IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. MARCHAND ELLIOTT, Defendant/Appellant.	DEATH PENALTY CASE Supreme Court S-027094 Los Angeles County Superior Court No. VA 008051

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In this reply brief, appellant has focused on reply arguments for Issue I (incomplete appellate record), Issue II (racially- motivated juror challenge), Issue IV (prosecutorial misconduct), Issue V (misleading jury about risk of executing an innocent person), Issue VII (limits on cross-examination of fingerprint expert), Issue VIII (limits on evidence of third-party culpability), Issue X (admission of uncharged crime in penalty phase), Issue XIV (prosecutor displaying list of inadmissible crimes to jury), Issue XV (failure to voir dire jurors or declare mistrial after appellant assaulted jury), and Issue XVII (failure to instruct jury to disregard erroneous statements by prosecutor and judge concerning relative costs of death penalty vs. life imprisonment). By so doing, Appellant is not abandoning any other issues presented for review in the Appellant's Opening Brief, but instead submits those other issues to the Court on the basis of the arguments presented for those issues in the Appellant's Opening Brief.

II. THE INCOMPLETE RECORD DEPRIVES APPELLANT OF AN ADEQUATE APPELLATE RECORD IN VIOLATION OF HIS RIGHT TO DUE PROCESS (Issue I).

A. The Denial of a Complete Record Violates Appellant's Right to Due Process.

In his opening brief, appellant argued that the appellate record in his case is in disarray and that he was erroneously denied the opportunity to correct and complete it after Mr. Elliott's first appellate attorney resigned from his case. Appellant pointed out several missing portions of the record and demonstrated how they prejudiced his ability to raise and litigate significant potential issues with needed factual support from the record.

Respondent does not dispute that the record is incomplete and lacking the transcripts and documents noted by appellant, or that appellant's current counsel was not given the opportunity to complete the record correction process in the superior court. Respondent's argument is limited to a denial that the incomplete record prejudiced appellant in prosecuting his appeal.

Respondent's argument that appellant was not denied a complete record for appeal ignores the fundamental constitutional argument raised by appellant, namely, the denial of an opportunity to try to settle the record of what happened before and during the trial. Appellant's first

appellate attorney failed to do this, and this Court denied appellant's current counsel's request to return the case to superior court so that the record could be completed. Appellant submits that he was denied his federal constitutional right to due process under the Fifth and Fourteenth Amendments, namely an opportunity to complete the record.

B. The Denial of a Complete Record Prejudices Appellant's Ability to Raise and Argue Issues on Appeal.

1. **Jury Instruction Settlement Conferences**.

In its effort to convince this Court that appellant has not been deprived of an adequate appellate record with regard to settling jury instructions, respondent engages in speculation both as to what was said during those unreported conferences and as to the origin of handwritten notes that appear on some of the proposed jury instructions.

At page 44 of Respondent's Brief, the government claims that many of the proposed instructions contain handwritten notes that "appear" to be those of the trial court, "based on a comparison of that handwriting with handwritten initials of the judge that appear on each instruction." Based on the government's self-proclaimed handwriting analysis, the government then goes on to rely upon those notations, (at Respondent's Brief at pages 44-45 and Argument 17) as evidence of the

judge's rulings. Respondent is trying unilaterally to create its own version of the record, substituting its own interpretation of the origin of notes written in the margins of some of the instructions for the required process of a request for settlement followed by a hearing and judicial determination, and, in turn, asking this Court to engage in the same speculation in order to find that there is an adequate record on appeal. Appellant submits that such speculation, based on further speculation, is no adequate substitute for a transcript of what actually took place in the settlement of jury instructions, or, at the very least a settled statement regarding the authorship of the marginal notes and their relation to rulings made in the instructions conference.

2. **The *Faretta* Hearing.**

The respondent engages in similar speculation with regard to the *Faretta* competency hearing held at the end of the trial in April 1992. *See Faretta v. California* (1975) 422 U.S. 806. The respondent's brief states that there was no need to conduct a competency hearing at that time, despite the facts (which were omitted from respondent's argument) that appellant had engaged in an outburst during trial that included throwing apples, that he made paranoid statements during the *Faretta* hearing that his trial attorneys were spies of the court, and that Dr. White had testified at the penalty phase that appellant suffered from emotional

problems.

One of the reasons given by respondent in support of its argument that there was no need for a competency examination, was that appellant had previously been granted pro per status in 1991. The problem with that argument is that there is no evidence of how the prior hearing was conducted or what information the court had before it or relied upon in its ruling. There is no transcript of the first *Faretta* hearing in 1991 nor is there any copy of the 1991 psychological competency examination in the record. Hence, there is no record from which it can be determined what impressions and reservations Dr. Maloney might have expressed in his report after evaluating Mr. Elliott, or whether Judge Flynn properly considered them and made the necessary inquiries into Mr. Elliott's ability to make a knowing and intelligent waiver of counsel before granting his motion. Given that Mr. Elliott's competence, even at that point, was sufficiently in doubt to warrant appointment of a mental health expert to evaluate his capacity to represent himself, this concern is more than academic.

It is also clear from the record that the judge who presided at Mr. Elliott's trial never read the transcript of the 1991 *Faretta* hearing or the 1991 competency evaluation report. The minute entries provide no clue as to the contents of the 1991 psychological report, including any

diagnoses made by the examining psychologist. There is simply no way to review the substance of the 1991 *Faretta* hearing, since only the forms filled out by Mr. Elliott and the minute entries in the record still exist for appellate review.

The absence of the documents and transcripts of the 1991 *Faretta* hearing from the appellate record greatly prejudices appellant's ability to appeal the determination that appellant was competent to represent himself in the post-trial proceedings. First, the trial court was on notice of appellant's potential mental disorders and incompetency based on appellant's erratic, bizarre and self-destructive behavior during trial. Appellant had an outburst in open court in which he threw objects at the jury. He had chosen to wear special glasses during trial that made him look more like the alleged robber, which undoubtedly had some influence on the in-court identifications of him by witnesses. His desire to represent himself after trial could also be seen as more self-destructive behavior that was indicative of some underlying mental illness. The absence of documents and transcripts of the 1991 *Faretta* hearing makes review of the post-trial *Faretta* hearing much more difficult.

3. **The Appointment of Angela Wallace**

In the Appellant's Opening Brief, at pp. 61-62, appellant discussed the missing letter from Angela Wallace, appellant's trial

counsel before the case was transferred to the Norwalk district. As pointed out at p. 62 of the opening brief, a trial court's discretion to appoint attorneys is not absolute and the appointment of a new attorney over one who had previously represented the defendant in the same case, against the wishes of the defendant, may amount to an abuse of discretion. In this case, the trial court never read into the record the contents of Ms. Wallace's letter in which she requested to continue as appellant's trial counsel. The contents of that letter are simply unknown at this time. A remand for further record correction proceedings would allow Ms. Wallace to produce a copy of her letter to the trial court, if one still exists.

There is also another reason to believe that the trial court's refusal to appoint Ms. Wallace to continue as defendant's trial counsel was an abuse of discretion. The court held, in part, that it was the "absolute policy" of the courts in Norwalk to appoint only members of the Southeast Bar Association. (1 RT 1.) Such an inflexible and absolute policy could result in highly arbitrary decisions that disrupt the rapport between defendant and appointed counsel, and could reasonably result in distrust between the defendant and his new counsel. It also allows for prosecutors to engage in forum-shopping for the express purpose of forcing appointment of new counsel and destroying the important bond

of trust already developed between a defendant and his prior counsel.

The trial court even made note of the trust and rapport that had developed between Mr. Elliott and Ms. Wallace. (1 RT 2.) The trial court also attempted to instill trust between Mr. Elliott and his new counsel by telling Mr. Elliott what a great lawyer his new counsel was. (1 RT 3 and 8.) At the same time, the court admitted to having some type of off-the-record meeting about the case with Mr. Ramirez and Mr. Stein, the new attorneys, without the defendant being present. In other words, there is a strong indication that the trial court had already made up its mind on appointed counsel before even giving Ms. Wallace a chance to be heard on her request to remain as defense counsel. All of these facts give rise to an inference that the trial court abused its discretion in refusing to allow Ms. Wallace to continue as appointed counsel. Under these circumstances, it is vital to know the contents of Ms. Wallace's letter to the court in order to properly review the trial court's decision to remove her from the case.

4. The Effects of the Disorganization of the Record on the Appeal.

It is fair to say – and respondent does not dispute – that the trial court record in this case is highly disorganized and that the record is without many documents that are relevant to this appeal. This is a death

penalty case, the most serious of all criminal appeals. A rush to judgment without an adequate and complete record of the proceedings in the trial court would make this appeal a mockery of justice, elevating expediency over due process. Clearly, this case should be remanded for further proceedings to settle the record so that Mr. Elliott is afforded due process in defending against the state's attempt to execute him.

C. The Fact That Appellant Filed an Opening Brief Does Not Establish That He Has Been Afforded Meaningful Appellate Review.

At one point in its brief (RB 49), respondent makes the almost laughable argument that the fact that appellant managed to file an opening brief shows that the state of the record didn't preclude meaningful appellate review.

Filing a brief was necessary to argue and preserve the issue of the inadequate record itself and to show the prejudice from its incompleteness and disarray. In addition, it was necessary to argue the merits of the issues to the extent possible, in order to preserve what could be preserved of them. If appellant had made no argument, or failed to raise issues where the record was incomplete, respondent would undoubtedly argue, in future proceedings, that he had forfeited those issues by failing to raise them on appeal. Appellant had no choice but to

file an opening brief, even if it was based on an incomplete record. The question whether the state of the record has made meaningful appellate review of any issue impossible is not answered by the filing of a brief arguing the issue to the extent the existing record permits, especially when, as in this case, the content of the missing portions is unknown, as is the effect the missing material might have had on the strength or even the character of the issue.

