IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE BRETT WILLIAMS, Defendant and Appellant.	)	Case No. SO30553 (Los Angeles Superior Court No. TA 006961)

AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
SUPERIOR COURT LOS ANGELES COUNTY
HON. MADGE WATAI

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

In this Reply Brief, Appellant addresses specific contentions made by respondent but does not reply to those contentions that in Appellant's view are adequately addressed in his Opening Brief. The failure to respond to any particular argument, sub-argument, or allegation made by respondent, or to reassert any particular point made in the Opening Brief, does not constitute a concession, abandonment or waiver of the point by Appellant, see People v. Hill (1992) 3 Cal. 4th 959, 995, fn. 3, but reflects Appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this Reply are numbered to correspond with the argument numbers in Appellant's Opening Brief. The Opening Brief contained 21 arguments, all of which the State responded to in Respondent's Brief. Appellants Reply Brief addresses 13 of those arguments. Specifically, this Reply Brief does *not* address arguments VIII, IX, XIV, XVI, XVII, XIX, XX, and XXI. Further, arguments XIII and XVIII are consolidated in this Reply Brief into a single argument numbered Argument XIII.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S RULING THAT THE PROSECUTOR HAD RACE-NEUTRAL REASONS FOR EXCLUDING THE VAST MAJORITY OF AFRICAN-AMERICAN WOMEN FROM APPELLANT'S JURY.

Mr. Williams' prosecutor used his peremptory challenges to excuse five of the six African-American women summoned to Mr. Williams' jury pool. (15 RT 1232, 1236-38.) When challenged by the defense, the prosecutor explained, "[S]ometimes you get a feel for a person that you just know that they can't impose it based on the nature of the way that they say something." (15 RT 1237.) The D.A. got this "feel" for roughly 83% of the black women in the venire.[1]

The trial court was predisposed to share the prosecutor's stereotyped feelings. As the court unabashedly acknowledged when defense counsel persisted in his complaints that the prosecutor's peremptories were used in a

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[1] Whatever doubt there may be that Mr. Williams' prosecutor exercised peremptory challenges against jurors based solely on the color of the jurors' skin is erased by the deputy district attorney's record admission that he struck several white jurors from Mr. Williams' venire *because they were white*. The prosecutor engaged in this race-based exclusion of potential jurors purportedly to achieve "a greater mix of racial diversification." (15 RT 1250.) The prosecutor, in other words, plainly stated that race – and race alone – motivated his exercise of multiple peremptory strikes. See Powers v. Ohio (1991) 499 U.S. 400, 406 (noting a criminal defendant may challenge a prosecutor's race-based use of peremptory challenges whether or not the defendant and the excluded jurors are of the same race because race-based peremptories harms the jurors as well as the community at large.)

racially disparate manner, "I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is. I have found it to be true." (15 RT 1239.)

Thus it is not surprising that the prosecutor's list of jurors against whom he would exercise his peremptory challenges matched the court's own list (written and/or mental) of jurors who would likely be dismissed, and that each list was top-heavy with black women. (15 RT 1228.) Nor is it surprising that the court accepted the prosecutor's excuse for dismissing a particular African-American female juror even when the court had not taken notes on, and had little or no recollection of, the prospective juror's voir dire. (See 15 RT 1231-32 ("I don't have [any recollection] on this [juror] at this time, but I would accept [the prosecutor's] explanation as to his exercise of the peremptory."); 15 RT 1239 ("I can only go by what [the prosecutor] is saying because I stopped making notes on my Hovey."))

Respondent contends that the trial court's denial of defense counsel's multiple Wheeler motions "is entitled to deference because the court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor and the record contains substantial evidence supporting the trial court's denial of the motions." (RB 34.) The court did indeed permit the prosecutor to proffer reasons for his peremptory challenges. And Appellant does not question here the sincerity of the

court's belief that black women, as a general matter, are unqualified to sit on capital juries. However, that belief vitiates any deference owed by this Court to the trial court's determination that the prosecutor's strikes were race-neutral. Moreover, it is an unsupported and indefensible stretch to claim that the trial court's evaluation of the prosecutor's justifications was *reasoned.* Rather, the trial court's own biased predilections against black women in capital cases simply cohered with the prosecutor's subjective reasons for striking such jurors, whether the court made notes of its views of particular jurors in advance of the Wheeler motions (see 15 RT 1228) or failed to make any written record whatsoever. The court does not offer, and the record does not reflect, anything more than its perfunctory acquiescence to the prosecutor's proffered reasons. Respondent's attempt to cobble together a meaningful and independent judicial review of the prosecutor's justifications rings hollow.

As Professor Barbara Babcock of Stanford Law School has written, the invidious exercise of peremptory challenges "in the case of minority women . . . subjects them to the most virulent double discrimination: that based on a synergistic combination of race and sex . . . ." Barbara Allen Babcock, "A Place in the Palladium: Women's Rights and Jury Service" (1993) 61 U. of Cincinnati L. Rev. 1139, 1163. The trial court's acknowledgment that "I have found . . . black women . . . very reluctant to

impose the death penalty" (15 RT 1239) is but another way of stating that "Black women are the most prejudiced of jury members, the least qualified to serve." (Id., citations omitted.) This double discrimination "essentializes the prospective juror" based on the immutable traits of gender and race, and "ignores her ability to act as an autonomous individual." Note, "Beyond Batson: Eliminating Gender-Based Premptory Challenges," (1992) 105 Harv. L. Rev. 1920, 1936. Cf. id. at 1932 (noting that "jury selection guides upon which attorneys frequently rely . . . are riddled with crude stereotypes and categorical assumptions about the influence of gender" on juror impartiality.) The stereotyped view of African-American women held by the trial court almost certainly acted as a "filter[] that influence[d]" how the court interpreted not only the answers and behavior of prospective black women jurors but also the prosecutor's rationales for peremptorily striking them. A. Bernard Whitley, Jr. and Mary Kite, The Psychology of Prejudice and Discrimination (Thomson Wadsworth 2006) at p. 145. "In general, ambiguous behaviors - those that can be interpreted in more than one way- are assimilated to the stereotype." Id.

All that we are left with is the prosecutor's inchoate, subjective feelings that the vast majority of African-American females in the venire could not fairly serve on a capital case. As in Miller-El v. Dretke (2005) 545 U.S. 231 ("Miller-El II"), the prosecutor offered neutral-sounding

reasons -- the jurors' purported ambivalence toward the death penalty -- that upon closer examination turn out not to be neutral at all.

A. Comparative Juror Analysis Is Appropriate.

In Miller-El, the prosecutor used peremptory strikes to remove 10 of 11 African-Americans from the defendant's venire. The Supreme Court observed that this pattern was so striking that "happenstance is unlikely to explain this disparity." 545 U.S. at p. 240 (quoting Miller-El v. Cockrell (2003) 537 U.S. 322, 340 ("Miller-El I").) To determine whether the state had engaged in a pattern of purposeful discrimination in violation of Batson v. Kentucky (1986) 476 U.S. 79, the Court analyzed the prosecutor's justifications for striking certain black jurors by comparing the prosecutor's decision not to strike similarly situated, non-black jurors. After undertaking this comparative analysis, the Court held that the prosecutor's exercise of peremptory challenges was improper and overturned the lower courts' determination to the contrary. Miller-El II, 545 U.S. at p. 240.

Respondent urges this Court to shield itself from a more robust perspective on the entire record which reveals the prosecutor's justifications as mere pretext. Specifically, respondent argues it is improper to consider all of the voir dire testimony and compare the prosecutor's strikes of African-American jurors with his treatment of other, non-minority, panel members who may have expressed similar views but who were not struck.

According to respondent, "engaging in comparative juror analysis for the first time on appeal is unreliable" (RB 37-38), citing People v. Johnson (2003) 30 Cal.4th 1302, 1318, rev'd on other grounds, Johnson v. California (2005) 545 U.S. 162.[2] Respondent asks this Court to ignore the full record in this case because the record, as discussed in Appellant's Opening Brief, reflects that several non-African-American female jurors seated in this case expressed as much or greater ambivalence toward the death penalty, and their ability to impose it, than the Black women who were struck by the prosecutor's peremptory challenges. (See AOB at pp. 109-111.) When there are strong similarities between two jurors and the "principal difference between them is race, the credibility of the prosecutor's explanation is much weakened." U.S. v. Thomas (2d Cir. 2003) 320 F.3d 315, 318.

