SUPREME COURT COPY

COPY

No. S119296

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

THOMAS LEE BATTLE,

Defendant and Appellant.

(San Bernardino County Superior Court No. FVI012605)

SUPREME COURT
FILED

DEC 18 2013

Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

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

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DEATH PENALTY

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No. S119296

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	(San Bernardino County
	)	Superior Court
THOMAS LEE BATTLE,	)	No. FVI012605)
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On November 28, 2000, a complaint was sworn out in San Bernardino County charging appellant, Thomas Battle, in Case No.

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

FVI012605 as follows: in count 1 with the willful, deliberate and premeditated murder of Andrew Demko on or about November 18, 2000, in violation of section 187, subdivision (a); in count 2 with the willful, deliberate and premeditated murder of Shirley Demko on or about November 18, 2000, in violation of section 187, subdivision (a); in count 3 with the first degree residential burglary of Andrew Demko on or about November 18, 2000, in violation of section 459; in count 4 with the first degree residential robbery of Andrew Demko on or about November 18, 2000, in violation of section 211. (1 CT 2-7.) The complaint also alleged that all the charges were serious felonies pursuant to section 1192.7, subdivision (c) and that counts 3 and 4 were violent felonies within the meaning of section 667.5, subdivision (c). (*Ibid.*)

On November 29, 2000, appellant was arraigned, entered pleas of not guilty to all charges and denied all the other allegations, and the public defender was appointed to represent him. (1 CT 21.)

On November 2, 2001, the first amended felony complaint was filed in San Bernardino County Superior Court charging appellant as follows: in count 1 with the unlawful murder of Andrew Demko, in violation of section 187, subdivision (a) on or about November 13, 2000; in count 2 with the unlawful murder of Shirley Demko, in violation of section 187, subdivision (a) on or about November 13, 2000; in count 3, with the first degree residential burglary of a dwelling of Andrew and/or Shirley Demko in violation section 459 on or about November 13, 2000; in count 4 with the first degree residential robbery of Andrew and/or Shirley Demko in violation of section 211 on or about November 13, 2000; in count 5, with the kidnapping of Andrew Demko in violation of section 207, subdivision (a) on or about November 13, 2000; in count 6, with the kidnapping of

Shirley Demko in violation of section 207, subdivision (a) on or about November 13, 2000. (1 CT 64-67.)

The first amended complaint also alleged that all the charges were serious felonies pursuant to section 1192.7, subdivision (c) and that counts 3 and 4 were violent felonies within the meaning of section 667.5, subdivision (c). (1 CT 64-67.) The complaint further alleged as to counts 1-6 that appellant used a deadly and dangerous weapon, a knife, causing the offense to be a serious offense within section 1192.7, subdivision (c)(23). (1 CT 68.) In addition, the complaint alleged pursuant to sections 1170.12, subdivisions (a)-(d) and 667, subdivisions (b)-(i), that appellant suffered a prior conviction of a serious felony, a violation of section 459 on March 13, 1995, in San Bernardino Superior Court, and a prior conviction for violation of section 470 on April 15, 1997, also in San Bernardino Superior Court. (1 CT 68.)

The first amended complaint further alleged special circumstances as follows: that, as to count one, the murder of Andrew Demko was committed while the appellant was engaged in the crime of burglary within the meaning of section 190.2, subdivision (a)(17)(G), the crime of robbery within the meaning of section 190.2, subdivision (a)(17)(A), and the crime of kidnapping within the meaning of section 190.2, subdivision (a)(17)(B); that, as to count two, the murder of Shirley Demko also was committed while appellant was engaged in the crime of burglary within the meaning of section 190.2, subdivision (a)(17)(G), the crime of robbery within the meaning of section 190.2, subdivision (a)(17)(A), and the crime of kidnapping within the meaning of section 190.2, subdivision (a)(17)(B); and that, as to counts one and two, the murders of Andrew Demko and Shirley Demko, are special circumstances within meaning of section 190.2,

subdivision (a)(3). (1 CT 69-70.)

On November 7, 2001, appellant entered a not-guilty plea to all the charges, and denied the special allegations and the prior conviction allegations. (1 CT 74.) On the same day, a preliminary hearing was held, and appellant was held to answer on all the counts and the special circumstance and enhancement allegations. (1 CT 74-75.)

Also on November 7, 2001, the prosecution announced its intention to seek the death penalty. (1 CT 74.)

On November 21, 2001, an information was filed in San Bernardino County Superior Court alleging the same counts, the same enhancements, and the same special circumstances as alleged in the first amended complaint. (1 CT 144-150.)[2] On the same day, appellant again entered not-guilty pleas to the charges and denied all the special allegations and prior-conviction allegations. (1 CT 152.)

On February 24-27, 2003, the trial court held an in limine hearing pursuant to Evidence Code section 402 on whether to admit the statements appellant made during his custodial interviews (2 CT 396, 408, 429), and on March 3, 2003, the trial court granted the prosecution's motion to admit, and denied appellant's motion to exclude, the statements (2 CT 429).

On February 10, 2003, the trial began with jury selection. (1 CT 289.) On March 5, 2003, the trial court denied appellant's motion under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79, challenging the prosecution's use of peremptory challenges. (2 CT 433.)

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[2] On March 4, 2003, the information was amended by interlineation to correct the date of the conviction of the alleged prior burglary from March 13, 1995, to February 14, 1995. (1 CT 148.)

On March 5, 2003, twelve jurors and four alternates, were selected and sworn to try the case. (2 CT 434).

On March 11, 2003, the guilt phase began with the prosecution's presentation of its case-in-chief (2 CT 437), and on March 26, 2003, the prosecution rested (2 CT 467).

On March 17 and 18, 2003, the trial court denied appellant's motion to redact certain statements he made during the custodial interrogations from the audiotapes and the transcripts that the prosecution planned to introduce as evidence, and the statements were admitted. (3 CT 450, 452; 8 RT 1788-1792; 8 RT 1903-1909.)

On March 26, 2003, the defense presented its case (2 CT 470), and on April 7, 2003, the prosecution presented its rebuttal (2 CT 480.)

The prior conviction allegations were not tried to the jury. (2 CT 521-536; 3 CT 606-624.)

On April 10, 2003, the jury began its deliberations in the morning (2 CT 589), and also deliberated on April 11, 15, 16, 17, 18 and 21 (2 CT 591-595, 598; 3 CT 601, 604). On April 22, 2003, the jury returned its verdicts finding appellant guilty on all counts and finding true all the special circumstances and sentencing enhancements except the prior conviction allegations, which appellant later admitted. (3 CT 632-633, 699.)

On April 24, 2003, the penalty phase began. (3 CT 634.) On that day, the prosecution presented its case in aggravation (3 CT 634), and on April 29, 2003, the defense presented its case in mitigation (3 CT 636).

On May 5, 2003, both parties presented their closing arguments, the jury was instructed and began its deliberations. (3 CT 700.) The jury also deliberated on May 6, 7, and 8 before returning a verdict of death on May 9, 2003. (3 CT 701-703, 709, 718.)

On September 4, 2003, the trial court denied the motion for new trial and automatic motion for reduction of penalty. (3 CT 786.) The trial court sentenced appellant to death on Counts 1 and 2 and to determinate terms of years in state prison on counts 3 through 6 and the accompanying enhancements, all of which were stayed and then ordered to run consecutive to the sentence on count 5, ordered him to pay restitution of $10,000 pursuant to section 1202.4, and remanded him to custody at San Quentin State Prison. (3 CT 787-788.)

STATEMENT OF FACTS

I. GUILT PHASE

A. The Prosecution's Case

1. Andrew and Shirley Demko Disappear

In November of 2000, Andrew Demko, 77 years old, and Shirley Demko, 72 years old, had been married for 22 years. They lived with their two dogs in Apple Valley. (7 RT 1611-1613.) Both Andrew and Shirley used a cane and a walker, and Andrew's hearing was almost gone. (7 RT 1613-1614.) Andrew had two adult children, Denise Goodman and Richard Demko. (7 RT 1611-1612.) On about November 14, 2000, a mailman noticed that the mail from the previous day was still in the Demkos' letterbox. (7 RT 1596, 1599.) As the week went on, the mail still was not being picked up. (7 RT 1597.) Although Thanksgiving was approaching, Denise had not heard from her parents about whether they were coming to visit. (7 RT 1615.) For several days, Denise tried to call her parents, but received no response and began to call relatives to see if any had heard from them. (7 RT 1615-1616.)

Denise called the police and asked them to check on her parents. She was told that everything looked fine – the car was not at the house, and

the dogs were locked in a room in the house. (7 RT 1616-1617.) Still concerned, Denise spoke with her parents' neighbor who, on about November 20, noticed papers were stacking up in the front yard and a mail or delivery post-it was on the front door. The neighbor checked the house and reported similar findings. (7 RT 1603-1607; 7 RT 1617.) Denise, still concerned, called the police and asked them to go check again. (7 RT 1618.) When the police returned Denise's call, they asked her to come to the police station the next day, where she was informed her father was dead. (*Ibid.*)

2. The Demkos' Bodies Are Found in the San Bernardino Desert

On November 18, 2000, a man and his son were hunting in the San Bernardino desert when they came upon the body of a man lying on the ground. (6 RT 1364, 1370.) Upon receiving a 911 call, the San Bernardino County Sheriff's Office responded to the scene. (6 RT 1373, 1375-1376.) The body of a woman was found about 200 yards away from the man. (6 RT 1375-1376.) A homicide investigative team arrived, and forensic specialists examined the area for evidence. (6 RT 1388, 1392.)

The man was lying on his back, wearing his pajamas, bathrobe and a slipper. (6 RT 1395.) His pajamas had blood on them near his upper right chest. (*Ibid.*) The ground near the other slipper was disheveled, showing scuffling on the dirt. (6 RT 1397.) Other shoe prints along with scuff marks, which appeared like fingers dragging across the dirt, were found. (7 RT 1421-1422.) The man was later identified as Andrew Demko. (9 RT 2250; 10 RT 2650.)

The woman was found lying on her stomach, wearing pajama bottoms. (7 RT 1432.) Her torso had been subjected to "extensive animal

activity" with her back missing flesh and only a small number of organs remaining in the body cavity. (7 RT 1456.) Her right shoulder was detached from the arm, and the skull had no skin. (*Ibid.*) The pajamas had blood on them and a one-inch cut in the material. (7 RT 1445, 1468.) The woman was later identified as Shirley Demko. (9 RT 2260; 10 RT 2650.)

The ground near Mrs. Demko's body was saturated with blood, and samples were collected. (7 RT 1432, 1469.) Cigarette butts were found dumped in a pile near the body, some of which appeared to have lipstick on the end. (7 RT 1432-1433, 1438.) The cigarette butts were not tested for DNA. (7 RT 1467.)

The area where the Demkos' bodies were found was open desert with sparse vegetation and off-road recreational activity. (6 RT 1371, 1377.) Some tracks were clear, while others were difficult to see, and the testimony was inconsistent as to how many sets of tire tracks there were. (6 RT 1382, 1398, 1406-1407; 7 RT 1464.) There was a set of tire tracks that went from the woman's body to the man's body. (6 RT 1405-1406.) A comparison between the tire impressions found in the desert and the impressions taken from the tires of the Mercury Sable car belonging to the Demkos was never made. (7 RT 1538-1539, 1686.)

On November 28, 2000, ten days after the Demkos' bodies had been found, a homicide detective returned to the crime scene to look for evidence of zip ties, with which, he had been informed, the victims had been bound. (10 RT 2507-2808.) He found five zip ties within 30 feet of each other, scattered in the general area of the bodies; he also found some duct tape with what appeared to be a blood stain on it. (10 RT 2508-2509, 2511-2512.) He had seen the zip ties when the crime scene was initially processed, but they had not been collected at the time. (10 RT 2520.) The

duct tape and zip ties were processed for fingerprints, but none were found. (7 RT 1558-1561.) No shoe print evidence or no tire track evidence was presented. (9 RT 2099.) No murder weapon was found, and no DNA evidence or other physical evidence linked appellant to having been in the desert where the Demkos' bodies were found. (9 RT 2099-2100.)

3. The Causes of the Demkos' Deaths

Autopsies were performed on the bodies on November 22, when their identities were still unknown. (7 RT 1455, 1457.) The cause of Andrew Demko's death was strangulation with a stab wound to the neck. (10 RT 2338.) It could not be determined if the stab wound or strangulation had occurred first. (*Ibid.*) The stab wound was on the right side of the neck, was four and one-half inches deep, and was consistent with a single-edged knife. (9 RT 2253, 2295, 2298; 10 RT 2335.) An abrasion on the edge of the wound was consistent with a knife guard injury. (9 RT 2253-2254, 2301-2302.) There were abrasions and bruising on his forehead, which were caused by blunt force trauma, and on his chin and neck, which was evidence of strangulation. (9 RT 2303-2306.) There were injuries to his hands, wrists, knees, feet and arms. (9 RT 2307, 2309-2310, 2327.) Some of the injuries were consistent with defensive wounds, some with being dragged, and others with being bound. (9 RT 2322-2325, 2327.) Some injuries were more consistent than others with the use of zip ties, but it could not be determined that zip ties had been used. (9 RT 2322-2323, 2384-2385.)

The cause of Shirley Demko's death was homicidal violence of undetermined etiology, but with significant portions of her body missing, the specific mechanism of death could not be determined. (10 RT 2352-2353.) Mrs. Demko's wrists were duct taped together, and her hands

had blunt force trauma and cuts to them. (7 RT 1457, 2357, 2364-2365.) The duct tape was later examined for fingerprints, but none were found. (7 RT 1558-1559.) Mrs. Demko's lower extremities showed bruises and abrasions, the cause of which was unclear, and the injuries to her feet and ankle were consistent with, but not necessarily caused by, binding or zip ties. (10 RT 2359-2360, 2364.) There was no evidence of a stab wound below the shoulder blade or in the neck, which may have been due in part to the skeletonized condition of the upper body. (10 RT 2367-2370.)

4. The Physical Evidence at the Demkos' House

Denise and Richard were taken to inspect their parents' house. The television, VCR and stereo speakers were missing. (7 RT 1623-1624.) Although financial items and mail were strewn on the office floor, there were no signs of struggle, blood or ransacking in the house. (7 RT 1668, 1681, 1683.) The Demkos' dogs were not in the house. (7 RT 1647, 1679.) A cup of coffee and a burned cigarette were found on the dining room table, along with an open newspaper, dated November 13. (7 RT 1653-1654; Exh. 178, 180-181.) Los Angeles Times newspapers, dated November 14-19, and a copy of the Desert Dispatch, dated November 14, all still wrapped for delivery, were stacked in the corner of the dining room. (7 RT 1655-1657; Exh. 180.) Two Federal Express delivery slips were found in the trash can in the kitchen. (7 RT 1651.) One of the Federal Express slips was dated November 21, three days after the Demkos' bodies had been found, which indicated someone had been inside the residence after that time. (7 RT 1651-1652.)

Cigarette butts, newspapers, Federal Express tags and dog hairs were collected. (7 RT 1639, 1684, 8 RT 1766, 1769, 1773, 1775.) Although the house was processed for latent impressions, no fingerprints were found

anywhere in the house, including on any of the newspapers or Federal Express tags. (8 RT 1767-1773.) Although numerous shoe print impressions were taken from the house and the garage (8 RT 1776-1778), they were not tested before trial, although the sheriff's investigators had obtained nine pairs of appellant's shoes. (9 RT 2099, 10 RT 2512-2513.) In short, there was no fingerprint, DNA or other evidence that appellant had been at the Demkos' house. (9 RT 2099-2100.)

5. Appellant's Possession of the Demkos' Car Leads to His Arrest

Jenica McCune met appellant in 1994, when he was a Marine. They were very good friends, but not romantically involved, and lived together from 1994 to 1999. (7 RT 1700; 8 RT 1715, 1730.) They called each other "brother" and "sister," and McCune's children called appellant "uncle." (8 RT 1730, 1735.) Appellant came to take care of McCune's children, with whom he had a good relationship, when her husband was shot and killed in April 1999, and again when her great-grandfather died. (8 RT 1730, 1734-1735.)

In November 2000, McCune was living in Victorville with her children and a roommate, Mercedes Villatoro. (7 RT 1693-1694; 8 RT 1715-1716.) Appellant came to McCune's apartment, which surprised her because she had not been in contact with appellant for about a year. (8 RT 1717, 1719.) According to McCune, appellant arrived on November 13, or perhaps November 15 or 16, but she was not positive about the date. (8 RT 1715-1716, 1737-1738.) For about the next two weeks, McCune saw appellant every day. (8 RT 1721.)

Appellant had a car, described by Villatoro and McCune as a blue Ford or Ford Taurus and identified as shown in Exhibit 132, which he said

he had bought. (7 RT 1694-1695, 1701; 8 RT 1720, 1722.)[3] Appellant told McCune that the car was dirty because the people who owned it before him had dogs (8 RT 1720, 1748) and that he had not yet registered the car because "'[y]ou know how your little brother works'" (8 RT 1724). Other people also saw appellant with a similarly-described car around this time. (9 RT 2199-2201; 10 RT 2445.)

On the evening of November 25, Villatoro borrowed the car from appellant. (7 RT 1694.) While driving, Villatoro was stopped and questioned about the car by the police. (7 RT 1697.) She directed them to appellant, who was at the apartment. (*Ibid.*) Appellant was taken into custody. (8 RT 1797.)

Items were collected from the car including cigar wrappers and tops from the ashtray (7 RT 1519), which were not tested for DNA or other evidence (7 RT 1536, 1545, 1570, 1578). In a compartment between the two rear seats, boxes of checks, credit cards, insurance and grocery cards, and a photocopy of the driver's licenses for both of the Demkos were found. (7 RT 1522.) Inside the driver's door, a J.C. Penny gift card was found. (7 RT 1544.) Latent fingerprints were collected from the inside, outside, and contents of the car. (7 RT 1551, 1554, 1556.) The fingerprints from the car did not match appellant's. (10 RT 2550, 2561- 2562.)[4]

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[3] The Demkos' car was a Mercury Sable which Villatoro, an insurance agent who worked with cars, testified looked similar to a Ford Taurus. (7 RT 1694, 1701-1702.)

[4] These prints were compared only to those of appellant and Trenia Sutton, Perry Washington's sister. (10 RT 2562; 12 RT 3163-3164.)

6. Other Property from the Demkos' Home Is Tied to Appellant and the Christian Living Home on Rancherias Road in Which He Lived

In November 2000, appellant was living in the Christian Living Home on Rancherias Road in Apple Valley run by Reverend M.L. Harris, and previously had lived in another of Harris's residences on Mesquite, which was not far from the Demkos' home. (8 RT 1927-1928; 9 RT 2196.) Perry Washington and several other men also lived at the Rancherias residence. (9 RT 2217.)

On November 26, the morning after appellant's arrest, San Bernardino County Sheriff's detectives searched the room appellant shared with William Kryger at the residence on Rancherias Road and found several items linked to the Demkos. (10 RT 2479, 2481.) A J.C. Penny bag with costume jewelry was under appellant's bed. (10 RT 2485-2486.) A Nordic Track box and accompanying VCR cassette in Shirley Demko's name and a Capital One credit card sheet, also in her name, were under Kryger's bed. (10 RT 2483, 2487, 2514.) The search of the room also found a watch and a box of rubber gloves on a bookshelf (10 RT 2486, 2488), small white hairs (10 RT 2521), a box of coins in a closet (10 RT 2488), another watch, a Carden pen set, and a rubber glove, turned inside out in a trash can (10 RT 2485-2488), a Bank of America check, and two speakers with dimensions matching the indentations in the carpet in the Demkos' house (10 RT 2484-2485; 8 RT 1871-1876). Nine pairs of shoes were taken from the room, although no evidence was presented of any comparison. (10 RT 2513; 9 RT 2098-2099.)

Three days later, the detectives searched Perry Washington's room at the Rancherias Road residence. (10 RT 2495.) They did not find any

property obviously connected to the Demkos, but found a black jacket with small white hairs on it. (10 RT 2496, 2515.) No evidence was presented that these hairs were compared to the other white hairs collected in the case, which presumably came from the Demkos' dogs. (8 RT 1766, 10 RT 2515-2516.) In a patio area outside the house, the detectives found a pillowcase containing the Demkos' checks, credit cards and wallet. (10 RT 2505-2506.)

The TV, VCR and videos, which had been taken from the Demkos' home, were recovered from the Bear Valley Pawn Shop. (8 RT 1860; 12 RT 3028.) The pawn slip for the videos was dated November 15, 2000, and the slips for the TV and VCR and a boom box were dated November 17, 2000. (9 RT 2237-2246.) Appellant's name and fingerprints were on the pawn slips. (10 RT 2236, 2241, 2243-2245, 2555-2557.)

McCune discovered additional evidence in her apartment as she was packing to move. She found a GTE phone card, a 76 or Shell gas card and a Texaco card – all with the name "Demko" on them – and a bank card underneath the bathroom sink, and a pocket watch, which she had seen hanging on appellant's pants, in the coat closet by her front door. (9 RT 2118-2121.) When McCune discovered the items, she called the Victorville Sheriff's Department (9 RT 2122), and an officer picked up the items (9 RT 2122-2123, 2159).[5]

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[5] McCune did not disclose this information to the prosecution before trial. Immediately after she testified for the prosecution, appellant delivered a letter to McCune stating that he was going to marry Shelby Barnes. (9 RT 2158.) McCune then informed the investigating officers and prosecutor of the additional evidence, which she had previously disclosed to the defense investigator, and she was recalled as a prosecution witness. (9 RT 2153,
(continued...)

7. Appellant's Custodial Statements

On November 26 and 27, appellant was interrogated by San Bernardino Sheriff's detectives Michael Gilliam, Derek Pacifico, and Robert Heard. They testified about, and played audiotapes of, the custodial interrogations.[6] Appellant was advised of and waived his *Miranda* rights at the beginning of the November 26 interview (3 CT 869-870), and again at the beginning of the first interview on November 27 (4 CT 955-956). Over the course of the interrogation, appellant gave several versions of the crimes, which varied with regard to his participation in the crimes and the people he implicated in them. According to the homicide detectives, all the custodial interviews were recorded, but one tape – tape 2 on November 26 – turned out to be blank. (3 CT 825; 8 RT 1817-1818, 1847, 1887-1888.)

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[5] (...continued)
2165-2166.)

[6] Appellant was interviewed by detectives Gilliam and Pacifico for about four and a half hours through the early morning hours of November 26. (8 RT 1816-1818; 3 CT 868 - 4 CT 940 [Exh. 256f, transcript of interview]; 8 RT 1803-1806, 1811-1812, 1815 [audiotapes of the interview, Exh. 256d and Exh. 256e, are played for jury].) Detectives Gilliam and Pacifico interviewed appellant for a short while on the morning of November 27 (4 CT 955-965 [Exh. 257d, transcript of interview]; 8 RT 1900 [audiotape of the interview, Exh. 257c, is played for jury].) This interview was followed immediately by an extended interview by investigator Heard. (4 CT 1083-1164 [Exh. 258g, transcript of interview]; 8 RT 2004 [audiotape of the interview, Exh. 258e, is played for jury]; 8 RT 2012-2013 [audiotape of the interview, Exh. 258f, is played for the jury].) After Heard's interrogation, detectives Gilliam and Pacifico again interviewed appellant. (5 CT 1316-1462 [Exh. 259h, transcript of interview]; 8 RT 2077 -2079 [audiotapes of the interview, Exh. 259e, is played for the jury].)

a. Appellant admits possessing property linked to the Demkos, but denies involvement in the murders

The first taped interview, on November 26, began at 1:13 a.m. (3 CT 868.) Detective Gilliam informed appellant he wanted to talk to appellant about the car appellant lent to Mercedes Villatoro. (3 CT 870.) Appellant said the car had been lent to him by his friend Neal, who also was known as "Nasty" and "Lefty" and whose real name, as established at trial, was Anthony Bennett. (3 CT 873; 9 RT 2175.)[7] Appellant ran into Neal and explained that he had been laid off work and was without transportation. (3 CT 880.) Neal offered appellant the use of the car. (3 CT 871, 880.) Appellant borrowed the car several times, the first being about a week before the police interview (3 CT 875), and he told Jenica McCune that the car was his (3 CT 878). Neal told appellant that he could use the Texaco gas card that was in the car. (3 CT 882.)

Neal also showed appellant some boxes, in the car's trunk, containing checks, credit cards and identification cards with male and female names. (3 CT 887, 889.) When Neal removed two of the boxes and asked if appellant wanted to make some money, appellant declined and explained that he was trying to "fly straight." (3 CT 887, 889.) Appellant knew Neal was doing "some real foul things. (3 CT 890.)

Appellant's girlfriend, Angie Dodd, found a credit card, or perhaps a telephone calling card, with a woman's name on it in appellant's jacket pocket. (3 CT 871, 887-888.) Appellant had found the card in, and later returned it to, the armrest of the car. (3 CT 888, 890.) Appellant also

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[7] The name "Neal" is spelled in two ways in the record; appellant uses the version that first appears in the interrogation transcript.

explained that he had a TV and VCR at the group residence because a different Angie, who was known as "Left Eye," had asked him to store the items for her while she moved. (3 CT 883-884.) Although appellant had not known this Angie very long, he kept the TV and VCR in the house for a couple of days and then returned them to her. (3 CT 885-886.)[8]

The detectives told appellant that the owners of the car appellant was using had been found dead in the desert, that their house had been broken into and their TV and VCR were missing, and that someone knew appellant had the car on November 13, the day the people went missing. (3 CT 891.) Appellant denied involvement and said he did not kill anybody. (3 CT 891-892.) Appellant did not know if Neal and his friends were involved, but knew that another person in his house, Perry, was involved "[w]ith the credit cards and stuff" (3 CT 892, 895-896; 4 CT 926-927) and asked appellant if he wanted to make some quick cash by pawning a TV and VCR (3 CT 894-895). Appellant, who already was pawning some of his own possessions to get money, picked up the TV, VCR, speakers and movies from Neal on November 17 or 18 (3 CT 893, 896) and pawned the TV and VCR at Bear Valley Pawn Shop (3 CT 894). He did not pawn the speakers because they were needed for church at the park on Sunday. (3 CT 894-895.) Appellant insisted the only thing he was asked to do and did was to get rid of the TV and VCR. (3 CT 893.)

At this point, for some unknown reason, the recording of the interrogation stopped for approximately 90 minutes. (4 CT 900; 8 RT 1818, 1939-1940.)

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[8] This Angie a/k/a "Left Eye" was identified at trial as Alicia Fisher. (9 RT 2104.)

b. After the unrecorded portion of the November 26 interview, appellant admits going into the Demkos' house with four other people to take their property, but says he left the group while the victims, bound in the car trunk, were still alive

When the recording of the interview resumed, appellant's story had changed dramatically. (4 CT 900.) He had gone from telling the detectives he had pawned a handful of items and borrowed the car from Neal, to placing himself in the middle of the Demkos' house with four others – Neal, Left Eye (Neal's girlfriend), Neal's "brother" (whose name appellant did not even know) and Steve. (4 CT 910-914.) According to appellant, the plan – made months in advance – was to enter the house, take everything, including the car, and to take over the people's credit. (3 CT 901-906.) Appellant was an outsider in the group, while the others had known each other for years. (4 CT 903.) Appellant had been told the people in the house would be away on vacation (4 CT 903), but after walking by the house the afternoon before the crimes and seeing they were not gone, he assumed they would be home (4 CT 906).

According to appellant, on the morning of the crimes, he met up with the others shortly after 4:00 a.m. (4 CT 908.) Everyone wore gloves, and everyone but appellant had socks over their shoes. (4 CT 932.) When they got to the Demkos' house, it was dark. (4 CT 907.) When Neal's brother entered the front door, the man screamed. (4 CT 913.) Steve struggled with and tried to choke the old man who called for his wife, and Neal's brother tackled the woman and fought with the woman, who was saying she was helpless and unarmed. (4 CT 914-915, 920.) Appellant described the man as wearing a dark blue bathrobe with lighter blue pajamas, but did not

recall what the woman was wearing. (4 CT 931.)

Appellant's job was to go into the individual rooms to look for and take valuables, which he did. (4 CT 905, 915-918.) From his position in the bedroom, appellant could hear the woman saying "'don't hurt us, just take what you want, you know, we don't have anything, but whatever you see just take and please, you know, don't hurt us.'" (4 RT 919.) When appellant left the bedroom, the couple was not in the house. (*Ibid.*) Appellant did not see them being tied up. (4 CT 934.) As the group left in the car, the sun was coming up. (4 CT 921.)[9] Left Eye was driving, and appellant described where the others sat in the car. (4 CT 920-921.) Appellant knew the man and woman were in the trunk of the car because there was pounding inside the trunk. (4 CT 922-923, 931.)

Appellant became nauseous, asked that they stop the car, got out of the car, and began throwing up. (4 CT 922.) The others called him names, and Left Eye tried to force him up, but appellant was throwing up and could not move. (4 CT 923.) When he got out of the car, he had an idea about what the others were going to do with the people in the trunk. (4 CT 929.) The group left him by the side of the road, but returned in less than an hour. (4 CT 923.) Appellant again started to throw up; the others again called him "a little bitch," and again left him. (4 CT 923-924.) Appellant started to walk back to town, got a ride with a man in a pick up, and went to a Del Taco restaurant where he cleaned himself up. (4 CT 924.) He returned home on his own, and threw the shoes he was wearing in the trash. (4 CT 933.)

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[9] The court took judicial notice of the fact that the sun rose at 6:21 a.m. on November 13, 2000. (10 RT 2650.)

Later that day, appellant saw Neal, who apologized to appellant about calling him names and offered him use of the car, credit cards and checks. (4 CT 924, 928.) With regard to the car, Neal said, "[T]hey ain't around no more to report it stolen so you can hold onto it for a while." (4 CT 924.) From this comment, appellant understood the people were dead. (*Ibid.*) Two nights later, appellant went back to the house and took the TV, VCR, a pair of speakers and a boom box, and pawned them at Bear Valley Pawn. (4 CT 934-935.) He took a Fed Ex notice off the door knob and set it on top of the stereo and put the newspapers in the corner of a patio walkway in front of the house. (4 CT 936-937.)

c. In the first interview on November 27, appellant provides further information about the participants in the crimes

Starting at 10:10 a.m. on November 27, appellant was interviewed again by detectives Gilliam and Pacifico. (4 CT 955.) Appellant was read and waived his *Miranda* rights. (4 CT 955-956.) He gave the detectives information about the locations of Neal, Neal's brother, Left Eye, Steve and appellant when they approached the house (4 CT 956-957), how he knew the other participants and their relationships (4 CT 957-961), and identified photographs of them (4 CT 962-964).

d. In the second interview on November 27, appellant admits that he knew there was a plan to kill the people and that he was in the desert, first says Steve killed both the man and the woman, but later says he stabbed both victims while Steve held a gun on him

Immediately after the preceding interview, special investigator Robert Heard interviewed appellant. (8 RT 2002.) At first, appellant told Heard a version of the crimes similar to that he had told detectives Gilliam

and Pacifico.[10] Appellant added some details, including that when the group entered the house, the man screamed "Shirl" for his wife (4 CT 1123) and that the man and woman were fighting for their lives (4 CT 1125). He also described how the people were taken from the house. (4 CT 1126-1128.) Appellant said that Perry and Matthew Hunter, who also were living with him at Reverend Harris's house, were not involved in the plan. (4 CT 1094-1095.)

When investigator Heard pressed for further information, appellant, for the first time, admitted that in August he knew that the plan was not only to take the car, credit, identity and house, but also was to kill the residents. (4 CT 1099-1104.) Steve was to handle and kill the man, and Neal's brother was going to kill the woman. (4 CT 1119-1121.)

When investigator Heard accused appellant of lying when he said he was not present when the people were killed, appellant changed his story. He stated that he tried to get out of the car, but Steve pulled a gun on him,

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[10] Appellant said that Neal was the mastermind of the plan to make money using the credit of an old man who lived in a particular house (4 CT 1089-1091, 1093, 1096-1097); that the participants were Neal, Left Eye, Neal's brother, Steve and appellant (4 CT 1093); that he participated in breaking into the house and taking property (4 CT 1123-1129); that he heard pounding in the trunk as the group was driving in the car and assumed the couple was still alive (4 CT 1133); that he vomited – made himself vomit – and got out of the car as the victims were being driven to the desert (4 CT 1129-1130); that the others, angry at him, drove off leaving appellant by the side of the road, but later returned and then left again (4 CT 1131), and appellant went to Del Taco to clean himself up (4 CT 1134); that later that same day appellant took the car, but declined Neal's offer of checks and credit cards, although Neal left some of both in the car in case appellant changed his mind (4 CT 1135-1137); and that at Neal's direction, he went back to the house at a later date for the TV and other items to make the crime look like a burglary (4 CT 1138-1139).

and he was told that they were going to hurt his godson, Marquis. (4 CT 1139.) The group, including appellant, drove into the desert. (4 CT 1140.) When they got to the desert, Steve pulled the woman out of the trunk. (4 CT 1141-1142.) She cried, "[O]h God, no. You said you weren't going to kill us. Please God, don't kill me." (4 CT 1141.) Steve and Neal's brother cut the zip ties off the woman's ankles and wrists and duct taped the woman to quiet her. (4 CT 1143, 1145-1146). At some point, the man said, "what are you doing to my wife." (4 CT 1147.)

According to appellant, Steve remained with the woman while the rest drove further into the desert with the man in the trunk. (4 CT 1143, 1145.) Appellant did not know how the woman was killed (4 CT 1141), but saw Steve run towards the car holding a bloody knife, and it appeared she had been stabbed (4 CT 1147-1148). Appellant also last saw the man, whose ankles and wrists were bound with tie wraps, with Steve, who choked him and still had the knife. (4 CT 1148.) Everyone ran in different directions throwing the ties and duct tape that had been used into the desert. (4 CT 1048-1049.) As directed, appellant tossed the gray duct tape, which would have his fingerprints because he did not have on gloves. (4 CT 1049.) Left Eye had taken the woman's jewelry and made appellant take it to his house where he put it under his bed. (4 CT 1150.) Appellant also stated that Perry had the credit cards, which he knew were stolen and that he, appellant, had made no purchases, except for gas, on any of the cards. (4 CT 1151, 1154, 1160.)

Investigator Heard still was not satisfied with appellant's statements, and accused appellant of having killed the people. (4 CT 1155.) Appellant then admitted he stabbed first the woman and then the man. (4 CT 1156-1158.) According to appellant, he took off the ties and duct taped both

people. (4 CT 1156.) Steve choked the man until he was unconscious or dead, and then handed appellant the knife. (*Ibid.*) Steve held a gun to appellant's back, and appellant stabbed the man in the neck on the left side. Steve and Neal's brother also forced appellant to stab the woman in the back. (4 CT 1157.) He stabbed each victim once. (4 CT 1156, 1158.) Appellant did not think he killed either victim because the man was already dead when Battle stabbed him, and the old woman was still alive after appellant stabbed her. (4 CT 1159.)

e. In the final interview on November 27, appellant first admits the burglary but denies involvement in the murders, saying Perry alone killed the couple, but then admits he stabbed the man and the woman while Perry held a gun on him

After being interrogated by investigator Heard, appellant was re-interrogated by Detectives Gilliam and Pacifico. Appellant narrated a similar version, but with some changes, as that he last had told Heard – basically that he stabbed both the woman and the man after Neal threatened to harm appellant's godson, Marquis, if appellant did not carry out those acts and while Steve held a gun on appellant. (5 CT 1320-1389.) In this version, appellant again stated Perry was not involved (5 CT 1318), admitted he choked as well as stabbed the man (5 CT 1376), and said Left Eye had a backpack with the ties, duct tape, box cutter and knife (5 CT 1341-1345, 1379).[11]

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[11] The salient points in this version were as follows. The plan was to take over the people's credit and kill them. (5 CT 1324.) Appellant participated in the burglary, robbery and kidnapping. (5 CT 1351-1361.)
(continued...)

Detectives Gilliam and Pacifico doubted aspects of appellant's story and, admittedly lying, told him that Left Eye (Alicia Fisher) could not have participated in the crimes on November 13 because she had been arrested and jailed on the night of November 12, when she had not been, and that only his shoe prints were found, when, in fact, no prints were found in the desert and no shoe print comparisons from the Demkos' house had been made. (5 CT 1390-1393; 7 RT 1467; 8 RT 1840-1841; 9 RT 2100, 2104.) Appellant reversed his story: he was not in the desert at all, but previously said he had been there in order to protect a friend, Perry, who had helped him in the past and who was appellant's roommate at the Rancherias Road house. (5 CT 1398-1399, 1400, 1412.)

In this version, appellant, who recently had been fired from his job,

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[11] (...continued)
When appellant got nauseous, Steve forced appellant at gunpoint to stay in the car en route to the desert. (5 CT 1362.) Referring to appellant's godson, Neil said, "you have a real handsome little boy and it will be real fucked up if somethin' happened to him cause you don't want to follow directions." (5 CT 1362.) In the desert, the woman pleaded for her life. (5 CT 1364-1365, 1366). Still holding the gun on appellant, Steve ordered appellant to duct tape the woman's mouth, to stop her from screaming, and her wrist and ankles, because she had gotten out of the ties (5 CT 1365, 1370), handed appellant a knife and told him to stab the woman (5 CT 1367). Appellant stabbed the woman once in the rib cage (5 CT 1368), and left the woman, who was still alive, with Steve, who had the knife (5 CT 1368, 1371-1372). With regard to the man, Steve held a gun to appellant's head, cocked the trigger and told appellant to "[c]hoke this mother fucker to death, now" (5 CT 1375-1376). Appellant then choked the man, who passed out. (5 CT 1376). Steve gave appellant the knife and, holding the gun between appellant's eyes, told appellant to "finish the job." (5 CT 1377.) Appellant sat the man, who was unconscious, up and stabbed him on the left side, but not all the way, and Steve grabbed appellant's hand and rammed the knife all the way down so nothing showed but the knife handle. (5 CT 1378-1379.)

spontaneously decided to enter the Demkos' house with the intention of taking and pawning property. (5 CT 1399.) He entered the unlocked back door, was surprised by the man, pushed him to the ground and tied up both the man and his wife with rope appellant found in the garage. (*Ibid.*; 5 CT 1401-1403.) Scared, appellant left the house without any property and went home, where he told Perry what had happened. (5 CT 1400.) Perry told appellant to give him his clothes, which Perry would destroy. (*Ibid.*) Appellant showered and fell asleep. (5 CT 1400, 1408.) When appellant awoke, Perry was gone, but returned later that morning. (5 CT 1400.) Perry said he had used plastic ties and duct tape to bind the couple, had taken them to the desert, stabbed the woman in the back and the neck, and choked the man and stabbed him in the neck. (5 CT 1400, 1406, 1408.) Perry had a J.C. Penny's bag, the couple's driver's licenses and social security cards, and said their credit cards and checks were in the car. (5 CT 1404, 1405, 1407.) Perry said appellant could drive the car because the people would not be found. (5 CT 1407.) Appellant drove to the desert area, but turned back when he encountered a truck and then a CHP car. (5 CT 1404-1405.) On a different occasion, appellant went back to the house for the TV and VCR. (5 CT 1406.) Appellant said he knew all the details about the desert crime scene because he had been told what happened. (4 CT 1398.)

Detective Gilliam doubted appellant's new version. (5 CT 1413-1417.) Appellant then gave another version of the crimes, which diverged from his previous story at the point he told Perry about the burglary. Appellant said he committed the initial burglary alone, had taken the plastic ties with him, had used them to tie up the couple, and had left after things went sideways on him. (5 CT 1424-1427.) Perry brought appellant back to

the victims' house. (5 CT 1424-1425.) Perry threatened to kill Marquis and appellant's girlfriend. (5 CT 1425.) They took the TV and VCR and some other items. (5 CT 1428.) Perry told appellant to help him pick up the people, and appellant put the woman in the trunk. (*Ibid.*) When appellant questioned what they were doing, Perry pulled a gun on appellant and threatened to kill Marquis, and appellant put the man in the trunk. (*Ibid.*) The woman asked if they were going to kill her, and appellant told her they were not. (*Ibid.*) Perry directed appellant to drive to the desert (5 CT 1429), where he told appellant to get the woman out of the trunk (5 CT 1430). Standing on the door rim, Perry kept the gun on appellant and told him to kill them. (*Ibid.*) At Perry's direction, appellant duct taped the woman's mouth, but did so loosely, taped her arms behind her back and taped her feet. (*Ibid.*) The woman said, "I thought you wasn't gonna kill us" and appellant started crying. (*Ibid.*) Perry said, "come on T, your son's what, counting on you, don't fuck it up," and appellant stabbed the woman in the back and in the neck. (5 CT 1431.) When they drove away, she was still alive. (*Ibid.*) Perry stood on the door jam as appellant got the man out of the trunk. (*Ibid.*) Perry told appellant, "just remember about your boy and worry about what I tell you to do now" and directed appellant to choke the man. Appellant choked the man, but did not kill him. (5 CT 1432.) At Perry's orders, appellant stabbed the man in the neck. (*Ibid.*)

8. Appellant's Admissions to Matthew Hunter and Jenica McCune

Matthew Hunter, who had a felony conviction for robbery, lived with appellant at the Christian Living Homes on both Mesquite and Rancherias. (9 RT 2196.) Appellant's nickname was "Battle Cat." (9 RT 2205.) According to Hunter, sometime before November 2000, appellant said he

was going to come up with a car and whomever "he got the car from . . . would come up missing" in the desert. (9 RT 2198-2199.) Appellant said he could bury a body in the desert and nobody would ever find it. (9 RT 2199.) However, Hunter acknowledged that in his initial interview by police, he did not report any of these statements of appellant. (9 RT 2206.)

On the day of his arraignment, appellant called McCune from jail. (9 RT 2123-2124.) McCune described what appellant said. Appellant told her that the crime was a robbery that went bad. (9 RT 2124.) According to appellant, he, Perry and some other guys broke into the house. (*Ibid.*) The old man met appellant in the hallway; scared, appellant turned to leave. (9 RT 2125.) Perry pulled a gun on appellant and said, "'We're not gonna get out of this now, they've seen us. We're parolees, we'll have to pay for this.'" (*Ibid.*) Perry mentioned he was a three-striker. (9 RT 2141.) Perry told appellant that if he did not do what Perry said, he would kill appellant's nieces and nephews, apparently referring to McCune's children, as well as appellant's godson, and also would hurt appellant. (9 RT 2125, 2130.) Perry had appellant tie up the people, who were an elderly couple, put them in the trunk, and drive to the desert with Perry sitting in the car behind appellant with a gun to his head. (9 RT 2130.) Appellant did not say what happened to the people in the desert. (*Ibid.*) Other than Perry, McCune did not remember appellant mentioning the name of anyone else who was involved. (9 RT 2130, 2141-2142.)[12]

9. Some of the People Appellant Implicated Deny Their Involvement in the Crimes

Anthony Bennett, a convicted felon whose nicknames included

[12] During McCune's testimony, the trial court admonished the jury that appellant was not on parole at the time of this incident. (9 RT 2129.)

"Nasty," "Nasto," "Lefty," "Lefto," and "Neal," did not really know appellant. (9 RT 2176.) Bennett had lived in the same halfway house with appellant for only a few months in the spring of 2000. (9 RT 2176-2177.) According to Bennett, appellant approached him with a deal to get cars "real cheap," but Bennett said he did not drive stolen cars and walked off. (9 RT 2178.) Bennett denied participating in a burglary, denied having any discussion with appellant about burglarizing an elderly couple, taking a car or credit cards, or putting a house in his name, and denied forcing appellant to stab a man and a woman. (9 RT 2178-2179).

Steve Richardson, who had a conviction for burglary in 1999 and whose nicknames included "Stevo," lived with appellant in the house on Mesquite for a month or two. (9 RT 2186-2188.) Richardson never had a discussion with appellant about burglarizing a house or stealing a car from old people in Apple Valley, never went with appellant to burglarize a house in Apple Valley, never held a gun to appellant and forced him to kill an elderly man and an elderly woman, and never stabbed an elderly man or woman. (9 RT 2188-2189.)

10. William Kryger Sees Appellant at Night Dressed in Black with Duct Tape and Zip Ties and Later During the Day Sees Him Bring Property into the Rancherias House

William Kryger shared a room with appellant at the Christian Living Home on Rancherias (10 RT 2439), but he did not sleep in the room with appellant because he "didn't really like living with blacks." (10 RT 2442; 10 RT 2554.) On November 16 or 17, 2000, sometime between 10 p.m. and 1 a.m., Kryger noticed appellant in the family room of the Rancherias residence. (10 RT 2442-2443.) Appellant was dressed in a black sweatsuit and was holding silver duct tape and long, black zip ties. (10 RT 2443-

2444.) When Kryger asked appellant what he was doing, appellant responded, "Don't worry about it" and left. (10 RT 2444.)

The next morning or the following morning, Kryger saw appellant bring cleaning supplies, videotapes and a big TV into their bedroom. (10 RT 2446.) Kryger assumed these items were being unloaded from a car that appellant just recently had acquired. (10 RT 2446, 2453, 2472.) Kryger testified that Washington also was removing items from the car, but admitted that he previously had said Washington was at his girlfriend's house when the car was unloaded. (10 RT 2472.) Kryger had prior convictions for possession of flammable materials for arson in 1997, as a result of his placing a bomb in his girlfriend's house (10 RT 2442, 2476), and for first degree burglary and possession of stolen property (10 RT 2442).