III. THE PROSECUTOR'S EXCUSES FOR STRIKING MINORITY PROSPECTIVE JURORS WAS A PRETEXT FOR PURPOSEFUL RACIAL DISCRIMINATION (Issue II).

A. The Exclusion of African-American Jurors

Respondent devotes a great deal of time to attempting to justify the apparent purposeful discrimination by the prosecutor during jury selection. In its effort to justify the racially-motivated peremptory challenges made by the prosecutor, the government strays far from the facts and ignores the trial court's repeated abdication of its duty to make reasonable inquiries into the prosecutor's purpose in striking prospective non-white jurors.

Behind the array of supposedly race-neutral reasons which the prosecutor presented for her exercise of the peremptory challenges of

Ms. Jones and Mr. Glasper, one stark reality is apparent and undeniable; the defendant was black and the only two black persons on the jury panel were stricken by the prosecutor for suspect reasons. It may be hard to accept that a prosecutor, who is sworn to uphold the law, would engage in purposeful discrimination based on group bias, but the record shows that this prosecutor was indeed motivated to remove all blacks from the jury.

To counter a common misconception, appellant notes that in making racially motivated challenges, the prosecutor need not have been acting out of bigotry or racial animus. Peremptory challenges based on bias against a group are often the product of stereotyping regarding the likely views of that group about the justice system or the case at hand, but have little or nothing to do with negative feelings toward members of the group. Nevertheless, the use of peremptory challenges to eliminate prospective jurors from service on the basis of race or ethnicity is improper.

The three-part test under *Batson v. Kentucky* (1986) 476 U.S. 79, is clear: first, the defendant must make a prima facie showing that the challenge was based on race. If such a showing is made, the burden then shifts to the prosecutor to produce a "clear and reasonably specific" race-neutral explanation for the challenge. Finally, the trial court must make a

determination whether the defendant, despite the prosecutor's justification, has met his burden of proving purposeful discrimination. (*Ali v. Hickman* (9th Cir. 2009), 584 F.3d 1174, 1180.) In making this assessment, the trial court must make a "sincere and reasoned attempt" to evaluate the prosecutor's explanation, but an insufficient inquiry by the court is not entitled to deference on appeal. (*People v. Silva* (2001) 25 Cal.4th 345, 385-86.) In fact, this Court has held that a trial court's failure to engage in a careful assessment of the prosecutor's stated reasons is itself reversible error. (*Id.* at 386.)

A comparative analysis of the stricken black jurors and non-stricken white jurors clearly shows that the answers given by the two African-American jurors were very similar to those of white jurors who were allowed to serve on the jury. As discussed in pages 113-14 of the Appellant's opening brief, a side-by-side comparison shows that every single answer provided by Ms. Jones in her juror questionnaire concerning the death penalty was similar to answers given by non-black panelists who did eventually serve on the jury. The fact that the prosecutor could not remember or articulate a reason for striking Ms. Jones until the prosecutor stalled for time by looking at Ms. Jones' questionnaire is a strong indicator that the prosecutor was fabricating a race-neutral justification.

It was also clear that the prosecutor's reasons for striking Mr. Glasper were a pretext for a racial motivation for removing Mr. Glasper from the jury panel. As in the case of Ms. Jones, Mr. Glasper provided neutral even-handed answers for all questions related to the criminal justice system as well as his views on the death penalty, as discussed in pages 129-130 of Appellant's opening brief. The prosecutor, in basing her justification of Mr. Glasper's removal on an interpretation of his answers in the questionnaire as supposedly showing his distrust of the legal system, ignored the fact that several prospective jurors who were not challenged gave one-sided answers raising the same concerns raised by Mr. Glasper.

The respondent's brief essentially comes down to one claim; the reasons proffered by the prosecutor for removing the only two black people on the jury were, on their face, race-neutral. However, a trial court, or an appellate court, must do more than simply accept any facially neutral reason. If prosecutors were required only to offer some kind of facially race-neutral reason, then it is difficult to imagine how any defendant could prevail on a *Batson* claim. The Supreme Court's exhaustive review of the record in *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317 forecloses such an approach. In *Miller-El*, the Court established that comparative juror analysis is a valuable tool by which a

fact-based review of the voir dire record, using both juror questionnaires and verbal responses of prospective jurors, can determine whether facially race-neutral reasons are a pretext for a discriminatory motive. (*Id.* at 545 U.S. 241.)

Respondent failed to rebut or even respond to the first claim by appellant, that the prosecutor was offering fantastically false reasons and claims regarding the prosecution's peremptory strikes. When the defense raised a *Batson/Wheeler* challenge to Mr. Glasper, the second consecutive African-American that the prosecutor removed from the jury, the prosecutor claimed incorrectly that it was the defense who had challenged and removed the first African-American, Ms. Jones, even though the prosecutor had removed Ms. Jones only minutes earlier, and had been required to state reasons for that first challenge to an African-American. At that point, the prosecutor's credibility was suspect, and her subsequent justification for striking Mr. Glasper should be viewed in the light of that misrepresentation.

The prosecutor gave two "race-neutral" reasons for striking Mr. Glasper from the jury. The first reason was his "appearance", focusing on his hairstyle and clothing. His hairstyle was described as an "Afro with a bun cut into the back." In other words, his hair was styled in a manner not unusual to young African-American males. As defense

counsel observed, Mr. Glasper's hairstyle may have been unusual in Norwalk, where there are relatively few African-Americans, but his appearance would not be unusual in central Los Angeles. (4 RT 804-05.) The prosecutor also stated that his answer to the question regarding worst problems in the criminal justice system were "Sometimes people are tried with lack of evidence; innocent people being convicted. Guilty, known fact, getting away easy."(emphasis added). The prosecutor then said "and people with attitudes like that are not going to be open-minded." (4 RT 804.) The prosecutor offered no other justification for the peremptory strike.

There are two observations to be made about the prosecutor's justifications for striking Mr. Glasper. First, the justification is completely contrary to the statement in the questionnaire. The statement indicates that sometimes innocent people are convicted and sometimes guilty people go free. The statement is literally true and identifies a recognized problem with the criminal justice system.

Second, Mr. Glasper's answer to the questionnaire was even-handed, and showed no bias toward law enforcement or criminal defendants. It was simply an observation of the reality of the existence of imperfections in our American criminal justice system. This statement in no way reveals an "attitude" indicative of a person who is "not going

to be open-minded." Instead, the prosecutor's justification evidences an attempt to provide a pretext for the prosecutor's real motive, which was to remove all African-Americans from the jury.

In an overzealous effort to bolster the prosecutor's justification for striking African-Americans from the jury, the respondent's brief goes beyond the reasons stated by the prosecutor on the record, to offer justifications that do not appear in the transcript record. On page 72 of the brief, respondent cites to other responses in Mr. Glasper's questionnaire, that were never offered by the prosecutor as reasons for striking Mr. Glasper from the jury panel, as "other statements indicating distrust of the legal system and sympathy for defendants." Appellant submits that those additional juror responses now dredged up by the government are a belated attempt to justify the unjustifiable, and should not be relied upon by this Court in deciding whether the prosecutor was engaged in purposeful racial discrimination. The reliance on possible race-neutral explanations for a peremptory challenge not stated by the prosecutor "does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenge." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1109 (citing *Johnson v. California* (2005) 545 U.S. 162, 125 S.Ct. 2410, at 2418). *See also,*

Miller-El v. Dretke (2005) 545 U.S. 231, 125 S.Ct. 2317, 2332 (" A *Batson* challenge does not call for a mere exercise in thinking up any rational basis."); *and, Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 700-01 (speculation does not qualify as circumstantial evidence of the prosecutor's actual reasons for a juror challenge).)

Respondent's discussion of comparative juror analysis is also flawed. Respondent acknowledges that this Court, in *People v. Lenix* (2008) 44 Cal.4th 607, 80 Cal.Rptr.3d 98, 115, approved comparative analysis as a tool in determining whether a prosecutor's explanation for exercising a peremptory challenge was a pretext for purposeful discrimination. As discussed below, respondent's challenge to the validity of the comparative analysis set forth in Appellant's Opening Brief (RB 74-76) was both weak and misleading, particularly when compared to the detailed analysis set forth in the appendices attached to the appellant's opening brief.

Respondent claims the comparative juror analysis is flawed because it fails to recognize that Mr. Glasper was the only juror who had an "unusual hairstyle" and no other juror was identified as wearing a t-shirt and jeans. (RB 74.) This distinction, however, reflects the same racial bias by the appellee's attorneys as by the trial prosecutor. The simple reality is that Mr. Glasper's "Afro" hairstyle was a hairstyle that

is not unusual among young African-American men, and is probably distinctive to African-Americans. In other words, the respondent's argument is that this 22-year old African-American's hairstyle was unusual because he looked like a 22-year old African-American. It was unique among the jury panel because he was the only African-American male on the jury panel. It is disingenuous to claim that a prosecutor's justification for striking an African-American person because of their hairstyle is race-neutral when the hairstyle referred to is associated with African-Americans. Although the trial judge agreed with the prosecutor that Mr. Glasper's hairstyle looked bizarre, the trial judge's observation doesn't change the fact that the hairstyle was common to young African-Americans. Instead, it bolsters appellant's claim that the challenge was based on a physical appearance that is associated with African-Americans.

The bottom line is that the prosecutor's justification was racially motivated, and the respondent's attempt to now justify the prosecutor's actions also appears to be racially motivated.

Respondent's attempts to show that Mr. Glasper's responses to questions about the criminal justice system were biased is also misleading. On page 75 of Respondent's Brief, respondent compares Mr. Glasper's responses regarding problems in the criminal justice

system to those of other jurors in an attempt to show that Mr. Glasper's concerns were slanted towards innocent people being convicted while other jurors expressed concerns that guilty people were going free. The problem with respondent's analysis is that it conspicuously omitted the rest of Mr. Glasper's answer, where he also identifies guilty people "getting away easy" as a problem in the criminal justice system. If respondent is going to engage in comparative juror analysis, then it should not play sleight of hand with the facts.