Respondent's reliance on this Court's decision in Johnson, however, is misplaced. First, Appellant submits that the portion of the Court's Johnson decision questioning the propriety of engaging in comparative juror analysis on appeal misinterprets the U.S. Supreme Court's decision in

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[2] In arguing that comparative juror analysis is unreliable when done for the first time on appeal respondent ignores the difficulty of requiring that comparative analysis be done at trial: How can defense counsel fully undertake such an analysis until the jury is sworn and each member of the venire is known? At any point before the jury composition becomes final, counsel can compare struck jurors only with jurors who have not yet been struck but could be struck at any moment.

Miller-El I. Moreover, respondent's argument is undercut by the Supreme Court's decision in Miller-El II in which the High Court expressly notes that the failure to engage in comparative analysis in the trial court does not preclude such an analysis in the reviewing court, 125 S.Ct. at p. 2326, fn. 2., and observes that such an analysis can supply highly relevant and persuasive evidence regarding the credibility of the prosecutor's proffered justifications for utilizing peremptory challenges against members of minority groups. Finally, respondent's opposition to comparative analysis does not take account of the several capital cases decided after Miller-El II in which this Court has undertaken comparative juror analysis. See, e.g., People v. Avila (2006) 38 Cal.4th 491, People v. Jurado (2006) 38 Cal.4th 72, People v. Guerra (2006) 37 Cal.4th 1067, People v. Schmeck (2005) 37 Cal.4th 240, People v. Gray (2005) 37 Cal.4th 168, People v. Cornwell (2005) 37 Cal.4th 50, and People v. Ward (2005) 36 Cal.4th 186. (See also, Collins v. Rice (9th Cir. 2003) 348 F.3d 1082, at pp. 1092-93, 1095-96 (conducting a comparative analysis not done by the state trial or appellate courts, and noting that the prosecutor did not challenge seated white jurors whose answers were similar to the struck juror).) As these cases suggest, this Court does in fact engage in comparative juror analysis on appeal. It should do so here.

B. Comparative Juror Analysis Contraverts the Prosecutor's Purportedly Race-Neutral Reasons for Exercising his Peremptory Challenges.

Comparative juror analysis in this case reveals that the five African-American females peremptorily struck by the prosecution – Harriet Reed, Theresa Cooksie, Paula Cooper-Lewis, Reytha Payton, and Ruth Jordan – were not only avowed supporters of capital punishment but made statements indicating they were as capable of imposing this punishment as any of the jurors who were ultimately seated. Indeed, at least one of the women struck by the prosecution, Ruth Jordan, was substantially *more* consistent and emphatic in her endorsement of capital punishment than several of the jurors who were chosen to sit.

The first of three Wheeler motions in this case was made after the prosecutor peremptorily struck Harriett Reed, Theresa Cooksie and Paula Cooper-Lewis, the only African-American women to have appeared by that point in the jury selection process. After acknowledging that there was a prima facie showing of race-based dismissals, the trial court asked the prosecution to justify the peremptory challenges. The prosecutor complied, explaining:

> All during the individual questioning of them I rated very reluctantly in terms of their ability to impose the death penalty . . . . Each of them demonstrated a reluctance in terms of answering direct questions when called for the requirement of the imposition of the death penalty with an affirmative answer that they would impose it.

> They would either say, well, I think I might be able to, or I could, but their reluctance to impose it was evident not only from the answers that they gave from the time that it took them to respond to the question, their general demeanor in answering the questions and my impression from each of them.

(15 RT 1211.)

The veracity of this justification is cast into doubt, however, by the record which reflects that all three jurors were unquestionably qualified for jury service and offered responses no different from jurors who were eventually seated.

1. Harriett Reed

The completed juror questionnaire of the first African-American female to appear in the jury pool, Harriett Reed, shows her to have been a proponent of the death penalty for "hardcore murders." (15 Supp. CT 3556.) Ms. Reed stated that she believed California should have capital punishment and that it should be imposed "in certain circumstances." During voir dire Ms. Reed noted that she considered hardcore murders to involve the mutilation or burning of bodies, but that the death penalty was an appropriate punishment for other types of murder as well. (15 RT 391-392.) She stated she personally could impose the death penalty if necessary, and she could weigh the aggravating and mitigating factors. (15 RT 391.)

2. Theresa Cooksie

Theresa Cooksie, like Ms. Reed, was supportive of the death penalty, stating on her questionnaire that the death penalty was appropriate for a "coldhearted killer." Ms. Cooksie repeated this sentiment elsewhere on the questionnaire, stating that the death penalty was necessary because "when cold-hearted [killers] take people['s] lives their live[s] should be taken also. (21 Supp. CT 5165.)[3] During voir dire, Ms. Cooksie stated she would not automatically vote for the death penalty because she "would have to hear the evidence and see how the trial is. I just can't say, oh, I'll give him the death penalty." (5 RT 216.)

3. Paula Cooper-Lewis

The juror questionnaire responses of Paula Cooper-Lewis reveal that Ms. Lewis believed the death penalty was "fair in some cases," and that the purpose of capital punishment was to "rid society of people that would be a constant threat to society as a whole, *i.e.*, people who commit heinous crimes and if ever released into society would jeopardize society's safety." Ms. Lewis "somewhat agreed" that people who intentionally kill another person without legal justification deserved the death penalty, but that every

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It bears noting that the prosecutor who struck Ms. Cooksie in his closing argument at the penalty trial urged the jury to sentence Mr. Williams to death because he was "cold-blooded" (35 RT 3423-24.)

case had different circumstances. During voir dire, Ms. Lewis on more than one occasion said she believed she could impose a sentence of death on another person. (10 RT 759, 760.)

The responses provided by Ms. Reed, Ms. Cooksie, and Ms. Cooper-Lewis belie the prosecutor's claim that these prospective jurors were "reluctant" or hesitant in responding to his questions. Moreover, if the prosecutor had genuinely been concerned about the capability of these women to impose a sentence of death, it is highly unlikely that he would have expressed no similar reservations about other panelists who were not African-American females but nonetheless were as or more hesitant in answering death-qualifying questions.

For example, Wanda Muncey, a white prospective juror, initially claimed during her Hovey voir dire that she would not have "any qualms" about imposing a sentence of death. (10 RT 687.) But shortly after making this statement, she had the following exchange with the prosecutor expressing more tentativeness about sentencing someone to death:

> Prosecutor: If you were placed in that situation, are you the type of a person that could impose the death penalty on another person?
>
> Muncey: That's something I don't know, I've never had to do.
>
> Prosecutor: If we get to that situation where you've heard all the evidence and you believe because of the things that Mr. Williams has done in his life he deserves the death

penalty, could you vote for that?

Muncey: I think I could.

(10 RT 690.)

If this colloquy left any doubt that Ms. Muncey harbored qualms about imposing a death sentence, a subsequent exchange laid bare her hesitancy:

Prosecutor: Do you want to be a juror on a case like this? You say it's your first experience.

Muncey: Yes. Well, to be truthful I'm scared to death. I don't know how I would react being the first time on such a harsh case.

Prosecutor: Would you be fair?

Muncey: I think I can be fair but I'm just scared because it is my first time.

(10 RT 691.) Yet, unlike with prospective jurors Reed, Cooksie and Cooper-Lewis, the prosecutor never questioned Ms. Muncey's personal commitment to imposing a sentence of death.[4]

Other prospective jurors who gave answers similar to those provided by the African-American women in question were also given passes by the

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[4] Ultimately, Ms. Muncey was peremptorily struck by the defense *after* the prosecution stated that it accepted the jury as presently constituted (15 RT at 1224-1225.) Ms. Muncey was then replaced on the panel by Ms. Retha Payton, an African-American women who was the subject of the defense's second Wheeler motion, discussed below.

prosecution. For instance, Lisa Bohn, like Ms. Cooksie, stated that she would not automatically impose the death penalty against Mr. Williams even if he was found guilty: "Well, if he's going to do it that doesn't mean I have to vote for the death." (8 RT 520.) Like Ms. Cooksie, when Ms. Bohn was asked whether she could personally impose the death penalty, she replied, "Yes, I think so." (8 RT 521.) Ms. Bohn was not struck and she sat as a juror.

