v. Virginia, supra,* 443 U.S. at p. 318.)

C. There Was No Substantial Evidence of Robbery.

1. Robbery, Generally.

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." A defendant must form the intent to take the victim's property prior to killing the victim in order for the crime of robbery to have occurred. (*People v. Frye* (1998) 18 Cal.4th 894, 956; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) If the defendant's intent to steal property arose only after force was used, the offense was theft and not robbery. (*People v. Kelly, supra*, 1 Cal.4th at p. 529.)

As applied to the instant facts, three principal aspects of robbery are key. First, the defendant's use of force or fear must actually cause the victim to be afraid, and the victim's fear must be objectively reasonable. (*People v. Wright* (1996) 52 Cal.App.4th 203; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1704; see also *People v. Cash* (2002) 28 Cal.4th 703.) Second, a defendant must form the intent to take the victim's property prior to the use of force or fear. (*People v. Frye* (1998) 18 Cal.4th 894, 956; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) If the defendant's intent to steal property arose only after force or fear was used, the offense was theft and not robbery. (*People v. Kelly, supra*, 1 Cal.4th at p. 529.) That is because the gravamen of

robbery is the use of force or fear to effect the taking. (See e.g., *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 351; *People v. Ramos* (1982) 30 Cal.3d 553, 589.) And there must be a concurrence of the acts, that is, the use of force or fear, and the intent to take. (*People v. Green* (1980) 27 Cal.3d 1, 53; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Third, to constitute robbery, the amount of force or fear must exceed what is required only to take the property. (*People v. Wright, supra,* 52 Cal.App.4th at p. 210.)

2. There Was No Substantial Evidence of Any Intent to Take Property Before the Use of Force or Fear.

The property taken was clothing Sigler wore and food stamps she possessed. The clothing was taken at the end of the incident. There was no evidence when the food stamps were taken. As to the clothing, there was no evidence the original intent was to take Sigler's clothing. That would make no sense. Three young men would not have wanted to take a middle aged woman's clothing. Rather, the clothing was removed from Sigler's person, not to take it from her, but to take it off her, to accomplish the other charged offenses, e.g., rape. The taking of the clothing occurred at the end of the incident, more as an afterthought. The prosecutor argued Hardy took the clothes to destroy evidence because the clothes contained blood and possibly semen. (11RT 2352.) While the prosecutor speculated the intent when approaching Sigler was robbery, there was no evidence of this at all. Indeed,

the only evidence concerning the initial confrontation with Sigler was that it had nothing to do at all with robbery. Hardy, Pearson and Armstrong were walking on the street, and Sigler was across the street. She yelled a racial slur at them. (10RT 2101-2102, 2137.) The three crossed the street to argue with Sigler over the racial slur, and the situation escalated. (10RT 2103-2104.) There was no evidence of any demand for Sigler's personal property.

Other evidence also was inconsistent with any intent to rob before the use of force or fear. Had there been an intent to take the clothes or food stamps, that would have been accomplished easily enough at the time of the initial confrontation, not later behind the building. Hardy and his companions outnumbered Sigler three to one. They were on a deserted, poorly lit street late at night. The three males easily could have robbed Sigler of whatever property they wished while on Wardlow Road. There apparently were no witnesses in the area, and a robbery could have been accomplished efficiently *if that had been the intent.* Instead, no property was taken until the end of the encounter, and only during, or after, the other offenses had been committed. The location of the food stamp booklet cover is consistent with this: it was not found on Wardlow Road.

3. There Was No Substantial Evidence That the Amount of Force or Fear Exceeded What Was Necessary to Take the Food Stamps and Clothes.

The evidence demonstrates Sigler was beaten severely, and near death or dead, by the time any property was taken. Even assuming arguendo Sigler was alive, she was clearly near death and likely unconscious based on the severity of her injuries. (See e.g. 10RT 1974 [neck and head injuries from wooden stick, Exhibit 3, could have rendered her unconscious].) At this point, Pearson told Hardy to gather the clothes, and Hardy complied. (10RT 2105.) While there was no evidence when, or how, the food stamps were taken, it is reasonable to infer they were taken from the clothing, or picked up off the ground where they had fallen during the offenses. No piece of evidence makes any other scenario more. More importantly, there is no substantial evidence the property was taken earlier. The reasonable inference from the evidence supports the scenario that property was taken only after the other offenses, and independent of them, because of the complete absence of any evidence of pre-force intent to take. This type of taking is not robbery because no more force was used greater than that needed to effect the taking itself. (*People v. Turner* (1990) 50 Cal.3d 668, 725; *People v. Morales* (1975) 49 Cal.App.3d 139, 139.) This taking would be akin to a purse-snatching.

Courts have long held the act of snatching an item from a person does not establish the force necessary to constitute a robbery. In an attempt to define force, appellate courts have found that "'force' is a relative concept" which "is not synonymous with a physical corporeal assault." (*People v. Mungia, supra*, 234 Cal.App.3d at pp. 1708-1709; *People v. Wright, supra*, 52 Cal.App.4th at p. 209.) Force requires something more than just "the quantum of force which is necessary to accomplish the mere seizing of the property." (*People v. Morales, supra*, 49 Cal.App.3d at p. 139 [purse snatch defendant entitled to a lesser instruction on larceny from the person].) Several appellate decisions have defined the force required for robbery. *People v. Dreas, supra*, 153 Cal.App.3d 623, defined force as "the power or energy by which resistance is overcome." (*Ibid.*, quoting *State v. Snyder* (1918) 41 Nev. 453.) *People v. Lescallet* (1981) 123 Cal.App.3d 487, 491, held the force necessary for robbery was "such force as is actually sufficient to overcome the victim's resistance." (*Ibid.*, quoting *People v. Clayton* (1928) 89 Cal.App. 405, 411.)

Several cases draw a distinction between the force necessary merely to take, say, a victim's purse – which is insufficient for robbery – and a separate act or greater degree of force, which is sufficient. The separate act could be, for example, a shove, (*People v. Mungia, supra*, 234 Cal.App.3d 1703), which may cause the victim to fall. Or the greater degree of force may break the

strap of the purse (*People v. Roberts* (1976) 57 Cal.App.3d 782, 787), or bloody and injure the victim (*People v. Jones* (1992) 2 Cal.App.4th 867). Here, however, there was no evidence Sigler was shoved, injured in any way so that her clothes or food stamps could be taken.

4. There Was No Substantial Evidence That the Property Was Taken While Sigler Was Still Conscious or Alive.

The prosecution had the burden of proving beyond a reasonable doubt that the intent to take Sigler's property occurred before Sigler lost awareness or had died. A defendant must have formed the intent to take the victim's property prior to the victim's death to be guilty of robbery. (*People v. Frye, supra*, 18 Cal.4th at p. 956.) It follows this same rule should also apply to the situation where the victim is unconscious. That is because the essence of robbery is the taking of property from the victim by force or fear. (§ 211.) If a person is unconscious, that person experiences neither force nor fear. Here, there is no substantial evidence Sigler experienced force or fear related to the taking of her clothes or food stamps.

This case differs from cases where the defendant either killed, or rendered the victim unconscious, for the purpose of robbery. (Compare, (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1367-1368; *People v. Dreas* (1984) 153 Cal.App.3d 623, 628-629.) The defendants in *Kelley* and *Dreas*

formed the intent to commit a robbery prior to the victim becoming unconscious. In contrast, a defendant has not committed robbery when the defendant finds a victim unconscious and takes property. (*People v. Russell* (1953) 118 Cal.App.2d 136, 138-139.)

The deputy medical examiner testified microscopic examination "suggested" many of Sigler's injuries occurred around the time of death, or just before death. (10RT 1932.) The cause of death was multiple injuries to the head and neck. (10RT 1963.) The doctor testified it was difficult to say how long Sigler lived after the injuries, but death was "rapid." Sigler died within minutes of sustaining the injuries. (10RT 1964.) The doctor "expect[ed]" the genital injuries occurred first (10RT 1976, 1977), and all injuries occurred within a very narrow time frame. (10RT 1976.) Further, the medical examiner could determine if injuries were pre-death, but not whether Sigler lost consciousness. (10RT 1973.) Sigler's neck and head injuries could have rendered her unconscious. (10RT 1974.)

Sigler's clothing was taken as Hardy, Pearson, and Armstrong were leaving the scene, and after Pearson instructed Hardy to gather her clothes. (10RT 2105.) There was no evidence when the food stamps were taken relative to other events. Hardy did not mention the food stamps during his statements, which supports the inference the taking of the food stamps was not

a planned, intended event. The food stamp booklet cover was found next to the rear of the building a week later. (10RT 20151, 2053-2054.) This was far from the place of the first encounter with Sigler, which was back on Wardlow Road. If the taking of the food stamps had occurred on Wardlow Road, it is likely the booklet cover would have been found on the street. Instead, its location behind the building demonstrates the taking of the food stamps, like the taking of the clothing, occurred at the end of the incident when Sigler was either unconscious or dead.

Based on the foregoing, the evidence was insufficient to prove Hardy guilty of count 2, and insufficient to prove the robbery special circumstance. Accordingly, the conviction on count 2 and the special circumstance true finding should be reversed. Additionally, the judgment of death should be reversed due to the reversal of the special circumstance, as explained in Argument VI, *ante*, and incorporated by this reference.

GUILT PHASE INSTRUCTION ISSUES

VIII

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF FELONY MURDER, WHICH IMPERMISSIBLY PERMITTED A GUILTY VERDICT BASED ON IMPROPER LEGAL THEORIES, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The prosecution proceeded on four different possible theories of murder: deliberate and premeditated, felony murder, torture murder, or aiding and abetting. (See e.g., 11RT 2355-2358, 2365 [prosecutor's closing argument].) The court instructed on all four theories. (2CT 543-544 [CALJIC No. 3.02 (aiding/abetting)], 548-549 [CALJIC No. 8.20 (deliberate /premeditated)], 550 [CALJIC No. 821 (felony murder)]; 551 [CALJIC No. 8.24 (torture murder)].) At the prosecutor's request, jurors also were instructed they need not agree on a theory of guilt. (2CT 547.) The verdicts do not reflect what theory, or theories, the jurors found true beyond a

reasonable doubt. Thus, any instructional error that involved an improper legal theory for guilt on murder requires reversal. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128 [holding rule in *People v. Green* (1980) 27 Cal.3d 1, 69-71, continues to apply in cases in which the verdict could have been based on a legally inadequate theory]; in accord (*Mills v. Maryland* (1988) 486 U.S. 367, 376 [108 S.Ct. 1860, 100 L.Ed.2d 384]; accord, *Zant v. Stephens* (1983) 462 U.S. 862, 881 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Yates v. United States* (1957) 354 U.S. 298, 312 [77 S.Ct. 1064, 1 L.Ed.2d 1356]; *Stromberg v. California* (1931) 283 U.S. 359, 369-370 [51 S.Ct. 532, 75 L.Ed. 1117]; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062 ["The fundamental rule that applies when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground is clear: the verdict may not stand when there is no way to determine its basis."].) The error is particularly damaging where, as in Hardy's case, the jurors were not required to agree on the theory of conviction because "the possibility that even one juror might have relied upon the legally erroneous theory requires invalidation of the conviction." (*Keating v. Hood*, *supra*, 191 F.3d at p. 1063.)

Here, the instructional error occurred based on modifications to pattern instruction CALJIC No. 8.21, which explained felony murder. The modifications involved the seven felonies, charged in Counts 2 through 8,

which were listed felonies in section 189. (2CT 550.) The pattern instruction appears to have contemplated use in the situation of a single section 189 felony. Its use was error when multiple section 189 felonies were alleged because it permitted jurors to find Hardy guilty of murder, if jurors found the killing occurred during one listed felony, and Hardy had the specific intent to commit *another*, unrelated listed felony. For example, under the instruction, jurors could have found Hardy guilty of felony murder if they found the victim died during the commission of rape, and Hardy had the specific intent only to commit robbery. Accordingly, the verdict of guilt on count 1 and the judgment of death must be reversed.

B. Standard of Review.

Errors in jury instructions are questions of law which are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206; *People v. Guiuan* (1998) 18 Cal.4th 588, 569.) Appellate review of an instructional issue does not entail any deference to the trial court. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.) "The independent or de novo standard of review is applicable in assessing whether [jury] instructions correctly state the law, and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration." (*People v. Posey* (2004) 32 Cal.4th 193, 218 [citations omitted].)

C. The Modified Version of Caljic No. 8.21 Impermissibly Permitted Jurors to Find Hardy Guilty of Murder Based on Several Improper Legal Theories.

The trial court instructed jurors on felony murder as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission of any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object (a wooden stake), or torture, is murder of the first degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object (a wooden stake), or torture and the commission of any such crime must be proved beyond a reasonable doubt.

(2CT 550.)

Nowhere did the instruction tell jurors that in order to find Hardy guilty under a theory of felony murder the jury had to find: (1) the killing occurred during the commission of one of the specified felonies; (2) and Hardy had the specific intent to commit *that specified* felony which resulted in the victim's death. The special instruction requested by the prosecutor, telling jurors they "need not unanimously agree on the theory of first degree murder" (2CT 547), combined with the prosecutor's argument only exacerbated the error. The prosecutor stressed in her argument that jurors did not have to agree, and how

they arrived at their verdict was not important. She argued any felony from the list sufficed. (11RT 2359.)

The instruction, and the prosecutor's argument, improperly conflated all section 189 felonies, and permitted jurors to mix and match indiscriminately among all seven felonies. Moreover, because of the nature of the evidence, which showed that all charged offenses occurred during a single incident, and over a relatively short period of time, the instruction was even more confusing. This was not a situation where the charged felonies each occurred at a distinctly different time, and the evidence pointed definitively to death occurring at a certain time.

The jurors were told to consider seven felonies for the felony murder, and to consider two aspects of every felony: whether death occurred during the commission of one of the seven felonies, and whether Hardy had the specific intent to commit any one of the seven felonies. That left the jurors with 49 possibilities. In the following chart, the x-axis (vertical) represents a felony, during which a juror found death occurred. The y-axis (horizontal) represents a felony for which a juror found Hardy had specific intent. Then the chart on the following page reveals the various combinations of those two findings. However, because jurors were never instructed that to find felony murder, they had to find that death occurred during *the* felony Hardy specifically intended

to commit, the instruction permitted a guilty verdict for murder under 42 improper legal theories, and only seven legally proper theories.

Specific intent→ / **Death occurred during↓**	Robbery Count 2	Kidnap for rape Count 3	Rape in concert Count 4	Rape Count 5	Penetrate w/object in concert Count 6	Penetrate w/object Count 7	Torture Count 8
Robbery Count 2	Proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper
Kidnap for rape Count 3	**Im**proper	Proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper
Rape in concert Count 4	**Im**proper	**Im**proper	Proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper
Rape Count 5	**Im**proper	**Im**proper	**Im**proper	Proper	**Im**proper	**Im**proper	**Im**proper
Penetrate w/object in concert Count 6	**Im**proper	**Im**proper	**Im**proper	**Im**proper	Proper	**Im**proper	**Im**proper
Penetrate w/object Count 7	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	Proper	**Im**proper
Torture Count 8	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	**Im**proper	Proper

A conviction under the theory of felony murder requires proof the defendant acted with the specific intent to commit *the* underlying felony,

during which the death occurred. (*People v. Hart* (1999) 20 Cal.4th 546, 608.) The felony murder theory does not apply unless the intended felony and death are part of "a continuous transaction." (*People v. Cavitt* (2004) 33 Cal.4th 187, 193 [requiring causal connection between killing and felony, and proof that felony and killing were one continuous transaction]; *People v. Thompson* (1990) 50 Cal.3d 134, 171.) That is why there is a specific intent requirement for felony murder even when the underlying section 189 felony is a general intent crime. "[T]he intent required for the conviction of murder is imported from the specific intent to commit the concomitant felony." (*People v. Sears* (1965) 62 Cal.2d 737, 745. In felony murder, the law imputes malice to the defendant when death occurs during the perpetration or attempt to commit the target felony. (Cf., *People v. Friend* (2009) 47 Cal.4th 1, 75.) It is the connection between the intent to commit the target felony, and the target felony's nexus to the homicide, that is the rationale for the felony murder doctrine. "[T]he intent required for a conviction of murder is imported from the specific intent to commit the concomitant felony." (*People v. Sears, supra,* 62 Cal.2d at p. 745.)

The verdicts show the jury was convinced Hardy specifically intended to rob Sigler and to kidnap her for the purpose of rape, as charged in counts 2 and 3. The verdicts also show the jury did not find Hardy was the killer.

Jurors selected choice "B" on the verdict form, and did not find Hardy was the actual killer, which was choice "A" on the form. (3CT 597.) Jurors found not true all allegations of personal arming or personal use of a weapon relating to counts 2 through 5, and failed to reach findings on weapon allegations relating to counts 1, and 6 through 8. Thus, the jury could have been convinced Sigler died during the penetration with a foreign object. The chart, *ante*, demonstrates this would be an improper theory for felony murder as to Hardy, however, because the jury did not find the death occurred during, or was the result of, the felony Hardy specifically intended to commit, i.e., robbery in this example. *People v. Cavitt* (2004) 33 Cal.4th 187, explained that a non-killer's liability for murder depends on the relationship between the target felony and the act resulting in death. For felony murder liability to attach to the non-killer "there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death." (*Id.* at p. 201.)

D. The Trial Court's Deficient Instructions Violated Hardy's Federal and State Constitutional Rights.

The federal due process clause requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571].) The trial court's failure to instruct on all elements of an offense under the theories

of criminal liability prosecuted violates a defendant's right to due process of law under the Fourteenth Amendment and Article I, section 15, of the California Constitution. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1313.) Hence, the trial court's failure to instruct that felony murder requires specific intent for the section 189 felony, during which death occurred, violated Hardy's right to due process of law. The trial court's failure to instruct properly on the elements required for felony murder prevented the jury from determining whether all the elements had been proved beyond a reasonable doubt in violation of the defendant's right to a jury determination of the facts under the Sixth Amendment and Article I, section 16 of the California Constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *People v. Breverman* (1998) 19 Cal.4th 142, 155.) Without proper instruction on the prerequisites for felony murder, the jury had no way properly to make the factual determinations that were elements of felony murder.

The Eighth Amendment, and Article I, section 17, of the California Constitution require heightened reliability during the guilt and penalty phase of a capital prosecution. (*Beck v. Alabama* (1980) 447 U.S. 625, 637 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *People v. Ayala* (2000) 23 Cal.4th 225, 263.) Hardy was eligible for the death penalty only if he was guilty of first degree

murder. The first degree murder conviction rested in part on the felony murder theory. The jury was unable to make the factual determinations necessary to determine if Hardy committed felony murder because of the instructional deficiencies identified above. This failure undermined the reliability of the jury's determination that he was eligible for the death penalty and therefore violated Hardy's right to not be subject to cruel and unusual within the meaning of the Eighth Amendment and Article I, section 17 of the California Constitution.

E. The Erroneous Instruction Was Prejudicial and Requires Reversal of Count 1 and the Judgment of Death.

The erroneous instruction for felony murder, which omitted the requirement for specific intent for the felony during which death occurred, violated Hardy's federal constitutional rights. Accordingly, the judgment of guilt on count 1 must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The error was not harmless beyond a reasonable doubt because: (1) the evidence that Hardy harbored specific intent to commit any crime at all was weak circumstantial evidence; (2) there was nothing in the evidence making it more likely that Hardy had specific intent for the felony during which death occurred; and (3) evidence tended to show death likely occurred as a result of counts 6, 7, or 8 (penetration with a foreign object,

penetration with a foreign object in concert, or torture), which were the last offenses to be committed. Thus, the instruction impermissibly permitted conviction on murder without either the requisite causal or temporal connection.

The prosecution case regarding the details of the assault consisted primarily of Hardy's own statements during interrogation. Except for Hardy's statements, no other evidence showed the order in which the offenses were committed with the exception that the cause of death was the result of head injuries. (10RT 1976.) Thus, for example jurors could have convicted under a felony murder theory by concluding that, after Sigler suffered head injuries, Hardy formed the specific intent to rob her. Or jurors could have concluded that, after hearing the racial slur, Hardy intended to rob and batter Sigler. Thereafter, Pearson orchestrated the other offenses, including the specific intent crimes, in which Hardy had no or minimal participation, after which Sigler died. Under these scenarios, all equally supported by the evidence, jurors could have convicted on count 1 without the requisite causal connection between the death and the section 189 felony, and without finding the felony and killing were a continuous transaction as required by this Court. (*People v. Cavitt, supra,* 33 Cal.4th at p. 193.)

When the prosecution presents its case to the jury on alternate legal theories, some of which are legally correct and other legally incorrect, and a reviewing court cannot determine from the record which theory the jury adopted, then the conviction cannot stand. (*People v. Green* (1980) 27 Cal.3d 1, 69.) This jury returned a verdict of guilty to first degree murder without specifically identifying what theory the verdict rested. (3CT 597-598.) The jury found Hardy was not the actual killer, but rather was an aider and abetter who either intended to kill or was a major participant who acted with reckless indifference to human life. (3CT 597.) Thus, the jury was not convinced Hardy was the killer, but instead found him guilty as a participant. (3CT 597.) The verdict does not reveal whether jurors relied on felony murder. Even assuming there was sufficient evidence to find Hardy guilty of premeditated first degree murder, it is not possible to conclude the jury found him guilty based on that theory.

People v. Guiton (1993) 4 Cal.4th 1116, explained the distinction between a theory of conviction that is legally inadequate and one that is factually inadequate (i.e., one that involves insufficiency of proof). (*Id.* at p. 1128.) This Court held reversal is not required in cases of factual inadequacy so long as one theory of guilt is factually supported. (*Ibid.*) However, the rule in *Green* continues to apply in cases where the verdict could have been based

on a legally inadequate theory. (*Ibid.*) Accordingly, in cases where the verdict may have been based on a legally improper theory, reversal is required unless there is "a basis in the record to find that the verdict was actually based on a valid theory." (*Id.* at p. 1129 [fn. omitted].)

As discussed *ante*, the record shows the instructions allowed the jury to convict Hardy of murder based on 49 theories of felony murder, 42 of which were legally incorrect. Because the error in Hardy's case involves the possible, or even likely, application of a legally erroneous theory, the issue revolves around "instructional error on a 'legally incorrect' theory of the case which, if relied upon by the jury, could not *as a matter of law* validly support a conviction of the charged offense." (*People v. Harris* (1994) 9 Cal.4th 407, 419 [italics in original, fn. omitted].) The error requires reversal because there is no basis in the record for concluding that the verdict finding Hardy guilty of first degree murder was actually based on any of the seven legally valid legal theories.

Under California case law, when it cannot be determined from the record whether the jury based its murder verdict on a legally correct theory or a legally flawed theory, the appellate court cannot say the error is harmless and the error must be deemed prejudicial. Reversal is avoided only if the People affirmatively show that no juror relied on the erroneous instruction as the sole

basis for finding the defendant guilty. (*People v. Smith* (1984) 35 Cal.3d 798, 808; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 980-982; *People v. Jones* (2000) 82 Cal.App.4th 663, 671; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1239.) Respondent cannot make such a showing on this record. As this Court explained: "An instructional error presenting the jury with a legally invalid theory of guilt does not require reversal, however, if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory." (*People v. Pulido* (1997) 15 Cal.4th 713, 727.)

The United States Supreme Court and the Ninth Circuit apply the same rule when determining whether an instructional error allowing the jury to convict on an unlawful theory of guilt requires reversal. The rule, as stated by the Supreme Court, is: "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury when reaching the verdict. [Citations omitted.]" (*Mills v. Maryland* (1988) 486 U.S. 367, 376 [108 S.Ct. 1860, 100 L.Ed.2d 384]; accord, *Zant v. Stephens* (1983) 462 U.S. 862, 881 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Yates v. United States* (1957) 354 U.S. 298, 312 [77 S.Ct. 1064, 1 L.Ed.2d 1356]; *Stromberg v. California* (1931) 283 U.S. 359, 369-370 [51 S.Ct. 532, 75 L.Ed. 1117];

Keating v. Hood (9th Cir. 1999) 191 F.3d 1053, 1062 ["The fundamental rule that applies when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground is clear: the verdict may not stand when there is no way to determine its basis."].) The error is particularly damaging where, as in Hardy's case, the jurors were not required to agree on the theory of conviction because "the possibility that even one juror might have relied upon the legally erroneous theory requires invalidation of the conviction." (*Keating v. Hood*, *supra*, 191 F.3d at p. 1063.)

In Hardy's case the record does not reveal the theory on which the jury found Hardy guilty of murder, and the instruction made it highly likely that the guilty verdict was based on an improper theory. Accordingly, Hardy's conviction for murder and the judgment of death must be reversed.

IX

THE JUDGMENT OF DEATH, AND THE JUDGMENTS OF GUILT ON COUNTS 1 THROUGH 7, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF AIDING AND ABETTING LIABILITY, WHICH IMPERMISSIBLY PERMITTED GUILTY VERDICTS BASED ON IMPROPER LEGAL THEORIES, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The aiding and abetting instruction impermissibly mixed and matched among the seven offenses in counts 1 through 7, and permitted the jury to find Hardy guilty of each of the seven counts without requiring any natural and probable consequence connection between his target offense and the non-target offense that actually caused the offenses of conviction. The instruction permitted jurors to convict on any one of seven offenses by making findings under these four steps: (1) the offense, or any one of the other six offenses, was committed; (2) Hardy aided and abetted in any one of the seven offenses; (3) a co-principal to Hardy's target offense committed any one of seven

offenses; and (4) any one of the seven offenses was a natural and probable consequence of any of the other seven offenses. (2CT 543-544.) The instruction permitted conviction without requiring the two offenses to be linked by a natural and probable consequence (at step four). There was no requirement in the instruction that the offense of conviction, the offense Hardy aided and abetted, or the non-target offense committed by a co-participant be linked together by natural and probable consequences. So for example, jurors could have convicted Hardy of murder, if they found (1) murder was committed; (2) Hardy aided and abetted robbery; (3) Pearson was a co-participant in the robbery who also committed rape; and (4) rape in concert was a natural and probable consequence of rape.

As in Argument VIII, *ante*, the problems arose because the pattern instruction appears to contemplate only a single target, and single non-target offense. Hardy incorporates by this reference the authorities cited in Argument VIII, *ante*, that require reversal when conviction was based on an improper legal theory. Hardy also incorporates from Argument VIII the standard of review for instructional error.

B. The Instruction on Aiding and Abetting.

The trial court gave the following modified version of CALJIC No. 3.02:

One who aids and abets another in the commission of a crime [or crimes] is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.

In order to find the defendant guilty of the crimes[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake, as charged in Count[s] 1-8, you must be satisfied beyond a reasonable doubt that:

1 The crime *or any one of the following crimes* of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake were committed;

2 That the defendant aided and abetted *any one of those crime[s]*;

3 That a co-principal in that crime *committed the [sic] any one of the following crimes* of: crime[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake; and

4 That *any one of the following crime[s]* of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake *were a natural and probable consequence of the commission of any one of the crime[s]* of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake.

(2CT 543-544 [italics added].)

The jury devoted attention to trying to parse through this modified instruction, and in doing so discovered the only error obvious to a layperson. The second paragraph identified all eight counts, and the remainder of the instruction discussed only seven. (3CT 590.) Jurors asked about the discrepancy, and whether torture should be included as part of the instruction. (3CT 590.) The parties and the court discussed the jury's question (12RT 2447-2475), and the court answered, "no, the instruction should have stated 'Counts 1-7.'" (3CT 590.)

C. The Law Governing the Natural and Probable Consequences Theory of Aider and Abettor Liability Requires a Nexus Between the Offense of Conviction, the Target and Non-target Offenses, and the Offenses Linked by a Natural and Probable Consequence.

The doctrine of natural and probable consequences in the context of vicarious or derivative liability has been recognized in California law for more than a century.[25] This Court noted in *People v. Prettyman* (1996) 14 Cal.4th 248, 260, "The first California decision to embrace this doctrine was *People v. Kauffman* (1907) 152 Cal. 331 [parallel citation]." In *Kauffman*, six men in

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[25] The doctrine has been criticized by legal scholars. "Most commentators strongly oppose this doctrine as both 'incongruous and unjust' because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal." (Rogers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, (1998) 31 Loy. L.A. L. Rev. 1351, 1361, and fn. 33.)

San Francisco conspired to commit a burglary involving the taking of money from a safe at a cemetery in San Mateo County. All of the men except Kauffman were armed with revolvers. When the six men arrived at the cemetery, they found an armed man on the premises and decided to leave. On their way home, an encounter with a police officer led to a gunfight, during which the officer was fatally shot. (*Id.* at pp. 332-333.) Kauffman was not armed at the time of the shooting. He testified when the shooting occurred he was standing still and his hands were in the air. (*Id.* at p. 334.) He was convicted of second degree murder (*id.* at p. 332), on the theory that the killing of the officer was an act committed in furtherance of the common design of the conspiracy to commit the burglary and, as one of the conspirators, he was responsible for the killing. (*Id.* at p. 334.)

This Court held the governing rule was that when several people conspire to commit an unlawful act, each is criminally responsible for the acts of his or her associates committed in furtherance of the common design for which they combine. (*People v. Kauffman*, *supra*, 152 Cal. at p. 334.) "Each is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan." (*Ibid.*) *Kauffman* made clear, however, that the rule

applied only to acts which were "an ordinary and probable effect of the wrongful act specifically agreed on" and did not apply to "a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design." (*Ibid.*) Accordingly, "if one member of the party departs from the original design as agreed upon by all of the members, and does an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor." (*Ibid.*)

Although *Kauffman* was a case involving a conspiracy theory of liability for substantive crimes committed in the course of the conspiracy, later decisions applied the natural and probable consequences doctrine to aiders and abettors. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261, and cases cited.) The basis of the doctrine is that aiders and abettors should be responsible for criminal acts they have naturally, foreseeably and probably put in motion. (*Id.* at p. 260.) However, as noted in *Kauffman* and confirmed in *Prettyman*, the doctrine does not apply to criminal acts which occur when one of the principals departs from the original design and commits an act which was not a natural, foreseeable or probable consequence of the design. (*People v.*

Prettyman, supra, 14 Cal.4th at pp. 260-261; *People v. Kauffman, supra*, 152 Cal. at p. 334.[26])

Pearson was the major participant in all offenses. Under the evidence, reasonable jurors could have concluded Pearson departed from the original plan, to which Hardy agreed, say, robbing and perhaps battering, or even raping Sigler. But the instructions required no nexus between the target offense and the particular offense committed by the co-participant at step three (Pearson in this example). The instructions simply failed to explain fully the nexus required by *Prettyman.*

California law requires the trial court to instruct the jury on the natural and probable consequences doctrine, and, when doing so, identify and describe the elements of both the charged non-target crime, that constitutes the natural

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[26] Other jurisdictions agree that when a co-participant departs from the target offense, the aider and abettor to the target offense is not liable for the non-target offense. For example, if two people agree to assault a person, and one of them unexpectedly robs the victim, the robber alone is guilty of robbery since robbery was not part of the design they shared. (*People v. Foley* (1886) 59 Mich. 553 [26 N.W. 699, 700-701]; *Rex v. Hawkins* (1828) 3 Car. & P. 392, 172 Eng.Rep. 470.) Similarly, if two defendants agree to commit a larceny, and one of them robs a person instead, the robber alone is guilty of robbery. (*State v. Lucas* (1880) 55 Iowa 321 [7 N.W. 583].) Likewise, if two defendants agree to fight two other people with their fists, and one uses a deadly weapon without the knowledge of the other, only the defendant who used the deadly weapon is responsible for the death resulting from use of that weapon. (*Regina v. Caton* (Eng. 1874) 12 Cox Crim. Cases 624.)

and probable consequence, and the target crime the defendant actually aided and abetted. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 254, 263-270.) The question whether the non-target crime of conviction is a natural and probable consequence of the target crime ordinarily is a factual question for the jury to determine. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 261-262; *People v. Kauffman*, *supra*, 152 Cal. at p. 335; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531; *People v. Rogers* (1985) 172 Cal.App.3d 502, 515.) But to make this determination, the jury must be properly instructed, and here it was not. This was because there were seven offenses for the jury's consideration at each of the four steps of the aiding and abetting analysis.