Other recent Ninth Circuit cases also establish that there was *Batson* error in this case. In *Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, the court held that the proper analysis at *Batson's* step three, whether there was purposeful discrimination, is whether the peremptory strike was "motivated in substantial part" by race. (*Cook, supra,* 593 F.3d at p. 815.) If it was so motivated, the petition is to be granted regardless of whether the strike would have issued if race had played no role. "We reject the . . . mixed-motives analysis, and limit our inquiry to whether the prosecutor was 'motivated in substantial part by discriminatory intent.'" (*Id.*) Applying the *Cook* rule to this case, it is clear that the prosecutor in Mr. Elliott's trial exercised a peremptory challenge of Mr. Glasper based in substantial part on his "bizarre" "afro" hairstyle, which was a hairstyle distinctive to African-American males.

Thus, even if there were other race-neutral explanations offered by the prosecutor, it is clear that the peremptory strike of Mr. Glasper was motivated in substantial part by race.

Another recent Ninth Circuit case, *Crittenden v. Ayers* (9th Cir. August 20, 2010) ___ F.3d ___, 2010 WL 3274506, reaffirmed the rule that a prima facie case of purposeful discrimination, the first step in a *Batson* analysis, does not require a showing of a pattern of striking panel members from a cognizable racial group because "' the Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Id.* at p.9 (quoting *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919.) Thus, a *Batson* challenge can still be established in this case on the basis of Mr. Glasper's peremptory strike even if there were no pattern of striking African-Americans from the jury panel. Of course, Appellant submits that there was an apparent pattern of purposeful discrimination in that the prosecutor struck both of the African-American jurors from the panel.

B. The Exclusion of Hispanic Jurors.

In this case, the trial court stated that the prosecution appeared to be engaged in a pattern of using peremptory challenges to strike Hispanic women from the jury panel, and that the court would require

the prosecutor to explain and justify any further prosecutorial strikes of Hispanic females. When the prosecutor subsequently made yet another challenge of a Hispanic woman, the defense objected and asked the court to enforce its previous promise to investigate the motive for these apparently racially-motivated jury challenges, and require the prosecutor to explain the rationale for her systematic striking of Hispanic women from the jury pool. (4 RT 813.) The trial court, in a complete about- face from its earlier ruling, refused to require the prosecutor to offer an explanation, and instead offered its own justification, which was that the juror had indicated in her questionnaire that she opposed the death penalty. (4 RT 813.) When defense counsel pointed out that the juror had stated during voir dire that she could impose the death penalty in the right case, the court disregarded the juror's voir dire responses and stated, "Based on her representations and showing in the questionnaire, the objection is disallowed." (4 RT 814.)

In the opening brief, Appellant focused on a Hispanic juror, Ms. Garcia (referred to in Respondent's Brief as Mary G.). The trial court found that there was a pattern of the prosecution striking Hispanic jurors, especially female Hispanic jurors. (4 RT 796-798.)

Appellant pointed out that the reason given by the prosecutor for striking Ms. Garcia was based on a mistake by the prosecutor, who

confused Ms. Garcia with another juror. In the absence of a stated reason specific to Ms. Garcia, there was no race-neutral reason given by the prosecutor to strike Ms. Garcia. The prosecutor's stated reasons, at 4 RT 798-99, were as follows:

> Ms. Najera: Your Honor, Miss Garcia, as I recall, from when she was on the stand yesterday, came very close to being a challenge for cause.
>
> She was sitting here– in fact I tried to challenge her for cause. She was sitting next to Miss Roux-Clough, as I recall. And she – I thought I had her originally down for my questionnaire as a challenge for cause. If she had stuck to her answers when she was talked to, it would have gotten her kicked. But she changed her tune as soon as Miss Roux-Clough changed hers. So unless I got my people mixed up–

That is the entirety of the prosecution's stated reasons for excusing Ms. Garcia. As appellant pointed out in the opening brief, the prosecutor clearly "got my people mixed up." The record shows that Ms. Garcia was not even in the same group as prospective juror Roux-Clough. (4 RT 633-34, 762) The record also shows that the prosecutor never tried to challenge Ms. Garcia for cause. The prosecutor simply was talking about another female Hispanic juror. The prosecutor never gave a race-neutral reason for striking Ms. Garcia. The prosecutor's confused explanation is strong evidence that her explanation was a pretext for her true motive for striking Ms. Garcia, namely the

prospective juror's race.

In their brief, Respondent claims that trial counsel's failure to raise an objection that the prosecutor was misidentifying the juror is to be construed as a waiver of that claim on appeal. Aside from the absurdity of imposing a forfeiture on the ground that defense counsel failed to notice a mistake missed by both the prosecutor and the court, Respondent's argument must be rejected, because there is no requirement in the *Batson* analysis that defense counsel is required to correct misstatements in the prosecutor's reasons for a peremptory strike. Defense counsel did all that was required of them; they raised the *Batson* objection in a timely manner and established a prima facie case of racial discrimination in striking Hispanic jurors. At that point the burden shifted to the prosecutor to provide a race-neutral explanation and for the trial court to then weigh the factors to determine if there was purposeful discrimination. Here the prosecutor never made it past the second step of the *Batson* test, by failing to provide a race-neutral reason for striking Ms. Garcia.

Respondent's reliance on *People v. Lewis* (2008) 43 Cal.4th 415, 481 is also misplaced. A careful reading of *Lewis* reveals an entirely different factual situation, presenting a question whether the defense even made a *Batson/Wheeler* motion to challenge the prosecution's

peremptory strikes of prospective Hispanic jurors, and whether the defense pursued the court to make a ruling on that specific *Batson* challenge. (*Lewis, supra,*. at pp. 481-82.) In this case, however, there is no doubt that an appropriate motion was brought by defense counsel to challenge the prosecutor's discriminatory pattern of striking Hispanics from the jury. There is also no doubt that the trial court made a ruling that there was a race-neutral reason for the peremptory strike. Thus, the issue of whether the trial court erred in denying the *Batson* challenge is clearly preserved for appeal.

IV. APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT AND VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS REGARDING THE ADMISSION OF ALLEGATIONS OF THREATS OF PERSONAL SAFETY TO A PROSECUTION WITNESS AND JURORS WERE NOT FORFEITED (ISSUE IV).

In Issue IV, appellant raised the claim that the prosecutor engaged in prosecutorial misconduct by injecting unsupported suggestions that the personal safety of an important prosecution witness was in jeopardy because she had identified Mr. Elliott, coupled with insinuations that the jurors themselves may be in danger. (AOB 160-182).

In Argument IV(b) of respondent's brief, regarding the testimony

of prosecution witness Janet Delaguila, respondent argued that the prosecutorial misconduct claim was forfeited because trial defense counsel did not object. (RB 89, 94.) The record, however, shows that defense counsel did make an objection of relevancy when the prosecutor elicited testimony from Ms. Delaguila that her employer had transferred her "for [her] personal safety," as set forth in the transcript excerpt quoted at p. 162 of Appellant's Opening Brief.

Furthermore, it was not necessary for defense counsel to state a federal constitutional objection in order to preserve the constitutional claim for this appeal. This Court has clearly held that where a defendant's constitutional claim is based on the same facts as those underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v.Lewis* (2008) 43 Ca1.4th 415,490.)

In *People v. Wilson* (2008) 43 Ca1.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer* (2006) 38 Cal.4th 412:

> "As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate

> claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.")

(*People v. Wilson, supra,* 43 Cal. 4th at p. 13 fn.3.)

In this case the objection by defense counsel of relevancy was based on the same set of operative facts as the constitutional claim. The questioning by the prosecutor was not relevant because it was an attempt to inject inflammatory suggestions of non-existent threats purportedly made by Mr. Elliott. This attempt to scare the jury was both irrelevant and violative of Mr. Elliott's constitutional right to due process and a fair trial; his right under the Sixth Amendment to confront his accusers; and his right under the Eighth Amendment to a reliable and non-arbitrary penalty verdict.

V. THE PROSECUTOR DID MISLEAD THE JURY ABOUT THE RISK OF EXECUTING AN INNOCENT PERSON (ISSUE V).

Issue V addresses the erroneous and prejudicial statements by the prosecutor and the trial court as to the "safeguards" in the law to eliminate any risk that innocent persons could be executed. (AOB 183-192) In its brief, respondent claims that *Caldwell v. Mississippi* (1985) 472 U.S. 320, is not applicable because the rule of *Caldwell*, that a jury must not be misled into believing that the sentencing decision in capital cases lies elsewhere, does not apply to the jurors' determination of guilt.(RB 102.) In making that argument, respondent mischaracterized the concerns expressed by prospective jurors as relating only to the use of circumstantial evidence to produce guilt (RB 102-103), when, in fact, prospective juror Karen Timion explicitly stated a concern that innocent people had been executed based on circumstantial evidence. (AOB 183, 4 RT 773-74.)

Later in the same argument, respondent argued that the claim that the prosecutor's misconduct violated due process was forfeited by counsel's failure to object on constitutional grounds. (RB 106.) As with similar objections to the sufficiency of the objection, it was not necessary for defense counsel to state a federal constitutional objection in order to preserve the constitutional claim for this appeal.

This Court has clearly held that where a defendant's constitutional claim is based on the same facts as those underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v.Lewis* (2008) 43 Ca1.4th 415,490.)

In *People v. Wilson* (2008) 43 Ca1.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer, supra:*

> "As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17."

(People v. Wilson, supra, 43 Cal. 4th at p. 13 fn.3.)

In this case, the constitutional claim is based on the same operative facts as the objection at trial. Defense counsel made a timely objection to the prosecutor's statements on the grounds that the prosecutor had just falsely represented to the prospective jurors that the State of California had guarantees against wrongful executions. This objection was specific and sufficient to state a constitutional violation.