11. Evidence That Perry Washington Was Working on the Morning of November 13

Anticipating appellant's third-party culpability defense, the prosecution presented evidence that on November 13, 2000, William Hawkins, who owned a construction company, had hired Washington to install a hot water heater. (10 RT 2523.) On that day, Hawkins got several calls from Washington. (10 RT 2524.) Phone records showed Hawkins received the first call at 6:00 a.m. when Washington called to get the address for the job. (10 RT 2525-2526, 2528.) At 8:51 a.m., Hawkins received another call from Washington, who this time was calling because he could not understand the lockbox to get into the house. (10 RT 2526, 2528-2529.) The drive from Apple Valley to the location where Washington was to install the water heater took about 25-30 minutes (10 RT 2531), and the job generally took about three hours (10 RT 2529).

B. The Defense Case

The defense theory, as set out in closing argument, was that the prosecution had charged the wrong man with murder – that Perry Washington was the actual killer, and appellant was involved only in taking, using and getting rid of the Demkos' property after they were killed. (12 RT 3185-3186.) Defense counsel argued that appellant made up the stories he told the sheriff's detectives because he knew about the murders, was afraid of and wanted to protect Washington, and was afraid his godson would be killed. (12 RT 3210-3212.) The defense also challenged the credibility of key prosecution witnesses (12 RT 3171, 3197-3210) and the adequacy of the prosecution's investigation of the crimes (12 RT 3163-3164, 3173-3176, 3183, 3189-3194). Defense counsel presented evidence to support all these points.

1. Perry Washington's Motive to Kill

According to the defense, Washington had a motive to kill the Demkos. The trial court took judicial notice of two of Washington's prior convictions for robbery. (12 RT 3057-3058; Exhs. 311-312.) Under California's three-strikes law, Washington already had two "strikes," which are convictions for serious or violent felonies such as robbery. (12 RT 2998-2999.) If convicted of another felony, including burglary, he would be a "three-striker" and would face a sentence of 25 years to life in prison. (12 RT 2999-3000.)

The defense theory was supported by the testimony of William Kryger. On cross-examination during the prosecution's case-in-chief, Kryger admitted his involvement in a residential burglary of an old man's house on November 2, 2000, a little more than a week before the Demkos were killed, which was orchestrated and committed by Perry Washington.

(10 RT 2458, 2462.) In that crime, Kryger was with Washington when Washington, as part of an illegal taxi service, took the man home from the hospital, hid in the man's house, and stole his property, including a TV and VCR. (10 RT 2458, 2460-2462.) Washington brought a TV and VCR into his room at the Rancherias house. (10 RT 2471-2472.) Kryger, who picked up Washington after the burglary, told police he did not enter the man's house, although he had. (12 RT 2462.) Explaining his denial to police, Kryger said, "I tell 'em what they want to hear so they won't arrest me. I'm not stupid." (*Ibid.*) Kryger was convicted of the November 2 burglary, did prison time, and got a strike because he would not testify against Washington. (10 RT 2550, 2463, 2474.)[13]

2. Appellant's Interactions with Perry Washington Around the Time of the Crimes

Jenica McCune noticed the presence of Perry Washington in appellant's life around the time of his arrest. On cross-examination during the prosecution's case-in-chief, McCune confirmed that she had told an investigator that on the day of appellant's arrest, someone called him about 15 times. (8 RT 2136.) Based on the name appellant said when he answered the phone, McCune believed it was Perry Washington. (*Ibid.*) It

[13] At an in limine hearing outside the presence of the jury in this case, Washington invoked his Fifth Amendment right against self-incrimination when defense counsel questioned him about his involvement in the crimes against the Demkos. (10 RT 2427-2428.) Washington had pled guilty to receiving stolen property arising from the use of stolen credit cards and checks and had admitted having two prior robbery convictions in exchange for a prison term of 25 years to life, but had not yet been sentenced. (10 RT 2424-2425.) The jury in this case was not informed that Washington had invoked his privilege against self-incrimination. (10 RT 2430.)

seemed as if Washington was directing appellant and appellant was afraid of Washington. (9 RT 2136-2137.)

Shelby Barnes also observed Washington in appellant's life in the weeks before appellant's arrest. Barnes, who at trial was 21 years old, had known appellant since she was 13 years old, when she met him in a park after her mother had kicked her out of their house. (12 RT 2979.) Barnes considered appellant to be her best friend; he made sure she was taken care of. (12 RT 2980, 2988-2989.) Their relationship had not been romantic or sexual (12 RT 2988), but at the time of trial, her feelings had changed, and they talked about marrying (12 RT 2989).

Every time Barnes saw appellant in the blue Mercury car before his arrest, he was with Perry Washington. (12 RT 2993-2994.) Barnes's oldest child, Marquis, was appellant's godson, and appellant acted like a father to him – potty-training him, baby-sitting him, and taking him to the park and the movies. (12 RT 2979-2981, 2986.) Appellant loved Marquis and would take any threat against Marquis very seriously. (12 RT 2986.) Barnes was surprised when Washington showed up unexpectedly at her house a few times both before and after appellant's arrest. (12 RT 2983-2984, 2986-2987, 2994.) Barnes admitted Marquis was living with her mother because in 2000-2001 she dealt with her problems, including her best friend (appellant) being gone, by doing drugs. (12 R 2992.)

Reverend Harris also testified about his observations of appellant and Washington together in November 2000. Harris had a mentor-type relationship with appellant. (11 RT 2828-2829.) Appellant had lived in both the Christian Living Homes – one on Mesquite and one on Rancherias Road – that Harris ran. (11 RT 2821.) The homes housed parolees, although appellant was not on parole in November 2000. (11 RT 2812-

2813.) At that time, Perry Washington also lived in the Rancherias house. (11 RT 2816.) In Harris's view, Washington was not a follower-type personality, and Washington knew everything that was going on in the house. (11 RT 2818.)

A couple of weeks before appellant's arrest, Harris saw appellant and Washington together. (11 RT 2816-2817.) Washington intercepted Harris in the living room while appellant walked down the hallway. (11 RT 2817-2818.) Appellant came out of the bedroom carrying a pillowcase, went outside through the back door, and then came back into the house. (11 RT 2818.) It appeared suspicious to Harris, as if appellant was trying to slip by. (11 RT 2818, 11 RT 2827-2828.) Also suspicious was an incident at Thanksgiving dinner. (11 RT 2835-2836.) Washington came in the door, went over to appellant and Hunter, had a conversation with them, and the next thing, they all went out the door. (11 RT 2836.) In the two weeks before his arrest, appellant seemed distant, withdrawn and preoccupied. (11 RT 2829-2930). In Harris's experience, although he found out appellant had lied to him, he thought that appellant was truthful. On the other hand, Harris knew Washington to be untruthful, and he had lied to Harris many times. (11 RT 2835-2836.)

3. Perry Washington Is Overheard Admitting That Appellant Was Taking the Blame for Murders Washington Committed

Johnney Prowse was serving a seven-year prison sentence as part of a plea bargain in a case in which he faced a 25-years-to-life sentence for auto theft and evading police, but agreed to provide information to law enforcement in exchange for a lesser sentence. (11 RT 2838, 2840-2841.) Prowse provided information to several law enforcement agencies including

the FBI. (11 RT 2843-2844.) He also had two burglary convictions. (11 RT 2845.) Before going to prison, Prowse had been confined in West Valley Detention Center, where he worked as a chow server. (11 RT 2839.) Sometime between late 2000 and April 2001, Prowse was serving food to Washington when he heard Washington tell two other inmates that he "got away with a couple of hot ones" that "Battle Cat," as appellant was known, was being charged with. (9 RT 2135; 11 RT 2839-2840, 2845, 2848.) Prowse later met appellant in jail and asked him if he was "Battle Cat," and told him what he had heard. (11 RT 2841.) Although Prowse thought he had told people in law enforcement about the incident, he could not remember whom, and he did not tell the sheriff's deputies he worked with. (11 RT 2844-2846.)

Prowse previously had been a Nazi Low Rider who did not associate with African-Americans. (11 RT 2841-2842.) Although Prowse knew appellant for a number of months at West Valley, served chow with him, and played handball with him, Prowse did the same with many people, and would not call appellant a friend. (11 RT 2842.) Prowse did not get any benefit for his testimony in this case. (11 RT 2842.) Prowse said he knew what it felt like to face a life sentence – and possibly death – and did not want to see someone "go down" for something he did not do. (*Ibid.*)

4. Perry Washington's Use of the Property Stolen from the Demkos

The defense presented evidence that Washington used the property taken from the Demkos' house. Washington and Trenia Sutton, who was referred to as his "sister," were seen on a video surveillance tape using the stolen credit cards. (10 RT 2648, 2652; 12 RT 3163-3164.) Washington admitted to sheriff investigators that he knew the cards were stolen, and

said he had got them from appellant who, when Washington was interviewed, already was in custody. (11 RT 2681, 2684-2685, 2689.) On November 24, 2000, Sutton cashed a Bank of America check written out to her by A. Demko on November 22, 2000 for $200, and was seen in a surveillance picture at the bank. (10 RT 2658-2660.) Numerous apparel items purchased with the credit cards were recovered at both Sutton's house and the home of Tiny Anderson, Perry Washington's girlfriend. (10 RT 2660-2664.) A car with no license plate was seen in the driveway of Anderson's house. (11 RT 2668.) Washington was ultimately arrested for parole violation, credit card fraud, theft and embezzlement. (8 RT 1972-1973.)

5. Law Enforcement's Limited Investigation of Perry Washington

Although appellant implicated Washington in his final statements to the sheriff's detectives, Washington was not interviewed, nor was his room searched until three days after appellant had made his statements. (11 RT 2687.) Law enforcement questioning of Washington focused mainly on the stolen cards, which he was found using. (8 RT 1994.) The detectives did not investigate appellant's claim that Washington had previously entered the Demko's house, or his allegation that Washington was driving a stolen car. (8 RT 1988-1990; 9 RT 2104.) There was no attempt to match any of the latent prints developed in this case to Perry Washington. (See 10 RT 2562.)

C. The Prosecution's Rebuttal Case

The prosecution called five law enforcement witnesses who knew or worked with Prowse in an attempt to impeach his testimony that Washington admitted he "got away with a couple of hot ones" and appellant

was taking the blame. Each purportedly was named by Prowse as a person to whom he gave information about Washington's admissions. (11 RT 2844.) They all denied that Prowse told them or passed along information to them about overhearing an inmate confess to a crime for which someone else was being framed. (12 RT 3005 [San Bernardino County Sheriff officer Alejandro Barrero], 3008 [San Bernardino County Sheriff officer Richard Wyatt], 3012 [FBI agent David Volk], 3017 [Department of Corrections officer Glen Willett], 3025 [Fontana Police Department officer Aaron Scharf].) However, FBI agent Tom Trier, Prowse's controller, i.e. the person who was responsible for him as an informant, did not testify. (12 RT 3024.)

II. PENALTY PHASE

A. Prosecution's Case In Aggravation

The prosecution presented a stipulation that appellant had two prior felony convictions, one in 1995 for first degree residential burglary and one in 1997 for forgery. (15 RT 4000-4001.) In addition, the prosecution presented evidence of unadjudicated crimes – appellant's participation in a prison riot in 1999, and his assault on Matthew Hunter in 2000 – and victim impact evidence from Denise Goodman and Richard Demko.

1. The Prison Riot

In 1999, there was a riot in the yard at Tehachapi State Prison, involving 40-50 Hispanic and black inmates, including appellant, in which three inmates were stabbed. (13 RT 3482-3483.) Appellant was not found with a weapon (13 RT 3489, 3492), and was not seen hitting anyone (*ibid.*), but he had injuries on his hand consistent with being in a fight (13 RT 3485, 3501). Racial tensions were a major concern at the prison (13 RT 3488), and if there was a riot and an inmate did not participate on behalf of his

race, in some circumstances he might be injured or killed by members of his own race. (13 RT 3489.)

At a prison disciplinary hearing resulting from the riot, appellant said he was caught between the two groups of blacks and Hispanics when the officers yelled to get down, and he remained up because he did not know which way to go. (13 RT 3500.) Although he initially denied being hit or hitting anybody, appellant later admitted he hit an inmate in self defense. (13 RT 3501-3503.) The incident was classified as a division D violation which, on a scale of A-F, was at the lower end of the scale in terms of seriousness. (13 RT 3498.) As a result of participating in the riot, appellant was placed on administrative segregation. (13 RT 3509.) It was determined, however, that he was not a continuing threat to the safety of the institution, and at the end of his discipline, he could be safely housed in the general population in a level one facility. (13 RT 3509.)

2. The Assault on Matthew Hunter

In the summer of 2000, appellant, Matthew Hunter and Anthony Bennett lived together at one of Reverend Harris's houses. (13 RT 3515.) One day, Hunter and appellant had been out drinking, and, according to Hunter, appellant apparently became jealous of Hunter over his talking to a woman. (13 RT 3516, 3525.) Appellant asked Hunter to go outside. (13 RT 1517.) Once outside, appellant struck Hunter with a liquor bottle over the back of the head and then on the left side of his head, causing Hunter to fall to his knees. (13 RT 3517-3519.) Appellant left without saying anything. (13 RT 3519.) Hunter went to the hospital where his lacerations were repaired (*ibid.*), but he did not report the incident to the police. (13 RT 3520.) Later, appellant explained to Hunter that he had gotten drunk and "'tripped out.'" (*Ibid.*) According to Bennett, right after the assault,

appellant, who was intoxicated, said he had beaten Hunter because Hunter had disrespected him by "'hitting on his girlfriend.'" (13 RT 3531-3532.) Although Bennett testified that appellant said he tried to kill Hunter and he should have killed him (13 RT 3531-3532), in his earlier statement to police, Bennett made no mention of this part of appellant's statement (13 RT 3536-3537).

3. Victim Impact Evidence

Denise Goodman and Richard Demko described their father and stepmother. Andrew Demko was born in 1923 into a rough neighborhood in Chicago. (13 RT 3538.) To find a way out of poverty and get an education, Andrew joined the service and, serving on a destroyer during World War II, suffered back and ear damage in an explosion. (13 RT 3539-3540.) After the war, Andrew went to college, married his first wife in 1948, had his children, Denise and Richard, and worked as a salesman. (13 RT 3541-3542.) Denise, who described herself as "daddy's little girl," had great memories of her father, and Andrew taught her that she could do anything she set her mind to. (13 RT 3543.) Andrew had been Richard's Little League coach. (13 RT 3565.) When Richard and Denise were still young children, their mother developed a brain tumor and became partially paralyzed. (13 RT 3544.) Devastated by his wife's illness, Andrew changed jobs so he could care for his wife until she died eleven years later. (13 RT 3545.) Andrew tried to keep people happy and essentially raised Richard and Denise on his own. (13 RT 3544-3545.)

After his wife's death, Andrew met Shirley, and they married in 1975. (13 RT 3546.) Shirley had a rough childhood. Her mother died in childbirth (13 RT 3566), and Shirley moved among foster care homes (13 RT 3547). Shirley was a tough person, a former roller derby skater, but she

made Andrew happy again. (13 RT 3547.) Together Andrew and Shirley traveled, golfed, watched movies, went dancing, and generally enjoyed each other's company. (13 RT 3547. 3548, 3550, 3552.) Although they had slowed down with age, using a cane and a walker to move around, Andrew and Shirley had a wonderful relationship and would do anything for each other. (13 RT 3552, 3567.)

As adults, Denise and Richard maintained a very close relationship with their father. (13 RT 3543, 3565-3566.) Andrew was Richard's mentor and the biggest fan of his career. (13 RT 3565.) Richard had a teenage daughter who loved her grandparents, and they adored her. (13 RT 3567, 3572.)

Denise described the horror of learning her parents had been killed, identifying them from a photograph, calling Andrew's brother with the news of his death, being unable to function and thinking she was losing her mind. (13 RT 3554-3557.) She had been planning her wedding, but instead planned her parents' cremation. (13 RT 3559.) Before her mother died, Denise had promised that she would look out for her father; Denise felt she had let her mother down, had nightmares about her father's and stepmother's experience, and felt guilty she was not there to save them. (13 RT 3557, 3560.)

The Demkos' deaths changed both Denise and Richard. Denise became cynical and distrusting, scared of shadows and constantly locking doors. (13 RT 3558-3559.) She could no longer tell a child the boogie man did not exist, because it did. (13 RT 3558.) Holidays were ruined. (13 RT 3559.) Richard's sense of security also was gone; he would not let his daughter out to ride her bike. (13 RT 3570.) A big chunk had been taken out of Richard; it was hard for him to reach for the phone and not have

anyone to call anymore. (13 RT 3569.)

The trial itself was distressing for Richard and Denise. Richard learned many of the circumstances of his parents' death at the trial, such as how they were killed. (13 RT 3571.) At one point, Denise held her breath so long, she had to be helped out. (13 RT 3560.) The trial brought back nightmares for her, and she wanted to scream and cry, but could not. (*Ibid.*) It was hard for Richard not to feel what his parents must have experienced – being in the trunk, taken out and butchered. (13 RT 3572.)

The prosecution introduced photos of Andrew and Shirley Demko and the last letter Andrew wrote to Denise. (13 RT 3966; Exhs. 317-331.) Denise told the jury that nobody had the right to take someone else's life so brutally and without any regret and that she missed her father awfully. (13 RT 3562.) Richard told the jury his parents were wonderful people. He advised the jurors to spend as much time as they could with people they loved because they never knew what was going to happen to them. (13 RT 3573.)

B. The Defense Case in Mitigation

The defense presented mitigation evidence about appellant's family background, childhood and upbringing from eight relatives, testimony from psychologist Joseph Lantz about the impact of appellant's childhood on his personality development and behavior, and testimony from prison expert Anthony Casas regarding prison security for inmates serving life-without-parole sentences.

1. Appellant's Early Childhood with His Birth Family

Central to appellant's life was the secret he did not discover until the defense prepared for trial – that his parents, Laura and Tom Battle, had

adopted appellant when he was four years old from his birth mother, Brenda McDaniel, a Caucasian woman, without the knowledge or consent of his birth father, James Cleotis (Yogi) Williams, an African-American man. (14 RT 3619, 3630, 3631.) Brenda died unexpectedly in 2000 (14 RT 3754), but several members of her family, including appellant's previously unknown father, grandmother, aunts and half sisters described in some detail the poverty, physical violence, sexual abuse, maltreatment, racism and signs of mental illness that plagued their extended family. (14 RT 3640, 3646, 3657-3658, 3677-3678, 3681, 3682, 3684-3685, 3699, 3752, 3766.)

Brenda worked as a migrant field worker, moving from place to place in the South, sometimes with and sometimes without her children. (14 RT 3642-3643.) She had relationships with various men (14 RT 3621, 3751, 3760), and she and her children were subjected to physical abuse (14 RT 3621, 3625, 3760-3762). Brenda and Yogi were physically violent (14 RT 3594, 3624), and Brenda had attempted to kill herself in front of Yogi (14 RT 3635-3626, 3766). Yogi and Brenda had a boy, born a year and a half before appellant (14 RT 3594), who died in infancy from crib death (14 RT 3627).

Three months after appellant's birth, Brenda decided to leave Yogi. Yogi wanted to keep appellant with him, but Brenda refused and took appellant first to Georgia (14 RT 3749, 3762) and eventually back to West Virginia, where her parents and siblings lived (14 RT 3644, 3671, 3696-3697, 3751). When Brenda began seeing another man, she treated appellant as if he did not exist anymore. (14 RT 3651, 3654, 3748, 3751.) Brenda physically and verbally abused her children, including appellant. (14 RT 3654, 3677-3678, 3766.) Brenda's father was violent and would line all the

children against the wall and give them bad whippings. (14 RT 3646, 3752.)

The McDaniel family was poor. There was not enough food; coffee and water were put in appellant's baby bottle because they could not afford milk. (14 RT 3647.) Brenda frequently worked two or three jobs. (14 RT 3692.) Brenda's mother turned Brenda and her children out of her house, and the children were placed in foster care, a pattern that was repeated several times throughout their childhood. (14 RT 3672, 3674, 3753, 3766.) At one point, appellant and his sister Tonya were sent to the same home. (14 RT 3672.) The foster family was white, and made racist comments about appellant and spanked him with a wooden board. (14 RT 3674-3675.)

Georges Creek, West Virginia, the canyon or holler in which the McDaniel family lived, was steeped in racism. (14 RT 3681-3682, 3699.) Because appellant was not white (14 RT 3644), the family was shunned by the whole community, including Brenda's father's family. Brenda's mother called Brenda a "nigger lover" and refused to pick up appellant, saying, "That nigger's not a grandchild of mine" and "I don't have a nigger as a grandson." (14 RT 3645, 3690.) Appellant was supposed to be kept hidden indoors. (14 RT 3646, 3654, 3678.) When the older children walked down the road with appellant in tow, people threw rocks and eggs at them and called them "nigger lovers." (14 RT 3647, 3681-3682.) There were threats and acts of intimidation. (14 RT 3681.) One night, a cross was burned in the yard, and Brenda suspected her own parents might be the culprits. (14 RT 3650-3651, 3681-3682, 3698.) A week later, Brenda's car was set afire. (14 RT 3652-3653, 3681.)

Brenda's hard life and the racism in their family and community proved too much. (14 RT 3692.) One of Brenda's sisters offered to rear appellant, but Brenda refused. (14 RT 3678, 3680.) When appellant was four years old, Brenda decided to give him up for adoption. (6 CT 1654.) As appellant's aunt testified, Brenda forced appellant into the car, slapping and hitting him as he cried and calling him "bastard," "son of a bitch" and "little nigger," and then appellant was gone, taking nothing with him. (14 RT 3654-3655.)

2. Appellant's Later Childhood and Adolescence with His Adoptive Parents

Evidence about appellant's childhood after his adoption was primarily presented through the videotaped deposition of his mother, Laura Battle, who was too ill to testify at trial. (15 RT 3957; Exh. 370 [video]; 6 CT 1649-1689 [Exh. 370A (transcript)].) Appellant was the only child of Laura Battle and her husband, Tom Battle, who had been too old to adopt through an agency. (6 CT 1654-1655.) Laura had learned about appellant through one of his aunts who worked with Laura. (6 CT 1656; 14 RT 3682.) Tom and Laura adopted and reared appellant in Charleston, West Virginia. (6 CT 1652, 1654.) They never told appellant that he was adopted. (6 CT 1659.)

Growing up, appellant was a fairly good student who did not get into any serious trouble, and had no major behavioral, mental or physical problems. (6 CT 1662, 1685.) Appellant took karate lessons from the age of 5 until 17, competed and medaled in the national Junior Olympics, and taught karate to people both younger and older than himself. (6 CT 1666-1670.)

Appellant encountered some racial issues as a child. He had a hard time adjusting to being the only minority person at karate (6 CT 1674), and at school he was teased for having much lighter skin than some of the other children (6 CT 1673). When he was about ten years old, appellant asked Laura what color he was. (*Ibid.*)

Appellant was very involved in his parents' church. He ushered, gave the welcome, participated in Sunday school, and sang in the choir. (6 CT 1663-1664.) He was respectful of and helpful to his elders, doing yard work for his elderly neighbor (6 CT 1655-1656) and visiting a woman at a nursing home after school (6 CT 1664). Appellant enjoyed working for a couple of summers for an organization that helped underprivileged children. (6 CT 1671-1672.) He contributed to the family's finances by working at jobs at Burger King and as a chef at a restaurant after high school. (6 CT 1672.)

Laura had an alcohol problem, and she went into a residential treatment facility for a month when appellant was about 9 or 10 years old. (6 CT 1676-1677.) Growing up, appellant was closer to Laura than to his father, and she may have been somewhat overprotective. (6 CT 1675-1676.) In Laura's view, appellant had a normal childhood and did not want or need for anything, and he had a good relationship with her and Tom. (6 CT 1684, 1686.)

When appellant was 17, he left home and married a girl named Talisha. (6 CT 1678.) Although the wedding happened in town, appellant had not told Laura about it, and she was not in attendance. (*Ibid.*) Appellant joined the Marines; both Laura and Tom attended his basic training graduation. (6 CT 1678-1679.) Appellant then went to Alabama. (6 CT 1680.) Laura learned of appellant's return through friends and saw

him before he headed to Barstow, California. (6 CT 1680-1681.) That was the last time Laura and Tom saw appellant. (6 CT 1681.)

3. Expert Evidence Regarding the Impact of Appellant's Background on His Personality and Behavior

Dr. Joseph A. Lantz, a clinical psychologist, testified about the impact of appellant's background and upbringing on his personality development and behavior. (14 RT 3794.) Lantz explained that appellant's childhood development was marred from the moment of his birth in ways that interfered with his ability to bond with others and develop a sense of trust and inter-connectedness. (14 RT 3807, 3810.) Appellant was born to a mother, Brenda, who recently had lost a child, had three other young children, was a victim of abuse, and lived a transient lifestyle. (14 RT 3807-3808.) Brenda was verbally abusive to appellant and often was absent. (14 RT 3810.) Appellant's birth father, Yogi, was not around long enough to function as a father. (14 RT 3820.) Appellant was placed in foster care as early as the first year of his life. (14 RT 3810.) When living with his family, appellant lacked consistent care givers and role models. Brenda's boyfriends came and went, and appellant's maternal grandfather was old, often away, and racist. (14 RT 3821.) As a black child living in a white family, appellant was an outsider in a deeply racist environment (14 RT 3808-3809), and even at a young age, he would have appreciated that he was not accepted, but was the source of a problem (14 RT 3809, 3827).

On top of this difficult beginning, at the age of four, appellant was abruptly abandoned by his mother. (14 RT 3810-3812.) Angry, cursing, and physically dragging appellant, Brenda took her young son and left him in an attorney's office for a private adoption into a strange home with no preparation or follow up. (*Ibid.*) In Lantz's view, the separation was

especially traumatic for appellant because it was a permanent loss – his mother never returned, and he never saw her or his siblings again. (14 RT 3810, 3819.) Describing psychological studies, Lantz underscored the importance of child-maternal attachment for healthy mental development (14 RT 3818) and opined that adoption is widely recognized as the most extreme solution, even when children come from abusive homes (14 RT 3815-3816). In Lantz's opinion, giving appellant away was the ultimate rejection. (14 RT 3811.)

Just as appellant received no counseling or support to aid him in coping with his mother's abandonment and his adoption into a new family, Laura and Tom Battle received no preparation for rearing appellant. (14 RT 3812.) As Lantz explained, children in abusive families "get along by going along." (14 RT 3813.) Significantly, when he moved in with Laura and Tom, appellant seemingly went lock-step along without any problem. (*Ibid.*) Internally, however, appellant would have had massive problems, although he had already learned not to show them. These issues went unaddressed. (*Ibid.*)

According to Lantz, Tom Battle was old and did not have a real ability to parent appellant (14 RT 3822), and Laura Battle's alcoholism added a layer of separation, isolation and withdrawal which appellant experienced (14 RT 3823-3824). Although Laura felt they gave appellant a good home, with religion and structure, and were proud that appellant was a polite and compliant boy, his emotional health was ignored. (14 RT 3813-3814, 3820, 3824.) In the sixth and seventh grades, appellant was sexually abused by a teacher. (14 RT 3815.) When appellant told Laura, she got angry, and did not believe him, and although the teacher was later arrested, it still was never discussed at home. (14 RT 3815.) At the age of 12,

appellant started drinking alcohol. (14 RT 3824.)

Being left by his wife, Talisha, and losing his child was yet another loss for appellant, which confirmed that he could count on no one. (14 RT 3827.) After Talisha, appellant's relationships with women were primarily friendships, and he seemed incapable of developing an emotional connection or in-depth relationship with another person. (14 RT 3828-3829, 3830.) His only real relationship appeared to be with three-year-old Marquis, who appellant called his "son." (14 RT 3829.) Lantz found it significant that appellant could connect so strongly with a child who was at the stage in life in which appellant personally had suffered so much trauma. (14 RT 3829-3830.)

Lantz administered an I.Q. test, on which appellant scored within the average range (14 RT 3797), and the Minnesota Multiphasic Personality Inventory (MMPI) II, an assessment of personality functioning, which showed no signs of psychosis or malingering (14 RT 3801-3802). Lantz concluded appellant had a personality disorder classified as "not otherwise specified" (14 RT 3803), which included appellant's pattern of telling multiple versions of stories, as he had done this his whole life and not just to the police in this case. (15 RT 3886, 3898.)

In Lantz's view, appellant's childhood was not the reason that he was involved in the crimes in this case, and it did not mean that appellant did not understand the difference between right and wrong or that his responsibility was reduced. (14 RT 3831; 15 RT 3897.) Rather, as Lantz explained, the events of appellant's childhood put him at risk for this to have happened, and better circumstances would have given him a greater chance to succeed. (14 RT 3830-3831.) Although Lantz acknowledged that appellant's sisters, who had also had terrible childhoods, had not

committed similar crimes, he noted that both sisters had suffered numerous difficulties as adults. (15 RT 3947.) Lantz concluded appellant was a person who was never given the opportunity to develop the ability, personality, and emotional stability to form relationships and a life that may have prevented this tragedy. (14 RT 3831.) Lantz also noted that although appellant denied being involved in the actual killing, he admitted his involvement regarding the victims' property, and expressed remorse for what happened to them as well as an understanding that it was wrong to have been involved. (14 RT 3852.)

4. Prison Security for Inmates Serving Life-Without-Parole Sentences

Anthony Casas, a former associate warden of San Quentin State Prison, testified about the four security levels in California prisons (14 RT 3721-3725), and explained that a person convicted of murder is automatically assigned the highest level – level four – where movement is carefully controlled (14 RT 3724, 3742). Illustrating his testimony with photographs, Casas described a level four prison's maximum security provisions – double razor wire and lethal electrified fences, gun towers, roaming armed patrols, strategic positioning of housing units, heavy-gauge steel doors and beds anchored in concrete. (14 RT 3726-3730.)

Although level four prisoners are considered a serious security risk, those serving a life-without-parole sentence were not the most dangerous criminals; rather those under the age of 24, involved with gangs or with a history of repeated violence in the community were the most troublesome. (14 RT 3731.) Unless an inmate has been shown to be a security risk, he has contact with other inmates. (14 RT 3733.) Casas acknowledged that it was possible for inmates in a level four prison to assault guards and other

inmates and to be found with a weapon in their cells (14 RT 3731, 3734-3735), but assaults in prison had declined over the previous 20 years with the advent of new level 4 prisons (14 RT 3732), and inmates who misbehave are placed in 24-hour lock-down in their cells (14 RT 3733). An inmate's participation in a race riot might indicate that he would not be a compliant prisoner. (14 RT 3734.)

According to Casas, prisoners serving a sentence of life without the possibility of parole were incarcerated for the rest of their lives. (14 RT 3731.) Prisoners were given three meals a day and could have a television and a few books in their cell. (14 RT 3739.) Depending on the facility and the individual's behavior, prisoners might be able to have a VCR or a typewriter, go to the library, play cards and socialize with other inmates, go to an exercise yard, take correspondence classes, and write and telephone to, and receive letters and visits from, people outside the prison. (14 RT 3739-3741, 3743.)

5. Pleas of Appellant's Family to Spare His Life

Although at the time of trial, appellant had not seen his mother and father, Laura and Tom Battle, in about ten years, and he had not seen members of his birth family since he was adopted at the age of four, eight of these relatives testified about their desire to form a renewed relationship with appellant and their love for him and pleaded with the jury to spare his life. (6 CT 1686 [Laura Battle, mother]; 14 RT 3633, 3635-3636 [James Cleotis (Yogi) Williams, birth father]; 14 RT 3700 [Elizabeth McDaniel, maternal grandmother]; 14 RT 3755-3756 [Tonya Arthur, sister]; 14 RT 3769 [Kimberly Denise Hernandez, sister]; 14 RT 3659, 3664 [Sandra Arlyne McDaniel, aunt]; 14 RT 3685-3686 [Terry Lynn McDaniel, aunt]; 14 RT 3694-3695 [Dorothy Ann Dillon, aunt].)

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING NO PRIMA FACIE CASE OF RACIAL DISCRIMINATION WHERE THE PROSECUTOR PEREMPTORILY STRUCK AFRICAN-AMERICAN PROSPECTIVE JUROR J.B. AND SIX OF THE SEVEN AFRICAN-AMERICANS CALLED TO THE JURY BOX WERE EXCUSED

Appellant, a black man, was convicted and sentenced to death by twelve white jurors for the murder of an elderly white couple.[14] After the excusal of the juror at issue in this case, the prosecutor had removed through two peremptory challenges two thirds of the African-American jurors called into the box for questioning. Even prior to the attorney-led voir dire, the prosecutor had attempted to stipulate to the dismissal of well over 50 percent of the African-Americans in the jury panel, despite the fact that the questionnaires of the jurors whose stipulations defense counsel rejected did not demonstrate that they were unqualified to serve.

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[14] Exh. 328 (photo of Andrew and Shirley Demko); Exh. 360 (photo of appellant); 7 CT 1691 (race of Juror # 80, Seated Juror # 1); 7 CT 1719 (race of Juror # 201, Seated Juror #2); 7 CT 1747 (race of Juror # 204, Seated Juror # 3); 7 CT 1775 (race of Juror # 62, Seated Juror # 4); 7 CT 1803 (race of Juror # 68, Seated Juror # 5); 7 CT 1831 (race of Juror # 35, Seated Juror # 6); 7 CT 1859 (race of Juror # 351, Seated Juror # 7); 7 CT 1887 (race of Juror # 387, Seated Juror # 8); 7 CT 1915 (race of Juror # 43, Seated Juror # 9); 7 CT 1943 (race of Juror # 296, Seated Juror # 10); 7 CT 1971 (race of Juror # 347, Seated Juror # 11); 8 CT 1999 (race of Juror # 347, Seated Juror # 12); 8 CT 2083 (race of Juror # 76, originally alternate Juror # 3, who replaced Juror # 347 as Seated Juror # 12); 8 CT 2055 (race of Juror # 184, originally alternate Juror # 2, who replaced Juror # 76 as Seated Juror # 11). Seated jurors will hereafter be referred to only by their original juror number, not by their seated juror number.

When presented with these facts, as well as other information evincing possible discrimination, the trial court found that it was a "close case," but denied appellant's motion under *Batson v. Kentucky* (1986) 476 U.S. 79 (*"Batson"*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*"Wheeler"*), finding that a prima facie showing had not been made. (5 RT 1130.) In so doing, the trial court – which had presumptively applied the incorrect standard later repudiated in *Johnson v. California* (2005) 545 U.S. 162 ("*Johnson*") – explicitly misapplied the relevant case law: it required that for appellant's *Batson/Wheeler* motion to go forward, he must prove "systematic exclusion" of a protected class (5 RT 1128). The trial court also improperly ignored relevant evidence. For this reason, at a minimum, a remand to the trial court to reevaluate appellant's prima facie case is necessary.

Even should this Court find remand for redetermination of step one unnecessary, the record establishes that appellant has satisfied the minimal burden necessary to establish an inference of racial discrimination in the prosecutor's use of a peremptory challenge to exclude prospective juror J.B. from the jury. Therefore, this case should be remanded to the trial court to consider the remaining steps of appellant's *Batson/Wheeler* challenge.

The trial court's denial of appellant's motion violated his rights to equal protection under the Fourteenth Amendment to the federal Constitution and trial by an impartial jury drawn from a representative cross-section of the community under the state Constitution.

A. The Proceedings Below

In-court jury selection procedures commenced on February 10, 2003, with the swearing in of the first panel of prospective jurors, at which time, the trial court began to address excusals for hardship. (2 RT 68, 74.)

The trial court's jury-selection procedure used a 20-page juror questionnaire (see, e.g., 7 CT 1690-1710) supplemented by oral voir dire conducted by the parties. Prior to any questioning of the jurors, the court requested that the parties compile a list of jurors for which excusal for cause would be stipulated. (2 RT 62; 3 RT 507.) With regard to questions about jurors' views on the death penalty, the prosecutor stated that both parties agreed to "pretty much eliminate[] everybody that said they were A and E [in response to question 2A on page 15 of the questionnaire], but some of the B and D's might [require cause challenges] depending on how they answer [during voir dire]." (4 RT 885; see also 4 RT 731-737 [names of jurors stipulated for excusal prior to voir dire].)[15] Some jurors gave

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[15] Question 2A read in full:

Please read all of the group descriptions below (A-E) thoroughly. After reading them all, check the one that best describes your feelings or attitude:
A. I strongly favor the death penalty. I would always vote for death in every case where the defendant was convicted of first degree murder and a special circumstance was found true. I will not seriously weigh and consider the aggravating and mitigating factors in order to determine the appropriate penalty in this case.
B. I favor the death penalty but would not always vote for it in every case of first degree murder and a special circumstance found true. I will seriously weigh and consider the aggravation and mitigating factors in order to determine the appropriate penalty in this case.
C. I neither favor nor oppose the death penalty. I will seriously consider both possible penalties based upon all of the evidence and circumstances.
D. I have some doubts or reservations about the death penalty, but I would not always vote against the death penalty in every case. I will seriously weigh and consider the

(continued...)

conflicting answers in response to question 2A, and similar inquiries posed in questions 6 and 7 on the questionnaires.[16] In other words, some jurors either indicated (1) both that they could impose the death penalty despite doubts, but also that they would always vote against death or (2) both that they favored the death penalty, but would not automatically vote for death but also that they would sentence all special circumstance murderers to death. (4 RT 788.)

After completing the hardship excusals, the court called 12 prospective jurors into the jury box for attorney questioning, after which the prosecutor and defense counsel were invited to address for cause challenges to the trial court. (4 RT 886, 893.) Upon resolution of for cause challenges, the parties were allowed to use alternating peremptory strikes or to accept the jury as constituted. When a juror was excused for cause or by

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[15] (...continued)
aggravating and mitigating factors in order to determine the appropriate penalty in this case.
E. I strongly oppose the death penalty. I would never vote for the penalty of death. I would not seriously weigh and consider the aggra-vating [sic] and mitigating factors in order to determine the appropriate penalty in this case.

(See, e.g., 7 CT 1705.)

[16] Question 6 on page 16 of the jury questionnaire read in full: "If you and the eleven other jurors found Mr. Battle guilty of murder and found a special circumstance to be true, would you always vote against death, no matter what evidence might be presented or argument made during a penalty trial? Yes __ No __." (See, e.g., 7 CT 1706.)

Question 7 on page 17 of the jury questionnaire read in full: "If you and the eleven other jurors found Mr. Battle guilty of murder and found a special circumstance to be true, would you always vote for death, no matter what evidence might be presented or argument made during a penalty trial? Yes __ No __." (See, e.g., 7 CT 1706.)

peremptory challenge after being subject to voir dire, a new juror was called into the box for additional attorney-led voir dire. (See, e.g., 4 RT 986.)

On March 4, 2003, the first group of prospective jurors was called into the box for voir dire. (4 RT 893.) At this time, 88 prospective jurors remained in the panel after initial hardship excusals and stipulations for cause. (4 RT 886-893 [roll call].) Prior to the exercise of any peremptory challenges, two additional prospective jurors (J.N. and C.W.) were excused for cause and by stipulation, leaving 86 jurors in the panel. (4 RT 930, 981.) Of the remaining 86 members of the panel, seven identified themselves on their questionnaires as African-American or black: Juror 360 (seated alternate #1; see 8 CT 2026-2044 [questionnaire]), J.K. (9 CT 2531-2251 [questionnaire]), A.H. (13 CT 3623-3643 [questionnaire]), J.B. (14 CT 4071-4091 [questionnaire]), E.F. (15 CT 4211-4231 [questionnaire]), B.A. (17 CT 4855-4876 [questionnaire]), and S.W. (19 CT 5331-5351 [questionnaire]).[17] Before the *Batson/Wheeler* motion at issue, one of these prospective jurors, J.K., was excused for hardship (5 RT 1077), leaving only six African-Americans in the panel eligible to serve. After the motion, two additional African-Americans were excused by stipulation: B.A. and A.H. (6 RT 1246-1248.) This left a total of four eligible African-American jurors in the panel, two of whom were ultimately stricken by the prosecution.

When the first 12 prospective jurors were selected for questioning in the jury box, two were African-Americans: S.W. and E.F. (5 RT 1124.)

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[17] An additional African-American juror, M.N., mixed up the appearance dates and did not show up on the first day of voir dire. (4 RT 837.) However, after she arrived on the second day she was excused by stipulation after she indicated an inability to vote for death. (5 RT 1081.)

The prosecution used its fifth peremptory challenge to strike S.W., whom it had unsuccessfully challenged for cause. (5 RT 1032.)

After a defense peremptory challenge, J.B. was called into the box. (5 RT 1036.) J.B.'s questionnaire indicated she was a 52- year-old African-American woman who had a master's degree in school administration and school psychology and had been an elementary school teacher since 1974. (14 CT 4072-4073.) She had been married since 1979, and had two sons, ages 17 and 22, who were students and lived at home. (14 CT 4072.) She previously served on a jury, which reached a verdict, in San Bernardino County. (14 CT 4075.) She stated she had been the victim of a home robbery. (14 CT 4078 [question 26].) She neither favored nor opposed the death penalty and would seriously consider both possible penalties (14 CT 4086), and she did not have any moral, philosophical or religious objections to the death penalty (14 CT 4087). Further, J.B. stated that she would not automatically vote either for life or death if the appellant was convicted of special circumstances murder and would be able to weigh and consider all mitigating and aggravating facts in the case. (14 CT 4087.) She felt the death penalty was used "about right" in California, but too frequently in Texas. (14 CT 4088.)

Under questioning by defense counsel, J.B. stated that she would not have a problem imposing either an LWOP sentence or a death sentence. (5 RT 1036-1037.) During questioning by the prosecutor, J.B. reiterated that she could impose the death penalty "if [appellant is] guilty." (5 RT 1040.) When further asked whether she would feel comfortable being part of a group that recommended death, she stated "No. I don't have a problem with that. I'm my own person." (5 RT 1041.) The prosecutor asked whether, given her background in school psychology, she would

automatically believe the testimony of a psychologist or psychiatrist. (5 RT 1038.) In response, J.B. described her experience on a prior case in which her skepticism of a psychologist's testimony was confirmed by information she learned after the trial. (5 RT 1039.)

The prosecutor also asked J.B. about her response to the questionnaire inquiry about what a sentence of "death by lethal injection or death in the gas chamber" would "mean to you?" (14 CT 4088.) J.B. had written "Curel [sic]. Inhumane. Why?" (*Ibid.*) She explained that her feeling resulted from when she read about innocent people on death row who were later exonerated. (5 RT 1040 ["I just felt that that was so inhumane to execute someone for something that they didn't do"].) The prosecutor pressed further on this point, asking whether that feeling would be on her mind and whether she would think, "I don't want to make that mistake; I'm not going to vote for death. It's just easier. I will give him life without parole?" (4 RT 1040-1041.) J.B., answered, "No," and explained that she would go by the facts proved and the law. (5 RT 1041.)

The prosecution used its ninth peremptory challenge to excuse J.B. (5 RT 1099), which triggered appellant's *Batson/Wheeler* challenge (5 RT 1123). Out of the presence of the jury, defense counsel stated that "we have a very limited number of African-American jurors in the pool. I calculated, of the 86 jurors that we had yesterday after cause and hardships, there were seven African-American jurors. There have been three in the box, and Mr. Mazurek [the prosecutor] has used two – has used peremptory challenges to exclude two of the three." (5 RT 1123-1124.) Defense counsel noted that, at that time, the prosecution had used peremptories to exclude two-thirds of the African-Americans who were called into the box. (5 RT 1124.)

Defense counsel also noted that, although he did not yet have the daily transcripts of voir dire, the prosecutor had questioned J.B. "more than he did other jurors." (5 RT 1126.) He also argued that, unlike in the case of other jurors, even after J.B. said that "she could be fair and that she would be able to impose the death penalty, he [the prosecutor] went further in an attempt to get her to admit bias." (5 RT 1126.)

Finally, defense counsel stated that the prosecutor's written list of proposed stipulations included African-Americans, including J.B., whose questionnaires did not support stipulated excusal, a tactic which defense counsel alleged had been employed by the prosecutor in an attempt to remove several potentially eligible black jurors prior to in-court questioning. (5 RT 1126-1127.) Thus, because this pattern suggested that the prosecutor was "seeking to exclude jurors prior to us even beginning voir dire based on race, and the fact that he excluded a very fair juror, [J.B.], in a case where Mr. Battle is an African-American where there's very few African-Americans available to him to serve on the jury," defense counsel argued he had proved a prima facie case of racial discrimination. (5 RT 1127-1128.)

The trial court responded as follows:

> But needless to say, in order to go forward with the motion – and for the record it would be under *Batson* and *Wheeler* – the Court has to make a finding that there has been a systematic exclusion of a protective [sic] class. Certainly African-American is a protective [sic] class, that's not the issue. The issue is whether or not there's a systematic exclusion of it.
>
> At this point I can't – I'm not in a position to say Mr. Mazurek is doing a racially motivated – has a racially motivated motive. So your –

The issue regarding the ones he wished to stipulate to that were not stipulated to, or were stipulated to, . . . [¶] . . . of those proposed to be stipulated – I guess – I guess I don't know how that – how that makes – it seems to me if Mr. Mazurek had offered to stipulate to them as – for cause – that you all – what you all stipulated to, it seems to me if he offered to do that, that's kind of an indication that he saw something in that juror that would in his opinion make that person not a qualified juror for a capital case. I don't know at this juncture that the reason for that was racially motivated. Absent that, absent that, I can't find, I will not find, that there is a prima facie showing at this point.