The seven offenses identified as ones, to which the natural and probable consequences doctrine of aiding and abetting liability could attach, were murder, robbery, kidnapping for rape, rape in concert, rape, penetration with a foreign object in concert, and penetration with a foreign object. (2CT 543-544.) To find Hardy guilty of any one of these, however, the instruction did not require a natural and probable consequence connection to the count of conviction. There were only two steps where jurors had to find a natural and probable consequence connection. Step three required a connection between the target offense Hardy intended, and the non-target offense a co-participant committed. Step four required a connection between any one of the seven

offenses and any one of the other six. The jurors would have not understood a connection was required between steps one through three, and step four. That is how the example in Section A, *ante,* could occur. Jurors could have convicted Hardy of murder, if they found: (1) murder was committed; (2) Hardy aided and abetted robbery; (3) Pearson was a co-participant in the robbery who also committed rape; and (4) rape in concert was a natural and probable consequence of rape. Similarly, under this instruction, jurors could have convicted Hardy of robbery if they found: (1) murder was committed; (2) Hardy aided and abetted a kidnap; (3) Pearson was a co-participant in the kidnap who also committed rape; and (4) rape in concert was a natural and probable consequence of rape. Jurors identified the non-legal error in the instruction, which included torture in the second paragraph, but had no way to identify the legal error that remained in the instruction.

The natural and probable consequence theory of liability requires the jury to find that the non-target offense of conviction is a natural and probable consequence of one of two crimes: (1) the target crime the jury found Hardy aided and abetted, or (2) the non-target crime committed by a co-participant, which was itself a natural and probable consequence of the target crime. The non-target offense of conviction cannot merely be the natural and probable consequence of some other non-target crime.

People v. Prettyman, supra, 14 Cal.4th 248, held the natural and probable consequence doctrine applies when the jury makes five findings. They are: "that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime; (4) the defendant's confederate committed an offense other than the target crime; and (5) *the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.*" (*Id.* at p. 262 [footnote omitted, italics and underling added].) This requirement is based on a common law rule that "a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*Id.* at p. 260.) Furthermore, as this Court explained about the five-part test: "Instructions describing each step in this process ensure proper application by the jury of the 'natural and probable consequences' doctrine." (*Id.* at p. 267.) In addition, *Prettyman* explained that, in order to convict a defendant based on the natural and probable consequence theory, "each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a

criminal act, and that the offense actually committed was a natural and probable consequence of *that* act." (*Id.* at p. 268, italics added, italics in original deleted.)

The instruction Hardy's jury received ran afoul of the holding in *Prettyman*, quoted above. Specifically, the instruction failed altogether to explain the fourth and fifth requirements set forth in *Prettyman.* Under the instruction the trial court gave, Hardy has demonstrated the jury could have convicted him of murder under one of several erroneous theories. The same is also true for the other six offenses covered by the aiding and abetting instruction. *Prettyman* stated: "If, for example, the jury had concluded that defendant Bray [the aider and abettor] had encouraged codefendant Prettyman [the actual killer] to commit an assault on Van Camp but that Bray had no reason to believe that Prettyman would use a deadly weapon such as a steel pipe to commit the assault, then the jury could not properly find that the murder of Van Camp was a natural and probable consequence of the assault encouraged by Bray." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 267.)

In Hardy's case, step four in the instruction failed to explain the required natural and probable consequence connection to the offense of conviction. The correct instruction would have told jurors Hardy was guilty of a non-target offense if jurors decided he aided and abetted one of the other

six crimes and the non-target offense of conviction was a natural and probable result of *the* crime he aided and abetted, or of *the* crime the co-participant committed while committing Hardy's target crime. Alternatively, jurors could have been instructed to find first, which crimes gave rise to which non–target crimes as a natural and probable consequence. Then jurors could have been told to decide whether Hardy either aided and abetted one of those as target crimes, or whether the co-participant committed one of those as a non-target crime while committing Hardy's target crime. Instead, the instruction permitted conviction on non-target crimes based on any one of several erroneous theories.

D. The Erroneous Instruction on Aiding and Abetting Violated Hardy's Federal and State Constitutional Rights, and Requires Reversal of Counts 1 Through 7, and the Judgment of Death.

Argument VIII, *ante*, set forth the authorities requiring reversal for this type of instructional error, and the arguments and authorities explaining how Hardy was prejudiced. Those arguments and authorities are incorporated by this reference for the sake of brevity.

The jury found Hardy guilty of murder as an aider and abettor, and did not find he was the actual killer. (3CT 597.) The jury found not true the allegation Hardy personally used of a deadly weapon on three counts. (3CT 599 [robbery], 600 [kidnap for rape], 601 [rape in concert].) The jury was

deadlocked, and could not reach findings, on personal use on four counts. (3CT 597 [murder], 602 [rape], 603 [penetration by a foreign object in concert], 604 [penetration by a foreign object], 605 [torture].) This verdict and findings reveal the jury understood Hardy's liability was as an aider and abettor. As to each of the eight counts, the jury's findings show the jury found one of Hardy's companions was the primary actor, not Hardy. Thus, the error in the aiding and abetting instruction permeated infected each of counts 1 through 7.

Based on the foregoing, reversal of counts 1 through 7 and the judgment of death is required.

X

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE VERDICT FORM, COMBINED WITH THE JURY INSTRUCTIONS, INCORRECTLY PERMITTED THE JURY TO FIND HARDY GUILTY OF FIRST DEGREE MURDER BASED ON A LEGAL THEORY THAT SUPPORTS ONLY SECOND DEGREE MURDER, AND RESULTED IN A WRITTEN VERDICT FORM THAT FAILS TO REFLECT THE FINDINGS OF FACT REQUIRED FOR FIRST DEGREE MURDER, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The verdict form for count 1, murder, was a hybrid verdict form that combined the verdict for the count with legal theories supporting both: (1) guilt on the count, and (2) true findings on special circumstances. As a result, the verdict form for count 1 fails to reflect with any certainty that the jury convicted Hardy of first degree murder on a valid legal theory. The form presented two options for the jurors to select. Jurors were to select whether they found Hardy was: "(A) The Actual Killer; or (B) An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless

indifference to human life." (3CT 597.) The jury circled option B. (3CT 597.) Option B contained two legal theories: (1) aiding and abetting, which could apply as a theory of liability for guilt, or to the special circumstances; and (2) a major participant acting in reckless disregard for human life, which applied only to the special circumstances. The hybrid form, however, made it appear Hardy could be found guilty of first degree murder if jurors found he acted "in reckless disregard for human life," which is a theory that would support second degree murder, but not first degree murder.

The combination of the hybrid verdict form, and the absence of any clarifying instructions, deprived Hardy of his right to a jury determination of all the facts pertaining to his guilt or innocence as required by the Sixth Amendment, and Article I, section 16 of the California Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 536 [122 S.Ct. 2428, 153 L.Ed.2d 556] [the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444] [the right to have a jury requires the trier of fact to determine the truth of every accusation].) The verdict form made it probable the jury failed properly to determine the facts necessary to find Hardy guilty of first degree murder.

The combination of the hybrid verdict form, and the absence of any clarifying instructions, also violated Hardy's right to federal due process of law, which required the jury to find each element of first degree murder beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 314-315 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Furthermore, because the hybrid verdict form without proper instruction lacked statutory authority, the jury's verdict on Count 1 violated due process, and should not be treated as a reliable findings of fact. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [due process right in state following its own procedure].)

B. The Hybrid Verdict Form, for Which the Trial Court Gave No Clarifying Jury Instructions, Resulted in a Guilty Verdict on Count 1 That Could Rest on an Impermissible Legal Theory, That Is, That Hardy Was Guilty Based on Acting with Reckless Indifference to Human Life.

The verdict form for count 1 was a hybrid verdict form that combined a general verdict and a special verdict. Sections 1150 through 1155 set forth the requirements for the form of verdicts. Section 1150 provides that, "The jury must render a general verdict, except that in a felony case, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict." Section 1151 provided in part, "A general verdict upon of plea of not guilty is either "guilty" or "not guilty," which

imports a conviction or acquittal of the offense charged in the accusatory pleading." Section 1152 provides, "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them." Section 1154 provides, "The special verdict need not be in any particular form, but is sufficient if it presents intelligibly the facts found by the jury." Thus, the verdict form for Count 1 was a hybrid because it contained both the verdict of guilt (§ 1151), and findings of fact without a judgment of guilt (§ 1152).

The hybrid verdict form used for count 1 contained the following language:

> We the jury in the above-entitled action find the defendant WARREN HARDY GUILTY of the crime of MURDER, in violation of Penal Code Section 187(a), a felony, as charged in Count 1 of the information.
>
> We further find it to be Murder of the _____ Degree. (Insert First or Second)
>
> We further find the allegation that the defendant Warren Hardy in the commission of the above offense personally used a dangerous and deadly weapon in violation of Penal Code Section 12022(b)(1) to be _____(Insert True or Not True)
>
> We the jury in the above-entitled action find the defendant Warren Hardy was:

A. The Actual Killer; or

B. An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life

(Circle all of either "A" or "B")

We further find the allegation of the special circumstance of robbery pursuant to Penal Code Section 198.12(a)(17)(A) to be _____ (Insert True or Not True)

We further find the allegation of the special circumstance of kidnapping for rape pursuant to Penal Code Section 198.12(a)(17)(B) to be _____ (Insert True or Not True)

We Further find the allegation of the special circumstance of rape pursuant to Penal Code Section 198.12(a)(17)(B) to be _____ (Insert True or Not True)

We further find the allegation of the special circumstance of rape by a foreign object pursuant to Penal Code Section 198.12(a)(17)(K) to be _____ (Insert True or Not True)

We further find the allegation of the special circumstance of torture pursuant to Penal Code Section 198.12(a)(18) to be _____ (Insert True or Not True)

(3CT 597-598.)

Two aspects of the form are objectively noteworthy. First, the phrase "We the jury in the above-entitled action find the defendant Warren Hardy . . . ." appears only twice: (1) for use in determining guilt on the murder count itself, and (2) as a introductory phrase to the A or B options that applied only

to the special circumstances. This usage would lead a lay juror to conclude each of the two sentences, starting with those same words, concerned the guilty verdict. Second, the introductory language to each of the four findings to the special circumstances began with the same language, "we further find the allegation . . . ." This, too, would lead a lay juror to conclude: (1) each of the sentences starting with those words concerned special circumstances; and (2) only sentences beginning with those words concerned special circumstances. This would lead to the conclusion that the choice of A or B concerned the verdict of guilt, not the special circumstances. On its face, the verdict form lent itself to the interpretation that guilt for first degree murder could be reached based on a finding of reckless indifference to human life.

There are three fatal flaws with the verdict form. Hardy will discuss each.

1. The Jury Instructions Failed to Clarify the Concepts of Aiding and Abetting, and Acting in Reckless Disregard for Human Life on the Verdict Form Applied Only to the Special Circumstances, and Not to the Issue of Guilt.

No instruction, and nothing on the verdict form, made it clear to jurors that options A and B concerned only special circumstances, and not the verdict of murder itself. The hybrid form confused lay jurors because option A included the term "Aider and Abetter," which the court had instructed was a

theory for finding guilt on count 1 (and other counts). The actual term "aids and abets" appeared only in the instructions on aider and abettor liability. (2CT 542-544; CALJIC Nos. 3.01, 3.02.) The two instructions on aider and abettor liability concerned the charged crimes. CALJIC No. 3.02 specifically identified Counts 1 through 7 as the offenses, to which aiding and abetting liability could apply. (2CT 543-544.)

CALJIC No. 8.80.1 instructed on when and how to determine if the special circumstances were true. It contained the words "[aided,] [abetted,]" in a long series of other words describing various forms of vicarious liability that could attach to the special circumstances findings. CALJIC No. 8.80.1 told jurors they could not find the special circumstance true unless convinced beyond a reasonable doubt either: Hardy had the intent to kill, or he was a major participant acting with reckless indifference to human life. (2CT 553-554.) CALJIC No. 8.80.1 read in pertinent part:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider or abettor or co-conspirator, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree], or with reckless indifference to human life and as a major participant [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of one of more of the following crimes: robbery, kidnapping, kidnapping for rape,

> rape, rape by a foreign object (a wooden stake), or torture pursuant to Penal Code section 190.2 (a)(17) which resulted in the death of a human being, namely Penny Keptra also known as Penny Sigler.

(2CT 553-554.)

The words "aided" and "abetted" appeared in the special circumstance instruction (CALJIC No. 8.80.1), but they were not joined together with the word "and," representing a concept. Instead, the two words were buried in among many other words describing special circumstance liability. The words did not appear as a phrase "aiding and abetting" in the special circumstance instruction. Rather, the words, and concept of, "aiding and abetting" was discussed in the instructions only when the court explained aider and abettor liability for guilt in CALJIC Nos. 3.01 and 3.02.

The appearance of the words together, "Aider and Abettor" in Option B on the verdict form, suggested a concept. That concept was mirrored by the use of that same phrase "aiding and abetting" in the instructions on aiding and abetting liability for guilt. (CALJIC Nos. 3.01 and 3.02.) This would have led lay jurors to believe this option addressed guilt of murder, not a true finding on the special circumstance. Then, thinking that Option B applied to the question of guilt of first degree murder, jurors also would have concluded that the concept of acting "with reckless indifference to human life" was a way to find guilt on first degree murder. This misunderstanding would have been

reinforced by Option A, that Hardy was "the Actual Killer" since that too would have been a theory of guilt for murder. Jurors, however, circled only B, not A. (3CT 597.)

No instruction clarified for jurors that the concepts in Option B were relevant only to special circumstances. Option B included the concept of reckless indifference to human life, which supports second degree murder, but not first degree. Therefore, the guilty verdict could represent the jury's finding of guilt on the improper legal theory of reckless indifference to human life. There is no way to know that it does not.

2. The Jury Instructions Failed to Clarify Jurors Had to First Determine Hardy's Guilt of First Degree Murder *Before* Making the Selection A or B.

No instruction, and nothing on the verdict form, made it clear to jurors they were to decide on the A or B options only after first finding Hardy guilty of first degree murder. CALJIC No. 8.80.1 instructed in its preamble, that "If you find [the] defendant in this case guilty of murder of the first degree, you must then determine . . . The following special circumstance[s] . . . ." (2CT 553.) Hardy acknowledges that instruction likely would have sufficed if some other instruction, or the verdict form itself, made clear that the selection of A or B related only to special circumstances. As demonstrated, *ante,* however, there was no such clarification.

The trial court did not instruct the jury that it should select Options A or B only if, and after, the jury had already independently found that Hardy was guilty of first degree murder. *People v. Davis* (1995) 10 Cal.4th 463, 511-512, approved the use of hybrid verdict forms even though "not explicitly authorized by statute" when "the court conveyed to the jury with ample clarity that it was required to make the special finding only after it had deliberated on the issue of guilt." (*Ibid.* citing *People v. Farmer* (1989) 47 Cal.3d 888, 920 [jury's finding of guilt, followed answers to two specific questions constituted a general verdict].) Here, there were no instructions that conveyed "with ample clarity" that the jury could make the selection of A or B only after first finding Hardy guilty beyond a reasonable doubt of first degree murder.

3. The Hybrid Verdict Form Violated Penal Code Sections 1150 Through 1154, and California Case Authorities, Resulting in a Completed Form That Fails to Reflect the Required Findings of Fact to Sustain a Guilty Verdict on First Degree Murder.

The verdict form was unauthorized under California law. The language in section 1150 that, "The jury must render a general verdict . . ." requires the trial court to use a general verdict unless the jury was "in doubt as to the legal effect of the facts proved . . . ." Then a special verdict may be used. Section 1150 does not provide for the use of a general verdict and a special verdict. The statute requires the trial court to use either a general verdict form or a

special verdict form. As demonstrated, *ante*, the trial court's melding of the two types of verdict forms permitted by statute lacked statutory authority, and created confusion about what the jury found.

People v. Davis, supra, 10 Cal.4th 463, approved hybrid verdict forms only in limited circumstances where the form and the instructions did not interfere with the deliberative process. (*Id.* at pp. 511-512.) *Davis* rejected the challenge to the verdict form because the defendant could not show the form had interfered with the jury's deliberative process. (*Id.* at p 511.) Hardy's case is different because no instructions clarified the confusion on the form. After *Davis*, in *People v. Jackson* (1996) 13 Cal.4th 1164, the jury was provided verdict forms which required it to find the defendant guilty of premeditated murder, guilty of felony-murder, guilty under both theories, or not guilty. The defendant argued the verdict form was not authorized by statute. This Court rejected the argument, concluding, "The verdict rendered by the jury, however, was not a special verdict; it did not present only findings of fact." (*People v. Jackson, supra*, 13 Cal.4th at p. 898; see also *People v. Neely* (1993) 6 Cal.4th 877, 989 [approving the use of verdict forms which required the jury to find the defendant guilty of either premeditated murder or felony-murder and concluding the verdict was not a special verdict]; *People v. Webster* (1991) 54 Cal.3d 411, 446-447 [approving verdict forms for

different theories of murder and stating that special findings may accompany a general verdict as long as they do not interfere with the jury's deliberative process]; *People v. Farmer, supra,* 47 Cal.3d at p. 920.)

Hardy's case is distinguishable from the foregoing cases. The verdict forms in those cases addressed a single count. Thus, there was no possibility of confusion about the jury's verdict for the specific count for which the jury answered questions. The verdicts were general verdicts, and additionally required answers to questions about the specific theory supporting the general verdict. The additional questions related to the guilty verdict, and amplified it by identifying the legal theory for guilt. In contrast, the grafting of the liability concepts for the special circumstances onto the verdict form for count 1 required additional findings that did not relate to the theory of guilt. Unlike *Davis* and *Jackson*, a jury could find all special circumstances to a murder not true, and the guilty verdict would be unaffected. But if the jury in *Jackson* had found all the theories for guilty not true, then the verdict could not stand.

There also is a fatal problem with the order of findings. *People v. Farmer, supra*, 47 Cal.3d at page 920, illustrates:

> A jury in a criminal trial must, except in enumerated circumstances, deliver a general verdict. (Pen. Code, § 1150.) But in a true special verdict the jury finds only the facts, leaving judgment to the court. (*Id.*, § 1152.) Here, the jury returned a general verdict of guilt and, on the assumption it followed

> instructions, decided the two specific questions afterwards. The findings were thus not a special verdict.
>
> Defendant suggests that although the questions do not violate the requirement of a general verdict, they are impermissible because they are not explicitly authorized by statute. In addition, since special findings are expressly allowed in civil trials (Code Civ. Proc., § 625), the fact that they are not authorized by statute in criminal proceedings further implies they are inappropriate. On these grounds, we held in *People v. Perry* (1972) 7 Cal.3d 756, 783, 784 [103 Cal.Rptr. 161, 499 P.2d 129], that the defendant did not have the right to present the jury with special interrogatories. But *Perry* differs from the case at bar in several respects. There the disapproved question required that the jury make a written finding regarding the sufficiency of the evidence before it could consider the issue of guilt. This demand created a clear danger of interference with the jury's deliberative process, the very evil sought to be avoided by the rule against special criminal verdicts.

The safeguards present in *Farmer* were absent in Hardy's trial. In *Farmer*, the jurors were instructed to decide the general question of guilt before addressing the special findings. Hardy's jury was not so instructed concerning selecting the A or B options. *Farmer,* and its discussion of *Perry,* shows that when the jury is permitted to address special questions before deciding guilt, which Hardy's jury was free to do, the result is interference with the deliberative process. That is what happened by using the verdict form for count 1 without instructing clearly that the jury had to find guilt of first degree murder *before* considering options A or B. It was never made clear to

Hardy's jury that it could not work backward: deciding options A or B, then determining guilt.

C. Hardy Was Prejudiced by the Flawed Verdict Form, and Lack of Clarifying Instruction, Which Violated Hardy's Federal Constitutional Rights and Requires Reversal.

The verdict form, and lack of clarifying instruction, deprived Hardy of his constitutional rights to a jury determination of the facts, and to proof beyond a reasonable doubt on all elements, (*Ring v. Arizona, supra,* 536 U.S. at p. 536 ; *Jackson v. Virginia, supra*, 443 U.S. at pp. 314-315.) The verdict form (and lack of full instruction on how to use) violated Hardy's Sixth Amendment right because the verdict form makes probable the jury convicted of first degree murder based on an improper legal theory. (*Mills v. Maryland, supra,* 486 U.S. at p. 376; *People v. Guiton, supra,* 4 Cal.4th at p. 1128.) This Court explained that when a verdict may be based on a legally improper theory, then reversal is required unless there is "a basis in the record to find that the verdict was actually based on a valid theory." (*People v. Guiton, supra,* 4 Cal.4th at p. 1129 [fn. omitted].) As demonstrated above, the record cannot, and does not, show the guilty verdict on count 1 was based on a valid legal theory.

This was structural error that does not require a showing of prejudice. The United States Supreme Court has defined the term structural as defects in

a trial which "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246; 113 L.Ed.2d 302].) Structural errors include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. (*Id.* at pp. 309-310.) Such structural errors cannot be harmless. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. (*Id.* at p. 310, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [106 S.Ct. 3101, 92 L.Ed.2d 460].)

The flawed verdict form, when used without clarifying instruction, was structural error because it is not possible to discern whether the jury made the required findings to support the guilty verdict. The language in option B, discussing a major participant's acting with "reckless disregard to human life" derives from Proposition 115 passed in 1990. This language "expanded the scope of . . . section 190.2 by adding subdivisions (c) and (d). Accordingly, a person other than the actual killer is now subject to the death penalty or life imprisonment without the possibility of parole if that person intended to kill

or was a major participant in the underlying felony and acted with reckless indifference to human life." (*People v. Mil* (2012) 53 Cal.4th 400, 408-409; see also *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127] [a non-killer may be eligible for capital punishment if either he had specific intent to kill or was a major participant acting with reckless indifference to human life].) The language has no place in the determination of guilt for first degree murder.

The basic function of the jury is to make findings of fact that are reflected in the verdict. There is no way to measure prejudice when the means by which the jury expressed its factual findings, i.e., the verdict form, is contradictory and susceptible to different interpretations, only one of which represents a valid legal theory for first degree murder. A reasonable juror would have thought that options A and B concerned theories of guilt. The term aiding and abetting was discussed in the instructions only as a theory of guilt.

Johnson v. United States (1997) 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718] described "structural error" as "a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Hardy's jury suffered from a misunderstanding that permitted a guilty verdict on first degree murder based on reckless indifference to human life.

Without knowledge of the required elements, the jury was unable to render a complete verdict on every element of first degree murder. That deprived Hardy of his right to a jury trial on all the elements of first degree murder. This failure affected the framework of the trial and constituted structural error requiring reversal. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 280; *Arizona v. Fulminante, supra,* 499 U.S. at p. 309.) The judgment must therefore be reversed without any demonstration of prejudice.

Reversal is required even if the error is tested for prejudice. Because the error violated Hardy's federal constitutional rights, the judgment of guilt must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Technical defects in a verdict may be disregarded only if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the defendant's substantial rights were not prejudiced. (*People v. Webster, supra,* 54 Cal.3d at p. 447.) Here, the jury's intent to convict Hardy of first degree murder based only on proper legal theories cannot be discerned. Based on the form and the instructions, the guilty verdict could be based on the erroneous legal theory of reckless indifference to human life. The deficiency in the verdict form was not a matter of a mere technicality, but pertained to the reliability and

accuracy of the jury's verdict on first degree murder. Accordingly, the judgment of guilt on count 1 and the judgment of death should be reversed.

XI

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT TO COUNTS 1 AND 8, AND THE TRUE FINDINGS ON THE TORTURE ALLEGATIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT AIDING AND ABETTING LIABILITY AND TORTURE REQUIRED SPECIFIC, NOT GENERAL INTENT, AND THEREFORE THE INSTRUCTIONS IMPERMISSIBLY PERMITTED GUILTY VERDICTS WITHOUT A JURY FINDING THAT HARDY HAD THE REQUISITE SPECIFIC INTENT, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST EX POST FACTO AND THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The jury found Hardy guilty of murder as an aider and abettor, found him guilty of torture, and found true the torture allegations.[27]

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[27] For sake of brevity, Hardy refers to the special allegations involving torture by the shorthand reference "torture allegations." These true findings include:

(1) as to count 1, murder, the special circumstance allegation involving torture (§ 190.12, subd. (a)(18); 3CT 598);

(2) as to count 4, forcible rape in concert, the special circumstance allegation involving torture (§ 667.61, subd. (d)(3); 3CT 601);

(3CT 597, 605.) Both guilty verdicts, and the torture allegations, required specific intent, but no instruction made that clear to jurors. The trial court instructed the jury on the definitions of general and specific intent. (3CT 538, 539 [CALJIC Nos. 2.02, 3.30, 3.31.) When doing so, the court modified the pattern instructions to specifically identify those "crime[s] [and] [allegation[s]]," and theories requiring either general or specific intent. (3CT 538, 539.) The court erroneously failed to include torture, and aiding and abetting, as requiring specific intent, and also identified torture as a general intent crime. Other instructions failed to clarify for jurors that special intent was required for aiding and abetting, and for torture. The instructions relieved the prosecution of proving an element of aiding and abetting liability, an element of count 8, and elements of the torture allegations.

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(3) as to count 5, forcible rape, the special circumstance allegation involving torture (§ 667.61, subd. (d)(3); 3CT 602);

(4) as to count 6, penetration by a foreign object in concert, the special circumstance allegation involving torture (§ 667.61, subd. (d)(3); 3CT 603); and

(5) as to count 7, penetration by a foreign object, the special circumstance allegation involving torture (§ 667.61, subd. (d)(3); 3CT 604).

The Fifth, Sixth and Fourteenth Amendments to the Federal Constitution together guarantee the right to have a jury find all elements of the offense beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] .) "Jury instructions relieving states of this burden violate a defendant's due process rights . . . [by] . . . subvert[ing] the presumption of innocence accorded to accused persons and [by] invad[ing] the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218]). Failure to properly instruct by omitting or misstating elements is federal and state constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct 1827; 144 L.Ed 2d 35]; *United States v. Gaudin* (1995) 515 U.S. 506 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *People v. Cox* (2000) 23 Cal.4th 665, 676; *People v. Flood* (1998) 18 Cal.4th 470, 479-480.) This error requires reversal of counts 1and 8, the true findings on the torture allegations, and the judgment of death. Hardy incorporates by reference the authorities cited in Argument VIII, *ante*, that require reversal when a conviction is based on an improper legal theory. Hardy also incorporates from Argument VIII the standard of review for instructional error.

B. Aiding and Abetting and Torture Require Specific Intent.

An aider and abettor is a person who "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourage or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) *People v. Mendoza* (1998) 18 Cal.4th 1114, explained the mental state required for aider and abetter liability. The defendant in *Mendoza* was convicted of second degree murder, five counts of attempted murder, and shooting at an occupied dwelling. The defendant was prosecuted on aiding and abetting theories. The issue before this Court was whether evidence of voluntary intoxication was relevant to the defendant possessing the requisite mental state necessary for aiding and abetting liability. The issue arose because voluntary intoxication is not a defense to a general intent crime, but is admissible to show a defendant may not have formed the requisite specific intent. (§ 22, subds. (a) and (b).) Shooting at an occupied dwelling is a general intent crime. However, *Mendoza* noted liability as a principal and liability as an aider and abetter requires different mental states:

> The mental state necessary for conviction as an aider and abettor, however, is different from the mental state necessary for conviction as the actual perpetrator.

> The actual perpetrator must have whatever mental state is required for each crime charged, here shooting at an inhabited building, murder, and attempted murder. An aider and abettor, on the other hand, must "act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."
>
> (*People v. Beeman* (1984) 35 Cal. 3d 547, 560.)

(*People v. Mendoza, supra*, 18 Cal.4th at pp. 1128-1129.) This Court concluded that aiding and abetting liability requires specific intent:

> The intent requirement for an aider and abettor fits within the Hood definition of specific intent. To be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also the additional criminal act the perpetrator commits. . . Aiding and abetting liability attaches only with the intent that the direct perpetrator commit a further, criminal, act in order to achieve the future consequence of that act.

(*People v. Mendoza, supra*, 18 Cal.4th at pp. 1128-1129.)

Torture also requires specific intent. (See e.g., *People v. Massie* (2006) 142 Cal.App.4th 365, 372; *People v. Pre* (2004) 117 Cal.App.4th 413, 420.) The trial court had a sua sponte duty to include torture among the charged offenses that required specific intent. (*People v. Ford* (1960) 60 Cal.2d 772-792-793.) The Code proscribes torture: the infliction of great bodily injury upon another when done "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . ." (§ 206.) *People v. Mungia* (2008) 44 Cal.4th 1101, 1136,

discussing the special circumstance of murder with torture, explained the intent required is to cause cruel and extreme pain and suffering for the purpose of revenge, or for any other sadistic purpose. (*Ibid.*) The intent to torture "is a state of mind which unless established by the defendant's own statements (or other witness's description of a defendant's behavior in committing the offenses), must be proved by the circumstances surrounding the commission of the offense, which include the nature and severity of the victim's wounds." (*Id.*, at p. 1137, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 141.)

C. The Jury Instructions Omitted Aiding and Abetting and Torture from the Crimes or Allegations Requiring Specific Intent, and Incorrectly Identified Torture as a Crime Requiring Only General Intent.

The trial court instructed jurors about specific and general intent with three instructions that discussed specific counts, theories, or allegations. CALJIC No. 2.02 discussed the sufficiency of circumstantial evidence to prove specific intent (or other mental state). The modified version of CALJIC No. 2.02 stated in relevant part:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged in Counts 1, 2, and 3 or find the allegations pursuant to Penal Code section 667.61 (a), (b), (d), and (e) to be true, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

(2CT 520.[28])

The circumstantial evidence instruction was critical because the prosecution case rested almost entirely on circumstantial evidence that corroborated Hardy's statement. The instruction stated that counts 1, 2, and 3 (murder, robbery, and kidnapping for rape), and certain allegations, required specific intent. Neither torture in count 8, nor the special torture allegations, was included. The instruction did not identify any theory that required specific intent. By mentioning "theory" generally, but not specifically, the inference was that no theory required specific intent. At a minimum, what theory, if any, required specific intent was not explained anywhere in the instructions. Thus, a reasonable lay juror would understand circumstantial evidence could prove the specific intent required for the crimes, allegations, or a "theory that the defendant had . . . specific intent." By identifying only counts 1, 2, and 3 as requiring specific intent, and no theory that did, the reasonable inference was that only these enumerated counts required specific intent.

The court next instructed on intent with this modified version of CALJIC No. 3.30 discussing general intent:

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[28] The second paragraph of the instruction addressed circumstantial evidence subject to two reasonable interpretations. The second paragraph is omitted above because it is irrelevant to this issue.

> In the crime[s] [and] *unless otherwise instructed the* [[29]] [allegation[s]] charged in Count[s] 4,5,6,7, and 8, namely, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object - wooden stake, or torture, and the personal use of a deadly weapon - wooden stake, there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] is acting with general criminal intent, even though [he] may not know that [his] act or conduct is unlawful.