VI. THE TRIAL COURT'S RESTRICTIONS ON CROSS-EXAMINATION OF THE PROSECUTION'S FINGERPRINT EVIDENCE WAS AN IMPROPER RESTRICTION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE ONLY PIECE OF PHYSICAL EVIDENCE CONNECTING HIM TO THE ROBBERY AND MURDER. (ISSUE VII)

A. The Federal Constitutional Claims Were Not Waived by Trial Counsel's Failure to Make a Record of a Constitutional Objection.

In his opening brief, appellant argued that the trial court's erroneous ruling limiting his cross examination of the police fingerprint examiner denied him his rights to confront witnesses and to present a defense, under the Sixth and Fourteenth Amendments. Respondent has argued in response that the claim of constitutional error was forfeited because trial counsel did not object on those grounds. Respondent's forfeiture claim is without merit.

In this case, the record is clear that the trial court abruptly stopped the cross-examination of the state's fingerprint identification witness, Deputy George, with an accompanying warning and admonition to defense counsel that he would allow no further cross-examination of the fingerprint witness unless defense counsel could vouch to the court that they would be calling a witness who would say the same prints were not those of the defendant. (7RT 1286-1288.) Defense counsel responded, explaining the expert testimony they planned to present to impeach Deputy George's conclusions identifying the prints as appellant's. The court responded by ruling that any such testimony was excluded under Evidence Code section 352 because the defense expert would not testify affirmatively that the fingerprints were not Mr. Elliott's. As the record shows, defense counsel made their objection to the court's ruling abundantly clear and provided the court with the information it needed to make the only correct ruling under the circumstances. Further defense objections based on constitutional grounds would have been futile and unnecessary. (*See, People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Williams* (1997) 16 Cal.4th 153, 255; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433 ; *People v. Whitt* (1990) 51 Cal.3d 620, 655.)

Moreover, the argument actually made by defense counsel did encompass the constitutional basis for the claim sufficiently that there is

no reason for this Court to think that the trial judge would have ruled differently had the constitutional argument been explicitly presented -- that in this case, to quote *Boyer*, *supra*, "rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases..." Here, trial counsel's argument that he was entitled to present evidence impeaching George's techniques and showing that there could be doubt about the origin of the fingerprint were tantamount to an assertion of the right to present evidence and a defense. Furthermore, appellate courts are allowed to consider pure questions of law based on undisputed facts and constitutional claims involving fundamental rights, even in the absence of an objection. For all these reasons, appellant's claims that the errors in his case violated his constitutional rights should not be deemed forfeited.

B. The Trial Court Placed Unconstitutional Restrictions on the Defendant's Right to Meaningful Cross-examination.

In the opening brief, appellant argued that the trial court violated Mr. Elliott's Sixth Amendment right to confront witnesses against him because the court terminated an appropriate cross-examination of the

fingerprint expert. (AOB 230 ff.)

In essence, the trial court's ruling used a conditional form of restriction on defense counsel's cross-examination of the fingerprint expert; unless the defense was prepared to call a witness to affirmatively testify that the latent prints did not match those of the defendant, the defense could not cross-examine the state's expert witness on subjects relating to the reliability of his method for determining a match between two fingerprints or present any expert testimony themselves relating to that issue. Thus, any further cross-examination during the prosecution's case-in-chief was predicated and conditioned upon the defense committing to the presentation of specific defense testimony.

The United States Supreme Court has long held that the cross-examiner's right to discredit adverse witnesses through impeachment is an essential component of the right to confrontation. (*See Davis v. Alaska* (1974) 415 U.S. 308, 315; *Slovik v. Yates* (9th Cir. 2009) 556 F.3d 747, 752-53.) By conditioning and restricting cross-examination contingent on the defendant's ability and commitment to presenting a defense fingerprint witness offering a different conclusion, the trial court denied Mr. Elliott those constitutional rights.

In addition, the restriction on cross examination and presentation of expert testimony for the defense effectively lowered the

prosecution's overall burden of proof of appellant's guilt. As the proponent of the expert testimony the government bore the burden of establishing the reliability of the proffered evidence.

Finally, the ruling unconstitutionally shifted the burden of proof from the prosecution to the defense by requiring Mr. Elliott to present affirmative evidence that the fingerprints on the objects in the van were not his, as a condition to presenting expert testimony at all. It was not Mr. Elliott's task to prove the fingerprints excluded him, but only to raise a reasonable doubt that the expert's identification of them was correct. Evidence that the fingerprint comparison technique used by the prosecution's analyst did not reliably produce correct identifications was relevant to the question whether the prosecution had met its burden; it was neither necessary nor proper for the court to insist that the defense present additional evidence that the identification in this particular case was wrong.

The ruling also violated the principle that the trial court may not force a defendant to relinquish one constitutional right as a condition for asserting another. This rule against unconstitutional conditions on trial rights precludes the government from coercing the waiver of a constitutional right either by conditioning the exercise of one constitutional right on the waiver of another *(see, e.g., Simmons v.*

United States (1968) 390 U.S. 377, 394) or by attaching conditions that unreasonably penalize the exercise of a constitutional right (*see, e.g., United States v. Jackson* (1968) 390 U.S. 570, 583.) Here, the trial court required the defendant to forego his right to put the government to its test of proving his guilt beyond a reasonable doubt without calling any witnesses, or introducing any evidence in a defense case, as a condition for his constitutional right to fully confront and cross-examine the government's witnesses.

Respondent has made several arguments, often mutually contradictory, in support of its claim that the trial court's limitations on appellant's cross examination were proper and, in any event, harmless.

In addition to its contention that appellant has forfeited his claim that the court's ruling was constitutional error because he did not argue that ground below, respondent makes a number of arguments regarding the merits of the claim:

– The trial court acted within its discretion in stopping the cross-examination of Deputy George regarding the number of characteristics shared by appellant's fingerprints and those on the Rubbermaid container because "any additional questioning for these purposes was of little, if any, relevance" because Deputy George's testimony that no minimum number of characteristics was required was "plainly correct."

(RB 125-126).

– The trial court did not bar the defense from presenting expert testimony challenging the reliability and methodology of fingerprint evidence.

– "Even if the court's ruling could be construed as barring the proposed defense fingerprint expert testimony," the proffered evidence was properly ruled inadmissible under Evidence Code section 352 because "it was of marginal relevance and taking of the testimony would be a waste of time," apparently because the defense expert, had he been allowed to testify, would not have testified definitively that the fingerprints did not belong to appellant.

– The trial court's statement barring additional testimony unless the defense intended to call an expert to testify that the prints did not belong to appellant was not improper.

– Any error in precluding defense cross examination and presentation of evidence was harmless beyond a reasonable doubt, because the cross examination actually permitted sufficiently accomplished its purpose of impeaching Deputy George's conclusions; because the visual comparison of fingerprints is such a "long-established technique" that any limitation on questioning about its reliability was "meritless" [sic]; because the jury saw photographs of the fingerprints

and could see for itself whether there was a match without relying completely on Deputy George's expert testimony; and because numerous eyewitnesses identified appellant as the Lucky store robber.

Several of respondent's arguments are grounded on a faith in fingerprint examination techniques, and particularly the "ACE-V" method, that has been shown to be unfounded in a number of court decisions, documented misidentifications, and, most recently, a landmark report by the National Academy of Sciences.

Respondent's argument that neither the preclusion of cross examination nor the exclusion of defense expert testimony was error is based on an inadequate understanding of both the methodologies of fingerprint examination and defense counsel's intent in cross-examining Deputy George and presenting evidence impeaching the reliability of fingerprint identification.

Defense counsel's attempted cross-examination of the prosecution's fingerprint witness was a legitimate attempt to discredit the reliability of a witness who had testified that fingerprint identification was a science and that, using that science, he had positively identified the latent prints in the van as Mr. Elliott's. (7 RT 1268.)

Deputy George testified that he kept no notes of his examination

of the fingerprints, never counted or kept track of points of identified similarities, and never wrote a report of his examination. (7 RT 1271, 1284.) His testimony about his methodology for concluding the two fingerprints match – a method of analysis known among fingerprint examiners as the "ACE-V" method [1]– is best summed up as his knowing it when he sees it. Furthermore, his opinion that no minimum number of points of identity need be found to make an identification when comparing fingerprints represents a minority view among fingerprint examiners. (*See United States v. Mitchell* (3d Cir. 2004) 365 F.3d 215, 222.) Most jurisdictions employ a standard that requires the examiner to find a match between a known and latent print at a minimum number of points of comparison before the examiner can testify that the two prints match (though Canada and the United Kingdom do not require any minimum number.) The trial court's rulings precluded defense counsel from presenting this information to the jury and showing the lack of a scientific basis for the technique used by Deputy George.

The trial court's rulings excluding expert testimony entirely missed the point of impeachment of the reliability of a technique.

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National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" (2009) (hereinafter, "Strengthening Forensic Science"), pp. 137-138.

Moreover, they were based on fallacious reasoning regarding the relationship between calling a match and calling an exclusion in a given case.

The question whether a technique is capable of making reliable identifications is not the same as a question whether the identification made in a particular case was correct. The essence of a claim that an identification technique is unreliable is that it cannot be reliably determined, *when an identification is purportedly made,* whether or not the examiner was correct. Evidence that an identification technique does not produce reliable results says not that the conclusion that two samples have the same source is necessarily mistaken, but that (a) it may be mistaken, and (b) it may be impossible to tell in a given instance whether it is mistaken or not. Clearly, this is relevant evidence in deciding what weight to give testimony asserting a match.

The court also failed to understand that there is a difference in the ability of particular identification techniques to reliably include and exclude questioned samples. In fingerprint examination, as in DNA typing, toolmark examination, and many other forensic techniques, a clear non-match of two samples at one or more locations can indisputably show that they came from different sources. The ability of a technique to generate a clear exclusion, however, does not answer the

question whether it is capable of reliably determining identity from an apparent match. In the words of the National Academy of Sciences report:

> The determination of an exclusion can be straightforward if the examiner finds detail in the latent print that does not match the corresponding part of the known print, although distortions or poor image quality can complicate this determination. But the criteria for identification are much harder to define, because they depend on an examiner's ability to discern patterns (possibly complex) among myriad features and on the examiner's experience judging the discriminatory value in those patterns.