Now, if you go through those questionnaires and you find that – and you can show me that there's a theme in there that the only ones that he wanted excluded by stipulation were minorities, well, then maybe you've got something to talk about. But I don't think that's the case. Because looking at the panel, there's a number of minorities, including African-Americans.

Now, you're right, in terms of sheer numbers, the numbers are not great. However, there are a number of minorities out there including African-Americans.

And I don't know at this point, and I will not find, that his excusing of [J.B.] was racially motivated. I am not going to require at this point of Mr. Mazurek to explain his reasoning for it, because I can't find in good conscience that this has been a prima facie showing. Now, I can't say – I can say this: You're close. And I will be more than I have already circumspect about how and who is being excused. But as far as a prima facie showing, I'm going to find that it's insufficient at this point.

Your motion for – under *Wheeler* and *Batson* is denied without prejudice.

(5 RT 1129-1130.)

Subsequently, after being asked by the trial court whether it wished to place anything on the record, the prosecutor responded:

> No. I – I just – I don't feel I need to justify my reasons. But in talking about the people that were proposed to be stipulated to, for example, one of the people was Miss [M.N.], who explained a clear, as she did in the jury box, a clear reservation about even being able to impose the death penalty.

(5 RT 1130.)

Thereafter, the trial court interjected that M.N. had a son who was murdered, and it was surprised she had not already been stipulated to. (5 RT 1130.) The prosecutor continued: "Yeah. . . . And that's one of the people I proposed to stipulate to. And that goes far beyond racial reasons." (5 RT 1130-1131.) The trial court agreed and resumed voir dire. (5 RT 1131.)

The prosecutor gave no reason for his challenge of J.B., and the trial court cited none.

B. Applicable Legal Standards

The equal protection clause of the federal Constitution, as well as the state constitutional right to an impartial jury drawn from a representative cross-section of the community, prohibit discrimination in the exercise of peremptory challenges on the basis of a juror's race. (*Batson, supra*, 476 U.S. at p. 89; U.S. Const., 6th & 14th Amends.; *Wheeler, supra*, 22 Cal.3d at pp. 276-277; Cal. Const., art. I, § 16.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Under the familiar three-step analysis applicable to *Batson/Wheeler* claims, the defendant bears the initial burden of establishing a prima facie case by presenting evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson, supra*, 545 U.S. at p.

168; *Batson*, *supra*, 476 U.S. at pp. 93-97; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) After this "step one" threshold showing is satisfied, it is the prosecution's burden ("step two") to present nondiscriminatory reasons for the peremptory challenges in question (*Batson*, *supra*, 476 U.S. at pp. 97-98; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281), after which the trial court must evaluate the reasons the prosecutor proffered ("step three") to determine whether the defendant has proven purposeful discrimination. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

Critically, the burden for demonstrating a prima facie case is a low one. (*Overton v. Newton* (2nd Cir. 2002) 295 F.3d 270, 279, fn.10 [burden of prima facie showing under *Batson* "minimal"]; *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145 ["the threshold for making a prima facie Batson claim is quite low"]; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 512 ["the burden at the prima facie stage is low"]); see also *People v. Harris* (2013) 57 Cal.4th 804, 882-883 (conc. opn. of Liu, J.) ["this court has improperly elevated the standard for establishing a prima facie case beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike"].) The minimal burden is particularly low when there are few of the challenged class in the pool of eligible jurors. (*United States v. Clemons* (3rd Cir. 1988) 843 F.2d 741, 748 [it is "easier to establish a prima facie case when all blacks are excluded from a jury, or when one or two blacks are excluded from a panel in a district with a relatively low black population"].)

C. This Court Should Order A Remand On Appellant's *Wheeler/Batson* Claim Because The Trial Court Applied The Wrong Standard And, Although Recognizing Appellant's Showing Was "Close," Found No Prima Facie Case Of Racial Discrimination

In 26 of the 27 pure step-one cases decided after *Johnson v. California*, *supra*, 545 U.S. 162, this Court has employed *de novo* review to remedy the error that existed due to the fact that the trial courts may have applied the incorrect standard enunciated by this Court to assess whether a prima facie case had been met.[18] Despite the fact that trial courts for years

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[18] See *People v. Jones* (2013) 57 Cal.4th 899, 919-920 (four of five African-American women stricken); *People v. Harris* (2013) 57 Cal.4th 804, 833-838 (two of three African-Americans stricken); *People v. Edwards* (2013) 57 Cal.4th 658, 697-699 (one of two African-Americans stricken); *People v. Lopez* (2013) 56 Cal.4th 1028, 1047-1050 (two of two African-Americans were stricken); *People v. Pearson* (2013) 56 Cal.4th 393, 420-423 (one of three African-Americans stricken); *People v. Streeter* (2012) 54 Cal.4th 205, 220-226 (three of seven African-Americans called into the box stricken); *People v. Thomas* (2012) 53 Cal.4th 771, 795-796 (six of fifteen African-Americans called into the box stricken); *People v. Elliott* (2012) 53 Cal.4th 535, 559-574 (sole African-American alternate juror and two of two African-American jurors stricken); *People v. Dement* (2011) 53 Cal.4th 1, 18-21 (ten of twenty women stricken); *People v. Clark* (2011) 52 Cal.4th 856, 905 (four of five African-Americans stricken); *People v. Blacksher* (2011) 52 Cal.4th 769, 800-803 (two African-Americans stricken); *People v. Garcia* (2011) 52 Cal.4th 706, 746-750 (seven of forty-two women stricken); *People v. Hartsch* (2010) 49 Cal.4th 472, 485-490 (five of ten African-Americans stricken); *People v. Taylor* (2010) 48 Cal.4th 574, 611-617 (single African-American stricken); *People v. Davis* (2009) 46 Cal.4th 539, 582-584 (five Hispanics stricken); *People v. Hawthorne* (2009) 46 Cal.4th 67, 77-84 (three African-Americans stricken); *People v. Carasi* (2008) 44 Cal.4th 1263, 1291-1295 (twenty of twenty-three challenges against women); *People v. Howard* (2008) 42 Cal.4th 1000, 1016-1020 (two African-Americans stricken); *People v. Kelly* (2007) 42 Cal.4th 763,

(continued...)

had conducted their review of defendants' prima facie burden under an unduly strict standard, this Court never has found that a trial court improperly rejected a prima facie showing in these cases. The string of affirmances is due in part to the flawed manner in which this Court conducts its step-one analysis. (See generally *People v. Harris* (2013) 57 Cal.4th 804, 863-891 (conc. opn. of Liu, J.).) But it is also a product of this Court's attempts to remedy presumed trial court error through *de novo* review of a ruling that encompasses *factual* and even non-record based evidence available only to the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197 ["whether the defendant bore his burden of a prima facie showing . . . [is] examined for substantial evidence: [it is] . . . reducible to an answer to a purely factual question"].) Strikingly, although this Court has explicitly held that the trial court's prima facie analysis is always a "factual" question reviewed for substantial evidence (*ibid.*), it has engaged in de novo review of prima facie cases infected with *Johnson* error by

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[18] (...continued)
778-781 (single African-American stricken); *People v. Hoyos* (2007) 41 Cal.4th 872, 899-903 (three of four Hispanics stricken); *People v. Bonilla* (2007) 41 Cal.4th 313, 340-350 (two of two African-Americans, three of four Hispanic women, and twenty of thirty women stricken); *People v. Lancaster* (2007) 41 Cal.4th 50, 73-78 (six African-Americans stricken); *People v. Bell* (2007) 40 Cal.4th 582, 594-601 (two of three African-American women stricken); *People v. Williams* (2006) 40 Cal.4th 287, 312-313 (two Hispanics and one African-American stricken); *People v. Avila* (2006) 38 Cal.4th 491, 540-558 (three African-Americans and three Hispanics stricken); *People v. Gray* (2005) 37 Cal.4th 168, 183-192 (two of six African-Americans stricken); *People v. Cornwell* (2005) 37 Cal.4th 50, 66-74 (one of two African-Americans stricken). In one case, this Court found that, even though this Court's enunciated standard was incorrect, the trial court nonetheless applied the correct standard. (*People v. Hamilton* (2009) 45 Cal.4th 863, 899.)

asserting that it is simply resolving the "legal question" of whether a prima facie case is met. (See, e.g., *People v. Cornwell* (2005) 37 Cal.4th 50, 73.) This is not the proper method of remedying trial court error in a fact-bound determination such as the existence of a prima facie case of discrimination.

The United States Supreme Court and other courts have chosen to remand cases to the trial court when the standards of a *Batson* step-one analysis were not properly applied. (See section C.2.b., *post.*) Although perhaps not every step-one *Batson/Wheeler* case decided under the standard rejected in *Johnson* requires remand, appellate courts should not place themselves in the shoes of trial court judges in cases such as this one – where a trial court deemed the case "close," and the determination encompasses issues difficult to assess on appeal such as the comparative intensity of the questioning of jurors. And this Court should not attempt to conduct a de novo review where the trial court's determination of an admittedly "close case" came after it rejected relevant evidence under a standard even stricter than that repudiated in *Johnson.* As one California court noted:

> [W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.

(*People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405; § 1260.) Such a remand is appropriate in this case.

1. The Trial Court Applied the Wrong Standard

The *Batson/Wheeler* motion in this case occurred during the window between the reaffirmation of the "strong likelihood"standard in *People v.*

Box (2000) 23 Cal.4th 1153, 1188, fn.7, and the disapproval of this standard in *Johnson v. California, supra*, 545 U.S. 162. (See also *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342 [noting that the United States Supreme Court has "concluded that California courts had been applying too rigorous a standard in deciding whether defendants had made out a prima facie case of discrimination"].)

It is well established that trial courts are presumed to be aware of and to have followed the law (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114), at least in the absence of a clear indication to the contrary (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944). For this reason, this Court has presumed that trial courts evaluating *Batson/Wheeler* motions before the high court's ruling in *Johnson v. California, supra*, 545 U.S. 162, employed an unduly strict standard in assessing the showing required to substantiate a prima facie case under *Batson*. (See, e.g., *People v. Hawthorne* (2009) 46 Cal.4th 67, 79.) Therefore, in absence of evidence to the contrary, this Court must similarly presume that the trial court applied the wrong standard.

However, aside from any presumption that the trial court was following the flawed standard in effect at the time of the trial, the trial court's own analysis provides unmistakable evidence that it employed an incorrect standard – one even more strict than the too stringent "strong likelihood" standard disapproved in *Johnson v. California, supra*, 545 U.S. 162. In framing the issue, the trial court indicated that "in order to go forward with this motion . . . this Court *has to make a finding that there has been a systematic exclusion* of a protective [sic] class. Certainly, African-American is a protective [sic] class, that's not the issue. The *issue is whether or not there's a systematic exclusion of it.*" (5 RT 1128, italics

added.) This statement is patently inconsistent with the applicable standard. "When a party makes a *Wheeler* motion, the issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (*People v. Avila* (2006) 38 Cal.4th 491, 549; *People v. Arias* (1996) 13 Cal.4th 92, 136-137 [a *Wheeler* violation "does not require 'systematic' discrimination, and is not negated simply because both sides have dismissed minority jurors or because the final jury is 'representative'"].)

Nor can the trial court's improper framing of the central issue be explained away as inadvertent, since the trial court proceeded to employ incorrect methodology throughout its analysis. First, when the motion was made, the trial court stated that it was "not in a position to say [the prosecutor] is doing a racially motivated – has a racially motivated motive." (5 RT 1128.) However, at step one, the trial court is *not* asked to make a decision on the existence of a "racial . . . motive" or even a probability thereof. (*Johnson*, *supra*, 545 U.S. at p. 170.) In *Johnson*, the high court held that the first step is not intended to be "so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid*; see also *Smith v. Cain* (5th Cir. 2013) 708 F.3d 628, 632, 634 [district court properly found that state trial court's statement "I do not believe there is any showing of a systematic exclusion based upon the order in which the strikes were made" was an unreasonable application of clearly established Supreme Court

law].)

Similarly, when the trial court addressed defense counsel's assertion that the prosecutor had strategically attempted to stipulate to African-American prospective jurors, it repeated this incorrect understanding of the standard governing the first stage of the *Batson* analysis and reaffirmed that it required some form of systematic exclusion to establish an inference of discrimination:

> it seems to me if he offered to [stipulate to black jurors], that's kind of an indication that he saw something in that juror that would in his opinion make that person not a qualified juror for a capital case. *I don't know at this juncture the reason for that was racially motivated.* Absent *that, I can't find*, and I will not find, that there is a prima facie showing at this point. Now if you go through those questionnaires and you find that – and you can show me that there's a theme in there that *the only ones that he wanted excluded by stipulation were minorities,* well, then maybe you got something to talk about. But I don't think that's the case. Because looking at the panel, there's a number of minorities, including African Americans.

(5 RT 1129, italics added.)

In other words, the trial court framed the inquiry regarding the allegedly improper stipulations – at step one – as an effort determine the ultimate question at step three: whether "the reason for [the suspect stipulations] *was* racially motivated." (*Ibid*; see also 5 RT 1130 ["I will not find, that his excusing of [J.B.] *was racially motivated.*"]; *People v. Harris*, *supra*, 57 Cal.4th 804, 874 (conc. opn. of Liu, J.) [warning of the risks of "collapsing all three of *Batson*'s steps into the prima facie inquiry"]; *Madison v. Commissioner, Ala. Dept. of Corrections* (11th Cir. 2012) 677 F.3d 1333, 1339 [state court acted "contrary to clearly established federal law" when it "demanded that [defendant] establish purposeful

discrimination at the outset rather than merely produce evidence sufficient to raise an inference of discrimination, which is all that *Batson* requires"].)

Further, the trial court explicitly stated that because, at this step-one juncture, it "d[id]n't know" that the reason for was the stipulations "was racially-motivated," it *could not* find a prima facie case without evidence that the prosecutor stipulated *only* to African-American prospective jurors. (5 RT 1129.) That the prosecutor may have strategically attempted to remove by stipulation some, though not all, African-American jurors who, based on their questionnaires were not obviously biased, was relevant to the analysis the trial court should have undertaken. Disparate treatment of African-American jurors is always at least relevant to the existence of a potentially discriminatory motive. (Cf. *Miller-El v. Cockrell* (2003) 537 U.S. 322, 332 [finding relevant that "[t]he evidence suggests, . . . that the manner in which members of the venire were questioned varied by race"].) And differential treatment of African-American jurors is relevant regardless of whether these differences are aimed *solely* at systematically excluding African-American jurors. (See *id.* at p. 344 [noting that discriminatory script was used "for 53 percent of the African-Americans questioned on the issue but for just 6 percent of white persons"].)[19]

For these reasons – both the trial court's explicitly incorrect framing of the pertinent legal issue and its flawed analysis of the evidence – the record unequivocally demonstrates that the trial court employed an

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[19] Because, as shown above, the trial court's use of the wrong standard pervaded its analysis, this Court's analysis in *People v. Reynoso* (2003) 31 Cal.4th 903, that a "passing statement" to "systematic exclusion" does not demonstrate legal error, is inapplicable. (*Id.* at p. 927; see also *id.* at p. 933 (dis. opn. of Kennard, J. [reasoning of the majority in *Reynoso* was incorrect].)

improper standard in evaluating appellant's prima facie case.

2. Because the Trial Court Found a Close Case Despite Applying an Incorrect and Too Onerous Standard and Ignoring Relevant Evidence, Remand Is the Only Appropriate Remedy

As set forth below, because the trial court applied an incorrect standard in this case, appellant is entitled to remand to the trial court for complete determination of his *Batson/Wheeler* motion under the proper standards. Although this Court normally reviews pre-*Johnson* step-one claims de novo, remand is necessary in this case because the trial court is the most institutionally competent to review what it deems a "close" prima facie case, particularly where it involves evidence not easily susceptible to appellate review.

a. The standard of review of step-one claims

This Court ordinarily applies a deferential standard of review in assessing the trial court's denial of a *Batson/Wheeler* motion and upholds the trial court's ruling as long as it is supported by substantial evidence. (*People v. Avila, supra*, 38 Cal.4th at p. 541; see also *People v. Reynoso, supra*, 31 Cal.4th at p. 908 [noting "great deference" customarily afforded trial court rulings in *Batson/Wheeler* cases].) This deference is justified because the trial judge – who directly observes the voir dire – is in the best position to determine under all the relevant circumstances whether a prima facie showing has been made. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1201.) "These circumstances are often subtle, visual, and therefore incapable of being transcribed, subjective, and even trivial." (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1067.) This Court has underscored the importance of deference to the firsthand perspective of the trial court in the

Batson analysis:

> The trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . [¶] The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.]

(*People v. Lenix*, *supra*, 44 Cal.4th at pp. 626-627.)[20]

In cases such as this one – in which the trial court's rejection of a prima facie case predated *Johnson v. California*, *supra*, 545 U.S. 162 – this Court "cannot simply defer to the trial court's prima facie ruling" where it is unclear whether the trial court applied the correct standard. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105.) Ordinarily, despite the normal deference owed to the trial court's determinations, this Court therefore reviews the prima facie case de novo. (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 79 [court "reviews the record independently (applying the high

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[20] Although *Lenix* was a step-three case, it drew its language from *People v. Johnson* (2003) 30 Cal.4th 1302, 1320, rev'd *Johnson v. California*, *supra*, 545 U.S. 162, a first-step case, and explicitly affirmed that "concerns about the inability of a reviewing court to judge the dynamics of jury selection apply equally in assessing the prosecutor's credibility at the third *Wheeler/Batson* step" as well as the first. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 627, fn.17.)

court's standard) to resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race" in cases where it could not "be sure the [trial] court used the correct standard"].)

However, substituting de novo review for deferential substantial evidence review is not always the appropriate remedy when the governing *Batson* standards are not applied. In some cases, the trial court's analytic error makes appellate determination of a *Batson/Wheeler* issue an unsuitable substitute for redetermination by the trial court precisely because the appellate court is "not privy to the unspoken atmosphere of the trial court." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 627.) As shown below, in those cases, the proper remedy to cure the trial court's error is remand, and this case falls into that category.

b. Remand, rather than analyzing the cold record de novo, is the appropriate remedy to cure the trial court's error in a close case where the intensity of the prosecutor's questioning of a challenged juror is at issue

The trial court's errors in this case cannot be adequately cured by applying de novo review to the cold record. As an initial matter, the trial court used an improper standard to refuse to consider relevant evidence – defense counsel's allegations that the prosecutor was strategically stipulating to African-American jurors whose questionnaires did not support excusal – because defense counsel could not show that the "only" jurors to which the prosecutor proposed to stipulate were black. (5 RT 1129.) As discussed in more detail in section D.5. below, the fact that the prosecutor sought to exclude by stipulation 50 percent of the African-Americans in the jury panel, some of whom were facially pro-prosecution, was relevant

evidence to support the prima facie case.

By analogy to the Title-VII burden-shifting cases from which the *Batson* framework originated (see *Batson, supra,* 476 U.S. at p. 94, fn. 18; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338; *People v. Johnson, supra,* 30 Cal.4th at p. 1314 overruled on other grounds by *Johnson v. California, supra,* 545 U.S. 162), the appropriate remedy when a trial court improperly rejects relevant evidence in determining the existence of a prima facie case is to remand to the trial court so it can reconsider its ruling while utilizing the previously rejected evidence. (See, e.g., *Malave v. Potter* (2nd Cir. 2003) 320 F.3d 321, 327 [where trial court improperly rejected statistics which did not match the "preferred methodology" the "District Court must determine [on remand] whether [plaintiff] makes out a prima facie case" based on "statistical analysis and other evidence"]; *De Medina v. Reinhardt* (D.C. Cir. 1982) 686 F.2d 997, 1002 ["the district court's opinion reflects a basic misperception of the relevancy and role of statistical evidence in the plaintiffs' prima facie showing; hence, we remand for a redetermination of whether plaintiffs can make out a prima facie case"]; *Griffin v. Carlin* (11th Cir. 1985) 755 F.2d 1516, 1526 [because "it is unclear whether the district court would have found plaintiffs' statistics sufficient to establish a prima facie case if it had considered the . . . appropriate labor pool, we must remand this issue for further proceedings"]; *Wheeler v. City of Columbus, Miss.* (5th Cir. 1982) 686 F.2d 1144, 1151 [where district court improperly fragmented plaintiff's statistical evidence, remand necessary to determine "whether her statistical evidence in and of itself, or together with other evidence, establishes a prima facie case of discrimination by the City"].)

Remanding for proper determination of the prima facie case also is commonplace in *Batson* cases. For instance, after *Batson* was decided, the

high court held that the new rule applied to all cases still pending on direct appeal. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) The standard course for federal appellate courts thereafter addressing retroactively-applied *Batson* claims was not simply to determine the existence of the prima facie case on the cold appellate record; instead, appellate courts routinely remanded to trial courts for analysis of the prima facie case in the first instance. (See, e.g., *United States v. Allen* (4th Cir. 1987) 814 F.2d 977, 977-978 [remanding despite three blacks serving on jury whom prosecutor did not strike despite opportunity to do so because "factual contentions of this nature are best resolved in the district court"]; *United States v. David* (11th Cir. 1986) 803 F.2d 1567, 1568, 1570 [remanding for prima facie analysis where two of three black jurors on panel were stricken]; *United States v. Wilson* (8th Cir. 1987) 816 F.2d 421, 423 [remanding for prima facie analysis where prosecutor excused three of four black jurors]; cf. *United States v. Townsley* (8th Cir. 1988) 843 F.2d 1070, 1083 ["Although it appears from the record that defendant [] has made a strong showing for a prima facie case, we are impelled to remand to the district court to make that determination in the first instance"].)

Except where the prima facie case was established as a matter of law, *Johnson v. California*, *supra*, 545 U.S.162, the United States Supreme Court similarly has declined to assess the prima facie case on the cold appellate record. (See *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614, 631 [holding *Batson* applies in civil cases but remanding and declining to determine existence of prima facie case]; see also *Edmonson v. Leesville Concrete Co., Inc.* (5th Cir. 1991) 943 F.2d 551, 552 [remanding to district court in light of Supreme Court holding].)

Other courts have applied precisely the same remedy – remand for redetermination of the prima facie case – to improper step-one analysis in *Batson* claims. For example, in *Cobb v. State* (Ala. Crim. App. 1995) 678 So.2d 247, 248-249, the trial court found no prima facie case of discrimination, but it erroneously relied upon the percentage of blacks in the venire in comparison to the percentage of blacks on the jury in a manner potentially violating a prior state decision. The statistical evidence was similar to the case at bar: the state in *Cobb* argued that "no pattern of racial striking was shown in that the prosecutor used only two of his seven strikes to remove blacks from the jury, whereas he could have used his strikes to remove all four blacks." (*Id.* at p. 248.) The appellate court noted that, in a string of cases involving similarly improper use of statistics in the prima facie analysis, "this court has remanded the causes for the trial court to determine whether a prima facie case of discrimination existed, when the trial judge relied on the percentages comparison condemned in *Ex parte Thomas* [the prior decision]." (*Ibid.*, citation omitted.)

Similarly, in California, appellate courts have remanded where the trial courts have applied erroneous standards in conducting their *Batson* analysis. *People v. Hutchins* (2007) 147 Cal.App.4th 992 and *People v. Tapia* (1994) 25 Cal.App.4th 984, although both arising due to analytic error during step three, are instructive. The trial court in *Hutchins* improperly applied a "clear and convincing evidence" standard to the defendant's burden to prove discrimination. (*People v. Hutchins, supra,* 147 Cal.App.4th at pp. 996-997.) Noting that the record did "not indicate whether the trial court would have granted appellant's *Wheeler* motion if it believed the burden of proving purposeful race discrimination was a preponderance of evidence, rather than clear and convincing evidence," the

appellate court held that limited remand was the appropriate remedy. (*Id.* at pp. 109-110.)

In *People v. Tapia, supra*, 25 Cal.App.4th 984, the trial court implicitly found a prima facie case by inquiring about the prosecution's justifications for its peremptory challenges. (*Id.* at p. 1014, fn. 9.) However, the appellate court concluded that the trial court "utilized the wrong standard, determining there was objective 'good cause' to excuse the prospective jurors" instead of examining whether the prosecutor's actual reasons were pretextual. (*Id.* at p. 1014.) The appellate court remanded, instructing the trial court to "assume the defendant has established a prima facie case of wrongful exclusion [of the relevant protected class]." (*Id.* at p. 1031.)

And this Court, in the very case which had previously led to rejection of its prima facie analysis by the United States Supreme Court, has sanctioned the remedy of limited remand to the trial court. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103 [remanding for full step-three analysis].) These cases demonstrate that, when de novo review of a *Batson/Wheeler* claim is unsuitable, remand to the trial court is an appropriate remedy.

To be sure, not every case in which the trial court has misapplied – or is presumed to have misapplied – the correct standard at step one requires remand. As this Court has stated, in many "post-*Johnson* cases, we are able to review the record to resolve the legal question whether defendant's showing supported an inference that the prosecutor excused a prospective juror for an improper reason." (*People v. Lancaster* (2007) 41 Cal.4th 50, 75 [citing cases].) For instance, in a large number of post-*Johnson* step-one cases, the defendants pointed solely to the race of the

juror(s) stricken or other statistical evidence to satisfy their prima facie burden.[21] Similarly, in many cases defendants have presented statistics combined with other undisputed factual evidence which this Court could

[21] See, e.g., *People v. Streeter* (2012) 54 Cal.4th 205, 223 ("defendant's only stated basis for establishing a prima facie case at trial was that the prosecutor exercised three of five peremptory challenges against African-American jurors"); *People v. Clark* (2011) 52 Cal.4th 856, 905 ("Defendant rests his claim of error on the statistical frequency with which the prosecutor excused African-Americans from the jury pool"); *People v. Blacksher* (2011) 52 Cal.4th 769, 801 (aside from fact that two stricken jurors were African-American "[d]efendant offered no circumstances relevant to his claim of discriminatory intent"); *People v. Garcia* (2011) 52 Cal.4th 706, 745 (rejecting defense argument that by using all early peremptory challenges against women the prosecutor created a "'statistical' scenario amounting to a prima facie *Wheeler/Batson* case"); *People v. Taylor* (2010) 48 Cal.4th 574, 614 ("defense counsel merely pointed out that T.B. was an African-American woman and submitted the question on that basis alone"); *People v. Hartsch* (2010) 49 Cal.4th 472, 487 ("in the trial court defendant relied entirely on the fact that the prosecutor had excused four of the first five African-Americans called to the jury box"); *People v. Davis* (2009) 46 Cal.4th 539, 582 (referring only to number of jurors stricken); *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 79 ("defendant relied *solely* on the fact that, at that point, the prosecutor had used three of her eleven peremptory challenges to excuse African-American prospective jurors," original italics); *People v. Carasi* (2008) 44 Cal.4th 1263, 1293 ("Defendant argues that the statistical disparity between the number of prosecutorial strikes used against men and women establishes a prima facie inference of discriminatory motive"); *People v. Howard* (2008) 42 Cal.4th 1000, 1018, fn. 10 ("defense counsel provided no other basis for inferring discriminatory intent" other than pattern of strikes); *People v. Bonilla* (2007) 41 Cal.4th 313, 342 (Bonilla relies "principally on the fact that all African-Americans – two of two – were struck from the juror pool"); *People v. Guerra* (2006) 37 Cal.4th 1067, 1101 ("defense counsel sought to establish a prima facie case of discrimination based solely on the circumstance that R.M. was the only Hispanic sitting in the jury box, leaving only two other Hispanics on the entire panel").

adequately evaluate on a cold record.[22] In these situations – in which the factual issues are undisputed and do not depend on the trial court's evaluation of prospective jurors' demeanor, the tenor of jurors' answers, or the prosecutor's tone of questioning – it is accurate to state, as this Court has repeatedly, that the reviewing court must "resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 79, original italics.)

However, as this Court has held, the trial court's decisions at step one and step three also involve *factual* questions left to the determination of the trial court, which is the very reason why they are ordinarily reviewed under the deferential substantial evidence standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197.) This Court's deferential review of the trial court's evaluation of step-one decisions – relating to factors many of which are incapable of analysis on appeal – underscores how nuanced and

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[22] See, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 794 (defendant cited number of challenges against African-Americans, the interracial nature of the offense, fact that two of challenged jurors gave answers that appeared to favor the prosecution, and the excluded jurors had little more than their group membership in common); *People v. Avila*, *supra*, 38 Cal.4th at p. 554 (arguments included "[p]rospective Juror S.A. was the only individual out of her group of 24 called to the box who was Black; the prosecutor did not ask S.A. any questions; and S.A.'s answers to the questionnaire and the court's questioning were evenhanded"); *People v. Hoyos* (2007) 41 Cal.4th 872, 901 (defense counsel "sought to establish a prima facie case of discrimination solely on the circumstance that the prosecutor struck three individuals of Hispanic ancestry, and that defendant was of the same ancestry"); *People v. Cornwell*, *supra*, 37 Cal.4th at p. 69 (arguments included prospective juror was one of two African-Americans on the panel and that her questionnaire and voir dire responses indicated she was death-qualified and could be fair juror).

intensely contextual the nature of the prima facie inquiry can be.

Here, unlike other step-one cases reviewed de novo by this Court, the trial court was asked to evaluate the relative intensity of the prosecutor's questioning of a prospective juror in comparison to other prospective jurors – whether the prosecutor's questioning was a standard inquiry into J.B.'s views on the death penalty or instead was a ploy to get the African-American juror to "admit bias." (5 RT 1126; see also *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 344 [noting that if disparate questioning "created the appearance of divergent opinions even though the venire members' views on the relevant subject might have been the same," excusal of jurors with legitimately unfavorable opinions may still support a finding of discrimination].) Disparate questioning of minority jurors is not limited to use of different "scripts" employed in *Miller-El*, and analysis of differential treatment of jurors during voir dire goes beyond the precise length and language of the questions on the written page. Instead, when the issue is brought to the trial court's attention, as here, its analysis will encompass extra-record evidence such as tenor and tone.

Appellate review, even de novo, is simply an inadequate substitute for a trial court's firsthand evaluation of this form of evidence, which may depend entirely on the prosecutor and prospective jurors' respective demeanor and inflection during voir dire. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 622 [noting that even a simple sentence may have many meanings based on intonation].) De novo review is particularly problematic when, as in this case, the record suggests that the trial court's determination depended not simply on comparative statistics or other objective evidence easily susceptible to appellate review.

Here, the trial court found a "close case" where the prosecutor had employed two of eleven peremptories against African-American prospective jurors. (5 RT 1130.) This Court's case law provides no indication that these statistics – alone, or in combination with objective factors such as the race of the defendant and victims – compel a finding that this case was a close one. (Cf. *People v. Carasi*, *supra*, 44 Cal.4th at pp. 1291, 1295 [no prima facie case of gender discrimination even though prosecutor used 20 out of 23 peremptory challenges against female prospective jurors]; *People v. Dement*, *supra*, 53 Cal.4th 1, 19 [showing that 10 of prosecutor's 13 peremptory challenges exercised against women failed to state prima facie case].) To the contrary, this Court has expressed a belief that, when there are few African-American prospective jurors, a pattern suggesting discrimination "will be difficult to discern when the number of challenges is extremely small." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 343 & fn. 12; *People v. Bell*, *supra*, 40 Cal.4th at pp. 597-598 ["While the prosecutor did excuse two out of three members of [a cognizable] group, the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible"].)

On the other hand, the statistics in this case are comfortably within the realm of disparity that *may* trigger a finding of a prima facie case by a trial court positioned closer to the action. (See, e.g., *People v. Hamilton*, *supra*, 45 Cal.4th 863 at p. 899 [where only 6 of the 67 prospective jurors were black "[t]he trial court found defendant had made a prima facie showing of discriminatory purpose in the challenge of the second and all subsequent Black prospective jurors"]; *People v. Avila*, *supra*, 38 Cal.4th at p. 542 ["The trial court found that, in view of the small number of African-Americans on the panel, two excusals constituted a prima facie showing

under *Wheeler*"]; *People v. Jones* (2013) 57 Cal.4th 899, 916 [trial court found defendant had made a prima facie showing after two African-Americans were stricken]; *People v. DeHoyos* (2013) 57 Cal.4th 79, 103 [trial court found prima facie showing where 5 of 16 peremptory challenges were against African-American or Hispanic jurors]; *People v. Thompson* (2010) 49 Cal.4th 79, 106 ["The trial court stated that, based on the number of challenges against African-American prospective jurors (three out of nine exercised), defense counsel had stated a prima facie case"].)

Because of the small sample size of strikes exercised against African-Americans in this case, the trial court's finding that this was a "close case" likely hinged at least in part on factors particularly within the province of the trial court – such as an assessment of the tone and demeanor of both the prospective juror and the prosecutor. Such a conclusion is particularly plausible where the character of the questioning of an African-American was at issue. Because the trial court was troubled even under the stringent "strong likelihood" standard of review applicable at the time, de novo review is simply an inadequate remedy. (Cf. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23 [remanding where "the District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a 'close case'"].)

For these reasons, because the record in this case does not indicate whether the trial court would have found a prima facie case if it had applied the correct standard, remand is the only appropriate remedy. (*People v. Hutchins*, *supra*, 147 Cal.App.4th at pp. 996-997.)

D. Assuming This Court Refuses To Remand This Case To The Trial Court For Reconsideration Of Its Step-One *Batson/Wheeler* Ruling, And Instead Conducts De Novo Review, Appellant Established An Inference Of Racial Discrimination By The Prosecution In Its Peremptory Challenge Of J.B.

In this case, a young African-American man was convicted and sentenced to death for the murder of an elderly white couple by an all-white jury. The prosecutor did not state, nor did the trial court find, a reason for J.B.'s challenge, and no non-racial reason is so obvious from the record as to dispel any inference of discrimination. Several factors, some deemed especially relevant by this Court in reviewing a prima facie case under *Batson/Wheeler*, support a finding that the prosecutor used peremptory challenges in a racially-discriminatory manner: (1) that the defendant and the stricken juror(s) were members of the same, identified minority group (African-American), and were similar only as to group membership, but were otherwise heterogeneous, while the victims and the majority of the remaining jurors were members of a different group (Caucasian); (2) that the prosecutor struck most of the members of the identified group and used a disproportionate number of his peremptory challenges against the identified group as well as against another minority group (Hispanics); (3) that the prosecutor engaged in disparate voir dire of the stricken juror at issue; (4) that the prosecutor appeared eager to allow one African-American prospective juror (J.K.) to be excused for hardship; and (5) that the prosecutor sought to stipulate to the excusal for cause of at least 50 percent (four of the eight) of the African-American jurors in the jury panel based on their questionnaires, despite the fact that these questionnaires did not necessarily support disqualification. (See *People v. Bell*, *supra*, 40 Cal.4th at p. 597, quoting *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281 [listing first

three factors]; *Batson*, *supra*, 476 U.S. at p. 96, [trial courts "should consider all relevant circumstances" in determining whether a reasonable inference arises that a peremptory challenge was based on race].) Appellant addresses each of these factors in turn.

1. The Race of the Defendant, the Race of the Victims, the Ultimate Composition of the Jury, and Cross-Racial Credibility Determinations at Issue in this Case All Support Appellant's Prima Facie Case

As a preliminary matter, appellant was African-American, as was J.B., the juror subject to the disputed challenge. (10 RT 2457; 14 RT 3809; 14 CT 4072; see *Powers v. Ohio* (1991) 499 U.S. 400, 402 ["[r]acial identity between the defendant and the excused person . . . may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred"].) Moreover, the victims in this case were white, as were all 12 jurors who convicted appellant of murder and sentenced him to death.[23] That the prosecutor's exercise of strikes produced an all-white jury is itself a factor which has been held to satisfy the prima facie case. (See, e.g., *State v. Grandy* (S.C. 1991) 411 S.E.2d 207, 208 ["appellant satisfied his burden of proving a prima facie case by showing that he was black and that the solicitor used a peremptory challenge to obtain an all-white jury].)[24] And the existence of an all-white or nearly all-white jury supports a prima facie showing, even

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[23] See footnote 14, *ante*, on page 50.

[24] In *Grady*, as in this case, there was a black juror seated as an alternate. (Taggart, *Prosecutor Must Meet Heightened Burden in Demonstrating Racially Neutral Explanation for Use of Peremptory Strikes* (1992) 44 S.C. L. Rev. 25, 29 fn. 50 [analyzing record of *Grady* case].)

where few strikes are at issue. (*Johnson*, *supra*, 545 U.S. at p. 164 [finding prima facie case where "[t]he prosecutor used 3 of his 12 peremptory challenges to remove the black prospective jurors" and the resulting jury was all white]; *United States v. Stephens*, *supra*, 421 F.3d at p. 514 [finding significant that prosecutor's peremptory challenges "eliminated all but one minority venireperson from the jury"]; *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 275-276 [finding prima facie showing where striking of three prospective jurors resulted in all-white jury].)

Fourth, and relatedly, a key issue to be decided by the all-white jury was assessing the credibility of appellant's custodial confessions to participating in the murders of the Demkos, which the defense asserted were fabricated. Such cross-racial credibility determinations lend further support to the prima facie case when the defendant is a member of the excluded class. (*Holloway v. Horn* (3rd Cir. 2004) 355 F.3d 707, 723 [noting that commonality in race between stricken jurors and defendant was particularly relevant to prima case because the defense would "rise or fall largely on his claim that the custodial statement was fabricated, [the black defendant's] credibility versus that of Detective Gilbert, a white police officer, was a crucial issue for the jury"]; *United v. Stephens*, *supra*, 421 F.3d at p. 515 [relevant factor that "jury had to determine the credibility of an African-American defendant in characterizing his conduct . . . weighed against contrary testimony by Caucasian employees"]; see also King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev. 63, 75-99 [discussing origin and effects of race on jury determinations].)

Finally, although the African-American jurors stricken by the prosecution were both educated women, they were in other ways as

heterogeneous as the community as a whole. (See 14 CT 4071-4091 [J.B. questionnaire]; 19 CT 5331-5351 [S.W. questionnaire].)

2. The Prosecutor's Use of a Disproportionate Number of Strikes Against African-Americans and Other Minority Jurors Supports Appellant's Prima Facie Case

As noted above, the jury that convicted appellant and sentenced him to death was all white.[25] However, the statistical inquiry under *Batson* and *Wheeler* looks not simply at the final composition of the jury, but at the disproportionate nature of the strikes exercised against the excluded group. As this Court has noted, the most complete manner to assess the disproportionate nature of strikes against a particular group is to compare "the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (*People v. Bell* (2007) 40 Cal.4th 582, 619, fn. 4.) In this form of analysis, courts often refer to percentage of jurors challenged as a "strike rate" or "challenge rate."[26]

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[25] Ultimately, the prosecution accepted one African-American juror as Alternate Juror 1, Juror 360. (8 CT 2026-2053 [questionnaire].) However, this fact is of limited relevance because, as this Court has recognized in a step-three analysis, procedural and strategic differences in the selection of alternate jurors means that they are "not similarly situated for *Batson-Wheeler* purposes to the jurors who were originally sworn to try the case." (*People v. Lewis* (2006) 39 Cal.4th 970, 1018, fn. 13; see also 6 RT 1219 [noting the different number of peremptories allocated for alternates].)

[26] Appellant uses the term "strike rate" or "challenge rate" in the manner generally employed in the *Batson* case law. "The strike rate is computed by comparing the number of peremptory strikes the prosecutor used to remove black prospective jurors with the prosecutor's total number

(continued...)

At the time of appellant's *Batson/Wheeler* motion, two thirds of the African-American jurors seated in the jury box (2 out of 3) had been excluded by the prosecutor's peremptory challenges.[27] Thus, the prosecutor's strike rate of African-American jurors (2 strikes out of 11 peremptory challenges) was 18.18 percent. This rate was more than twice as high as the percentage of eligible African-Americans in the panel, which was 7.31 percent.[28] It was more than twice as high the percentage of African-Americans according to the figure defense counsel used in making the *Batson/Wheeler* motion, which was 8.31 percent.[29] And it was more

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[26] (...continued)
of peremptory strikes exercised." (*Abu-Jamal v. Horn* (3rd Cir. 2008) 520 F.3d 272, 290; *United States v. Alvarado* (2nd Cir. 1991) 923 F.2d 253, 255; see generally Watts & Jeffcott, *A Primer on Batson, Including Discussion of Johnson v. California, Miller-El v. Dretke, Rice v. Collins, & Snyder v. Louisiana* (2011) 42 St. Mary's L.J. 337, 387.)

[27] The prosecutor struck S.W. and J.B., leaving E.F. in the box. (5 RT 1124, 1032, 1036.)

[28] At the time of the *Batson/Wheeler* motion, there were 82 jurors in the panel who had been found eligible, i.e. the jurors excluding those jurors who were excused for hardship or cause, or by stipulation. (See 4 RT 871-892 [88 jurors at commencement of voir dire]; 4 RT 930, 981 [excusals of C.W. and J.N.]; 5 RT 1063-1064 [excusal by stipulation of C.K. and J.P.]; 5 RT 1076-1077 [excusal for hardship and by stipulation of J.K. and T.D.].) M.N., though ultimately excluded for cause (5 RT 1081), was not present when 88 jurors were counted on the first day. There were six African-American jurors who had been found eligible at the time of the motion: the seven African-American jurors present at the commencement of voir dire, minus J.K., who had been excluded for hardship at the time of the motion. (4 RT 871-892 [listing J.H., J.K., A.H., J.B., E.F., B.A., and S.W.]; 5 RT 1076-1077 [excusal of juror J.K.].)

[29] Defense counsel appears to have compared the 86 prospective
(continued...)

than three times as high as the percentage of eligible African-Americans in the panel after all hardships and cause challenges were finally resolved, which was 5.41 percent. (5 RT 1125.)[30]

Whichever statistic is used, the prosecution's strike rate was more than double the number of eligible African-American jurors. This disparity fits squarely within the range of statistical disparities present in other cases in which courts have found a prima facie showing. (See, e.g., *People v. Hamilton*, *supra*, 45 Cal.4th at p. 899 [trial court found prima facie case after two of six black prospective jurors where stricken]; *People v. Thompson*, *supra*, 49 Cal.4th at p. 106 [trial court found prima facie case where three out of nine peremptories were against black jurors]; *United States v. Alvarado* (2nd Cir. 1991) 923 F.2d 253, 255-256 [prima facie case found where prosecutor struck four of seven minority jurors because "a

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[29] (...continued)
jurors present in the panel prior to the exercise of any peremptory challenges. (4 RT 871-892 [88 jurors at commencement of voir dire]; 4 RT 930, 981 [excusals of C.W. and J.N.] with the seven African-American jurors present at the commencement of voir dire. (4 RT 871-892 [listing J.H., J.K., A.H., J.B., E.F., B.A., and S.W.].) This number includes the four jurors (C.K., J.P., J.K., and T.D.) who, as discussed in footnote 28, were excluded for hardship or by stipulation.

[30] There were some additional exclusions for cause and hardship after the beginning of the peremptory challenges. After these exclusions, African-American jurors comprised only 5.41 percent of the eligible prospective jurors: four eligible African-Americans compared with 74 total eligible jurors. (5 RT 1063-1064 [excusal by stipulation of C.K. and J.P.]; 5 RT 1076-1077 [excusal for hardship and by stipulation of J.K. and T.D.]; 5 RT 1081 [excusal of M.N.]; 5 RT 1135 [stipulated excusal of K.K]; 6 RT 1188-1190 [stipulated excusal of C.S. and I.C.]; 6 RT 1211 [stipulated excusal of G.K.]; 6 RT 1123 [stipulated excusal of G.S.]; 6 RT 1247-1248 [stipulated excusals of A.H and B.A.].)

challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson*"]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [prima facie case found where "[a]t the time of the first *Wheeler* motion, after which the judge in effect warned the prosecutor not to strike any more Hispanics, the prosecutor had exercised 29 percent (four out of fourteen) of his challenges against Hispanics" compared to 12 percent of Hispanics in the venire].)[31]

To be sure, this is not to say that the statistics alone *commanded* the trial court's finding that appellant had come close to establishing a prima facie case. This Court and others have recognized that when very few strikes have been exercised against a minority group, the sample size alone introduces a significant element of uncertainty. (*People v. Bonilla, supra*, 41 Cal.4th at p. 343; *Fernandez v. Roe, supra*, 286 F.3d at p. 1078.) Therefore, disparity between the strike rate and the jury composition for a

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[31] Ultimately, the prosecution utilized 2 of 17 peremptories against African-Americans during the selection of the 12-member jury, approximately 11.76 percent. Including the sole challenge exercised by the prosecution during the selection of alternates, it used 2 of 18 against black jurors, or 11.1 percent. This is still over twice the percentage of the ultimate composition of eligible African-American jurors which was 5.41 percent. Moreover, even if compared to the initial composition of African-American jurors, the lower 11.76 percent percentage strike rate was due to the fact that there was only one other African-American who was seated in the box and was not disqualified due to hardship or cause: prospective juror E.F. Because E.F. was stricken by the defense prior to the prosecutor either accepting the jury as constituted or exhausting its peremptory challenges, it is virtually impossible to draw meaning from the prosecutor's failure to strike E.F. first. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1320 (conc. opn. of Kennard, J.,) [noting that a "prosecutor biased against [a group] would not necessarily permit that bias to prevail over all other considerations" and thus the prosecutor may first choose to strike other unfavorable jurors].)

class of jurors does not ineluctably lead to an inference of discrimination when few strikes have been exercised. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 343 & fn. 12 [an inference of discrimination is difficult to discern from a small number of challenges alone]; *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1078 [two "challenges, standing alone, may not be sufficient to support an inference of discrimination"].) Nevertheless, the trial court – which was in the best position to judge all of the relevant circumstances – found this case close despite the small number of challenges when the *Batson* motion was made.