(2CT 538.)

This instruction incorrectly identified torture as a crime requiring only general intent.

Next, the court instructed on specific intent using this modification to CALJIC No. 3.31:

> In the [crime[s]] [and] [allegation[s]] charged in Count[s] 1, 2, 3, namely murder, robbery, or kidnap for rape, and the special allegations pursuant to Penal Code section 667.61 (a), (b), (d), and (e), there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the [crime[s] [or] [allegation] to which it relates [is not committed] [or] [is not true].
>
> [The specific intent required is included in the definition[s] of the [crime[s]] [or] [allegation[s]] set forth elsewhere in these instructions.]

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[29] Script text was interlineated by hand in the instructions used by the court.

(2CT 539.) The instruction, like CALJIC No. 2.02 before it, identified only counts 1, 2, and 3 as requiring specific intent.

When defining aiding and abetting, the court used CALJIC No. 3.01 stating:

> A person aids and abets the commission of a crime when he,
>
> 1. With knowledge of the unlawful purpose of the perpetrator and
>
> 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> 3. By act or advice aids, promotes, encourages or instigates the commission of the crime.

(2CT 542.)

The instruction did not specify that the intent required for aiding and abetting is specific intent. Instead, the instruction equated the required intent with "purpose," which was not defined elsewhere in the instructions. A reasonable layperson juror would have concluded that the "intent or purpose" for aiding and abetting was something different from, and less than, the specific intent defined by the court in CALJIC NO. 3.31, which limited its application to counts 1, 2, and 3, and certain special allegations, but did not explain it applied also to the aiding and abetting theory.

The court instructed for count 8 torture using CALJIC No. 9.90, which identified two elements the prosecution had to prove: (1) that "[a] person

inflicted great bodily injury upon the person of another;" and (2) "t]he person inflicting the injury did so with the specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (2CT 568.) This instruction, identifying the specific intent required for torture, was inconsistent with the court's three previous instructions, one of which told jurors torture was a general intent crime, and two of which omitted torture from the list of identified specific intent crimes.

D. The Erroneous Instructions Prejudiced Hardy by Permitting a Verdict of Guilt on Count 1 Based on Aiding and Abetting, and on Count 8, and the Torture Allegations Without Any Finding of Specific Intent to Support the Verdicts.

The verdict form shows the jury found Hardy guilty of murder as an aider and abettor. (3CT 597.) This required a finding beyond a reasonable doubt that Hardy specifically intended to encourage, or facilitate, the commission of the target crime. The jury also convicted Hardy of torture, and could not reach a verdict on whether he personally used a deadly weapon when doing so. (3CT 605.) A guilty verdict for torture legally required a finding beyond a reasonable doubt that Hardy specifically intended to cause cruel or extreme pain and suffering for enumerated purposes. The jury also found true the torture allegations to counts 1, and 4 through 7. As the foregoing quoted instructions demonstrate, jurors were never instructed properly about the specific intent requirements. By eliminating the offense of torture, and the

theory of aiding and abetting from CALJIC Nos. 2.02 and 3.31, the instructions impermissibly suggested that either only general intent was required, or some other type of intent was required, but not specific intent. Further, the instructions erroneously included torture as a general intent crime when it is not.

No instruction made clear to jurors that specific intent was required for aiding and abetting. While CALJIC No. 9.90 discussed "specific intent," that instruction conflicted directly with the court's other instructions. Any juror who questioned what intent was required for torture would have returned to the two instructions that defined general and specific intent, and to which offenses and theories they applied. Doing so would have left jurors with the unmistakable, yet wrong, impression that torture was a general intent crime. CALJIC No. 9.90 conflicted with CALJIC Nos. 2.02, 3.30, and 3.31, and did not clarify them. A conflict between instructions does not clarify either instruction. In a similar situation, the United States Supreme Court explained "nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable

instructions the jury applied in reaching their verdict." (*Francis v. Franklin* (1985) 471 U.S. 307, 322 [105 S.Ct. 1965, 85 L.Ed.2d 344].)

The failure to instruct the jury on an element of a charged offense is structural error, and requires reversal absent any showing of prejudice. *Johnson v. United States* (1997) 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718], defined a "structural error" as "a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Without knowledge of all of the required elements, the jury was unable to render a complete verdict on every element of torture, and also on the required specific intent element of aiding and abetting murder. This deprived Hardy of his right to a jury trial on all of the elements of the charged in counts 1 and 8, and in the torture allegations. This failure affected the framework of the trial and constituted structural error requiring reversal. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Morever, even if the instructional errors are not structural error, under the facts of this case, it is not possible for "the beneficiary of a constitutional error [i.e., the prosecution] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v.*

California, supra, 386 U.S. at p. 26; *Neder v. United States* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

An instructional error omitting an element "will be deemed harmless only in unusual circumstances, such as where each element was undisputed, the defendant was not prevented from contesting any of the omitted elements, and overwhelming evidence supports the omitted element." (*People v. Mil* (2012) 53 Cal.4th 400, 414.) *Neder* instructs reviewing courts to "conduct a thorough examination of the record. If at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error-for example, where the defendant contested an omitted element and raised evidence sufficient to support a contrary finding- it should not find the error harmless." (*People v. Mil, supra,* 53 Cal.4th at p. 417, citing *Neder v. United States, supra,* 527 U.S. at p. 19.) Because "the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones . . . , it must be accepted the jurors failed to deliberate on any element taken from the jury by the court's misdirection." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748, citing *Sparf and Hansen v. United States* (1895) 156 U.S. 51 [15 S.Ct. 273, 39 L.Ed. 343].)

Based on the foregoing, the judgment of guilt on counts 1 and 8, the true findings on the torture allegations to counts 1, and 4 through 7, and the judgment of death should be reversed.

XII

THE JUDGMENT OF DEATH AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY IMPROPERLY ON FELONY MURDER THAT INCLUDED TORTURE, MURDER BY TORTURE, TORTURE AS A SPECIAL CIRCUMSTANCE, AND TORTURE, BASED ON CHANGES IN THE LAW THAT HAD NOT BEEN PASSED AT THE TIME OF THE OFFENSES. THE INSTRUCTION IMPERMISSIBLY PERMITTED A GUILTY VERDICT BASED ON AN IMPROPER LEGAL THEORY, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST EX POST FACTO AND THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The trial court instructed the jury on torture in multiple ways, including: (1) a theory of first degree murder based on felony murder with torture as the felony; (2) first degree murder by torture; (3) torture as a felony to find first degree murder based on aider and abetter liability; (4) torture as a special circumstance to murder; (5) torture as an enhancement allegation to counts 4 through 7; and (6) as a substantive offense in count 8. The trial court instructed on a theory of felony murder based on torture, when "torture in violation of section 206 was not added to section 189's list of predicate

felonies . . . until 1999, after Sigler's murder. [Citation.]" (*People v. Pearson* (2012) 53 Cal.4th 306, 319.) The charged crimes occurred in the late night hours of December 28, 1998, and the early morning of December 29, 1998. (See e.g., 11RT 2250.) As explained in Argument VIII, *ante,* an instructional error that involves an improper legal theory for guilt on murder requires reversal. (*People v. Guiton, supra,* 4 Cal.4th at p. 1128; *Mills v. Maryland, supra,* 486 U.S. at p. 376.)

The instructions improperly placed before jurors a theory of first degree murder that did not exist at the time of the offenses, and thereby violated the constitutional prohibition against ex post facto laws. Article I, section 10 of the United States Constitution provides: "No State shall ... pass any ... ex post facto law. . . ." An ex post facto law retroactively changes the legal consequence of an act committed before the law changed. The ex post facto clause prohibits three categories of legislative acts: "any provision [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [110 S.Ct. 2715, 2719, 111

L.Ed.2d 30], quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169 [46 S.Ct. 68, 70 L.Ed. 216].)

B. The Erroneous Torture Instructions.

The concept of torture permeated the trial. Yet the verdicts definitively show jurors found Hardy was not the actual killer, and was not armed with, and did not use a weapon, including the one used to inflict torture. Rather, jurors found Hardy was vicariously liable. The jury found Hardy guilty of murder based on either aiding and abetting liability, or that he was a "major participant and acted with reckless indifference to human life." Jurors selected choice "B" on the verdict form, and did not find Hardy was the actual killer, which was choice "A" on the form. (3CT 597.) Jurors also were not convinced Hardy personally was armed or used a weapon. The jury found not true all allegations of personal arming or personal use of a weapon relating to counts 2 through 5, and failed to reach findings on weapon allegations relating to counts 1, and 6 through 8. (3CT 597, 599-605.)

Jurors were instructed 11 times on torture during the guilt phase. First, CALJIC No. 3.30 was modified to tell jurors, in part, that torture was a general intent crime. (2CT 538 [the "crime[s] and unless otherwise instructed the [allegation[s]] charged in Count[s] . . . 8, namely . . . torture".].)

Second, CALJIC No. 3.31, as modified, told jurors that counts 1 through 3, and "the special allegations pursuant to Penal code section 667.61 (a), (b), (c), (d), and (e) . . . " require specific intent. (2CT 539.) Section 667.61, subdivision (d)(3) alleged in counts 4 through 7 that the defendant inflicted torture in the commission of the offenses.

Third, CALJIC No. 3.02 instructed on the natural and probable consequence theory of aiding and abetting liability. Initially, the court instructed jurors Hardy could be found guilty "as charged in Count[s] 1-8" under if the crime was committed, Hardy aided and abetter, a co-principal committed one of the crimes, and any crime was the natural and probable consequence of any other crime. (2CT 543-544.) The instruction identified the seven charged offenses, and excluded torture. Jurors noticed torture was listed by reference to count 8, but not identified by name as were the other seven counts. This prompted jurors to ask, "In instruction (3.02 1 of 2) on page 1 of 2, each crime except for torture is listed and the it [sic] reads, 'as charged in Count[s] 1-8.' However, since 'torture' is in fact count #8, should 'torture' be included or not in that part of the instructions?" (3CT 590.) The court's response was, "No, the instruction should have stated 'Counts 1-7.'" (3CT 590.)

Fourth, CALJIC No. 8.10 defined murder, listed three elements required to prove murder, the third of which was "the killing [was done with malice aforethought] [or] [occurred during the commission of any of the following crimes: [including] torture . . . ." (2CT 545.)

Fifth, the court gave a special instruction requested by the prosecutor, telling jurors they "need not unanimously agree on the theory of first degree murder." (2CT 547.) By way of example, the special instruction explained, "the jury need not agree as to whether the murder was deliberate and premeditated or if the murder was committed during . . . torture, in order to find the defendant guilty of first degree murder." (2CT 547.)

Sixth, CALJIC No. 8.21 instructed the jury on first degree felony murder, and included torture among the felonies that made the unlawful killing first degree murder. (2CT 550.)

Seventh, CALJIC No. 8.24 explained murder by torture, stating that murder "perpetrated by torture is murder in the first degree." The instruction listed three elements, including the intent requirement that the murder was committed "with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain . . . ." (2CT 551.) The third element was that the acts taken to inflict extreme and prolonged pain were the cause of death. (2CT 441.)

Eighth, CALJIC No. 8.27 instructed on aider and abettor liability for murder based on felony murder, and included torture among the felonies that triggered liability. (3CT 552.)

Ninth, citing section 190.2, subdivision (a)(17), CALJIC No. 8.80.1 told jurors if they found Hardy guilty of murder, they also had to determine if one or more of the special circumstances, including torture, occurred. (2CT 553-554.)

Tenth, CALJIC No. 9.90 explained the elements of the substantive crime of torture alleged in count 8. (2CT 568.)

Eleventh, a special instruction on the section 667.65, subdivision (d)(3) allegations to counts 4 through 7, told that to find the allegation true, jurors had to find the defendant committed the charged offense, and "inflicted torture on the victim as defined elsewhere in these instructions."

The jury found Hardy guilty of first degree murder as an "Aider and Abettor . . . or . . . a Major Participant . . . ," and found true the special circumstance of torture. (3CT 597-598.) The jury also found Hardy guilty of torture in count 8, and found true the torture allegations to counts 4 through 7. (3CT 601-605.) *People v. Pearson, supra,* 53 Cal.4th at page 319, concluded the theory of felony murder by torture could not apply to a crime that predated 1999, when section 189 was amended to include felony murder by torture.

In *Pearson*, this Court found the error was harmless because Pearson's "jury necessarily found he murdered Sigler while engaged in the commission" of one of the enumerated section 189 felonies. (*People v. Pearson, supra,* 53 Cal.4th at p. 320, citing *People v. Marshall* (1997) 15 Cal.4th 1, 38.) As explained in Argument VIII, *ante*, the standard for reversal based on factual or legal deficiencies in the prosecution's case differ. Argument VIII also demonstrated the evidence failed to establish an independent felonious purpose for any of he several felonies. Thus, the felony murder doctrine cannot serve as an alternative basis for finding the error harmless. In cases where the verdict may have been based on a legally improper theory, reversal is required unless there is "a basis in the record to find that the verdict was actually based on a valid theory." (*People v. Guiton, supra,* 4 Cal.4th. at p. 1129 [fn. omitted].)

It is not a question of whether another, proper legal theory supports the verdict. It is a question of whether the jury's findings establish with certainty the conviction was not based on an improper theory. (Contra, *People v. Marshall, supra,* 15 Cal.4th at p. 38.) The most substantial question for the jury was on count 1, murder. It was the first count, and the prosecutor told the jury their first step was to determine Hardy was guilty of murder in the first degree. (11RT 2360.) The first verdict form jurors had to complete was for

murder. (3CT 597.) Only after jurors decided murder did they turn their attention to the special circumstances, including whether the special circumstance of torture was true. (3CT 598.) This order permitted jurors to reach a verdict on murder under any of the prosecutor's proffered theories, including murder by torture, then backfill findings on the less heinous special circumstances. What this meant is that when jurors focused on the question of murder first, under the instructions they could have reached a guilty verdict on an improper theory. Here, the guilty verdict on count 1 must be set aside because "it could be supported on one ground but not another," and this Court cannot be certain "which of the two grounds was relied upon by the jury . . . ." (*Mills v. Maryland, supra,* 486 U.S. at p. 376.)

Based on the foregoing, the guilty verdict on count 1, and the judgment of death, must be reversed.

XIII

THE JUDGMENT OF GUILT TO COUNT 2, ROBBERY, THE SPECIAL CIRCUMSTANCE FINDING OF THE COMMISSION OF ROBBERY DURING A MURDER, THE FIRST-DEGREE MURDER CONVICTION, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF THEFT, IN VIOLATION OF: (1) HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) HARDY'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

A. Summary of Argument.

The jury found Hardy guilty in count 2 of robbery, and found the robbery special circumstance true. (2CT 597, 599.) The robbery count and special circumstance were based on evidence that Sigler had been given some food stamps on the evening of her death; food stamp coupons that might have been in Sigler's possession were used at a market frequented by Hardy, Armstrong, and possibly Pearson (10RT 2045-2049); and a food stamp booklet cover was found a week after the offenses, next to the rear the building behind which Sigler's body was found. (10RT 2051, 2054.) There was no evidence when, in relation to the commission of the other offenses, the food stamps were taken, that is, either before, during, or afterward. No piece of evidence made any one of those times more likely than not.

The trial court instructed on the elements of robbery using CALJIC No. 9.40, which included robbery in the felony murder instructions using CALJIC Nos. 8.21 and 8.27, and included robbery in the special circumstances instructions using CALJIC Nos. 8.80.1 and 8.81.17. (2CT 550-555, 558.) The court did not, however, instruct that theft is a lesser included offense of robbery.

Grand theft and theft are lesser included offenses of robbery.[30] (*People v. Valdez* (2004) 32 Cal.4th 73, 110; *People v. Ortega* (1998) 19 Cal.4th 686, 693-694; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) Sigler's death would have been "rapid," and she died within minutes of sustaining the injuries. (10RT 1964.) She also could have been rendered unconscious, before death, due to her injuries. (10RT 1974.) Taking of property from the body of a person who is already dead is theft, not robbery. (*People v. McGrath* (1976) 62 Cal.App.3d 82, 86-88.) Taking property from an unconscious person is also theft when the intent to

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[30] The difference between grand theft and petty theft is determined by the value and nature of the property taken. (See e.g., §§ 484, 487, 488.) Two food stamp coupons possibly from Sigler's book were obtained from the Lorena Market: one worth $5, the other worth $1. (10RT 2039.) The parties stipulated that Joseph O'Brien would have testified that on December 29, 1998, he gave Sigler a $10 coupon book, containing a $5 coupon and a $1 coupon. (10RT 2065.) Thus, the value of the property taken did not meet the threshold amount for grand theft, which was $400. For purposes of discussion, Hardy will refer to the offense as theft.

take the property was formed after the person became unconscious. (Cf., *People v. Kelley, supra*, 220 Cal.App.3d at pp. 1367-1368.) The trial court erred by failing to instruct the jury on the lesser included offense of theft. Because this error was prejudicial, the judgment of guilt to count 2 should be reversed, the special circumstance finding of a robbery during the commission of a murder should be vacated, and the felony-murder conviction should be vacated.

B. Standard of Review.

Hardy incorporates the authorities requiring the de novo standard of review for instructional error set forth in Argument VIII, *ante*. Hardy also incorporates by reference the authorities cited in Argument VIII, that require reversal when conviction was based on an improper legal theory.

C. The Trial Court Had a Sua Sponte Duty to Instruct the Jury on Theft as a Lesser Included Offense to Robbery.

Under *Beck v. Alabama* (1980) 447 U.S. 625, 634 [100 S.Ct. 2382, 65 L.Ed.2d 392], the trial court had a duty under the federal due process clause and Eighth and Fourteenth Amendments to instruct the jury on all lesser included offenses. Due process requires an instruction on a lesser included offense when the evidence warrants it. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; *People v. Avena* (1996) 1 Cal.4th 394, 424.) The trial court also had a duty under the Sixth and Fourteenth Amendments, (*Sullivan v. Louisiana*

(1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182] [the Sixth Amendment requires the jury to find the facts which determine a defendant's guilt]), and Article I, sections 7, 15, 16 and 17 of the California Constitution, to instruct the jury on all lesser included offenses.

Additionally, as set forth in Argument VIII, *ante*, and incorporated fully by this reference, the trial court had a duty to instruct the jury on lesser included offenses in this capital prosecution to avoid violating the defendant's rights under the federal and California Constitutions.

The trial court had a *sua sponte* duty to instruct the jury on theft because the evidence raised a question of Hardy's guilt of only theft. *People v. Ramkeesoon, supra*, 39 Cal. 3d at page 351, explained the requirement for courts to give sua sponte instructions on lesser included offenses "is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence." A reasonable jury could have found Hardy guilty of the lesser theft offense, and not the greater offense robbery offense based on substantial evidence. (*People v. Valdez, supra*, 32 Cal.4th at p. 116.)

There was substantial evidence of theft. As set forth in Argument VIII, *ante,* Hardy was not guilty of robbery because the intent to take Sigler's property arose after she was either unconscious or deceased. (*People v. Frye, supra*, 18 Cal.4th at p. 956 [the defendant must have formed the intent to take

the victim's property prior to the victim's death in order to be guilty of robbery]; cf. *People v. Kelley, supra*, 220 Cal.App.3d at pp. 1367-1368 [affirming a robbery conviction of an unconscious person when the defendant rendered the victim unconscious for the purpose of perpetrating the robbery].) Only if Sigler was rendered unconscious for the purpose of taking her property can the robbery conviction stand. (*People v. Kelley, supra*, 220 Cal.App.3d at p. 1368.) It is wholly improbable that three young males would act together to render Sigler unconscious for the purpose of taking her food stamp coupons or clothing.

The evidence presented nothing from which the timing of the taking of the food stamp coupons could be reasonably inferred. The location of the food stamp booklet cover close to the building, and the distance from Sigler's body, did not inform the determination of when the coupons were taken. First, the booklet cover was found days on January 6, 1999, just over a week after the offenses on December 29, 1998. (10RT 2051.) The cover was paper, and easily could have been blown to the side of the building by wind, or moved there by animals or other people over the course of that intervening week.

Second, the prosecution's evidence showed Sigler died quickly after sustaining her injuries. It was not possible to determine exactly how long Sigler lived after the injuries. Her death was "rapid" - - within minutes.

(10RT 1964.) All injuries occurred within a short time. (10RT 1976.) It could not be determined whether Sigler lost consciousness while suffering her injuries. (10RT 1973.) Certainly, her neck and head injuries could have rendered her unconscious. (10RT 1974.) The facts surrounding the offenses support a reasonable conclusion that the taking of Sigler's property was incidental to the other offenses, occurring after their completion. The prosecutor's theory that the offenses occurred because Sigler had only $6 in food stamps, which angered her attackers, was speculation, and found no support in the evidence. (But see, 11RT 2356 [prosecutor's closing argument].) A more likely scenario was that while Sigler lay unconscious or dead, Hardy, Pearson and Armstrong gathered her clothing and other items, found the food stamp booklet, and took it. The absence of evidence about when the food stamp coupons were taken, along with the circumstances surrounding the other offenses, and that Sigler expired within minutes of suffering her injuries, was substantial evidence that only theft, not robbery occurred.

Third, the prosecutor's argument that Hardy participated in the robbery when, days later, he went to the market and spent the food stamps, was an improper legal theory for robbery. The robbery, if any, ended when the robber(s) reached a place of temporary safety. A robbery remains in progress

until the perpetrator has reached a place of temporary safety. (*People v. Wilkins* (2013) 56 Cal.4th 333, 340-341, 345 [felony murder liability continues throughout robber's flight from scene until place of temporary safety is reached]; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772.) The question of whether a defendant has reached a place of temporary safety is usually a question of fact for the jury. (*People v. Johnson* (1992) 5 Cal.App. 552, 559.) The test for whether the defendant has reached a place of temporary safety is objective. (*Id.*, at pp. 559-560.) By the time Hardy used the food stamp coupons at the Lorena Market, all participants had reached places of temporary safety. They rode the bus home, went about their activities, and were no longer fleeing or in hiding. (Cf., *People v. Ford* (1966) 65 Cal.2d 41, 57 [defendant burglarized residence, and later shot and killed a police officer; "it cannot be held that the homicide can be promoted to murder of the first degree on the theory that the homicide was committed in the perpetration of a robbery."].) This was not a situation where Hardy was fleeing while being pursued by law enforcement immediately after the crimes. (Compare, *People v. Salas* (1972) 7 Cal.3d 812, 823 [homicide committed during course of robbery where defendant was in "hot flight" and pursued by law enforcement within three minutes of the robbery and killing occurred six to seven minutes later].)

Initially the trial court did not instruct on second degree murder. However, the verdict form for count 1 required jurors to select either first or second degree murder. (3CT 597.) During deliberations, the jury asked for a definition of second degree murder referencing the verdict form. (3CT 590.) Thereafter, the trial court instructed with CALJIC No. 8.30, which told jurors, in pertinent part, that:

> If the felony was an enumerated felony then the murder would be first degree murder. All felonies alleged in this case are enumerated felonies. Stated another way, if you find the evidence is insufficient to prove deliberation and premeditation and you further find that the murder did not occur during the commission of any of the felonies listed in counts 2 through 8, then the murder would be of the second degree.

(2CT 584.) This instruction failed to address the verdict on count 1 if jurors were to find a lesser offense in counts 2 through 8. Jurors were not required to specify, or be unanimous, on the theory of murder. Thus, some jurors may have found the evidence was insufficient to prove deliberation and premeditation, and reached a guilty verdict concluding the murder occurred during a robbery (count 2) without having considered whether the alleged robbery was only a theft.

The evidence here contrasts with *People v. Castaneda* (2011) 51 Cal.4th 1292, and *People v. Gray* (2005) 37 Cal.4th 168. Each of those cases considered whether there was error in failing to instruct on theft as a lesser

included of robbery in a capital case. In each case, items of significant value were taken: in *Castaneda* a watch, ring and credit cards, and in *Gray*, coin collections and cash. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1331; *People v. Gray, supra,* 37 Cal.4th 168 at p. 219.) *Castaneda* rejected the argument that instruction on theft was warranted, concluding the evidence showed the defendant had multiple motives for killing the victim, including robbery, which could have coincided with the defendant's anger at the victim. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1332.) In *Gray*, the victim's house was ransacked and the property discovered missing. (*People v. Gray, supra,* 37 Cal.4th 168 at p. 219.) In both cases, this Court concluded there had been no evidence presented by either party, from which a jury could have found only theft. In contrast, the evidence presented in Hardy's case showed nothing from which an intent to take property could have been inferred before the commission of the other offenses. The prosecution presented Hardy's statement describing the encounter with Sigler from start to finish. At no point did he describe any taking of Sigler's property until the end of the encounter. He mentioned taking only clothing. His explanation of the initial encounter was that it began because Sigler made a racial slur. The ensuing verbal argument quickly became physical. Since it was the prosecution's burden to prove the requisite timing of the intent to take, and since the evidence

supported equally the inference of an after-acquired intent, the instruction on theft was required.

Further, the omission of instruction on the lesser included offense of theft increased the likelihood the jury would impose the death sentence, because the jury's finding on the robbery charge and special circumstance could be considered part of the circumstances of the crime. Had the jury found Hardy guilty only of theft, that basis for felony murder and the robbery special circumstance would also have fallen aside.

The rule is that the trial court does not have to instruct sua sponte on a lesser included felony that forms the basis for a felony murder theory, or as a special circumstance, when the felony at issue was not separately charged. (*People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Here, the felony at issue, robbery, was charged, and the state of the evidence required instruction on the lesser included offense of theft.

D. The Duty to Instruct on Theft Applied Equally Both to Felony Murder and the Robbery Special Circumstance.

The robbery felony-murder finding, and the robbery special circumstance finding, made Hardy eligible for the death penalty. This Court has held that a trial court does not have a *sua sponte* duty to instruct the jury on theft as a lesser included offense of robbery when robbery is alleged only

as the felony in a felony-murder prosecution, or alleged as a special circumstance for the death penalty. (*People v. Valdez, supra*, 32 Cal.4th at pp. 110-111; *People v. Cash, supra*, 28 Cal.4th at p. 737; *People v. Silva, supra*, 25 Cal.4th at p. 371.) The situation here, however, differs because robbery was also alleged as a separate offense, which triggered the duty to instruct on lesser included offenses not only for the charged greater offense, but also relating to felony murder and the special circumstance. Thus, the issue here, unlike in *Valdez, Cash*, and *Silva,* is how the court's sua sponte duty to instruct on a lesser included offense (theft) extends to a robbery special circumstance allegation and robbery felony-murder when the robbery is also a separately charged count.

Beck v. Alabama, supra, 447 U.S. 625, held the trial court's failure to instruct the jury on a lesser included offense raised by the evidence violated the defendant's right to due process of law and the Eighth Amendment prohibition against imposition of cruel and unusual punishment. (Id. at pp. 637-638.) The Court reasoned the failure to instruct on a lesser included offense enhanced the risk of an unwarranted conviction. (*Ibid.*) The same rationale applies to Hardy's case.

The lesser included offense at issue in *Beck v. Alabama* was felony-murder as a lesser offense of robbery-intentional killing. The lesser included

offense at issue in this case is theft as a lesser included offense of robbery. The due process clause, and the Eighth Amendment prohibition against cruel and unusual punishment, required instructions on the lesser included offense of felony-murder in *Beck v. Alabama* and apply equally to require instruction on the lesser included offense of theft in Hardy's case. Robbery is a more serious offense than theft. The jury found robbery true as a special circumstance and also found robbery was a felony supporting the felony-murder conviction. Hardy's commission of a robbery, not a theft, necessarily influenced the jury in its decision that death was the appropriate punishment. The trial court's failure to instruct the jury on the lesser offense of theft increased the likelihood that Hardy would suffer the death penalty because the jury should have been considering a lesser crime in its sentencing decision.

Hardy's right to a jury trial under the Sixth and Fourteenth Amendments, and Article I, Section 16 of the California Constitution, also required the trial court to instruct the jury on the lesser included offense of theft. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182] [Sixth Amendment requires jury to find facts that show defendant's guilt].) The jury was required to determine if Hardy's conduct amounted to only theft, not robbery.

The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v. Alabama, supra*, 447 U.S. at p. 632.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) By preventing the jury from considering Hardy's guilt of an offense that would have removed him from eligibility for the death penalty (at least with regard to the felony-murder conviction based on robbery or the robbery special circumstance allegation), the trial court's failure to instruct the jury on theft increased the risk that Hardy would erroneously be sentenced to death.

Robbery also was a charged offense in count 2 in the instant case. The rule that instruction on lesser included offenses is not required for felony murder and special circumstance allegations applies only when the greater offense was not a charged crime. (*People v. Silva*, *supra*, 25 Cal.4th at p. 371 [concluding that because robbery was not a charged offense, the trial court did not have a sua sponte duty to instruct the jury on theft as a lesser included offense of robbery under the felony-murder charge and robbery special circumstance allegation].) It would make no sense to require instruction sua

sponte on a lesser included offense where the greater offense of robbery carries a punishment of two, three or five years (§ 213), but require no similar instruction when the robbery, as felony murder or a special circumstance, operates to increase punishment to death. Here, because robbery was charged in count 2, the trial court had a sua sponte to instruct the jury on theft as a lesser included offense for the count, the felony-murder, and the special circumstance allegation.

Additionally, this Court should reconsider and reverse, or clarify, earlier decisions, and hold a trial court has a *sua sponte* duty to instruct the jury on lesser included offenses when the greater offense is alleged as a felony in a felony-murder charge or as a special circumstance. Due process required the trial court to instruct the jury on theft as a lesser included offense of robbery for the felony-murder charge and the robbery special circumstances. Felony-murder constitutes first degree murder (§ 189), and places the defendant in the class of defendants potentially eligible for the death penalty. (§190.2, subd. (a).) True findings to special circumstances make the defendant eligible for the death penalty. (§ 190.2, subd. (a)(1)-(22).) The same rationale in *Beck v. Alabama*, requiring instruction on a lesser included offense for a murder charge also applies to instruction on a lesser included offense for a felony-murder charge and a special circumstance allegation. "[W]hen the evidence

unquestionably establishes that the defendant is guilty of a serious, violent offense–but leaves some doubt with respect to an element that would justify conviction of a capital offense–the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) The trial court's failure to instruct the jury on theft for the felony-murder charge and the robbery special circumstance allegation erroneously increased the risk that Hardy would become eligible for, and receive, the death penalty. Hence, due process of law required the trial court to give theft instructions as a lesser included offense of robbery for the felony-murder charge and the special circumstances allegation.

Any decision by this Court holding that instructions on lesser included offenses are not necessary for predicate felonies under the felony-murder doctrine, or for special circumstance allegations, runs afoul of the procedure condemned by *Beck v. Alabama*. In *Beck v. Alabama*, the High Court found the Alabama death penalty statute unconstitutional because it deprived the jury of the option of finding the defendant guilty of a lesser offense which would have removed him from eligibility for the death penalty. (*Beck v. Alabama, supra*, 447 U.S. at pp. 636-638.) Similarly, decisions by this Court failing to require jury instructions on lesser included offense for predicate felonies under

the felony murder doctrine, and for special circumstance allegations, deprives the jury of the option of finding that the defendant committed a crime less than that charged in those allegations, which would make the defendant ineligible for the death penalty. This outcome cannot be reconciled with *Beck v. Alabama.*

Schad v. Arizona (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], is consistent with Hardy's position there is a right to a jury instruction on theft for the felony-murder charge and the robbery special circumstance allegation. In *Schad*, the defendant was found guilty of first-degree murder under theories of premeditated murder and felony-murder based on the commission of a robbery. The defendant argued he was entitled to a jury instruction on robbery as a lesser included offense of the felony-murder allegation. The trial court in *Schad v. Arizona* instructed the jury on the lesser included offense of second-degree murder. The defendant argued that *Beck v. Alabama* entitled him to a jury instruction on robbery. The *Schad* Court noted, "[o]ur fundamental concern in *Beck* was that a jury convinced that the defendant had committed some crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." (*Schad v. Arizona, supra*, 501 U.S. at p. 646.)