If Ms. Cooper-Lewis's responses conveyed equivocation, they were no more remarkable than the responses of other jurors. For instance, Ms. Cooper-Lewis stated on her questionnaire that the death penalty was "fair in some cases," and in response to the question whether she agreed persons who kill without legal justification should be executed, she stated "every case has different circumstances." Juror Billy Haley answered similarly, stating on voir dire that he would keep an open mind about the circumstances justifying a sentence of death:

> ". . . I believe in that, that some people can be rehabilitated. I also believe that some people can't. So based on that kind of thinking that would allow me to go along with the death penalty in certain kinds of circumstances, and I don't have any canned ideas of what the circumstances would be. **I would try to deal with it on a case by case basis.**

(5 RT 160, emphasis added.) Mr. Haley was not peremptorily struck.

Given the responses of persons not struck by the prosecution, the

prosecutor's claim that he struck Ms. Reed, Ms. Cooksie and Ms. Cooper-Lewis based on what they wrote or said simply does not withstand scrutiny. That leaves the prosecutor's alternative argument that these three women were struck because of their demeanors: "It was just my general impression from their answers that **in spite of what they said** they wouldn't have the ability to impose [a death sentence] when it actually came down to it. That is my reason for excusing them." (15 RT 1212, emphasis added.)

The prosecutor's gut instinct fails to qualify as the sort of "clear and reasonably specific" explanation contemplated by Batson, 476 U.S. at 98. Moreover, if the prosecutor was relying on the demeanor or behavior of the jurors in exercising his peremptory strikes, it was the duty of the trial court to engage in a reasoned and sincere effort to scrutinize the plausibility of the prosecutor's explanations. (People v. Hall (1983) 35 Cal. 3d 161, 167-168.) The trial court failed to do so, choosing instead to deny the defense's Batson-Wheeler motion without explanation.

For the reasons stated above, the only plausible explanation for the prosecutor's exercise of his peremptory challenges against Ms. Reed, Ms. Cooksie and Ms. Cooper-Lewis is impermissibly rooted in race and gender.

4. Retha Payton

Retha Payton was the subject of the second Wheeler motion brought by defense counsel. Ms. Payton stated on her juror questionnaire that she believed the death penalty was sometimes necessary. (5 Supp. 1 CT 1049-1082.) She also stated that she believed the death penalty was a deterrent, and that its purpose was to "make more people think before committing a serious crime." She also believed that life in prison was not as severe a sentence as capital punishment. During voir dire Ms. Payton declared that the death penalty was necessary in some circumstances but not in others. (10 RT 729-730.) She also stated that she felt she could impose the death penalty "if that is the way the evidence pointed." (Id. at 730.)

When challenged as to why he exercised a peremptory challenge against Ms. Payton, the prosecutor initially claimed that he struck her solely on the basis of her responses, although simultaneously acknowledging that he did not have Ms. Payton's responses in hand when he struck her. In the prosecutor's words:

> After listening to her responses – and I don't have my sheet in front of me – I downgraded her to a one. In order to get a one on my scale, she has to answer with extreme hestitance [sic] towards any questions related to the death issue or I would never rate her down that far. I would have to look at her questionnaire to know exactly what it was to cause me concern but, obviously, there were hesitations in her answers -- to the responses she gave me.

(15 RT 1226.)

Defense counsel seized on the vagueness of the prosecutor's justification, arguing:

> The prosecutor at any time he can say, my subjective feeling is that there was hesitancy in their answers, therefore, I justify the peremptory challenge. And when there is a Wheeler motion I think you should do more than that because, as the prosecution just indicated, he doesn't even recall why, so if he doesn't really recall why, then how can he, on the one hand, say "because it might have been hesitancy in answers." **That is a subjective thing, and he doesn't even remember.**

(15 RT 1226-1227, emphasis added.) In response, the trial court admitted it had not kept track of Ms. Payton's responses and called a recess to allow the prosecutor to retrieve his notes and make his record.

When court reconvened, however, the prosecutor did an about-face. Instead of taking issue with Ms. Payton's written or oral responses about the death penalty, he focused instead on her demeanor:

> It was just my impression she didn't have the ability in spite of what her answers were. It had a lot more to do with not what she said but how I read what she was saying from being present in court with her and observing her demeanor and the way she answered questions. **It clearly isn't from the words that are written down. It was my general impression from the way she answered the questions, not what she said.**

(15 RT 1230, emphasis added.)

The prosecutor, in other words, switched from claiming that Ms. Payton's equivocations were apparent in clear, recorded statements capable of independent review and examination, to arguing that her equivocations

were expressed through unconscious, ephemeral mannerisms which only the prosecutor had noticed and the significance of which only the prosecutor could accurately discern. Moreover, the prosecutor fell back on his subjective impressions – incapable of corroboration – only after it was made clear that the peremptory strike could not be supported by the text of the juror's actual responses.

For its part, the trial court failed yet again to probe the prosecutor's belated and baseless justification, instead accepting the prosecutor's explanation even though the court had no independent recollection of Ms. Payton's demeanor during voir dire. (15 RT 1231.) In Miller-El II the Supreme Court found it difficult to believe a prosecutor's revised explanation which was proffered only after the initial justification had been discredited. (Miller-El II, 545 U.S. at p. 246.) Such an explanation, the Court observed, "reeks of afterthought." (Id.) The same stench permeates this case.

5. Ruth Jordan

If the prosecutor's justifications in response to the first and second Batson-Wheeler motions lacked credibility, his rationale for eliminating prospective juror Ruth Jordan, the subject of the third Batson-Wheeler motion, was flagrantly specious. Nothing in Ms. Jordan's juror questionnaire suggested that the prosecution could legitimately have any

concerns about her ability to serve on a capital jury. Ms. Jordan stated that being called for jury duty was a privilege, and looked back favorably on her prior grand jury experience. (5 Supp. 1 CT 1069.) In response to Question 95, which inquired about her general feelings regarding the death penalty, Ms. Jordan stated that even though she did not believe capital punishment was a deterrent, "[I]t is necessary in our own society because so many people think it is." (Id. at 1075.) Moreover, she devoutly believed that California should have the death penalty, because it would be "... a solace to the friends, family of the victims." (Id. at 1076.) She added that the purpose of the death penalty was "to ensure that perpetrators and victims[']families and friends could end experiences with finality. To let the punishment fit the crime." (Id.)

Nor did Ms. Jordan's answers on voir dire raise plausible red flags about her ability to impose the ultimate penalty. When the prosecutor asked her whether she had the ability to render a death verdict against another person, she replied, "[O]f course." (15 RT 914-915.) She also affirmed that she would listen to all the evidence carefully, and evaluate whether the death penalty was an appropriate punishment. (Id.) In short, Ms. Jordan's written and oral responses conveyed consistency and thoughtfulness, and steadfastly placed her in the camp of persons capable of sentencing the proper defendant to death. Significantly, the prosecutor accepted the jury

three times with Ms. Jordan seated.

Ultimately, the prosecutor exercised a peremptory strike against Ms. Jordan, making her the fifth African-American woman struck from the jury box. Defense counsel, in turn, levied his third Wheeler motion counsel, warning again that it was "clear" that "blacks [were] getting kicked off." (15 RT 1235.) In exasperation counsel asked why the prosecution was only then exercising its peremptory strike: "How can he perempt that juror? If she was a problem before why wasn't she perempted? He has accepted her while she was on the jury." (15 RT 1233.)

The prosecutor replied that he chose not to exercise a peremptory against Ms. Jordan on three earlier occasions for two reasons: he did not want to prompt another Wheeler objection, and he feared that he would "offend the blacks [i]n the jury" pool for striking her. (15 RT 1233-1234.) Apparently, though, as voir dire drew to a close, the prosecutor took measure of the court's handling of the two prior Batson-Wheeler motions and determined (correctly, as it turned out) that his ability to have his subjective, uncorroborated impressions uncritically accepted by the court boded well should he be asked to justify striking Ms. Jordan. What is more, with the vast majority of African-American women already excised from the jury pool by virtue of his earlier challenges, the chances of offending other members of the venire were greatly lessened. So reassured,

he struck Ms. Jordan.