Moreover, the exclusion rate was also high due to the small number of African-American prospective jurors ultimately eligible to serve on the jury.[32] The prosecution excluded two of four (50 percent) of the African-Americans found eligible in the panel. When the exclusion rate is high, even a small number of strikes can satisfy the prima facie burden, at least when the defendant and the jurors are of the same race. (See *Johnson*, *supra*, 545 U.S. at pp. 164, 172 [finding prima facie case where prosecutor used 3 of his 12 peremptory challenges (25 percent) to remove three black prospective jurors who constituted 7.1 percent of the venire]; see also *Jones v. West* (2nd Cir. 2009) 555 F.3d 90, 97-98 [noting that high exclusion rates alone may be sufficient to establish a prima facie case]; *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 925 [in hate crime case, prima facie case established where defendants struck three out of the four black venire

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[32] The exclusion rate is calculated by comparing the number of challenges exercised against eligible prospective jurors of the defendant's race with the percentage of eligible prospective jurors of the defendant's race known to be in the jury panel. (*Lewis v. Horn* (3rd Cir. 2009) 581 F.3d 92, 103.)

members].)

Thus, where the number of African-Americans in the jury panel is low, it is easier to establish a prima facie case on the basis of one or two strikes alone. (*United States v. Clemons*, *supra*, 843 F.2d at p. 748; *State v. Walker* (Wis. 1990) 453 N.W.2d 127, 135 & fn. 5 [in light of low number of black jurors, challenge of single African-American established prima facie case where juror "did not answer in a way that would suggest a disqualifying attitude to any general questions directed at the pool of jurors by the judge or by the lawyers"]; see also *People v. Harris* (2013) 57 Cal.4th 804, 882-883 (conc. opn. of Liu, J.) [collecting cases].)

This Court has noted that in the "ordinary case," to make a prima facie case after the excusal of only one or two members of a group is "very difficult." (*People v. Bell*, *supra*, 40 Cal.4th at p. 598, fn. 3.) This blanket statement appears difficult to reconcile with the high court's holding in *Johnson*, *supra*, 545 U.S. at pp. 164, 172, where a single additional strike (three out of twelve exercised) was held to satisfy the prima facie case as a matter of law where only 3 of 43 (7.1%) of eligible jurors were African-American. If applied to cases where jury panels have few minorities, this Court's rule in *Bell* will have the "particularly pernicious" effect of stripping black defendants of their rights under *Batson* merely because of "the statistical likelihood that their jury venires will be overwhelmingly non-black." (*United States v. Clemons*, *supra*, 843 F.2d at p. 748.)

In any event, in contrast to many cases in which a claim of a prima facie case was rejected by this Court where few strikes were at issue, in this case the statistical evidence of strikes against the identified group was not the only evidence suggesting the possibility of discrimination. (Cf. *People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 79-80 [no prima facie showing

where the defendant's motion was based *solely* on the assertion that the prosecutor used 3 of 11 peremptories to excuse African-American prospective jurors]; *People v. Bell, supra*, 40 Cal.4th at p. 597 [small number of strikes against African-American women insufficient to state prima facie case where the victim, not the defendant, was a member of the excluded group and three African-American men served on the jury]; *People v. Bonilla, supra*, 41 Cal.4th at p. 343 [2 of 30 strikes used to eliminate only 2 black jurors in the 78-person pool did not establish prima facie case where defendant "d[id] not contend the prosecution's questioning . . . was . . . materially different from the questioning of non-African-American jurors. Nor is [defendant] African-American"].)

Here, beyond the racial divide between the defendant and the victims, there was not only a statistical pattern of the prosecution strikes against African-Americans, but also other non-white jury members. At the time of the motion, the prosecutor also had stricken three Hispanic jurors. (See 5 RT 1003 [excusal of Hispanic woman M.T.]; 5 RT 1020 [excusal of Hispanic man D.P.]; 5 RT 1026 [excusal of Hispanic woman E.M].)[33] In

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[33] Appellant relies only upon Hispanic self-identification, i.e. as Latino, Hispanic or, as with E.M., Spanish American. (See *People v. Bonilla, supra*, 41 Cal.4th at p. 344 & fn. 11 [explaining that "Bonilla of course is a Hispanic male" for purposes of *Batson* analysis while noting that "Bonilla is a Spanish-American male"].) This Court has also sanctioned the use of Hispanic surname as a proxy for a protected ethnic origin, even when "no one knows at the time of challenge whether a particular individual who has a Spanish surname is Hispanic." (*People v. Trevino* (1985) 39 Cal.3d 667, 686.) In this case, some jurors had what appear to be surnames of Hispanic origin, but did not self-identify as Hispanic. Because these jurors were explicitly asked their race or ethnic origin as part of the questionnaire, appellant does not rely upon these Hispanic surnames, in the absence of (continued...)

other words, at the critical period during which the motion was made, the prosecution had used almost fifty percent of its peremptory challenges to excuse non-white jurors (5 out of 11.)[34] After this point, because the trial court had found a "close case," the prosecutor was "in effect warned" that the trial court might soon find a prima facie case. (See *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1078 [focusing on statistics from the time period "of the first *Wheeler* motion, after which the judge in effect warned the prosecutor not to strike any more Hispanics" or else he would find prima facie case].) The numbers thereafter improved. Nonetheless, the prosecution still had disproportionately exercised 5 out of 17 peremptory challenges against black or Hispanic jurors by the conclusion of the selection of the 12-member jury, despite the fact that there were ultimately only 12 eligible black or Hispanic jurors in the entire pool.

Other courts have not hesitated to find a prima facie case where the prosecution disproportionally struck other non-white jurors, in addition to members of the identified group, even when the total number of stricken jurors of the identified group was low. For example, in *United States v. Stephens*, *supra*, 421 F.3d 503, the prosecutor exercised six challenges to eliminate two African-Americans, three Hispanic-Americans, and the sole Asian-American, while the defense excluded another African-American, leaving a jury comprised of eleven whites and one Hispanic-American, with

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[33] (...continued)
Hispanic self-identification, in his statistical analysis.

[34] The strike rate of Hispanic jurors by the prosecution (3 of 11 or 27.3 percent at the time of the hearing, and 3 out of 17, or 17.6 percent after the selection of the twelve-member jury) was similarly disproportionate to the number of self-identified Hispanic prospective jurors present at the commencement of voir dire, 8 out of 88 (roughly 9 percent).

two white alternate jurors. (*Id.* at p. 513.) Although, with only two African-Americans challenged, the court was "cognizant that with the small numbers involved, a pattern is difficult to detect," it nonetheless found a prima facie case base upon the disproportionate use of strikes made against non-white jurors, leaving a virtually all-white jury. (See *id.* at pp. 513-514.)

Similarly, in *Fernandez v. Roe*, *supra*, 286 F.3d 1073, the Ninth Circuit acknowledged that a challenge of two out of two prospective African-American jurors, standing alone, was a "potentially unreliable" statistical sample, but nonetheless found a prima facie case based upon the prosecution's separate, disproportionate use of strikes against Hispanic jurors (4 out of 14, compared to their 12 percent composition in the panel). (*Id.* at pp. 1078-1079.)

Thus, although in this case appellant did not object to the excusal of any Hispanic jurors, the prosecution's disproportionate use of strikes against non-white jurors is nonetheless relevant under the "all relevant circumstances" standard utilized in determining whether an inference of discrimination is established. (*United States v. Stephens*, *supra*, 421 F.3d at p. 513.) Given the prosecution's disproportionate use of peremptory challenges against African-Americans and Hispanics, appellant's showing is sufficient to satisfy the "minimal burden" necessary to establish a prima facie case, even without resort to the non-statistical evidence. (*Overton v. Newton*, *supra*, 295 F.3d at p. 279, fn. 10.) But, as shown below, there was additional evidence before the trial court raising an inference that the prosecution discriminated on the basis of race in using its peremptory challenges, some of which the court improperly declined to consider.

3. The Prosecutor's Disparate Questioning of African-American Prospective Jurors Supports Appellant's Prima Facie Case

One of the factors listed under *Wheeler* is whether the prosecution engaged in "desultory" questioning of jurors of a particular group. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) However, not only perfunctory questioning of minority jurors, but also disparate questioning aimed at the possibility of bolstering later challenges, supports a prima facie case of discrimination. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 344 [script concerning ability to impose a death sentence disparately employed against minority jurors during prosecutors questioning supported finding of intentional discrimination]; cf. *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343 [noting the absence of any allegation that questioning of non-minority jurors was "materially different from the questioning of non-African-American jurors" in denying existence of prima facie case].) Such disparate questioning is particularly relevant here, where the prosecutor disproportionately challenged African-American prospective jurors (three of the eight who were called into the box) for cause. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 344 [even apparently legitimate strikes based on jurors' views can be evidence of discrimination if there is disparate questioning which leads to seemingly divergent views].)

Defense counsel specifically pointed to disparate questioning during his *Batson/Wheeler* challenge, stating that the prosecutor "questioned [prospective juror J.B.] more than he did other jurors. Even after she said that she could be fair and that she would be able to impose the death penalty, he went further in an attempt to get her to admit bias." (5 RT 1126.) Defense counsel's complaint regarding disparate questioning of J.B. naturally encompasses a number of different factors, some of which cannot

be assessed on a cold record, such as tenor and tone of the prosecutor as well as the juror. (See *ante* section C.2.b.) But one category of difference that is easily assessed by comparison with other jurors, and one that reflects an obvious disparity, is that of simple length of questioning.

To compare the length of questioning of J.B. with that of other jurors, it is important to note that the attorney-led voir dire was conducted in two relatively distinct phases, only the second of which permits meaningful comparison.[35] Looking at that second phase of questioning, the prosecutor's questioning of the white seated jurors was minimal. It occupied approximately one page (5 RT 1046 [Juror # 201]; 5 RT 1049-1050 [Juror # 241]; 5 RT 1137-1138 [Juror # 68]; 6 RT 1225-1226 [Juror # 351]; 6 RT 1228-1229 [Juror # 43]) or between one and two pages (5 RT 1089-1090 [Juror # 80]; 6 RT 1216-1217 [Juror # 224]; 5 RT 1097-1098 [Juror # 35]). Only twice did the questioning occupy over two pages. (5 RT 1005-1007 [Juror # 62]; 6 RT 1180-1182 [Juror # 296].)

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[35] The first phase was focused on the jurors initially called into the jury box and was witnessed by the entire panel. During this phase, the parties occasionally addressed all jurors in the box, and also interspersed group questioning with specific questions directed randomly at individual jurors. (See 4 RT 894-931 [questioning by defense counsel]; 4 RT 942-972 [questioning by prosecutor].) A second phase arose after challenges for cause of the first 12 jurors were settled. (See 5 RT 981 [beginning of questioning of new jurors]; 6 RT 1231 [acceptance of empaneled jurors].) During this second phase, new jurors were called into the box, and each was asked a set of questions by both parties, after which counsel would raise a challenge for cause or pass on such a challenge. It is impossible to compare the length of questioning of prospective jurors questioned during the first phase with that of second phase jurors or even that of other first phase jurors because of the absence of sequential questioning, group questioning, and requests for volunteers for questioning. (4 RT 942; see generally 4 RT 942-972.)

A similar analysis can be conducted with respect to the non-black jurors the prosecutor chose to strike peremptorily. For non-black prospective jurors stricken by the prosecutor during the second phase of questioning, his questioning also was almost always relatively brief. This questioning occupied approximately one page (5 RT 999-1000 [M.T.]), two and a half pages (5 RT 1018-1020 [D.P.]), one half a page (5 RT 1028 [T.M.]), one and a half pages (5 RT 1025 [G.J.]), one page (5 RT 1034-1035 [D.B.]), one and a half pages (5 RT 1105-1107 [L.R.-U.]), three pages (6 RT 1143-1145 [P.S.]), six pages (6 RT 1155-1161 [J.A.]), just over two pages (6 RT 1169-1172 [E.R.]), just over three pages [6 RT 1174-1177 [T.L.]), two and a half pages (6 RT 1206-1208 [G.L.]), and just over one page (6 RT 1213-1214 [R.O.]).[36]

In contrast, the prosecutor's questioning of prospective juror J.B. occupied over five pages of reporter's transcript. (See 5 RT 1038-1043.) Notably, the only juror whose questioning approximated the length of J.B.'s was J.A., who unlike J.B. had indicated both during his questioning and on his questionnaire that he had serious moral reservations about the death penalty, but nonetheless did not provide unequivocally disqualifying responses. (See 6 RT 1155; 23 CT 6606-6607.) Similarly, of the two prospective jurors who were questioned for over three pages, one also voiced serious reservations about the death penalty during questioning and in his questionnaire. (6 RT 1143 [voir dire of P.S.]; 17 CT 4674-4675 [P.S. questionnaire].) Thus, while there are obvious reasons for the prosecutor's lengthy questioning of both P.S. an J.A. – a need to assure himself that they

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[36] The questioning by the prosecutor of the one white alternate he chose to strike also occupied approximately one page. (See 6 RT 1268-1269 [A.S.].)

were willing to impose death or perhaps a desire to find anything disqualifying in their responses – no such explanation serves to justify the lengthy questioning of J.B.

Also notable, the prosecutor's questioning of two of the other African-American jurors called during the second phase of attorney-led voir dire was more than twice as long as his questioning of the seated jurors and longer than that of virtually all of the non-black jurors he struck – approximately three pages for J.K. (5 RT 1055-1058)[37] and approximately three and a half pages for A.H. (6 RT 1241-1244).

Defense counsel's assertion that in voir dire the prosecutor "went further in an attempt to get [J.B.] to admit bias" (5 RT 1126) is not limited to the strict number of pages of questioning. It also implicates the form of the questions themselves. Analysis of the prosecutor's questioning of J.B. and other African-American jurors therefore requires an analysis of the substantive examination during voir dire. Such analysis requires an examination of the pattern of the questions employed by the prosecutor on the issue of prospective jurors' death qualification and his application of these pattern questions to individual prospective jurors.

In addressing death qualification, the prosecutor overwhelmingly used variations on a single pattern of questions, which he posed using slightly different phrasing to almost every prospective juror. The most commonly employed forms asked if the juror was someone who (1) could state that the defendant "deserved to die" (see, e.g., 5 RT 944, 948, 950, 983, 1000, 1007, 1089, 1138) or "deserves the death penalty," "deserved it

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[37] This figure excludes all questioning by the prosecutor regarding J.K.'s hardship.

[the death penalty]" or "deserved death" (5 RT 1040, 1056, 1095; 6 RT 1177, 1181, 1201), (2) could find that death is the "appropriate punishment" or "appropriate penalty" or simply "appropriate" or "warranted" (5 RT 1030, 1106-1107, 1110; 6 RT 1157, 1192, 1208, 1214, 1217, 1225), or (3) could "vote for death" or "vote for the death penalty" or have no problem "voting for the death penalty" (5 RT 944, 999, 1046, 1057, 1088, 1117; 6 RT 1166, 1171).

Occasionally, the prosecutor would add a rhetorical flourish to the above pattern questions. The most common method was to inform prospective jurors that they would not only have to reach a death verdict, but also would have to "say to the defendant" or "tell the defendant" or "tell[] him" of their death judgment. (5 RT 1019, 1026, 1028, 1035, 1056, 1138, 1157; 6 RT 1177, 1181, 1214, 1225). Slightly less common was to inform prospective jurors that sometimes, in addition to telling the defendant, they would "look at" or be "looking at" the defendant prior to making a death judgment. (5 RT 950, 983 1000, 1006-1007, 1041, 1089, 1138.) Somewhat more dramatically and less frequently, the prosecutor would add that, prior to rendering a death verdict, the juror might have to see not only the defendant, but also the defendant's family and/or friends. (4 RT 949, 1007, 1117, 1208, 1242.) Additionally, the prosecutor occasionally would inquire if the juror could be the jury foreperson and actually sign his or her name on the verdict. (5 RT 944, 984, 1007, 6 RT 1181; see also 6 RT 1266 [asking simply "You think you could actually be the person that signed the verdict?"].) With the "vote for death" formulation of the standard question, the prosecutor once added the colorful phrase "with your heart and your mind and every bit of you." (5 RT 1057.)

These emphases, seemingly targeted to press jurors who the prosecutor thought might have some qualms about imposing a death sentence, were disproportionately directed at African-American jurors. Virtually every African-American juror subject to bias questioning by the prosecutor during the selection of the jury was provided some form of more intense inquiry, beyond the standard formulations. (5 RT 949 [prosecutor told E.F. that "you're going to see the defendant every day, and from time to time you may see the defendant's – some friends or some family" before asking whether under "those set of circumstances" could he render a death verdict]; 9 RT 1041 [prosecutor asked J.B. if she would have a problem saying "death is the appropriate sentence and coming back out here looking at the defendant and telling him so?"]; 9 RT 944 [prosecutor asked S.W. if she could be the "foreperson" on the jury and "sign your name" on a death verdict]; 9 RT 1056-1057 [asking J.K. if she could "say to the defendant, yeah, what you did and weighing all the circumstances that I'm supposed to weigh, I come out in favor of the death penalty and you deserve it?" then informing her it "will be a very heart-wrenching and emotional process" then asking "would your heart feel the same way" as her mind about a death conclusion, then asking "could you see yourself with your heart and your mind and every bit of you saying, I vote for death?"]; 6 RT 1242-1243 [asking A.H. "can you come back out, look at the defendant and maybe friends and family of his and say, you deserve the death penalty?" then "you don't have any qualms . . .[or] personal problems or beliefs" then asking if she "could come back out and tell the defendant death is appropriate" then asking again while noting she would be coming "back out here looking at the defendant and saying, you deserve to die?"]; 6 RT 1265-1266 [asking alternate Juror 360 first whether he could "could come back and vote for

death?" then "Any hesitation in your mind?" then "You think you could actually be the person that signed the verdict?"].)

That six of seven African-American jurors questioned by the prosecutor received some form of added emphasis is, at the very least, suspicious. The disproportionate use of such differentially "graphic" scripts against African-American jurors is strong evidence of discriminatory intent. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 364-370; *Miller-El v. Dretke* (2004) 545 U.S. 231, 265-266.) The lopsided questioning is all the more suspicious where the voir dire of the African-American jurors often involved repeated formulations of the same question in the face of initial affirmations that the jurors could impose death. (See 1040-1041 [J.B.]; 9 RT 1056-1057 [J.K.]; 6 RT 1242-1243 [A.H.]; 6 RT 1265-1266 [alternate Juror 360].) Indeed, it is possible that the prosecutor's persistent, disparate questioning of African-American jurors may have resulted in a cause-based excusal where none would otherwise have occurred. (Cf. *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 344 [even apparently legitimate strikes based on jurors views can be evidence of discrimination if there is disparate questioning which leads to seemingly divergent views].)

In sum, both the disparate length and form of the prosecutor's questioning of African-American jurors supports the inference that discrimination may have played a role in jury selection. Because such disparate questioning is itself a strong indicia of racial bias (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 260-261), it is powerful proof in meeting the minimal burden of establishing a prima facie case.

4. The Prosecutor's Apparent Eagerness to Excuse J.K. for Hardship Supports Appellant's Prima Facie Case

Like disparate questioning of jurors, selective solicitude for minority

jurors' hardship concerns is evidence that supports the inference of discrimination. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 484 [prosecutor's concern that black student's obligations would hinder his ability to participate as a fairminded juror was evidence of pretextual discrimination, especially where prosecutor did not voice similar concern for white jurors]; *United States v. Taylor* (2nd Cir. 1996) 92 F.3d 1313, 1329 [in reverse *Batson* case, magistrate properly considered racially disparate treatment of requests for hardship excuses].)

Moreover, even if prospective African-American jurors are ultimately not eligible to sit on the jury due to cause or hardship, a prosecutor's level of interest in seating or not seating such jurors also is relevant to determining whether he harbors discriminatory stereotypes about such minority jurors. (*People v. Jones* (2011) 51 Cal.4th 346, 362 [fact that prosecutor "would have liked to have had on the jury the two African-American jurors who were excused for hardship, as well as [a third] who was excused for cause due to her views on the death penalty" helped to dispel appearance of bias arising from the fact that prosecution challenged three of the five of the African-Americans from the jury box].) In this case, the prosecutor expressed an immediate willingness to stipulate to juror J.K.'s excusal, even prior to any verification that jury service, in fact, would pose a hardship for her. Although not conclusive evidence of discriminatory intent, this factor also supports appellant's prima facie case.

J.K. was a full-time registered nurse who was seeking a masters degree in nursing. (5 RT 1051.) She repeatedly indicated that she could vote for death. (5 RT 1056-1058.) When called into the box, J.K. renewed her concerns, voiced previously, that jury service would interfere with her work and school schedules, in particular workplace meetings she needed to

attend for a project relating to her masters program. (See 2 RT 79-81; 4 RT 844-847 [initial concerns]; 5 RT 1051-1053 [renewed concern].)

After the voir dire by both parties, when the trial court suggested that J.K. was a strong candidate for possible hardship excusal, the prosecutor stated, "I'm willing to stipulate to excuse her, and I was willing to stipulate to excusing her the other day." (5 RT 1058.) Defense counsel indicated that it was unclear from her answers that J.K. was unable to rearrange her work schedule to incorporate the required meetings on a day when the jury did not convene. Therefore, defense counsel requested that J.K. be told to contact her employer about this possibility prior to his stipulating to a hardship excusal. (5 RT 1059.)

At this point, the prosecutor interjected that he was willing to excuse J.K. (5 RT 1059.) When the trial court inquired whether the prosecutor would be willing to exercise a peremptory challenge to allow J.K. to leave the jury pool, the prosecutor stated, "I would rather not use a preempt, but I think it's very unfair to her." (5 RT 1059.)

Although the trial court had previously agreed that J.K.'s hardship seemed sufficient (5 CT 1058), further questioning by the trial court confirmed defense counsel's belief that the juror had not yet attempted to work out the scheduling problem with her employer, and the court requested that she attempt to do so. (5 RT 1060.)

Ultimately, J.K. spoke with her supervisor about the day-time meetings necessary for her class project, which could not be rearranged (5 RT 1073-1076), and the court excused her on hardship grounds (5 RT 1076-1077).

The record shows that the prosecutor advocated for J.K.'s excusal for hardship and resisted defense counsel's reasonable request that J.K. see

whether her master's program could accommodate the jury service schedule. Not only did the prosecutor agree to stipulate to J.K.'s excusal after all of the facts were presented, but he was willing to stipulate to her excusal from the moment she voiced a concern about a potential scheduling conflict. (5 RT 1058-1059.) This is particularly notable where the more evenhanded questioning by the trial court in the middle of the process revealed that the existence of an irreconcilable conflict had not been established. (See 5 RT 1060.) While the trial court ultimately made a reasoned decision after careful consideration of all the circumstances, the prosecutor's willingness to short-circuit the inquiry and excuse J.K. immediately is suggestive of potential discrimination.

5. The Prosecutor's High Number of Offers to Stipulate to African-American Jurors Supports Appellant's Prima Facie Case

Among the troubling non-statistical evidence presented by appellant in support of his *Batson/Wheeler* claim was his allegation that the prosecutor was strategically attempting to stipulate to African-American jurors, when an examination of their questionnaires suggested that there was "no reason to do that other than racial bias." (5 RT 1127.)

The record does not contain the proposed list of jurors for which the prosecutor requested stipulation on the basis of cause, referred to by defense counsel during the *Batons/Wheeler* hearing. However, the record does contain the list of the jurors ultimately stipulated to for cause prior to voir dire. (2 CT 415; 4 RT 731-737.) Moreover, defense counsel indicated on the record that the prosecutor requested to stipulate to African-American

prospective jurors J.B. and A.H. (5 RT 1127),[38] while the prosecutor later indicated that it had proposed to stipulate to African-American prospective jurors M.N. (5 RT 1130) and B.A. (6 RT 1246-1247.) Thus, the record demonstrates that the prosecutor attempted to stipulate to – at a minimum – 50 percent of the African-American jurors (four of the eight) who were questioned during voir dire.

More comprehensively, the jurors stipulated to for cause were disproportionately minority jurors. There were 71 jurors excused for cause prior to voir dire on potential bias (see 4 RT 731-737 [listing juror names]), leaving 116 prospective jurors (4 RT 737). Of this pool of 187 jurors, 21 (roughly 11 percent) were black, and 29 (roughly 15 percent) were Hispanic. Almost 43 percent of the African-American prospective jurors (9) were removed by stipulation prior to questioning on potential bias, while 55 percent of the Hispanic prospective jurors (16) were similarly removed by stipulation.[39] Incorporating into this calculation the black jurors to

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[38] With regard to J.B., defense counsel indicated that it was his belief J.B. was on the prosecutor's list of for cause stipulations but "if she isn't, . . . I would ask to be corrected by [the prosecutor] on that. But I believe that he requested me to stipulate to [J.B.]" (5 RT 1127.) The prosecutor made no correction.

[39] The following nine black prospective jurors, with questionnaire pages in parentheses, were excused for cause by stipulation (4 RT 731-737 [list of stipulated jurors]) prior to voir dire on potential bias: R.B. (8 CT 2194-2221), L.F. (9 CT 2306-2333), I.H. (9 CT 2390-2417), T.W. (12 CT 3287-3314), M.J. (13 CT 3707-3734), M.W.-P. (14 CT 3987-4014), L.M.-H. (16 CT 4379-4406), R.H. (16 CT 4407-4434), and C.S. (25 CT 7011-7031). The following 16 Hispanic prospective jurors, with questionnaire pages in parentheses, were excused for cause by stipulation prior to voir dire on prospective bias: C.H. (9 CT 2418-2445), D.M. (10 CT 2727-2754), D.V.H. (12 CT 3259-3286), M.G. (13 CT 3539-3566), T.D.

(continued...)

whom the prosecutor attempted to stipulate (B.A., M.N., J.B., and A.H.), fully 61 percent of the African-American jurors were either stipulated to or subject to the prosecutor's attempted stipulation. In comparison, only 33 percent (43 of 129) of the white jurors were excused by stipulation for cause.[40]

More tellingly, this disparity does *not* result from minority jurors disproportionately providing the most obvious disqualifying answers – an intention automatically to impose death or life sentences in every case – to the very questions upon which the parties indicated the stipulations were

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[39] (...continued)
(15 CT 4155-4182), S.G. (15 CT 4267-4294) C.M. (16 CT 4519-4547), M.M. (16 CT 4575-4602), R.E. (18 CT 4995-5015), G.P. (18 CT 5191-5211), K.R. (19 CT 5247-5274), G.P. (20 CT 5751-5771), H.V. (21 CT 5863-5883), M.D.D. (22 CT 6115-6135), R.S. (23 CT 6367-6387), C.M. (24 CT 6927-6947).

[40] The following 43 white prospective jurors, with questionnaire pages in parentheses, were excused for cause by stipulation prior to voir dire on potential bias: R.B. (8 CT 2139-2165), C.H. (9 CT 2446-2473), S.J. (9 CT 2502-2530), G.L. (9 CT 2559-2586), P.L. (9 CT 2587-2614), P.M. (10 CT 2643-2670), R.P. (10 CT 2783-2810), H.W. (10 CT 2839-2866), M.B. (11 CT 2895-2922), J.D. (11 CT 2951-2978), R.H. (11 CT 2979-3006), R.M. (11 CT 3063-3090), M.N. (11 CT 3091-3118), E.T. (12 CT 3231-3258), K.A. (12 CT 3343-3370), D.A. (12 CT 3371-3398), B.B. (12 CT 3455-3482), P.H. (12 CT 3595-3622), B.T. (14 CT 3903-3930), A.T. (14 CT 3931-3958), A.B. (15 CT 4099-4126), D.L. (16 CT 4491-4518), M.S. (17 CT 4687-4707), R.S. (17 CT 4771-4791), B.C. (17 CT 4939-4959), B.F. (18 CT 5023-5043), H.H. (18 CT 5079-5099), J.G. (19 CT 5499-5526), D.S. (20 CT 5779-5799), D.T. (21 CT 5835-5855), S.A. (21 CT 5947-4967), D.B. (21 CT 5975-5995), K.B. (21 CT 6003-6023), T.G. (22 CT 6171-6191), P.K. (22 CT 6199-6220), L.W. (23 CT 6507-6527), M.B. (23 CT 6619-6639), P.C. (23 CT 6647-6667), M.C. (24 CT 6703-6723), H.I. (24 CT 6787-6807), G.J. (24 CT 6815-6835), D.P. (25 CT 6983-7003), F.T. (25 CT 7067-7087); see also 4 RT 731-737 (list of stipulations).

based: questions 2A, 6, and 7. (See 4 RT 788, 885 [discussing fact that disqualification stipulations were based on questions 2A, 6 & 7). In fact, quite the opposite was true: white jurors who were excused by stipulation for cause were *more* likely to indicate that they would automatically vote for life or death in every case.[41] In other words, not only were significantly higher percentages of minorities, and in particular African-Americans, targeted for stipulation, these groups were *less* likely than whites to provide answers indicating a desire to automatically impose life or death in every case, the stated basis of the stipulations. It is against this background that this Court must analyze claims that the prosecutor was strategically and

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[41] Of the 13 African-American jurors either stipulated to or subject to the prosecutor's attempted stipulation, only seven (53.8 percent) answered questions 2A, 6, or 7 in a manner indicative of automatic imposition of life or death sentences: I.H. (9 CT 2405-2406), R.H. (16 CT 4422-4423), B.A. (17 CT 4870-4871), L.F. (9 CT 2321-2322), T.W. (12 CT 3302-3303), M.J. (13 CT 3722-3723), and L.M-H. (16 CT 4394-4395). With regard to Hispanics, 9 of 16 (56.25 percent) provided at least one answer that they would automatically impose a life or death sentence in every case: C.H. (9 CT 2433-2434), D.M. (10 CT 2742-2743), D.V.-H. (12 CT 3274-3275), M.G. (13 CT 3554-3555), T.D. (15 CT 4170-4171), C.M. (16 CT 4534-4535), M.M. (16 CT 4590-4591), M.D. (22 CT 6130-6131), and C.M. (25 CT 6942-6943). In contrast, 27 of the 43 (62.8 percent) of the stipulated white jurors provided answers indicating that they would automatically impose life or death sentences: G.L. (9 CT 2574-2575), P.L. (9 CT 2602-2603), P.M. (10 CT 2658-2659), R.P. (10 CT 2798-2799), H.W. (10 CT 2854-2855), R.H. (11 CT 2994-2995), M.N. (11 CT 3106-3107), E.T. (12 CT 3246-3247), K.A. (12 CT 3358-3359), D.A. (12 CT 3386-3387), B.B. (12 CT 3470-3471), P.H. (13 CT 3610-3611), B.T. (14 CT 3918-3919), D.L. (16 CT 4506- 4507), M.S. (17 CT 4702-4703), B.F. (18 CT 5038-5039), J.G. (19 CT 5514-5515), D.S. (20 CT 5794-5795), S.A. (21 CT 5962-5963), D.B. (21 CT 5990-5991), K.B. (21 CT 6018-6019), T.G. (22 CT 6186-6187), P.K. (22 CT 6214-6215), P.C. (24 CT 6662-6663), M.C. (24 CT 6718-6719), H.I. (24 CT 6802-6804), and D.P. (25 CT 6998-6999).

selectively offering to stipulate to the excusal of African-American jurors for cause.

Obviously, as with the exercise of a peremptory challenge, discriminatory motivation is not the *only* reason that might explain a prosecutor's decision to offer to stipulate to an African-American juror. However, by analogy to peremptory challenges, an inexplicable statistical disparity in the rate at which African-Americans were selected by the prosecutor for proposed stipulation allows for an inference that discrimination may have played a role. That the prosecutor targeted African-American jurors for stipulation at a high rate is therefore significant to the claim that discrimination also infected the exercise of peremptory challenges.

Admittedly, if there existed an irrefutable basis for each of the prosecutor's proposed stipulations, these might provide an obvious non-discriminatory explanation, rendering any inference from a statistical disparity less relevant. Conversely, the lack of a strong basis for a given proposed stipulation, or more importantly a suggestion that the reasons the prosecutor provided were pretextual, would support an inference of discriminatory intent. As a whole, a suspicious pattern of targeting African-Americans for stipulation would strongly support appellant's prima facie claim in the use of the peremptories at issue. (Cf. *Fernandez v. Roe*, *supra*, 286 F.3d at pp. 1078-1079 [prima facie finding with regard to one racial group supported prima facie finding against another, despite small sample size].)

Review of the four African-American jurors to whom the prosecutor proposed a stipulated exclusion in the face of defense counsel's opposition demonstrates that none of them possessed an unequivocal bias against the

death penalty worthy of exclusion for cause, much less stipulation thereto.

a. J.B.

J.B. was the same juror who was the subject of the *Batson/Wheeler* motion, and her questionnaire and voir dire responses are discussed above. (See section A, *ante*, pages 55-56.) Suffice it to say that J.B.'s questionnaire responses were thoughtful, and she did not disclose any disqualifying bias. (5 RT 1036-1043.) Nonetheless, according to defense counsel, the prosecutor offered to stipulate to excuse J.B. – a fact the prosecutor did not dispute when given the opportunity. (5 RT 1127.) Moreover, despite the fact that J.B. was one of only two African-American jurors to whom defense counsel specifically pointed as questionable subjects for stipulation, the prosecutor offered no basis for his alleged discriminatory attempt to stipulate to J.B.'s excusal. Instead, the prosecutor attempted *only* to explain his offer to stipulate to prospective juror M.N., an individual whom defense counsel had not even mentioned. (Cf. *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 [finding relevant that when defense counsel "called" prosecutor on misstatement about strike, prosecutor did not defend it, but "suddenly came up with" another ground for the strike].) As shown below, the prosecutor's alleged grounds for stipulating to M.N. were not solidly grounded in her questionnaire and were suggestive of pretext.

b. M.N.

M.N. was a 64-year-old African-American woman. (6 CT 5640.) In the portion of the questionnaire testing death qualification, M.N. gave several responses suggesting she would fairly consider both possible punishments: she neither favored nor opposed the death penalty and would consider both possible penalties (26 CT 5654 [question 2A]) and would not automatically vote for or against death. (26 CT 5655 [questions 6 & 7].)

However, some answers suggested M.N. was at least uncomfortable with the death penalty, sitting in judgment, and respecting a defendant's right to refuse to testify.[42]

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[42] M.N. answered "yes" to the question "[d]o you have any moral, philosophical, or religious objection to the death penalty," explaining "The Lord God said I give life and I only I take life." (26 CT 5655 [question 8].) She answered that she was "not at all comfortable" in considering a defendant's background and prior incidents of violence in determining whether to return a death or LWOP verdict. (26 CT 5655 [question 11].) She was willing to weigh and consider all the aggravating and mitigating factors that would be presented before deciding the penalty in the case. (26 CT 5655 [question 12].) When asked about her attitude toward consideration of prior incidents of violence and childhood experiences, M.N. answered "I don't think he should be put to death because of prior incidents of violence" and "childhood experiences should never be consider[ed] in a case." (26 CT 5656 [question 14 a & b].) Later, she responded that the death penalty was used neither too often nor too seldom, but "about right," explaining "all crime and murder should be put to death." (26 CT 5656 [question 16].) When asked about her "attitude and feelings/thoughts about the consideration of MERCY in a case such as this" M.N. responded, "I would have mercy and give him life in prison without possibility of parole." (26 CT 5657.) In response to the question asking if she had a "religious, moral or philosophical feeling that would make it difficult or impossible for you to sit in judgment of another person," she answered "yes" and explained "I feel I am not qualified to judge anyone" and later explained "I have a sad feeling to have to judge someone." (26 CT 5642, 5644 [questions 9b and 17].) M.N. answered affirmatively to the question "regardless of what the law says, a person on trial should be required to testify." (26 CT 5650.) When asked why a person charged with a serious crime might not testify, she answered "maybe give some wron[g] information not understanding the question." (26 CT 5650.) She answered "No" to the question "[a]re you able to presume this defendant innocent unless proven guilty beyond a reasonable doubt, whether or not he testifies?" (25 CT 5650.) M.N. responded "probably" to the question "[i]f this defendant does not testify, would you hold that against him, even though the law states you must not do so?" (26 CT 5650.) She explained

(continued...)

The proposed stipulation of M.N. was the only one the prosecutor directly attempted to explain. When asked to place anything on the record regarding the *Batson/Wheeler* motion, the prosecutor declined to explain his peremptories but "in talking about people that were proposed to be stipulated to, for example, one of the people was Miss [M.N.], who explained a clear, as she did in the jury box, a clear reservation about even being able to impose the death penalty. So as far as that goes –." (5 RT 1130.) The trial court then interrupted to point out that M.N. had a son who was murdered, and it was surprised she had not already been stipulated to prior to voir dire. (*Ibid.*) The prosecutor continued: "Yeah. . . . And that's one of the people I proposed to stipulate to. And that goes far beyond racial reasons." (5 RT 1130-1131.) Both of these reasons were simply not grounded in M.N.'s questionnaire responses and thus are suggestive of pretext.

With regard to M.N.'s murdered son, this fact was revealed only during voir dire and was omitted from her questionnaire. (Compare 5 RT 1081 [voir dire] with 26 CT 5639-5659 [questionnaire].) Therefore, although potentially a basis for a proposed stipulation,[43] M.N.'s tragedy was unknown to the prosecutor at the time he agreed to the final list of stipulations (2 CT 415; 4 RT 731-737), much less at the time he offered its proposed stipulation. Thus, the prosecutor's attempt to use this impossible explanation as a justification for its stipulation suggests pretext.

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[42] (...continued)
by stating "[b]ecause he did not try to defend himself." (26 CT 5650.)

[43] Of course, it is the defense, not the prosecution, that would most obviously wish to stipulate to a juror whose son was murdered.

The prosecutor's other explanation, that M.N. had "explained a clear, as she did in the jury box, a clear reservation about even being able to impose the death penalty" is likewise inaccurate. M.N. gave open-minded responses to both questions 6 & 7 and question 2A (26 CT 5654-5655), the very questions which the prosecutor explained were used to cull through the prospective jurors for stipulations (4 RT 885).

It is true that M.N. ultimately was found unqualified based upon her answers during voir dire. (5 RT 1081.) But the conclusion that her "clear reservations about even being able to impose the death penalty" rendered her unqualified (5 RT 1130-31), is difficult to square with her questionnaire responses alone. Although M.N. gave a few responses suggesting some level of discomfort with the death penalty, she repeatedly stated she would not automatically impose one penalty or the other and stated she was willing to weigh all aggravating and mitigating circumstances. (See 26 CT 5654-5655 [questions [2A, 6, 7, & 12]; *see Miller-El v. Dretke*, *supra*, 545 U.S. at p. 244 [fact that prosecutor "mischaracterized" juror's testimony as suggesting he "would not vote for death if rehabilitation was possible, whereas [the juror] unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation" suggestive of pretext].)

To the extent that some of her responses raised concerns, M.N. was precisely the type juror which the prosecutor expressly stated would require further voir dire "based upon some of the answers that were ambiguous." (4 RT 885; see *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 244 [prosecutor's mischaracterization particularly suspicious where he could "have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike"].) Thus, the prosecutor's claim that M.N. warranted

a stipulation prior to voir dire because her questionnaire revealed a "clear reservation about even being able to impose the death penalty" helps to raise the inference that discrimination was involved.

Finally, although M.N. also provided answers in the questionnaire revealing a potential inability to set aside the defendant's refusal to testify, the prosecutor never questioned her about these responses during voir dire. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 [evidence of pretext included fact that "prosecution asked nothing further about the influence [juror's] brother's history might have had on jurors, as it probably would have done if the family history had actually mattered"].)[44] More importantly, this was *not* the reason the prosecutor offered for his proposed stipulation, but instead he cited her alleged "clear reservations" about the death penalty and murder of her son. (5 RT 1130-1131.)

c. A.H.

A.H. was a 48-year-old African-American woman. (13 CT 3630.) A.H. had experienced violence firsthand: she was in the "line of fire" of a street shooting.[45] Her questionnaire indicated that she neither favored nor opposed the death penalty and would not automatically vote for either death or a life sentence. (13 CT 3638 [question 2A]); (13 CT 3639

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[44] Nor is such a failure surprising, as it would be appellant, not the prosecution, who would most naturally seek M.N.'s excusal out of concern that she might not respect his Fifth Amendment rights.

[45] A.H.'s questionnaire stated she was called as a witness in a criminal case because she "hear[d] a shooting on my [post-office] route." (13 CT 3630.) She described her role as "not a eyewitness, however I was on the street when the shooting started." (*Ibid.*) She also stated she was "in the line of fire while delivering my route." (*Ibid.*)

[questions 6 & 7]).[46] In tension with these evenhanded answers, A.H. checked "yes" when asked if she would always vote not guilty in order to avoid a penalty phase (13 CT 3638 [question 4]), a response which the prosecutor later suggested might have been an inadvertent mistake (6 RT 1241-1242). (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 244 [relying on prosecutor's failure to "clear[] up any misunderstanding by asking further questions" prior to excusing juror"].)[47]

It is true that A.H. ultimately was excused by stipulation in an apparent horse-trade with B.A. after on voir dire she expressed difficulty in rendering a death verdict. (See *post* section C.5.d.)[48] However, she was

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[46] A.H. also had no moral, philosophical or religious objection to the death penalty (13 CT 3639 [question 9]), was willing to weigh and consider all the aggravating and mitigating factors in deciding the penalty (13 CT 3639 [question 12]), and thought that the death penalty was used about the right amount. (13 CT 3640 [question 17].)

[47] A.H. was a typical example of jurors with conflicting or ambiguous answers, whom the prosecutor indicated might require further voir dire. (See 4 RT 885.) That A.H.'s answer to question 4 was likely an inadvertent error was apparent in the prosecutor's later questioning. (See 6 RT 1241-1242 ["Q. You marked on one of the questions – and a couple of people have – you know, when you check things, you may not have meant to check certain boxes or not. . . . Is [your answer to question 4] a fair statement or was that maybe just a box that you had checked? A. I really don't recall. I don't recall it."].)

[48] After being repeatedly pressed by the prosecutor on her ability to deliver a death verdict, A.H. answered first "I would have to do it according to the law and follow the law" and "No, I don't [have problems with death being appropriate under instructions]," then stated that she could not tell the defendant "he deserved death" (6 RT 1242), and then that she would "have to follow the instructions but personally, no" she could not vote for death. (6 RT 1243-1243.) The trial court then intervened and asked if she could (continued...)

targeted for stipulated excusal not based upon voir dire, but upon on her questionnaire. The questionnaire as a whole simply does not support the conclusion that she was unequivocally unqualified, let alone that her excusal should be stipulated. To premise a stipulation on a lone ambiguity, which the prosecutor himself indicated was a repeated occurrence among jurors (6 RT 1241), supports an inference that the prosecutor targeted A.H. for removal not based upon an errant answer, but instead upon her race.

d. B.A.

B.A. was a 53-year-old African-American man. (17 CT 4856.) He was a seemingly pro-prosecution juror who gave conflicting answers with regard to whether or not he would automatically vote for death.[49]

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[48] (...continued)
return a verdict of death if the aggravating evidence substantially outweighed the mitigating evidence, to which A.H. replied "no" and then "it's possible," but that the evidence would have to be "real substantial." (6 RT 1243-1244.) A.H. further stated that she would be unable to sign the verdict form as the jury foreperson. (6 RT 1244.) A.H. and B.A. were subsequently both dismissed by stipulation as discussed in more detail below. (6 RT 1246-1248.)

[49] B.A. was former police officer whose brother and son were also police officers. (17 CT 4857, 4859.) Another brother was shot during a robbery and later died from the wound. (17 CT 4861.) B.A. was working for the Department of Homeland Security as a Federal Enforcement Investigator. (17 CT 4859, 4861.) He stated that law enforcement testimony was more truthful and accurate than civilian testimony. (17 CT 4863.) B.A. indicated that (1) he strongly favored the death penalty, would always vote for death, and would not seriously weigh the aggravating and mitigating evidence in the case; (2) he held this position because "if the defendant is proven guilty of murder then a life for a life - beyond a reasonable doubt;" and (3) with regard to LWOP, "if there is a slite [sic] possibility of a doubt then life in prison." (17 CT 4870 [questions 2A, 2B, and 2C].) However, B.A. also stated that he would not automatically vote
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After defense counsel affirmed during voir dire that B.A. currently had federal peace officer status, the following exchange relating to A.H. and B.A. occurred:

> MR. KNISH [defense counsel]: I would move to excuse Mr. [B.A.] because he has peace officer status.
>
> THE COURT: Well, that's not an excusal. He's a federal peace officer; he's not an 832 [sic] police officer. He used to be, but he's not anymore. So that's not – I don't know how in looking at [B.A.] and now [A.H] –
>
> MR. MAZUREK [deputy district attorney]: I was willing to stipulate to Mr. [B.A.] but Mr. Knish wouldn't let me.
>
> MR. KNISH: No. That is false.
>
> MR. MAZUREK: That is true. That was the one that I pointed out to you that he was African/American, and then Mr. Knish then withdrew his stipulation to Mr. [B.A.].
>
> THE COURT: How did either one of them get through your stipulations?
>
> MR. MAZUREK: Because Mr. Knish, I offered to stipulate to an African/American, based solely on race they agreed not

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[49] (...continued)
for or against the death penalty. (17 CT 4871 [questions 6 & 7].) When asked whether he would feel comfortable giving weight to the defendant's background in assessing penalty, he checked "very much" and stated, "if for reason this affected him then it all should be taken into consideration." (17 CT 4871 [question 11].) He checked "yes" in response to the question was he "willing to weigh and consider all the aggravating and mitigating factors that will be presented to you before deciding the penalty in this case." (17 CT 4871 [question 12].) B.A. wrote that a defendant should "never" be sentenced to death absent consideration of background information" and the jury "must hear all the evidence." (17 CT 4872 [question 13B].) When asked to state his attitude toward the consideration of childhood experiences in determining the sentence, he stated, "I would take it into account before imposing the sentence." (17 CT 4872.)

to stipulate and that was why.