Schad concluded the concern in *Beck v. Alabama* was "not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." (*Schad v. Arizona, supra*, 501 U.S. at p. 647.) Here, in contrast, the trial court gave only one instruction on second degree murder, and did so only after the jury asked about the verdict form, which required the jury to select either first or second degree murder. The court then instructed with CALJIC No. 8.30. (3CT 584, 590, 597.) This instruction told the jury all enumerated felonies, including robbery, made the murder first degree. Thus, Hardy's jury did not have any meaningful option of convicting Hardy of a murder charge lesser to that of first degree murder. Hardy's jury essentially was in the position of finding him guilty of a crime that made him eligible for the death penalty, or finding him not guilty of any murder at all. Under these circumstances, the jury needed the option of finding Hardy committed a felony less than the category of felonies that triggered his eligibility for the death penalty.

The Eighth Amendment prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, also requires instruction on the lesser included offenses to greater offenses upon which a felony murder theory or special circumstance is based. The function of special circumstance findings is to narrow the class of defendants eligible

for the death penalty to the worst offenders. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [208 S.Ct. 546, 98 L.Ed.2d 568] [to pass constitutional muster under the Eighth Amendment, a capital sentencing scheme must genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder].) Section 189 sets forth an exclusive list of felonies that make a defendant guilty of first-degree murder death eligible. That list does not include theft. Similarly, the special circumstances listed in section 190.2, subdivision (a), that make a defendant eligible for the death penalty do not include theft. California's statutory scheme to narrow and determine the class of defendants eligible for the death penalty cannot perform the narrowing function required by the Eighth Amendment if the jury is precluded from considering whether the defendant committed a crime less than the crime which triggers the defendant's eligibility for the death penalty.

The rationale adopted by this Court not to require lesser included offenses for a felony murder charge and special circumstance allegation is flawed. *People v. Silva* cited *People v. Miller* (1994) 28 Cal.App.4th 522, and *People v. Memro* (1995) 11 Cal.4th 786, 888-890 (conc. & dis. opn. of Kennard, J.) for the proposition that the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant

only as to predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) In *People v. Memro*, Justice Kennard dissented from language in the majority opinion that could be interpreted as suggesting a defendant had the right to a jury instruction on a lesser included offense when the greater crime served only as a predicate offense for a felony-murder charge. The majority opinion concluded a lesser included offense instruction was not required because the evidence did not raise the defendant's guilt of that offense. (*People v. Memro, supra*, 11 Cal.4th at pp. 870-873.) Any language in *People v. Memro* from the majority opinion, or Justice Kennard's concurring and dissenting opinion, concerning instructions on lesser included offenses for predicate felonies under the felony-murder doctrine constitutes dicta. Neither opinion addressed how the trial court's failure to instruct on lesser offenses for predicate felonies in a felony-murder impacts the constitutionality of California's sentencing scheme under the Eighth Amendment.

In *People v. Miller, supra*, 28 Cal.App.4th 522, the defendant was found guilty of felony-murder. The jury found true a robbery special circumstance. The defendant argued the trial court erred by failing to instruct the jury on grand theft as a lesser included offense of robbery. The Court of Appeal rejected the argument because "the included offense doctrine applies

only to charged offenses." (*People v. Miller, supra*, 28 Cal.App.4th at p. 526.) *People v. Miller* was not a capital case, and therefore did not consider how due process and Eighth Amendment jurisprudence in the context of capital cases impacted the analysis. *People v. Silva* erred by relying on dicta in Justice Kennard's concurring and dissenting opinion in *People v. Memro*, and the opinion in *People v. Smith*, for the proposition that, in a capital prosecution, the trial court's sua sponte duty to instruct on lesser included offenses "does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine." (*People v. Silva, supra*, 25 Cal.4th at p. 371.) Neither case supported this broad conclusion.

In *People v. Cash, supra*, 28 Cal.4th 703, this Court revisited the question. The defendant in *Cash* argued the trial court's failure to instruct the jury on a lesser included offense of a greater offense that formed the basis for the felony murder charge, and the special circumstance allegation, violated his Sixth Amendment right to present a defense and Eighth Amendment right not to be subject to cruel and unusual punishment. This Court rejected the argument because "[d]efendant's claim does not fall within the limited situations in which such claims implicate rights under the federal Constitution. California requires a sua sponte instruction on lesser included charged offenses regardless of whether the case is a capital, or a noncapital, one. Therefore, the

unavailability of a lesser included offense instruction to an uncharged crime does not operate to weight the outcome in favor of death for defendants facing capital charges." (*People v. Cash, supra*, 28 Cal.4th at p. 738, citing *Hopkins v. Reeves* (1998) 524 U.S. 88, 96 [118 S.Ct. 1895, 141 L.Ed.2d 76], *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 and *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn.5.) This reasoning is flawed because the failure to give jury instructions for a greater offense that forms the basis for a charge of felony murder, and a special circumstance, tips the outcome in favor of imposition of the death penalty. The failure to give the instruction makes the defendant eligible for the death penalty when he otherwise would not be eligible for that punishment. Furthermore, because special circumstances are factors that make some murders worse than other types of murders, each special circumstance found true by the jury presumably plays some role in convincing the jury that death was the appropriate punishment.

Moreover, Hardy's situation differs from cases where there was no evidence to support a conviction on the lesser offense. (Compare, *People v. Castaneda, supra,* 51 Cal.4th at p. 1328 [concluding no substantial evidence of lesser included offense].) Here, there was evidence that Hardy possessed the victim's personal property after her death, but no evidence showed how, or when, that property came to be in Hardy's possession. The "when" is

important to robbery because the force or fear must have occurred for the purpose of the taking, and also the intent to take property must have preceded the application of force or fear. The evidence here, unlike in *Castaneda*, made theft equally likely, but the jury was never provided instruction to decide that question.

This Court's conclusion that lesser included offense instructions are not required for felonies alleged under the felony-murder doctrine, or as special circumstances, because "the included offense doctrine applies only to charged offenses," (*People v. Miller, supra*, 28 Cal.App.4th at p. 526), is irreconcilable with *Jones v. United States* (1999) 526 U.S. 227,[119 S.Ct. 1215,143 L.Ed.2d 311] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 1[24 S.Ct. 2531, 159 L.Ed.2d 403]. *Jones v. United States* considered the federal carjacking statute, which provided for three maximum sentences depending on the level of harm sustained by the victim: 15 years (no serious injury to a victim), 25 years ("serious bodily injury"), and life (if the victim died). The structure of the statute suggested bodily harm was a sentencing provision. The High Court concluded the degree of harm to the victim was an element of the crime. (*Jones v. United States, supra*, 526 U.S. at p. 232.) *Jones* reached this

conclusion in order to avoid reducing the jury's role "to the relative importance of low-level gatekeeping," (*Id.*, at p. 244), and noted its decision was consistent with a "rule requiring jury determination of facts that raise sentencing ceilings" in state and federal sentencing guideline systems. (*Id.*, at p. 251.)

In *Apprendi v. New Jersey*, the defendant pled guilty to several charges. The trial court enhanced the defendant's sentence by 10 years because it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or a group of individuals because of race. The issue was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (*Apprendi v. New Jersey, supra,* 120 S.Ct. at p. 2351.) *Apprendi* noted there was no historical distinction between an "element" of an offense and a "sentencing factor." Thus, "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition elements of a separate offense." (*Id.*, at p. 2359, fn. 10.)

In *Blakely v. Washington*, the Supreme Court concluded a Washington State enhancement statute which depended on findings of fact made by the trial judge was unconstitutional:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring*, *supra*, at 602, 153 L.ED. 2d 556, 122 S.CT. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483, 147 L.ED. 2d 435, 120 S.CT. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 153 L.ED. 2d 524, 122 S.CT. 2406 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 147 L.ED. 2d 435, 120 S.CT. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority.

(*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.)

United States v. Booker (2005) 543 U.S.220 [125 S.Ct. 738, 160 L.Ed.2d 621], further explained *Apprendi v. New Jersey* and *Blakely v. Washington*. *Booker* noted that under those decisions, any fact which impacted the defendant's maximum potential sentence constituted an element of a crime:

> The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.,* at 478, 120 S.Ct. 2348. As a

> matter of simple justice, it seemed obvious that the procedural safeguards designed to protect *Apprendi* from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.*, at 476, 120 S.Ct. 2348.

(*United States v. Booker, supra*, 125 S.Ct. at p. 748.)

Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], considered the constitutionality of the capital sentencing scheme in Arizona. In Arizona, the jury determined the defendant's guilt of first-degree murder. The trial judge then determined the presence or absence of aggravating facts and whether a judgment of death should be imposed.[31] In *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511], the Supreme Court had upheld the constitutionality of Arizona's sentencing scheme because the additional facts found by the trial judge were sentencing considerations and not "element[s] of the offense of capital murder." (*Walton v. Arizona, supra*, 497 U.S. at p. 649.) *Ring v. Arizona* reconsidered the holding of *Walton v. Arizona* in light of its decision in *Apprendi v. New Jersey*. The *Ring* decision noted, "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing

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[31] Under Arizona law, the aggravating facts included the defendant's criminal background as well as facts concerning the commission of the charged murder.

factor" is not determinative of the question, 'who decided,' judge or jury." (*Ring v. Arizona, supra*, 536 U.S. at pp. 604-605.) *Ring* thus concluded that, "[b]ecause Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)

The foregoing United States Supreme Court decisions eliminated the concept of a "sentencing factor" as it pertains to facts that must be found to determine the maximum sentence that can be imposed on a defendant. The aggravating factors in *Ring v. Arizona*, which the Supreme Court concluded had to be found by the jury, are the functional equivalent of a felony alleged to support felony murder or as a special circumstance. The Supreme Court decisions above require the felonies alleged as special circumstances, and under the felony murder charge, to be treated as elements of an offense. This Court's conclusion that instruction on lesser included offenses need not be given for such allegations because "the included offense doctrine applies only to charged offenses," (*People v. Miller, supra*, 28 Cal.App.4th at p. 526), is irreconcilable. The Fifth and Fourteenth Amendments right to due process of law, and the Sixth and Fourteenth Amendments right to a jury trial, as interpreted by Supreme Court decisions *ante*, require that special circumstance

allegations, and felonies alleged in connection with felony-murder, be treated as elements of an offense.

For the reasons above, this Court should reconsider and reverse or clarify its holdings in *People v. Valdez*, *People v. Cash*, and *People v. Silva* that jury instructions on lesser included offenses are not required for special circumstance allegations and felonies alleged under a felony-murder charge. Accordingly, the trial court erred by failing to instruct the jury on the lesser included offense of robbery for the felony-murder charge and the robbery special circumstance allegation.

E. The Error Was Prejudicial and Requires Reversal.

The trial court's failure to instruct the jury on the lesser included offense of theft violated Hardy's federal right to due process of law, right to a jury trial, and the Eighth and Fourteenth Amendments prohibition against cruel and unusual punishment. Hence, the judgment of guilt to count 2, the special circumstance finding of robbery, and the felony-murder conviction based on robbery, must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The trial court's failure to instruct the jury on theft violated Hardy's state constitutional rights because Hardy had a due process right to have the state follow its own laws and procedures. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The

violations of Hardy's state constitutional rights must result in reversal of count 2 unless those errors were harmless beyond a reasonable doubt.

The failure to instruct the jury on theft was not harmless beyond a reasonable doubt. The evidence of robbery was scant. What the evidence showed, at most, was possession of recently stolen property, with no indication of how, or when, the food stamp coupons were taken. Hence, the judgment of guilt on count 2, and the robbery special circumstance and the theory of robbery felony murder cannot stand. Because of the modification of the judgment as set forth above, the judgment of death also should be reversed.

XIV

REVERSAL ON COUNT 1, AND THE JUDGMENT OF DEATH, IS REQUIRED BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT MISSTATED THE LAW, BY FAILING TO INSTRUCT THE PROSECUTION HAD TO PROVE BEYOND A REASONABLE DOUBT THE ABSENCE OF UNREASONABLE HEAT OF PASSION OR PROVOCATION THAT RENDERED HARDY UNABLE TO DELIBERATE AND PREMEDITATE, AND THEREBY VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, AND RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The evidence showed Sigler made a racial slur at Hardy and his companions, using the inflammatory words "fuck you," and "nigger." This evidence was uncontradicted. Indeed, the prosecutor's primary evidence against Hardy was his own statement, which identified Sigler's use of the word "nigger" as the genesis of the initial confrontation. A white person's use of the word "nigger," when speaking to a black person, is extraordinarily inflammatory. "It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry.'" (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116, quoting

Swinton v. Potomac Corp. (9th Cir. 2001) 270 F.3d 794, 817 [ellipsis in original].) "Any person in the United States should be aware of the N-word. Ignorance could be very costly. Failing to recognize it as the signal of danger that it often is could well lead to injury, just as using it unaware of its effects and consequences could well cost a person his reputation, his job, or even his life." (Kennedy, *Lecture: The David C. Baum Lecture: "Nigger!" As a Problem in the Law* (2001) 2001 U.Ill.L.Rev. 935, 937.)

A reasonable interpretation of the evidence was that Hardy acted under subjective provocation, or unreasonable heat of passion, after hearing Sigler call him and his companions "niggers." Such subjective provocation can reduce first-degree murder to second-degree if it reduces the defendant's ability to premeditate and deliberate. Initially, the trial court did not instruct on second degree murder. Only after receiving the jury's question about the verdict form, which required jurors to make a finding whether the murder was first or second degree (3CT 590, 597), the trial court instructed with CALJIC No. 8.30, which was the only instruction that explained the difference between first and second degree murder to the jurors. CALJIC No. 8.30 instructed that second degree murder was unlawful killing with malice aforethought, "but the evidence is insufficient to prove deliberation and premeditation." (2CT 584.) There was no instruction on provocation. Instruction with only CALJIC No.

8.30 lessened the prosecution's burden of proof and denied Hardy his constitutional rights to due process, a fair trial, and to present a defense. (U.S. Const., V. VI. & XIV. Amends.; Cal. Const., art. 1, § 7.)

B. Standard of Review.

Hardy incorporates by reference the authorities cited in Argument VIII, *ante*, that require reversal when conviction was based on an improper legal theory. Hardy also incorporates from Argument VIII the standard of review for instructional error.

C. The Issue Is Cognizable on Appeal.

The issue is cognizable on appeal even though defense counsel did not object to the instruction, or request different instruction. Section 1259 provides:

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

This Court has applied section 1259 to review the correctness of jury instructions, despite the lack of an objection in the trial court. (*People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Further, a defendant's claim that an instruction misstated the law or violated his right to due process "is not the type [of error] that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.

7; see also § 1259.) Here, the question whether the jury instructions properly explained the relevant law on provocation is a pure question of law that requires no factual development below. This Court can decide the issue just as readily as the trial court based on the existing record. Further, any such questions of law must be determined de novo by this Court in any event. (See e.g., *Salve Regina College v. Russell* (1991) 499 U.S. 225, 231 [111 S.Ct. 1217, 113 L.Ed.2d 190].)

D. Applicable Legal Principles Required Additional Instruction on the Concept of Provocation.

1. Incendiary Racial Remarks Constitute Legal Provocation.

Under California law, words alone can constitute provocation. *People v. Barton* (1995) 12 Cal.4th 196, 201, explained, "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" *People v. Lee* (1999) 20 Cal.4th 47, 49, further explained, "Although section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,'the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation."

A verbal argument alone may constitute sufficient provocation to instill heat of passion even under the "reasonable man" standard for provocation necessary for a finding of the "heat of passion" version of voluntary manslaughter. (*People v. Valentine, supra,* 28 Cal.2d at pp. 137-138; *People v. Berry* (1976) 18 Cal.3d 509, 515, cited with approval in *People v. Beltran* (2013) ___Cal. 4th ___ [2013 Cal.Lexis 238, Slip. Op. June 3, 2013, p. 15. S192644]).) In *Valentine*, the jury was instructed that "neither provocation by words only, however opprobrious, nor contemptuous . . . or gestures without an assault . . . are of themselves sufficient to reduce the offense . . . from murder to manslaughter." (*People v. Valentine, supra,* 28 Cal.2d at p. 137.) On appeal, Valentine challenged the instruction as impermissible "judicial legislation engrafted upon the provisions of section 192."

In deciding *Valentine* and most recently in *Beltran*, this Court conducted an in-depth historical review and statutory analysis. The opinion concluded that an "actual injury" prerequisite for provocation appeared to have existed under the Crimes and Punishment Act of 1850, but was not included in the Penal Code when enacted in 1872. (See e.g., *People v. Valentine, supra,* 28 Cal.2d at p. 137.) The *Valentine* opinion also sought to reconcile this Court's own conflicting decisions. For example, *People v. Bruggy* (1892) 93 Cal.476, 481, had held "mere words" were insufficient provocation. *People*

v. Hurtado (1883) 63 Cal.288, 292, and *People v. Logan* (1917) 175 Cal.45, 48-49, conversely held words could be sufficient provocation.

Valentine applied the rule of statutory construction, and concluded that "the Legislature by deleting an express provision of a statute intended a substantial change in the law. [Citation.]." (*People v. Valentine, supra,* 28 Cal.2d at p. 142.) Accordingly, *Valentine* adopted the rule in *Hurtado* and *Logan* that mere words can be sufficient provocation. *Valentine* does not represent an outdated anomaly.

In *People v. Berry, supra,* 18 Cal.3d 509, the defendant was convicted of murder after the trial court omitted instruction on voluntary manslaughter. The defendant was married to a woman half his age, and his new wife left for Israel three days after the couple married. When she returned, the wife taunted her husband with her love for a man in Israel, whom she believed had impregnated her. The wife had intercourse with the defendant, but said it would be the last time because of her love for the man in Israel. The wife engaged in other sexual taunts and arguments, which ended with the defendant throttling her. In *Berry,* the Court noted its decision in *People v. Logan, supra,* 175 Cal. at pages 48-49, that *"it is left to the jurors* to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether

or not he did, commit his offense under a heat of passion." (*People v. Berry, supra*, 18 Cal.3d at p. 515 [emphasis in *Berry* original].) *Berry* also noted the Code required "no specific type of provocation." (*Ibid.*) Further, the *Berry* opinion also recognized that "evidence of infidelity by the defendant's paramour, taunts directed to him and other conduct," demonstrated the defendant had killed in "'wild desperation.'" (*Ibid.*)

People v. Brooks (1986) 185 Cal.App.3d 687, 694, noted that section 192 requires "no specific type of provocation," and whether provocation exists is a question of fact for the jury. In *Brooks*, the defendant killed Todd after being told Todd was responsible for killing the defendant's brother. At trial, the defendant argued that learning of his brother's murder was provocation sufficient to reduce murder to manslaughter. The trial court declined to instruct on voluntary manslaughter. *Brooks* held:

> A recognition that murder of a family member is legally adequate provocation for voluntary manslaughter would be consistent with previous decisions in this jurisdiction. Other cases have recognized the disclosure of infidelity of a wife (*People v. Berry, supra*, 18 Cal.3d 509), a quarrel over the performance of a car mechanic between a father and son (*People v. Edgmon* (1968) 267 Cal.App.2d 759), and even verbal provocation (*People v. Berry, supra*, 18 Cal.3d at p. 515), as legally adequate provocation. We cannot say that verbal provocation, blows struck in a quarrel, or disclosure of infidelity are legally more provocative than the murder of a family member.

> Since appellant did not actually see Todd murder his brother, the provocation for killing Todd might more properly be characterized as hearing from bystanders that Todd murdered his brother. A sudden disclosure of an event, where the event is recognized by the law as adequate, may be the equivalent of the event itself, even if the disclosure is untrue. (*State v. Yanz* (1901) 74 Conn. 177 [50 A. 37].) In [a] California case, citing *Yanz*, the court explained that where there is a reasonable belief in the information disclosed, the provocation is adequate. (*People v. Logan* (1917) 175 Cal. 45, 49 [].)

(*Id.* at pp. 693-694.)

Later case authorities have continued to recognize that words alone may constitute provocation. For example, when a wife who has been carrying on an affair says to her husband, in reference to her lover, "you go suck his penis," that can be sufficient provocation to justify reducing the husband's subsequent killing of the lover to voluntary manslaughter. (*People v. Le* (2007) 158 Cal.App.4th 516, 521, 526.) More recently, and in the gang context, this Court has held it is objectively, "reasonably foreseeable" that a gang challenge will result in the use of homicidal force. (*People v. Medina* (2009) 46 Cal.4th 913, 921.) Equally foreseeable is that a white person calling a black person "nigger" may result in the use of homicidal force.

Other jurisdictions have recognized that blacks suffering from various forms of pervasive racial prejudice may be particularly susceptible to provocation, and both the psychiatric and legal communities recognize the condition of Black Rage. The summary to this issue above noted use of the

word "nigger" "could well lead to injury . . . cost a person his reputation, his job, or even his life." (Kennedy, *Lecture: The David C. Baum Lecture: "Nigger!" As a Problem in the Law* (2001) 2001 U.Ill.L.Rev. 935, 937.) Black Rage as a psychological condition has been recognized since 1968. (Grier & Cobbs (1968) *Black Rage*.) Black Rage is "characterized by an uncontrollable rage precipitated by racism and unequal treatment." (Goldklang, *Note: Post-Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility* (Fall 1997) 5 Va.J.Soc. Pol'y & L. 213, 216.)

Racist provocation was recognized in American jurisprudence as long ago as 1847 in *Freeman v. The People* (1947) 4 Denio 9 [1847 N.Y. LEXIS 48].) Freeman, a black youth, was wrongfully imprisoned at age 16, beaten by white jailers, and, six months after his release, murdered a white family. Freeman's defense counsel argued that white society's mistreatment of Freeman had made him insane. (*Ibid*; Falk, *Article: Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television, Intoxication and Black Rage* (March 1996) 74 N.C.L. Rev. 731, 749.) A century later in *Fisher v. United States* (1946) 328 U.S. 463 [66 S.Ct. 1318, 90 L.Ed.1382], the United States Supreme Court considered the case of a black defendant convicted of murdering a white woman. Fisher worked as a janitor in a library. A white librarian called Fisher "a black

nigger," and he hit her. The woman began screaming, and Fisher killed her to stop her screaming. (*Id.* at p. 479.) The *Fisher* majority held the effects of racial oppression did not render Fisher insane. (*Id* at p. 471.) In separate dissents Justices Frankfurter and Murphy each commented on the effects of lifelong racial prejudice on mental state. Justice Frankfurter concluded the jury was improperly instructed on provocation, and reversal was required on that basis. (*Id.* at p. 490, dis. op. of Frankfurter, J.) He wrote, "Concededly there was no motive for the killing prior to the inciting 'you black nigger.' The tone in which these words were uttered evidently pulled the trigger of [the defendant's] emotions, and under adequate instructions the jury might have found that what these words conveyed to [the defendant's] ears unhinged his self-control." (*Id.* at p. 485, dis. op. of Frankfurter, J.)

United States v. Alexander (D.C. Cir. 1972) 471 F.2d 923, considered the defendant's defense that racial prejudice and oppression throughout his life caused him to react in an explosion of violence and bloodshed after a white man called him and his friends a "nigger bastard." (*Id.* at pp. 928-929.) The two defendants drew and shot revolvers leaving two white United States Marines dead, and another white Marine and white woman seriously wounded. (*Id.* at pp. 926, 928-929.) The defense was that the defendant's life of suffering racial prejudice left him with no other meaningful choice after

hearing a racial slur. (*Id.* at p. 960 (dis. op. of Bazelon, J.).) In a lengthy, split, per curiam decision, reflecting "the number and perplexity of the issues," the convictions for second degree murder were affirmed.[32] Lest it be viewed as a southern state phenomenon, the defendant raising the racial provocation theory grew up in the Watts section of Los Angeles. (*Id.* at pp. 958, 960.) In his dissent, Judge Bazelon noted that when the white Marine called the defendant a "black bastard," the defendant had "an irresistible impulse to shoot." (*Id.* at p. 957.)

Two years later, the Circuit Court of Appeals for the District of Columbia again considered a case of racial provocation where the black defendant was in a pool hall fight. Later in the day, he shot a white man playing pool, and then shot another white man. (*United States v. Robertson* (D.C. Cir. 1974) 507 F.2d 1148, 1150.) The Court of Appeals remanded, concluding the trial court should have received testimony in support of, and contradicting, an insanity defense since the experts could not agree. (*Id.* at pp. 1158-1161.) Following remand, Roberston refused to pursue an insanity defense, and was convicted of second degree murder and assault with intent to kill. (*Id.* at p. 1149; *United States v. Robertson* (D.C. 1977) 430 F.Supp. 444, 445.)

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[32] Three assault convictions for one defendant were vacated.

The foregoing case authorities and psychiatric literature confirm what common sense experience in America dictates: racial tensions remain high, and racial slurs and epithet are a sadly well traveled road to provoking violence.

2. The Instructions Failed to Explain the Relationship Between Provocation and First Degree Murder.

The jury instructions given were inadequate to inform jurors of the applicable legal principles governing the case. Murder is the unlawful killing of a human being "with malice aforethought." (§ 187, subd. (a).) There are two types of malice, express and implied. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102; § 188.) Express malice is the unlawful intent to kill. (§ 188; *People v. Blakeley* (2000) 23 Cal.4th 82, 87.) "Malice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Knoller* (2007) 41 Cal.4th 139, 143 [internal quotation marks omitted].) The prosecution bears the burden of proving that the defendant acted with malice. (*People v. Nieto Benitez, supra*, 4 Cal.4th at p. 112.)

Murder is of the first degree when it is "willful, deliberate, and premeditated," as well as when a number of other enumerated factors apply.

(§ 189.) Here, the prosecution proceeded on multiple theories, including that the murder was premeditated and deliberate, occurred during one of the enumerated felonies, was torture murder, or Hardy aided and abetted in the murder. (See e.g., 11RT 2358-2359 [prosecutor's closing argument].) If none of these theories applies, the offense was, *at most*, second-degree murder. (Cf., *People v. Nieto Benitez, supra*, 4 Cal.4th at p. 112.)

It is unclear which theory convinced any juror beyond a reasonable doubt. It is clear that the prosecution argued premeditation and deliberation. In order to support a finding of first degree murder based on premeditation and deliberation, "the People bear the burden of proving beyond a reasonable doubt that the killing was the result of premeditation and deliberation . . . ." (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) Thus, while second degree murder, or voluntary manslaughter, may be described by the presence of factors that negate malice, such as provocation, that does not make provocation an element of second degree murder, or manslaughter. Rather, when there is evidence of provocation, it is the prosecution that must prove beyond a reasonable doubt that the defendant did not act under the influence of one of these factors in order to convict him of murder. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 44 L.Ed.2d 508]; *People v. Rios* (2000) 23 Cal.4th 450, 462.)

Unreasonable heat of passion can reduce first-degree murder to second-degree. Almost seven decades ago, in *People v. Valentine, supra,* 28 Cal.2d 121, this Court reversed a first-degree murder conviction for instructional errors, because the trial court failed to instruct the jury to consider whether provocation reduced the offense from first- to second-degree murder. *Valentine* explained that provocation insufficient to reduce the murder to manslaughter "may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation." (*Id.* at p. 132; in accord *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294-1296 [defendant who is subjectively prevented from deliberating because of provocation is guilty of second-degree rather than first-degree murder, even if a reasonable person would not have been so precluded].)

People v. Padilla (2002) 103 Cal.App.4th 675, explained, and applied, the "unreasonable heat of passion" principle. There, the defendant challenged his first-degree murder conviction because the trial court had refused to admit evidence that he killed his cellmate while under the influence of a hallucination. (*Id.* at p. 679.) The Court of Appeal in *Padilla* explained that although the hallucination "failed the objective test" for provocation sufficient to reduce murder to manslaughter, "nothing in the law necessarily preclude[d]

Padilla's hallucination from negating deliberation and premeditation so as to reduce first degree murder to second degree murder, as that test is subjective." (*Ibid.*) Thus, the trial court committed reversible error by preventing the jury from hearing evidence on whether Padilla had killed under the influence of unreasonable but sincere heat of passion. (*Id.* at p. 680.)

More recently, in *People v. Beltran*, *supra*, this Court explained the proper analysis for provocation focuses on "the defendant's state of mind, not his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*People v. Beltran, supra,* ___Cal. 4th ___ [2013 Cal.Lexis 238, Slip. Op. p. 16 [italics in original].) Provocation exists when "the anger or other passion [is] so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene." (*Id.* at p. 17.) The use of the word "nigger" can trigger precisely this type of strong reaction that bypasses judgment.

Just as in *Fisher*, before Sigler called Hardy and his companions "niggers," "there was no motive for the [offenses]" but "[t]he tone in which these words were uttered evidently pulled the trigger of [Hardy's] emotions, and under adequate instructions the jury might have found that what these words . . . unhinged his self-control." (*Fisher v. United States*, *supra*, 328 U.S.

at p. 485 (dis. op. of Frankfurter, J.).) The prosecution bore the burden of proving the absence of provocation, and the instructions never told jurors this. Hardy is aware that *People v. Rogers* (2006) 39 Cal.4th 826, held instruction on provocation was a pinpoint instruction. (*Id.* at p. 878.) *Rogers* reasoned the trial court had no sua sponte duty to give the provocation instruction, unless it was requested by counsel and supported by the evidence. However, Hardy's argument here presents a different issue from the one in *Rogers*. *Rogers*, another capital case, discussed CALJIC No. 8.73, and held the instruction, which provided detailed instructions on how subjective provocation relates to premeditation and deliberation, was a pinpoint instruction that need not be given absent a defense request. However, the *Rogers* jury – unlike the jury here – was, in fact, instructed with the essential principle that a "sudden heat of passion or other condition precluding the idea of deliberation" could reduce the charge from first degree murder to second. (*People v. Rogers, supra*, 39 Cal.4th 826 at pp. 866-867; see also CALJIC No. 8.20.)

Accordingly, the trial court in *Rogers* fulfilled its duty "to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Blair* (2005) 36 Cal.4th 686, 744.) Under the procedural background in

Rogers, and in view of the instructions the *Rogers* jury did receive, giving an additional provocation instruction, such as CALJIC No. 8.73, would indeed have been a pinpoint instruction, because it would have directed the jury's attention to a specific part of the defendant's case. Here, in contrast, the jury was never instructed on the general principles of law raised by the evidence. The jury never heard the basic principle that it should consider whether subjectively experienced provocation rendered Hardy unable to deliberate, such that he might have been guilty of only second degree murder. For these reasons, *Rogers* does not control this issue.

Additionally, *Rogers* does not control because the issue here is different. Hardy argues that CALJIC No. 8.30 failed to correctly state the law because it did not include the requirement that the prosecution prove the absence of subjective provocation beyond a reasonable doubt. In contrast, *Rogers* considered only whether a separate, and additional, instruction on provocation was required to be given *sua sponte*. Cases are not authority for propositions not considered. (*People v. Barragan* (2004) 32 Cal.4th 236, 243.)

E. The Failure to Instruct Fully on the Effect of Provocation on Premeditation and Deliberation Was Prejudicial and Requires Reversal.