("Strengthening Forensic Science," *supra*, at p. 140.)

The court's ruling that defense expert testimony was irrelevant unless the expert could testify that appellant was excluded as the source of the prints was erroneous because it was based on a mistaken belief about the capabilities and limitations of the technique.

The court's rulings also kept from the jury evidence that the reliability of latent fingerprints as a method of identification depends greatly on the quality of the prints. Latent prints are often less clear than inked prints. They may have fewer available points of comparison due to smudging or fragmentation; they may be incomplete, and they may be distorted by movement of the hand or by the shape of the surface on which they were left. All these factors increase the potential for error and misidentification. (*"Strengthening Forensic Science," supra*, at p.

140; Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint Science Is Revealed*, 75 So.Cal. L.Rev. 605, 607-610 (2002); cf. *United States v. Calderon-Segura* (9th Cir. 2008) 512 F.3d 1104, 1108-09.) Here, the fingerprints attributed to Mr. Elliott were partial prints, one of which, according to defense counsel's proffer of his expert's proposed testimony, matched at only eight points.[2]

As early as the time of Mr. Elliott's trial, data existed which cast fundamental doubt on the accuracy and reliability of the type of fingerprint testimony produced against Mr. Elliott. As the record below shows, Mr. Elliott was prepared to present expert testimony challenging the police analyst's methods as unscientific and his conclusions as unreliable.

A study of the first major accreditation examination of fingerprint examiners in 1995, at a time relatively close to appellant's trial, found that the reliability of the tested fingerprint examiners' conclusions was startlingly poor. *Fingerprints Meet Daubert, supra,* 75 So.Cal. L.Rev. at p. 634.) Of the 156 fingerprint examiners who took the accreditation test, only sixty-eight (44%) were able to both correctly

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2 An eight-point match is not conclusive proof that the latent and known prints came from the same source. Misidentifications have been documented between known and latent fingerprints matching at as many as sixteen points. (See http://onin.com/fp/problemidents.html.)

identify the five latent print impressions that should have been identified and the two elimination latent prints to be identified. *Id.* Even more significantly, thirty-four of the test participants (22%) made erroneous identifications on one or more of the questioned prints, for a total of forty-eight misidentifications. *Id.* In commenting on the results of that 1995 test, the head of forensic sciences for the Illinois State Police stated that "this [poor test result] represents a profile that is unacceptable . . . ." *Id.*

More recent events have only confirmed the legitimacy of concerns about fingerprint evidence. The National Academy of Science's landmark report, *Strengthening Forensic Science in the United States: A Path Forward* (2009) criticized the methods used for comparing and interpreting fingerprints and reporting results and found them scientifically invalid. (*Id.*, at pp. 136ff.)

Mr. Elliott, through his counsel, had the right to pursue vigorous and thorough cross examination and impeachment of the fingerprint examiner regarding the lack of any documented or credible methodology supporting his conclusions, and to present expert testimony of his own to show the unreliability of the methods used. The court's rulings blocking his attempts to show the questionable reliability of Deputy George's identifications in the case were erroneous.

C. The Error Was Prejudicial.

Sixth Amendment Confrontation Clause violations are subject to harmless-error review. (*See Coy v. Iowa* (1988), 487 U.S. 1012, 1021-1022, 108 S.Ct. 2798, 2803.) The standard of review, under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, which respondent does not dispute, is whether the error was harmless beyond a reasonable doubt.

It is well established that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. (*See Maryland v. Craig* (1990) 497 U.S. 836, 845-47, and *Ohio v. Roberts* (1980) 448 U.S. 56, 65.) When a Confrontation Clause error is detected, the harmless-error standard is crucial to maintain faith in the accuracy of the outcome: the absence of full adversary testing, for example, cannot help but erode confidence in a verdict, as a jury easily may be misled by such an omission.

The trial court's errors were not harmless, under the facts of this case. The latent fingerprints in question, taken from items in the stolen van that was used by the robbers to escape, was the only physical evidence linking Marchand Elliott to the crime. (RT 1254, 1260.) No DNA, blood or hair evidence connected him to the crime, nor was any gun or clothing recovered. In addition, the fact that the van was stolen

six days prior to the robbery (RT 1228) makes the connection between appellant's fingerprints and the murder even more tenuous. The witnesses' descriptions of the robber varied widely, and several witnesses did not identify Mr. Elliott in photographic lineups. Given the fact that the lion's share of the evidence against Mr. Elliott consisted of contradictory and impeached eyewitness testimony, the fingerprint testimony, supported by the testimony of a supposedly expert analyst, might well have been dispositive to some of the jurors.[3]

The restrictions on the cross-examination of the prosecution's fingerprint witness and the denial of his proffer of expert testimony were clearly violative of Mr. Elliott's rights to confrontation, the presentation of a defense, and a fair trial, both at guilt and penalty.

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[3] Respondent argues, at one point, that any error was harmless because the jury were shown photographs of the known and latent fingerprints and could see for themselves whether the prints matched. This begs the question of the effect of Deputy George's uncontroverted and unimpeached expert testimony on quelling any doubts a juror might have upon viewing the prints. Furthermore, Deputy George testified as an expert, based on his training and experience, to a conclusion the jurors were unable to determine for themselves on the basis of seeing the photographs of the prints, i.e., that the latent prints could be identified as uniquely that of Mr. Elliott, to the exclusion of any other person in the entire world.

VII. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EVIDENCE OF OTHER ARMORED CAR ROBBERIES WHICH THE POLICE ATTRIBUTED TO STEVEN YOUNG DENIED MR. Elliott HIS RIGHT TO PRESENT A COMPLETE DEFENSE (ISSUE VIII)

At Mr. Elliott's trial, the court adamantly refused to admit evidence that Steven Young, who had been identified by two eyewitnesses as the Lucky Store robber and whose fingerprint had been found on a newspaper in the getaway van, had recently pled guilty to committing a series of armed robberies of armored car guards in the Los Angeles area during the twelve months preceding the robbery at issue in this case. (RT 1525.) The trial court, in a ruling made at the close of the prosecution's case in chief, emphasized the supposed strength of the prosecution's evidence; specifically, it pointed out that five witnesses had made "unequivocal, unimpeached identification" of Mr. Elliott as the robber. (8 RT 1526.)

As an additional basis for its ruling, the trial court further reasoned that the evidence of the uncharged armored car robberies did not have the characteristics of a "signature crime" that would tend to identify Steven Young as the perpetrator of the robbery charged against Mr. Elliott.[4]

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[4] At p. 250 of the Appellant's Opening Brief, appellant incorrectly stated

Respondent makes a series of arguments defending the trial court's ruling. Initially, like the trial judge, respondent places great emphasis on the supposed strength of the prosecution's case against Mr. Elliott. The remainder of respondent's argument is fairly incoherent and lacking in analysis of the evidence. To the extent appellant can tease out its points, they seem to be:

1. That the evidence implicating Young was not sufficient to raise a reasonable doubt of Mr. Elliott's guilt, as required under *People v. Hall* (1986) 41 Cal.3d 826, because it merely showed that Mr. Young had a disposition to commit similar crimes.

2. That evidence that appellant and Mr. Young looked similar and knew each other failed to connect Young to the Lucky Store robbery.

3. That appellant's attorneys had argued that appellant was light-skinned and Young was dark.

4. That the evidence of Mr. Young's guilty pleas to the other armored car robberies was properly excluded under Evidence Code section 352 because it would somehow have required the jury to resolve

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that this issue was subject to de novo review. Appellant now acknowledges, as stated at p. 134 of respondent's brief, that a ruling on the admissibility of third-party culpability evidence is reviewed for abuse of discretion.

the issue of the identity of the robber in those other cases.

5. That the trial court properly excluded the evidence because it found that the similarities between the Lucky Store crimes and Young's other robberies were not sufficient to establish Young's identity as the perpetrator or to show Young's use of a common scheme or plan.

6. That the evidence of Young's other robberies was inadmissible because it showed only a criminal disposition.

Respondent argued that any error was harmless because the defense was permitted to present evidence that two eyewitnesses identified Young as the robber in a photo lineup and that Young's fingerprint was found on a newspaper on the dashboard of the getaway van.

Finally, respondent argued yet again that appellant forfeited his claims of constitutional error by failing to argue them in the trial court.

At the outset of this reply, appellant wishes to make clear that no evidence of other robberies, either adjudicated or unsolved, was admitted into evidence. At p. 130 of Respondent's Brief, the impression is created that the Court allowed the defense to present evidence of four convictions of Steven Young for other similar robberies (citing 8 RT 1504-13). The reality, however, is that the court clearly held that "as far as bringing any other conduct of Mr. Young before this court, any other

crimes which he's been convicted, any other crimes in which he's a suspect, the rule is you may not." (8 RT 1525.)

In analyzing whether evidence of a third party's culpability in committing the charged offense should be admitted, it is important to start with the rule that the Sixth and Fourteenth Amendments guarantee that criminal defendants must have "a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324 (citations omitted); *see also California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-03; *Crane v. Kentucky* (1986) 476 U.S. 683, 689-90.)

In *Holmes v. South Carolina, supra,* the Supreme Court strongly criticized an analysis of the admissibility of third party evidence that focused on the strength of the prosecution's case. In reversing the conviction and disapproving the state evidentiary rule created by the South Carolina Supreme Court, the Court, in an opinion by Justice Alito, held such analysis, which emphasizes the strength of the prosecution's case, is simply not logical.

> "Just because the prosecution's evidence, *if credited,* would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without

> making the sort of factual findings that have traditionally been reserved for the trier of fact. . . . The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."

(*Holmes v. South Carolina, supra,* 547 U.S. at pp. 330-331.)