As before, the prosecutor initially tried to justify his peremptory challenge by claiming his strike had "nothing to do with the color of her skin ... it has to do with her responses." (15 RT 1234.) The record makes clear, however, that nothing in Ms. Jordan's responses reflects an inability to impose the death penalty: she was an unequivocal supporter of capital punishment, stating during voir dire that she was fully willing to consider it as punishment for another human being. (15 RT 914-915.) In fact, the prosecutor seated as jurors other persons who expressed far more hesitancy about the death penalty than Ms. Jordan. For instance, when juror Billy Haley was asked the same question as Ms. Jordan about whether he could impose the death penalty if the circumstances warranted it, juror Haley offered this highly cautious response:

> Never having done it before I believe I could. Without having the experience, you know, it's kind of a hard thing to say, yeah, I definitely will, but I believe that I could do that if that's what I felt was necessary.

(5 RT 162.) Compared with the sureness and clarity of Ms. Jordan's responses, Juror Haley's relative lack of resoluteness about imposing the death penalty further undermines the prosecutor's professed rationale for striking Ms. Jordan.

To be sure, Ms. Jordan was not sure whether life in prison was a

more serious punishment than a sentence of death. But so too were many other members of the venire. Moreover, Ms. Jordan did not come close to expressing the view held by juror Willie Jackson that a life sentence led to greater suffering of the defendant than death. As Mr. Jackson explained during voir dire:

> [L]ife imprisonment, I think it would just let the person, you know, just see how they really mess up, you know. I believe it would be with them all the time, instead of giving them death and it would just be over with.

(6 RT at 266.) Even though Mr. Jackson's views had no basis in California law and might even prompt him to vote against the death penalty for particularly egregious murderers, the prosecutor allowed Mr. Jackson to sit as a juror.

Nor could it be claimed that Ms. Jordan's opinion that the death penalty was not an effective deterrent constituted grounds for her removal[5]. Lela Bohn, who sat as a juror, stated on her questionnaire that she disagreed with the position of some people that "use of the death penalty will cut

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[5] It so happens that Ms. Jordan's opinion is corroborated by substantial research. See, e.g., Jeffrey Fagan, Franklin Zimring and Amanda Geller, "Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty" (2006) 84 Texas L. Rev. 1803; Jon Sorensen, et al., "Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas" (1999) 45 Crime & Delinq. 481; and Ruth Peterson & William Bailey, "Felony Murder and Capital Punishment: An Examination of the Deterrence Question" (1991) 29 Criminology 367.

down on crime." (13 Supp. CT 3172.).

With three peremptory strikes left at the conclusion of voir dire, the prosecution could have removed jurors Haley, Jackson and Bohn. But even though these jurors articulated positions of potentially equal or greater concern to the interests of the prosecution in securing a death judgment, these three jurors, none of whom were African-American-females, were seated. Ms. Jordan, however, was struck.

As the Supreme Court has held, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El II, supra., 545 U.S. at p. 241. Unfortunately, the trial court did not require the prosecutor to follow through on his initial justification. Nor did the trial court independently explore the contradictions between the prosecutor's explanations and the actual record. Instead, the court simply admitted "I don't recall [Ms. Jordan's] responses at all" (15 RT 1234.)

When it came time for the prosecutor to prove that he struck Ms. Jordan because of her responses, he changed course entirely. Unable to successfully invoke the cold, objective record of Ms. Jordan's juror questionnaire or her voir dire answers, the prosecutor offered a wholly different rationale: Ms. Jordan's "demeanor." In the prosecutor's words:

> It is my impression not only from her answers to the questions but her demeanor and the fashion in which she answered them, I don't think she can impose the death penalty on any case. It doesn't matter the circumstances regardless. **I don't know how to exactly express it for the record. . . . But sometimes you get a feel for a person that you just know that they can't impose it based upon the nature of the way that they say something.**

(15 RT 1236-1237, emphasis added.) As one legal commentator has observed, even if the written transcript of voir dire proceedings conveys "evidence of a particular type of behavior" – something distinctly lacking here – "on the record the prosecutor should be able to articulate his reasons for drawing a negative inference from it. Otherwise, general assertions that a prosecutor does not like the looks of a potential juror may present the appearance, if not the substance, of racism." David Hopper, "*Batson v. Kentucky* and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?" (1988) 74 Virginia L. Rev 811, 828. Here, not only was the written record silent about the behavior of the prospective juror in question, but the prosecutor was uncharacteristically inarticulate about his reason for striking her: "I don't know how to exactly express it . . . But sometimes you get a feel." (15 RT 1236-1237.)

It is noteworthy that although Ms. Jordan's "demeanor" engendered such strong feelings in the prosecutor about her purported deep-seated predilections, the prosecutor chose not to engage in extended voir dire with Ms. Jordan to elicit what he believed were her actual views. "The state's

failure to engage in any meaningful voir dire examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (Miller-El II, 545 U.S. at p. 246, quoting Ex parte Travis (Ala. 2000) 776 So. 2d 874, 881)[6]

For its part, the trial court – as with the striking of Ms. Payton – did not press the prosecutor for more than his subjective, unsubstantiated, and, in this case, impossible to corroborate opinion. The court simply said, "I understand," (15 RT 1237) and denied the defense objection. Cf. Hopper, supra., at p. 828 ("Courts should closely examine any subjective or impressionistic rationales for the removal of minority venirepersons. This category breaks down into challenges allegedly based on inferences from observed mannerisms and those motivated by idiosyncratic assumptions of the prosecutor.")

In sum, the proffered explanation made by the prosecution is utterly unconvincing, consisting as it does of subjective impressions that the prosecutor is at a loss to describe. Although peremptory strikes often

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See also, Brian Serr & Mark Maney, "Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance" (1988) 79 J. Crim. L. & Criminology 1, 8 ("An attorney who for any reason feels uncomfortable with a particular juror, or feels more comfortable with another, is likely to strike the venireperson who causes the discomfort. It is not surprising that the scarcity of minority jurors mirrors the paucity of minority prosecutors.")

depend on instinct, when "illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (Miller-El II, 545 U.S. at 252.) Here, the justification carries an odor of pretext.

C. A Prior Case Shows that the Prosecutor Freely Purges African-American Women from Capital Juries with the Trial Court's Acquiescence.

People v. Ward (2005) 36 Cal.4th 18, has particular relevance for this case. Mr. Ward was tried by the very same prosecutor, and before the very same trial court, as Mr. Williams, only seven months before jury selection began in this case. (See Ward, Appellant's Opening Brief 105.) During Mr. Ward's capital jury selection, the prosecutor exercised seven of nine peremptory challenges to remove African-Americans from the jury panel, six of whom were African-American females, prompting the defense to raise (unsuccessfully) six separate Wheeler motions. Ward, supra, 36 Cal.4th at p. 199. In other words, the same errors that infected jury selection in the Williams case plagued the preceding Ward case, and were committed by the same actors. What emerges from this broader context is a stark pattern and practice of impermissible racial and gender exclusion from capital juries carried out by Mr. Williams' prosecutor, and acquiesced to by the same judge in Appellant's case. (See, Ward 19 RT 1918 (prosecutor acknowledges striking "an extraordinary number of female blacks"). This

pattern, in turn, follows on the heels of similar unlawful jury selection practices within the Los Angeles County District Attorney's Office. See, e.g., People v. Turner (1986) 42 Cal.3d 711, 714 (finding Los Angeles County prosecutor used peremptory challenges to strike prospective jurors in a racially discriminatory manner and reversing capital conviction); People v. Fuentes (1991) 54 Cal.3d 707 (same). This pattern and practice of using peremptory challenges to discriminate against minority jurors provides additional support for reversing Appellant's conviction. (See, Swain v. Alabama (1965) 380 U.S. 202 (prosecutor's history of racial bias is relevant to support an inference of discrimination); cf., Miller-El II, 545 U.S. at pp. 252-266 (finding Batson error based on cumulative factors, including previous discrimination in jury selection by prosecutor).)

One final point. Respondent observes that African-Americans sat on Appellant's jury, suggesting this somehow cures the prosecutor's exclusion of other African-American panelists or the court's condoning of those exclusions. (RB 32; 15 RT 1234.) This suggestion must be rejected. As the United States Court of Appeals for the Fourth Circuit has observed, the number of African-Americans who served on the jury "only shows that race may not have been a determinative factor *every* time an African American juror was called to the jury box." (Allen v. Lee (4th Cir. 2004) (en banc) 366 F.3d 319, 359, cert. denied, Allen v. Polk, 543 U.S. 906 (emphasis in

original).) In that case the majority of seated jurors were black, 366 F.3d at 327, but the prosecution used 11 of 13 strikes (84.6%) against blacks.[7] (Mr. Williams' prosecutor struck 83% of the black women.) As the United States Supreme Court made clear in Batson (1986) 476 U.S. 79, 95, a single discriminatory challenge is enough to warrant reversal. Accord, Eagle v. Linahan (11th Cir. 2001) 279 F.3d 926 ("the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown," quoting United States v. David (11th Cir. 1986) 803 F.2d 1567.)