MR. KNISH: I recall that for this juror -- I can't deny or agree to that, but he did put A on his questionnaire. Was he on your list?

MR. MAZUREK: Um-hm. I agreed.

THE COURT: Okay.

MR. MAZUREK: I would like to excuse Ms. [A.H.] based upon her inability. When I asked her, she said she could not. When the Court inquired, she said, Well, it's possible. And in following up, she certainly indicated that if she were the foreman she in no way could put her name on the verdict of death. And I think based upon her answers and her tone and her body language and attitude it's pretty apparent that this lady could not vote for death.

THE COURT: I don't know. If you both stipulate and agree to both of them.

MR. KNISH: Yes, that's fine.

MR. MAZUREK: Sure. Sure.

THE COURT: Thank you.

(6 RT 1246-1247.)

As an initial matter, the prosecutor's claim that it was defense counsel who was race-conscious in his refusal to accept the prosecutor's offer to B.A.'s stipulation is both unconfirmed by defense counsel and irrelevant. (Cf. *People v. Reynoso*, *supra*, 31 Cal.4th at 927 ["the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges"].) More importantly, although the record does not substantiate the prosecutor's allegations about the defense, the prosecutor's own admission indicates that he was keeping track of the race of a juror for whom he was attempting to secure a stipulation. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 347 ["supposition

that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards"].)

Although it is not clear precisely why the prosecutor offered to stipulate to B.A. prior to voir dire, none of the reasons potentially suggested by B.A.'s questionnaire entirely dispels the possibility that the offer was not only conscious of, but was influenced by, race. The fact that B.A. was a retired police officer working for the federal government does not suggest that he should have been disqualified to serve as a juror. As the trial court noted, B.A. was not currently a California peace officer and was therefore not disqualified from serving on a jury. (See Code Civ. Proc., § 219, subd. (b)(2); Pen. Code, § 830.2.) Further, the prosecutor made no attempt to exclude B.A. due to his peace officer status at any point during voir dire.

Based upon the death-qualification portion of his questionnaire, B.A. did provide answers indicating bias, but also appeared to be among the individuals with ambiguous or conflicting answers that the prosecutor stated on the record were appropriate for voir dire. (4 RT 885.) It is true that B.A.'s connection with law enforcement, tendency to credit the testimony of law enforcement, and pro-death penalty views made him a seemingly favorable prosecution juror and may have been so strong as to disqualify him. Yet, this only highlights the suspiciousness of the fact that the prosecution offered to stipulate to his removal when such removal was not mandated by his questionnaire responses. (Cf. *People v. Allen* (1979) 23 Cal.3d 286, 291, fn.2 [prima facie case supported by fact that, among the excluded group were jurors who, except for their race, would have been considered desirable prosecution jurors because of their ties to law enforcement].)

Nor did the prosecutor's questioning of B.A. show that he was

troubled, in any way, by B.A.'s responses to the questionnaire regarding death qualification. In fact, during the prosecutor's brief examination of B.A. – and unlike his questioning of virtually every other juror in the panel – the prosecutor did not ask B.A. a single question about his death penalty views. (See 6 RT 1240-1241.) This lack of interest shows that, regardless of what can be gleaned from B.A.'s responses in the questionnaire or during voir dire, the prosecutor did not believe that he should be disqualified based upon his views.

Finally, although B.A., like A.H. and M.N., had a direct experience with violent crime – namely the killing of his brother during a robbery – the prosecutor similarly asked no questions whatsoever of B.A. on this point and never even mentioned the fact to the judge, suggesting he was quite willing to let the relative of a murder victim serve on the jury.

This is not to say that there are no conceivable explanations for the prosecutor's stipulation to B.A. But the proposed stipulation of B.A. was not an isolated act. B.A.'s stipulation must be considered alongside the fact that the prosecutor offered to stipulate to fully 50 percent of the African-American jurors present for voir dire, three of whom had ties to law enforcement or other arguably pro-prosecution characteristics. (See, e.g., 13 CT 3630 [A.H. had been present "in the line of fire" of street shooting]; 17 CT 4857, 4859, 4861 [B.A., his son and his brother had been police officers, and his brother was shot and killed]; 14 CT 4080 [J.B.'s sister was a retired police officer].) Plainly put, the prosecution disproportionately singled out arguably qualified African-American jurors for excusal by stipulation.

In sum, the prosecutor's proposal to stipulate to the exclusion of four African-American jurors before voir dire when their questionnaires did not

reveal bias or other disqualifying cause adds to the evidence showing a prima facie case of a discriminatory use of the peremptory challenge.

6. Remedy

When a prima facie case has been shown and there are no stated reasons for the juror's excusal, this Court has held that the proper remedy is to "at least attempt to have the trial court resolve the matter on remand." (*People v. Johnson*, *supra*, 38 Cal.4th at p. 1100.) Given the passage of time, this may or may not be feasible. (*Id.* at p.1103 ["it may turn out that the court cannot make a reliable determination"]; *id.* at p. 1105 (conc. opn. of Werdegar, J.) [underscoring that "the majority's holding that the trial court, on remand, retains the discretion to decide that an accurate reconstruction of the voir dire is impossible due to the passage of time"]; but see *Snyder v. Louisiana* (2008) 552 U.S. 472, 486 [refusing to remand more than 10 years after motion]; *People v. Carasi*, *supra*, 44 Cal.4th at p. 1333, fn. 8 (conc. opn. of Werdeger, J.) [noting the *Johnson II* remand rule was "called into question" by *Snyder*].) Therefore, assuming this Court finds a prima facie case has been established, the proper remedy is either to remand for further consideration of appellant's *Batson/Wheeler* challenge, including a feasibility determination, or to reverse the judgment.

E. Conclusion

As demonstrated above, appellant's showing was sufficient to establish an inference that discrimination was at play in the prosecutor's peremptory challenge of prospective juror J.B. In a case charging a young black defendant with the capital murder of an elderly white couple, the prosecutor peremptorily challenged two of the handful of black jurors using a disproportionate number of strikes against African-American and other minority prospective jurors, engaged in disparate questioning of African-

American prospective jurors, fought hard to ensure that another was excused based on hardship, and sought stipulated excusals of four African-Americans before the record showed a clear basis for doing so. All of this conduct was viewed firsthand by the trial court, along with the evidence of the demeanor of the prosecutor and the jurors. Synthesizing these record-based and non-record-based factors and applying the wrong legal standard, the trial court found the prima-facie-case determination to be a "close" one.

Purely as a matter of logic, an evidentiary showing that the trial court determined was "close" under an unduly stringent standard is sufficient to meet a threshold that is, in fact, significantly lower. This fact was recognized by the high court in *Johnson*, in which the trial court had likewise found a "close case" after only two black jurors were stricken from a pool with relatively few African-Americans. (*Johnson*, *supra*, 545 U.S. at p. 165.) After rejecting this Court's unnecessarily strict prima facie standard and speculative analysis, the high court in *Johnson* noted:

> in this case the inference of discrimination was sufficient to invoke a comment by the trial judge that 'we are very close,' and on review, the California Supreme Court acknowledged that 'it certainly looks suspicious that all three African-American prospective jurors were removed from the jury.' [Citation.] Those inferences that discrimination may have occurred *were sufficient to establish a prima facie* case under *Batson*.

(*Id.* at p. 173, italics added.) The same can be said about this case. For this reason, and the other reasons enumerated above, this Court should (1) remand to the trial court for a redetermination of whether appellant established a prima facie case of discrimination; (2) find that a prima facie case of discrimination has been established and remand to the trial court for further proceedings or (3) or reverse the judgment.

II.

APPELLANT'S INVOLUNTARY STATEMENTS TO SAN BERNARDINO COUNTY SHERIFF SPECIAL INVESTIGATOR ROBERT HEARD WERE UNCONSTITUTIONALLY AND PREJUDICIALLY ADMITTED AGAINST HIM AT TRIAL

Appellant was interrogated over the course of two days, November 26 and 27, 2000, by two teams of interviewers. (See Statement of Facts, *ante*, at pp. 15-26.) Detectives Michael Gilliam and Derek Pacifico conducted the November 26 interrogation and a preliminary interview and a final interview on November 27. In between their November 27 interviews, special investigator Robert Heard conducted an extensive pre-polygraph interview of appellant, administered a polygraph test, and followed up with a post-polygraph interview. There is an apparent logic to the interrogations. The November 26 interview, in which detectives Gilliam and Pacifico obtained appellant's initial admission that he participated in the burglary, robbery and kidnapping, but not the killing, of the Demkos, set the stage for investigator Heard's more aggressive work on November 27.

In the pre-polygraph interview, Heard repeatedly doubted appellant's statements and prodded him for further information about the crimes. Heard's tactics became coercive when, pushing appellant to say he knew the perpetrators' plan was to kill the Demkos, Heard offered appellant his help if appellant would tell him the plan and then misleadingly indicated to appellant that his knowing that the plan included killing the Demkos was not important. Heard's tactic induced the admission he sought. And from that point through the remainder of the continuous interviews on November 27, appellant incriminated himself further, ultimately admitting that he stabbed both Andrew and Shirley Demko and attempted to strangle Mr.

Demko. Because Heard's tactics overbore appellant's will, all his ensuing statements were involuntary, and their admission at trial violated his Fifth and Fourteenth Amendment due process rights as well as his due process rights under the state Constitution and prejudiced the jury's verdicts as to both the guilt phase and penalty phase verdicts.[50]

A. The Proceedings Below

On the first day of trial, the prosecution filed a motion to admit appellant's statements to law enforcement officers on the grounds that they were voluntary. (1 CT 273-287, 289.)[51] On February 24-27, 2003, the trial

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[50] Unredacted audiotapes were used for the in limine hearing and related motions, and a redacted version of the tapes and transcripts were used at trial. (See Statement of Facts, *ante*, at p. 15, fn. 6 [listing redacted exhibits].) In the redacted version, the references to a polygraph examination were deleted and the November 27 polygraph interview by Heard was presented as simply another interview. The unredacted tapes and transcripts are in the record as follows:

Exhibits 256a and 256b are the first and third tapes (3 RT 527-529, 534-535) and Exhibit 256c (3 CT 791-867) is the transcript of the November 26 interview by Gilliam and Pacifico.

Exhibit 257-A is the tape (3 RT 570, 575) and Exhibit 257b is the transcript (4 CT 941-954) of the November 27 pre-polygraph interview by Gilliam and Pacifico.

Exhibits 258a, 258b and 258c are the tapes (4 RT 598-605) and Exhibit 258d (4 CT 966-1081) is the transcript of the pre-polygraph interview, the polygraph examination, and the post-polygraph interview by Heard.

Exhibits 259a, 259b, and 259c are the tapes (4 RT 619-627) and Exhibit 259d is the transcript (4 CT 1165-5 CT 1315) of the post-polygraph interview by Gilliam and Pacifico.

[51] In its written motion, the prosecution argued that as a matter of law (1) exhorting the defendant to tell the truth did not make a statement involuntary, (2) telling a defendant he failed a polygraph was not coercive, and (3) lying by police to a defendant during an interrogation did not make (continued...)

court held an evidentiary hearing on the motion at which the San Bernardino County Sheriff's detectives who questioned appellant after his arrest – Michael Gilliam, Derek Pacifico, and Robert Heard – as well as appellant testified. (2 CT 408, 410-411, 414; 3 RT 519-568 and 4 RT 620-638 [Gilliam]; 3 RT 568-592 [Pacifico]; 3 RT 593 - 4 RT 619 [Heard]; 4 RT 540-708 [appellant].) The unredacted audiotapes of most of the custodial interviews of appellant were played. (*Ibid.*) The one exception was the unrecorded 90-minute portion of the interrogation on November 26 conducted by Detectives Gilliam and Pacifico in which appellant went from denying involvement in the crimes against the Demkos other than receiving property taken from their house to admitting he participated in the burglary. (3 CT 825.)[52]

After the hearing, appellant filed a response to the prosecution's motion and requested that his statements be excluded from trial because they were involuntary and their admission would violate the Fifth and Fourteenth Amendments to the United States Constitution as well as his

[51] (...continued)
statements obtained in response involuntary. (1 CT 284-287.) The prosecutor admitted "Gilliam lied to defendant by telling him he had identified one of his supposed accomplices [Angie/Left Eye] and that she was incarcerated at the time of the crimes." (1 CT 279.)

[52] At the in limine hearing, Gilliam and Pacifico explained that they used a dual-tape recording machine in which the tapes went automatically from the first tape to the second tape, but the third tape had to be inserted manually. (3 RT 538-539, 557-558, 583-584.) Gilliam did not realize the recording of the second tape malfunctioned until he went to make copies of the tapes. (3 RT 539.)

state constitutional rights. (2 CT 416-425; 4 RT 479.)[53]

The trial court heard argument on the parties' motions (2 CT 429; 4 RT 739-759) and ruled that, based on the totality of the circumstances, appellant's statements were voluntary and admissible (2 CT 429; 4 RT 768). Using the factors raised in appellant's written response as a template, the court found that (1) appellant was not exhausted, but was coherent and cogent during the interviews (4 RT 763-764); (2) there was no indication of "any type of impairment, whether mental or physical, to show that [appellant] had some type of inebriant in his system" (4 RT 764-765); (3) the detectives' statements highlighted by defense counsel were exhortations to tell the truth (4 RT 765); (4) there was no evidence of threats or promises (4 RT 765-766); (5) there was no mention of religious beliefs (4 RT 768); and (6) under controlling state law, there was nothing wrong with the officers' use of deception (*ibid.*). Based on the totality of the circumstances, the court found that appellant's statements to the detectives and the polygraph examiner were voluntary and did not violate his state or federal constitutional rights. (*Ibid.*) Just before the prosecution introduced

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[53] In its written response, the defense argued that appellant's statements were involuntary and thus inadmissible because (1) appellant was exhausted during all the interrogation sessions; (2) appellant had "consumed a fifth of ru[m], almost a fifth of tequila, and some beer in the 12 hours prior to the first interrogation;" (3) the detectives made "numerous coercive comments which inevitably led to Mr. Battle's belief that he would not get out of the interview room until he told the 'truth;'" (4) the officers used threats and promises to induce appellant to make admissions; (5) the detectives used manipulation, including religious beliefs; and (6) the detectives used deception, especially, as the prosecutor admitted, falsely telling appellant that Alicia Fisher (a/k/a "Left Eye") was in jail on November 12 and thus could not have been involved in the crime. (2 CT 419-424.)

appellant's interrogation statements, appellant renewed his objection to their admission on the grounds that they were coerced. (8 RT 1802.) The trial court overruled the objection and noted appellant's standing objection to the entire statement. (8 RT 1802-1803.)

Under state law, the trial court's factual findings as to the circumstances surrounding the confession are subject to review for substantial evidence, but its decision as to the ultimate issue of the admission of a confession is reviewed de novo. (*People v. Holloway* (2004) 33 Cal.4th 96, 114; *People v. Memro* (1995) 11 Cal.4th 786, 826.) The federal standard of review is similar. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 287 [reviewing court gives deference to the factual findings of the state trial court, but the issue of voluntariness is a legal question requiring independent determination].) The key findings of the trial court in this case – that there was no promise or improper deception on the part of the interrogators – were not supported by substantial evidence, and its conclusion that appellant's statements were voluntary was erroneous.

B. Appellant's Statements During The November 27 Interview That He Knew There Was A Plan To Kill The Demkos And Participated In Their Murders By Stabbing Them Were Coerced By Improper Interrogation Tactics And Therefore Were Unconstitutionally Admitted

The introduction of an involuntary confession at trial violates the due process clauses of the Fifth and Fourteenth Amendments. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *People v. Benson* (1990) 52 Cal.3d 754, 778.) A confession is involuntary if the suspect's will to resist the interrogation was overborne by coercion, either physical or psychological. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225; *People v. Hogan*

(1982) 31 Cal.3d 815, 841 [applying same test].)[54]

Coercive police conduct is "a necessary predicate" to a finding that a confession is involuntary (*Colorado v. Connelly* (1986) 479 U.S. 157, 167), so "the statement and the inducement must be causally linked" (*People v. Maury* (2003) 30 Cal.4th 342, 404). The voluntariness of a statement is determined by examining the totality of the circumstances surrounding the confession. (*Colorado v. Connelly, supra*, at p. 176; *People v. McWhorter* (2009) 47 Cal.4th 318, 347.) Finally, the prosecution must prove by a preponderance of evidence that the challenged statement was voluntary. (*Colorado v. Connelly, supra*, at pp. 168-169; *People v. Benson, supra*, 52 Cal.3d at p. 779.)

Interrogations vary. They can be scripted or free flowing, hard-driving or subtle. In this case, an initial, low-key interview was followed by a more focused, and ultimately coercive, one. The interview of appellant in the early morning hours of November 26, by detectives Gilliam and Pacifico, and their pre-polygraph interview of him on November 27 set the stage for detective Heard's interrogation-cum-polygraph-examination on November 27, in which his subtle psychological tactics overcame appellant's will to resist the questioning and induced appellant to incriminate himself in the crimes against the Demkos far beyond the admissions he already had made.

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[54] As both the high court and this Court have noted, their cases use the terms "coerced confession" and "involuntary confession" interchangeably. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 288; *People v. Cahill* (1993) 5 Cal.4th 478, 482.)

1. The November 26 interview of appellant by Gilliam and Pacifico laid the groundwork for the coercive polygraph interrogation by Heard on November 27

In the November 26 interview, after waiving his *Miranda* rights, appellant initially admitted only that he had borrowed the car, identified as belonging to the Demkos, from an acquaintance, Neal (3 CT 792-799, 803-805), used a Texaco credit card that he had found in the car to buy gas (3 CT 805-806), and stored a television and a VCR for a couple days for a friend (3 CT 806-809). (See Statement of Facts, *ante*, at pp. 16-17.) At this point, appellant had implicated himself only in receiving stolen property.

Detectives Pacifico and Gilliam pushed appellant for more information. Gilliam informed appellant that the elderly man and woman who owned the car he had been driving had been found dead in the desert, and a TV and VCR were missing from their house. (3 RT 816-817.) Gilliam invoked the purported admonition of Reverend Harris, appellant's mentor, to be truthful. (3 CT 817.) Appellant denied being involved in a burglary (3 RT 818), repeatedly denied that he killed anyone (3 CT 818), but admitted that he was asked to pawn the TV and VCR, and did so (3 CT 819-820).

During the 90-minute portion of the interrogation that was not recorded, appellant apparently incriminated himself in the burglary of the Demkos' home. (See Statement of Facts, *ante*, at p. 18.) Appellant stayed with what he apparently told the detectives in the unrecorded portion of the interview – that he participated in the burglary with four other people. (3 CT 827-828.) However, he did not admit that, as the detectives suggested, the plan was to kill the people in the house. (3 CT 830-831, 855.)

Appellant proceeded to describe the burglary of the Demkos' house and their kidnapping (3 CT 832-848), but said he became nauseous and got out of the car while the Demkos were alive (3 CT 848-849). He also admitted that a couple nights later he went back to the house for the TV, VCR, and some other property (3 CT 860). Toward the end of the interview, Gilliam referred to appellant's earlier (apparently unrecorded) request to take a polygraph, and appellant confirmed his willingness to do so. (3 CT 864.)

2. In the November 27 pre-test interview, polygraph examiner Heard coerced appellant into admitting he knew there was a plan to kill the Demkos by promising to help appellant and deceiving appellant about his potential criminal liability, and Heard then misleadingly played on appellant's fear for himself and his godson to get appellant to confirm his new admission

On November 27, detectives Gilliam and Pacifico conducted a short interview of appellant and again obtained a waiver of appellant's *Miranda* rights before turning him over to polygraph examiner Heard. (4 CT 941-953, 966.) At bottom, the interviews surrounding the polygraph exam were an interrogation, which picked up where Gilliam and Pacifico left off. At the in limine hearing Heard denied that the pre-polygraph interview was an interrogation aimed at obtaining statements from appellant about the crime. (4 RT 609.) The record, however, shows otherwise.

In the pre-polygraph interview, Heard did not simply establish rapport with appellant, obtain his consent and explain the polygraph procedure, as he contended at the in limine hearing. (4 CT 967-968, 970-

974; 4 RT 602-603, 609-610.)[55] Rather, Heard took appellant through his version of the crime, asking appellant a series of questions about the crime and those involved. (4 CT 975-989; 4 RT 609.) Appellant described various details: how he heard of the plan to use people's credit (4 CT 981-982); his walking by the victims' house sometime between late July-August (4 CT 984); the people who were involved and those who were not involved (4 CT 985-988); Neal as the mastermind (4 CT 988); and being enticed by Neal's assertion that perhaps Neal could put the car in appellant's name (4 CT 989). Appellant also brought up his godson, Marquis, several times. (4 CT 977-980.)

Heard did more than simply get appellant's "side of the story," as Heard claimed at the in limine hearing. (4 RT 609.) Gilliam and Pacifico had briefed Heard about what appellant had told them the previous day. (4 RT 614.) Heard apparently knew the precise direction in which he wanted to push appellant – to get the admission the detectives did not get the previous day, i.e. there was a plan to kill the Demkos. And he took appellant there. Heard confirmed that the plan was to hit the house to make some money, to use the people's credit. (4 CT 989.) Heard next pressed for more details about the plan:

HEARD: What else was in that plan?

BATTLE: Basically everything else was ...

HEARD: Okay. You have to know something I've been

[55] Heard used his explanation of the polygraph exam, which included three examples of polygraphs – with subjects all having appellant's first name, Tommy – not only to impress upon appellant his keen ability to detect lies (4 CT 969, 4 CT 971-974), but to cast himself and the detectives as neutral experts searching only for the truth (4 CT 972, 974, 975, 976).

doing this for thirty years okay? And I've worked many, many burglaries, many burglaries. What we've got is we've got here's what I'm hearing. We've got two senior citizens that are always home and they look like maybe they're retired or not working again and we're going to go do something steal something for their credit, stuff like that?

BATTLE: Yeah.

HEARD: You're leaving out something because you're I need to know exactly what else was in that plan. Who was going to do what? When were we going to do it?

BATTLE: Oh well they told me they'd let me know when we were going to do it.

HEARD: Who's they?

BATTLE: Neil and Left Eye.

HEARD: Okay.

BATTLE: She was like the belligerent kind you know somewhat. She had a quick temper, quick tongue.

HEARD: Got it.

BATTLE: He was like I said the calm, cool, collected person all the time. From what I was told you know I could get basically whatever was lying around the house as long as I didn't bother with what their intentions were. I didn't know it was never explained I was never explained what their full intentions were.

HEARD: Well we're going to get to that. We'll get to that because I need to know let me explain something to you. Sometimes good things happen to bad people and sometimes bad things happen to good people.

BATTLE:	Yes.
HEARD:	When you say what their intentions were, what do you mean by that?
BATTLE:	Exactly what their, their full plan of operation was.
HEARD:	Well talk to me. I'm not shy.
BATTLE:	You know he basically told me they really weren't interested in much of what was inside the house.
HEARD:	Okay. What were they interested in?
BATTLE:	He said basically he was going to try to take their identify [sic] for a short period of time.
HEARD:	Okay.
BATTLE:	I don't know Left Eye had talked one time briefly about trying to take their house.
HEARD:	You mean take their house lift it up and take it somewhere?
BATTLE:	No.
HEARD:	How?
BATTLE:	Basically like just. ..
HEARD:	Get rid of them and just take the house?
BATTLE:	Well something like that. I didn't know ...

(4 CT 989-991.) With a leading suggestion, Heard prodded appellant toward the admission he wanted – that the plan was to "get rid" of the people. Plainly, this part of Heard's pre-polygraph examination was nothing more and nothing less than a continued attempt by Heard to obtain the admission about the perpetrators' plan that detectives Gilliam and Pacifico had failed to extract the previous day.

Immediately after the above-quoted segment, Heard increased the pressure:

HEARD: Look at me. Does anything on my face say that I'm shy or anything?

BATTLE: No. I'm just. ..

HEARD: I've been doing this for thirty years.

BATTLE: I'm just nervous.

HEARD: And I don't blame you for being nervous and you know what, I'm sitting in this chair. I'm not sitting in that chair. If I'm sitting in that chair I'd be nervous too. *Because you know there's something you need to understand Tommie is you're in a hole right now.*

BATTLE: I know.

HEARD: *And you know what Tommie you got to stop digging. Don't dig no more okay? This will because once I write my report I can't promise to do anything for you because if my boss found out that I promised you something that was untrue, I'd be in trouble.* Tommie I've been doing this too long okay? Now I worked the burglary detail for many, many years. I worked the homicide detail for three and a half and you are fortunate enough that in this department these homicide detectives they're working homicide. Why? Because they're the best of the best. They are not stupid. You can't see stupid written across their forehead okay? So let's go back. Their intentions?

BATTLE: Their intentions was to take their credit.

HEARD: Take their house?

BATTLE: Yeah Neil had mentioned a couple of times that he had hookup at DMV where he'd be able to use like the people's credit cards.

HEARD: Okay.

BATTLE: Things like that. Basically take over their identity.

(4 CT 991-992, italics added.) Having told appellant both that he was in a hole, i.e. in trouble, and impliedly promised that, for a limited time only, Heard could help appellant. Heard then directly asked, "What we're [sic] we going to do with those two people?" (4 CT 993.) Appellant responded that he "had nothing to do with that" and "didn't discuss that part with them at all." (*Ibid.*) Heard asked what appellant heard. (*Ibid.*) Appellant said at one time he was "real nervous about it" and asked what they planned with regard to everything, and Neal gave him "like this little grin" and told him it was none of his business. (*Ibid.*) Heard probed further, asking what Neal's grin meant (4 CT 994), but not getting the answer he wanted, Heard shifted tactics.

Using a mock polygraph question, Heard asked whether before November 2000, appellant suspected that Neal was going to kill the two people in the house. (4 CT 995.) Appellant denied having such a suspicion. (*Ibid.*) Heard then rejected appellant's denials:

> HEARD: No. No. But you have to understand okay? *You're in the hole*. My job is just to verify that you tell me the truth.
>
> BATTLE: Okay.
>
> HEARD: I don't care if they said something and you thought oh my God is that what they're going to do *because as long as you're not involved in that, that's all that's important . . .*"

(*Ibid.*, italics added.) Rewording the question, as Heard told appellant he might have to do on the polygraph exam, he asked, "When did you first become concerned on this plan that those people were let me get right to the point, those people are going to get killed?" (4 CT 996.) And appellant began to give Heard the admission he was after: he was told the people

would "just be missing for a while." (*Ibid.*) Heard pushed further, and, as is apparent on the audiotape, appellant got emotional and cried as he admitted he knew the plan was to kill the people (Exh. 258a):

HEARD: Missing for a while? What does that mean?

BATTLE: That's all he said.

HEARD: I don't understand that. See now, see I've worked the homicide detail for three and a half years. You are, you are no dummy okay? You're no dummy. Are you telling me back in August when you had this conversation that you became concerned at that time that those people were going to be killed by someone else? Is that a yes or no?

BATTLE: Yes, sir.

HEARD; Okay. Got it. Now ...

BATTLE: It's not like I could back out though at that time.

HEARD: I understand.

BATTLE: Because if, if they tell me you know in so many words that they're basically going to do that if they can do that to them you know.

HEARD: They can do it to you?

BATTLE: Yeah.

HEARD: And your godson? Let me make sure because I don't want to put words in your mouth because I'd like to write something down if you'll allow me. In August of this year, two, thousand?

BATTLE: Yes, sir .

HEARD: You became aware of this plan to go hit this house, is that correct?

BATTLE: Yes, sir.

HEARD: Take the car. Is that a yes?

BATTLE: Yes, sir.

HEARD: Take their credit?

BATTLE: Yes, sir.

HEARD: Their identity?

BATTLE: Yes, sir.

HEARD: Their house?

BATTLE: Yes, sir.

HEARD: And kill them?

BATTLE: Yes, sir.

HEARD: Is that a yes, sir?

BATTLE: Yes, sir.

HEARD: Okay. Got it. Now what happens if you would have backed out at that point once you found out in August they were going to kill them?

BATTLE: I didn't know what was going to happen. I swear. I'm telling the truth.

HEARD: You got a godson. You got a godson to worry about. Now I'm glad that's out. That's a question I don't have to ask. I can just tell them you told me the truth about that. Can I write that down?

BATTLE: Yes, sir.

HEARD: Okay. Eleven, twenty knew I want you to see what I'm writing knew in August two, thousand the plan okay and that was the plan. Number one?

BATTLE: Yes, sir.

HEARD: Take ID, Number two take car. Number three take home. Number four they said you could take whatever was in the house?

BATTLE: Yes, sir.

HEARD:	Valuables. And number five kill the residents. I won't put anything down. I won't put words in your mouth. You knew in August of two, thousand the plan, five things take their ID, take their car, take their home, take their valuables and kill the two residents is that correct?
BATTLE:	Yes, sir.

(4 CT 996-998.) Later, Heard returned to, and had appellant reiterate, his admission that as early as August, he knew there was a plan to kill the residents of the house. (4 CT 1005, 1013-1015.)

Whether Heard perceived of this pre-test interview as an interrogation or not, his tactics improperly induced appellant against his will to incriminate himself further in the crimes. The coercion occurred during the second of two long interviews on consecutive days with only short breaks during each. The first interview started shortly after 1:00 a.m. and lasted about four and a half hours (8 RT 1800, 1815-1819), and the second day's interviews started a little after 10:00 a.m. and went into the late afternoon (4 CT 941; 9 RT 2103). (See *Spano v. New York* (1959) 360 U.S. 315, 322 [eight-hour interrogation, much of which took place during middle of night until early morning hours, was factor contributing to involuntariness of confession]; *Mincey v. Arizona* (1978) 437 U.S. 385, 398-399 [more than three-hour interrogation was factor contributing to involuntariness of confession]; *People v. Azure* (1986) 178 Cal.App.3d 591, 601-602 [four-hour interrogation was factor contributing to involuntariness of confession].)

The trial court overlooked evidence showing that, as Heard prodded appellant toward a more incriminating version of the crimes, he used two problematic interrogation tactics that coerced appellant's further

admissions: an implied promise of a benefit, available for a limited time, that Heard would help get appellant out of the hole he had dug for himself and a false assurance that appellant's knowledge, in advance of participating in the burglary, of a plan to kill the Demkos was not important. After overcoming appellant's will to resist his questioning, Heard used a third questionable tactic – a misleading suggestion that appellant's fear for himself or for his godson provided an excuse or justification – to get appellant to confirm his new admission. Taken together, these tactics rendered appellant's statements involuntary.

a. Heard impliedly promised to help appellant if he made further admissions within a limited time

In ruling appellant's statements were voluntary, the trial court found there were no promises: "I don't see factors of threats and promises, and I certainly didn't hear any promise [sic] that were involved." (4 RT 766.) Certainly, not all statements by a police interrogator urging a suspect to tell the truth carry an implied promise of a benefit or leniency. (*People v. Belmontes* (1998) 45 Cal.3d 744, 773.) In this case, however, the court's finding is not supported by substantial evidence. At the in limine hearing the prosecutor asked detective Gilliam whether he made any promises to appellant; Gilliam testified that he did not. (3 RT 533.) The prosecutor, however, did not ask investigator Heard the same question, and he made no similar denial. The record of the interviews shows that Heard offered to help appellant if he cooperated. After telling appellant he was "in a hole," he directed:

> And you know what Tommie you got to stop digging. Don't dig no more okay? This will because once I write my report I can't promise to do anything for you because if my boss found out that I promised you something that was untrue, I'd

be in trouble.

(4 CT 991.)

Appellant reasonably would have understood this admonition in its commonsense meaning as saying, "Tell me what you know, now, before I write my report, and I promise to help you." (See *Grades v. Boles* (4th Cir. 1968) 398 F.2d 409, 411-412 [prosecutor's words must be viewed from the perspective of the defendant]); *People v. Carrington* (2009) 47 Cal.4th 145, 170 [officer's statement that he would help defendant explain "'this whole thing'" to another city's police department was not a promise of leniency when considered in the context of defendant's prior questions and officer's express disclaimer of control over or information about the investigation].) Heard may not have offered a specific benefit, as occurred in some other cases (see, e.g., *People v. Jimenez* (1978) 21 Cal.3d 595, 611 [if defendant talked about the case, the officer "would tell the jury and the jury would go lighter on him" in potential death penalty case], overruled on other grounds, *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn.17), but his message contained an unmistakable quid-pro-quo: if appellant "stopped digging," i.e. said what he knew, Heard would help him.

Moreover, Heard injected a sense of urgency into the proposed benefit. It was a limited-time offer, available only until he wrote his report. If this were a simple exhortation that appellant should tell the truth, there would have been no reason for Heard to set a deadline for doing so. But Heard went beyond urging appellant to tell the truth. He conveyed that there was an advantage to be had if appellant said what Heard wanted to hear. This was an implied promise of a benefit. (See *People v. Brommel* (1961) 56 Cal.2d 629, 632 [collecting cases where this Court found comments like "'it would be better for him to make a full disclosure'" and

"'it would be better for him to tell what he knew'" to be promises of leniency or advantage], overruled on other grounds, *People v. Cahill, supra*, 5 Cal.4th at p. 509, fn.17.)

Appellant did not further incriminate himself immediately after Heard held out the prospect of a benefit. But he did so shortly after Heard floated the offer of help. (See 4 CT 991, 996.) Heard's promise, together with the misleading assurances that would come only five transcript pages later, induced appellant's further admissions. As this Court has ruled, "'if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. ...'" (*People v. Jimenez, supra*, 21 Cal.3d at pp. 611-612, quoting *People v. Hill* (1967) 66 Cal.3d 536, 549.) Heard's statement conveyed such a message of more lenient treatment and is part of the improper, and ultimately coercive, tactics that overrode appellant's will and resulted in his admitting that he knew about the plan to kill the Demkos.

Finally, Heard's comments after appellant made his new admission corroborate that he had made a promise to help appellant. Heard implicitly referred to his offer when he asked appellant to repeat his new admission. Evoking his prior statement that "once I write my report I can't promise to do anything for you" (4 CT 991), Heard expressly asked appellant's permission to "write something down" (4 CT 996) as he had appellant confirm, in step-by-step fashion, his new admission about the plan to kill the Demkos (4 CT 997). Just before Heard had appellant, yet again, recite his understanding of the plan to kill the Demkos (4 CT 997-998), Heard said, "I can just tell them you told me the truth about that. Can I write that

down?" (*Ibid.*) Obviously, Heard, who knew the interview and polygraph exam were being recorded (3 RT 597), did not need to write down appellant's statements in order to be able to report them to the detectives. Rather, by writing something down and referring to what he would tell the detectives, he was suggesting to appellant that he was carrying out his part of the bargain. If there had been no promise, none of this would have been necessary or would have made sense.

b. Heard falsely assured appellant that his knowledge of a plan to kill the Demkos was "not important"

Shortly after Heard's promise of a benefit, he misled appellant about his potential criminal liability. At this point in the interview, Heard did not ask appellant open-ended questions to uncover additional information about the crimes. Heard was trying to get appellant to commit to a scenario Heard proposed – that appellant knew there was a plan to kill the Demkos. Heard first reminded appellant, "You're in the hole" and then said, "I don't care if they said something and you thought oh my God is that what they're going to do because *as long as you're not involved in that, that's all that's important. . . .*" (4 CT 995, italics added.) The plain meaning of this assurance was that appellant would not be in a bigger hole, i.e. in bigger trouble, if he acknowledged knowing of the plan to kill, so long as he was not involved in the killings.

The problem, however, was that Heard's assurance was seriously misleading. The assertion that appellant's knowledge of the plan was not "important" unless he "was involved in that, " i.e. the killings, was simply false. If appellant admitted knowing, months before the burglary, that the plan included killing the Demkos, he possibly implicated himself as an accomplice in premeditated and deliberate murder. (See CALJIC Nos.

3.01, 3.02, 8.20.) The prosecution theory would be that in joining in the burglary with knowledge of the plan to kill, appellant intended to aid and abet premeditated murder as well as the other crimes. To be sure, appellant's earlier admission that he participated in the burglary, robbery and kidnapping exposed him to first degree murder liability under a theory of felony murder unless he could prove he withdrew from the underlying felony before the murder. (See CALJIC Nos. 3.03, 4.40, 8.21.) But an admission supporting a theory of premeditation and deliberation had serious legal implications beyond a first degree murder conviction.

The admission that appellant knew there was a plan to kill the Demkos could be highly significant to proof of a felony murder or multiple murder special circumstances: it could provide the basis for inferring that appellant harbored the mental state required by the instructions to prove the special circumstances if they were charged and the jury found appellant to be an accomplice rather than an actual killer. (See CALJIC No. 8.80.1.) And if the prosecution sought the death penalty, the admission would be highly relevant under section 190.3, factor (a), as aggravating personal culpability for the murders beyond felony murder liability. (See CALJIC Nos. 8.85, 8.88.) As an experienced homicide investigator, Heard certainly must have been aware of the difference between felony murder and premeditated murder and the implications of getting appellant to admit he knew there was a plan to kill the Demkos. (See *People v. Cahill* (1994) 22 Cal.App.4th 296, 315 [not plausible that homicide investigator was unaware of the felony-murder rule and that defendant's statement would amount to a confession of felony murder].)

In short, whether appellant knew about a plan to kill the Demkos before participating in the burglary, robbery and kidnapping was *not*, as

Heard counseled, unimportant. Far from it, the admission Heard sought carried serious consequences in terms of the mental state required to prove accomplice liability for premeditated and deliberate murder, accomplice liability for the special circumstances, and the extent of appellant's personal culpability, which would be highly relevant to the jury's penalty decision if the prosecution sought the death penalty. (See *People v. Cahill*, *supra*, 22 Cal.App.4th at p. 315 [homicide investigator misled defendant about the law by focusing on premeditated murder and saying nothing about felony murder when defendant's admissions established basis for felony murder].)

There is little doubt that this misleading assurance – that a highly incriminating fact was "not important" – was part of a deliberate interrogation strategy. Heard repeated it later in the interview. He used it in previewing a polygraph question about whether appellant was present when the people were taken out of the trunk (4 CT 1022-1023 ["Say from this point on to be very honest with you what happens from this point on is really not as important as what happened before that"].) And Heard used it during the post-polygraph interview, when he pressed appellant to admit he was at the scene when the Demkos were killed. (4 CT 1056 ["The fact that you were present at the scene where they were killed doesn't dig the hole any deeper . . . ."].)

There also is no question that Heard's strategy – the implied promise of a benefit together with his misleading minimization of the significance of the admission he sought – worked. There was virtually no gap between Heard's assurance and appellant's admission. Appellant first stated that he knew the people would "just be missing for a while" (4 CT 996), in his very next answer confirmed that in August he was "concerned . . . that those people were going to be killed by someone else" (*ibid.*), and then moved

quickly to stating that he "was aware of this plan" to "kill them." (4 CT 996-997.) This timing "is a relevant factor." (*People v. Rundle* (2008) 43 Cal.4th 76, 118, fn. 12; *People v. Cahill, supra*, 22 Cal.App.4th at pp. 316-317 [when a confession comes after an implied promise, "absent adduction of countervailing evidence, e.g. a substantial time lapse between the implied promise and the incriminating statements, the confession must be attributed to that implied promise"].) In this case, the timing of appellant's statement establishes the requisite causality: appellant admitted knowing about the plan almost immediately after Heard deceptively dismissed the significance of the fact he urged appellant to admit and soon after Heard's implied promise. (See *People v. Scott* (2011) 52 Cal.4th 452, 480 [court does not determine whether detectives promised defendant leniency where alleged promises were not "causally related" to defendant's statement]; *People v. Williams* (2010) 49 Cal.4th 405, 444-445 [alleged deception did not cause incriminating statement where defendant continued to deny guilt until days later]; *People v. Carrington, supra,* 47 Cal.4th at p. 172 [officer's comment that defendant's admitting she committed a second murder "wouldn't make any difference" did not affect her decision to confess where she maintained her innocence during the interview as well as during a subsequent interview and revealed that she was aware that confessing to an additional murder would increase the severity of the punishment.)

The remaining question under the federal due process clause is whether appellant's will to resist Heard's interrogation was overborne when he said he knew about the plan to kill the Demkos. (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 303-304.) Consistent with this Court's case law, the trial court applied a different standard to assess the voluntariness of a confession resulting from police lies, subterfuge or trickery. The trial court

ruled that:

> The Sixth factor is deception. And when we talk about deception, we'll certainly – lying is not good. Lying is not good for anyone. However, unless the defense can show that the defendant's will was overborne by these deceptions, or he said something that he wouldn't ordinarily have said and confessed to something as a result of a lie, then I don't know that we're particularly – that there's anything particularly wrong with deception.
>
> Personally, I don't think anyone should lie at any time. That's my own personal opinion. My personal feelings have nothing to do with this case. But I think the supreme court in Thompson, 50 Cal.3d. at 167 said that deception can be used by the officers with the exception of making someone say something that they wouldn't normally do, that isn't normally true.

(4 RT 768.) The court was correct about the state rule, which holds that police deception during a criminal interrogation "does not invalidate a confession as involuntary unless the deception is of a type reasonably likely to produce an untrue statement." (*People v. Scott*, *supra*, 52 Cal.4th at p. 481; accord, *People v. Thompson* (1990) 50 Cal.3d 134, 167.)

The federal due process standard for determining voluntariness, however, does not turn on whether the statement is likely to be untrue. It asks whether the confession is "the product of an essentially free and unconstrained choice by its maker" or whether "his will has been overborne and his capacity for self-determination critically impaired." (*Culombe v. Connecticut* (1961) 367 U.S. 582, 602; accord, *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at pp. 225-226.) Certainly, one of the values served by the constitutional ban on using coerced confessions at trial is to protect against convictions based on untrustworthy evidence. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386.) But that is not the only reason for the rule. It also

furthers two other goals: (1) to insure that in our criminal justice system, which is accusatorial, not inquisitorial, the prosecution proves guilt by evidence freely secured and not by evidence resulting from pressure on suspects that subjugates their free will and (2) to guarantee that police practices comport with standards of fundamental fairness. (*Ibid.*; *Spano v. New York* (1959) 360 U.S. 315, 320-321; *Lego v. Twomey* (1972) 404 U.S. 477, 485.) Although the possible unreliability of a coerced confession is a concern underlying the due process prohibition against using such evidence, it is *not* part of the due process test for voluntariness.

More than 50 years ago, the United States Supreme Court rejected a test for voluntariness that considered whether a confession, induced by police deception, was likely to be true or false. In *Rogers v. Richmond* (1961) 365 U.S. 534, the trial court's voluntariness ruling was based on the finding that the police "pretense of bringing petitioner's wife in for questioning 'had no tendency to produce a confession that was not in accord with the truth.'" (*Id.* at p. 542.) The state reviewing court similarly considered "the probable reliability" of the confession in sustaining the trial court's decision to admit the evidence. (*Id.* at pp. 542-543.)[56]

The high court concluded that both the trial and reviewing courts had determined the admissibility of the confessions "by reference to a legal

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[56] The state reviewing court had framed the standard as follows: "The question is whether, under these and other circumstances of the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions." (*Rogers v. Richmond*, *supra*, 365 U.S. at pp. 542-543.)

standard which took into account the circumstance of probable truth or falsity" which "is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." (*Rogers v. Richmond*, *supra*, 365 U.S. at pp. 543-544.) The high court then reiterated the due process test:

> The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined – a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

(*Id.* at p. 544.) Because the state courts applied a "constitutionally inadequate test" for determining whether the confessions were voluntary, the high court vacated the conviction. (*Id.* at p. 545.)

As *Rogers* makes clear, the controlling question is whether appellant's will was overborne by Heard's tactics. Admittedly, police misrepresentations do not always render an otherwise voluntary confession inadmissible. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [police falsely telling defendant his companion had confessed was insufficient to make an otherwise voluntary confession inadmissible].) But "a lie told to a detainee regarding an important aspect of his case can affect the voluntariness of his confession or admission." (*People v. Engert* (1987) 193 Cal.App.3d 1518, 1524 [failure to inform defendant he was under arrest did not render confession involuntary].) And the nature of the police deception is highly relevant to the question of voluntariness. (See, e.g., *Leyra v. Denno* (1954) 347 U.S. 556 [misleading statements regarding the role of the state psychiatrist contributed to involuntariness of confession].)

Here, the nature of Heard's subterfuge was obvious: he was encouraging appellant to admit to a more serious involvement in the crimes

while falsely telling him that it would make no difference. This tactic of minimizing a suspect's culpability is known to be an effective interrogation practice. (*Commonwealth v. DiGiambattista* (Mass. 2004) 813 N.E.2d 516, 527; Inbau et al., Criminal Interrogations and Confessions (4th ed. 2004), pp. 232, 236, 253-254, 258, 271-278, 281.) Certainly, other types of police trickery during interrogations can pose serious problems. (See, e.g., Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 Denv. U. L. Rev. 979; Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game* (1996) 30 Law & Soc'y Rev. 259.) But at least with regard to some fact-based lies, a suspect may have an inkling as to whether an officer is lying. For example, when an officer says that a suspect's fingerprints were found at the crime scene, the suspect should know that, if he were at the crime scene, the assertion may be true, and if he were not at the crime scene, the assertion is likely false.