When a factual circumstance like subjective provocation negates an element of the crime, such as premeditation and deliberation, federal due

process requires the prosecution to bear the burden of proving the absence of that circumstance beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704; *People v. Martinez* (2003) 31 Cal.4th 673, 707 (conc. & dis. opn. of Kennard, J.); *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414; *Walker v. Endell* (9th Cir. 1988) 850 F.2d 470, 472.) Premeditation and deliberation are elements of first degree murder.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] Justice Thomas explained in his concurring opinion:

> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element. . . . One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

(*Id.* at p. 501 (conc. opn. of Thomas, J.).)

Justice Kennard likewise explained in her concurring and dissenting opinion in *Martinez* that, "[t]he elements of a crime are '[t]hose constituent

parts of a crime which must be proved by the prosecution to sustain a conviction.' [Citation.]" (*People v. Martinez, supra*, 31 Cal.4th at p. 707 (conc. & dis. opn. of Kennard, J.).) "To sustain a conviction for first-degree murder under California law, the prosecution must prove premeditation and deliberation. [Footnote omitted.] Accordingly, the absence of unreasonable heat of passion is an element of first-degree murder, in the sense of being an essential component of the elements of premeditation and deliberation necessary to sustain a conviction of that offense." (*Ibid.*)

The requirement for the prosecution to prove the absence of a particular mental state is commonplace in homicide law. (*Mullaney v. Wilbur, supra*, 421 U.S. at pp. 702, 704 [absence of heat of passion]; *People v. Rios, supra*, 23 Cal.4th 450, 454, 462 [absence of heat of passion and of imperfect-self-defense]; *People v. Najera* (2006) 138 Cal.App.4th 212, 227 ["absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt"]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083 [absence of self-defense is an element of murder]; *People v. Roe* (1922) 189 Cal. 548, 560-561 [same].) California law provides that unreasonable, subjective provocation, that precludes a defendant's deliberation, reduces first-degree murder to second-degree. (*People v. Valentine, supra*, 28 Cal.2d at p. 132.) A defendant who is subjectively unable

to deliberate because he has been provoked is guilty of second-degree murder even if a reasonable person would not have been provoked under the same circumstances. (*Ibid.*)

The foregoing authorities demonstrate that when, as here, the evidence showed provocation, then the prosecution has the burden of proving the absence of subjective provocation beyond a reasonable doubt in order to prove the premeditation and deliberation elements of first degree murder. When a factual circumstance, such as unreasonable heat of passion, negates an element of the crime, such as premeditation and deliberation required for first degree murder, the federal Constitution's due process guarantee imposes upon the prosecution the burden of proving the absence of that circumstance beyond a reasonable doubt. (*Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.)

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. (*People v. Blair* (2005) 36 Cal.4th 686, 744.) The trial court's obligation to instruct sua sponte "includes instruction on all of the elements of a charged offense . . . ." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334; *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Under the Fifth and Sixth Amendments to the United States Constitution, as applied to the states by incorporation into the Fourteenth Amendment, a criminal defendant

has a right to jury findings, beyond a reasonable doubt, as to all the elements of a charged crime, and to sua sponte instructions correctly defining the elements of the crime which make such a finding possible. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 [109 S.Ct. 2419, 105 L.Ed.2d 218]; *Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218]; *People v. Flood* (1998) 18 Cal.4th 470, 491-492.) This right includes instructions on an "aspect of an element" where the facts of the case put that aspect in question. (*People v. Harris* (1994) 9 Cal.4th 407, 425; *Yates v. Evatt* (1991) 500 U.S. 391 [109 S.Ct. 2419, 105 L.Ed.2d 218].)

In opening statement, Hardy's counsel conceded Hardy's participation as an aider and abetter to many, but not all, of the offenses, and argued Hardy did not personally commit the offenses. (10RT 1916-1917.) In summarizing the events leading up to the offenses, counsel focused jurors on Sigler's yelling the racial slur, "fuck you, niggers," as the triggering event precipitating the incident. (10RT 1119.) Trial evidence later showed Sigler had yelled the slur. (10RT 2102.) The racial slur, aggressive and highly provocative, was the genesis of the confrontation that ended so brutally and tragically. (10RT 2103; see also, discussion, *ante*.) Upon hearing Sigler call them "niggers," Hardy and his two black companions crossed the street, Hardy asking, "who the fuck you calling nigger?" (10RT 2103.) Despite this evidence, the jury was never

instructed on the basic, well-settled principle that even provocation that would not cause a reasonable person to act in the heat of passion can reduce the offense from first- to second-degree murder if the defendant acted in a heat of passion at the time of the killing. (*People v. Valentine, supra*, 28 Cal.2d 121, 130-132.) As demonstrated above, the facts of this case squarely put provocation into question. There was uncontradicted evidence of racial provocation. Therefore, the trial court failed to provide the jury with "complete and accurate instructions on all general principles of law relevant to the issues raised by the evidence." (*People v. Montiel* (1993) 5 Cal.4th 877, 942.)

"Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479-480; *People v. Cox* (2000) 23 Cal.4th 665, 676; *Neder v. United States* (1999) 527 U.S. 1, 18 [119 SCt 1827; 144 LEd2d 35].) Because the error in failing to instruct on the prosecution's burden of proving the absence of unreasonable provocation violated Hardy's rights under the federal Constitution, the standard of prejudice in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], should apply. This standard requires reversal

unless the prosecution can establish the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.)

The error here was prejudicial because the evidence supported provocation, and required that the jury be instructed on provocation and the prosecution's burden of proving the absence of provocation. "Provocation means 'something that provokes, arouses, or stimulates'; provoke means 'to arouse to a feeling or action [;]' . . . 'to incite to anger.' [Citations.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334; *People v. Ward* (2005) 36 Cal.4th 186, 215 ["provocation . . . is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state"].) Sigler's words, and their tone, were provocation sufficient to create a heat of passion response by Hardy. Under the evidence presented by the prosecution, a reasonable juror would have concluded Hardy was provoked by Sigler's yelling, "fuck you, niggers." But jurors were never instructed about the legal effect of provocation on first degree murder.

The failure of the trial court to instruct the prosecution had to prove the absence of provocation when there was substantial evidence of provocation, requires reversal of count 1 and the judgment of death.

XV

THE JUDGMENT OF DEATH, THE SPECIAL CIRCUMSTANCES FINDING THAT HARDY COMMITTED MURDER IN THE COMMISSION OF A KIDNAPPING AND A KIDNAPPING FOR RAPE, THE SECTION 667.61, SUBDIVISION (D) KIDNAPPING ALLEGATIONS TO COUNTS 4, 5, 6 AND 7, AND THE JUDGMENT OF GUILT ON COUNT 3, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The jury found true the special circumstance allegation that Hardy committed murder in the commission of a kidnapping and a kidnapping for rape. (12RT 2528; 3CT 597.) The jury also found Hardy guilty of the crime of kidnapping for rape in count 3, and found true the kidnapping allegations to counts 4 though 7. (12RT 2529; 3CT 600.) The trial court erroneously gave multiple instructions concerning how the jury should determine the asportation element of kidnapping. The instructions required jurors to consider "the totality of the circumstances attending the movement" when determining

whether Hardy committed kidnapping. (See e.g., 2CT 559, 573.) This was error because the offenses were committed on December 29, 1998, prior to *People v. Martinez* (1999) 20 Cal.4th 225, an opinion that overruled then-controlling California law. "[B]efore *Martinez* . . . , 'the asportation standard [was] exclusively dependent on the distance involved.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) *People v. Martinez* was decided on April 8, 1999, after Hardy committed the crimes. *Martinez* does not apply retroactively. (*People v. Castaneda, supra,* 51 Cal.4th at p. 1319.) Accordingly, the jury instructions for kidnapping impermissibly incorporated the additional factors allowable only after the decision in *People v. Martinez.* The instructions were therefore erroneous. Proper instructions would have allowed jurors to consider only the distance Sigler was moved in determining kidnapping. The prosecutor argued the erroneous definition of asportation to the jury. The erroneous instructions were prejudicial, and therefore the judgment of guilt on count 3, the true finding to the special circumstance allegations of kidnapping and kidnapping for rape, and the kidnapping allegations to counts 4 through 7 must be reversed. The judgment of death also must be reversed.

B. Standard of Review.

Hardy incorporates by reference the authorities cited in Argument VIII, *ante*, that require reversal when conviction was based on an improper legal theory. Hardy also incorporates from Argument VIII the standard of review for instructional error.

C. Summary of Charges and Instructions Involving Kidnapping.

The amended information charged Hardy with murder (§ 187, subd. (a)), and alleged the special circumstance that the murder was committed during a kidnapping, and during a kidnapping for rape. (§ 190.2, subd.(a)(17)(B); 2CT 396.) The information also charged Hardy in count 3 with kidnapping for rape. (§ 209, subd. (b)(1).) Enhancements to counts 4 through 7 alleged kidnapping allegations. (§ 667.61, subds. (a) and (d).)

There were no eyewitnesses, and the prosecution's proposed sequence of events, including the kidnapping, was reconstructed from the medical examiner's testimony, Hardy's statements to law enforcement, and distances measured in and around the place the victim's body was found.

The medical examiner's testimony relevant to the asportation element of kidnapping was limited to his opinion that: (1) the sexual assaults occurred before the head injuries (10RT 1977); and (2) some of the victim's injuries were consistent with having been thrown over a fence (10RT 1967). Hardy's

statements were unclear about the distance the victim was moved while alive. The evidence supported the prosecution's theory the victim's body was dragged after death. The fence and wall, over which the victim was taken, were about 35 feet from where the body was found. (11RT 2241, 2244.) The closest blood splatter to the body was about 12 feet away from where the body was found. (11RT 2249.) Portions of the body were covered with mulch, and the face and arms were buried. (11RT 2242.) The body was about in the middle rear of the commercial buildings. (11RT 2231.) The area where the body was found was well off Wardlow Road where the victim first encountered Hardy and his companions. (See e.g., 11RT 2231 [victim approximately 150 feet south of Wardlow Road].) Since the evidence concerning the distance of asportation was so uncertain, the prosecutor argued other factors showed asportation. She argued that the victim was moved to an area behind closed businesses where no one could hear her (11RT 2350); that after the movement, Hardy and his companions could do anything and would think they would not be caught (11RT 2350); and that the movement increased the risk to the victim (11RT 2375). She specifically told jurors to look at the totality of the circumstances in addition to the actual distance moved. (11RT 2377.) In final summation, the prosecutor stressed the three defendants had moved the victim to a secluded spot. (11RT 2415.)

The trial court instructed that if jurors found Hardy guilty of murder in the first degree, then they had to determine if one or more of the special circumstances was true. (2CT 553.) Two of the special circumstances identified were kidnapping offenses: "If you find [the] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s]: [are] true or not true: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object (a wooden stake), or torture." (2CT 553.)

The trial court did not specifically instruct on any kidnapping offense unique to the special circumstances. Rather, the trial court instructed on what constituted simple kidnapping, kidnapping for rape alleged in count 3, and kidnapping as an enhancement to counts 4, 5, 6 and 7, under section 667.61, subdivision (a). With respect to the asportation element of simple kidnapping, the trial court instructed:

> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is mor than slight or trivial is substantial in character, *you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement [increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes.* If an associated crime is involved, the movement also must be

> more than that which is incidental to the commission of the other crime.

(2CT 559 [emphasis added]; CALJIC 9.50 (1999 Revision).)

In connection with count 3 (kidnapping to commit rape), the trial court instructed on the asportation element of kidnapping as follows:

> 4. The movement of the person was for a substantial distance, that is, a distance more than slight, brief or trivial; and
>
> 5. The *movement substantially increased the risk of harm* to the person moved, over and above that necessarily present in the crime of rape itself.

(2CT 561 [emphasis added]; CALJIC 9.54 (1998 Revision).)

In connection with the section 667.61, subdivision (a)(2) enhancement to counts 4, 5, 6, and 7, that Hardy kidnapped the victim during the commission of those offenses, the trial court instructed on the asportation element of kidnapping in exactly the same manner it had for simple kidnapping, *ante*. (2CT 572.)

California law on the element of asportation for kidnapping changed in 1999 when this Court issued its opinion in *Martinez*. California recognizes two types of kidnapping: simple and aggravated. Section 207, subdivision (a), defines and proscribes simple kidnapping:

> Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or

county, or into another part of the same county, is guilty of kidnapping.

Section 209 proscribes aggravated kidnapping, i.e., kidnapping committed for certain enumerated crimes. (*People v. Martinez* (1999) 20 Cal.4th 225, 229, 232.) The asportation elements for simple and aggravated kidnapping differed.

People v. Daniels (1969) 71 Cal.2d 1119, 1139, adopted a two-part test for the asportation requirement for aggravated kidnapping. *Daniels* held aggravated kidnapping requires movement of the victim that: (1) is not merely incidental to the commission of the underlying crime, and (2) increases the risk of harm to the victim over and above that present in the commission of the underlying crime. *People v. Stanworth* (1974) 11 Cal.3d 588, 600, acknowledged the asportation element for simple kidnapping differs from asportation in an aggravated kidnapping. *Stanworth* explained, "where only simple kidnapping is involved, it is clear that the victim's movement cannot be evaluated in the light of a standard which makes reference to the commission of another crime." (*Id.* at p. 600.) *Stanworth* explained distance was the critical factor, and "the victim's movement must be more than slight [citation] or trivial [citation], they must be substantial in character to constitute kidnapping under section 207." (*Id.* at p. 601.)

Later, *People v. Caudillo* (1978) 21 Cal.3d 562, reaffirmed that distance was the defining aspect of asportation in a simple kidnapping. *Caudillo* focused solely on the distance the victim was moved, and found the distance of the asportation insufficient to prove simple kidnapping. (*Id.*, at pp. 573-574.) *Caudillo* discussed case authorities analyzing various quantified distances. In *Caudillo*, however, there was no measured distance of movement. Rather, the victim had been moved from her apartment to a storeroom on the same floor of the apartment building. (*Id.* at p. 573.) *Caudillo* rejected any factor other than distance in determining asportation. (*Id.* at p. 574.) That was California law until April 1999 when this Court issued the *Martinez* decision.

People v. Martinez, supra, 20 Cal.4th 225, overruled *Caudillo*, holding factors other than distance alone can establish asportation for simple kidnapping. The trier of fact, in determining whether asportation has been established for simple kidnapping, can consider "such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez, supra*, 20 Cal.4th at p. 237.) Federal due process of law, however, prevented

the retroactive application of its decision because it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." (*Id.* at p. 238.) Accordingly, the movement of the victim in *Martinez* was insufficient as a matter of law to prove asportation. (*Id.* at p. 239, citing *People v. Brown* (1974) 11 Cal.3d 784, 789 and *People v. Green* (1980) 27 Cal.3d 1, 67.)

D. The Issue Is Cognizable on Appeal.

As explained in Argument XIV, *ante*, the issue is cognizable on appeal even though defense counsel did not object to the instruction, or request different instruction. (§ 1259; *People v. Cleveland, supra*, 32 Cal.4th at p. 749; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 505-506.)

E. The Trial Court's Use of Post-*Martinez* Instructions Were Improper Because the Offenses Pre-dated *Martinez*.

The offenses were committed on December 29, 1998. *People v. Martinez* was decided on April 8, 1999. Thus, at the time of Hardy's offenses, the *only* factor jurors could consider in determining asportation, or its substantial nature, was distance. Two of the three instructions used to define kidnapping during the guilt phase told jurors they must consider "the totality of the circumstances," and then listed non-exclusive factors to consider other than distance. Two instructions on kidnapping told jurors the totality of the circumstances included, but were "not limited to, the actual distance moved,

or whether the movement [increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes." (2CT 559, 572.) The instruction for count 3 did not list multiple factors, or reference the "totality of the circumstances." The instruction for count 3 did, however, impermissibly identify "increased risk of harm to the person moved." Moreover, since the jurors received three different instructions on kidnapping, none of which specified it was to be used for the special circumstance finding, it is impossible to conclude on this record that jurors would not have applied the improper instructions.

Any instruction identifying a factor other than distance for determining asportation was improper in Hardy's case because the offenses occurred before *Martinez*, which cannot apply retroactively. (*People v. Morgan* (2008) 42 Cal.4th 593, 61-611 [reversing kidnapping special circumstance because the prosecution improperly relied on the increase risk of harm to the victim from movement to prove asportation].)

F. The Instructions Used to Define Asportation Violated Hardy's Federal and State Constitutional Rights.

The federal due process clause forbids judicial enlargement of a statute in a manner that is unforeseeable by reference to the law which had been expressed prior to the conduct in issue. (*Pierce v. United States* (1941) 314 U.S. 306, 311 [62 S.Ct. 237, 239, 86 L.Ed. 226] [judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness]; U.S. Const., 5th and 14th Amends.) *Bouie v. City of Columbia* (1964) 378 U.S. 347, 355 [84 S.Ct. 1697, 12 L.Ed.2d 894], held the South Carolina Supreme Court decision that expanded a trespassing statute to include not leaving premises after being asked to do so constituted an unlawful judicial expansion of a criminal statute in violation of the due process clause. Similarly, *People v. Martinez* concluded its expansion of the kidnapping statute could not be applied retroactively because of the due process requirement of notice. (*People v. Martinez, supra*, 20 Cal.4th at pp. 238-239.) The California Constitution also guarantees criminal defendant's due process of law. (Cal. Const., Article I, section 7.) The trial court's kidnapping instruction therefore violated federal and state due process of law.

The erroneous kidnapping instruction also violated Hardy's right to a jury trial under Sixth Amendment and Article I, section 16 of the California

Constitution. *Ring v. Arizona* (2002) 536 U.S. 584, 609 [122 S.Ct. 2428, 153 L.Ed.2d 556], held the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444], explained, "[T]he right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as requiring "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *United States v. Gaudin* concluded the defendant's Sixth Amendment right to a jury trial had been violated when the trial court, in a prosecution for making false statements, decided the issue of materiality rather than requiring the trier of fact to make that determination. Similarly, the erroneous kidnapping instruction resulted in the jury not properly finding the facts necessary to trigger Hardy's eligibility for the death penalty.

The trial court's erroneous kidnapping instruction also violated the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions. The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability in the fact finding process during the guilt phase of a capital prosecution. (*Beck v.*

Alabama (1980) 447 U.S. 625, 632 [100 S.Ct. 2382, 65 L.Ed.2d 403].) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in the guilt phase of a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) The jury determined Hardy's eligibility for the death penalty based on an aggravating factor found true because of instructional error. The jury also considered this aggravating factor in assessing whether the death penalty should be imposed. Hence, Hardy was found eligible for the death penalty, and given that sentence, in violation of the Eighth Amendment and Article I, section 17 of the California Constitution.

G. The Error Was Prejudicial.

The erroneous kidnapping instruction violated Hardy's federal constitutional rights. Accordingly, the true finding to the kidnapping special circumstances, the judgment of guilt on count 3, and the kidnapping allegations to counts 4 through 7 must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The instructional error was not harmless beyond a reasonable doubt. The *Chapman* test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct.

1884, 114 L.Ed.2d 432], quoting *Chapman v. California, supra,* 386 U.S. at p. 24.) "To say that an error did not contribute to the verdict is, rather, 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, supra*, 500 U.S. at p. 403.)

The jurors were not told they could consider *only* the distance in determining if asportation sufficient for kidnapping occurred. The information concerning distances was somewhat vague. The starting point of the asportation was established only by Hardy's multiple statements, none of which was clear on this point. The prosecution theory appeared to be based on a speculative distance beginning at around the place the chain link fence was bent and ending where the body was discovered. However, the evidence did not definitively identify any starting point for movement. Similarly, the forensic evidence showed the victim was beaten, dragged and left. (11RT 2249.) Portions of the body were covered by mulch. The face and arms were buried. (11RT 2242.) The victim died from head wounds, which were suffered at the end of the beating and would have been rapidly fatal. (10RT 1976- 1977.) Forensic evidence supported the conclusion the victim was moved after being beaten, when she most likely was dead, and such movement

could not have been attributable to asportation during kidnapping. In sum, the evidence did not establish a specific distance of asportation.

One of the prosecution's theories was the original criminal intent was robbery. The prosecutor argued Hardy and his companions were going to rob the victim, then discovered she had nothing except $6 worth of food stamps. (11RT 2356.) The prosecution's theory was this angered the assailants who then threw her over the fence, and decided to rape her out of public view. (11RT 2356.) Under the prosecution's own theory, some of the victim's movement - - at least to the fence or wall – could have been attributable to her avoiding contact with her robbers, not to any kidnapping.

The prosecutor's arguments also focused jurors' attention on the improper, pre-*Martinez* factors other than actual distance. This was because the prosecution's evidence failed to show any specific distance with certainty beyond a reasonable doubt. The prosecutor argued the victim was moved: (1) from the sidewalk to behind closed business (11RT 2350); (2) to where no one could hear her scream (11RT 2350); and (3) to where Hardy and his companions could do anything and not get caught. (11RT 2350). The prosecutor specifically, and improperly, told jurors to look at "the totality of the circumstances" in addition to the actual distance moved. (11RT 2377.) In final summation, the prosecutor argued the victim had been moved to a

"secluded spot." (11RT 2415.) These arguments exacerbated the erroneous instructions on asportation, and demonstrate the error was not harmless beyond a reasonable doubt.

People v. Morgan (2008) 42 Cal.4th 593, requires reversal of the kidnapping special circumstances, count 3, and the kidnapping allegations to counts 4 through 7. In *People v. Morgan*, the defendant dragged the victim out of a bar and murdered her. The victim's body was found approximately 245 feet from the bar. The prosecutor argued the defendant had kidnapped the victim based both on the distance he moved her and the increased risk of harm as a result of the movement. One of the prosecutor's theories was the victim had been moved forcibly a distance of as little as 90 feet. This Court noted its decision in *People v. Martinez,* which expanded the factors the trier of fact could consider to prove simple kidnapping to include an increase in the risk of harm to the victim. (*People v. Morgan, supra*, 42 Cal.4th at p. 610.) This Court concluded the prosecutor's closing argument improperly relied on the increased risk of harm to the victim to prove simple kidnapping because the crime occurred before *People v. Martinez* was decided. (*People v. Morgan, supra*, 42 Cal.4th at p. 611.) This Court also concluded the argument required reversal of the kidnapping charged and special circumstance because a distance of 90 feet was inadequate as a matter of law to prove a simple

kidnapping under the case law applicable prior to *People v. Martinez*. (*Id.*, at pp. 611-612.)

As in *People v. Morgan*, the prosecutor in this case extensively argued the increased risk of harm to the victim, and the totality of the circumstances relating to the movement. (11RT 2350, 2375, 2377, 2415.) The jury instructions also erroneously incorporated the increased risk of harm and totality of the circumstances theories. (2CT 559, 561, 573.)

The kidnapping special circumstances allegation was submitted to the jury based on an inadequate legal theory. It is impossible for this Court to determine whether the jury found the kidnapping special circumstance allegations or the kidnapping allegations to counts 4 through 7 true, or returned a guilty verdict on count 3 based on an adequate legal theory. (*People v. Morgan, supra*, 42 Cal.4th at p. 613 [reversing the kidnapping conviction and true finding to the kidnapping special circumstance allegation because Court could not determine if the guilty verdict rested on an adequate legal theory].) The true findings to the kidnapping special circumstance allegations, the true findings to the kidnapping allegations to counts 4 through 7, and the judgment of guilt on count 3 must therefore be reversed.

H. The Judgment of Death must Be Reversed.

For the reasons set forth in Argument XII, *ante*, and incorporated by reference, reversal of the kidnapping special circumstances requires reversal of the judgment of death. (*Brown v. Sanders*, *supra,* 546 U.S. 212.) The kidnapping special circumstances in this case applied a prejudicial label – kidnapping – to irrelevant conduct that should not have impacted whether the jury chose to sentence Hardy to death. (*Id.* at p. 224.)

Here, the two kidnapping special circumstances found true by the jury were elements of the crime of capital murder because those findings made Hardy eligible for the death penalty. (*Blakely, supra*, 542 U.S. at p. 328 [dis. opn. of Breyer, J.].) Reversal of any one of the special circumstances means the jury did not reach unanimous agreement, within the meaning of the Sixth and Fourteenth Amendments, about how Hardy committed the crime, or how he should be punished. The jury's belief that Hardy kidnaped the victim was especially prejudicial. The kidnapping was so closely interconnected to the other special circumstances that the jury's consideration of all the circumstances necessarily would have included kidnapping.

For the reasons above, the judgment of death must be reversed.

XVI

THE JUDGMENT OF DEATH, THE SPECIAL CIRCUMSTANCE FINDING THAT HARDY COMMITTED MURDER IN THE COMMISSION OF RAPE WITH A FOREIGN OBJECT, AND THE JUDGMENTS OF GUILT ON ALL COUNTS SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPERMISSIBLY FAVORED THE PROSECUTION BY INSTRUCTING 35 TIMES USING THE PROSECUTION'S UNDULY PREJUDICIAL CHARACTERIZATION OF THE FOREIGN OBJECT, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

A. Summary of Argument.

The operative charging document identified the weapon used in the offenses only once, in the personal use enhancement allegation. (§ 12022, subd. (b)(1); 2CT 402.) The weapon was described as a "stake/stick." (2CT 402.) There were two sources of evidence about the type of weapon used: Hardy's statements and the medical examiner. Hardy repeatedly used one word to describe the weapon: stick. (See e.g., 10RT 2148-2151, 2189-2191.) The deputy medical examiner described the victim's injuries as being consistent with the use of a stick, and testified a wood splinter was removed

from the victim internally. (10RT 1949, 1951-1952, 1954-1955, 1974-1975.) The stick used was never found. Instead, the prosecution introduced Exhibits 3 A, B, and C, portions of three road stakes of the type being used in the Caltrans work ongoing in the area. (10RT 2027.) The deputy medical examiner testified the victim's injuries were consistent with those exhibits. (10RT 1934.) However, the exhibits were not the weapon used. The detective who gathered the stake had simply picked up a random stake. (11RT 2251.) The detective did not believe it was the weapon used, and there was no evidence to the effect. (11RT 2251.) The stake exhibit was nothing more, or less, than similar to the weapon that could have been used. It was just for demonstration, but was not the instrument used in the crime. (11RT 2251.) Thus, began the prosecution's transmutation of a stick into a stake.

Hardy's only description of the stick used was an estimate of two of the three dimensions. He described the stick as about 36 inches long and an inch and a half wide. (11RT 2189.) Conceptually, the word "stake" is far more offensive and brutal than the word "stick." Yet, the trial court incorporated the prosecutor's word "stake" into the jury instructions 35 times. Doing so impermissibly favored the prosecution and prejudiced Hardy. (*People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"]; in

accord *Reagan v. United States* (1895) 157 U.S 301, 310 [15 S.Ct. 610, 39 L.Ed 709].) These instructions gave an unfair advantage to the prosecution and violated the balance required by United States Supreme Court precedent and due process. (*Wardius v. Oregon* (1973) 412 U.S. 470, 473 fn. 6 [93 S.Ct. 2208, 37 L.Ed.2d 82] ["state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights]; U.S. Const. 14th Amendment.)

B. Standard of Review.

Errors in jury instructions are questions of law which are reviewed de novo. (*People v. Guiuan, supra,* 18 Cal.4th at p. 569.) The standard is discussed more fully in Argument VIII, *ante*, and that discussion is incorporated fully by reference.

C. The Impermissibly Prejudicial Pinpoint Instruction Favored the Prosecution.

The weapon used against the victim was not introduced as evidence. The only evidence from a percipient witness who actually saw the weapon came from Hardy, who described it as a stick. Instead of omitting reference to the nature of the weapon by using a non-charged description, such as "wooden object," or using the less brutal word "stick," the instructions referred to the weapon 35 times as a "stake."

The instruction on natural and probable consequences used the word stake 11 times. (2CT 543-544.) The instruction defining murder used the word stake four times. (2CT 545.) The instruction on first degree felony murder used the word stake four times. (2CT 550.) The instruction on first degree felony murder, aider and abettor liability, used the word stake four times. (2CT 552.) The introductory instruction on special circumstances used the word stake twice. (2CT 553.) The instruction on special circumstances used the word stake twice. (2CT 555.) The instruction on unlawful penetration by a foreign object, acting in concert, used the word stake three times. (2CT 564-565.) The instruction on unlawful penetration by a foreign object by force or threats used the word stake five times. (2CT 566-567.) The instruction on the personal use of a deadly weapon used the word stake twice. (2CT 570.) The repeated use of the word "stake" was like a drumbeat of prejudice.[33]

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[33] By way of example, CALJIC No. 8.21 consisted of only two paragraphs, in which the word stake was used four times:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission of any of the following crimes: robbery, kidnap for rape, rape in concert, sexual penetration by a foreign object (**a wooden stake**) in concert, sexual penetration by a foreign object (**a wooden stake**), or torture, is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The longstanding law is well settled that jury instructions should be neutral statements of the law and avoid singling any particular piece of evidence for scrutiny by the jury. In *People v. McNamara* (1892) 94 Cal. 509, 513, the Court disapproved of "the common practice [of] select[ing] certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law."

More recently, *People v. Michaels* (2002) 28 Cal.4th 486, 539, held that instruction on specific evidence is improper, and should not be used because it is impermissibly argumentative. In *Michaels*, the defendant requested a special instruction that discussed specific evidence in the case. The defendant had requested instruction on the application of section 190.3, factor (k). The requested instruction would have told jurors to consider: whether the defendant had been emotionally impacted his father's sexual abuse of defendant's sister,

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> The specific intent to commit any of the following crimes: robbery, kidnap for rape, rape in concert, sexual penetration by a foreign object (**a wooden stake**) in concert, sexual penetration by a foreign object (**a wooden stake**), or torture and the commission of any such crime must be proved beyond a reasonable doubt

(2CT 550 [emphases added] [misplaced bracket in first paragraph appears in the original written instructions].)

his mother's rape, his sister's rape, whether defendant had been "motivationally impacted" by other his victim's sexual and physical abuse of her daughter, and whether defendant was impaired as a result of his overall psychological condition. (*Id.* at p. 538.) The trial court refused the instruction, but did instruct about the defendant's overall psychological condition. (*Ibid.*) This Court concluded the trial court's ruling was correct. *Michaels* explained the instruction improperly assumed facts that were not necessarily true. (*Id.* at p. 539.) *Michaels* cited with approval this Court's earlier decision in *People v. Earp* (1999) 20 Cal.4th 826, 886, again upholding the trial court's refusal to give a defense pinpoint instruction because the instruction invited the jury to "draw inferences favorable to one of the parties from specified items of evidence" and, therefore, was "argumentative."

In short, "[a]n argumentative instruction is one which is "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Sanders* (1995) 11 Cal.4th 475, 558.) The trial court's use of instructions that incorporated the word "stake" 35 times was the functional equivalent of an impermissible prosecution pinpoint instruction, and was improperly argumentative. As this Court long ago instructed, "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions . . . ." (*People v. Moore, supra,*

43 Cal.2d at pp. 526-527; see also *Reagan v. United States, supra,* 157 U.S. at p. 310.)

D. The Prejudicial Instructions Deprived Hardy of His State and Federal Constitutional Rights to a Trial by Jury.

The Sixth Amendment (applied to the States through the 14th Amendment) guarantees the right to trial by jury. A violation of the Sixth Amendment occurs when improper instruction deprives a criminal defendant of the right to a jury determination of a factual issue guaranteed by the right to trial. For example, the failure to instruct on an element of the offense, or an instruction directing the jury to find an element against the defendant, violates Sixth Amendment. (See *Fiore v. White* (2001) 531 U.S. 225, 228-229 [121 S.Ct. 712, 148 L.Ed.2d 629]; *Carella v. California* (1989) 491 U.S. 263, 265-266 [109 S.Ct. 2419, 105 L.Ed.2d 218]; *People v. Figueroa* (1986) 41 Cal.3d 714, 725.) The same constitutional violation occurs in situations where the jury is not given an opportunity to decide a relevant factual question. (*People v. Figueroa, supra,* 41 Cal.3d at p. 724; *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398.) Similarly, instructions that lessen the prosecution's burden of proof (or shift that burden to the defendant) violate the Sixth Amendment right to trial by jury and due process. (*Yates v. Evatt* (1991) 500 U.S. 391 [111 S.Ct. 1884, 114 L.Ed.2d 432, 446-450].)