* * *

In sum, the prosecutor's justifications for striking five African-American women from Appellant's venire are prime examples of what Justice Breyer has described as the "better organized and more systematized . . . use of race- and gender-based stereotypes in the jury-selection process. . ." Miller-El II, 545 U.S. at p. 270 (Breyer, J., concurring). For the reasons set forth above, reversal of the judgment is required.

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The Fourth Circuit, it should be noted, conducted a comparative analysis which had not been done by the state trial or appellate courts.

II. PROSPECTIVE JUROR REHEIS WAS ERRONEOUSLY STRUCK FOR CAUSE.

A. Introduction

The various statements made by prospective juror Gregory Reheis during voir dire and on his juror questionnaire regarding the death penalty are described in the briefs of both parties. Respondent, however, in arguing that Mr. Reheis was properly struck for cause (RB 38-46), neglects to place Mr. Reheis's personal qualms about capital punishment in their full and proper context. A fair reading of the transcript reveals what respondent tries in vain to downplay: that prospective juror Reheis clearly and repeatedly assured the court that, despite his personal scruples about the death penalty, he would be able to act in accordance with his oath as a juror and consider the death penalty in appropriate circumstances. (See AOB 113-126.) Because nothing in the record supports the trial court's finding that Mr. Reheis's views substantially impaired his performance as a juror, his exclusion was erroneous and reversal is required.

B. Prospective Juror Reheis's Moral Opposition to the Death Penalty Did Not Substantially Impair His Ability to Perform His Duties as a Juror.

It is well settled that a juror may not be challenged for cause based on his or her views on capital punishment, unless those views would prevent or "substantially impair" the performance of his duties as a juror in

accordance with his instructions and his oath. (Wainwright v. Witt (1985) 469 U.S. 412, 424; People v. Heard (2003) 31 Cal.4th 946, 958; People v. Jones (2003) 29 Cal.4th 1229, 1246.) In particular, a conscientious personal opposition to the death penalty is insufficient to automatically disqualify a juror:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(Gray v. Mississippi (1987) 481 U.S. 648, 658, quoting Lockhart v. McCree, (1986) 476 U.S. 162, 176; accord, People v. Stewart, (2004) 33 Cal. 4th 425, 446.)

Prospective juror Reheis was exactly the kind of open-minded, dispassionate individual whom the Supreme Court in Lockhart and Gray regarded as qualified for serving on a capital jury. While Mr. Reheis acknowledged his personal opposition to capital punishment, he stated no fewer than eight times that his views would not inhibit his ability as a juror to consider the death penalty as an appropriate sentence. (12 RT 987-988, 989, 993, 995, 998, 1001, 1002, 1004.)

Indeed, Mr. Reheis's responses during voir dire were consistent with the responses on his juror's questionnaire and underscored his high regard

for the integrity of the jury system, in spite of the demands it might place on him. Mr. Reheis, in fact, had previously served as a juror and so had first-hand experience not only of the responsibilities that such service entailed, but also of the toll it could take. (See 6 Supp. 1 CT 1275-76.) Nevertheless, he rated his prior experience as a juror as positive and regarded it as his "duty" to answer his jury summons and serve, if asked. (6 Supp. 1 CT 1276.) Thus, while Mr. Reheis was "not really very pleased" with being asked to possibly undergo a second tour of jury duty, he felt compelled to participate in good faith in the jury selection process, noting that "somebody's got to do it." (Id.) These statements, as well as Mr. Reheis's denials that he would automatically impose life without parole during sentencing, paint a vivid portrait of a citizen who has a keen understanding of jury service forged by experience, an unwavering sense of duty to serve if called, a commitment to follow the juror's oath, and the capacity to set aside his personal views in order to honor that oath.

Under Gray, Mr. Reheis clearly was qualified to sit as a juror: "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" (Gray, 481 U.S. at pp. 658-659, quoting Witt, 496 U.S. at p. 423.) As explained below, California's capital

sentencing guidelines contemplate that jurors take into account their own personal beliefs in weighing aggravating and mitigating factors. Had he been allowed to serve, Mr. Reheis would have been a model juror.

Respondent diminishes the considered and consistent responses that Mr. Reheis articulated both during voir dire and on his questionnaire by mischaracterizing the distinctions he draws between his personal views and his ability as a juror to follow the law as "vacillations" and "contradictions." (RB 5.) Respondent appears unable to accept the possibility that a juror could set aside his personal beliefs and honor his oath to follow the law -- a scenario that, notwithstanding respondent's skepticism, occurs frequently in courtrooms across the country, not only with jurors but with judges as well. Indeed, respondent appears to equate an individual's moral opposition to the death penalty with a *per se* inability to follow the law pursuant to a sworn oath. Respondent's argument echoes that of the prosecutor and the court, who at trial simply refused to accept that Mr. Reheis's personal beliefs would not frustrate his impartiality:

> The Court: Mr. Reheis, let me inquire. I am confused that you feel that your personal conviction is one way but that you could be a juror and become something else, become a juror and leave that behind. You seem to feel that you could do that.
>
> Mr. Reheis: Yes, I do. (12 RT 1000.)
>
> Prosecutor: And in spite of your objections to the death penalty

you could impose the death penalty?

Mr. Reheis: I believe I could.

Prosecutor: I think that's what gives me difficulty. I don't understand that.

(12 RT 992-993.)

This and similar colloquies not only underscore the integrity and nuance of Mr. Reheis's position but also reveal the unfounded skepticism and gratuitous distrust of his questioners. When excluding a juror for cause, the court's inquiry is limited only to determining whether the juror's personal beliefs "actually preclude him from engaging in the weighing process and returning a capital verdict." (Stewart, 33 Cal. 4th at p. 446, quoting People v. Kaurish (1990) 52 Cal.3d 648, 699.) Here, there is no evidence that Mr. Reheis's personal views would have impaired his ability to consider the full range of sentencing alternatives, including the death penalty. To the contrary, Mr. Reheis was clear and unequivocal that his personal beliefs would not interfere with his oath as a juror – an oath he had taken and upheld on a previous occasion. (12 RT 987-988.) Absent evidence that he was substantially impaired, the court had no basis for excusing Mr. Reheis for cause.

C. Prospective Juror Reheis's Difficulty in Describing Under What Circumstances He Might Impose the Death Penalty is Not Grounds for Disqualification.

Respondent argues that Mr. Reheis's dismissal was proper because he had difficulty in expressing under what circumstances he might consider the death penalty an appropriate punishment. (RB at 1.) Respondent correctly notes that Mr. Reheis admitted difficulty imagining the precise circumstances in which he would do so. (12 RT 989-990.) Nevertheless, Mr. Reheis repeatedly assured the court that he could impose the death penalty. Against this backdrop, the prosecutor erroneously concluded that there were in fact no circumstances in which Mr. Reheis would consider the death penalty to be an appropriate sentence. (12 RT 1000, 1004-1005.) The prosecutor made this argument even though the prosecutor agreed with defense counsel that Reheis had never once actually stated that he could never impose the death penalty as a juror. (12 RT 1005.)

Again, the legally appropriate inquiry is whether a juror can uphold his oath and follow the court's instruction -- not, as the prosecutor would have it, whether the juror can describe a scenario deserving of death. Whatever difficulty Mr. Reheis may have had in imagining when he might impose the death penalty is only minimally relevant to whether he would have difficulty imposing the death penalty if he concluded that it was the appropriate punishment. Indeed, the Court has long held that jurors cannot properly be asked on voir dire whether they could or could not impose a death sentence under a particular set of facts. People v. Fields (1983) 35

Cal.3d 329, 356-358 (Trial court may properly prohibit voir dire which seeks to ascertain a juror's view on the death penalty in actual or hypothetical cases not before him.) That determination can be made only after the juror has heard all of the evidence both in aggravation and in mitigation that bears on punishment. (Id., at p. 358, n.13.)