But suspects do not generally have the same ability to detect police deception about the law or the legal ramifications of an admission or confession. Unless trained in or knowledgeable about criminal law, a suspect, like appellant, has little or no way to assess the reliability of a detective's assurance, like Heard's, that admitting a particular fact is "not important." Moreover, because police are held out as experts about crime, it is natural for a person being questioned by police to accept any assurance about criminal liability at face value. For this reason, although "misrepresentations of fact" may not be "enough to render a suspect's ensuing confession involuntary. . . [,] [p]olice misrepresentations of law . . . are much more likely to render a suspect's confession involuntary." (*United States v. Lall* (11th Cir. 2010) 607 F.3d 1277,1285, citations omitted [confession held involuntary where detective assured defendant he would

not be prosecuted].)

That is the case here. Heard's deceit involved a misrepresentation about the law, not the facts. This difference distinguishes *Frazier v. Cupp*, *supra*, 394 U.S. at p. 739, the high court's leading case on the effect of police deception on the voluntariness of a confession, in which falsely telling the defendant that his cousin had implicated him did not render the confession involuntary. And this difference distinguishes decisions of this Court finding statements obtained through police deception to be voluntary. (See, e.g., *People v. Williams* (2010) 49 Cal.4th 405, 442-443 [officers' deception included telling defendant that witnesses had observed defendant at the ATM where the victim withdrew money and that fingerprint evidence tied him to the crime]; *People v. Smith* (2007) 40 Cal.4th 483, 505 [officers gave defendant a sham test and falsely told him the result was positive for gunshot residue]; *People v. Jones* (1998) 17 Cal.4th 279, 299 [officers deliberately implied they knew more about the crime than they did]; *People v. Thompson*, *supra*, 50 Cal.3d at p. 167 [officers lied to defendant about physical evidence including that tire tracks and soil samples linked his car to the scene of the victim's death].)

In contrast to these cases involving interrogators' lies about crime facts, Heard's false assurance that knowing about the plan to kill the Demkos was "not important" addressed the legal consequence of the admission and thus is analogous to cases in which police deception rendered statements involuntary. (See, e.g., *Leyra v. Denno*, *supra*, 347 U.S. at pp 559-560 [psychiatrist working for police obtained defendant's confession in part by falsely assuring defendant that "he had done no moral wrong and would be let off easily"]; *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416-417 [defendant was told that if he asked for a lawyer he

could not speak to police and it "might be worse"]; *United States v. Anderson* (2nd Cir. 1991) 929 F.2d 96, 100-102 [officer said if defendant asked for a lawyer, he would be permanently precluded from cooperating with the police]; *People v. Cahill, supra*, 22 Cal.App.4th at p. 315 [officer's deceptive account of law of murder, which omitted mention of the felony-murder doctrine, made more plausible his implicit promise that a first degree murder charge might be avoided if there were a confession showing no premeditation].) Heard's misleading assurance, combined with the promise to help appellant if appellant "stopped digging" i.e., told him what he knew (4 CT 991), precluded appellant from making a rational choice about whether to incriminate himself further, which rendered all his subsequent statements involuntary.

c. In coercing appellant into admitting he knew there was a plan to kill the Demkos, Heard played on appellant's fear for his godson's and his own safety

During this portion of the interview, Heard also played on appellant's fear for his own, and particularly his godson Marquis's, safety, which added to the coercive effect of the tactics discussed above. Appellant mentioned his godson several times in the pre-polygraph interview (see 4 CT 878, 945, 980, 987, 1000, 1003), including that he was trying to adopt Marquis (4 CT 977). Appellant also had referred repeatedly to Marquis during his November 26 interrogation (3 CT 800, 804, 810, 813), about which Heard had been briefed (4 RT 614). At the in limine hearing, Heard indicated that appellant became emotional when Marquis was brought up, especially when threats against Marquis were discussed. (4 RT 613-614.) It was thus apparent that Marquis was very important to appellant.

Heard brought up Marquis right after appellant first stated that he was concerned in August that the people in the house would be killed. Immediately after starting to acknowledge the plan, appellant said, "[i]t's not like I could back out though at that time . . . [b]ecause if, if they tell me you know in so many words that they're basically going to do that if they can do that to them you know." (4 CT 996.) In response, Heard disclaimed that he wanted "to put words" in appellant's mouth, but he did just that. He filled in what appellant had not said, that "they can do it to you" and "your godson," and emphasized the importance of this suggestion by stating "I'd like to write something down if you'll allow me." (*Ibid.*) Heard returned to this theme immediately after he had appellant repeat his admission, stating "You got a godson. You got a godson to worry about." (4 CT 997.) When appellant talked about having Marquis with him when he met Neal in a park before the crimes, Heard again raised the issue of Marquis being threatened (4 CT 998) and appellant's fear for Marquis's safety (4 CT 999), and told appellant, "[t]hat's something you have to remind me to tell the detectives. . . ." (*ibid.*).

Heard played on appellant's fear for Marquis throughout the remainder of the interrogation. In the post-polygraph interview, Heard repeated, "[a]nd that, that's very important for the detectives to know that they were going to hurt Marquis. Now, take me back to where they were killed." (4 CT 1056.) When Pacifico entered the room, Heard told him that appellant was "[ve]ry cooperative, very concerned about Marquis." (4 CT 1079.) In reporting on appellant's admission that he stabbed the victims, Heard inserted Marquis as he told Pacifico: "you know Marquis, right, he's his godson, so encouraged him just to be real up front with you and go from there." (*Ibid.*) In their post-polygraph interview, Pacifico and Gilliam

continued to exploit appellant's feelings for Marquis and the concern, previously voiced by Heard, about what the people appellant implicated might do to him. Gilliam said to appellant: "And I know that you're a, you were worried about Marquis, correct? . . . But by puttin' this on uh, Lefty and Left Eye and all of them, didn't you think that was going to eventually come back on Marquis? . . . Don't you think . . . we're gonna go . . . what do cops do, we go get a warrant we crash their pad, we take them in." (5 CT 1258.) The implication would not likely be lost on appellant who was party to Heard's previous comment to Pacifico that he was "not convinced that those other four people were present. Until you bring them in here and we polygraph them." (4 CT 1079.)

As the record shows, Heard used Marquis in two ways as he coerced appellant's admission that he knew of the plan to kill the Demkos. In light of Heard's promise to help appellant, Heard's initial comments (4 CT 996-999) reasonably implied that appellant's concern for Marquis's safety might somehow help him to justify or mitigate his actions. At the same time, Heard's statements about Marquis also could be perceived as an indirect threat, directed to appellant, about what others might do to Marquis if appellant did not tell the investigators what they wanted to hear, i.e. if appellant continued to implicate others and did not take full responsibility for the crimes. Gilliam's post-polygraph statement about Marquis (5 CT 1258) makes clear that Heard's initial references to Marquis were intended to pressure appellant into making further admissions. Manipulating appellant's concern for Marquis, by itself, may not have been coercive (see, e.g., *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [threats that defendant's children would be taken away from her coerced the confession]; *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336 [threatening defendant

that she would not see her child for a long time, and reminding her that "she had a lot to lose" coerced her confession]), but it contributed to and reinforced Heard's improper, and ultimately coercive, implied promise to help appellant and misleading assurances about appellant's criminal liability.

d. The coercion taints all the statements appellant made during the remainder of the November 27 interviews

The involuntariness of appellant's statement that he knew there was a plan to kill the Demkos renders that statement as well as all his subsequent statements on November 27, including his more incriminating admissions that he strangled and stabbed Andrew Demko and stabbed Shirley Demko, inadmissible. The law governing this point holds: "'Where an accused makes one confession and then testifies or upon subsequent questioning again confesses, it is presumed that the testimony or second confession is the product of the first. [Citations.] ... [T]he prosecution has the burden of showing a break in the causative chain. ...'" (*People v. Hogan*, *supra*, 31 Cal.3d at pp. 843-844, quoting *People v. Johnson* (1969) 70 Cal.2d 541, 547-548; accord, *People v. McWhorter*, *supra*, 47 Cal.4th at p. 359.) Federal due process law also bars admission of a suspect's statements made after an involuntary statement when they all are "simply parts of one continuous process." (*Leyra v. Denno*, *supra*, 347 U.S. at p. 561 [first involuntary statement rendered subsequent confessions inadmissible where all were obtained in the same place within about five hours]; *United States v. Anderson* (2nd Cir. 1991) 929 F.2d 96, 102 [defendant's second confession was properly suppressed as tainted by the coercion of defendant's first confession where there was no showing that the "taint clinging to the first confession was dissipated"].)

All of appellant's statements on November 27 were part of one continuous process. There was no intervening event that broke the causative chain between appellant's admission and his ensuing statements. Gilliam and Pacifico interviewed appellant beginning at 10:10 a.m. and then took him directly to Heard (4 CT 941, 951-953), whose pre-test interview began at 10:35 a.m. (4 CT 966; 4 RT 607) and ran straight into the polygraph exam (4 CT 1047-1055). Heard's post-polygraph interview began at 1:10 p.m. and went until Pacifico joined them. (4 CT 1079; 4 RT 607.) At that point, detectives Gilliam and Pacifico took over and questioned appellant for several more hours. (4 CT 1165; 4 RT 633.) Except for the initial short interview by Gilliam and Pacifico, all these interviews apparently occurred in the same room from mid-morning to late afternoon or early evening with only a few, short breaks. (4 RT 596 [Heard's interviews took place in an office next door to the homicide office]; 4 CT 1026, 1072, 1165, 1260-1261.) The presumption is that all appellant's subsequent statements resulted from the first, involuntary one, and the prosecution cannot show otherwise. The trial court erred in admitting not only appellant's statement about knowing there was a plan to kill the Demkos, but all his statements to Heard, Gilliam and Pacifico made after that admission.

C. The State Cannot Prove That The Admission of Appellant's Involuntary Statements Was Harmless Beyond A Reasonable Doubt

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most provocative and damaging evidence that can be admitted against him." (*Arizona v. Fulminate*, *supra*, 499 U.S. at p. 296; accord, *In re Cox* (2003) 30 Cal.4th 974, 1032.) This Court has

recognized that an unconstitutionally admitted confession "is much more likely to affect the outcome of the trial than are other categories of evidence, and thus is much more likely to be prejudicial . . . ." (*People v. Cahill* (1993) 4 Cal.4th 498, 503.) The State has the burden to prove the erroneous admission of a confession is harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, i.e. to prove it did not contribute to the verdict. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 295-296; *Satterwhite v. Texas* (1988) 486 U.S. 249, 256.) In this case, the State cannot carry that burden.

1. Appellant's Involuntary Statements Were the Cornerstone of the Prosecution's Case

Appellant's confession lay at the heart of the prosecution's case. The central issue was who committed the crimes, and the answer turned on whether appellant's admissions were viewed as truthful or fabricated. (See, e.g., 12 RT 3117 [prosecutor argued defendant's statements were not made up but reflected what happened]; 12 RT 3215-3216 [defense counsel argued all of appellant's "stories are absurd . . . They're all false. They're all lies."].) If credited as true, as the prosecutor argued, some of appellant's involuntary statements provided sufficient basis for finding him guilty of premeditated and deliberate murder as the actual killer and finding the special circumstances true. The prosecutor considered appellant's statements as so crucial to his case that he played the audiotapes of the interrogations in their entirety for the jury. The prosecutor relied extensively on the detailed information contained in appellant's statements to argue that appellant – and appellant alone – was the person who committed all the crimes against the Demkos, including murdering them. (12 RT 3102-3117, 3128.) In his closing argument, the prosecutor argued

that the details in his statements damned appellant: "There's certain information that the defendant provided that was so specific and so detailed it would have to have taken somebody that was actually there and somebody who was actually doing it to provide those details." (12 RT 3102-3103.) The prosecutor's emphasis on the involuntary statements, which shows their importance to the case against appellant, prevents the State from proving beyond a reasonable doubt that their admission did not contribute to appellant's convictions. (*Chapman v. California*, *supra*, 386 U.S. at p. 25 [prosecutor's focus in closing argument on error made it impossible to say the error did not contribute to the convictions].)

2. The Length of the Jury's Deliberations and its Mid-Deliberation Inquiries Indicate That Appellant's Involuntary Statements Likely Had an "Indelible Impact" on the Jury

As Justice Kennedy has advised, a "court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence." (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 313 (conc. opn. of Kennedy, J.).) In addition to the importance of appellant's statements to the prosecution's case, three facts about the jury's deliberations underscore the "indelible impact" they likely had on the jury.

First, appellant's statements were not only played in their entirety for the jury, but the jury paid attention to them. On the first day of deliberations, the jury requested "access to a cassette player and several copies of the transcripts of Battle interview tapes #1 and #3" (2 CT 585 [jury inquiry #1]), and later that same day asked for "all transcripts of T. Battle interviews" (2 CT 588 [jury inquiry #4]). The court provided the

requested materials. (2 CT 589-590; 13 RT 3351-3352.) Thus, the record shows that in convicting appellant of all charges, the jury focused on all his statements, which undercuts any suggestion that the erroneous admission of the involuntary ones was not prejudicial. (See *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103, quoting *Gantt v. Roe* (9th Cir. 2004) 389 F.3d 908, 916 [jury's requests for readbacks of testimony indicated that "'[t]he jury was clearly struggling to reach a verdict'"]; *Merolillo v. Yates* (9th Cir. 2011) 663 F.3d 444, 457 [request for readback of medical testimony of three witnesses "illustrates the difficulty" presented by testimony].)

Second, the jury did not reach its decision quickly: it deliberated for seven days before returning its guilty verdicts. (2 CT 589, 591-595, 598; 3 CT 601, 604.) Even considering that one juror became ill and was replaced on the third day the jury deliberated (2 CT 593), the length of the deliberations indicates that, even with appellant's extensive statements including a confession to murder, the determination of whether appellant was guilty was not easy. Given that both the prosecutor and defense counsel told the jury the only real issue was whether appellant committed the crimes (12 RT 3062, 3064, 3151), the jury's lengthy deliberations indicate a close case in which the admission of involuntary statements cannot be shown to be harmless beyond a reasonable doubt. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 365 [finding prejudice where "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner"]; *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1036, citations omitted ["Longer jury deliberations 'weigh against a finding of harmless error" because "[l]engthy deliberations suggest a difficult case'"]; *In re Martin* (1987) 44 Cal.3d 1, 51 [deliberation over the course of five days "practically compels the conclusion" that the

case was "very close"]; *People v. Paniagua* (2012) 201 Cal.App.4th 499, 520 [characterizing three days of deliberations as "lengthy" and bearing on the issue of prejudice "favorably to the defendant"].)

Third, judging from the jury's inquiries, one or more jurors questioned appellant's role in the crimes. On the first day of deliberations, the jury sent the court a note asking, "If removal of property from house after death of owners is still counted as robbery?" (2 CT 586.) After the court asked the jury to clarify its question (13 RT 3346), the jury sent another note asking, "If the defendant had nothing to do with the murders. If after their death the defendant enters the home and removes property belonging to the deceased, is it still robbery?" (2 CT 587), and the court answered, "no" (*ibid.*; 13 RT 3351). These questions indicate that the jurors were questioning the prosecution's theory and considering the defense version of the case – that appellant had nothing to do with the burglary, robbery, kidnapping or murders, but merely took the Demkos' property after the crimes. This inquiry undercuts any notion that the prosecution had presented an overwhelming case of appellant's guilt.

On the sixth day of deliberations, the jury had another question, this time about the relationship of the allegation that defendant used a knife and the special circumstances. (3 CT 600-601; 13 RT 3403-3404.)[57] As the court and counsel noted, the inquiry was confusing. (13 RT 3404-3406.) But it shows the jury was working hard to scrutinize the evidence in light of

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[57] The jury note asked: "if a knife was in his possession at the beginning of the crimes but not displayed or 'used' until the alleged murders. Does the instructions that burglary and robbery and kidnapping are ongoing until safe or evasion of pursuors [sic] is complete mean that the knife was used in <u>each</u> crime. [¶] This is in reference to special circumstances." (3 CT 600.)

the instructions, and did not find the prosecution had presented an open-and-shut case. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions indicate close deliberations].) The jury's questions, like its request to listen to and read the interrogations and the length of its deliberations, cuts against the State's ability to prove the admission of appellant's involuntary statements was harmless beyond a reasonable doubt.

3. The Prosecution's Other Evidence, Including Appellant's Admissible Statements, When Considered in Light of the Problems in its Case and Questions Raised by Appellant's Defense, Does Not Present the Type of Overwhelming Evidence of Guilt That Would Prove the Error in Admitting the Involuntary Statements to Be Harmless Beyond a Reasonable Doubt

In its landmark case applying harmless error review to coerced confessions, *People v. Cahill*, *supra*, 5 Cal.4th 498, this Court described three, limited circumstances in which the erroneous admission of a defendant's confession "might" be found harmless: "(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime." (*Id.* at p. 505, citing *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 312-314 (conc. opn. of Kennedy, J.).)

None of these categories of compelling proof, nor anything comparable, is present here. Appellant was not caught committing the crimes. There were no eyewitnesses, nor were there numerous witnesses who could be described as disinterested and reliable. There was no physical

evidence linking appellant to the burglary, robbery, kidnapping or murders. Finally, not only was there no videotape of the commission of the crime, but there was not even a complete record of appellant's interrogation. Quite to the contrary: the audiotape of the key portion of the interrogation, where appellant went from denying any involvement in the crimes beyond receiving stolen property to admitting his participation in the burglary of the Demkos' house, turned out to be blank, and there was no other record of his statements. (8 RT 1823 [detective's report of this session consisted of two sentences]; 8 RT 1937 [detective destroyed his notes of the interview, which was not videotaped].)

To be sure, the prosecution presented evidence in addition to appellant's involuntary statements. Appellant's statements on November 26 to Gilliam and Pacifico and his statements on November 27 to Heard before the interrogation became coercive would have left the jury with appellant's initial versions of the crime. But those statements, taken together with the other evidence the prosecution presented, do not establish that the admission of the involuntary statements was harmless beyond a reasonable doubt either as to the guilt and special circumstances verdicts or the death verdict.

Without appellant's involuntary statements, the jury would have been left with appellant's first version of the crimes involving Neal, Left Eye, Neal's brother, Steve and himself – what defense counsel termed "the Mission Impossible story." (12 RT 1351.) In this version, appellant participated in the burglary, robbery and kidnapping, but got out of the car en route to the desert and was not present when the Demkos were killed. Appellant's admissions, if believed to be true, implicated him as an accomplice in first degree felony murder unless, as the jury was instructed,

the jury concluded that he withdrew from the underlying felony before the murder. (See 2 CT 543; 13 RT 3307-3308 [CALJIC No. 4.40 given to jury].) And other evidence implicated appellant: Hunter's testimony that appellant talked about getting a car and people coming up missing and being buried in the desert (9 RT 2198-2199), Kryger's testimony about seeing appellant one night in mid-November dressed in black holding duct tape and zip ties (10 RT 2442-2444), and McCune's testimony that appellant called her from jail and told her Perry forced him to tie up the people, put them in the trunk and drive them to the desert with Perry sitting behind appellant holding a gun to his head (9 RT 2130).

However, in assessing prejudice under the *Chapman* standard, the question is not whether there was sufficient evidence for the jury to convict if the erroneously admitted evidence had not been introduced. (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Rather, the question is whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Ibid.*; accord, *Chapman v. California*, *supra*, 386 U.S. at p. 23.) That conclusion should be reached here, where the defense gave the jury grounds for viewing appellant's admissions as fabricated out of fear of Perry Washington and grounds for concluding there was a reasonable doubt about whether appellant was involved in the crimes at all.

As discussed above, even with the involuntary statements, including appellant's admissions that he stabbed both Andrew and Shirley Demko, along with the other incriminating evidence, the jury did not reach a quick verdict, but appeared to have some question about appellant's guilt. If only appellant's first account of the crime – the least incriminating version – had been admitted, it is reasonable to assume that the jury's decision to convict

would have been much more difficult.

Moreover, the testimony of McCune, Hunter and Kryger cannot be viewed independently of appellant's inadmissible statements. In *Fulminante*, the plurality opinion made this point in concluding that the coerced confession was not harmless beyond a reasonable doubt. (*Fulminante v. Arizona*, *supra*, 499 U.S. at pp. 298-300 [subsequent admissible confession was not cumulative to, and could not be viewed independently from, the first involuntary confession].) Although the facts in this case and *Fulminante* may differ, the same principle applies: the jury's assessment of appellant's admissions to McCune and Hunter, and the incriminating testimony by Kryger, "could easily have depended in large part on the presence of" the inadmissible statements. (*Id.* at p. 300.) In short, appellant's voluminous, albeit inconsistent, admissions to Heard could have bolstered the credibility of these witnesses' incriminating testimony. And without the involuntary statements, the jurors might have found McCune's, Hunter's and/or Kryger's stories unbelievable. (See *ibid.*)

Judged on their own testimony, the credibility of these witnesses was open to question. As defense counsel outlined for the jury, McCune made inconsistent statements about basic facts, including the people appellant said were involved in the crimes, and also made statements that were not consistent with other evidence in the case. (See 12 RT 3200-3207.)

Hunter's veracity was called into doubt. He had a 1997 felony conviction for robbery. (9 RT 2198.) Although he testified to appellant's statements about getting a car from people who would come up missing in the desert and about being able to bury a body in the desert and no one finding it (9 RT 2198-2199), he did not report these statements when detective Pacifico first interviewed him and at that time denied having

knowledge of anything related to the crimes (9 RT 2206). As defense counsel argued, there was a factual basis for concluding that, based on newspaper reports, Hunter fabricated the admissions that he testified appellant made. (12 RT 3198-3200.)[58] In addition, although Hunter testified he was appellant's friend (12 RT 2196), he revealed animosity and thus bias against appellant.[59]

Similarly, the jury had reason to look with skepticism at William Kryger's testimony. He not only had multiple felony convictions (10 RT 2441), but admitted participating with Perry Washington in the burglary of an old man's house in Apple Valley about ten days before the crimes committed against the Demkos, and admitted lying to police about his involvement (10 RT 2458, 2460-2462). Explaining his lies, Kryger said, "I tell 'em what they want to hear so they won't arrest me. I'm not stupid." (10 RT 2462.) The date he testified he saw appellant late at night dressed in black and holding duct tape and zip ties, November 16 or 17, differed from

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[58] On the same day the local newspaper reported details about the crime, Hunter told Steve Richardson about statements that appellant allegedly had made about the crime. (9 RT 2189-2192, 2207-2216.) At least one of the purported admissions that Hunter related to Richardson – that appellant said he used duct tape on the people (9 RT 2191) – was a lie. Hunter himself admitted that appellant did *not* say this. (9 RT 2216.) According to Richardson, Hunter did not tell him what appellant had said, but rather what Hunter had seen in the newspaper. (9 RT 2190.) Hunter denied any such assertion. (9 RT 2226.) Richardson reported his conversation with Hunter to the detectives, who then contacted Hunter and obtained the story about appellant's purported statements that Hunter told at trial. (9 RT 2208-2212; 11 2893-2894, 2897-2899.)

[59] At trial Hunter admitted that he told the detectives, "I'm going to try to make it to some of his [appellant's] trial sessions, man, just to see the look on his face." (9 RT 2215.)

the prosecution's theory of the case, in which the crimes were committed on November 13. (10 RT 2442.) And he was inconsistent about whether, around that same time, he saw Washington unloading property with appellant from a car. (10 RT 2472.)

There were other weaknesses in the prosecution's case. First, although in the November 26 interrogation, appellant incriminated himself in the burglary, robbery and kidnapping, there was no physical evidence, other than his possession of property taken from the Demkos, linking him to the crimes.

Second, as argued by defense counsel (12 RT 3221-3223), there were inconsistencies between appellant's statements and the physical evidence on some basic facts. For example, appellant said he stabbed Mr. Demko on the left side of his neck (4 CT 1157; 5 CT 1379), but the stab wound was on the right side (9 RT 2253). Appellant said the knife used to stab the Demkos had a six-inch blade and no guard (5 CT 1365-1366; 10 RT 2377-2378; Exh. 260), but the autopsy showed that Mr. Demko's stab wound was four and one-half inches deep and had abrasions consistent with the blade being fully inserted and a knife guard at the top of the blade (9 RT 2254, 2302; 10 RT 2379). Appellant said he put the newspapers outside the Demkos' house (4 CT 937), but they were found inside the house (7 RT 1656, 1660). Appellant said he placed a Fed Ex slip on the stereo (4 CT 936), but Fed Ex notices were found in a trash can (7 RT 1651). These inconsistencies supported the defense theory that appellant's interrogation statements were made up out of fear of Perry Washington and based on sources other than firsthand knowledge of the crimes.

Third, there was room to doubt the thoroughness and adequacy of the law enforcement investigation of the physical evidence, as defense counsel

pointed out to the jury. (12 RT 3188-3194, 3197.) For example, the sheriff's department seized nine pairs of appellant's shoes, but did not compare them to shoe prints left at the Demkos' house. (7 RT 1683-1685; 8 RT 1776-1778; 9 RT 2099; 10 RT 2512-2513.) The same was true for car tire impressions found in the desert: criminalists made casts of the tire impressions found in the desert and those on the car belonging to the Demkos, but the two were not compared. (7 RT 1538-1539, 1577, 1686.) Apparently, no DNA or other analysis was done on other evidence such as hairs found near Shirley Demko's body (7 RT 1499), the tooth brush and cigar tip found in the car (7 RT 1584), or cigarettes found dumped in the desert (7 RT 1432-1433, 1436-1437, 1467, 1578). At least no evidence of such testing was presented. A homicide detective noticed nylon ties on his first visit to the desert crime scene, but he did not collect them until ten days later. (10 RT 2508.) And Perry Washington's fingerprints were not compared to any of those lifted from the evidence. (10 RT 2560-2563.)

Fourth, the defense presented the jury with a stark counter narrative to the prosecution's theory of the crimes: Perry Washington committed the crimes against the Demkos (6 RT 1339; 12 RT 3158); appellant did not commit or participate in the crimes beyond taking property belonging to the Demkos and from their home after they were killed (12 RT 3185-3186); and that to protect himself from Washington whom he feared, appellant fabricated numerous stories about the crimes, based on what the detectives told him, what he had read in the newspapers, what Perry Washington told him and, as defense counsel surmised, what he observed when taken to the desert crime scene after the killings (12 RT 3178, 3211-3220). The defense presented evidence, independent of appellant's statements, to support its theory which showed that: Washington's "two-strike" status (12 RT 2999-

3000, 3057-3058), coupled with his commission of a similar burglary shortly before the crime in this case (10 RT 2458, 2460-2462), gave him motive to kill the victims during a burglary; appellant feared Washington (9 RT 2136-2137) and loved Marquis and would take seriously any threat against Marquis (12 RT 2986); Washington surprised Shelby Barnes, Marquis's mother, by unexpectedly showing up at her house indicating he knew where to find her (12 RT 2983-2984, 2987, 2994); appellant was seen frequently with Washington in the weeks before appellant's arrest (11 RT 2816-2817, 2836; 12 RT 2993-2994) and appeared at times to act under Washington's direction (9 RT 2136-2137; 11 RT 2816-2817, 2835-2836); and in jail Washington told another inmate, who worked as an informant for various law enforcement agencies including the FBI, that appellant was charged with "a couple hot ones" that Washington committed (9 RT 2135; 11 RT 2839, 2845, 2848).

In this way, the defense challenged the prosecution's case with a competing view of who killed the Demkos which contended that, despite his admissions about participating in the burglary, robbery, kidnapping, and murders, appellant was not involved in the charged crimes and provided a basis for entertaining reasonable doubt as to his guilt.

This fact, along with the extensive, incriminating scope of the involuntary statements and the problematic nature of the prosecution's other evidence, distinguishes appellant's case from the decision in *People v. Cahill*, *supra*, 22 Cal.App.4th 296, on remand from this Court. In *Cahill*, the defendant was convicted of one count of murder with true findings of burglary, robbery, and rape special circumstances. The Court of Appeal found that the interrogating officer's representation that the defendant could avoid a first degree murder charge if the killing was not premeditated, in the

context of the interrogation, was a deceptive promise of leniency that induced the incriminating statement. (*Id.* at pp. 314-317.) However, the court held that given the limited nature of the involuntary portion of the confession and the strength of the other uncontroverted evidence, which included physical evidence placing the defendant in the victim's apartment, the admission of the involuntary statement was harmless beyond a reasonable doubt.[60]

In the court's view, a key component was missing: there was no "candidate theory and basis for reasonable doubt as to defendant's guilt of felony murder." (*People v. Cahill*, *supra*, 22 Cal.App.4th at p. 319.) The only alternative explanation that would exonerate the defendant was that an unrelated third party with the same blood type as that found in the victim coincidentally raped and killed her the same night that defendant and his co-perpetrator burglarized her apartment which, the court concluded, "no honest, fair-minded jury would entertain . . . as a ground for reasonable doubt of defendant's guilt." (*Ibid.*)

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[60] In *Cahill*, the defendant's involuntary statement admitted he and another man entered the victim's apartment with an intent to steal; defendant took the woman's purse and briefcase, and the other man attacked and raped the victim. (*People v. Cahill*, *supra*, 22 Cal.App.4th at p. 308.) According to defendant's admissible statements, he committed an unrelated burglary by himself the night the victim was killed; during that other burglary, defendant took checkbooks which he later lost; after the first burglary and on the same night, he left his house with the intent to commit another theft. (*Id.* at p. 319.) The checkbooks from the first burglary were found in the murder victim's bedroom, and blood-typing evidence established that appellant, but not the co-perpetrator, could have been the source of the semen found in the victim. (*Id.* at pp. 302, 319.) The court found that this evidence compelled the conclusion that defendant was in the victim's bedroom and raped her. (*Id.* at p. 319.)

In contrast, in this case, appellant's involuntary statements were not a limited portion of the overall confession, but included many details of the crimes as well as a confession to stabbing both victims and strangling one. There was no physical evidence placing appellant either inside the Demkos' house or in the desert where they were killed. Moreover, defense counsel presented what was missing in *Cahill* – a "candidate theory" for reasonable doubt. Although the prosecutor may have mocked the defense in his closing argument (12 RT 3230-3221), the length of the jury's deliberations and the nature of its questions show that the jurors did not reject the defense out of hand. Plainly put, the State cannot prove beyond a reasonable doubt that the erroneous admission of appellant's involuntary statements did not contribute to the convictions.

4. Assuming, Arguendo, This Court Were To Find The Admission of Appellant's Involuntary Statements To Be Harmless Beyond A Reasonable Doubt with Regard to the Convictions, The State Could Not Carry its Harmless-Error Burden with Regard to the Special Circumstances and the Death Penalty

At a minimum, the admission of appellant's involuntary statements requires reversal of all the special circumstances findings and the death verdict. In discussing CALJIC No. 8.80.1, the trial court, the prosecutor, and defense counsel all agreed that the "reckless indifference to human life" provision did not apply, and that if the jury found appellant was not the actual killer, the jury was required to find that he had an intent to kill before it could return the burglary, robbery or multiple-murder special circumstances. (11 RT 2938-2939.) The jury was so instructed. (13 RT 13

RT 3315; 2 CT 552.)[61] The instructions also required proof of an intent to kill for the kidnapping special circumstance (2 CT 556-557; 13 RT 3318-3319), regardless of whether the jury found appellant to be the actual killer or an accomplice.

Just as there was room for reasonable doubt as to whether appellant participated in the crimes against the Demkos, there was room for reasonable doubt about whether he was the actual killer or an accomplice. And the State cannot prove beyond a reasonable doubt that without the coerced part of appellant's custodial statements, the jury unanimously would have found that appellant harbored an intent to kill as required by the instructions to find the special circumstances true and to impose a death sentence.

In the admissible portion of appellant's statements – before Heard coerced his admission that the plan was to kill the people in the house – appellant, as part of the group led by Neal and Left Eye, participated in the burglary, robbery, and kidnapping. However, appellant, nauseous, got out of the car on the way to the desert, and was left by the side of the road when he realized what was likely to happen. (See Statement of Facts, *ante*, at pp. 18-21.) This version does not establish that appellant had an intent to kill.

Nor does McCune's testimony about appellant's telephone call from jail. In it, appellant said he was forced at gunpoint to drive the car with the

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[61] The instruction 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 and abetter, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided and abetted or assisted any act in the commission of the murder in the first degree." (2 CT 552; 13 RT 3315.)

victims in the trunk to the desert. But appellant said nothing about who killed the Demkos or anything else from which a jury could infer, beyond a reasonable doubt, that appellant acted with an intent to kill.

Hunter's testimony that appellant talked about getting a car and the people coming up missing may be probative of the intent to kill question, but that statement is too insubstantial, particularly in view of grounds for questioning Hunter's credibility (see section C.3., *ante*, at pp. 159-160), to prove the essential intent-to-kill element beyond a reasonable doubt.

The statements by appellant portraying himself as the actual killer or as an aider and abetter who took actions from which an intent to kill could be inferred came after Heard coerced appellant's admission that he knew about the plan to kill the people in the house. (See Statement of Facts, *ante*, at pp. 21-26.) Without these involuntary statements, the evidence that appellant was the actual killer or an aider and abettor who had an intent to kill was far from overwhelming and, for many of the reasons discussed already, left ample room for reasonable doubt about whether the prosecution had proved them.

Finally, the admission of the involuntary statements cannot be proved harmless beyond a reasonable doubt with regard to the death sentence. The details appellant provided in the inadmissible interrogations were part of the "circumstances of the crime" the jury considered under section 190.3, factor (a). They were the only evidence outlining in graphic terms the undeniably disturbing facts of crimes against Andrew and Shirley Demko, including their being bound and shut in the trunk of their car, Mr. Demko's question about what was being done to his wife (4 RT 1147), Mrs. Demko's plea that she not be killed (4 CT 1141), and the manner in which they were strangled and/or stabbed. These aggravating details likely

had an "indelible impact" on the jury at the penalty phase as well as the guilt phase. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 313 (conc. opn. of Kennedy, J.).) Certainly, they influenced the trial court's assessment of the evidence in his ruling on the section 190.4, subdivision (e) ruling. (16 RT 4192-4193 [emphasizing premeditated and deliberate nature of crimes and unnecessary brutality in kidnapping and murder in the desert].) Given their importance to the trial court, appellant's involuntary statements likely carried a similar importance for the jury in determining his punishment, and in this way likely "contributed to" the jury's death verdict. (See *Fulminante v. Arizona, supra*, 499 U.S. at p. 301 [confession influenced not only jury's decision to convict, but sentencing judge's decision to impose death].)

In sum, the erroneous admission of appellant's involuntary custodial statements cannot be proved harmless under *Chapman v. California, supra*, 386 U.S. at p. 24, and requires reversal of the entire judgment or, in the alternative, reversal of all the special circumstance findings and the death sentence.

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO REDACT STATEMENTS APPELLANT MADE DURING CUSTODIAL INTERROGATIONS ABOUT PAWNING HIS SWORDS AND PREVIOUSLY COMMITTING BURGLARY

After the trial court ruled that appellant's interrogation statements were voluntary and admissible, it ordered that certain statements, including appellant's references to his own prior bad acts, had to be deleted before the evidence could be presented to the jury. The prosecutor redacted the tapes and transcripts, but appellant objected to several remaining passages: in one, appellant talked about pawning his sword collection and in others, appellant's comments indicated he previously had committed burglary. The trial court found the probative value of the challenged statements outweighed their prejudicial impact under Evidence Code section 352, and refused to order any further redactions. The trial court abused its discretion in denying appellant's requests to delete these specified references, and as a result, the admission of this inflammatory evidence violated state law and appellant's right to a fair trial and due process under the Fourteenth Amendment to the United States Constitution.[62]

A. The Proceedings Below

On March 3, 2003, before the start of jury selection, appellant moved to preclude all mention in the guilt phase of the trial of his "being in prison, being on parole, having priors for burglary, shooting other people, stabbing

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[62] The reference to the blades or swords and some of the statements indicating a prior burglary were made during the November 26, 2000 interrogation and thus are not affected by the claim in Argument II that appellant's statements to investigator Heard on November 27 were involuntary and thus were unconstitutionally admitted.

other people, being an ex-con . . . ." (4 RT 782-783.) The motion was premised on the assumption that he would not testify. (*Ibid.*) The prosecutor argued that appellant intended to call psychologists who would offer opinions about appellant's background, and the evidence the defense sought to exclude would be relevant to their conclusions. (4 RT 783.) The trial court acknowledged that "[o]rdinarily . . . this is a pro forma motion. You ask for it and it's granted and nobody objects . . . ." (*Ibid.*) Agreeing with the prosecutor, however, the court stated that by putting appellant's mental state, specifically his confabulations, in issue, his criminal background was relevant to the psychologists' opinions. (*Ibid.*) The court therefore granted appellant's motion with the caveat that should the defense psychologist testify, the prosecutor would be allowed to question the psychologist about her consideration of appellant's prior record in reaching her opinions. (4 RT 784.) It was agreed that the prosecution would redact appellant's interrogation statements to investigating officers (4 RT 784-785), and the redactions were made.[63]

However, statements indicating appellant possessed and pawned a knife collection and previously committed burglary remained in the redacted version of the interrogations. On March 17 and March 18, 2003,

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[63] See, e.g., redaction of references to appellant's polygraph examination (compare 5 CT 1273, 1290 with 5 CT 1423, 1439) and his prior convictions (compare 3 CT 810 with 3 CT 887 and 5 CT 1249 with 5 CT 1400), and redaction of questions and answers about stabbings (4 CT 1030, 1035 with 4 CT 1133-1134 and 5 CT 1304 with 5 CT 1453), beating up people (compare 4 CT 1033 with 4 CT 1133-1134), shooting at people (compare 4 CT 1033 with 4 CT 1133-1134), run-ins with the law (compare 3 CT 802 with 3 CT 878), and being an ex-con (compare 3 CT 815 with 3 CT 891 and 5 CT 1268 with 5 CT 1418).

defense counsel sought to exclude these statements as irrelevant and/or more prejudicial than probative under Evidence Code section 352. (8 RT 1788-1792, 1902-1900.) The trial court denied all of appellant's requests, finding the evidence more probative than prejudicial. (8 RT 1789, 1791-1792, 1904, 1906, 1908-1909.)[64] Appellant's statements to the investigating officers, including these challenged portions, were played for the jury (2 CT 450-453, 457-459), and the transcripts of those statements were provided to the jury in the jury room (2 CT 589-590; 13 RT 3343-3344). The defense did not call a psychologist to testify at the guilt phase.

B. The Trial Court Abused Its Discretion In Refusing To Redact Inflammatory Statements Appellant Made During Custodial Interrogations Indicating He Possessed A Sword Collection And Had Previously Committed Burglary Because The Evidence Had Little Or No Relevance And Its Prejudicial Effect Far Outweighed Any Probative Value

Only relevant evidence – that which has "any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210) – is admissible (Evid. Code, § 350). Even relevant evidence should be excluded "if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues or of misleading the jury." (Evid. Code, § 352.) Evidence of a person's conduct "is inadmissible when offered to prove his or her conduct on a specified occasion" (Evid. Code, §1101, subd. (a)), but is admissible "when relevant to prove some fact . . . other than his or her disposition to commit such an

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[64] Appellant's specific objections, the parties' arguments, and the trial court's rulings are set forth in the discussion in section B below.

act" (Evid. Code, §1101, subd. (b)). Notwithstanding the hearsay rule, a declarant's statement is admissible against him in an action to which he is a party. (Evid. Code, § 1220.) Finally, trial court rulings regarding relevance and Evidence Code section 352 are reviewed for an abuse of discretion. (*People v. Linton* (2013) 56 Cal.4th 1146, 1181.)

1. The References to Appellant's Sword Collection Were Irrelevant Yet Inflammatory

Defense counsel requested that the trial court order the deletion of appellant's discussion of his "blade collection" during the November 26 interrogation. (8 RT 1791.) In that interview, appellant denied participating in the burglary and stated he was asked to get rid of the TV and VCR. (3 CT 891-893 [Exh. 256f (redacted transcript), pp. 24-26].) With reference to appellant's parole status redacted from the interview, the following conversation ensued:

Battle:	So, and I was already, because I needed some money I was already taking my movies to the pawn shop cause I had a lot of movies to pawn or, or sell. I even had some, I had started ah a blade collection again but I had to get rid of them so I pawned those as well.
Gilliam:	What's a blade collection?
Battle:	Well, I had ah, ah Dragon like a knife type of sword and I had ah, ah, ah antique like ah, ah Irish sword.
Gilliam:	Just two?
Battle:	Yeah, just two.
Gilliam:	Where did you pawn those at?
Battle:	Um I don't know the name of it, but it's on 7th St. . . . .

Gilliam: Did you pawn it in your name?

Battle: Yes.

(3 CT 893-894 [Exh. 256f (redacted transcript), pp. 26-27].)

Defense counsel objected to the admission of evidence of the blade collection on the grounds that it was irrelevant to the case, and also should be excluded under Evidence Code section 352, because it "creates an inference that Mr. Battle's an experienced user of knives" and, in light of the fact that the victims were killed with a knife, the jury would find it was "more likely he might have committed the crime because he has a huge knife collection that he pawned." (8 RT 1791, 1792.) The risk that the inflammatory impact of the evidence would outweigh any relevance it might have was increased because, as defense counsel pointed out, no murder weapon was found in this case, and there was no other evidence of appellant pawning these blades. (8 RT 1791.)

The trial court responded that there was "a lot of stuff in this interview that was irrelevant." (8 RT 1791.) The prosecutor argued that the victims had not been stabbed with a sword, and that appellant himself had drawn a picture of the kitchen knife used to kill the victims; he asserted the jury would not be misled and draw an inference that the victims were stabbed with swords. (8 RT 1792.) The court reiterated its question about the relevance of the evidence: "What's the relevancy that your client talked about it? . . . There are a lot of things in here that are irrelevant." (8 RT 1792.) It found that the probative value of the evidence outweighed the prejudicial effect under Evidence Code section 352, and allowed the evidence of appellant's blades to be admitted as part of the interrogation statements. (*Ibid.*)

The trial court's ruling was incorrect. As a preliminary matter, the court appeared to agree with defense counsel that evidence of appellant's sword collection had no relevance. (See 8 RT 1791-1792.) Notably, the prosecutor did not counter appellant's objection or the trial court's observations with any theory of relevance that would justify or support references to the blade collection in this case where the murder weapon was never found. (9 RT 2100.) On the contrary, the prosecutor's own observations – that appellant's drawing of the knife used in the crimes did not match his description of the blades in his collection and that the victims were not killed with any type of sword (8 RT 1792) – underscored the complete lack of relevance of the evidence, particularly since the key disputed issue was whether appellant was the person who committed the crimes against the Demkos. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 403 [greatest degree of similarity is required before instances of conduct on other occasions can be introduced to prove identity].)

The evidence that appellant possessed, but pawned, two swords possibly at some point near or after the crimes "gave rise to no permissible inferences making a fact of consequence more or less probable." (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1383.) On the lack of relevance, this case is analogous to *McKinney v. Rees*, *supra*, in which evidence that defendant owned a Gerber knife, wore camouflage clothing and carried a knife, and carved "Death is His" into his closet door was not probative of any disputed fact, including whether he had the opportunity to murder his mother (*id.* at pp. 1381-1383), and *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, in which evidence that the defendant's mother and stepfather possessed a set of knives manufactured by the same company as the purported murder weapon was not relevant because it did not connect

the defendant to the murder weapon (*id.* at pp. 887-888). Lacking any relevance, appellant's statements about his swords functioned only as character and propensity evidence, which was impermissible under Evidence Code section 1101, subdivision (a).

When evidence is irrelevant, the trial court has no discretion to admit it. (*People v. Alexander* (2010) 49 Cal.4th 846, 904.) This fundamental rule is not altered when the evidence consists of a defendant's extrajudicial statements. Evidence Code section 1220 provides an exception to the hearsay rule when a defendant's statements are introduced against him at trial, but like all evidence, such statements still must be relevant to be admissible. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 849 ["'Evidence Code section 1220 creates an exception to the hearsay rule for [an] admission of a party," but "does not define when a declarant-party's extrajudicial hearsay statement becomes *relevant* to be admissible against such party'"], quoting *People v. Allen* (1976) 65 Cal.App.3d 426, 433, original italics.) Having indicated that appellant's references to owning and pawning a sword collection lacked relevance, the trial court abused its discretion by refusing appellant's request to exclude them.[65]

Moreover, even assuming, arguendo, the blade-collection comments were relevant in some way, the trial court abused its discretion in finding that their probative value outweighed their prejudicial effect. The court's cursory ruling does not reveal its assessment of either the purported

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[65] The trial court's observation that "[t]here are a lot of things in here that are irrelevant" (8 RT 1792) does not justify its ruling. The fact that appellant may have made other irrelevant statements during the interrogation that defense counsel did not perceive as problematic or prejudicial does not undercut the validity of the objection to the irrelevant and inflammatory blade-collection evidence he sought to exclude.

probative value or the potential prejudice of the blade-collection evidence. The fact that the sword collection differed from the murder weapon did not erase its prejudicial impact. As defense counsel indicated, the danger lay in the possibility that the jury would use the blade collection as propensity evidence, i.e. that the jury would use appellant's interest in knives and possession of a sword collection as making him more likely to have been the person who used a knife to stab the Demkos to death. (8 RT 1791-1792.)