The instructions adopting the prosecution's theory of the case by using the word stake 35 times were tantamount to instructions that directed verdicts against Hardy. The impermissible directing of a verdict or finding "includes perforce situations in which the judge's instructions fall short of directing a verdict but which nevertheless have the effect of so doing by eliminating other relevant factual considerations if the jury finds one fact to be true." (*People v. Figueroa, supra,* 41 Cal.3d at p. 724; *United States. v. Voss, supra*, 787 F.2d 393, 398 ["When the jury is not given an opportunity to decide a relevant factual question," the defendant is deprived of his right to a jury trial]; *United States. v. Rockwell* (3rd Cir. 1986) 781 F.2d 985, 991 [instructions that "improperly invaded the province of the jury to determine the facts . . . [were] sufficiently misleading to deprive [defendant] of a fair trial"].)

E. The Instructional Error Requires Reversal.

Vladimir Lenin famously said that a lie told often enough becomes the truth. More to the point in this situation, is a statement made often enough, whether or not true, becomes the truth. That was the effect of the jury instructions repeating the word stake *35 times*. The crimes were unquestionably brutal. Even so, the instructions recharacterizing the weapon - - a weapon that had never been found - - as a stake, not a stick, as Hardy had described it, was an improper pinpoint instruction that favored the prosecution.

The multiple repetition of the word stake in the instructions conjured even more heinous crimes and a more brutal ordeal for the Sigler. The instructions that repeated the prosecutor's terminology, without any basis in the evidence for doing so, served more as argument than instruction in this regard. As such, the instructions impermissibly drew the jury's attention to a specific piece of demonstrative evidence, that was not the actual weapon used, and likely bore little resemblance to it, and strongly favored the prosecution by doing so. *People v. Lucero* (2000) 23 Cal.4th 692, 729-731, found a proposed jury instruction in a capital case that would have identified particular types of evidence (deprived childhood, military service, fatherhood, good behavior in prison) improperly argumentative. That is because the instruction would have impermissibly invited jurors to draw inferences favorable to the defendant from specified evidence. The same impermissible effect was accomplished by the jury instructions used in Hardy's trial that incorporated the word "stake" 35 times.

Significantly, the "stake" was purely a prosecution invention. It was not even based on the actual weapon used. Hardy, the only witness to the events, described the instrument as a stick. As this Court recognized, the evil of an instruction that focuses on evidence, not theory, is that it is an impermissible judicial comment on the evidence, and the case, that

masquerades as a neutral statement of the law. (*People v.* (1988) 45 Cal.3d 1126, 1136-1137.) The instructions were clearly written in a way that improperly argued the prosecution's view of the evidence under the guise of jury instructions. The instructions required jurors to consider specific prosecution evidence in determining issues of guilt or innocence in violation of Hardy's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a jury trial, a reliable determination of guilt, and due process. By doing so, the instructions impermissibly reduced the prosecution's burden of proof.

The error was not harmless beyond a reasonable doubt. (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432]; *Chapman v. California, supra,* 386 U.S. at p. 24.) The repetitive use of the word "stake" in instructions that were supposed to be neutral statements of law cannot be considered "unimportant in relation to everything else the jury considered . . . ." (*Yates v. Evatt, supra*, 500 U.S. at p. 403.) These instructions permeated nearly every finding of fact the jury made and thereby infected the entire guilt phase with the prosecution's argument. Accordingly, the convictions and the judgment of death should be reversed.

PENALTY PHASE

XVII

THE JUDGEMENT OF DEATH SHOULD BE REVERSED BECAUSE, OVER DEFENSE OBJECTION, THE TRIAL COURT ADMITTED IRRELEVANT NON-STATUTORY EVIDENCE IN AGGRAVATION, AND THEREBY VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A REASONABLE DETERMINATION OF PENALTY.

A. Summary of Argument.

Under the guise of "rebuttal," the prosecutor introduced evidence: (1) Hardy participated in "jumping in" a gang member earlier in the night that Sigler was murdered; and (2) after the murder had a verbal argument about gangs while riding the bus. A gang expert explained that "jumping in" was the initiation of a new member into a gang. The new member was usually beaten for one to three minutes. (14RT 3084-3085.) Defense counsel objected to the evidence, but was overruled. The trial court concluded Hardy's participation in a "jumping in" was criminal activity and admissible. (13RT 2896.) The prosecutor admitted the evidence was "not rebuttal per se." (13RT 2887.) She wanted jurors to believe Hardy had a propensity for violence. She convinced the judge, and apparently convinced the jurors too. However, evidence of the "jumping in" was improper rebuttal, not criminal activity, irrelevant, and was nothing more than inflammatory evidence that played upon the general

public's fear of criminal street gangs in a case that was not gang related. The evidence also was improper under section 190.3, subdivision (b). Because of the highly prejudicial nature of gang evidence (*People v. Gurule* (2002) 28 Cal.4th 557, 653; *People v. Cox* (1991) 53 Cal.3d 618, 660; cf., *Old Chief v. United States* (1997) 519 U.S. 172 [117 S.Ct. 644, 136 L.Ed.2d 574], the improper gang evidence deprived Hardy of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments requiring reversal of the judgment of death.

B. Relevant Procedural Background.

During the defense penalty case, the prosecutor informed defense counsel that she planned to introduce evidence of gang activity in rebuttal. Defense counsel objected:

> MR. YANES: Your Honor, yesterday Ms. Locke-Noble indicated that she was planning on calling rebuttal witnesses, and she told me off the record that she was talking about putting on some evidence of some gang activity. And I would object to that as not being rebuttal, because it doesn't rebut anything. We didn't put on evidence that he was not in a gang or he wasn't a gang member; in fact, we put on evidence that he was.
>
> If that's what the rebuttal is, if that's what the evidence is, I don't think that's rebuttal.
>
> THE COURT: Was that part of your planned rebuttal?
>
> MS. LOCKE-NOBLE: Part of my planned rebuttal was to but [sic] on evidence of gang activity, and that evidence is that before he committed the crime - - and I mean the same day, a

few hours before, or less - - the defendant was involved in jumping someone else into his gang. I think that shows his violent tendencies, his violent activities. I think it also shows that he is not this wholesome, loving person that the defense is trying to portray.

I think that goes to the circumstances of the crime, which I could not have brought in during the guilt phase, and I think it's appropriate to bring in at this phase, although I could not yet bring it in, until after the defense presented some of their evidence. And yesterday that's what happened.

And in order to for me to even bring that in, I had to wait for the defendant to do that, I couldn't just bring it up on my own.

THE COURT: What does it rebut?

MS. LOCKE-NOBLE: It's not rebuttal, per se, in the strict technical sense, but it goes to the circumstance in aggravation that he was involved in gang activity prior to the murder, within hours of the murder itself. And that activity was involving violence, and he continued that activity through the time that he committed this murder. And then subsequent to the murder, when he got on the bus, he also, again, was engaged in gang activity and had a verbal confrontation with a rival gang member.

So all of that shows the picture that he is not this wholesome, loving person.

And there is case law that says that the People can present this type of evidence to show this, but we can't present it until after the defense puts this in issue.

THE COURT: I'm not sure that the defense has actually presented a picture of a wholesome, loving individual.

MS. LOCKE-NOBLE: Well, they put on the board the other day that he is a loving father, that he was involved in church activities, church plays, studied the bible, all that kind of stuff.

THE COURT: Right.

MS. LOCKE-NOBLE: And that's what I'm referring to.

THE COURT: But certainly there are gang members who are loving fathers, and who go to church, and who read and study the bible. So I think being a gang member or even being involved in gang activity is contrary to being a loving father and going to church.

MS. LOCKE-NOBLE: Well, additionally, there was also evidence presented that he's a follower and not a leader. Well, in this particular case he's the one that initiated the jumping in of this person, he's the one that made the phone call to another gang member and said, "hey, we just jumped him in and we're going to call him Playboy." So that shows that he was a leader.

It also shows that he was not acting under the dominion and control of another, but was initiating all of this activity.

THE COURT: Well - -

MS. LOCKE-NOBLE: I'm looking for a case.

THE COURT: In the presentation of the evidence yesterday, the only item that I could think of that would lend itself to rebuttal, was the follower.

MS. LOCKE-NOBLE: Okay. Well - -

THE COURT: So - -

MR. YANES: Well, as to that, unless counsel has some - - first of all, let me back up.

First of all, counsel could have brought this in as an aggravating factor, him being a gang member, in her case in aggravation, at the beginning of her case in aggravation, and that's when she should have done it. There was no order, no issue about that coming in, in the penalty phase. There was only a matter of that

not coming in, in the guilt phase. So counsel should have done that, if this is what she wanted to do as an aggravating factor in her case in chief in the penalty phase. So I think the opportunity is lost.

And, in fact, we came out and said he is a gang member, in our part of the case. There was nothing, certainly, to rebut. Now also, unless counsel has some different information that I have about this jumping in is that after they left Mr. Gmur's house, and after they'd been drinking, Pearson comes back to Mr. Gmur's house and asked if they could use his back room to jump in Chris. So that's not my client asking to do that, it's Pearson.

He says no. He said they all left and then he doesn't see what happens. And then he says about 20 minutes later, they come back and my client asked to use the telephone, and he hears him talking on the phone to a gang member named Capone. This is Mr. Gmur overhearing this, you know, this conversation, while my client is using the phone, allegedly. And he hears my client say, "Chris is cool. Put him on." And they said, "we're going to call Chris 'Playboy.'" And that's it.

He says - - Gmur says he doesn't - - that this person, Chris, did not have any obvious injuries or anything unusual about his clothing when they came back in, to evidence any kind of violence having been done to him. And then at that point they left Mr. Gmur's house.

So there is no - - Mr. Gmur did not see any violence. There is nothing saying that my client took any kind of leadership role, other than making a phone call, telling somebody something. That goes to the weight of the evidence itself.

And so clearly that evidence does not prove what counsel wants to prove and, therefore it should not be admitted.

But even before that, this should have been put in, in the People's case in chief, in the penalty phase.

THE COURT: Miss Locke-Noble.

MS. LOCKE-NOBLE: Well, the People cannot put in evidence of bad character until the defense puts in evidence of good character. The case of People versus Fierro, F-I-E-R-R, 1 Cal.4th 173, specifically addresses that issue.

And in that particular case the prosecutor attempted to cross examine the defense witnesses, the defendant's mother, and I believe family friends concerning his background with regards to gang activity. There were objections to that. The court allowed the cross-examination and the prosecutor indicated that he was prepared to have several detectives from the police department to come in and testify that the defendant was, in fact, a member of a street gang.

The court indicated that once the defense has presented evidence of circumstances admissible under factor k, which is what we have in this situation, prosecution rebuttal evidence would be admissible as tending to disprove any disputed fact that is of consequence to the determination of the action.

"A defendant who introduces good character evidence widens the scope of the bad character evidence that may be introduced in rebuttal.

The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines the defendant's claim that his good character weighs in favor of mercy.

Accordingly, the prosecutor, when making such a rebuttal effort is not bound by the aggravating factors or by his statutory pretrial notice of aggravating evidence." In this particular situation that's what we have.

In People versus Fierro the court further explained that the defendant offered substantial evidence and argument that he was a kind, loving contributive member of his community, regarded with affection by members and family. Once he placed his general character in issue, the prosecutor was entitled to rebut

this evidence or argument suggesting a more balanced picture of his personality.

That's what the People intend on doing with this evidence that we want to present. The witness that they want to preclude is Monte Gmur, again, concerning the issue of jumping in a gang member just right before he committed this murder, and then having the bus driver of the bus that he was on testify to the incident that occurred on the bus and, of course, his own statements with respect to that, that he made to the police.

Also, we have a gang expert to testify what "jumping in" means, and what they do when they jump in somebody, and what colors means to gang members. And those are some of the witnesses that the People intend on presenting in rebuttal, specifically with respect to the gang issue.

And the People would also cite the case of People versus Jennings, at 46 Cal.3rd 963, starting at page 981, which also indicates that the People have a right to present a more balanced picture of the defendant's personality. But we can't do that until after that's put into evidence, and it wasn't put into evidence until the defendant put on his case in penalty.

I couldn't present that. That would have been misconduct for me to do so, to present that in my case in chief, in the penalty portion of this trial. That would have been grounds, probably, for a mistrial. So I had to wait until counsel put that in issue. It's now been put in issue and will also be put in issue by the next witness he intends on calling.

(13RT 2886-2893.)

Defense counsel pointed out that if the prosecution had evidence of Hardy's involvement in a violent "jumping in," that could have been introduced. But there was no evidence whatsoever that this "jumping in" was violent. What the prosecutor proposed was the introduction of inadmissible

bad acts for the purpose of injecting the specter of criminal street gangs into a trial where it had no place. Counsel pointed out defense evidence showed Hardy was a gang member, and did not deny it. Counsel argued there was nothing to rebut. (13RT 2894.) Defense counsel was correct.

The prosecution introduced evidence that Hardy participated in a gang "jumping in" at Gmur's house before the charged offenses, and was involved in a gang-related, verbal argument on a bus after the offenses. This gang evidence sandwiched the charged offenses, and suggested a saturation into gang life that was an inaccurate, inflammatory, and unduly prejudicial portrayal. The prosecution called three rebuttal witnesses to present gang testimony: Monte Gmur, Brian McMahon and Terri Aitken.

Gmur testified Hardy, Pearson and Armstrong were at Gmur's home on December 29, 1998. (14RT 3036.) Gmur heard Pearson and Hardy debating, including Hardy's making the comment, "you ask him." (14RT 3037.) Then Pearson asked to use one of Gmur's room, saying they wanted to put Chris on the block to jump him in. Gmur refused. About 20 minutes later, Hardy, Pearson, and Armstrong left with Chris. (14RT 3042.) Later in the evening, Hardy used Gmur's telephone, and called "Capone." Hardy said they had just put Chris on, he was cool, and he was "Playboy." Then all four left. (14RT 3043.)

Terri Aitken, an MTA bus driver testified. He drove route 60 from Long Beach to downtown Los Angeles on December 29, 1998. He stopped near Wardlow Road and Long Beach Boulevard around 12:30 or 2:00 a.m. (14RT 3048.) He picked up three, black male "gangsters" at Willow, not Wardlow. The first one argued over the fare. Aitken told the man to pay, and reached for the phone. Then, the other two told the man to pay. (14RT 2049.) Aitken testified the three men argued among themselves about Crips and Bloods. (14RT 3051.) All three exited the bus at Florence. (14RT 2049.) Detective Brian McMahon testified differently from the bus driver. McMahon had interviewed Aitken on January 5, 1999. Aitken reported to McMahon that three black males, who had been drinking, had a dispute with a fourth black male about gangs. (14RT 3053, 3056.) Aitken was unable to identify any of the males from photographs. (14RT 3056.) McMahon also questioned Hardy about the incident on the bus. Hardy told McMahon the dispute was over Crips, Bloods, and gang colors. (14RT 3054.)

C. The Gang Related Evidence Was Improper Character Evidence and Improper Rebuttal.

The prosecutor articulated multiple reasons for admitting the gang evidence. Her first reason was to show Hardy's "violent tendencies," and "his violent activities," and also to show "he is not this wholesome, loving person." (13RT 2887.) The court rejected this approach, asking, "What does it rebut?"

and concluding the defense had not "presented a picture of a wholesome, loving individual." (13RT 2887, 2888.) The court noted the only thing to rebut was the defense portrayal of Hardy as a follower, not a leader. (13RT 2889.) The prosecutor's second reason for admitting the gang evidence was to show Hardy's bad character. (13RT 2891-2895.) However, the defense also never attempted to portray Hardy as having stellar or even good character. Defense counsel explained, "we're not saying that he was a person of good character." (13RT 2895.) On balance, that is the only fair assessment of the defense case during the penalty phase.

The gang evidence was improper under section 190.3. The gang evidence was unduly prejudicial and highly inflammatory. This Court has warned that gang evidence has a "highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Gurule* (2002) 28 Cal.4th 557, 653.) Section 190.3 contains the procedure for the jury's determining the penalty in a capital case. Subdivision (b) of section 190.3 makes admissible "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." To be admissible under subdivision (b), the evidence must show actual, attempted, or threatened force, or violence, against a person. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1081-1082 [upholding

introduction of evidence the defendant possessed altered, contraband razors while in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1152 [same concerning six loose razor blades and two safety razor heads where defendant threatened the jailer].) Unlike the possession of contraband and potentially dangerous weapons while in custody, the evidence here did not involve an offense, a disciplinary violation, any actual violence, or threat of violence. Moreover, anything that occurred with Chris occurred with his consent and apparent willing participation similar to other common initiations. Accordingly, the gang evidence was impermissible under section 190.3.

Section 190.3 superseded former California law. This Court explained the effect of the amended statute was no longer to provide jurors with a list guiding them on aggravating and mitigating factors, but rather to limit the factors that jurors properly may consider at all. *People v. Boyd* (1985) 38 Cal.3d 762, 773-774, explained:

> The change from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion requires us to reconsider the question of what evidence is "relevant to aggravation, mitigation, and sentencing." (§ 190.3.) Relevant evidence "means evidence . . . having any tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action.*" (Evid. Code, § 210; see *People v. Ortiz* (1979) 95 Cal.App.3d 926, 933 [157 Cal.Rptr. 448].) (Italics added.) Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those

> factors. Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation.

(*Ibid.*)

More recently, this Court held "[a] prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3." (*People v. Jones* (2003) 29 Cal.4th 1229, 1265, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 148, and *People v. Boyd, supra*, 38 Cal.3d at pp. 772-776.) Thus, *Jones* concluded that a lack of remorse expressed after commission of the crime is not a proper aggravating factor under the statute.

As the United States Supreme Court recently reaffirmed, "[m]ere membership in a gang is not a crime under California law." (*Messerschmidt v. Millender* (2012) ___ U.S. ____ [132 S.Ct. 1235, 1257, fn. 7, 182 L.Ed.2d 47], citing *People v. Gardeley* (1996) 14 Cal.4th 605, 623; in accord *People v. Castaneda* (2000) 23 Cal.4th 743, 748.) Previously, the High Court had held that mere membership in a criminal gang is not a crime. (*Scales v. United States* (1961) 367 US 203, 203, 205, 227-228 [81 S.Ct. 1469, 6 L.Ed.2d 782].) Gang membership is, however, highly inflammatory and prejudicial evidence. Gang evidence ought not be admitted when its probative value is minimal.

(*People v. Herandez* (2004) 33 Cal.4th 1040, 1047.) Here, the evidence was not even minimally probative, and it was improper under section 190.3.

As *Boyd* explained, a defendant may introduce evidence under section 190, subdivision (k), concerning character, history, or record, that supports a sentence other than death. However, that same leeway is not afforded to the prosecution under section 190.3, which strictly limits evidence to the framework in that section. (In accord, *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1] [discussing Eighth and Fourteenth Amendments and requirement to consider any *mitigating* factor relating to the defendant's character or record]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954; 57 L.Ed.2d 973] [same].)

Similarly, evidence from the bus driver that Hardy and/or his companions argued about the bus fare, and argued either amongst themselves, or with a fourth individual, about gangs did not satisfy the requirements of section 190.3, subdivision (b). Aitken's testimony at trial was that Hardy argued with his companions, Pearson and Armstrong. (14RT 3051.) McMahon testified that when he interviewed Aitken on January 5, 1999, the resulting report reflected Aitken had reported three black males had a dispute with a fourth about gangs. (14RT 3053.) McMahon also interviewed Hardy, who said there was a dispute about Crips and Bloods, and colors. (14RT

3054.) There was no indication the dispute was anything more than a verbal disagreement about gangs. Whether Hardy argued with his companions, or whether the three argued with a fourth individual, evidence of the argument was not "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, subd. (b).

There was a verbal argument, the subject of which was gangs. There was no evidence, or reasonable inference, of "the use or attempted use of force or violence or the express or implied threat to use force or violence." Furthermore, there was no allegation, or inference, that any one of the charged crimes was gang related. (Compare, *People v. Champion* (1995) 9 Cal.4th 879, 943, modified (1995) 10 Cal.4th 462a, cert. den. (1996) 516 U.S. 1049 [116 S.Ct. 714, 133 L.Ed.2d 668] [evidence of gang membership proper under § 190.3, subd. (a) where evidence supported inference murders were committed by defendant's gang, and gang membership was a circumstance of crime].) Indeed, the crimes had nothing whatsoever to do with any gang. Hardy's involvement with any gang was irrelevant to the penalty phase. While there was no actual evidence of "attempted use of force or violence or the express or implied threat to use force or violence," the specter of Hardy's gang involvement impermissibly suggested precisely that type of violence.

Evidence of gang involvement also was improper rebuttal, as the trial court initially appeared to recognize. *People v. Fierro* (1991) 1 Cal.4th 173, cited by the prosecutor, does not support the introduction of the gang induction evidence. (See 13RT 2891-2893.) While Hardy presented evidence explaining his background and family situation, he did not present evidence that his character was good, or deny he had some association with a gang. Indeed, Hardy presented evidence he was in a gang. In contrast, in *Fierro*, the defendant's mother not only testified about family background and the defendant's educational difficulties, but also testified how "defendant often helped his neighbors . . . , played Little League baseball, acted in school plays and accompanied his family on picnics." (*Id.* at p. 236.) The mother testified the defendant was "well behaved," close to his siblings, and "was loved" by the family, his wife and children. (*Ibid.*) As the trial judge in Hardy's case found, the defense did not present a picture that Hardy was a "wholesome, loving individual." (13RT 2888.) *Fierro* stands for nothing more than once a defendant has placed his allegedly good character into issue, the prosecution may introduce evidence tending to show bad character. The gang evidence the prosecutor presented in this case, however, did not rebut any defense evidence.

The prosecutor also cited *People v. Jennings* (1988) 46 Cal.3d 963, 981, as justifying the admission of the gang evidence. (13RT 2893.) *Jennings*

neither considered nor decided a similar question. Cases are not authority for propositions not considered. (*People v. Barragan* (2004) 32 Cal.4th 236, 243.) At issue in *Jennings* was the defendant's appellate challenge to the admission of evidence of other crimes, the prosecution of which was barred by the statute of limitations by the time of trial. *Jennings* simply held evidence of "past criminal conduct" is not precluded because it occurred outside the limitations period. (*People v. Jennings, supra,* 46 Cal.3d at p. 981.)

Evidence of gang involvement was not proper rebuttal. First, it did not rebut any evidence presented by the defense. Second, the evidence was improper propensity evidence. Third, the evidence did not show violent behavior. There was no evidence Chris had been injured in any way following the alleged jump-in. Rather, at most, he was merely initiated into the gang, with his consent. Gmur testified Pearson and Hardy were alone with Chris for about 20 minutes in Gmur's music room, then the three left together. (14RT 3042.) When they returned, there was nothing at all unusual about Chris. Gmur saw that Chris had not been injured in any way. (14RT 3043.) The prosecution's gang expert explained a "jumping" in usually involved a brief beating that lasted one to three minutes. (14RT 3084.) He had no evidence or knowledge about this specific "jumping in." In any event, the gang detective's description of the initiation was quite similar to college and military initiation

rites. The only difference is the organization joined, which is precisely why the prosecution introduced the evidence. While mere membership in a criminal street gang is not, and cannot constitutionally be, a crime (*Scales v. United States* (1961) 367 U.S. 203, 229 [81 S.Ct. 1469, 6 L.Ed.2d 782]), jurors would view associating with a gang and participating in an initiation as very negative. This was precisely the type of improper evidence the Supreme Court warned against in *Ake v. Oklahoma* (1985) 470 U.S. 68 [105 S.Ct. 1087, 84 L.Ed.2d 53]. *Ake* explained "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." (*Id.* at p. 79.) The evidence of a gang "jumping in", and an argument about gangs - - both on the night of Sigler's murder - - improperly persuaded jurors to impose the death penalty based on a "strategic disadvantage" to Hardy manufactured by the prosecution. This gang evidence forced Hardy to defend his actions as a gang member, and forced him either to accept the prosecutor's characterization of him as a gang thug, or to defend the artificial gang persona the prosecutor created.

Hardy was prejudiced by the evidence of his participating in Chris's induction into a gang. First, the prosecution's evidence of Hardy's involvement with gang activities on the same night as the offenses suggested

a nefarious temporal link between criminal street gangs and the charged crimes when, in reality, no such link existed. The charged offenses were not gang related in any way.

Second, effectively the last evidence heard by the jurors before they determined the penalty was about Hardy's involvement in an argument over gangs and a gang induction. Psychologically, this gang evidence that was presented last was more likely to stay with jurors as they began deliberations on the penalty.

Third, the prosecution's gang evidence was prejudicial even though Hardy had presented evidence of his past involvement with a gang. Hardy's gang evidence was of a different character. Hardy's stepfather had gangster friends (13RT 2919-2920), and so Hardy was exposed to gangs from a young age. Still, it was only after Hardy was molested by a trusted pastor that he became involved in a gang where he achieved some misplaced sense of worth (13RT 2941-2942) with peers who had previously excluded him (13RT 2933). Even so, despite having a gang affiliation, Hardy cooperated with law enforcement in the prosecution of a gang murder case, and provided critical evidence for the prosecution. (13RT 2734.)

Fourth, the prosecution's gang evidence masqueraded as rebuttal. This suggested to jurors that the evidence somehow discredited Hardy's mitigation

evidence. The prosecutor argued strenuously that the gang evidence should be introduced, and for good reason: she knew precisely how prejudicial it was. (Cf., *People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it."].)

The purpose of permitting the prosecution to present rebuttal evidence is to provide jurors with "a more balanced picture of the defendant's personality" (*In re Ross* (1995) 10 Cal.4th 184, 208) where the defendant has introduced evidence of good character. But this Hardy did not do so. *People v. Loker* (2008) 44 Cal.4th 691, explained that admissible rebuttal evidence is covariant with evidence of good character introduced by the defendant. *Loker* explained, this Court has "firmly rejected the notion that 'any evidence introduced by defendant of his "good character" will open the door to any and all "bad character" evidence the prosecution can dredge up. As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf.' [Citation.]" (*People v. Loker, supra,* 44 Cal.4th at p. 709.) "The scope of proper rebuttal is determined by the breadth and generality of the direct evidence." (*Ibid.*)

In sum, introduction of inflammatory gang evidence was prejudicial error. The Eighth and Fourteenth Amendments preclude consideration of invalid aggravating factors. (*Espinosa v. Florida* (1992) 505 U.S. 1079, 1080-1083 [112 S.Ct. 2926; 120 L.Ed.2d 854]; *Clemons v. Mississippi* (1990) 494 U.S. 738, 752 [110 S.Ct. 1441; 108 L.Ed.2d 725].) The Eighth Amendment requires "close appellate scrutiny of the import and effect of invalid aggravating factors . . . ." (*Stringer v. Black* (1992) 503 U.S. 222, 230 [112 S.Ct. 1130; 117 L.Ed.2d 367].) "Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' [citation] by placing a 'thumb [on] death's side of the scale' [citation] thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty' [citation]." (*Sochor v. Florida* (1992) 504 U.S. 527, 532 [112 S.Ct. 2114; 119 L.Ed.2d 326].) The gang evidence tipped the scale in favor of death. Admitting the gang evidence violated Hardy's rights to a fair trial, due process, effective assistance of counsel, and to a reliable determination of death eligibility, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Accordingly, the death penalty should be reversed.

XVIII

THE JUDGEMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT PRECLUDED CROSS-EXAMINATION OF A PROSECUTION WITNESS CONCERNING A PRIOR INCIDENT DURING WHICH HARDY'S SON SUFFERED A STABBING INJURY. THE ERROR DENIED HARDY THE RIGHT TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL, AND THEREBY VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT WITNESSES, PRESENT EVIDENCE, DUE PROCESS, A FAIR TRIAL, AND A REASONABLE DETERMINATION OF PENALTY.

A. Summary of Argument.

The prosecution called two officers who testified about a 911 call to Hardy's home in April 1996. Officers testified they discovered Hardy's young son with a stab wound to his left thigh. On cross-examination, defense counsel sought to introduce an officer's testimony concerning the results of the Department of Children Services investigation into the incident, and the Department's determination. The trial court sustained the prosecutor's relevance objection, and the defense was precluded from introducing the evidence. (12RT 2629-2630.) The exclusion of evidence that local authorities charged with the responsibility of protecting children had investigated the 1996 incident and taken no action was relevant, and admissible under the doctrine of completeness (Evid. Code, § 356) and as mitigation (§ 190.3, subd.

(k).) Excluding the evidence was error that violated the prohibition against cruel and unusual punishment, and requires reversal of the judgment of death.

B. Relevant Procedural Background.

The prosecution presented evidence during the penalty phase through two officers concerning an incident at Hardy's home on April 11, 1996, when Hardy's son was injured. (12RT 2624.) Jacinto Ponce was one of the responding officers. (12RT 2586-2587.) Ponce responded to a call reporting a child had been stabbed. (12RT 2587.) Ponce and his partner, officer Philip Cloughsey, arrived to find Hardy, who was 19 years old at the time, sitting on the porch holding his five-year old son. Hardy held a tissue to the back of the boy's left thigh. (12RT 2588, 2624.) Hardy was under the influence of alcohol with a .1 blood alcohol content. (12RT 2617-2618.) The boy was bleeding from a two-inch diameter puncture wound. (12RT 2628.) Ponce testified Hardy gave three different stories to explain the boy's injury: Hardy's keys stabbed the boy (12RT 2590); a knife in Hardy's pocket stabbed the boy (12RT 2592-2593); and the boy fell onto the kitchen table and was cut. (12RT 2613). Ponce, who was not an accident reconstructionist (12RT 2610-2611) thought the explanation was inconsistent with the wound. (12RT 2617.)

Cloughsey later spoke with the boy at the hospital as he received medical treatment. The boy reported he had wrapped his legs around Hardy,

and felt a stabbing. He screamed, and Hardy put the boy down, called 911, and held a tissue to the wound. (12RT 2629.) The following occurred during cross-examination:

Q: Who called 9-1-1?

A: The defendant.

Q: Okay.

A: He called 9-1-1, grabbed some Kleenex, put him on the back of his leg and held him on the front porch.

Q: Until the police came?

A: Until the police came.

Q: Did you contact the Department of Children Services?

A: Yes, I did.

MS. LOCKE-NOBLE: Objection, Your Honor. Irrelevant.

THE COURT: Well, that answer will stand. I'm not sure I see the relevance of anything else.

Go ahead.

MR. YANES: Let's venture another one, Your Honor.

Q: Were you aware of their determination of what happened?

MS. LOCKE-NOBLE: Objection, Your Honor. Irrelevant.

THE COURT: Well, sustained.

MR. YANES: I have no further questions.

(12RT 2629-2630.)

C. Cross-examination of the Officer to Show Lack of Action by the Department of Child Services Was Proper under the Doctrine of Completeness and as Mitigation.

Exclusion of evidence of the officer's knowledge about the results of investigation by the Department of Child Services violated the doctrine of completeness by permitting the prosecutor to introduce only a portion of the state's evidence regarding the 1996 incident when Hardy's son was injured. The doctrine of completeness most often is applied to writings to address the concerns that a fact-finder could be misled because only portions of a statement are introduced, and are taken out of context. (See e.g., Evid. Code, § 356; Fed. Rules of Evid., Rule 106.) The doctrine, however, is not limited to writings. Evidence Code section 356 applies the concept also to acts. Section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ." The section explains the purpose of the introduction of the complete act is admissible when "necessary to make it understood . . . ."