In this case, as in *Holmes*, the trial court erroneously placed great emphasis on the strength of the prosecution case against Mr. Elliott. The court emphasized that five persons had unequivocally identified Mr. Elliott as the robber, and that no witness in the prosecution case had identified Mr. Young as a participant in the robbery. (RT 1526.) The trial court's analysis was limited to the evidence at the close of the government's case. (RT 1519, 1520, 1523.) The defense, as in *Holmes*, had certainly not conceded the correctness of the eyewitness identifications or the central issue in the case, namely the identity of the robber. The court, however, downplayed any inconsistencies in the prosecution witnesses' identification testimony as insignificant. (RT 1530-31.)

By limiting its analysis to the strength of the prosecution's case, the trial court engaged in the erroneous reasoning criticized by the Supreme Court in *Holmes*.

The trial court further reasoned that the evidence of the uncharged

armored car robberies did not have the characteristics of a "signature crime" that would tend to identify Steven Young as the perpetrator of the robbery charged against Mr. Elliott. The court's final ruling was that "I'm saying it's not signature. That's what my ruling is. It is not a signature." (8 RT 1529.) The trial court never ruled as to whether the evidence was admissible as part of a common scheme or plan, even though defense counsel explicitly requested the court to rule on the issue of admissibility under that theory.

At the outset it should be noted that the trial court seemed to have some doubt as to whether § 1101 even applied to issues of third party culpability. (*See* 8 RT 1528.) However, this Court held in *People v. Davis* (1995) 10 Cal.4th 463, 500-501, that nothing in Evid. Code § 1101 limits its application to evidence concerning a defendant, and that § 1101 is applicable to proposed evidence regarding prior criminal conduct of a third party alleged by the defendant to have committed the charged offense.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-03, this Court established the evidentiary standards for admitting evidence of uncharged crimes under § 1101, which vary according to the purpose for which the evidence is being admitted. Under § 1101(b) evidence of uncharged crimes can be admitted to prove identity, a common scheme

or plan, or intent.

In this case, the defense offered the evidence of Young's other robberies to show Young's identity as the robber in the crimes charged against Mr. Elliott, by adding to the eyewitness identifications of Young as the Lucky Store robber and the presence of his fingerprint in the getaway van further, uncontrovertable evidence that Young was a professional criminal whose common scheme was the commission of armed robberies of armored car guards using a method similar to that employed in the robberies in this case. (RT 1529.)

The trial court excluded the evidence not in an exercise of its discretion but because it applied the wrong standard for admissibility. "Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a 'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1148 (quoting *People v. Ewoldt, supra,* at 7 Cal.4th 402).) This was the "signature" standard relied upon by the trial court in its ruling quoted above. However, the inference of identity "need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*People v. Miller* (1990) 50 Cal.3d 954, 987.) And "the likelihood of a particular group of

geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics." (*Id*, at p. 989.) Under *Miller*, the features of Young's crimes, considered together, clearly supported an inference of identity strong enough, when added to the fingerprint and identification evidence indicating his personal presence at the scene of the Lucky Store robbery, to have raised a reasonable doubt that Mr. Elliottt was the perpetrator of those crimes. By requiring that Young's other armored car robberies bear a unique "signature," the trial court used the wrong standard and thus failed to exercise the discretion permitted it.

Moreover, "a lesser degree of similarity is required to establish relevance on the issue of common design or plan. "For this purpose, 'the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.'" (*People v. Carter, supra*, 36 Cal.4th at p. 1149 (quoting *People v. Ewoldt, supra,* 7 Cal.4th at p. 402).)

Here, the defense was seeking to show that this robbery was part of a common scheme and plan by Steven Young to commit armed robberies of armored car guards delivering or picking up money. The defense proffered that Young had pled guilty to a series of armored car robberies in the Los Angeles area covering a time span ending just

weeks before the robbery in this case. (RT 1525.) Furthermore, since Young had pled guilty to those other robberies, there was no reason to exclude the evidence under Evidence Code section 352, because his commission of the robberies and the factual record regarding their circumstances was undisputed.

The similarity of those other robberies to the Lucky Store crimes was obvious: all occurred in the Los Angeles area, all involved robbing an armored car guard while making a regular pickup or delivery of money at a business. The sequence of robberies over a twelve month period clearly indicated a common plan by Young to commit a series of robberies, specifically of armored cars under similar circumstances, rather than a series of similar spontaneous acts, which is the *Ewoldt* standard for admission of uncharged crimes to prove a common scheme or plan. Common scheme or plan evidence is legitimately used to establish identity.

The evidence presented at trial of the presence of Young's fingerprint in the stolen getaway van, and the identification of Young by two eyewitnesses to the charged robbery, showed Young's possible involvement in that crime. But that limited evidence– that some otherwise unknown man named Steve Young had been identified by two of the eyewitnesses and had left a fingerprint in a newspaper on the

dashboard of the getaway van -- was of limited value on its own. The prosecutor could, and did, explain the identifications away as mistaken and argue that the presence in the van of a newspaper with Young's fingerprint could have had an innocent explanation. Additional evidence that Young had committed a string of armored car robberies under similar circumstances to the one charged in this case would have given heightened meaning to the evidence that he was present at this one as well and weakened the prosecutor's attempts to discount the eyewitness and fingerprint evidence. Put another way, evidence that an unknown man named Steven Young looked like the Lucky Store robber and had left a single fingerprint in the getaway car could be reasoned away as coincidence. Evidence that an armored car robber named Steven Young had been identified by eyewitnesses in this armored car robbery and had left his fingerprint in the getaway car was another matter entirely.

Here, the defense proffer met the test established in *People v. Hall* (1986) 41 Cal.3d 826, 833, that there was sufficient direct or circumstantial evidence linking the third person to the actual perpetration of the crime to raise a reasonable doubt of Mr. Elliott's guilt. But the court's ruling prevented Mr. Elliott's counsel from informing the jury of the critical contextual information of Young's admitted involvement in a series of similar armored car robberies just prior to the robbery charged

against Mr. Elliott. The excluded evidence would have significantly aided the defense in establishing a reasonable doubt as to Mr. Elliott's involvement in the charged robbery and murder.

The recent Ninth Circuit case of *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754, supports appellant's argument that he was deprived of his constitutional right to present a meaningful defense. In *Lunbery*, a murder defendant was not allowed to introduce the statement of a deceased witness who admitted knowledge that another person, not the defendant, had committed the murder. Citing *Chambers v. Mississippi, supra*, the Ninth Circuit held that, depending on the circumstances of a case, a state court's rules of evidence cannot be mechanistically applied and must yield in favor of due process and the right to a fair trial, especially where the evidence had persuasive assurances of trustworthiness and was critical to the defense of third party culpability. "Due process," the court wrote, "includes a right to a meaningful opportunity to present a complete defense. . . . That right is violated by the exclusion of probative admissible evidence that another person may have committed the crime." *Id. at* 605 F.3d 760.

In this case, the fingerprints of both Marchand Elliott and Steven Young were found in the stolen getaway vehicle. Defendant sought to admit Young's pleas of guilty and other admissions he made regarding

his involvement in a string of other similar robberies of armored car guards in the Los Angeles area in the months preceding the robbery at issue, as evidence that Young had committed this charged armed robbery, as part of his common scheme or plan of robbing armored car guards during their stops to pick up money from businesses.

In *Lunbery*, the court also noted that the appellate review of excluded evidence cannot address each item independently without connecting it to the chain of circumstances constituting the elements of the defense. (*Id.* at p. 761.) Otherwise, the reviewing court can miss the entire probative force of the whole chain. (*Id.*) The missing element of the third party culpability defense in that case would have connected the chain of circumstances "and the remaining pieces of the puzzle would have become more relevant." (*Id.* at 761-62.)

In this case, as in *Lunbery*, the evidence that two witnesses identified Young as the robber in this case and that his fingerprint was found in the van were pieces of a puzzle whose pattern would have been made clear by the additional evidence of Steven Young's admission and guilty pleas to a string of similar robberies occurring shortly before the robbery in question. That excluded evidence was both trustworthy and critical to the defense that Steven Young also committed this robbery.

Contrary to respondent's claim, the trial court's error was not

harmless. Although the jury knew of the existence of Young's fingerprint and heard from at least two witnesses who had identified Young as the robber, the jury knew nothing of Young's criminal history. Without this background information showing that Steven Young, and not Marchand Elliott, was engaged in a long pattern of similar armed robberies of armored cars immediately preceding this robbery, the significance of Young's fingerprint in the getaway van was lost on the jury. The defense absolutely needed this evidence of other crimes by Steven Young in order to put Young's fingerprint and identification into proper context. As a result of the court's erroneous evidentiary ruling, Mr. Elliott was effectively precluded from having "a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina, supra.*) Such a deprivation of a complete defense amounts to a constitutional violation of the Sixth and Fourteenth Amendments that cannot be dismissed as harmless error.

Finally, the failure of defense counsel to make an explicit objection on constitutional grounds does not forfeit the constitutional claim on appeal. This Court has clearly held that where a defendant's constitutional claim is based on the same facts as those underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v. Lewis* (2008) 43 Ca1.4th

415,490.)

In *People v. Wilson* (2008) 43 Cal.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer, supra:*

> "As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.")

(People v. Wilson, supra, 43 Cal. 4th at p. 13 fn.3.)

In this case, the constitutional claim is based on the same operative facts contained in defense counsel's proffer as to why the other

robberies committed by Steven Young should be admitted as evidence of a common scheme or plan by Steven Young to commit robberies of armored car guards in the Los Angeles area.

VIII. THE COURT ERRED IN ADMITTING EVIDENCE OF THE HUGHES MARKET ROBBERY AND SHOOTING DURING THE PENALTY PHASE OF THE TRIAL (ISSUE X).