Contrary to respondent's position (RB 45), Mr. Reheis's inability to envision a situation in which the death penalty would be an appropriate sentence does not mean that his ability to be fair was substantially impaired. In fact, Mr. Reheis gave consistent, explicit, and detailed descriptions of how he would arrive at that particular outcome. He repeatedly elevated the juror's oath over his personal predilections. As he stated:

> The way I would interpret my role here as a juror **is not to impose my personal opinions but to view the evidence** and then go with what the dictates were from that point.

(12 RT 989, emphasis added.) As Mr. Reheis reiterated:

> Well, I believe that there are certain things that you have personal opinions upon that may not be other people's opinions or may not be exactly in conjunction with how the law is written or how the law is to be carried out. My opinion of my own judgment process is such that I could look at that objectively and weigh that, surely knowing that there are some prejudices of my own that will enter into it, but I still feel those prejudices would not be strong enough to sway my decision based upon what was presented here.

(12 RT 993.) Mr. Reheis later clarified:

> **[M]y belief is that [my personal beliefs] don't come into the judgment process to a degree that's going to change what the**

appropriate decision should be."

(12 RT 1001, emphasis added.)

It is striking how closely these iterations track California's capital sentencing guidelines, which contemplate that jurors "take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted." (Stewart, 33 Cal. 4th at p. 447.) The clarity of Mr. Reheis's understanding of his obligations as a juror underscores the sincerity of his (multiple) assurances that his personal beliefs would not interfere with his ability to find the death penalty to be an appropriate sentence. (12 RT 998.)

D. The Excusal of Prospective Juror Reheis Was Not Supported by Substantial Evidence.

The trial court erroneously concluded that Mr. Reheis's responses disqualified him from jury service. While the trial court's findings are to be given deference, where there is no inconsistency in a juror's statements regarding the death penalty its rulings may be upheld only if they are supported by substantial evidence. (People v. Haley, (2004) 34 Cal.4th 283, 306; Jones, 29 Cal.4th at p. 1246.) Here, however, prospective juror's Reheis's statements betray no inconsistency and do not support the trial court's ruling that he was substantially impaired in his ability to uphold his oath as a juror.

It bears repeating that from the outset Mr. Reheis was adamant that he could impose the death penalty as a juror. (12 RT at 990.) Nothing that he subsequently said contradicted that statement. (12 RT 987-988, 989, 993, 995, 998, 1001, 1002, 1004.) The trial court, however, unable to fathom Mr. Reheis's simultaneous moral opposition to the death penalty and his steadfast insistence that he could impose it as a juror, erroneously concluded that Mr. Reheis was substantially impaired. (12 RT 1007.) Respondent makes a similar argument, construing Mr. Reheis's statements against the death penalty as somehow fatal, *per se*, to his neutrality as a juror. (RB 6.) But the exclusion of a juror for cause on the basis of his personal beliefs turns on the very narrow question of whether the juror is "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" (Gray, 481 U.S. at pp. 657-658, quoting Witherspoon v. Illinois (1968) 391 U.S. 510, 522 (ellipses in original).)

Mr. Reheis's consistent "clear words" undercut any claim that he was "irrevocably committed . . . to vote against the penalty." Because there is no substantial evidence supporting the trial court's finding that Mr. Reheis was not qualified to serve as a juror, reversal is required.

III. PROSPECTIVE JUROR CHAMPLIN'S VIEWS ON THE DEATH PENALTY WERE EQUIVOCAL, AND HER DISMISSAL FOR CAUSE REQUIRES REVERSAL UNDER ADAMS/WITT.

As in its treatment of the improper striking for cause of prospective juror Reheis in Argument II, supra, respondent highlights selective excerpts from the record to argue that prospective juror Champlin's views about the death penalty substantially impaired her from carrying out her duties as a juror. (RB at pp. 49-50.)

When a juror says she "agree[s] somewhat" that capital punishment is justified for murderers (24 Supp.1 CT 6013-6047), that she has "mixed feelings" regarding the death penalty (9 RT 645-646), that she "do[es]n't know" or is "just not certain" (9 RT 653) if she can vote for death, that she "probably could" impose the death penalty," and that she "probably couldn't" impose the death penalty (9 RT 652), that juror is being equivocal. The parties to this lawsuit may legitimately disagree on the legal consequences of that status, but not that these answers reflect a juror who is equivocal. (See Gray v. State (Miss. 1985) 472 So.2d 409, 422 (juror who gave similar responses was "equivocal" juror).)

A fair reading of the full record of the voir dire of Ms. Champlin reveals a prospective juror who is candid about her "mixed feelings," who understands, both intellectually and emotionally, the awesome responsibility demanded of capital jurors (9 RT 655), but who nonetheless

is willing and able to consider death as an option in the appropriate case. (See Adams v. Texas (1980) 448 U.S. 38, 50 ("neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty").) Although Juror Champlin expressed equivocation about the death penalty and exhibited emotion at the prospect of having to decide another human being's fate, the record fails to establish that she was unable to carry out the duties of a juror in this case.

Respondent further contends that Adams and Gray v. Mississippi (1987) 481 U.S. 648, cited by Appellant in his Opening Brief, fail to support Appellant's argument because these two Supreme Court cases did not involve jurors who were truly equivocal about their views on the death penalty. (RB at p. 51.) This contention is meritless.

Adams and Gray, quite simply, **rejected** the notion that a state could satisfy its burden of proving that a capital-case juror was unable to perform his or her duties by showing that the juror gave equivocal answers as to whether the juror's opposition to capital punishment would impact his or her deliberations. In so holding, the Supreme Court also rejected the notion that a reviewing court was required to pay deference to any such discharges.

What is more, the voir dire answers given in Adams and Gray were nearly identical, in tone and content, to the ones given by juror Champlin. As the Court noted in Adams, the lower court "could, *and did*, exclude jurors who stated that they would be 'affected' by the possibility of the death penalty . . .," and in the process improperly struck qualified prospective jurors for cause. (448 U.S. at p. 49, emphasis added.) In Gray, the Supreme Court reversed a death sentence because a prospective juror, Bounds, was struck because she gave answers during voir dire revealing scruples against the death penalty and expressing some hesitation about sitting as a capital juror. (See 481 U.S. at p. 656 (trial court observing that juror Bounds "can't make up her mind."); id. at p. 654 (juror Bounds stating "I think I could [impose the death penalty.].)

Like the jurors in Adams and Gray, Juror Champlin did not hide the fact that she would be affected by the possibility of the death penalty, discussed her scruples against the death penalty, and expressed some hesitation at the notion of sitting on a death penalty case. But like the jurors in Adams and Gray, she was improperly discharged for cause. In the final analysis, Champlin's answers during voir dire revealed her to be an equivocal juror, not a substantially impaired juror. Her discharge for cause requires reversal.

IV. THE TRIAL COURT'S FAILURE TO DISMISS JUROR COON FOR CAUSE IS PRESERVED AS AN ISSUE ON APPEAL AND WARRANTS REVERSAL.

In his Opening Brief, Mr. Williams argues that juror Coon's staunch pro-death penalty views substantially impaired his ability to serve as a juror and that reversible error was committed when the trial court refused the defense motion to strike Coon for cause. Respondent claims, inter alia, that this issue was not preserved below and so is not cognizable on appeal. (RB 52-56.) This assertion is wrong.

A. Because Williams Exercised All of His Peremptory Challenges, the Cause Challenge Is Not Waived on Appeal.

Respondent claims that Mr. Williams "did not adequately preserve his claim regarding his challenge to Coon" because he had peremptory challenges available to him when Coon was placed on the jury but did not use them to dismiss Coon. (RB 54.) In respondent's view, whether a cause challenge is preserved turns on *when* Mr. Williams used his peremptory challenges. For respondent, in other words, the timing of the peremptory challenges is dispositive, not whether counsel fully exercised those challenges.

Respondent's argument is legally unsupported. Every case to face this issue has held that "[t]o complain on appeal that a prospective juror should have been excused for case, the defendant must have exercised and

exhausted his peremptory challenges." (See, e.g., People v. Kelly (1990) 51 Cal.3d 931, 960; accord, People v. Stankewitz (1990) 51 Cal.3d 72, 103; People v. Coleman (1988) 46 Cal.3d 749, 770; People v. Miller (1969) 71 Cal.2d 459, 473.) The rationale for this rule is sound; a defendant should not be able to complain on appeal about the composition of the jury which convicted him if, when the trial started, he had unused peremptory challenges which he could have used to correct the problem. (Kelly, 51 Cal.3d at p. 960.)