This is precisely the type of character and propensity evidence that Evidence Code sections 1101, subdivision (a) and 352 are designed to prohibit. (See *People v. Villatoro* (2012) 54 Cal.4th 1152, 1171 ["allowing a defendant to be convicted because of his bad character is generally impermissible not only under California law (§ 1101(a)) . . ., but is also 'contrary to firmly established principles of Anglo-American jurisprudence.'"].) The discussion of appellant's blade collection, although one passage in a long interrogation, "served only to prey on the emotions of the jury" and lead the jury "to believe more easily that he was the type" who would stab and kill the Demkos. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1385.) Moreover, because the jury could have inferred from appellant's statements that he pawned the swords after the crimes, the jury might have considered his unexplained act of getting rid of the swords as showing he used one or both of them in the commission of the crimes and his consciousness of guilt.

In sum, the prejudicial effect resulting from the jury's likely consideration of the blade-collection statements as propensity evidence far outweighed any probative value it might have had, and the trial court abused its discretion in refusing to redact the references to the sword

collection. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 [evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant and yet has very little effect on the issues]; *People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14 [evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome"].)

2. The References Indicating Appellant Previously Had Committed Burglary Lacked Substantial Probative Value and Were Highly Inflammatory

Defense counsel objected to statements appellant made during the interrogations that, read in context, indicated he had committed burglary on another occasion. First, during the November 26 interview, when appellant said he entered the victims' home with four other people, detective Gilliam asked appellant why they approached the house from different directions. (4 CT 939 [Exh. 256f (redacted transcript), p. 72].) The following exchange ensued:

Battle: Ah, me, I don't know he, Neil was basically trying to tell me that, that, that I looked stressed out.

Gilliam: Ah huh.

Battle: And um that I should, I've done it before ah I, I shouldn't sweat it cause he said I was looking all clammy and stuff. I didn't really pay that much attention.

Gilliam: Did you guys ah ...

Battle: Because I always look kind of shaky ...

Gilliam: Ah huh.

Battle: before I do something.

(*Ibid.*; see 8 RT 1789.) Defense counsel asserted that this statement created "a definite inference that there's been a prior." (8 RT 1789.) The court acknowledged that defense counsel "had a point." (*Ibid.*)

The prosecutor argued it was not clear whether Neal was saying that he, Neal, had "done it before," or if he was saying that appellant had "done it before." (8 RT 1789.) The court agreed and further noted, "It doesn't say what he's done before." (8 RT 1790.) Defense counsel countered that, taken in context, Neal was telling appellant that Neal knew appellant had "done it before" and therefore should not be "all sweaty" and "nervous" about going to the house, which "created an inference that appellant is an experienced criminal." (8 RT 1790.) The trial court determined that defense counsel's view was "one interpretation" of the evidence, but found there was nothing improper and refused to strike the evidence. (8 RT 1790-1791.)

Second, defense counsel objected to two passages during the afternoon interrogation on November 27 by detectives Gilliam and Pacifico. Appellant had explained that he was told to go back into the house after the crimes to take some items. (5 CT 1326 [Exh. 259h, p. 11].) Detective Pacifico asked why, and appellant responded:

> I don't know, it's like I told you, I, I never did anything like this, especially with people. I never did anything with anybody.

(*Ibid.*; see 8 RT 1903.) The prosecutor argued that the statement contained no reference to a prior burglary and was a complete denial of doing "anything." (8 RT 1904.) The court refused to strike the statement, finding the probative value outweighed the prejudice. (8 RT 1904.)

Defense counsel also objected to a statement a bit later in the same interview where appellant explained why he did not cover his face with a stocking and wear a beanie as the others did. (5 CT 1337 [Exh. 259h, p. 22.) The following exchange took place:

Battle:	Huh, like I said, I'd never uh, worked with a team or anything like that before.
Pacifico:	Okay.
Battle:	I, I was just used to having gloves.

(*Ibid.*; see 8 RT 1904-1905.)

Defense counsel argued that this statement, taken in context with the previous comment, implied that appellant had done burglaries in which he used gloves, and asked the court to exclude the evidence. (8 RT 1904-1905.) Disagreeing, the court observed that if appellant had come out and said, "'When I did my other burglaries, I did it this way,' well, then maybe that's something to talk about." (8 RT 1905.) The court also noted that the prosecutor contended appellant's interrogation statements were not the truth, but were lies: "If it's not the truth, then what difference does it make?" (*Ibid.*) The court reasoned that given the other things already excluded, the statement was not "particularly damning." (*Ibid.*) The court also asserted that its ruling had pertained to appellant's parole status and defense counsel was taking the ruling one step further than agreed. (*Ibid.*) The court found that the probative value of the evidence outweighed the prejudicial effect and allowed the evidence. (8 RT 1906.)

Third, defense counsel objected to the admission of three other comments appellant made later in the same interrogation on November 27 which, he argued, implied appellant had committed a prior burglary. (8 CT 1906-1908.) In describing his entry into the Demkos' house, appellant said:

> The man was awake and I had never break, broken into a house with somebody that was there.

(5 CT 1399 [Exh. 259h, p. 84].) Two transcript pages later, in talking about how he gained access to the house through the unlocked door, appellant said:

> Battle: . . . I mean old couples, they usually leave the back door unlocked, if they have a fenced in area and have dogs ...
>
> Gilliam: Mmm-hmm.
>
> Battle: I'm just, I'm just used to that.

(5 CT 1401 [Exh. 259h, p. 86].) Shortly thereafter, appellant said he left the house and went back to the Rancherias residence where he told Perry what had happened. (5 CT 1403 [Exh. 259h, p. 88].) He explained:

> I'm practically in tears when I get back to the house, cause I guess that I've never did anything with people in the house before.

(*Ibid.*) Defense counsel argued that, taken together, these statements clearly implied that appellant not only had done burglaries when no one was home, but had burglarized elderly people's homes. (8 RT 1907, 1909.) He objected to the admission of these statements as irrelevant and highly prejudicial. (8 RT 1907-1908.)

In response, the prosecutor argued that appellant's statement about elderly people leaving their doors unlocked did not necessarily refer to having done burglaries, but could have referred to other experiences, such as with grandparents. (8 RT 1908.) In addition, the prosecutor opined that appellant's statement that he had never done anything with people in the house before was just "one line in a whole long list of denials and various stories," and that he did not think the jury was "going to infer from that he's

done a burglary or numerous burglaries in the past." (8 RT 1909.) The trial court noted that the salient phrase with regard to this last statement was "'I guess' – he's not admitting that he did it, he's saying, 'I guess.'" (8 RT 1909.) The court found the probative value of appellant's statements outweighed the prejudice and admitted the evidence. (8 RT 1909.)

a. In the challenged statements, appellant impliedly admitted that he previously had committed burglary

As with the evidence about appellant's sword collection, the trial court abused its discretion in refusing to delete from the interrogations the passages containing appellant's statements, all made with regard to the burglary of the Demko's house. In assessing the admissibility of these statements, they should be given a commonsense reading and viewed as the jurors would likely have understood them. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 953 [this Court assessed evidence of asportation "using a commonsense or lay person's view of what constituted a kidnapping"].) These statements, taken together and read in context, at a minimum conveyed to the jury that appellant (1) previously had committed burglary (4 CT 939; 5 CT 1326, 1337, 1339, 1403), and went further to convey that he (2) had committed burglary by himself and not with others (5 CT 1326, 1337); (3) had committed burglary when the residents were not home (5 CT 1399); and (4) had burglarized the home or homes of elderly people (5 CT 1401, 1403).

The prosecutor's observation, in part echoed by the trial court, that the statements did not clearly refer to committing burglary, was not well-founded. To be sure, appellant never used the word "burglary," as both the prosecutor and trial court noted. (8 RT 1904, 1908 [prosecutor] and 8 RT 1905 [trial court].) But appellant did not need to use such explicit language

to convey that he had committed at least one prior burglary. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 505 ["187" shaved into defendant's hair was admissible as an implied admission]; *People v. Haskett* (1990) 52 Cal.3d 210, 249 [defendant's statement, "shut up, all the other girls had done what he wanted," was an implied admission of having committed other crimes].) As defense counsel argued, the clear implication of appellant's statements, uttered in the context of discussing the burglary of the Demkos' house, was that he had done a burglary before. (8 RT 1789, 1907, 1909.) Indeed, the trial court initially appeared to agree with defense counsel that appellant's statement, "I always look kind of shaky . .. before I do something," created "a definite inference that there's been a prior." (8 RT 1789.) If, as the trial court found, this reading was "one interpretation" (8 RT 1790), then it would have been reasonable for the jury to interpret the comment that way – as admitting a prior burglary.

Similarly, the prosecutor's argument that, in the first challenged statement, it was not clear whether the phrase "I've done it before" referred to Neal talking about himself or about appellant (8 RT 1789) does not negate appellant's implied admission that he previously had committed burglary. Whichever way the ambiguous phrase is read, the significant point is the passage that follows in which appellant unmistakably refers to himself: "I didn't really pay that much attention" (to Neal's statement) "[b]ecause I always look kind of shaky . . . before I do something." (4 CT 939.) Whether, in the middle of the challenged passage, Neal was referring to his own prior burglary or appellant's is not the key issue. What matters is that at the end of the passage appellant clearly was referring to his own prior unlawful entry.

In deciding whether further deletions were required to comply with its original redaction order, the trial court should have assessed the plain meaning of appellant's statements in their obvious context. Instead, it focused on common, unremarkable speech patterns, such as the phrase "I guess" in the final challenged statement – "I guess that I've never did anything with people in the house before" – to find that appellant was *not* admitting a prior burglary. (8 RT 1909.) Such parsing of individual words may be appropriate when construing a statute, but it is not how the jurors would have understood the meaning and import of appellant's statement. In a similar vein, the prosecutor attempted to convert appellant's statement, "I never did anything like this, especially with people. I never did anything with anybody" (5 CT 1326), from an implication that he had done a burglary by himself into a "complete denial" of having done "anything." (8 RT 1904.) But that hyper-technical, indeed contorted, reading is not how the jurors would have perceived the comment. They likely would have heard and read both these statements, as well as the others, as saying what they obviously implied – that appellant previously had done a burglary.

Finally, the trial court's observation that, under the prosecution's theory, many of appellant's interrogation statements were lies (8 RT 1905) does not diminish the significance of appellant's implied admission. The jury, not the prosecutor, was the fact finder charged with determining which evidence was "true" and which was "false." (See 3 CT 485; 13 RT 3267 [CALJIC No. 1.00 on duty to determine the facts from the evidence].) And as the fact finders, the jurors were free to credit or disbelieve any of appellant's statements, including those about committing a prior burglary, as they, in their own judgment, saw fit.

In sum, the challenged statements plainly conveyed that appellant had committed a prior burglary.

b. The prejudicial effect of appellant's implied admissions far outweighed any probative value

This Court has long recognized that evidence of a defendant's uncharged crimes has a "'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314; accord, *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) The reason is well-known: "[A]dmission of such evidence produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.'" (*People v. Thompson, supra*, at p. 317, quoting 1 Wigmore, Evidence, § 194, p. 650; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Because a substantial prejudicial effect is inherent in evidence of uncharged offenses, such evidence is admissible only if it has "'*substantial* probative value.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, original italics.) Evidence of uncharged misconduct is so prejudicial that its admission requires "'extremely careful analysis.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *Ewoldt, supra*, 7 Cal.4th at p. 404.) "[A]ll doubts about its connection to the crime charged must be resolved in the accused's favor. [Citations]." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, abrogated by statute on other grounds, *People v. Falsetta* (1999) 21 Cal.4th 903, 911.)

In this case, although defense counsel objected that evidence of a prior burglary was irrelevant (8 RT 1907-1908, 1909), the trial court did not explicitly assess its probative value. Nor did the prosecutor explain the relevance of the evidence. The court simply found nothing improper with

the first challenged statement – "Because I always look kind of shaky . . . before I do something" – (8 RT 1790-1791) and found the probative value of the other statements outweighed their prejudice (8 RT 1904, 1906, 1909). Of course, as evidence solely of criminal propensity, the statements that appellant had committed a prior burglary were inadmissible under Evidence Code section 1101, subdivision (a). And, as noted above with regard to the blade-collection evidence, if the statements had no permissible probative value, they were inadmissible. (Evid. Code, §§ 210, 350; *People v. Alexander*, *supra*, 49 Cal.4th at p. 904.) Even assuming, arguendo, that the evidence was relevant to prove some fact admissible under section 1101, subdivision (b), the trial court abused its discretion in finding that whatever probative value the statements had outweighed their prejudicial effect.

The factors this Court outlined in *Ewoldt* for determining whether other crimes evidence is admissible under Evidence Code section 352 lean toward excluding the prior-burglary admissions. (See *People v. Ewoldt*, *supra*, at pp. 404-405 [discussing factors]. First, as noted above, the prosecution proffered no theory of relevance for the prior-burglary evidence, so there is no basis for finding it material to the fact for which it was introduced. (See *People v. Gray* (2005) 37 Cal.4th 168, 202 [the admissibility of evidence of uncharged offenses "depends on the materiality of the fact to be proved"]; *People v. Valdez* (2004) 32 Cal.4th 73, 109 [evidence with "minimal" probative value properly excluded under section 352].) Even assuming the admissions were relevant to prove appellant's intent to burglarize the Demkos' home, the evidence hardly could be characterized as being of "substantial" probative value, as required by *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, in a case where appellant's own interrogation statements, if believed, repeatedly admitted this fact.

Moreover, the prior-burglary evidence could not be considered material to the purpose for which the prosecution introduced appellant's interrogation statements. As the prosecutor theorized in his closing argument, the details about the charged crimes that appellant disclosed during the interrogations established that appellant, and only appellant, was the person who burglarized, robbed, kidnapped and killed the Demkos. (12 RT 3102-3117, 3128; see Argument II.C.1., *ante*, at pp. 152-153.) The prior-burglary statement was not material to proof of the perpetrator's identity.

Second, the prior-burglary evidence was not independent from, but was part of, the prosecution's primary evidence on the charged crimes against the Demkos – appellant's interrogation statements. Third, there was no evidence that appellant was apprehended for his other burglary, and thus the jury was free to speculate that he had escaped unpunished, which breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses . . . ." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317, quoting 1 Wigmore, Evidence, § 194, p. 650.) Fourth, the date of the prior burglary was not stated, which also left the jury free to speculate that it could have been close in time to the crimes against the Demkos. Finally, the only *Ewoldt* factor that does not weight the probative-prejudice balance toward a finding of prejudice is that the uncharged burglary was not more inflammatory than the charged crimes, burglary, robbery, kidnapping and murder. In this case, however, burglary assumed particular importance as the predicate act from which all the other crimes resulted. On balance, the other factors show that the trial court abused its discretion in admitting the challenged statements.

In refusing to redact appellant's implied admissions of a prior burglary, the trial court considered none of these factors. Rather, the court's only explanation for its conclusion that the probative value of the evidence outweighed its prejudicial effect was that the challenged evidence was not "particularly damning" when compared to the material that already had been redacted. (8 RT 1905). But that is not the test. The fact that even more inflammatory evidence – such as references to the polygraph examination and its results – was deleted does not render the prior-burglary evidence benign. Although part of a long, two-day interrogation, appellant's implied admissions to a prior burglary packed a prejudicial punch. They were exactly the type of evidence that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues" and is therefore prejudicial within the meaning of Evidence Code section 352. (See *People v. Karis* (1988) 46 Cal.3d 612, 638.) The risk that the jury would conclude that appellant had a criminal propensity for burglary and was therefore guilty of the charged crimes, which included burglary, far outweighed any probative value the evidence may have had. (See *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396-1397 [danger of undue prejudice from admitting defendant's statements to detective that he had raped sister and niece, which was not admissible to prove identity, outweighed probative value in prosecution for molesting daughter].) Consequently, the trial court abused its discretion in admitting this evidence.

C. The Erroneous Admission Of The Sword And Prior-Burglary Evidence Resulted In A Miscarriage Of Justice Under State Law And Rendered The Trial Fundamentally Unfair In Violation Of The Due Process Clause Of The Fourteenth Amendment

Under state law, reversal of the guilt verdict is required if there is a reasonable probability that appellant would have achieved a more favorable result in the absence of the erroneously admitted evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under this standard, the verdict must be overturned if there is a reasonable probability that, in the absence of the erroneously admitted evidence, at least one juror would have had a reasonable doubt as to appellant's guilt and would have refused to convict. (*People v. Bowers* (2002) 87 Cal.App.4th 722, 736 ["a mistrial [is] a more favorable result for defendant than conviction" under *Watson* standard].) The trial court's refusal to exclude the evidence of appellant's sword collection and his prior burglary was prejudicial and requires reversal of the entire judgment.

At the guilt phase, the central issue for the jury to decide was whether appellant committed the crimes against the Demkos. As set forth above in Argument II.C., *ante*, the jury was presented with two sharply conflicting stories. The prosecution contended that although appellant presented several false versions about who committed the crimes, the detailed information he provided during the interrogations was proof that he was the person who kidnapped and killed the Demkos. The defense argued that appellant learned the details of the crimes primarily from, and fabricated his various stories out of fear of, the killer, Perry Washington, who recently had burglarized another elderly man's home, whose two-strike status gave him motive to kill the victims in this burglary, and who, with his

girlfriend, ended up using the Demkos' credit cards and checks. The point of the defense was not necessarily to prove that Perry Washington committed the crimes, but to raise a reasonable doubt in the jurors' minds that appellant did not. The erroneously admitted evidence of appellant's sword collection and prior burglary, taken separately and together, undercut the defense and thereby bolstered the prosecution's case. The prior-burglary evidence allowed the jury to view appellant as an experienced burglar, much like Perry Washington. In addition, knowing that appellant had collected swords likely made it easier for the jurors to credit the prosecution's view that appellant stabbed the Demkos to death.

The prejudicial impact of this highly inflammatory evidence must be viewed in the context of the entire case. As discussed previously in Argument II.C., the prosecution may have had a strong case, but it was not an overwhelming one that permitted no room for reasonable doubt. Jenica McCune, Matthew Hunter, and William Kryger, key witnesses for the prosecution, had credibility problems. (See Argument II.C.3. *ante*, pp. 159-161.) Appellant possessed the Demkos' car and some other property, but no physical evidence tied appellant to either their house, where the burglary and robbery occurred and kidnapping began, or to the place in the desert where they were killed. (See Argument II.C.3. *ante*, pp. 156-157, 161.) There was question about the thoroughness and adequacy of the law enforcement investigation of the physical evidence. (See Argument II.C.3., *ante*, pp. 161-162.) Moreover, the jury did not reach a verdict quickly, but deliberated for seven days and asked questions relating to appellant's role in the crimes. (See Argument II.C.2., *ante*, pp. 153-156.) All of this indicates that the convictions were not a forgone conclusion, and thus there is a reasonable probability that without the inflammatory evidence that appellant

had and pawned a sword collection and previously had committed burglary, at least one juror would have had reasonable doubts about appellant's guilt and not voted to convict.

The erroneous admission of the evidence not only resulted in a miscarriage of justice under state law, but also deprived appellant of his right to a fair trial under the due process clause of the Fourteenth Amendment.[66] The United States Supreme Court has recognized that the improper admission of evidence may violate the constitutional right to a fair trial (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) The question is whether the evidence "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The answer requires an "examination of the entire proceedings in [the] case." (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [judging challenged instruction in the context of the instructions as a whole and the entire trial record]; *Darden v. Wainwright* (1986) 477 U.S. 168, 182 [considering prosecutor's improper argument in the context of defense counsel's argument, the trial court's instructions and the overwhelming evidence of guilt on all charges].)

The unfairness of the admission of the challenged evidence is patent. All the factors discussed above that made the error a miscarriage of justice also made it a due process violation. The evidence that appellant had collected swords and previously had committed burglary, both individually

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[66] Appellant's federal constitutional claim is cognizable on appeal based on the Evidence Code section 352 claim he raised at trial. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

and cumulatively, likely worked to relieve the jurors of doubts they might have had about the prosecution's case, not because there was no reasonable doubt about the sufficiency of its proof, but because the erroneously-admitted evidence showed appellant to be a man with a proclivity toward knives and a criminal past committing the type of burglary that resulted in the murder of Andrew and Shirley Demko. In short, the challenged evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366; see *McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [admission of other crimes evidence violated due process where it was emotionally charged and similar to the charged crime, the remainder of the prosecution's case rested on circumstantial evidence, and the prosecutor relied on the other crimes evidence]; *United States v. Farmer* (2nd Cir. 2009) 583 F.3d 131, 146-147 [erroneous admission of evidence that defendant's nickname was "murder," which had little if any relevance, and prosecutor's use of the nickname so infected the trial with unfairness as to deny defendant due process]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-231 [erroneous admission of marginally relevant but highly prejudicial evidence of gang membership and activity deprived defendant of a fundamentally fair trial, in violation of due process].)

An error that so corrupts a trial with unfairness that it violates the due process clause cannot be deemed harmless error, but is itself a finding of reversible error. In this way, proof of the due process violation incorporates an assessment that the error mattered, i.e., that the error likely affected the verdict. The foregoing showing requires that the entire judgment must be reversed. Appellant need not make any further showing of prejudice. Even if the federal harmless error test applies to this due process violation, the state cannot show that the error was harmless beyond

a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at p. 24.

IV.

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DENIED APPELLANT'S REQUEST TO INFORM THE JURY THAT ANY LINGERING OR RESIDUAL DOUBT A JUROR HARBORED ABOUT HIS GUILT WAS A PERMISSIBLE MITIGATING FACTOR

Defense counsel requested an instruction that the jurors could consider any lingering or residual doubt they might have about appellant's guilt as a mitigating factor in selecting his sentence. The trial court denied the request. Its ruling was incorrect under state statutory law and its three-pronged rationale – that the instruction was confusing; that the guilt phase already had been tried; and that lingering doubt was not an issue in the penalty phase – was incorrect under this Court's decisions. In addition, the failure to define the concept of lingering doubt and explain its role in the penalty determination violated appellant's rights under the Eighth and Fourteenth Amendments to have the jury provided with notice and an understanding of the factors to be considered in selecting the appropriate penalty and give full effect to appellant's mitigating evidence. The omission also violated appellant's Fourteenth Amendment due process right to the enforcement of mandatory state statutory provisions and his state jury trial rights. In light of the evidence presented about the crimes during the guilt phase, the arguments of counsel, and the jury's deliberations at both phases of trial, the refusal to give the requested instruction cannot be dismissed as harmless error and requires reversal of the death sentence.

A. The Proceedings Below

On April 24, 2003, after the prosecutor rested his penalty phase case-in-chief (3 CT 634), defense counsel notified the trial court that he was "going to ask for a lingering doubt instruction" (13 RT 3575). The

following exchange occurred:

> THE COURT: We can take that issue up on the record, but you're not entitled to a lingering doubt.
>
> MR. KNISH [defense counsel]: I am going request that.
>
> THE COURT: If you want to brief it, but I know the law is real clear.
>
> MR. KNISH: I can specially argue it.
>
> THE COURT: I know the law says you're not allowed. That's not proper.

(*Ibid.*) Defense counsel returned to his request during a conference on the penalty phase instructions and asked the court to instruct the jury on lingering doubt. (15 RT 3995-3996.) Defense counsel understood that he was allowed to argue that the jurors could consider lingering doubt in deciding the appropriate punishment for appellant (15 RT 3395), but additionally requested the following instruction to help define and explain the concept:

> It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(3 CT 695 [citing *People v. Arias* (1996) 13 Cal.4th 92, 182 as authority].) Defense counsel emphasized that this was an important issue for this jury and the instruction "would be helpful" to the jurors in defining and setting out the parameters of the concept as a mitigating factor and letting the jurors know "how some courts have defined that term." (15 RT 3995.) Although the trial court did not "necessarily disagree" with defense counsel, it refused to give the instruction:

> I'm going to cite People vs. Fauber, F-a-u-b-e-r, 1992 case, 2

> Cal.4th 792 at 864, as the reason for my not giving it, giving lingering doubt. I think that instruction is confusing. We've already tried the guilt phase, and lingering doubt really isn't an issue in the penalty phase. You can argue, certainly. There's cases that say that you can argue it. But I don't think I have to give an instruction and I'm not inclined to do it.

(15 RT 3995-3996.)

As opposing advocates, defense counsel and the prosecutor presented the jurors with different views on both the appropriateness of re-examining the strength of the prosecution's case against appellant to decide if it warranted death and the definition of lingering doubt. In his penalty phase opening statement, defense counsel told the jurors that one of his "three themes for life" was that "you should never execute a man if you have any lingering or residual doubt about his guilt in a case." (14 RT 3585-3586.) He explained that he would "stand on all of the arguments" he made in the guilt phase and that, while he respected the jury's work, attentiveness, and verdict, the law allowed the jurors in the penalty phase to consider any lingering doubts they had about appellant's guilt. (14 RT 3586.)

In response, in his closing argument, the prosecutor initially conceded that "[f]actor K . . . embraces . . . lingering doubt." (15 RT 4030.) However, almost immediately thereafter, the prosecutor urged the jurors not to "focus on what you've already decided." (15 RT 4031.) He conflated lingering doubt with reasonable doubt and suggested there was no role for lingering doubt in the jury's deliberations for this consideration:

> . . . the principal [sic] behind it is, if you really don't think he did it, give him a break and give him life without parole instead of death.
>
> Well, you know, the defense got up in opening and told

> you they – the defense had respect for your verdict. I submit to you that if the defense argues lingering doubt to you, he has merely given lip service by saying they have respect for your verdict. Because what they're really asking you to do is to go back and find doubt in what you have already done.
>
> You've already determined that the defendant is guilty of these crimes. The defense wants you to go back and take a second bite of the apple and try to find some doubt where it doesn't exist. You all worked very hard and very conscientiously for a long period of time in reaching your decision in this case. This is not the time to go back and rehash all of those things. If there was doubt – if there was any reasonable doubt by any of you, you wouldn't have convicted the defendant in the first place.

(15 RT 4031.) Thereafter, defense counsel, as promised in his opening statement, urged the jury to spare appellant's life if questions remained unanswered about appellant's guilt beyond all doubt. (15 RT 4055, 4060-4064.)

B. The Trial Court's Refusal To Deliver The Requested Instruction On Lingering Or Residual Doubt, A Relevant Mitigating Factor In California, Violated Both State Law And The Federal Constitution

The legal adequacy of the trial court's instructions is reviewed independently. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

1. Under State Law, the Trial Court Should Have Provided Defense Counsel's Correct, Properly-Limited Statement of the Law to the Jury

Under California law, from at least 1965 to the present, lingering or residual doubt has been deemed a relevant mitigating circumstance for a capital jury's consideration at the penalty phase in deciding between life or death. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1221; *People v. Terry* (1964) 61 Cal.2d 137, 146.) In some cases, trial courts forthrightly have

informed the jurors about their power to rely on, and return a sentence less than death based on, this factor. (See *People v. Harrison* (2005) 35 Cal.4th 208, 255 [delivering similar, but lengthier, instruction to jury]; *People v. Valdez* (2004) 32 Cal.4th 73, 129 [delivering virtually identical instruction to jury]; *People v. Snow* (2003) 30 Cal.4th 43, 125 [delivering an instruction, approved by this Court, that was significantly longer than, but included same core concepts as, appellant's instruction]; *People v. Arias, supra*, 13 Cal.4th at pp. 182-183 [delivering same instruction, approved by this Court as a correct statement of law, as that rejected here]; *People v. Morris* (1991) 53 Cal.3d 152, 218-219 [delivering instruction that this Court characterized as "straightforward"].) Arbitrarily, in other cases, such as the present one, the trial court has not provided similar guidance to the jury. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 765 and cases cited therein; *People v. Ward* (2005) 36 Cal.4th 186, 219.)[67]

In this case, appellant proffered a short, clear and accurate instruction that addressed – and answered – two questions of law that were highly relevant to the jury's sentencing decision at the penalty phase. First,

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[67] In *Edwards*, the trial court instructed the jury on lingering doubt at the conclusion of the first penalty phase (*People v. Edwards*, California Supreme Court Case No. S073316 and Orange County Superior Court No. 93WF1180, CT 1198; RT 4192) and the jury was unable to reach a verdict (*Edwards, supra*, 57 Cal.4th at p. 669). At the conclusion of the penalty phase retrial, the trial court declined to instruct the jury on residual doubt, and the jury returned a death verdict. (*Id.* at p. 765.) In a separate motion filed concurrently with this brief, appellant requests that the Court take judicial notice of the records in *Edwards* showing the delivery of the lingering doubt instruction at the first penalty phase in *Edwards*. These records consist of the Clerk's Transcript pages 1181 and 1198 and the Reporter's Transcript page 4192 and are attached to both appellant's motion and this brief.

the instruction informed the jury that lingering doubt was an acceptable and permissible circumstance in mitigation of punishment, and second, the instruction defined the concept as occupying that place between reasonable doubt and all possible doubt. Thus, appellant's request met the fundamental requisites for an instruction: (1) it addressed the law, not the facts; (2) it addressed points of law relevant to the issues; and (3) it stated the law correctly. (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012), § 673, p. 1039.)

The trial court's characterization of the instruction as "confusing" is contradicted by this Court's decisions – before and after appellant's penalty trial – implicitly approving instructions with this language. (*See People v. Arias*, *supra*, 13 Cal.4th at pp. 182-183; [before]; *People v. Snow*, *supra*, 30 Cal.4th at p. 125 [before]; *People v. Valdez*, *supra*, 32 Cal.4th at p. 129, fn. 2 [after]; *People v. Gay*, *supra*, 42 Cal.4th at p. 1225 [after].) The trial court's other two reasons – that the jury had already tried the guilt phase and lingering doubt was not really a penalty phase issue – also are patently inconsistent with this Court's repeated pronouncements that capital jurors, both those who found the defendant guilty and those who served only as penalty retrial jurors, could consider any residual doubts and return a life verdict based on those doubts. (See, e.g., *People v. Gay*, *supra*, 42 Cal.4th at p. 1221; *People v. Sanchez* (1995) 12 Cal.4th 1, 77 [confirming that the jury's consideration of residual doubt was proper and the defendant could urge his possible innocence as a mitigating factor]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1252 [same].) Under all of the foregoing authorities, the trial court's three-fold reasoning was incorrect.

The trial court had a statutory duty to provide correct statements of law to appellant's jury upon request. Under section 1093, subdivision (f),

the judge "shall" charge the jury "on any points of law pertinent to the issues, if requested by either party[.]" (*Ibid.*; see also § 1127 [court must give requested instructions it "thinks correct and pertinent"].) The statutory command is mandatory and unmistakably clear. This Court recognized as much in *People v. Cox* (1991) 53 Cal.3d 618. In *Cox*, the Court determined that its earlier decision in *People v. Terry*, *supra*, 61 Cal.2d 137, authorizing a capital defendant to present evidence and/or argument relating to innocence or residual doubts about guilt, could not have addressed the trial court's duty to instruct on that concept because under the law at the time, "the jury received virtually no instruction at the penalty phase." (*People v. Cox*, *supra*, at p. 678.) The Court rejected Cox's argument that the trial court should have delivered his requested lingering doubt instruction, finding the instruction was improperly framed. The Court, however, in reliance on sections 1093 and 1127, opined that a trial court might "be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*Id.* at p. 678, fn. 20.) Although the Court subsequently retreated from this earlier observation as dictum (see, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 512-513), it has never suggested that the language of the statute was not mandatory, or that the statute imposed no duty to instruct a jury fully on the relevant law in a particular case.

The question, therefore, is whether other instructions, specifically CALJIC No. 8.85, factors (a) or (k) conveyed and defined the concept of lingering doubt under the facts of appellant's case so that the jurors were fully instructed in the applicable law. To be sure, the Court previously has determined in other cases that a jury might find room for consideration of lingering doubt in one or both of those CALJIC No. 8.85 factors. (See, e.g.,

People v. Thomas (2012) 53 Cal.4th 771, 826-827 (and cases cited therein) [confirming that factors (a) and (k) adequately cover the concept of lingering doubt]; *People v. Hamilton* (2009) 45 Cal.4th 863, 912 [finding that factor (a) includes residual doubt evidence]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272-1272 [reaffirming that the factor (k) instruction is sufficient "to encompass the notion of residual doubt"].) However, the plain language of the instructions suggest otherwise, and, therefore, appellant respectfully requests that this rationale be re-examined and discarded.

The instructions in the present case offered no definition of lingering or residual doubt, a key mitigating concept in the present case. The instructions were neither conflicting nor ambiguous on this point. There simply was no instruction defining that mitigating factor. The instructions given on the aggravating and mitigating factors, CALJIC No. 8.85, also were deficient on whether residual doubt, however defined or perceived by the jury, was a mitigating factor. In *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, a plurality of the United States Supreme Court observed that lingering doubt was neither a "circumstance of the offense" nor related to "any aspect" of a capital defendant's "character" or "record." In *People v. Cox*, *supra*, 53 Cal.3d at p. 676, this Court agreed. Indeed, the trial court here opined that lingering doubt was not really a penalty phase issue, although defense counsel could present argument on it. (15 RT 3995.) If the high court, this Court, and the trial court found that lingering doubt did not fit neatly into the sentencing factors, there is no reason to believe that appellant's jury, which, as discussed in section C. below, was confused about the term "extenuate" (3 CT 706), a concept essential to understanding the sentencing charge, reached a contrary conclusion and expanded the

instructions on its own to incorporate that principle.

The slim chance that the jurors would have intuited that residual doubt was a factor they could permissibly consider in mitigation was diminished further by the sharp disagreement of counsel over lingering doubt in their penalty phase arguments, particularly given the prosecutor's accusation that a defense argument based on lingering doubt would disrespect the jury's guilt phase verdict and insistence that revisiting any doubts about appellant's guilt would be improper. (See 15 RT 4031.) Plainly put, the instructions, taken as a whole, did not adequately inform the jurors of the scope of their sentencing authority: the instructions did not address the role of residual doubt in the jury's penalty deliberations, did not define the concept of lingering, as opposed to reasonable doubt, and did not resolve the opposing attorneys' irreconcilable views on this mitigating factor.

This Court's other rationale for declining to require a residual doubt instruction on request – that it is not required by the federal Constitution – also should be re-examined and discarded. The Court has noted that, in *Franklin*, the high court determined there was no federal constitutional right to a residual doubt instruction and has ruled that the same result obtains under state law. (*People v. Rogers* (2013) 57 Cal.4th 296, 348; *People v. Cox*, *supra*, 53 Cal.3d at pp. 676-677.) In *Franklin,* and more again in *Oregon v. Guzek* (2006) 546 U.S. 517, the United States Supreme Court declined to resolve whether the Eighth Amendment affords capital defendants the right to seek a sentence less than death on the basis of lingering or residual doubt. (*Id.* at p. 525.) In contrast, in California, as a matter of substantive capital jurisprudence since *Terry* was decided in 1965, "a capital jury may consider residual doubts about a defendant's guilt."

(*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1272.) Consequently, the question of whether an instruction is required is not appropriately answered logically or legally by reference to *Franklin.* Rather under state law, the question is whether the court fulfilled its duty to deliver an appropriate instruction on a clearly applicable legal principle. (*Cf. People v. Gurule* (2002) 28 Cal.4th 557, 659 [a trial court may refuse a proffered instruction only if it is an incorrect statement of law, is argumentative, or is duplicative, or might confuse the jury].)

In appellant's view, the Court no longer should leave to chance the possibility that jurors will divine on their own that remaining doubts about their belief in a capital defendant's guilt may be considered in the penalty calculus. Nor should the Court allow some capital defendants to receive clear instructions on the range of mitigation in their cases, while others are deprived of this benefit. Such capriciousness is inconsistent with the heightened reliability required in determining the appropriate sentence in capital cases. (*In re Sakarias* (2005) 35 Cal.4th 140, 160; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This fundamental principle supports a forthright explanation to the jurors, rather than playing hide-the-ball, with respect to their sentencing discretion. And plainly, the Court should not affirm the death verdict in appellant's case where the prosecutor obfuscated what the law permitted and where the trial court itself believed that lingering doubt had no role in the penalty phase because "[w]e've already tried the guilt phase." (15 RT 3995.)

2. The Trial Court's Failure to Give Any Instruction on Lingering or Residual Doubt Violated the Federal Constitutional Due Process Clause, and the Proscription Against the Imposition of Cruel and Unusual Punishment

The trial court's omission violated the federal Constitution in multiple ways. First, under state law, appellant had a statutory right to have the jury exercise its discretion and "fix his punishment in the first instance" at either life in prison without parole or death (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347) and to do so based on both statutory and judicially-recognized mitigating factors. *Hicks* held that a defendant, entitled by state statute to have jury decide his punishment, was deprived of federal due process by incorrect instructions that failed to state the jury's authority to impose any sentence of not less than ten years. Although the jury here, unlike the jury in *Hicks*, was instructed on all the punishment options provided by state law, its sentencing discretion was unfairly cabined by the trial court's failure to let the jurors know that under state law lingering doubt was a mitigating factor and a basis for choosing life without parole over a death sentence. In this way, appellant's jury, much like the jury in *Hicks*, was hindered from exercising its sentencing authority to the full extent allowed under state law.

Second, the due process clause of the Fourteenth Amendment was violated by the trial court's failure to heed the "the statutory mandate" (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20), embedded in section 1093 and a similar admonition about instructional duties in section 1127. (See *Sandin v. Conner* (1995) 515 U.S. 472, 484 [setting forth the test for evaluating whether a state prison regulation creates a liberty interest protected by the due process clause].) Although *Sandin* involved prison

regulations, its ruling applies to state statutes as well. (See *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148, 1155-1156 [applying *Sandin* to Code Civ. Proc., § 129 and noting that "once a state creates a liberty interest, it can't take it away without due process."].) In the context of a capital sentencing proceeding, sections 1093 and 1127 secure for the capital defendant his substantive right to a reliable sentencing by a jury with knowledge of the full range of its discretion, and guide the trial court in evaluating the circumstances under which requested instructions must be provided to the jury. The statutes also prescribe for the trial court what it must do if the requested instructions are proper. In this way, the statutes both protect a "substantive end" and are sufficiently mandatory in nature to create a liberty interest protected by the due process clause. (*Marsh v. County of San Diego*, *supra*, at pp. 1155-1156.)

Third, a jury charge may be impermissibly vague in violation of the Eighth and Fourteenth Amendments by failing "adequately to inform" the jury what it "must find to impose the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) In such a situation, the jury receives inadequate guidance about the meaning of the applicable state sentencing factors, and the vice of such an omission is that the resulting death sentence is impermissibly arbitrary and capricious. (*Id.* at p. 362.) Although sentence-selection factors are subject to a more deferential scrutiny than death-eligibility factors (*Tuilaepa v. California* (1994) 512 U.S. 967, 973), sentencing factors must have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding'" (*ibid.*, citation omitted). At a minimum, the instructions must tell "the jury to consider a relevant subject matter and [do] so in understandable terms." (*Id.* at p. 976.) In the present case, as explained in section B.1., *ante*, the

instructional omission left to chance and caprice whether appellant's jury understood and applied the concept of residual doubt, a mitigating factor embedded in the state's jurisprudence and which appellant was entitled to have them consider. The lack of definition and guidance in the instructions here violated the precepts described in *Maynard* and *Tuilaepa.*

Fourth, although appellant may not have been entitled to have a jury consider lingering doubt as a matter of federal constitutional law, he was so entitled under state decisional law. It was, simply put, a mitigating factor that he was entitled to have his jury consider under state law. A residual doubt over whether appellant committed a capital murder is by definition, as *Terry* recognized, something that might serve as the basis for a life verdict. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [excluding evidence of petitioner's good behavior in jail awaiting trial violated his right to place before the sentencer relevant evidence in mitigation of punishment].) Consequently, he was entitled to instructions that allowed the jury to give meaningful consideration and full effect to his evidence, theory, and argument explaining and applying that factor. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [confirming that the sentencer must be permitted to consider "any relevant mitigating factor"].)

In sum, the failure to deliver the requested instruction violated long-standing federal constitutional principles, and this Court should so find.

C. The Violation Of State Law And The Federal Constitution, Which Prejudiced Appellant's Chances For A Life-Without-Parole Verdict, Cannot Be Dismissed As Harmless Error

The effect of the trial court's failure to give the requested instruction on lingering or residual doubt on the penalty verdict should be assessed in

the context of the "broad discretion" entrusted to a jury in the penalty phase, the "highly subjective" judgment each juror must make, and the gravity of the consequence of a flawed verdict. (See *Turner v. Murray* (1986) 476 U.S. 28, 33-35, 37; see also *People v. Nunez* (2013) 57 Cal.4th 1, 61 [acknowledging each juror's "profoundly personal" and "qualitatively different" assessment of mitigating and aggravating factors].) Regardless of whether the error here is deemed one of state law or of federal constitutional dimension, the instructional omission cannot be found harmless under either standard. (*See People v. Brown* (1988) 46 Cal.3d 432, 447-448 [articulating the "reasonable possibility" test for state law errors affecting the penalty verdict]; *Chapman v. California*, *supra*, 386 U.S. at p. 24 [articulating the "harmless beyond a reasonable doubt" standard for federal constitutional errors].)

Given the facts of this case, residual doubt was likely to be a question on the jurors' minds. First, they had difficulty in the first phase of trial deciding whether appellant was guilty beyond a reasonable doubt of capital murder. (See Argument II. C.2., *ante*, at pp. 153-156.) The length of the deliberations – seven days – and the mid-deliberation inquiries – asking for a tape recorder to listen to appellant's interrogations and for the transcripts of all his interrogation statements and asking a question related to a defense theory of the case (2 CT 585-588) – prove as much. (See Argument II.C.2., *ante*, at pp. 154-155, citing *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103; *In re Martin* (1987) 44 Cal.3d 1, 51 and other authorities.) Therefore, it is not surprising that defense counsel made lingering doubt one of his "three themes for life" – "you should never execute a man if you have any lingering or residual doubt about his guilt in a case." (14 RT 3585-3586.)

Second, the same factors – lengthy deliberations and mid-deliberation questions – also bespeak the jury's difficulty deciding whether appellant deserved life or death. The penalty phase evidence took three and a half days to present – a half day for the prosecution (3 CT 634-635) and two and a half days for the defense (3 CT 636-638). The jury began deliberations toward the end of the court day on May 5, 2003, and deliberated for three more court days, May 6, 7, and 8, before returning a death verdict mid-morning on May 9, 2003. (3 CT 701-703, 708-709, 718.) The length of the deliberations suggests the decision was not simple or straightforward.

In addition, the jury's mid-deliberation notes to the trial court indicate the jurors wrestled with the concept of mitigating evidence. They first requested a dictionary, which the trial court properly denied. (3 CT 704-705; 15 RT 4132.) The jury then asked for "the definition and or interpretation of the term extenuates as it applies to factor K in factors for consideration." (3 CT 706; 15 RT 4133.) In response, the trial court sent a note to the jury stating, "extenuate = to lessen; to palliate; to mitigate. See also CALJIC 8.85." (3 CT 707.) The question, which shows the jury struggling to understand factor (k), indicates that, in the jury's view, the question of the appropriate penalty was likely close and or not clear-cut.

In this situation, the failure to instruct on lingering doubt, and the resulting inadequacy of the court's instruction on the mitigating factors, was important, perhaps dispositive for one or more jurors. As explained in section B., *ante*, lingering or residual doubt neither explicitly nor intuitively extenuates the gravity of the crime or relates to the character of the offender. The prosecutor suggested that if lingering doubt belonged any place in the penalty phase, it was as part of "factor K." (15 RT 4030.) A

logical interpretation of the jury's question is that at least one or more jurors were trying to find someplace in factor K, as read by the court, for consideration of doubts about appellant's guilt. However, nothing in the initial instructions or the court's attempted clarification of the word "extenuate" would have led any juror to understand that questions about guilt could be relevant to its penalty decision. Residual doubt, which does not relate to the circumstances in which the crime was committed or the defendant's character or record, is the only mitigating factor that is not mentioned or covered in the standard instructions, and yet, it is a compelling reason to choose life over death. (See Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1563 [in study of 153 jurors in 41 capital murder trials, 77.2 percent said residual doubt about the defendant's guilt did or would make the juror less likely to vote for death, making it "the most powerful 'mitigating' fact"].)

Third, the attorneys' closing arguments did not ameliorate the error and were "'more apt to confuse than to enlighten the jurors'" in light of the instructional lacuna. (*People v. Aranda* (2012) 55 Cal.4th 342, 376 , quoting *People v. Phillips* (1997) 59 Cal.App.4th 952, 958 [attorney disagreement during argument was more likely to render the instructional omission prejudicial].) Here, the lawyers presented opposing views on whether, given the protracted guilt phase deliberations, lingering doubt was an appropriate penalty consideration in appellant's case. Defense counsel said it was and urged residual doubt as the basis for a life-without-parole sentence. The prosecutor said it was not and went further by defining lingering doubt in a manner that tended to equate it with reasonable doubt (15 RT 4031), and urged the jury to dismiss it in a manner that this Court

has recognized would be likely to antagonize the jury against defense counsel. In *People v. Webster* (1991) 54 Cal.3d 411, the Court observed that lingering doubt arguments were often "unwise" because they risk "antagonizing" a jury that has just completed the process of finding the defendant guilty. (*Id.* at p. 455.) Here the prosecutor's argument – that appellant's lingering doubt argument showed no respect for the jurors' verdict and hard work; that if a single juror had any reasonable doubt there would have been no conviction; and that this was not the time "to go back and rehash all of those things" (15 RT 4031) – was likely to prejudice the jury against appellant exactly as contemplated by this Court in *Webster*.