Issue X addresses the trial court's error in allowing the prosecution to introduce evidence of the Hughes Market robbery in December 1987, in which the assistant manager, Mr. Guardino, was shot in the head at close range. There was no physical evidence linking Mr. Elliott to the Hughes Market robbery. Mr. Guardino was the only witness to identify Mr. Elliott as being involved in the Hughes Market robbery. As pointed out at pp. 266-268 of the Appellant's Opening Brief, Mr. Guardino's eventual identification of Mr. Elliott was inconsistent with his earlier descriptions of his assailant, and was likely influenced by his seeing the composite drawing in the newspaper nearly a year after the Hughes Market robbery.

In contrast to these facts, respondent writes about the factual background as if Guardino had identified Mr. Elliott from the start. (RB 145-46)

Respondent also makes the unreasonable argument that even if the evidence that Mr. Elliott was the shooter in that incident was insufficient, any error was cured by the fact that the jury was instructed that the offense must be proved beyond a reasonable doubt.(RB 149-150) That argument is belied by long experience with the reality that even properly instructed juries occasionally convict defendants on the basis of insufficient evidence.

If such erroneous verdicts can, and do, occur in guilt trials, where all the jurors have to agree that the offense has been proved beyond a reasonable doubt, the potential for prejudice is considerably greater from admission of insufficient evidence of criminal activity as an aggravator in the penalty phase, because the law does not require that the jurors agree as to the existence of any of the factors or even that the jurors rely on the same factors in reaching their individual determinations whether to vote for life without parole or death. Hence, the harm is done if even one juror mistakenly believes the offense has been proven and uses it as a basis to vote for death.

Furthermore, the test for whether evidence is insufficient is entirely independent of whether proper instructions were given. Reversal for insufficiency of the evidence is required if no reasonable jury could have found that the evidence presented proved the

defendant's guilt beyond a reasonable doubt. But this test does not appear in either the respondent's argument or the case he quotes for it, *People v. Barnett* (1998) 17 Cal.4th 1044, at 1172.

In *Barnett*, the Court wrote, "In light of [the reasonable doubt] instruction, it is not reasonably possible that a rational jury would have permitted inconclusive evidence connecting defendant with the alleged rape to cause it to impose the death penalty, when the evidence failed to show his identity as the rapist. (*See People v. Bloom* (1989) 48 Cal.3d 1194, 1230-1231.)" Appellant submits the analysis employed court in *Barnett* was incorrect; moreover, the cited passage in *Bloom* doesn't stand for this proposition at all. In *Bloom*, this Court agreed with the defendant that evidence that he had been arrested for carrying a concealed weapon was insufficient to prove he had actually committed the offense of carrying one. The court wrote, "Even if defendant could predicate error on the admission of evidence he elicited, the error could only be regarded as relatively minor and non-prejudicial, for no reasonable juror would vote for a death penalty merely because defendant had been arrested for, but not charged with, attempted robbery. Moreover, the jury was expressly instructed that it could not consider such evidence unless the offense (not merely the arrest) was proved beyond a reasonable doubt."

In *Bloom*, the issue was not that the evidence of a factor (b) crime was insufficient, but that the evidence did not prove an eligible crime at all, as a matter of law. Under those circumstances, the court could reasonably conclude that a properly instructed juror would have realized that the evidence presented did not show an eligible factor (b) crime; the reference to the beyond a reasonable doubt instruction was dictum.

Appellant submits that *Barnett* is wrong in the test it articulates for the prejudicial effect of factor (b) aggravators and the ability of reasonable doubt instructions to cure error, because it did not address the standard of proof on review for insufficiency of evidence claims or the peculiar consequences of presenting an insufficiently supported factor (b) crime at the penalty phase.

Appellant submits that if the evidence of the aggravator was insufficient, the prejudice inquiry must be informed by the fact that there is no requirement for jury findings about the factors the jurors found true and no unanimity requirement, and therefore no way of determining whether any juror mistakenly used the evidence in voting for death. Because empirical evidence, demonstrated in the case law, has shown that jurors do, in fact, find defendants guilty beyond a reasonable doubt on the basis of legally insufficient evidence, and because there is no way of determining whether one or more jurors made that mistake in this

case, the error must be considered prejudicial, regardless of whether the jury was correctly instructed, unless the uncharged conduct is so *de minimis* that there is no reasonable possibility that even one juror would have given it any weight in arriving at his or her moral and normative decision whether to impose death. The evidence of the defendant's arrest in *Bloom* might, for example, fall into the *de minimis* category, but clearly, a robbery and shooting such as that presented against Mr. Elliott in the penalty phase would not. The erroneous admission of that evidence requires that the penalty judgment against Mr. Elliott be reversed.

IX. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR DISPLAYED A LIST OF INADMISSABLE CRIMES BEFORE THE JURY (ISSUE XIV).

Issue XIV addressed the incident during the guilt phase of trial when the prosecutor displayed a box before the jury that listed various alleged crimes, many of which were not admissible at the guilt phase. Defense counsel moved for a mistrial, which was denied. (AOB 295-97.)

In its brief, respondent argued that the constitutional claims arising from the denial of the mistrial were forfeited because the motion was not made on those grounds at trial. (RB 167.) Respondent also

argued that the claim of prosecutorial misconduct was forfeited by trial counsel's failure to object on that ground. (RB 168-69.)

Appellant submits that respondent's forfeiture arguments are erroneous. First, it was not necessary for defense counsel to state a federal constitutional objection in order to preserve the constitutional claim for this appeal. This Court has clearly held that where a defendant's constitutional claim is based on the same facts as those underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v.Lewis* (2008) 43 Ca1.4th 415,490.)

In *People v. Wilson* (2008) 43 Ca1.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer, supra:*

> "As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal

> consequence of violating the federal Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)"

(*People v. Wilson, supra,* 43 Cal. 4th at p. 13 fn.3.)

In this case the constitutional claim is based on the same operative facts as the timely objection made by counsel, namely the prosecutor's displaying a list of inadmissible crimes before the jury.

Second, common sense dictates that a motion for a mistrial based on the prosecutor's conduct in placing that box with its inflammatory list on the counsel table next to the jury could be read as encompassing a prosecutorial misconduct claim.

X. THE APPELLANT'S BIZARRE AND SELF-DESTRUCTIVE BEHAVIOR DURING TRIAL, INCLUDING AN ASSAULT ON THE JURY AND THE TRIAL JUDGE, WARRANTED A COMPETENCY EXAMINATION, INDIVIDUAL VOIR DIRE OF THE JURORS, AND A DECLARATION OF MISTRIAL DURING THE PENALTY PHASE (ISSUE XV).

Issue XV addressed the apparent mental breakdown of Mr. Elliott during his trial. The facts surrounding this mental breakdown are set forth on pages 311-13 of the Appellant's Opening Brief. In summary, Mr. Elliott assaulted the jury by throwing apples at the jury, hitting two jurors with them. (RT 1906.) He also chose to wear a pair of glasses during trial that he had never worn before, and those glasses were remarkably similar to the glasses worn by the robber of Lucky's Market. During the penalty phase, he refused to wear civilian clothes.

After the apple-throwing incident, the court ordered Mr. Elliott to be shackled for the remainder of the trial for the safety of the jury. However, the trial court refused defense counsel's request for individual *voir dire* of the jurors to determine the impact of defendant's actions on the jury.

In its brief, respondent argued that defendant's outbursts and bizarre actions reflected more on Mr. Elliott's anger than on his mental competency. (RB 175). Respondent also argued that a party cannot profit from his own wrongdoing, citing *In re Hamilton* (1999) 20 Cal.4th

273, 305.

The language respondent relies upon from *In re Hamilton* is dicta. In *Hamilton*, the defendant, in a habeas petition, made a claim of juror misconduct based on the failure of one of the trial jurors to report that she thought she had seen petitioner's sister sitting in a car in the alley behind her house. After the language quoted by respondent at RB 177, the court went on to say, "We need not resolve that issue, however. For several other reasons, we conclude that the incident in [juror] Gholston's alley affords petitioner no basis for relief." (*Id.* at p. 305.)

In another case cited by respondent, *People v. Williams* (1988) 44 Cal.3d 1127, 1156-57 (*see* RB 177), the court expressed doubt whether a *juror misconduct* claim could be predicated on the juror's observations of the defendant's disruptive behavior.

Neither *Hamilton* nor *Williams*, both of which considered claims of juror misconduct based on jurors' responses to behavior by the defendant or his family, is pertinent to this case. No argument has been made that the jurors in appellant's trial committed misconduct. Rather, the question trial counsel asked the court to explore was whether any of the jurors were so biased against Mr. Elliott by his outburst that they could not longer give him a fair trial. Counsel asked the court to voir dire the jurors, and the court refused. Under the circumstances of this

case, the court's refusal to take action was error.

The apple-throwing incident was clearly disconcerting, even frightening, to at least some of the jurors. The record showed that one juror was "extremely upset," "hyperventilating," and "close to hysteria," (*see* AOB 311). A reaction of such intensity required the court to make an inquiry whether all the jurors could continue with the trial or whether their experience as victims of an assault by the defendant before them would affect their ability to fairly decide the issue of his guilt or innocence and, if the trial reached the second stage, the question of the appropriate penalty. In this case, where the jury might ultimately decide whether Mr. Elliott lived or died, the question whether all the jurors could do so fairly was especially critical.

Although it is generally within the discretion of a trial court to decide whether it is necessary to voir dire the jurors regarding their exposure to extraneous material during trial, an extraordinary situation such as this, where the jury was the direct target of a physical assault by the defendant and where at least one juror was obviously frightened by the episode, required that the court inquire whether all the individual jurors could still be fair. However, in this case, the trial court did not exercise even the discretion given him under the law, because the court based its refusal to voir dire the jurors on an illegitimate reason. The

judge explicitly said that he was refusing to voir dire the jury because he did not want to retry the case – a telling remark which suggests that the judge himself knew that the incident was serious and likely to have biased the jurors against Mr. Elliott. In short, the judge refused to inquire into whether the incident had affected the jurors' ability to be fair, not because he did not believe they had been influenced by it, but because he suspected they had been and he did not want to find out.