Where a trial court erroneously denies a defendant's challenge for cause and the biased juror actually sits on the jury, reversal is required whenever defendant has used all of his peremptory challenges. This Court articulated this principle nearly one century ago. (People v. Loper (1910) 159 Cal. 7, 9; accord, People v. Wells (1893) 100 Cal. 227, 228-231.)

Here, Mr. Williams exercised and exhausted all of his peremptory challenges. Thus, he did everything the law required of him.

In aid of its contrary conclusion, respondent seeks to raise the legal standard for preserving this claim by arguing that defense counsel waived any claim of error because he "failed to communicate his dissatisfaction regarding the jury to the trial court." (RB 55, citing People v. Maury (2003) 30 Cal.4th 342, 379.) Maury is inapposite and unhelpful to respondent because there defense counsel failed to exercise all of his peremptory

challenges. (30 Cal.4th at p. 379.) In any event, there is no need to speculate whether defense counsel felt "dissatisfaction regarding the jury." Had counsel been satisfied with juror Coon, he would not have moved to excuse him for cause. By doing so, counsel did all that was necessary to preserve this issue, and it is properly before this Court.

B. Principles of Due Process Prevent the Waiver of the Cause Challenge on Appeal.

Respondent also cites People v. Horning (2004) 34 Cal.4th 871, 896, in support of its argument that Mr. Williams waived his cause challenge because he did not exercise a peremptory against juror Coon and failed to reiterate his dissatisfaction regarding the jury to the trial court. In Horning, this Court laid out a three-part test for preserving a claim based on the trial court's overruling a defense challenge for cause. To preserve such a claim, "a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected." (quoting Maury, supra., 30 Cal.4th at 379.) The three-part test articulated in Horning, however, is not applicable to the voir dire in Mr. Williams case, for at least two reasons. First, as a general matter, Horning's three-part test should not be followed because, as explained below, it rests on questionable legal foundations.

Second, the Horning test is inapplicable to the jury selection in this case because Horning -- whatever its precedential value today -- did not represent prevailing law concerning the preservation for cause challenges at the time of Mr. Williams' jury selection in 1991.

In support of this three-part test, Horning cites the Maury decision, supra. To be sure, Maury, decided one year earlier in 2003, articulates this three-part test, and in so doing cites two other cases for support: People v. Cunningham (2001) 25 Cal. 4th 926, 976, cert. denied, 534 U.S. 1141 (2002), and People v. Crittenden (1994) 9 Cal.4th 83, 121. Neither of those cases, however, provides precedential support for the use of this three-part test. The Cunningham decision nowhere articulates the three-part test of Horning. What is more, as in Maury, defense counsel in Cunningham failed to exercise all of his peremptory challenges (and further did not justify his failure to exercise them). Thus, on its face Cunningham does not address the situation in this case where counsel exhausted his peremptory challenges.

The Crittendon case, by contrast, does involve a fact-pattern where defense counsel exhausted his peremptory challenges. The State argued on appeal that the denial of counsel's challenge for cause could not be heard on appeal because trial counsel failed to express dissatisfaction with the jury as sworn. The Court, however, rejected the State's argument and reviewed the

cause challenge on its merits. The Crittendon opinion is especially noteworthy because the Court went out of its way to state that an expression of dissatisfaction by trial counsel with the ultimate jury -- the third Horning factor -- was **not** clearly required by then-existing case precedent. As the Crittendon Court observed, "language in People v. Bittaker (1989) 48 Cal.3d 1046, 1087-1088, **suggest[s] an express statement of dissatisfaction is unnecessary if a defendant exhausts his or her peremptory challenges**." (Crittendon, supra, 9 Cal.4th at p. 122, n.4 (emphasis added).) Accordingly, the Court in Crittendon did not deny the cause challenge as waived.

In short, as of at least 1994, the test articulated by Horning for preserving a cause challenge claim for appeal was not part of California case law. If Horning's three-part test for preservation has ever become controlling law it did so some time **after** the Crittendon decision. At what point this occurred is not clear. As the preceding discussion reveals, the Horning test has its well-springs in mere dicta, and aspects of the test appear in scattered cases across a decade applied to various fact patterns.

The question, then, is whether the rule articulated in Horning for preserving a cause challenge for appellate review may be applied to this case. (RB 54; Horning, supra, 34 Cal.4th at p. 896.) The answer is no.

Where this Court changes the rules for preserving an issue on appeal,

federal and state principles of due process and fundamental fairness prevent retroactive application of the new rule. (See, e.g., People v. Collins (1986) 42 Cal.3d 378, 388. ("To deny defendants their right to appeal on [an] issue because [they followed existing law] . . . would be to change the rules after the contest was over.").) As Judge Alarcon wrote for a unanimous Ninth Circuit panel in this very context, "We refuse to impose subsequently-created requirements for preserving a claim on appeal on a defendant who did all that was necessary to comply with the law applicable at the time of his trial. By doing so, we avoid the brutal absurdity of commanding a man today to do something yesterday." (United States v. Givens (9th Cir. 1985) 767 F.2d 574, 579.) Thus, a decision changing the rules for preserving an issue on appeal will only be applied to "trials beginning after [the new] decision is final." (People v. Collins, supra, 42 Cal.3d at p. 388; accord, People v. Welch (1993) 5 Cal.4th 228, 238; People v. Chi Ko Wong (1976) 18 Cal.3d 698, 716.).

Trial in Mr. Williams' case began in 1991. At that time, the rule for preserving a cause challenge was very different than that articulated by the Court in 2004 in Horning. Indeed, as the Crittendon case makes clear, supra, 9 Cal.4th at p. 122 n.4, the Horning test cannot be said to date back even to 1994 -- three years **after** Mr. Williams' jury selection. Rather, in 1991, defense counsel was expected to know and to comport himself in

accordance with the straightforward and long-standing rule repeated by this Court as recently as one year before Mr. Williams' trial in its 1990 Kelly decision. According to Kelly, "To complain on appeal that a prospective juror should have been excused for cause, the defendant must have exercised and exhausted his peremptory challenges." 51 Cal.3d at p. 960. In other words, at the time of Mr. Williams' trial there was no need to undertake the three-part test suggested by Horning in order to preserve the claim for appeal. Pursuant to Collins, supra, and its progeny, the Horning test cannot apply to this case.

C. Juror Coon's Views Substantially Impaired Him for Jury Service.

As for respondent's fall-back position that despite Coon's strong support for the death penalty he was qualified to sit as a juror, the record supports Mr. Williams' assessment of error (see AOB 143-144), and that argument does not need repeating here.

V. THE FAILURE TO PROVIDE A LIMITING INSTRUCTION UPON THE INTRODUCTION OF GUILTY PLEAS BY EACH OF THREE CO-DEFENDANTS CONSTITUTED REVERSIBLE ERROR.

Respondent contends that the trial court had no duty to provide a limiting instruction at the guilt phase informing the jury that the guilty pleas of Mr. Williams' three codefendants, Linton, Cyprian and Lee, introduced at trial, could not be used to infer Mr. Williams' guilt. Respondent further contends that the instructions given by the trial court were adequate. RB 57-62. Respondent is wrong on both counts.

Contrary to respondent's claim, the cases cited by Mr. Williams do in fact support the necessity of providing a limiting instruction when co-defendants' guilty pleas are introduced. (See AOB 150-152.) The grounds on which respondent tries to distinguish those cases are unconvincing. See RB 60-61. Respondent seizes on minor factual differences between the cases cited in support of Appellant's argument and the case at bar, while ignoring the broader and more fundamental principles that comprise the holdings of those cases.

Respondent, for example, faults Appellant's citation to Lee v. Illinois (1986) 476 U.S. 530 as inapposite "because it concerned the use of an out-of-court confession by an accomplice." RB 60. In so arguing, respondent appears to allege in the margins (but never fully argues) that there is a

difference of constitutional magnitude, for purposes of the Sixth Amendment right to confrontation clause, between accomplice confessions and accomplice pleas where, as here, the (three) accomplice pleas were proffered in the context of accomplice testimony that (like the confession in Lee) linked the defendant to the crime. RB 60 n.18. Not only is respondent's semantic distinction between a confession and a plea unavailing in this case, the U.S. Supreme Court, in Hudson v. North Carolina (1960) 363 U.S. 697, 702-703 expressly stated that the introduction at trial of a "codefendant's *guilty plea*" requires "immediate[]" "curative instructions" so that the layperson jury is made "aware . . . that [the defendant] was entitled to . . . . protection from the prejudicial effect of [that] plea of guilt." (Emphasis added.)