This Court explained the purpose of Evidence Code section 356 in *People v. Arias* (1996) 13 Cal.4th 92, 156. "The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or

writing, so as to create a misleading impression on the subjects addressed. [Citation.]" (*Ibid.*) Here, the introduction of the testimony from two officers created "a misleading impression" that Hardy was responsible for the injury to his son in 1996. In order to prevent this misleading impression, Hardy was entitled to present evidence showing that local authorities took no official action on the incident.

The only reasonable inference from the record was that Hardy was never prosecuted for the incident. The prosecutor presented no evidence of charges brought, or a conviction obtained. The only reasonable inference from the record also was that the Department of Children Services looked into the incident (12RT 2629 [officer contacted child protective services], and that no action was taken by authorities as a result of the incident. The officer knew the results of the investigation and the agency determination. He knew this, not as a matter of idle curiosity, but as part of his official duties as one of the responding officers. There was no evidence Hardy's son was removed from the home, or that any supervision was ordered. Certainly, had the boy been removed from the home because of Hardy, the prosecutor would have introduced that evidence. But Hardy was not permitted to question the officer about the results of the investigation, and the lack of official action. The result

was a miscarriage of justice. (Evid. Code, § 354, subd. (c) [erroneous exclusion of evidence sought during cross-examination].)

Additionally, exclusion of evidence of the officer's knowledge about the results of investigation by the Department of Child Services violated Hardy's right to present mitigation after the prosecutor had presented evidence suggesting Hardy stabbed his son. Section 190.3 lists, as the final factor to be taken into account in determining penalty, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) The factor discusses "any . . . circumstance," and is not limited to circumstances surrounding the crimes. This Court explained the factor "as an open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence." (*People v. Easley* (1983) 34 Cal.3d 858, 878.) In doing so, this Court recognized the mitigation encompassed included "any other 'aspect of [the]defendant's character or record . . . the defendant proffers as a basis for a sentence less than death.'" (*Id.* at p, 878, fn 10 [instruction on breadth of factor k mitigation].)

Precluding Hardy's cross-examination to reveal the results of the investigation, and authorities' inaction, created a prejudicial misconception. The prosecution presented a tragic, perhaps suspicious, accident as one where

Hardy had stabbed his son. Investigating law enforcement and child protective services, however, at the time, most certainly reached a different conclusion.

D. The Trial Court's Preclusion of Cross-examination Concerning the Department of Child Services Results of Investigation Violated the Prohibition Against Imposition of Cruel and Unusual Punishment in the Eighth and Fourteenth Amendments, and Article I, Section 17 of the California Constitution, and must Result in Reversal of the Judgment of Death.

"[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1], quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] [plurality op. of Burger, J.].) The risk of arbitrary and capricious application of the death penalty can be prevented "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." (*Gregg v. Georgia, supra,* 408 U.S. at p. 195.) "[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally

indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944].)

Mitigating evidence in a capital sentencing hearing need meet only the low threshold of "relevance" under the Evidence Code in order to be admissible. "[T]he meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence applies." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284 [124 S.Ct. 2562, 2570, 159 L.Ed.2d 384], quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369.]) Once the test for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." (*Tennard v. Dretke*, *supra,* 124 S.Ct. at p. 2570, quoting *Boyde v. California* (1990) 494 U.S. 370, 377-378 [110 S.Ct. 1190, 108 L.Ed.2d 316].) For the reasons explained below, the trial court's preclusion of cross-examination to present mitigating evidence, concerning the April 1996 incident involving Hardy's son, violated Hardy's federal constitutional rights and was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Article I, Section 17, of the California Constitution requires the jury to consider mitigating evidence in capital proceedings. The test is whether the penalty imposed was grossly disproportionate to the defendant's culpability in light of the nature of the crime, his personal characteristics, and background. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1016; *People v. Dillon* (1983) 34 Cal.3d 441, 477-482.) Assessment of Hardy's personal characteristics required the jury to consider the outcome of local authorities' investigation and determination concerning his son's injury. Defense counsel's cross-examination attempted to reveal this, and was mitigating evidence, which should have been admitted under the Eighth and Fourteenth Amendments, and Article I, Section 17. Once the prosecution introduced evidence tending to show Hardy had injured his son, Hardy was entitled to present evidence through cross-examination that the injury was determined to not warrant further action of any kind - - either penal or administrative. Precluding the cross-examination, however, left jurors with an incorrect impression. Jurors decided to impose the death penalty based not only on the crimes, but also based on the facts and circumstances of Hardy's life. Inflicting injury on a young child is very inflammatory evidence that Hardy was prevented from fully rebutting or explaining.

Based on the foregoing, the judgment of death should be reversed.

XIX

THE PROSECUTOR'S USE OF DIFFERENT AND WHOLLY INCONSISTENT THEORIES AT THE PENALTY PHASES OF THE SEPARATE TRIALS OF HARDY AND HIS SEVERED CO-DEFENDANT KEVIN PEARSON VIOLATED HARDY'S TRIAL AND DUE PROCESS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ALSO RESULTED IN A VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRING VACATION OF THE DEATH PENALTY SENTENCE.

A. Summary of Argument.

"He is the leader." (14RT 3144, line 1.) Those were the prosecutor's words describing Hardy's role, and in support of the death penalty. Yes, according to the prosecutor, Hardy was behind it all, "He was the leader in this case." (14RT 3146, lines 12-13.) Yet, in co-defendant Pearson's later trial, again arguing for the death penalty, the same prosecutor argued: "The defendant was the leader." (20RT [Pearson][34] 4891, line 15.) "He was the leader." (20RT [Pearson] 4892, lines 12-13.) Only in Pearson's trial, the defendant to whom the prosecutor referred as the leader was Pearson, not Hardy. Indeed, at Pearson's trial, the prosecutor expressly argued that Hardy was under the control of Pearson, who was Hardy's leader. She argued Hardy

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[34] Under separate cover, Hardy requested this Court to notice judicially the court records in *People v. Pearson*, including the transcripts. Hardy cites to those transcripts herein with the notation "Pearson."

"stopped what he was doing because [Pearson] was the leader." (20RT [Pearson] 4891-4892.)

The prosecutor's use of inconsistent theories of leadership to exaggerate Hardy's role in the offenses and persuade the jury to select the death penalty violated Hardy's trial and due process rights under the Sixth and Fourteenth Amendments, and violated the Eighth Amendment prohibition against cruel and unusual punishment.

B. The Prosecution's Inconsistent Theories at the Penalty Phase Trials of Separate Defendants in Hardy's Case.

During the penalty phase, Hardy presented evidence that he was a follower, not a leader, and therefore not the prime mover behind the crimes. Defense counsel argued in his opening statement that Hardy suffered from a mental disorder, birth defects and major learning disabilities. (12RT 2716-2717.)

James Johnson, one of Hardy's former mentors and employers met Hardy when he was about 12 or 13 years old. (12RT 2752.) Johnson was Hardy's instructor. During the time Hardy was Johnson's student, and later as an employee, Hardy did only what he was told. (12RT 2753.) Hardy lacked initiative on his own. (12RT 2754.) When Hardy worked for Johnson, Johnson tried to get Hardy to take the initiative. (12RT 2756.) But Hardy was more a follower than a leader. (12RT 2756.)

Tiyarie Felix, the mother of Hardy's children, testified Hardy was a follower. (13RT 2828.) For example, Hardy followed Chris Armstrong, his half-brother, into gang activities. (13RT 2828.) Hardy was a follower, never a leader except with his children. (13RT 2828.)

Carl Osborn, Ph.D., a forensic psychologist, evaluated Hardy. (13RT 2906-2908.) Dr. Osborn obtained information from multiple sources. (13RT 2909-2910.) Dr. Osborn reached three conclusions relevant to sentencing, including that Hardy participated in the offenses while being dominated by a co-defendant. (13RT 2911.) Hardy's intelligent quotient (I.Q.) tested at 83, which was "pretty weak." An I.Q. of 100 is normal, 70 represents mental retardation. Hardy's I.Q. of 83 places him in the thirteenth percentile, which means 87 percent of people are more intelligent than Hardy. That means about four out of every five people are smarter than Hardy and can trick Hardy. (13RT 2943.) Counsel specifically asked Dr. Osborn about Hardy's ability to function as a leader:

> Q: Let me ask you something. What about for being a leader or follower, does it have an effect on that to have a low IQ?
>
> A: Sure, to the extent that the clever [lead] the not so clever.
>
> Warren is in the latter group, and when I say clever, and I don't mean intelligence quotient, a smart person, there are [a] lot of different smarts, there are street smarts. In the street environment, you got to have horse power and Warren doesn't

have it. When it comes . . . down to it when you put Warren in a complicated, time pressured situation, he is in big trouble.

(13RT 2944.) Dr. Osborn explained Hardy dropped out of the tenth grade. (13RT 2947.)

The defense presented expert opinion evidence from Dr. Osborn tending to show, under factor G, that Hardy was dominated by one of the co-defendants. Defense counsel asked, "Would you be very specific about why [you] drew the second conclusion . . . that he was dominated by a co-defendant?" Counsel further explained the question:

> Q: In other words, a follower-type thing. What factors do you contribute [sic] to that opinion or do you base that opinion on?
>
> A: Let me spell out my data for it. If you would - -
>
> MS. LOCKE-NOBLE: Objection, Your Honor, that wasn't the question asked.
>
> THE COURT: Well, I think it may fairly be within the question, so go ahead.
>
> THE WITNESS: What I am trying to do is give the jury an idea of how I drew this conclusion from various sources of information.
>
> As a matter of fact, let me quote what I have down in my notes. "People who know Warren say that he is a follower, not a leader."
>
> Pastor Scales, not the pastor who molested [Hardy], I want to make this clear. A different pastor who knew him later in life. This is what Pastor Scales said. This is a quote. "The step-father was an ogre to the defendant. The defendant needed someone to hang on to. He therefore got into gangs." And in

> capital letters, "Warren was always a follower." So this from Pastor Scales.

(13RT 2952-2953.) Osborn continued:

> Mr. Johnson said James [Hardy's stepfather] saw Warren as a follower, not a leader. He would attach himself to others in the program. He definitely needed to be led. Tyriea Felix said, "Warren is a big time follower and feels he has to prove himself to people."
>
> The desire and the urge to fit in, to be part of something is desperate in Warren. This is clear from his entire life history. It is still true about him. I'm sure he doesn't like hearing this, but I believe it strongly to be true.
>
> The only structure and family that Warren has is gang related. And while he makes a good show of things being cool and being tough, the criminal activity that I know that he was involved in before, he was an "also ran." He was with other guys who basically pointed out what to do and told him what to do.
>
> Based on the information that I have about this crime, that was also his part here, and that's what he does. He does what he is told. He will stand up and he is down with it, as they say, but he does what he is told. And I have no instances in any of the information that I have about Warren over many years of him being involved in a sex crime.

(13RT 2953-2954.)

The foregoing evidence of Hardy's habitual and lifelong nature as a follower was significant enough to the prosecutor that she addressed it during argument, and averred Hardy was in a leadership role vis-a-vis the two co-defendants. The prosecutor derided Dr. Osborn's opinion that Hardy was a follower:

> You have to decide whether or not you believe the opinion of Dr. Osborn, who based that opinion only on hearsay. [¶] . . .[¶] It said on that chart that he was a follower. He was a the oldest. He bought alcohol. Kids looked up to him. He has a deep clear voice. What did Dr. Osborn say? What was the best part of his testimony? He sounds like a guy three times his size. That's a command that you can do with your voice. You can make somebody believe in you and do what you want them to do with a voice. He can command others to follow him. He is the leader.

(13RT 3142-3144.) The prosecutor continued her attack on the defense theory that Hardy was a follower, not a leader:

> Factor I, the age of the defendant at the time of the crime. He was 22 at the time he committed this crime. **He was the oldest.** Alone this particular factor has no meaning, but in conjunction with Factor J, it makes sense.
>
> So let's talk about Factor J, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. It wasn't. **He was the leader in this case. He was the oldest. He was the big brother.** He bought alcohol for others who were younger than him and not yet 21. He gave the alcohol to his brother Jamelle and to Kevin Pearson.
>
> The defendant was up close and personal in these crimes he bit Penny twice. **The defendant initiated this violent attack.**
>
> The defendant collected all the evidence of the crimes. The victim's clothing, the wooden stake. He made sure that everything was collected. And even after that he had the others, Kevin Pearson and Jamelle Armstrong, stay at his home after the crimes. He wanted to make sure they did not go anywhere and start talking. **He want[ed] to keep a rein on them. He was the leader. He was in command. He wanted to make sure he had control over them.** He had the clothes they wore that

> night. He kept them. And his voice means business. When he speaks in that voice, you know he means what he is saying.

(14RT 3146-3147 [bold emphasis added].)

So in the prosecutor's words, Hardy was the leader. But later, in the penalty phase of Pearson's trial, the same prosecutor argued Pearson, not Hardy, was the leader. At Pearson's trial, the prosecutor focused the jury's attention on Factor J,[35] and argued Pearson was *the* defendant responsible for gathering and destroying evidence, and that Pearson controlled Hardy:

> It was [Pearson's] idea to destroy any fingerprints by rolling the victim down the hill. He used his shirt to wrap it around her waist and roll her in that mulch so that he could remove the fingerprints.
>
> It was [Pearson's] idea to collect all the incriminating evidence, her clothing, he was worried about the shoe, the stake, all of that was collected up. And [Pearson] was the one that worried about it. **He was the one that was in control. He was the one directing it.**
>
> [Pearson] made sure that the bus driver did not call the police. He was the one that made sure things ran smoothly until they got to Hardy's house.
>
> [Pearson] made sure that Hardy stayed under his control so the police would not be called, and he would not be caught. He was the first one to spend his share of the loot. He bought that black

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[35] Factor J states one factor jurors should consider when deciding the penalty is: "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." (§ 190.3, factor. (j).)

> and mild. Jamelle [Armstrong] got [sic] gave him the money. They got six dollars, two dollars a person and he wanted that black and mild cigar, a smoke after sex.
>
> He said, "we killed a white woman." This is a factor for you to take into consideration.
>
> [Pearson's] participation was not relatively minor. He was a major participant.

(20RT [Pearson] 4890 emphases added] [Hardy has requested this Court to take judicial notice of the records in Pearson's trial].)

Later, the prosecutor focused the jury on Factor G.[36] The prosecutor argued:

> Factor G. Whether or not the defendant acted under extreme duress or under the substantial domination of another person. **The defendant [Pearson] was the leader.** He was looked up to by other people. The defendant was Scrappy Capone of the Capone Thug Soldiers.
>
> The defendant [Pearson] asked Monte if he could put Chris on the block and him jump [sic] into the gang of C.T.S., Chris what is that? Beating someone up. A very short time before Penny was murdered there he is engaging in violent activity. What is his mindset.
>
> The defendant [Pearson] was bigger than Warren [Hardy] and he was about the same size as Jamelle [Armstrong]. The defendant immediately participated in the robbery. The defendant was [sic] first one to rape the victim. And how do we know that, because he told Warren [Hardy] that was disgusting,

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[36] Factor (g) states one mandatory factor to be considered is: "Whether or not defendant acted under extreme duress or under the substantial domination of another person." (Pen. Code, § 190.3, factor (g).)

> that he could get AIDS and what does Warren [Hardy] [sic]? Does he [sic] listened to him and he stopped what he was doing because **[Pearson] was the leader.**
>
> It was defendant's idea to collect the clothes. It was defendant's idea to wrap the shirt around her wrist drag her up the hill and roll her down the hill to destroy fingerprints in the mulch, **and who followed him? Jamelle [Armstrong]. He sees his leader [Pearson]** wrapping his shirt around the arms and wrists of the victim, and Jamelle [Armstrong] takes his shirt off and wraps them [sic] around the legs of the victim and they drag her up the hill.
>
> The defendant apologized to the bus driver to prevent police from being called and defendant **[Pearson] kept control over Warren Hardy's behavior on that bus. He was the leader.** Hardy was the same age as the defendant, but Jamelle was younger.

(20RT [Pearson] 4891-4892 [emphases added].)

The trials of the three co-defendants were severed because each had made confessions that could not be introduced against the other two. (2RT 48E-51; see also *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].) In other words, the severance of trials was to protect each of the defendant's rights. The inconsistent prosecution position at trial misused what was intended as a benefit to, or protection of, Hardy, and transmuted the separate trials into a subterfuge for presenting inconsistent prosecution theories at the penalty trials. The prosecution's inconsistency bore directly on the jury's decision to impose death because at Hardy's trial the prosecutor belittled the idea that Hardy was

influenced or controlled in any way by either of the two co-defendants. Instead, the prosecutor argued Hardy had influence and control over his companions. She argued Hardy was primarily responsible for the offenses, and for gathering and destroying evidence.

C. Inconsistent Prosecution Positions at Separate Penalty Phase Trials Violated Due Process.

The United States Supreme Court has held the Sixth Amendment guarantees concerning the trial rights of criminal defendants, applicable to the states under the Fourteenth Amendment, means criminal trials must be fundamentally fair. (*Dowling v. United States* (1990) 493 U.S. 342, 352 [110 S.Ct. 668, 107 L.Ed.2d 708].) United States Supreme Court precedent requires that fundamental fairness govern a prosecutor's actions because the prosecutor is the direct representative of a state in criminal prosecutions. (*Mooney v. Holohan* (1935) 294 U.S. 103, 110 [55 S.Ct. 340, 79 L.Ed. 791].) "The action of prosecuting officers . . . may constitute state action within the purview of the Fourteenth Amendment . . . ." (*Id.* at p. 112-113.) Similarly, prosecutorial misconduct is unconstitutional when the misconduct results in prejudice to a criminal defendant. (See e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647-648 [94 S.Ct. 1868, 40 L.Ed.2d 431] [prosecutorial misconduct violates due process].) For example, *Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215], held the prosecution's suppression of material

evidence favorable to a criminal defendant violates due process regardless of the prosecution's good faith or bad faith. Similarly, *Miller v. Pate* (1967) 386 U.S. 11, 7 [87 S.Ct. 785, 17 L.Ed.2d 690], held the Fourteenth Amendment does not tolerate the prosecution's use of false testimony to obtain a criminal conviction.

In *Jacobs v. Scott* (1995) 513 U.S. 1067 [115 S.Ct. 711, 130 L.Ed 2d 618], a capital case from Texas, the conviction was based primarily on the defendant's confession, which he recanted at trial. (*Ibid.*) The prosecution attacked the defendant's recantation, but at a co-defendant's later trial the prosecution adopted the recantation to convict a second defendant of the same murder. (*Ibid.*) The first-tried defendant sought a stay of execution and petitioned for certiorari. The United States Supreme Court denied the stay and the writ. Justices Stevens and Ginsburg dissented and found the prosecution's use of inconsistent theories violated due process because "[I]t would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed." (*Ibid.*)

This Court, four Circuit Courts of Appeal, and the United States Supreme Court have considered the issue of whether the prosecution's use of inconsistent theories violates due process. Each court that has considered the issue has concluded that inconsistent prosecution theories can violate due

process. In the following subesctions, Hardy will discuss: (1) this Court's decision in *In re Sakarias* (2005) 35 Cal.4th 140; (2) authorities from the Eastern District of New York, the Eighth and Eleventh Circuit Courts of Appeals, and (3) Ninth and Sixth Circuit cases that later went to the United States Supreme Court[37] to demonstrate the due process violation inherent in the prosecutor's use of inconsistent theories to obtain a death sentence against him.

1. Under *In re Sakarias* (2005) 35 Cal.4th 140, the Prosecutor's Use of Inconsistent Penalty Theories Violated Due Process.

In re Sakarias (2005) 35 Cal.4th 140, considered a case where the prosecution presented inconsistent theories at each of the guilt and penalty trials of two separately tried co-defendants. *In re Sakarias* was decided before *Bradshaw v. Stumpf* (2005) 545 U.S. 175 [135 S.Ct. 2398, 162 L.Ed.2d 143], which considered a due process challenge to inconsistent prosecution theories at separate trials.[38] Sakarias and his co-defendant Waidla were convicted in separate trials of the first degree murder of the same victim. Each was sentenced to death. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 134.) Waidla was

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[37] *Thompson v. Calderon* (9th Cir 1997) (en banc) 120 F.3d 1045, and *Stumpf v. Mitchell* (6th Cir. 2005) 367 F.3d 594, each of which was later reversed by the United States Supreme Court.

[38] The decision in *In re Sakarias* issued on March 3, 2005. The decision in *Bradshaw v. Stumpf*, discussed *post.*, issued on June 13, 2005.

tried first in 1990 and early 1991, and Sakarias in late 1991. (*Id.* at p. 147.) As in Hardy's case, the same prosecutor tried the cases in separate trials. In Waidla's trial, the prosecutor argued Waidla personally used the hatchet that inflicted the fatal wounds to the victim while she was in the living room of her home and then dragged her body into the bedroom where it was later found. The prosecutor argued Waidla's confession omitted admitting to multiple hatchet blows because Waidla did not want to acknowledge his role. (*Ibid.*) The prosecutor elicited testimony from the medical examiner that later injury to the victim had occurred postmortem. The prosecutor argued the victim died while in the living room. At the penalty phase, the prosecutor argued Waidla personally wielded the hatchet, first using the blunt end, then switching to the blade side, to inflict the mortal wounds.

In contrast, at Sakarias's later trial, the prosecutor declined to question the medical examiner about specific antemortem and postmortem wounds. The prosecutor thereby omitted evidence from Sakarias's trial that injuries likely sustained while dragging the victim from the living to the bedroom were sustained postmortem. This permitted the prosecutor to argue there was no evidence the victim was dead when dragged to the bedroom, where, the prosecutor argued, Sakarias (not Waidla) inflicted the fatal hatchet blows. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 148.) At the penalty phase, the prosecutor

argued Sakarias personally inflicted the hatchet wounds that ultimately killed the victim. (*Id.* at pp. 148-149.)

This Court held that "the prosecutor violated [Sakarias's] due process rights by intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials . . . ." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 145.)

In *Sakarias*, the prosecution's inconsistent theories in separate trials impacted both the guilt and the penalty phases. Specifically, both petitioners also argued the prosecution presented inconsistent theories of which defendant dominated the other under section 190.3, factor (g). (*In re Sakarias*, *supra*, 35 Cal.4th at p. 149.)

Section 190.3 requires[39] the trier of fact to take into account certain factors when deciding penalty. One mandatory factor is: "Whether or not defendant acted under extreme duress or under the substantial domination of another person." (§ 190.3, factor (g).) At Waidla's trial, the prosecutor argued Waidla was not dominated by anyone else, but was instead the dominant perpetrator. At Sakarias's trial, the prosecutor argued Sakarias was not dominated at all by Waidla. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 149.)

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[39] The language is mandatory, the section states: "the trier of fact shall take into account any of the following factors if relevant." (Pen. Code, § 190.3.)

While much of the discussion in *In re Sakarias* concerned the impact of the prosecutor's inconsistency at the guilt phase, it is clear that the effect at the penalty phase was equally important. *In re Sakarias* explained:

> For reasons explained below, we conclude that fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. *By doing so, the state necessarily urges conviction or* ***an increase in culpability*** *in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth.* At least where, as in Sakarias's case, the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained. In short, in the absence of a good faith justification, "[c]ausing two defendants to be sentenced to death by presenting inconsistent arguments in separate proceedings . . . .undermines the fairness of the judicial process and may precipitate inappropriate results." (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Cal. L.Rev. 1423, 1425.

(*In re Sakarias*, *supra*, 35 Cal.4th at pp. 155-156 [emphases added.)

One of the subheadings of the *Sakarias* decision reads, in part, "The People may not . . . obtain harsher sentences against two individuals by unjustifiably attributing to each a culpable act only one could have committed." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 156.) *In re Sakarias* considered and discussed decisions from the United States Supreme Court and the Eleventh, Ninth, Eighth and Sixth Circuit Courts of Appeals, and

concluded federal law holds "that a prosecutor's inconsistent argument in two defendants' separate trials attributing the same criminal or culpability-increasing act to each defendant denies the defendants fundamentally fair trials." (*Id.* at pp. 156-158.)

In re Sakarias expressly identified the prejudice that arose during the penalty phase because of the prosecution's inconsistent theories. "To the extent the false attribution of the antemortem blow to Sakarias was potentially material to the penalty decision, it deprived Sakarias of a fair penalty trial and entitles him to relief." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 165.)

In re Sakarias involved referee's findings that the prosecution's use of "divergent factual theories was intentional" and other related findings. (*In re Sakarias*, *supra*, 35 Cal.4th at pp. 151-155.) Hardy's direct appeal involves no referee's findings, but none is necessary for two reasons. First, the only reasonable inference from the record is the use of divergent theories by the prosecutor was intentional, and designed to influence jurors in each trial to impose the maximum penalty of death. This was not a case where the inconsistencies possibly could have been attributable either to accident or a change in the evidence. This prosecutor had repeatedly announced she was ready for trial, and would not adhere to any previously-agreed-order for trial

announced by her predecessor prosecutor.[40] (2RT 191; 3RT 319-321; 4RT 573.) Instead, the prosecutor was prepared for trial on whichever of the three defendants was ready for trial first. Further, all evidence relating to who among the three defendants might have dominated whom was discovered and in the prosecutor's possession long before Hardy's first trial began. (See e.g., 2RT 191 [prosecutor's statement that all evidence was the same in all three trials, and applied equally to all three defendants].)

The second reason no referee's finding is required is because good faith or bad faith on the prosecution's part is irrelevant to a determination of this issue. In a joint trial before a single jury, the prosecution never would have had the option of presenting inconsistent theories. Imagine a penalty phase trial in Hardy's case where after the prosecutor argued Pearson was the leader, and Hardy merely Pearson's follower, Hardy had been able to argue the

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[40] On June 28, 2001, the prosecutor stated she would be ready for trial on all three defendants at the same time. She would try first whichever defendant was ready first. She expected no new evidence, and all evidence applied equally to all three defendants. (2RT 191.) On July 23, 2001, the prosecutor again stated she would try first whichever defendant was ready first. (3RT 321.) The prosecutor stated she was unaware of any representation by her predecessor prosecutor concerning the order of the the trials. She declined to be bound by any statements, and would try first whichever defendant was ready first. (3RT 319-321.) On November 7, 2001, the prosecutor again stated she would be ready to try all three defendants, and whichever defendant was ready first would go to trial first. (4RT 573.)

prosecutor's very own words to discredit the position of Hardy's dominance that she urged on the jury.

As Professor Anne Poulin discussed in her article, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 California Law Review 1423, which *In re Sakarias* cited (see *In re Sakarias*, *supra*, 35 Cal.4th at p. 156), if any one of the defendants had known at the time of trial about the prosecutor's inconsistent positions, the prosecutor's inconsistent arguments would have been admissible at the trial. (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, *supra*, 89 Cal. L.Rev. at pp. 1440-1443, citing *United States v. McKeon* (2nd Cir. 1984) 738 F.2d 26, 28-32 [discussing prosecution's introduction of inconsistent defense attorney statements]; *United States v. Salerno* (1991) 937 F.2d 797, 810-811 [prosecutor's opening and closing statements in a prior criminal case were admissible].) Professor Poulin noted that in *United States v. Bakshinian* (C.D. Cal. 1999) 65 F.Supp.2d 1004, 1107-1108, the court concluded the prosecution was not entitled to the same leeway concerning inconsistent statements as may be accorded to defense counsel. Hardy's due process rights do not turn on the timing of the trials. The due process violation arises when the prosecution pursues inconsistent theories of culpability.

The prosecutor's theories, "Hardy was the leader," and "Pearson was the leader," are clearly inconsistent and irreconcilable. Thus, Hardy's case differs from that faced by the Wisconsin Supreme Court in *State v. Cardenas-Hernandez* (Wis. 1998) 579 N.W.2d 678 [219 Wis.2d 516]. The Wisconsin high court concluded the prosecutor's statements "were not clearly inconsistent" with one another. (*Id.* at p. 686.) In contrast, there can be no doubt of clear inconsistency here. There was only one leader: either it was Pearson or Hardy, but not both. Also, the prosecutor's allegedly inconsistent statements in the Wisconsin case occurred during an early bail hearing when the prosecution was unlikely to have investigated the case fully. (See *Id.* at pp. 681-683.) In contrast, the prosecutor's inconsistent statements in Hardy's case occurred at the penalty phase when the case had been exhaustively investigated and prepared for trial.

The prosecutor's use of inconsistent non-evidentiary statements or arguments violates due process just as much as the introduction of false testimony. The prosecution's use of false testimony violates due process even if the falsity is unknown to the prosecutor personally. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155 [92 S.Ct. 763, 31 L.Ed.2d 104].) Here, however, the inconsistencies were known to the prosecutor personally because

in each trial she inconsistently portrayed only the defendant on trial as having dominance over a defendant not on trial.

Further, the prosecutor's good faith or bad faith is irrelevant to due process analysis. A due process violation occurs either way -- in one instance by oversight or inadvertence, in the other by design. As Professor Poulin explained, good faith or bad faith is relevant only to a determination of a prosecutor's ethical violation, not to the due process violation effected by the inconsistent positions:

> Courts should find a due process violation even if the prosecutor in the second proceeding was personally unaware of the prior inconsistent government stance. Although some reported instances of prosecutorial inconsistency involved the same prosecutor making conflicting arguments in separate trials, many cases involve a different prosecutor making the inconsistent argument in the second case. [Footnote omitted.] The change in personnel should not alter the due process analysis. A change in personnel eradicates neither the unfairness of espousing inconsistent positions nor the threat to the integrity of the justice system and, therefore, should not defeat a claim for relief. The prosecutor's knowledge is pertinent to whether there is an ethical violation, but it should not draw the discussion away from the core issue in due process analysis, which is the fairness of the process. The courts should apply the rule of attribution established in *[Giglio v. United States*, *supra*, 405 U.S. 150] to cases of prosecutorial inconsistency as well. [Footnote omitted.] Where the prosecutor was oblivious to the falsity of the testimony, knowledge of the inconsistency should be imputed to the later prosecutor. [Footnote omitted.] The prosecutor's office is a single entity, and the due process violation exists "irrespective of good faith or bad faith." [Footnote omitted.]

(Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, supra*, 89 Cal. L.Rev. at pp. 1470-1471.)

In re Sakarias applied the *Chapman* standard of prejudice, with which the Attorney General had agreed in briefing. (*In re Sakarias, supra*, 35 Cal.4th at p. 165.) Under *Chapman*, Hardy is entitled to relief because there is a reasonable likelihood that the prosecutor's use of inconsistent theories, that is, Hardy's domination over his two co-defendants, affected the penalty verdict. (*In re Sakarias, supra*, 35 Cal.4th at p. 165, citing *United States v. Katar* (1st Cir. 1988) 840 F.2d 118, 128.)

2. Federal Authorities Hold That Due Process Is Violated When a Prosecutor Uses Inconsistent Theories in Separate Trials When No New Evidence Justifies the Change.

In *United States v. Urso* (E.D.N.Y. 2005) 369 F.2d 254, the district court concluded that due process may be violated only when the prosecution's theories are "inherently factually contradictory" and "irreconcilable." (*Id.* at p. 264.) *Urso* explained that for two theories to be irreconcilable, the truth of one theory must imply the falsity of the other. (*Id.* at p. 265.) The prosecutor's inconsistent theories about whether Hardy or Pearson was the leader violated the *Urso* standard. Hardy could not be Pearson's leader in Hardy's trial, and also Pearson's follower in Pearson's trial. The theories were "inherently factually contradictory" and "irreconcilable." (*Id.* at p. 264.)