Closing arguments by counsel "are not a substitute for a proper jury instruction" from the court. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.) This is particularly true where, as here, the trial court informs the jurors that the only correct law was that which it provided. (2 CT 485 [guilt phase admonition to jurors to apply the law as provided by the judge, whether or not the jurors agreed with the principle and whether or not the attorneys suggested something different]; 3 CT 642 [penalty phase direction to "accept and follow the law" as stated by the court]; see *People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6 [holding that in light of a similar directive from the trial court, the arguments of counsel did not cure an omission in the reasonable doubt instruction].) Specifically, in the present case, no *instructions* countermanded the prosecutor's affirmatively incorrect definition. His argument increased the likelihood of prejudice.

Finally, the aggravation did not so far outweigh the mitigation that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty. Certainly, the murders of Andrew and Shirley Demko, and the circumstances of those crimes, were

highly aggravated. But that fact, by itself, does not guarantee a death sentence. (See *In re Lucas* (2004) 33 Cal.4th 682, 735 [where defendant killed two elderly, vulnerable neighbors in their home, and had a prior violent assault, Court reversed death judgment because defense counsel failed to adequately investigate defendant's background and presented no mitigating evidence].) Notably missing from the prosecution's case were some major aggravating factors. Unlike many capital defendants, appellant did not have an extensive history of violent crimes. (See, e.g., *People v. Allen* (1986) 42 Cal.3d 1222, 1246 [defendant had prior conviction for murder, was the mastermind of seven armed robberies in which some of the victims were shot, and while in county jail called for a "death vote" for another inmate and directed brutal attack on him].) Appellant had a prior criminal record, but his convictions were for property offenses, burglary and forgery, and his unadjudicated offenses – hitting another inmate with his fist, assertedly in self-defense, during a prison riot and hitting a roommate over the head with a bottle while drunk and upset over a woman – were not beyond the jury's understanding. Nor did appellant exhibit a callous or cavalier attitude about the crimes after their commission. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 77 ["defendant, still bloody from the killings, returned to his friends and boasted of what he had just done"].)

To counter the aggravating evidence, appellant presented mitigation evidence from numerous members of his birth family who described the horrendous circumstances of his crucial, early years and abrupt abandonment by his mother when he was four years old; expert testimony about the psychologically disastrous effects of appellant's formative years; evidence from his mother about appellant's later childhood and adolescence, including his obedience, kind acts and accomplishments;

evidence, which was presented at the guilt phase, about the care, concern and support appellant extended as an adult to Jenica McCune and her children and Shelby Barnes and her son; and his relatives' pleas for mercy. (See Statement of Facts, *ante*, at pp. 40-49.)

In short, the crimes in this case may have been heinous, but a death sentence was not inevitable. (See *People v. Gay*, *supra*, 42 Cal.4th at p. 1227 [death verdict was not a foregone conclusion despite aggravating evidence that defendant murdered peace officer in the performance of his duties and had committed prior violent crimes, which were "unusually – and unnecessarily – brutal and cruel," and scant evidence in mitigation]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [although defendant's crime – murdering three friends after he had bound them and as they cried or begged for mercy – "was undeniably heinous," a death sentence "was by no means a foregone conclusion"]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [despite egregious nature of capital double murder, along with prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion"].) Viewed from the jurors' perspective, the question of punishment was close and if the jury had been clearly advised of the role of residual doubts, there is reasonable possibility that "at least one juror would have struck a different balance" (*In re Lucas*, *supra*, 33 Cal.4th at p. 690, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 123) and would not have voted for death, and, under the federal prejudice standard, the State cannot prove the error harmless beyond a reasonable doubt. Accordingly, the Court should reverse the death judgment.

V.

THE *OCHOA* RESTRICTION ON EXECUTION-IMPACT EVIDENCE GIVEN AS PART OF CALJIC NO. 8.85 PREVENTED THE JURY FROM GIVING MEANINGFUL EFFECT TO APPELLANT'S MITIGATING EVIDENCE

In *People v. Ochoa* (1998) 19 Cal.4th 353, this Court held that the impact of a capital defendant's execution on his or her family members may be considered by the jury in the penalty phase when it constitutes indirect evidence of the defendant's character. Although the issue in *Ochoa* was whether the trial court properly refused to instruct Ochoa's jury to consider sympathy for his family, its holding subsequently was converted into an instruction, which tells the jury to disregard family sympathy, as well as execution impact evidence, except where it reflects a positive aspect of the defendant's character.[68] Unlike previous claims about execution- impact evidence that have been rejected by this Court, appellant does not simply argue that the jury should have been permitted to consider the effect of his execution on his family, but asserts that under the unique circumstances of his case, the *Ochoa* instruction was ambiguous and unconstitutionally restricted appellant's jury from considering and giving effect to the particular mitigation evidence he presented. As a result, his death sentence must be reversed.

A. The Proceedings Below

As set forth in the Statement of Facts, appellant was abruptly given away by his birth mother, Brenda, when he was four years old. She

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[68] The principle announced in *Ochoa*, which appellant refers to as the "*Ochoa* instruction," was added to the instruction on section 190.3, factor (k), which is part of CALJIC No. 8.85.

apparently was overwhelmed by her circumstances, which included poverty and extreme racism directed towards her biracial son in their small West Virginia town. However, Laura and Tom Battle, who adopted appellant, never told him that he had been adopted. In fact, it was not until defense counsel was preparing for trial that appellant learned of his biological family. (See Statement of Facts, *ante*, at pp. 40-41.)

Although appellant was unable to recall his birth family, they remembered him. At the penalty phase, many of them testified about their extended family history and the poor, chaotic, abusive and racist circumstances of appellant's early childhood. (See Statement of Facts, *ante*, pp. 40-43.) They also testified about their love for appellant and their desire to develop a relationship with him. His maternal grandmother Elizabeth testified that she still loved him and wanted to get to know him better. (14 RT 3700.) His maternal aunt Sandy, who loved and cared for appellant when he was young, remembered him as quiet and affectionate. (14 RT 1652, 3654-3655, 3661.) After his adoption, Sandy missed appellant every day, never stopped loving him, and named both her daughter and son after appellant. (14 RT 3655, 3659). She told the jury she had been corresponding with appellant, wanted a relationship with him (14 RT 3659, 3664), and she begged the jury not to condemn him to death:

> Please don't take him away from me again. I know that the other family are very, very hurt and very sad and I'm so sorry. I'm so sorry, but please, please don't kill Tommie. Please.

(14 RT 3659.)

Another maternal aunt, Terry, who also had cared for appellant when he was young and felt like he was her first child, begged Brenda not to give appellant up for adoption, but to let her rear him. (14 RT 3679.) Terry had

never stopped loving appellant (14 RT 3685) and implored the jury not to return a death verdict:

> Please don't do this because as long as there's love and there's life and there's hope, there has to be another answer. There's always another answer. And like adoption is permanent, please don't make this permanent. And please, just please find another way. Please.

(14 RT 3686). His aunt Dorothy expressed her love for appellant and asked the jury for a chance to get to know him again:

> I would just like to say that there's always been that missing puzzle piece to our family. And for some reason God has brought us all back full circle so that we can maybe try to get to know each other, and I would like for them to give us that chance to get to know him, to get to try to pick up on those 22, 23 some-odd years that he hasn't been in our life.

(14 RT 3694-3695.) Appellant's older sisters, Tonya and Kim, also testified. Tonya always had loved her brother. Since his arrest, she had begun to develop a relationship with him and wanted it to continue. (14 RT 3755-3756.) Kim was devastated when appellant was given away. (14 RT 3767.) She never had a chance to say goodbye (*ibid.*) and carried him in her heart every day (14 RT 3769). She wanted the chance to have her brother now. (14 RT 3767-3769.)

Appellant's birth father, Cleotis (Yogi) Williams, had wanted custody of appellant as an infant, but lost contact with appellant when Brenda took him away; he never was informed about appellant's adoption. (14 RT 3629-3630.) Yogi kept a picture of appellant as a child on his television and looked at it every day. (14 RT 3630.) He loved and wanted a relationship with appellant, his only living child, more than anything. (14 RT 3633-3634, 3635-3636.)

On May 5, 2003, when discussing the penalty phase instructions,

defense counsel objected to the last two sentences of the factor (k) portion of CALJIC No. 8.85, which contained the *Ochoa* instruction, and asked the trial court to delete them. (15 RT 3990-3991.) The challenged language addressed sympathy for the defendant's family and at the time of appellant's trial, this portion of CALJIC No. 8.85, noted in italics, read as follows:

> In determining which penalty is to be imposed, 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:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. [*Sympathy for the family of the defendant is not a matter that you can consider in mitigation.* [*Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.*]]

(3 CT 662-663, italics added [CALJIC No. 8.85 (6th ed. 2000 rev.)]; 15 RT 4100-4101 [as read to the jury].)[69]

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[69] Appellant's objection to this CALJIC instruction, derived from *Ochoa*, should not be confused with the prosecution's separate request for a different, special instruction, also based on *Ochoa*, explaining that witnesses who testify on behalf of the victims are not permitted to address the subject of penalty. (3 CT 696; 15 RT 3961.) The trial court denied the prosecution's request (3 CT 696; 15 RT 3993-3994), and that instruction is (continued...)

Defense counsel argued that the instruction did not reflect settled federal constitutional law that "the jury is not to be restricted on what can be considered as a mitigating factor." (15 RT 3991.) Noting that much of the mitigation case was testimony from appellant's family, counsel also asserted that the instruction was confusing and would make it difficult for the jury to determine how that evidence could be considered – "what thing they can have sympathy for and what things they can't." (*Ibid.*)

The prosecutor responded that the contested portion of CALJIC No. 8.85 was a correct statement of the law. (15 RT 3991.) He argued that the defendant must be the "wellspring" of any sympathy and that the jurors could not consider any sympathy they might have for appellant's family members in light of the difficult circumstances of their own lives. (15 RT 3991-3992.)

The trial court stated that the instruction, including the portion challenged by appellant, had been upheld by this Court, citing *People v. Bemore* (2000) 22 Cal.4th 809, 856. (15 RT 3992.) After reading the relevant passage from *Bemore*, the court concluded, "So I think it's proper that it be given." (*Ibid.*)

Shortly after this ruling, the prosecutor gave his penalty phase summation and stated that under factor (k), the jury must not feel sympathy for defendant's family. (15 RT 4032.) Defense counsel followed with his closing argument. He too addressed the question of sympathy for appellant's family. (15 RT 4079.) The trial court gave the *Ochoa* instruction as part of CALJIC No. 8.85. (15 RT 4100-4101.)

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[69] (...continued)
not at issue here.

In his motion for a new trial, appellant again raised the legal error in giving the last two sentences of CALJIC No. 8.85. (3 CT 745, 749-750.) The prosecution responded that the instruction properly stated California law as established by this Court. (3 CT 778-779.) At the hearing, defense counsel acknowledged that the instruction reflected California law, but reiterated his arguments that the challenged portion of CALJIC No. 8.85 was inconsistent with decisions of the United States Supreme Court, in particular *Skipper v. South Carolina* (1986) 476 U.S. 1, and in the context of this case would confuse a reasonable jury in such a way as to permit it to disregard all the mitigating evidence from appellant's family. (16 RT 4160-4163, 4165-4166.) The prosecution opposed the new trial motion with the argument it previously gave that the instruction was correct. (3 CT 778-779; 16 RT 4163-4164.) The trial court denied the motion for a new trial on the grounds that the instruction correctly set forth the law as stated in *People v. Ochoa, supra*, 19 Cal.4th at pp. 353-356. (16 RT 4166.)

B. The Penalty Phase Instructions Must Permit Full Consideration Of A Defendant's Mitigation Evidence

In a capital case, "any barrier, whether statutory, instructional, evidentiary, or otherwise" that "precludes a jury or any of its members . . . from considering relevant mitigating evidence" is federal constitutional error under the Eighth Amendment. (*People v. Mickey* (1991) 54 Cal.3d 612, 693, citing *Mills v. Maryland* (1988) 486 U.S. 367, 374-375; *McKoy v. North Carolina* (1990) 494 U.S. 433, 438-443; *Skipper v. South Carolina, supra*, 476 U.S. at pp. 4-8.) The mere ability of a defendant to present mitigating evidence does not suffice. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 250, fn. 12.) In the penalty phase of a capital trial, a jury "'must be permitted to consider any relevant mitigating factor'" (*id.* at p.

248, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, original italics) and must be allowed to give effect to the mitigating evidence considered (*id.* at p. 253).

When the jury is not permitted to give meaningful effect or a reasoned moral response to the defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 264.) A flawed sentencing proceeding may result from an instruction that hinders the jury's ability to consider and give effect to mitigating evidence. (*Id.* at p. 259, fn. 21.) When an ambiguous instruction has been given, the question on appeal is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.) Although a reasonable likelihood is more than a possibility, the defendant need not show that more likely than not his jury applied the instruction in a constitutionally impermissible manner. (*Ibid.*)

In deciding whether an ambiguous instruction has unconstitutionally impaired the jury's ability to give consideration and effect to mitigating evidence, the reviewing court must consider a "'commonsense understanding of the instructions in light of all that has taken place at trial.'" (*Penry v. Johnson* (2001) 532 U.S. 782, 800, quoting *Boyde v. California, supra*, 494 U.S. at p. 381.) This includes an evaluation of the likely effect of the arguments by counsel upon the jury. (*Penry, supra*, at p. 800.) Particular attention must be paid to an instruction which directs the sentencer to disregard evidence. (See *Boyde, supra*, 494 U.S. at p. 384.)

When an unambiguous penalty-phase instruction is challenged, the reviewing court directly decides whether it is constitutional. (See, e.g.,

Smith v. Spisak (2010) 558 U.S. 139, 143-149; *California v. Ramos* (1983) 463 U.S. 992, 997-1009.) As noted previously, the Court reviews claims of instructional error de novo. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1210.)

C. Under The Unusual Circumstances of This Case, There Is A Reasonable Likelihood That The Jury Interpreted The *Ochoa* Instruction In A Way That Precluded It From Giving Meaningful Consideration To The Testimony Of Appellant's Family Members

In *People v. Ochoa*, *supra*, 19 Cal.4th 353, this Court considered whether sympathy for a capital defendant's family member is properly considered as a mitigating factor. Ochoa requested an instruction that read: "You may take sympathy for the defendant and his family into consideration in determining whether or not to extend mercy to the defendant." The trial court gave the requested instruction, but deleted the words "and his family." (*Id.* at p. 454.)

This Court found that the instruction as modified did not prevent Ochoa's jury from considering and giving effect to relevant mitigating evidence. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) The Court stated that, under section 190.3, "what is ultimately relevant is a defendant's background and character – not the distress of his or her family." (*Ibid.*) Expanding upon this idea, the Court explained:

> A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed.

(*Ibid.*)

In an effort to illustrate the fine distinction between considering sympathy for the defendant versus that for his family members, the Court provided the following example:

> For example, a jury may take into account testimony from the defendant's mother that she loves her son if it believes that he must possess redeeming qualities to have earned his mother's love. But the jury may not spare the defendant's life because the jury feels sorry for the defendant's mother, or believes that the impact of the execution would be devastating to other members of the defendant's family.

(*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.)

In *Ochoa*, the Court determined that the jurors could have interpreted the instruction proffered by the defendant as permitting a life sentence if they wished to spare his family the emotional distress of having him executed. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) In the Court's view, such a consideration was contrary to the individualized assessment of the defendant's background, record, and character required by both state and federal constitutional law. (*Ibid.*) Ultimately, the Court stated:

> In summary, we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character.

(*Ibid.*)

As the preceding discussion makes clear, in *Ochoa*, this Court was addressing whether the jury affirmatively should have been told that it could consider sympathy for the defendant's family. It did not consider whether a jury should be instructed that it must disregard the impact of a death verdict on those who love the defendant nor did it purport to offer model language for such an instruction. Nonetheless, the Court's summary of its holding in

Ochoa was converted into an instruction when it was added as the last two sentences to the end of factor (k) in CALJIC No. 8.85. The use note to this instruction recognizes, however, that it is not appropriate to give this portion of CALJIC No. 8.85 in every case. (See Use Note to CALJIC No. 8.85.)[70]

In cases decided after *Ochoa*, the Court has reaffirmed its holding that the impact of a death sentence on a defendant's family does not relate to either the circumstances of his offense or his character and background.[71] From *Ochoa* and subsequent cases, the Court has distilled a general rule:

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[70] CALCRIM No. 763 also includes similar language: "[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision. [However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]" The bench note indicates that these bracketed sentences should only be given upon request.

[71] See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 929-933 (no error for the trial court to instruct the jurors that they must focus on the defendant's character and background, and not the effect of their verdict on any third parties, after it was informed that a holdout juror may have been focused on the defendant's children); *People v. Bennett* (2009) 45 Cal.4th 577, 600-602 (no error to exclude testimony by expert witness about the impact defendant's execution would have on his children where the expert testified at length about defendant's relationship with them and their feelings for him); *People v. Romero* (2008) 44 Cal.4th 386, 425 (no error for trial court to instruct jury during defense counsel's argument that it could not weigh the effect the penalty decision would have on the families of either the defendant or the victim); *People v. Smith* (2005) 35 Cal.4th 334, 366-368 (error to exclude a witness's opinion about the defendant's execution because it was indirect character evidence, but harmless); *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 (no error to instruct jury not to consider sympathy for anyone other than the defendant); *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 (no prosecutorial misconduct to argue that the jury could consider sympathy for defendant but not for his family).

"evidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith* (2005) 35 Cal.4th 334, 367.) Whether the last two sentences of CALJIC No. 8.85 comport with this principle has not been addressed. To the best of appellant's knowledge, in only two cases has the *Ochoa* instruction been challenged. (*People v. Williams* (2013) 56 Cal.4th 165, 197-198; *People v. Livingston* (2012) 53 Cal.4th 1132, 1178-1179.) In both cases, the defendants simply asked the Court in effect to overrule the holding of Ochoa and its progeny by finding that sympathy for a defendant's family, as well as the impact of his execution on them, is a mitigating factor under state and federal law. Not surprisingly, this Court rejected the arguments as contrary to established precedent. (*People v. Williams*, *supra*, at pp. 197-198; *People v. Livingston*, *supra*, at pp. 1178-1179.)

In contrast, appellant is not simply asking this Court to reverse its established precedent. Rather, he argues that, under the particular circumstances of his case, there is a reasonable likelihood that the jury applied the *Ochoa* instruction in way that prevented the meaningful consideration of constitutionally relevant evidence. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302, 320 ["Penry contends that in the absence of his requested jury instructions, the Texas death penalty statute was applied in an unconstitutional manner by precluding the jury from acting upon the particular mitigating evidence he introduced"].) Plainly put, it is reasonably likely that the jury did not understand the execution-impact evidence presented by the defense as illuminating a positive or mercy-worthy quality of his character or background. Yet, under the unusual circumstances of

this case, the evidence did and was constitutionally relevant mitigation.

In the usual capital case, the love a defendant's family members feel for him will be the product of their lifelong relationship with him and thus will derive from what might be considered "the positive qualities" of the defendant's character. In the usual capital case, family members testify about their specific experiences of the defendant, e.g., his protectiveness to a younger sister when their alcoholic father became violent, his attempts to offer financial support to his mother, or his care and concern for his children. In that situation, testimony from family members is more easily understood and weighed by a jury as indirect evidence of the defendant's character. Accordingly, in such cases the *Ochoa* instruction may not preclude meaningful consideration of the defendant's mitigating evidence.

In appellant's case, however, the constitutional relevance of the love his birth family expressed for him and their feelings about a death sentence were more difficult to decipher. The instruction, as defense counsel noted in his new trial motion, forced the jury to parse whether the family's love related to appellant's character or background or not. (16 RT 4160-4161.) Because appellant's relationship with his birth family ended when he was given away for adoption, the jury would not likely have viewed the family's testimony as a reflection of appellant's character, positive or otherwise. It often may be difficult to dissect feelings of familial love because they reflect something about both the person who loves and the person who is loved. But when, as in this case, the family relationship was completely shattered for two decades, it is nearly impossible to separate what the family's love says about them and what their love says about the person they love. Nevertheless, the family members' testimony was constitutionally relevant mitigating evidence. Their feelings for appellant at

the time of trial, even if based on their love for and memory of him as a little boy, and their desire to re-establish their relationship with him were germane to the jury's sentencing task: their testimony conveyed that appellant was worthy of their time and attention and thus spoke to the constitutionally-required individualized assessment of whether a death sentence was appropriate.

In this case, the jury could have decided that the loss appellant's family members would experience upon his execution was a mitigating factor and supported a sentence less than death because *both* appellant and his family, who were separated from each other due to horrible circumstances including mental illness, poverty, and the effects of racism, deserved the opportunity to reunite and create the kind of relationship of which they had been deprived. Thus, the execution-impact testimony of the family was an aspect of appellant's history and was relevant to the jury's "reasoned moral response to [his] background, character and crime" (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at 252, internal quotation marks and citation omitted) in assessing whether death was the appropriate penalty. However, because the *Ochoa* instruction told appellant's jury to disregard such evidence unless it illuminated a positive quality of his background or character and because, under the unique facts here, the link between the family's feelings and appellant's character was not obvious, it was reasonably likely that the jury believed it was unable to give effect to the evidence.

Nothing about the context of the proceedings suggests otherwise. The arguments of counsel did not clarify the confusion caused by the *Ochoa* provision, but rather added to the likelihood that appellant's jury applied the factor (k) instruction in an unconstitutional manner. (See *Penry v. Johnson*,

supra, 532 U.S. at pp. 800-803 [in determining the commonsense understanding of a challenged instruction, the reviewing court considers all that has taken place at trial, including the arguments of counsel and other instructions given]; *Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at p. 259, fn. 21 [a jury may be precluded from meaningfully considering or giving effect to mitigating evidence as a result of the prosecutor's argument].) In his closing argument, the prosecutor told the jury that the entire defense was based on sympathy and underscored the *Ochoa* instruction's ban on sympathy for appellant's family: "But there are some certain rules that apply for sympathy. Okay. Factor K. The sympathy that you feel must be for the defendant. It cannot be for his family members." (15 RT 4032.) The prosecutor said nothing, however, about the jury's ability to use the execution-impact evidence so long as it reflected something positive about appellant.

Building on the *Ochoa* instruction, the prosecutor urged the jury to disregard the testimony of appellant's family members. He opined that everyone should feel sorry for the horrible conditions, poverty and racism they experienced. (15 RT 4032.) But he contended that their testimony was irrelevant to the jury's penalty decision because the young boy they knew "has absolutely nothing to do with the person that he is today." (15 RT 4032-4033.) The prosecutor pointed out that appellant did not share the hardships his family members described, and they did not know appellant after he was four years old. (15 RT 4033.) The prosecutor argued that the purpose of having appellant's family testify was simply "to take some of the sympathy that you feel for them and their hard lives and transfer it to the defendant[,]" whom "they really know nothing about." (15 RT 4033.) He discounted appellant's early childhood, arguing it had no "causal

relationship to the murders" (15 RT 4035) and "is not an excuse for anything" (15 RT 4038).[72]

In this way, the prosecutor's closing statement exploited the confusing *Ochoa* instruction. He focused on the first part of the instruction, emphasizing that the jury could not consider sympathy for appellant's family as mitigating evidence. He then went further: he cast the testimony of appellant's father, aunts, and sisters as a ploy for precisely the type of sympathy that the law prohibited. Thus, the prosecutor wove the *Ochoa* instruction into his argument that the jury should reject the entirety of their testimony. At the same time, he did nothing to help the jurors sort out the meaning of the second part of the Ochoa instruction about execution-impact evidence or the ways in which they could give mitigating weight to the family's pleas for appellant's life. Given the prosecutor's argument, a reasonable juror was likely to understand that the prosecutor's emphasis on the prohibition against considering sympathy for appellant's family as a mitigating factor as extending to the execution-impact evidence as well.

In his summation, defense counsel directly discussed the *Ochoa* instruction, but his argument did not dispel the ambiguity of the instruction or counteract the prosecutor's argument exploiting it. He offered to the jury as perhaps "the most powerful point . . . that if the state executes Tommie

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[72] The prosecutor's argument ignores the mitigating value of early childhood trauma, which "even if it is not consciously remembered, may have catastrophic and permanent effects on those who . . . survive it." (*Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1169, internal quotation marks and citation omitted [rejecting state's argument that defendant could not have been damaged by his dysfunctional family because he spent very little time with his family after he was removed from his home at the age of six].)

Battle, there will be a lot of people that will be very, very hurt." (15 RT 4079.) He then read the last two sentences of the factor (k) instruction and explained:

> And what that's saying, ladies and gentlemen, is that you just can't vote for life because you feel sorry for Kim, but you can consider the family members and the impact of the execution of Mr. Battle on those family members if it illustrates something good about Mr. Battle.

(*Ibid.*) Defense counsel directed the jury to the family's feelings and to the fact that they "lost Tommie for years, lost someone they really loved, have now found him only to lose him again if he gets the death penalty." (*Ibid.*) And he reiterated the limits the instruction placed on the jury's consideration of that evidence. (15 RT 4079-4080.) In this way, although defense counsel addressed the *Ochoa* instruction, he did not clear up the confusion it created in the context of the unusual relationship between appellant and the witnesses from his birth family, who testified about the effect his execution would have on them.

Moreover, nothing in the other instructions at the penalty phase counteracted the ambiguous factor (k) instruction. At the beginning of the instructions, the jury was told under CALJIC No. 8.84.1 that it must "accept and follow the law" as the court states. (3 CT 642; 15 RT 4086.) The preface to the instruction under CALJIC No. 8.85 on the sentencing factors then told the jury that its consideration of the evidence could be restricted as subsequent instructions directed: "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*]." (3 CT 662; 15 RT 4098, italics added.) The *Ochoa* proviso, which ended this instruction, was such an explicit limitation that

told the jury execution-impact evidence could not be considered in mitigation. (3 CT 663; 15 RT 4101; cf. *Boyde v. California, supra,* 494 U.S. at p. 382) [the lack of a similar, explicit limitation in the unadorned factor (k) instruction, which therefore permitted the jury to consider all relevant evidence, supported the finding that there was no reasonable likelihood the jury interpreted the instruction as prohibiting consideration of non-crime-related mitigating evidence].) The final instruction, CALJIC No. 8.88, directed that the jury "shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances *upon which you have been instructed,*" and thus reminded the jury of the CALJIC No. 8.85 instruction. (3 CT 692; 15 RT 4117, italics added.) In this way, the other instructions served to reinforce rather than negate the *Ochoa* restriction.

For all the above reasons, the *Ochoa* instruction "'inserted an element of capriciousness into the sentencing decision'" (*Penry v. Johnson, supra,* 532 U.S. at p. 800) by rendering the factor (k) instruction ambiguous and creating a reasonable likelihood that, in light of the particular facts of appellant's case, the instruction "failed to provide [the] jury with a vehicle for expressing its 'reasoned moral response'" to all of the his mitigating evidence (*Abdul-Kabir v. Quarterman, supra,* 550 U.S. at p. 256).

D. California's Restriction On Execution Impact Evidence Violates The Eighth And Fourteenth Amendments

In addition to challenging the *Ochoa* instruction as confusing and likely to preclude consideration of an important part of his mitigation case, appellant challenged the constitutionality of the California rule that, in deciding the appropriate penalty, the jury may not consider the impact of the defendant's execution on his family except as it reflects on a positive

characteristic of the defendant. (15 RT 3991 [trial objection]; see also 3 CT 749; 16 RT 4159-4160, 4162 [new trial motion].) Appellant is aware that this Court has rejected this claim. (See, e.g., *People v. Williams*, *supra*, 56 Cal. 4th at pp. 197-198; *People v. Smith*, *supra*, 35 Cal.4th at pp. 366-367; *People v. Ochoa*, supra, 19 Cal.4th at p. 456.) However, he raises this claim to preserve it for federal habeas corpus review should he not obtain relief from his death sentence in this Court.

As a preliminary matter, the *Ochoa* instruction on its face unconstitutionally restricts a jury's consideration of mitigating evidence. Under the Eighth Amendment, a defendant in a capital case is entitled to present, and the jury must consider, any aspect of a defendant's character or background that he proffers as basis for a sentence less than death. (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 317, 319; see also § 190.3 [evidence may be presented as to any matter relevant to mitigation and sentence including the defendant's character, background and history].) Mitigation is not limited to evidence of a defendant's positive qualities or his good character, but encompasses any information about his background and family history, whether considered "positive" or "negative." (See, e.g., *In re Lucas* (2004) 33 Cal.4th 682, 689, 698 [severe abuse suffered as very young child and subsequent institutionalization, which were not found to reflect positive qualities of petitioner's character or background, were "weighty" mitigating evidence]; *Wiggins v. Smith* (2003) 539 U.S. 510, 516-517, 534-535 [severe privation and bleak life history, which were not found to reflect positive qualities of petitioner's character or background, were "powerful" mitigating evidence].)

The CALJIC No. 8.85 instruction given in appellant's case ran afoul of this fundamental rule. It permitted the jury to consider evidence of the

impact of an execution on family member only if "it illuminates some positive quality of the defendant's background or character." (15 RT 4101.) Although *Ochoa* used this phrasing, the Court has not consistently defined the permissible scope of execution impact evidence with this limitation. As indicated above, in at least one case, this Court has expressed the operative principle without restricting it to evidence that demonstrates "a positive quality" of the defendant's background or character. (See *People v. Smith*, *supra*, 35 Cal.4th at p. 367, ["evidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness"].)

Even without the "positive quality" limitation, the *Ochoa* instruction would be unconstitutional. As discussed above in section B of this claim, under the Eighth and Fourteenth Amendments, a state may not preclude the sentencer in a capital case from considering any relevant evidence in support of a sentence less than death. (*Abdul-Kabar v. Quarterman*, *supra*, 550 U.S. at p. 248; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 4.) The United States Supreme Court has taken an expansive approach to determining the relevance of mitigation evidence in capital cases. It has instructed that "'[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 440, quoting *State v. McKoy* (N.C. 1988) 372 S.E.2d 12, 45 (opinion of Exum, C. J.).) And it has pointed out that the "threshold for relevance" is "low." (*Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

The effect of a defendant's execution upon his family passes this low Eighth Amendment standard. Just as the impact of the murder on the victim's family has been held to be constitutionally relevant to the sentencing decision (*Payne v. Tennessee* (1991) 501 U.S. 808, 287), so too the impact of the defendant's execution on his family is relevant to the sentencer's choice between life and death. Indeed, courts in other states have recognized the relevance of such evidence. (See, e.g., *State v. Jordan* (Tenn. 2010) 325 S.W.3d 1, 50-52 [exclusion of testimony of defendant's parents was harmless where other witnesses testified that they would be devastated if he was executed]; *State v. Mann* (Ariz. 1997) 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hand of the state would injure his family"]; *State v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446-447 [noting mitigating evidence of the negative effect defendant's death would have on his family]; *State v. Benn* (Wash. 1993) 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (Or. 1994) 879 P.2d 162, 167-168 [concluding that the Supreme Court's mandate for unfettered consideration of mitigating circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1994) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse impact on his seven year-old son . . . and on [defendant's] mother"].)

There was ample evidence that appellant's long-lost and recently-found birth family would suffer a loss from his execution. One or more reasonable jurors may have wished to consider whether to vote for

appellant's execution in light of the loss his family would suffer. The *Ochoa* instruction given as part of CALJIC No. 8.85 precluded consideration of that relevant evidence and thus violated the Eighth and Fourteenth Amendments to the United States Constitution.

E. The Unconstitutional Instruction, Which Prejudiced Appellant's Chances for A Life-Without-Parole Verdict, Cannot Be Dismissed As Harmless Error

Appellant assumes, but does not concede, that whether the *Ochoa* proviso is viewed as rendering the factor (k) instruction ambiguous or as a direct violation of the Eighth Amendment, the instructional error is subject to harmless error analysis under *Chapman v. California, supra*, 386 U.S. at p. 24.[73] Under that standard, the State cannot prove beyond a reasonable

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[73] In general, unambiguous instructions that violate the federal Constitution are subject to *Chapman* harmless error review. (See, e.g., *Washington v. Recuenco* (2006) 548 U.S. 212, 219-222 [failure to submit "armed with a firearm" sentencing factor to jury]; *Neder v. United States* (1999) 527 U.S. 1, 9-10 [omission of element of materiality in fraud prosecution].) However, the high court's jurisprudence is not entirely clear about whether unambiguous instructions that preclude the jury's consideration of relevant mitigating evidence also are subject to *Chapman* or any other harmless error review. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 608-609 and *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399 [reversing death judgments without assessing whether instructional errors restricting mitigation were prejudicial].) Moreover, to appellant's knowledge, the high court has not squarely held that ambiguous instructions that violate the federal Constitution are subject to *Chapman* analysis when reviewed on direct appeal, although it has engaged in or required prejudice review of ambiguous instructions presented in cases in a different procedural posture. (See *Jones v. United States* (1999) 527 U.S. 373, 394 [finding that any error resulting from allegedly ambiguous instruction in federal death penalty case, reviewed under plain error doctrine, did not affect defendant's substantial rights]; *Calderon v. Coleman* (1998) 525 U.S.
(continued...)

doubt that the *Ochoa* instruction did not contribute to the death verdict. As discussed in section C. *ante* of this argument, the prosecutor's argument exploiting the *Ochoa* provision was not effectively dispelled by defense counsel's summation, nor was the constitutional defect in the factor (k) instruction neutralized by other instructions. These factors weigh against finding that the error was harmless beyond a reasonable doubt, as do three others – the length of time the jury needed to reach a verdict, the jury's inquiries during its deliberations, and the balance of the aggravating evidence and mitigating evidence.

As discussed previously, the jury in this case did not render its death verdict quickly, indicating its decision was not clear-cut. (See Argument IV.C., *ante*, at p. 207.) In addition, it asked about the meaning of the key term "extenuate" in CALJIC No. 8.85. Just as the inquiry shows that at least some jurors were uncertain about what to do with any residual doubts they had about appellant's guilt, the inquiry also indicates some jurors were trying to figure out how to parse the *Ochoa* instruction in light of the number of family witnesses who testified about their distress if appellant were sentenced to death. Their testimony, as defense counsel argued in objecting to the *Ochoa* instruction, was a significant part of the mitigation case. (15 RT 3991.) Toward the end of his closing argument, defense counsel called the execution-impact evidence "maybe the most powerful point" in his plea for a life-without-parole sentence. (15 RT 4078.) Moreover, as also discussed previously with regard to the denial of the

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[73] (...continued)
141, 146-147 [per curiam decision noting that *Boyde* test for ambiguous instructions is not a harmless error test and remanding for application of harmless error test of *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637].)

lingering doubt instruction, and equally applicable here, the aggravation did not so far outweigh the mitigation so that no reasonable juror could have concluded that a sentence of life without the possibility of parole was the appropriate penalty. (See Argument IV.C., *ante*, at pp. 210-211.) In short, the State cannot carry its burden of proving that the error was harmless beyond a reasonable doubt. The Court should reverse the death judgment.

VI.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's 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." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law 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 to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained twenty-one special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Penal Code Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 662-663; 15 RT 4098-4099.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor argued the facts of appellant's crimes of burglary, robbery,

kidnapping, and multiple murder, including details of the timing, location and the method of the kidnapping and killing, the experience of the victims, and the impact on the family members all as aggravating "circumstances of the crime" under factor (a). (15 RT 4041-4048.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, 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 the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 363; but see *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that 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. (3 CT 692; 15 RT 4117-4118.) In fact, appellant's jury was specifically told by the prosecutor that "[t]o vote for death is not a reasonable doubt standard. This is just a weighing process." (15 RT 4023; see also 15 RT 4039.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 require 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. In order to impose the death penalty in this case, appellant's jury first had to make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No.

8.88; 3 CT 692-693; 15 RT 4117-4119.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has rejected the claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.)

Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (3 CT 662-663, 692-693; 15 RT 4098-4101, 4117-4119), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise 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*, *supra*, 13 Cal.4th at p. 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "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*, *supra*, 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true 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., § 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; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "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), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate 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.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was

instructed that unanimity was not required. (CALJIC No. 8.87; 3 CT 665; 15 RT 4101-4102.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant (13 RT 3481-3537) and devoted a portion of its closing argument to arguing these alleged offenses (15 RT 4007, 4012, 4030, 4040-4041).

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington, supra*, 542 U.S. 296, *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey, supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant 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." (3 CT 692; 15 RT 4118.) 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. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be

appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. 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. at p. 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction 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.) Appellant submits that 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 nonreciprocity 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.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity

was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing

(1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39

Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; § 190.3, factors (d) and (g); 3 CT 662-663; 15 RT 4099-4100) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila*, *supra*, 38 Cal.4th at p. 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85, factor (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act]; factor (f) [whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct]; and factor (h) [whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication].) The trial court failed to omit those factors from the jury instructions (3 CT 662-666; 15 RT

4098-4101), likely confusing the jurors and preventing them from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Indeed, the prosecutor emphasized the inapplicable sentencing factors in his closing argument. (15 RT 4027, 4029.) Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3 CT 662-663; 15 RT 4098-4101.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the Court need not instruct the jury that certain sentencing factors are only

relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme 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., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423. In a capital case, there is no burden of

proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider them.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim 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). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) 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 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), appellant urges the Court to reconsider its previous decisions.

VII.

THE CUMULATIVE EFFECT OF THE ERRORS AT THE PENALTY PHASE UNDERMINES THE FAIRNESS AND RELIABILITY OF THE DEATH JUDGMENT

Assuming, arguendo, that the errors asserted in Arguments IV-VI, taken separately, do not require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the penalty trial and the reliability of the resulting death verdict. (Cal. Const., art. I, § 15; U.S. Const., 8th & 14th Amends.; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process].) The overall impact of the errors must be considered in tandem: "A balkanized, issue-by-issue harmless error review" is not "very enlightening" in determining whether a defendant was prejudiced by symbiotic errors. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476; accord, *United States v. Waters* (9th Cir. 2010) 627 F.3d 345, 359 [noting errors worked in tandem to provide only half the picture to the jury concerning defendant's attitudes about violence]; *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1214 [capital case cumulating, in penalty phase prejudice analysis, refusal to change venue after jury voir dire, removal of counsel and appointment with inexperienced counsel, and instructional error concerning double-counting of special circumstance]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 [even if prosecutor's failure to disclose impeachment evidence, witness's perjury, and prosecutor's improper comments on privileged conduct were not each sufficient to justify habeas relief, the cumulative effect of the errors requires relief]; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381) [reversing for cumulative

effect of erroneous admission of evidence and improper prosecutorial argument]; see also *People v. Hill* (1998) 17 Cal.4th 800, 845 [finding a series of trial errors, although independently harmless, may "rise by accretion to the level of reversible and prejudicial error"].)

The erroneous denial of the lingering doubt instruction and the erroneous giving of the *Ochoa* instruction on execution-impact evidence, taken together, unfairly undervalued appellant's mitigation themes and likely had the effect of precluding the jury's consideration of a substantial part of the mitigation case. Defense counsel based the case for life on three main points: (1) the unanswered questions about the crime and lingering doubt about appellant's guilt (14 RT 3586; 15 RT 4055, 4060-4064); (2) the notion that childhood matters and the trauma of appellant's early years and abrupt abandonment at the age of four to his adoptive parents profoundly damaged his character and development (15 RT 4064-4077); and (3) appellant's positive qualities as illustrated, in large part, by the testimony about the impact his execution would have on his newly-found birth family (15 RT 4077-4080). The instructional errors undercut two of these three mitigation themes making it unlikely that the jurors, who already were unclear or confused about the meaning of the basic mitigation term "extenuate" (3 CT 706), were able to give effect to this evidence. This erroneous truncating of the mitigation case, in turn, left the aggravating evidence without an effective counterweight and thus seriously prejudiced appellant's chances for avoiding a death sentence. In this way, the cumulative effect of the instructional errors distorted the penalty phase in favor of a death sentence, although that penalty was not the inevitable verdict.

Moreover, these two errors were exacerbated by the other defects in California's capital-sentencing scheme which, as set forth in Argument VI, increased the risk that the jury's death verdict was imposed in an arbitrary and unreliable manner. In this way, the errors at the penalty phase – even if individually not found to be prejudicial – precluded the possibility that the jury reached an appropriate verdict in accordance with the Eighth and Fourteenth Amendment requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated because it cannot be shown that the penalty errors, collectively, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8.)

CONCLUSION

For all of the reasons stated above, the entire judgment – the convictions, the special circumstance findings, the sentencing enhancements, and the sentence of death – must be reversed.

DATED: December 17, 2013

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

NINA RIVKIND
Supervising Deputy State Public Defender

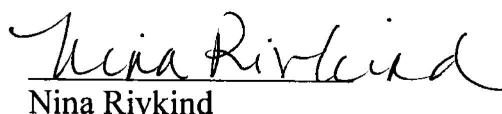
HEIDI BJORNSON-PENNELL
Deputy State Public Defender

Attorneys for Appellant
THOMAS LEE BATTLE

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the Supervising Deputy State Public Defender assigned to represent appellant, THOMAS LEE BATTLE, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 75,421 words in length.

Dated: December 17, 2013.



Nina Rivkind

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3 PEOPLE OF CALIFORNIA)
4 PLAINTIFF)
5)
6 v.)
7)
8)
9 Edwards, Robert)
10 DEFENDANT

FILED
ORANGE COUNTY SUPERIOR COURT
NOV 26 1996
ALAN SLATER, Executive Officer/Clerk
T. Walsh
BY T. WALSH

CASE NO. 93WF1180

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14 Vol II JURY INSTRUCTIONS
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16 GIVEN ✓
17 REFUSED __
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24 Penalty Phase
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Requested by People		Given as Requested		Refused	
Requested by Def.	✓	Given as Modified	✓	Withdrawn	
Given on Court's Motion					

John J. (Jack) Ryan, Judge

8.85.0m

Although the jury has found the defendant guilty of murder in the first degree, and found the special circumstances of torture and burglary to be true, by proof beyond a reasonable doubt, [the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty]. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DEPARTMENT 45

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,	)	
VS.	)	NO. 93WF1180
ROBERT MARK EDWARDS, DEFENDANT.	)	

HONORABLE JOHN J. RYAN, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

NOVEMBER 19, 1996

APPEARANCES OF COUNSEL:

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FOR THE DEFENDANT: RONALD Y. BUTLER
PUBLIC DEFENDER
BY: TIM SEVERIN, DEPUTY
BY: DANIEL BATES, DEPUTY

CHERI A. VIOLETTE, CSR NO. 3584
OFFICIAL COURT REPORTER

1 OF EXECUTION OR MAINTAINING A PRISONER FOR LIFE.
2 "ALTHOUGH THE JURY HAS FOUND THE DEFENDANT
3 GUILTY OF MURDER IN THE FIRST DEGREE AND FOUND THE
4 SPECIAL CIRCUMSTANCES OF TORTURE AND BURGLARY TO BE TRUE
5 BY PROOF BEYOND A REASONABLE DOUBT, THE JURY MAY DEMAND
6 A GREATER DEGREE OF CERTAINTY OF GUILT FOR THE
7 IMPOSITION OF THE DEATH PENALTY.
8 "IT IS APPROPRIATE TO CONSIDER IN MITIGATION
9 ANY LINGERING DOUBT YOU MAY HAVE CONCERNING THE
10 DEFENDANT'S GUILT. LINGERING OR RESIDUAL DOUBT IS
11 DEFINED AS THAT STATE OF MIND BETWEEN A REASONABLE DOUBT
12 AND BEYOND ALL POSSIBLE DOUBT.
13 "AS TO THE ALLEGED PRESENCE OF CRIMINAL
14 ACTIVITY BY THE DEFENDANT OTHER THAN THE CRIME FOR WHICH
15 THE DEFENDANT HAS BEEN TRIED IN THE PRESENT PROCEEDINGS
16 WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR
17 VIOLENCE AND AS TO THE ALLEGED PRESENCE OF A PRIOR
18 FELONY CONVICTION, THE DEFENDANT IS PRESUMED TO BE
19 INNOCENT UNTIL THE CONTRARY IS PROVED. THIS PRESUMPTION
20 PLACES UPON THE PEOPLE THE BURDEN OF PROVING THE
21 PRESENCE OF SUCH ALLEGED CRIMINAL ACTIVITY AND
22 CONVICTION BEYOND A REASONABLE DOUBT.
23 "IF THERE IS A REASONABLE DOUBT AS TO SUCH
24 CRIMINAL ACTIVITY OR CONVICTION, IT MAY NOT BE
25 CONSIDERED AS AN AGGRAVATING FACTOR.
26 "REASONABLE DOUBT IS DEFINED AS FOLLOWS:

DECLARATION OF SERVICE

Re: *People v. Thomas Lee Battle*

Cal. Sup. No. S119296
San Bernardino County Sup. Ct.,
No. FVI012605

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California, 94607; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Holly D. Wilkens
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101-3702

Honorable Eric M. Nakata
San Bernardino County Sup. Ct.
14455 Civic Drive
Victorville, CA 92392

Each said envelope was then, on December 18, 2013, sealed and deposited in the United States mail at Oakland, California, in Alameda County in which I am employed, with the postage thereon fully prepaid.

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described documents will be hand delivered to appellant, Thomas Lee Battle, at San Quentin State Prison within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on December 18, 2013, at Oakland, California.

DECLARANT