Another error in the trial court's reasoning was the court's assumption that the incident would require retrying the case. Individual voir dire, had it been conducted as the situation required, might have shown that only one or two jurors, if any, felt so affected that they didn't think they could be fair. If that were the case, they could have been dismissed and replaced with alternates. But the trial court chose to do nothing. By refusing to act, it abandoned its duty to ensure that Mr. Elliott received a fair trial, and instead chose the route of expediency over due process.

XI. THE TRIAL COURT CLEARLY MISLED THE JURY REGARDING THE FINANCIAL COSTS OF IMPOSING THE DEATH PENALTY AND FAILED TO INSTRUCT THE JURY TO DISREGARD THE ISSUE OF COSTS IN ITS DELIBERATIONS (ISSUE XVII)

In his opening brief, at pp. 338-58, appellant argued that the trial court and prosecutor misled the jury regarding the costs of imposing the death penalty and that the trial court failed to address the jurors' expressed concerns about the financial cost of the death penalty with an instruction that they were not to consider that issue in their deliberations.

In its brief, at RB 185-199, respondent conceded that the costs of life imprisonment and the death penalty are not appropriate considerations for the jury in determining penalty. (RB 188.) Respondent also made no attempt to show that the prosecutor and trial judge were factually correct in telling the jury panel that the costs of imposing the death penalty and the cost of housing a prisoner for life were about equal.

Instead, respondent argued that the claim was forfeited because trial counsel did not object to the prosecutor's and judge's remarks or claim that the prosecutor's comments constituted misconduct, and that in any event the prosecutor and trial court clearly informed the prospective jurors that they were not to consider costs in determining the penalty to be imposed on appellant. (RB, p. 188.) Respondent argued that the

curative instruction proffered by appellant was properly denied because it was not warranted by the statements made during voir dire, and that any error was harmless because neither side argued that the jury could consider costs and the jurors were instructed during the guilt phase that the statements of the attorneys were not evidence and they were to decide the case based on the evidence presented at trial. (RB 188-189.)

Appellant submits that respondent has implicitly conceded that the statements made by the prosecutor and judge regarding the relative costs of executing someone versus the cost of life imprisonment were erroneous. Indeed, recent studies have shown that it is much more expensive to impose the death penalty in California than to house a prisoner for life.

In arguing that no instruction was needed to explain to the jury that it could not consider the relative cost of life in prison and the death penalty, respondent attempts to minimize the discussions of cost during the voir dire by referring to them as "off-hand comments regarding costs" that did not prejudice the jurors. (RB 189.)

The record shows, however, that several jurors indicated, in response to Question 114 of the prospective juror questionnaire, that they believed it was cheaper for the state to execute a prisoner and that the death penalty would save "tax dollars." (See RB 186.) Both defense

counsel and the prosecutor engaged several prospective jurors in discussions of their concerns, discussions which, respondent observes, took place in the presence of large numbers of prospective jurors. (RB 192-193.) It is also undisputed that the trial court refused to give a proposed defense instruction advising the jury to disregard cost as a factor in their penalty deliberations. (RB 190.)

Respondent argues that no such instruction was necessary because the issue of costs was not expressly or implicitly raised by any of the parties, citing *People v. Benson* (1990) 52 Cal.3d 754, 807. (RB 191.) This is factually incorrect: the question of costs was expressly and implicitly raised by the prosecutor and defense counsel, and, more significantly, by the members of the jury panel.

First, as discussed above, the prosecutor did expressly provide the jury during voir dire with erroneous information as to the relative costs of the death penalty versus life imprisonment, and the court followed suit with similar misinformation. Secondly, the prosecutor implicitly raised the issue of the costs of life imprisonment during her penalty argument by referring to trial testimony about prison overcrowding and the resources available to prisoners such as a library, recreational facilities and conjugal visits. While respondent argues that the prosecutor's intent was to argue these factors as "prison conditions" and

not as costs, respondent's argument draws too fine a distinction in a very broad subject matter. All the prison conditions argued by the prosecutor are resources that cost taxpayers money. The prosecutor's argument implied that these resources available to prisoners are costly, even if she didn't expressly use the word "cost." Once the prosecutor made her prison resource argument against life imprisonment, the implication of costs to taxpayers had been raised by the government, and under the rule of *Benson* the court was required to give the instruction requested by the defense.

In any event, to the extent that respondent seems to suggest that an instruction about the cost of the death penalty vs. life imprisonment is required only when the issue of cost was raised by the parties, its argument is not supported by the case law.

A review of the actual text of *Benson, supra*, reveals no statement by the court that an instruction need be given only if the cost issue is raised by the parties. Rather, the Court held that the instruction was not warranted in that case because the cost issue was not brought up at all during the trial. (*People v. Benson, supra*, 52 Cal.3d 754, 806-807.) The same is true of *People v. Hines* (1997) 15 Cal.4th 997, 1066 and *People v. Thompson* (1988) 45 Cal.3d 86, 132.

A fortiori, none of the decisions cited by respondent addressed a

situation where the cost issue was brought out by the jurors and reinforced by the prosecutor and the court. The issue of costs in this case was, as the record showed, an object of concern to prospective jurors, was discussed on voir dire by counsel, and was addressed by the trial court in a statement that was factually incorrect. No jury instruction advised the jurors that they were not to consider the costs of the two possible penalties. In context, the misinformation from the prosecutor and the court about the relative cost of the two penalties could have been read by the jurors as permitting them to consider the expense of each sentence in the moral and normative decision of which penalty to impose, and to bring to this calculation whatever information and personal speculations they might have on the subject.

Absent an instruction, it cannot be said beyond a reasonable doubt that all twelve jurors understood that they were not permitted, in their individual consideration of the appropriate penalty, to factor in the monetary cost to society of one penalty over the other.

XII. APPELLANT HAS NOT WAIVED HIS FEDERAL CONSTITUTIONAL CLAIMS WHERE THOSE CLAIMS ARE BASED ON THE SAME UNDERLYING FACTS AND LEGAL CIRCUMSTANCES.

Respondent contends appellant has forfeited his constitutional claims on several of the issues presented for review. Although appellant has addressed that contention in specific arguments in this reply brief, appellant believes it is important to also discuss this issue as a separate reply argument to show that respondent's contention of forfeiture of constitutional claims on appeal lacks merit.

This Court has clearly held that where a defendant's constitutional claim is based on the same facts as those underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v.Lewis* (2008) 43 Ca1.4th 415,490.)

In *People v. Wilson* (2008) 43 Ca1.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer, supra:*

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> to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the federal Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)"

(*People v. Wilson, supra,* 43 Cal. 4th at p. 13 fn.3.)

The constitutional violations appellant raises in the context of his arguments on these issues neither rely upon different facts nor invoke different legal standards from those presented below. They merely assert added constitutional consequences, and for that reason appellant's constitutional claims are not forfeited.

This Court explained in *People v. Partida* (2005) 37 Cal.4th 428, that the requirement that an issue be preserved for review by a specific objection is based on Evidence Code section 353. That section provides that a judgment shall not be reversed unless there is a timely objection stating the specific ground of the objection. The purpose of this rule is to allow the proponent of the evidence a chance to address any flaws in the evidence and to allow the trial court the opportunity to consider

excluding the evidence or limiting its admission to avoid possible prejudice. (*Id.,* at pp. 433-34.)

Additionally, as explained, a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal. '" (*Id.* at p. 434 (citations omitted)).

Moreover, appellant submits that the rationale on which Evidence Code section 353 is based is not applicable to issues involving a trial court's *sua sponte* duty. A trial court has a *sua sponte* duty to give correct instructions on the basic principles of the law applicable to the case, including instructions on lesser included offenses, independent of any request or objection of the defendant. (*People v. Williams* (2009) 170 Cal.App.4th 587, 638; *People v. Anderson* (2006) 141 Cal.App.4th 430, 442.) Because this duty does not depend on any action by the defendant, it therefore follows that a defendant's failure to make a specific objection does not result in a waiver of a constitutional claim regarding an instructional issue on appeal. Furthermore, requiring a specific objection to preserve an instructional issue for appeal would result in a de facto abrogation of Penal Code section 1259, which provides that challenges to jury instructions affecting substantial rights

are not waived even if no objection is made at trial.

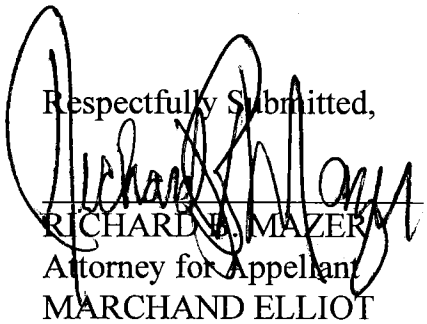
For these reasons, appellant has not waived his federal constitutional Fifth, Sixth, Eighth, or Fourteenth Amendment claims regarding the issues on appeal.

VIII. CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Appellant's Opening Brief, appellant Marchand Elliott respectfully requests this Court to grant the relief requested in this appeal and vacate the conviction and sentence of death imposed on Mr. Elliott.

Dated: November 8, 2010

Respectfully Submitted,



RICHARD B. MAZER
Attorney for Appellant
MARCHAND ELLIOT

CERTIFICATE OF SERVICE

I, the undersigned, certify:

That I am over the age of eighteen years, and not a party to the within cause; I am employed in the city and county of San Francisco, State of California; my business address is 99 Divisadero Street, San Francisco, California 94117.

On this date I caused to be served on the interested parties hereto, a copy of:

APPELLANT'S REPLY BRIEF

which contains 16,933 words of text,

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below;

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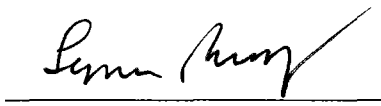
I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this Certificate has been executed on November 8, 2010 at San Francisco, California.



LYNN BRAZ