Smith v. Groose (8th Cir. 2000) 205 F.3d 1045, 1050, granted habeas relief when the prosecution, in bad faith, used inconsistent theories in separate trials. The prosecutor presented inconsistent, and conflicting testimony, from a witness in two trials in order to argue that each separately tried defendant had personally committed the murder when only one could have been the actual murderer. (*Id.* at pp. 1047-1048.) The prosecutor knew of the witness's conflicting statements at the time of the first trial, and selectively chose to present the testimony inconsistently at each of the two trials. (*Id.* at p. 1048.)

The victims in *Smith v. Groose* had the extreme misfortunate of having their home burglarized on the same day by two unrelated groups. (*Smith v. Groose*, *supra*, 205 F.3d at p. 1047.) One of Smith's co-burglars, Lytle, gave inconsistent accounts to the police before trial. (*Ibid.*) Lytle first reported a burglar from the other unrelated group murdered the victims. Two days later, Lytle stated someone from his and Smith's group murdered the victims. The prosecutor first used Lytle's second statement to convict Smith (and another accomplice) of first degree murder. Then at a later trial, the prosecutor used Lytle's first statement to convict a burglar from the unrelated group of the same murder. (*Id.* at p. 1048.)

A unanimous Eighth Circuit, citing *Mooney v. Holohan*, *supra*, held the prosecutor's use of inconsistent theories at the two separate trials violated due

process. (*Smith v. Groose*, *supra*, 205 F.3d at p. 1050.) *Smith v. Groose* explained "we do not hold that prosecutors must present precisely the same evidence and theories in [separate] trials for different defendants . . . ." (*Id.* at p. 1052.) Instead, the Eighth Circuit explained a due process violation arose from the prosecutor's efforts to obtain "as many convictions as possible without regard to fairness and the search for truth." (*Id.* at p. 1051.) "To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime." (*Id.* at p. 1052.)

Drake v. Kemp (11th Cir. 1985) 762 F.2d 1449, involved two accomplices who committed a robbery and murder. The prosecution argued inconsistent theories of guilt to obtain the death penalty against each of the two defendants in separate trials. (*Drake v. Francis* (11th Cir. 1984) 727 F.2d 990, 994.) A panel of the Eleventh Circuit initially rejected a due process argument, concluding the prosecution theories were fairly consistent. (*Ibid.*) In an en banc rehearing, the Eleventh Circuit granted relief. (*Drake v. Kemp*, *supra*, 762 F.2d 1449.) A separate concurring opinion, noted "the prosecutor's totally inconsistent theories of the same crime at [the defendants'] respective trials transgressed the Fourteenth Amendment's requirement that a criminal trial be fundamentally fair." (*Id.* at p. 1470 (conc. opn. of Clark, J.).)

3. The United States Supreme Court Precedents of *Bradshaw v. Stumpf* (2005) 545 U.S. 175 [135 S.Ct. 2398, 162 L.Ed.2d 143] and *Calderon v. Thompson* (1998) 523 U.S. 538, 550 [118 S.Ct. 1489, 140 L.Ed.2d 728], Compel the Conclusion That the Prosecution's Use of Inconsistent Theories at the Penalty Phases Violated Due Process.

Two United States Supreme Court decisions, arising from the Ninth and Sixth Circuits, respectively, concerned challenges by first-tried defendants, on due process grounds, to the prosecution's use of inconsistent theories at the subsequent trials of co-defendants. Hardy, like the defendants in those two circuit cases, was the first-tried defendant. Hardy will discuss each opinion.

Thompson v. Calderon (9th Cir 1997) (en banc) 120 F.3d 1045, vacated the petitioner's conviction and execution order because the prosecution argued inconsistent theories for the rape-murder in separate trials. (*Id.* at pp. 1045, 1056.) Initially, the Ninth Circuit denied relief, but then reversed the panel decision and reconsidered the matter en banc. In Thompson's trial, which preceded his co-defendant's trial, the prosecution argued Thompson was single-handedly responsible for raping the victim, then murdering her to cover up. (*Id.* at p. 1056.) In the co-defendant's later trial, the prosecution argued it was Thompson's co-defendant Leitch who was responsible for the victim's death because only Leitch had a motive to kill the victim. (*Ibid.*)

A plurality of the Ninth Circuit found that the inconsistency in the prosecution's theories concerning motives and perpetrators in Thompson's and Leitch's respective trials violated Thompson's due process rights. Significantly, as in Hardy's case, Thompson was the first-tried defendant. The plurality agreed that "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."[41] (*Id.* at p. 1058.) The United States Supreme Court vacated the Ninth Circuit decision on a different ground, concluding the court had abused its discretion by recalling its mandate in the absence of "extraordinary circumstances." (*Calderon v. Thompson* (1998) 523 U.S. 538, 550 [118 S.Ct. 1489, 140 L.Ed.2d 728].) The High Court did not address the due process violation.

The Sixth Circuit in the underlying case of *Bradshaw v. Stumpf* concluded the prosecution's use of inconsistent theories in separate trials violated the due process rights of the defendant who was tried first. (*Stumpf v. Mitchell* (6th Cir. 2005) 367 F.3d 594, 595.) Thus, the Sixth Circuit vacated Stumpf's guilty plea and death sentence based on the prosecution's

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[41] As demonstrated in the discussion of *In re Sakarias*, *ante*, the same due process violation occurs whether the prosecution presents the inconsistent theories on guilt or penalty phase issues.

inconsistent theories in separate trials that Stumpf and his co-defendant each personally had fired the fatal shot. (*Id.* at p. 613.) At Stumpf's plea hearing, the prosecutor argued Stumpf shot the victim four times, killing her as she sat on her bed. (*Ibid.*) At the co-defendant's later trial, the same prosecutor argued that Stumpf fired, mistakenly believed he had killed the victim, and tossed the gun aside. Then, the prosecutor argued, the co-defendant picked up the gun Stumpf had discarded and shot the victim four times, killing her as she sat on her bed. (*Ibid.*) On appeal, the state argued that new evidence was discovered after Stumpf's hearing, that is, evidence Stumpf discarded the gun after firing it, but without killing the victim. This "new evidence" led to the prosecution's use of inconsistent theories. (*Ibid.*) In contrast, in Hardy's case there can be no reasonable inference that the prosecution's inconsistent theories was due to the discovery of "new evidence." The majority of evidence came from the defendants during pretrial statements and never changed. The prosecutor repeatedly announced she was ready for trial, was dissatisfied with the delay, would not honor her predecessor's representations concerning which defendant would be tried first, and would go to trial first on whichever defendant was first ready for trial. (2RT 191; 3RT 319-321; 4RT 573.)

The majority opinion in *Bradshaw v. Stumpf*,[42] and the separate concurrences of Justices Souter and Ginsburg, comment that inconsistent prosecution theories may constitute grounds for reversing the sentence imposed. (*Bradshaw v. Stumpf, supra*, 545 U.S. at p. 2408.) Only two of nine justices found no due process violation. Justice Thomas, whose concurring opinion was joined by Justice Scalia, appeared to conclude there was no due process violation because "the Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions." (*Id.* at p. 2410.)

D. Hardy Was Prejudiced by the Prosecutor's Inconsistent Theories.

The Sixth Circuit majority opinion presumed prejudice from the prosecution's use of inconsistent theories at separate trials. (*Stumpf v. Mitchell, supra*, 367 F.3d at p. 88.) The United States Supreme Court, in dicta, referenced the materiality of the inconsistency, suggesting some requirement to demonstrate a link between the prosecution's inconsistency and the outcome

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[42] The United States Supreme Court reversed the Sixth Circuit's holding that Stumpf's plea was not knowing, intelligent or voluntary. (*Bradshaw v. Stumpf, supra*, 545 U.S. at p. 2407.) That issue in *Bradshaw v. Stumpf* is irrelevant to the issue Hardy raises, and therefore Hardy does not discuss that portion of the opinion.

(either verdict or sentence). (See e.g., *Bradshaw v. Stumpf*, *supra*, 545 U.S. at p. 2407.) The Ninth Circuit's plurality decision in *Thompson v. Calderon*, *supra*, found the prosecution violated Thompson's right to a fair trial when the prosecutor "manipulated evidence and witnesses, argued inconsistent motives, and at [the second] trial essentially ridiculed the theory [the prosecutor] had used to obtain a conviction and death sentence at Thompson's trial." (*Thompson v. Calderon*, *supra*, 120 F.3d at p. 1057.) The plurality found the prosecution's mere use of inconsistent theories violated due process and created a presumption of prejudice. (*Id.* at p. 1059.)

Hardy was prejudiced by the prosecutor's inconsistent theories. To obtain the death penalty, the prosecutor relied heavily on Hardy's status as the purported leader of the criminal activity resulting in Sigler's death. Jurors necessarily would find *the* leader of the three men more culpable, and more deserving of death. The prosecutor argued Hardy was the leader, the oldest, the "big brother" to Armstrong. Hardy was in command, she said, and had control over the other two. (14RT 3146-3147.) This argument in support of the death penalty for Hardy was wholly inconsistent with the same prosecutor's argument in support of the death penalty for Pearson. The argument violated the guidance of *Ake v. Oklahoma*, *supra,* 470 U.S. 68, 79, by gaining "a strategic advantage" over Hardy that "cast a pall on the

accuracy" of the outcome. This "strategic advantage" was exacerbated by the separate trials since only the prosecutor knew of the inconsistent theories she applied piecemeal to the defendants to achieve the maximum penalty. A sentence of death is different because "execution is the most irremediable and unfathomable of penalties . . . ." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411 [106 S.CT. 2595, 91 L.ED. 2d 335] [plurality opinion discussing need for heightened reliability in capital proceedings].)

The inconsistent prosecution theories for culpability based on a theoretical leadership role requires reversal of the judgment of death.

XX

THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL AND WARRANTS REVERSAL OF HARDY'S DEATH SENTENCE.

The cumulative effect of errors in Hardy's case denied him a fair trial on the issues of guilt and penalty. The individual errors are set forth fully *ante*. While each error individually constitutes grounds for reversal or other relief, the cumulative effect of the errors together form an additional ground for reversal. The errors in Hardy's trial cover the gamut, including improper jury selection, evidentiary and instructional issues, and penalty phase issues. The result of the errors was a trial in the superior court in which the hallmarks of fundamental fairness and due process were absent. Accordingly, the judgment of death should be reversed.

The cumulative effect of errors in Hardy's case denied Hardy a fair trial and violated his rights to due process. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468] [cumulative errors as denial of due process right to fair trial]; *People v. Holt* (1984) 37 Cal.3d 436, 459.) As demonstrated in this brief, the various guilt phase errors violated Hardy's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, Hardy was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial. (*People v. Hill* (1998) 17 Cal. 4th 800, 844-845; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.) "Where, as here, there are a number of errors, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. [Citations.]" (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

The proper standard of prejudice when any one of the errors to be aggregated is constitutional, is that reversal of the judgment is required unless the cumulative error is harmless beyond a reasonable doubt. (*United States v. Toles* (10th Cir. 2002) 297 F.3d 959, 972; in accord *People v. Williams* (1971) 22 Cal.App.3d 34, 50.) The standard is clearly met in this case. Even if this Court rules that prejudice must be measured by the standard for state court error, it is reasonably probable that the result in Hardy's case would have been different, and more favorable to him, but for the multiple errors at every stage of the trial. The cumulative weight of the guilt and penalty phase errors was prejudicial to Hardy. Each error was compounded by every other error, and the cumulative effect was multiplied. In view of the number, type and magnitude of the errors in the superior court, Hardy's case presents the

extraordinary situation where, the outcome would have been more favorable to him, and the trial below resulted in a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The "sum of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill*, *supra*, at p. 845.) Hence, the judgment of death should be reversed.

XXII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

A. Introduction and Summary of Argument.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because previous challenges to most of these features have been rejected by this Court, these arguments are presented in an abbreviated fashion for the purpose of alerting this Court to the nature of each component claim and its federal constitutional grounds. Hardy also requests this Court's reconsideration of each claim in the context of California's entire death penalty system.

People v. Schmeck (2005) 37 Cal. 4th 240, 303-304, stated that "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than: (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of *Schmeck*, Hardy presents the following challenges to preserve these claims for federal review and urge their reconsideration. Should this Court reconsider prior decisions relative to any of these claims, Hardy requests the opportunity to present supplemental briefing.

This Court's previous decisions have considered the following claims in isolation from one another. To the extent Hardy argues cumulative unconstitutionality, this argument presents a new claim. The U.S. Supreme Court has stated that: "[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., [126 S.CT. 2516; 165 L.ED. 2d 429].) *Marsh* considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was constitutionally acceptable, in light

of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Marsh, supra.* 126 S.Ct. at 2527; See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871; 79 L.ED. 2d 29] [while comparative sentence 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].)

Thus, even if individual components of a death penalty scheme can be deemed constitutional in isolation from one another, a reviewing court must also consider the cumulative operation of the entire scheme. Hardy requests this Court consider the defects in the California scheme, "in context" and collectively, to hold that the cumulative operation of the scheme is unconstitutional.

Primarily, Hardy avers California's sentencing scheme is so broad in its definitions of death-eligible defendants, 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 in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. In light of the ever-growing number of grounds for death-eligibility described currently in 22 distinct

subdivisions of section 190.2, nearly every murder in California permits a prosecutor to seek the death penalty. The fact that very few defendants actually receive the death penalty manifests an arbitrary and capricious selection process. The overbreadth is not limited to the categories of death-eligible offenders described by the special circumstances iterated in section 190.2. (See discussion, *post.*)

Additionally, beyond the indiscriminate selection process, there are no procedural safeguards during the penalty phase enhancing the reliability of that trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, who may not and need not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned on its head to mean that procedural protections taken for granted in guilt trials for lesser criminal offenses are unavailable when the question is a finding foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses from among the thousands of murderers in California a few scapegoats to be put to death.

B. The Categories of Special Circumstances Described in Penal Code Section 190.2 Fail to Meaningfully Narrow the Class of First Degree Murderers Who May Receive the Death Penalty.

To be constitutionally valid, a state death penalty scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.). Meeting this criteria requires a state genuinely to narrow, by rational and objective criteria, the class of murderers eligible for death. (*Zant v. Stephens* (1983) 462 U.S. 862, 878 [103 S.CT. 2733; 77 L.ED. 2d 235.]) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. This is particularly true when, as here, the underlying verdict of guilt of first degree murder is based upon a legislative classification, such as drive-by murder, which includes conduct traditionally treated as second degree murder, i.e., rash, impulsive killings. It bears repeating that the guilt phase jury in this case was not required to find premeditation in order to reach the verdict it returned.

This Court's previous decisions concluded the requisite narrowing in California's death penalty scheme is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 468.) However, the special circumstances are so numerous, and

common to many violent crimes against persons that special-circumstance murder in the statute now makes almost every murderer eligible for death at the whim of the prosecutor's discretion. This Court should reconsider and overrule its prior precedent, and hold that section 190.2, subdivision (a), is so broad that it fails to adequately narrow the set of murders eligible for death, in violation of the Eighth and Fourteenth Amendments.

C. The Broad Application of Section 190.3, Factor (A), Allowing a Jury to Treat Any Circumstance of the Crime as Aggravation, Violated Hardy's Constitutional Rights.

Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." That statutory provision was explained to jurors with CALJIC No. 8.85, given in the penalty trial, in pertinent part as follows:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) the circumstance of the crime with which the defendant was convicted in the present proceedings and the existence of any special circumstance[s] found to be true.

(3CT 623.) The instruction provided jurors no guidance whatsoever concerning what facts should be deemed aggravating and which should be deemed mitigating or neutral. There is no objective consensus on these issues

in the real world. (See e.g., *Montana v. Egelhoff* (1996) 518 U.S. 37, at pp. 45-47, [116 S.CT. 2013; 135 L.ED. 2d 36] [the fact of defendant's intoxication is treated at common law by some jurisdictions as enhancing culpability and by others as diminishing culpability].) *Egelhoff* reasoned states are free to treat intoxication as irrelevant to the severity of an offense because of the lack of consistency in the common law's treatment of intoxication as mitigating or aggravating.

As a result of the broad and indefinite classification of "circumstances of the offense," prosecutors can argue in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case, the prosecution relied on factor (a) in support of its call for death. It relied on "victim impact evidence," presented movingly through the testimony of Sigler's son. This Court has held "victim impact" comes within the ambit the "circumstances of the crime." (*People v. Zamudio* (2008) 43 Cal. 4th 327, 324-325.) There always will be victim impact with every murder. It will always be emotionally charged, and usually heartbreaking. The prosecution also relied on Hardy's supposed bad character including his robbery conviction, allegedly stabbing his young son, and gang affiliation and moniker of "Little No Good." (14RT 3137-3139, 3145.) This evidence was presented even though no nexus was shown between any of it

and Hardy's role in the offense. The prosecution also relied heavily on Hardy's purported role as the leader. (14RT 3144-3147.) In fact, very little, almost nothing, was actually known about the circumstances of the offense. But section 190.2 made speculation convenient for the prosecutor. These, and other, arguments illustrate the unlimited reach of section 190.3, subdivision (a).

This Court has not yet applied a limiting construction to factor (a) despite previous requests. (*People v. Blair* (2005) 36 Cal. 4th 686, 749.) The "circumstances of the crime" factor can hardly be called "discrete." (See *Brown v. Sanders* (2006) 546 U.S. 212, 222 [126 S.CT. 884; 163 L.ED. 2d 723]: [United States Supreme Court finds that lower federal court misdescribed California death penalty scheme as preventing sentencer "from considering evidence in aggravation other than discrete, statutorily-defined factors."] The concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all contextual features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without

some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." See *Maynard v. Cartwright, supra*, 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d. 750 512 U.S. 967][rejecting "vagueness" challenge to factor (a)]).

This Court has rejected the claim that permitting the jury to consider the "circumstances of the crime" results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal. 4th 595, 641.) Hardy urges the Court to reconsider this decision.

D. Use of a "So Substantial" Standard to Describe Aggravating Circumstances Warranting a Verdict of Death Is Impermissibly Vague.

The question whether to impose the death penalty upon Hardy hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (3CT 637; CALJIC No. 8.88.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. 356, 362.)

The substantiality or existence of aggravating factors was a contested issue during the penalty trial jury. As but one example, defense counsel attempted to exclude the prosecution's evidence concerning Hardy's participation in a gang initiation rite on the same night of the murder. (13RT 2896.) The "jumping in" was not witnessed by anyone, but the prosecution speculated the act was violent even though the new member showed no injuries. (See 14RT 3040, 3084.) This evidence is but one example that the error is not an abstraction in the context of this case.

This Court has previously concluded that the use of the phrase "so substantial" does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal. 4th 281, 316, fn. 14.) Hardy asks this Court to reconsider that conclusion.

E. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Restricted Consideration of Mitigation by Hardy's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367 [108 S.CT. 1860; 100 L.ED. 2d 384]; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.CT. 2954; 57 L.ED. 2d 973]. These adjectives are

contained in CALJIC No. 8.85, which was given to Hardy's jury. (3CT 623-624.) Hardy acknowledges that this Court has previously rejected this argument in *People v. Avila* (2006) 38 Cal. 4th 491, 614, but urges reconsideration of that conclusion.

F. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Application of the Capital Sentencing Decision.

As a matter of state law, each of the sentencing factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal. 3d 1142, 1184; *People v. Edelbacher, supra*, 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer to any of these "whether or not" sentencing factors established an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens, supra*, 462 U.S. 862, 879.)

The fact that this Court and the Legislature intended that the specified factors be solely mitigating is not the measure of their effect on a jury. The effect of an instruction on a jury is assessed by whether a reasonable juror could understand the instruction in an unconstitutional manner. (*Boyde v.*

California, supra, 494 U.S. 370, 380; *Francis v. Franklin, supra*, 471 U.S. 307, 325.) "This analysis 'requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.'" (*Francis v. Franklin, supra*, 471 U.S. at 315, quoting *Sandstrom v. Montana* (1979) 442 U.S. 510 at 514.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments. (But see *People v. Morrison* (2004) 34 Cal 4th 698, 730: "instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.")

The very real possibility that Hardy's penalty trial jury aggravated his sentence on the basis of "nonstatutory aggravation" including an absence of mitigating factors deprived him of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors. (See *People v. Boyd, supra*,

38 Cal 3d 762, 772-775.) That possibility violated Hardy's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra*, 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300: [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522 (same analysis of *Fetterly, supra*, applied to State of Washington capital sentencing statutes).)

The failure of the instruction to limit mitigation evidence solely to mitigation violated not only state law, but the Eighth Amendment, for it made it likely the jury treated Hardy "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235, [112 S.CT. 1130; 117 L.ED. 2d 367].) "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary according to juries' potentially mistaken understandings of how many factors the law permits them to weigh on death's side of the scale.

G. The Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require a jury to apply a reasonable doubt standard during any part of the penalty phase, except as to proof of prior criminal misconduct offered under section 190.3 (b). (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal. 4th 543, 590; *People v. Fairbank* (1997) 16 Cal. 4th 1223, 1255.) Hardy's penalty trial jury was not told it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. It was not told that it had to find aggravating factors other than prior criminality proven beyond a reasonable doubt (for example, that Hardy took a leadership role in a gang.) This Court has approved of this process. (See *People v. Hawthorne* (1992) 4 Cal. 4th 43, 79.)

After this Court decided *Hawthorne*, the United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, [127 S.CT. 856; 166 L.ED. 2d 856]; *Blakely v. Washington* (2004) 542 U.S. 296, [124 S.CT. 2531; 159 L.ED. 2d 403]; and *Ring v. Arizona* (2002) 536 U.S. 584, [122 S.CT. 2428; 153 L.ED. 2d 556], required any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. *Ring*, in particular, applies to capital sentencing decisions.

In *Ring*, the Supreme Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, 536 U.S. at 593, 617.) It held that any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Unquestionably, California statutory law and jury instructions require fact-finding by a jury during a post-conviction penalty phase before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal. 4th 107, 177), which was read to the jury in this case, "An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious

consequences which is above and beyond the elements of the crime itself." (3CT 636; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. Before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In *People v. Loker* (2008) 44 Cal. 4th 691, 755, this Court held that, notwithstanding *Cunningham*, *Blakely*, and *Ring*, a California defendant has no federal constitutional right to a jury finding beyond a reasonable doubt as to the facts supporting a death sentence. Hardy respectfully requests that this Court reconsider its decision in *Loker*.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 530 U.S. at 604.) The Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional factual findings during the penalty

phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." *Ring* and *Cunningham* require the requisite fact-finding in the penalty phase to be made unanimously, and beyond a reasonable doubt, as to all facts, not just those alleged under section 190.3, subdivision (b), that a jury may consider in aggravation.

H. The Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made by a Unanimous Jury.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances warranting the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, [96 S.CT. 2978; 49 L.ED. 2d 944].) "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452, [110 S.CT. 1227; 108 L.ED. 2d 369] (conc. opn. of Kennedy, J.).) Despite these federal precedents, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal. 3d 719, 749.) Hardy respectfully requests that this Court reconsider its conclusion that non-unanimous findings regarding facts in aggravation are sufficient to allow imposition of a death penalty.

The failure to require jury unanimity also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158a). Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.CT. 2246; 141 L.ED. 2d 615]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.CT. 2680; 115 L.ED. 2d 836]), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is required by the equal protection clauses of the Fifth and Fourteenth Amendments.

This Court has acknowledged that other-crimes evidence in a penalty phase of a capital trial often has "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal. 4th 694, 763-764.) To require jury unanimity respecting an enhancing allegation that adds a year to a defendant's sentence (see, e.g., § 12022), but not as to facts likely to cause a jury to choose death over life imprisonment, violates the right to equal protection, and by its irrationality also

violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. The failure to require unanimity cannot be deemed harmless in a case such as this, where the prosecution presented evidence of at least five unadjudicated criminal offenses, occurring on separate occasions, and to which Hardy had individual and separate defenses. There is a reasonable possibility that the jurors found a "patchwork" of aggravating facts upon which no true consensus was ever reached by the jury as a whole.

I. The Instructions Violated Hardy's Right to Due Process by Failing to Assign a Burden of Proof.

California law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) That statute creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Hardy is constitutionally entitled to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.CT. 2227; 65 L.ED. 2d 175].) Accordingly, the jury should have been instructed that the prosecution had the burden of persuasion regarding (1) the existence of any factor in aggravation,[43] (2) whether aggravating factors outweighed

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[43] Jurors were instructed they had to be "satisfied beyond a reasonable doubt" that Hardy previously had been convicted of attempted robbery, and committed wilful cruelty to a child (the stabbing incident involving Hardy's son). (3CT 634-635.)

mitigating factors, and (3) the appropriateness of the death penalty, and (4) that it was presumed that life without parole was the appropriate sentence.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal. 4th 1107, 1136-1137. This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal. 4th 92, 190.) Hardy is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider these decisions.

J. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Hardy's

right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

This Court has held that because CALJIC No. 8.88 tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal. 3d 955, 978; see also *People v. Kipp* (1998) 18 Cal. 4th 349, 381: ["We have determined that the trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation."].) Hardy respectfully requests that this Court reconsider its decisions in *Duncan* and *Kipp*. Hardy submits this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal. App. 3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal. App. 3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474 [93 S.CT. 2208; 37 L.ED. 2d 82.])

K. The California Sentencing Scheme Is Constitutionally Defective in Failing to Require That the Penalty Jury Make Written Findings.

The failure to require written, or other specific, findings by the jury regarding aggravating factors deprived Hardy of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. 538 at p. 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195, [96 S.CT. 2909; 49 L.ED. 2d 859.]) Because California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*, 16 Cal. 4th 1223, 1255-1256), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.CT. 745; 9 L.ED. 2d 770]: [failure of state court to make express findings relative to imposition of capital sentence may require federal court on habeas review to hold hearings].)[44]

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal. 4th 792, 859; *People v. Rogers* (2006) 39 Cal. 4th 826,

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[44] *Townsend* was overruled on a different point in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, [112 S.CT. 1715; 118 L.ED. 2d 318].

893.) Hardy respectfully requests that this Court reconsider its decisions in those cases. Ironically, such express findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal. 3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm, supra*, 11 Cal. 3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (§1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment

(see generally *Myers v. Ylst, supra*, 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen. Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland , supra*, 486 U.S. 367, 383, fn. 15.)

Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal. 4th 1, 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal. 4th at p. 79), the basis for the decision can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.[45]

There are no other procedural protections in California's death penalty system to compensate for the unreliability inevitably produced by the failure to require a statement of reasons for imposing death. (See *Kansas v. Marsh, supra.*) The failure to require written findings thus violated not only federal

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[45] For example, had the jury made written findings that Hardy was a leader within a criminal street gang, it would be clear that the jury relied on an impermissible basis to select death. As it stands, a reviewing court can only guess at the extent to which the "gang" evidence influenced the jury.

due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

L. The California Sentencing Scheme Is Constitutionally Defective in Failing to Require Inter-case Proportionality Review.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this prohibition to the process by which death is selected as a punishment has required that death judgments be both proportionate to one another and to the underlying facts, and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has expressly rejected. In *Pulley v. Harris, supra*, 465 U.S. at p. 51, the High Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court, and applied in fact, has become just such a sentencing scheme. *Harris, supra*, in contrasting the 1978 statute with the 1977 law which the

court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances that make convicted murderers eligible for the death sentence. (*Id.*, 465 U.S. at p. 52, fn. 14.) In particular, none of this Court's previous decisions have addressed the problem of applying a multiple murder special circumstance to first degree murder convictions that may have bypassed findings that the killings were premeditated and deliberate, such as by application of the "drive by" first degree murder provisions.

The ever-expanding list of special circumstances conferring death-eligibility fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.*

As argued in subsections B through J of this Argument, *ante*, the statutory scheme lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor, the "circumstances of the crime," is an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative inter-case proportionality review in the context of the entire California sentencing scheme, as required by federal constitutional principles (see *Kansas v. Marsh, supra*), that scheme is alternatively unconstitutional.

Section 190.3 itself does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal. 4th 173 at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal. 3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment, even if it did not do so previously.

M. Imposition of the Death Penalty Currently Violates the Eighth and Fourteenth Amendments to the United States Constitution Because it Is Contrary to International Norms of Humanity and Decency.

The United States stands as one of a small number of industrially-developed, democratic nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist

Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

This Court and the United States Supreme Court have previously rejected claims that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590; 2 L.Ed. 2d 630]; *People v. Cook* (2006) 39 Cal. 4th 566, 618-619; *People v. Ghent* (1987) 43 Cal. 3d 739, 778-779.) Those claims were presented in a historical context that no longer exists. Standards of decency that inform the Eighth and Fourteenth Amendments are never static. (*Trop, supra*, at 101.) Thus, Hardy's claim that the death penalty currently violates international norms of humanity and decency must be evaluated differently than they were evaluated in prior cases.

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554, [125 S.Ct. 1183; 161 L.Ed. 2d 1]), Hardy urges the Court to hold the death penalty unconstitutional because, among other things, it violates the

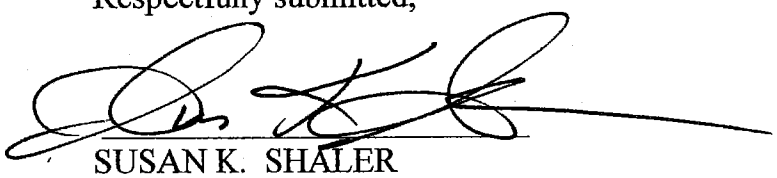
"evolving standards of decency that mark the progress of a maturing society" (*Trop*, 356 U.S. at 101), and a violation of international law. "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana* (2008) __ U.S. __, [128 S.Ct. 2641, 2650, 171 L.Ed. 2d 525] [holding that imposition of death penalty for aggravated child rape is disproportionate and violates the Eighth Amendment.].)

CONCLUSION

Hardy was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The foregoing errors deprived Hardy of his right to a meaningful determination of guilt and a reliable determination of penalty. Accordingly, the judgment of guilt must be reversed. Alternatively, the judgment of death must be vacated.

Respectfully submitted,

DATED: June 10, 2013



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CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO RULE 8.360(B)(1), CALIFORNIA RULES OF COURT

I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.630(b), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X4. The word count for the brief is 112,279, including footnotes, but not including the cover or tables. Because the brief does not comply with the rule, which limits the word count to 102,000, appellant previously filed a motion seeking leave to file an oversized brief, which this Court granted on April 30, 2013. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

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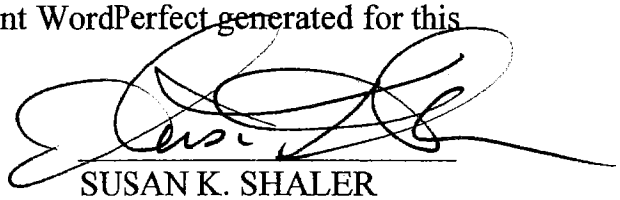

SUSAN K. SHALER

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action. My business address is: Susan K. Shaler Professional Law Corporation, 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075.

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APPELLANT'S OPENING BRIEF

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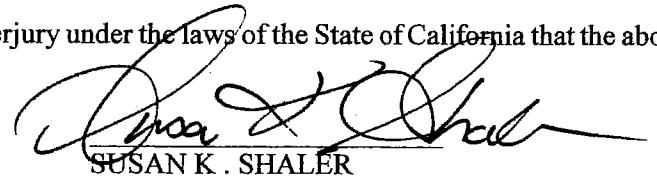

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