Respondent next attacks Appellant's reliance on the Hudson case because the uncured guilty plea issue in Hudson was not the central holding in that case. RB 60. To be sure, the main issue in Hudson was whether the trial court's failure to provide a criminal defendant with counsel deprived the defendant of due process. 363 U.S. at p. 703-704. But this fact does not detract from the merits of the Court's extended discussion of the plea issue. Indeed, the Court expressly stated that the "great potential prejudice" to the defendant from the admission of a codefendant's uncured guilty plea "*underline[d]* the [defendant's] need for counsel to advise him." Hudson,

363 U.S. at. pp. 702, 703 (emphasis added.) See also id. at p. 702 ("The potential prejudice of such an occurrence is *obvious* and has long been recognized by the courts . . . " (emphasis added.).) In other words, although the Hudson case ultimately concerned due process right to counsel, an integral part of the Supreme Court's analysis as to why (and when) due process was violated concerned its finding of error that defendant's right to a fair trial were prejudiced by the admission of a codefendant's plea without a limiting instruction. Hudson, 363 U.S. at pp. 702-703.

Respondent then takes issue with Appellant's reliance on United States v. Halbert (9th Cir. 1981) 640 F.2d 1000. In Halbert, the U.S. Court of Appeals for the Ninth Circuit found reversible error arising from the failure to give a limiting instruction following the introduction of codefendants' guilty pleas. Respondent contends that the Halbert case is inapposite because the introduction of those pleas occurred "[o]ver a defense objection." RB 61. "[I]n contrast," argues respondent, "appellant did not object to the admission of the evidence regarding the pleas, and even elicited such evidence from [co-defendant Dino] Lee . . . attempting to use the pleas to his advantage." Id. Again, the factual quibble that respondent raises is irrelevant to the constitutional matter at hand. There are several possible reasons why defense counsel would not object to the admission of, or might even affirmatively elicit a codefendant's plea, but

these reasons are wholly separate from a defendant's abiding interest in having questions of guilt based on the evidence against him -- "not on whether a government witness or a codefendant has plead guilty to the same charge." United States v. Black (5th Cir. 1982) 685 F.2d 132, 135. In other words, whether the admission of a codefendant's plea occurs over the objection of counsel or with counsel's blessing, the defendant retains his constitutional right in not having the co-defendant's plea considered as substantive evidence of his guilt.

The facts of Lee v. Illinois make this point clearly. In Lee, the Supreme Court held that the defendant's Sixth Amendment rights were violated and the Court reversed the defendant's murder convictions even though "*both* the prosecution and the defen[se] relied heavily" on the improperly admitted confessions of a co-defendant, and even though defense counsel affirmatively argued at trial that the co-defendant's confessions exculpated the defendant. 476 U.S. at p. 536 (emphasis added.) See also, United States v. Harrell (5th Cir. 1970) 436 F.2d 606, 614 (finding plain error where co-defendant's pre-trial guilty plea was admitted at trial of defendant without proper limiting instruction, *"despite the fact that it came in without objection."* (Emphasis added.))

Respondent also contends that the CALJIC instructions that were given at trial sufficed to overcome any failure to give the limiting

instruction complained of on appeal. RB 61-62. Respondent's argument in this regard is misleading. First, respondent states that "[t]he jury was specifically told that "[t]he fact that a witness has been convicted of a felony] . . . may be considered by you only for determining the believability of that witness." RB 61. Respondent omits to mention, however, that the quoted statement is but one part of a larger instruction, the entire thrust of which has *nothing* to do with protecting the defendant from an unjustified, highly prejudicial inference of guilt, but rather everything to do with witness credibility. Specifically, the full instruction reads as follows:

> The fact that a witness has been convicted of a felony, *if such be a fact*, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

CT 321; 27 RT 2939 (emphasis added.) When the instruction is viewed in its entirety, it becomes plain that, through selective quotation, respondent entirely distorts the purpose of the instruction. Respondent, to suit its argument, not only overlooks the sentence following the portion it quotes, respondent also warps what it quotes by redacting a critical clause from the middle of the sentence. Specifically, respondent leaves out the tell-tale clause "*if such be a fact*" which modifies the predicate of the sentence, the felony conviction. When this clause is re-inserted, it is apparent that the

instruction was never intended to redress the "great potential prejudice," Hudson, 363 U.S. at p. 702, that befell defendant / Appellant when the three guilty pleas of his three codefendants *were in fact* admitted into evidence. The instruction does *not* address what inferences are impermissible to draw about defendant's guilt; instead, the instruction focuses solely on how jurors should assess the credibility of a witness who may (or may not) have a felony record.

The actual meaning and purpose of this instruction is buttressed by its placement within the full set of instructions provided Appellant's jury. The instruction was preceded by an instruction to the effect that the persuasiveness of a piece of evidence can be wholly independent from the number of witnesses who testify to it. (27 RT 2939) It was followed, in turn, by an instruction going to the weight to be given to the uncorroborated testimony of a single witness. (27 RT 2939-2940.) In other words, the instruction selectively quoted by respondent fits snugly within a series of instructions that separately and collectively address the appropriate weight that the jury should accord witness testimony.

As a result, there is simply no basis to claim that this instruction constitutes a "*very specific limiting instruction precluding any use of*" the codefendants' pleas against Appellant. People v. Orozco (1993) 20 Cal. App. 4th 1554. Accord, Hudson, 363 U.S. at p. 703 (discussing duty of trial

judge "to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant"); id. (noting that jurors must be instructed that a defendant's "guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea." (citations omitted) (emphasis in the original).)

Respondent further contends that a separate instruction was sufficiently curative. RB 61-61. That second instruction required corroboration of accomplice testimony and stated that the testimony of an accomplice ought to be viewed "with distrust." This instruction provided, in relevant part that: "The defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense." (CT 333-335, 337; 27 RT 2945-2946.)

This second instruction, however, makes no mention of the admission of the codefendants' guilty pleas, only accomplice *testimony*. Thus, by its own terms, the instruction does not apply to the situation at hand. What is more, insofar as "guilt is personal" and the admission of the codefendants' guilty pleas "do not constitute admissions of any nature as against" the defendant, U.S. v. Winley (2nd Cir. 1981) 638 F.2d 560, 561, it makes no sense to instruct on the need to corroborate such pleas. In other words, the accomplice evidence to which this instruction refers is decidedly

something *other than* evidence of an accomplice's guilty plea. Accordingly, this instruction, too, is a far cry from the "very specific limiting instruction" required by law.

In sum, upon the admission of the codefendants' guilty pleas, the trial court had a *sua sponte* duty to instruct the jury that it was impermissible to infer Appellant's guilt directly from that fact that his co-defendants had pled guilty. The trial court failed to do so. As a result, reversal is required.

VI. A PREVIOUS JURY VERDICT CONVICTING THE PROSECUTION'S STAR WITNESS OF TWO COUNTS OF FIRST DEGREE MURDER FOR HIS ROLE IN THE OFFENSE IS NOT AN "IRRELEVANT DETAIL[]" THAT SHOULD HAVE BEEN KEPT FROM THE JURY.

As the prosecutor observed, the testimony of Patrick Linton against Mr. Williams was uniquely "devastating" in its impact. (54 RT 4144.) Linton's testimony was "*the one critical point*," above all others, on which the State hinged its case. (Ibid., emphasis added.) "*If any one piece of evidence all by itself . . . sunk [Mr. Williams],*" *it was Linton's testimony*. (54 RT 4145, emphasis added.) In this context, Mr. Williams' jury should at least have been given the opportunity to have all of the evidence it needed to properly assess Linton's *motive* for testifying against Mr. Williams.

Mr. Williams posits that because the jury was entitled to consider all relevant evidence regarding the strength and veracity of the State's case against him, he should have been permitted to introduce the fact -- undisputed by the state -- that at Linton's first trial, Linton had been convicted of two counts of first degree murder.

Respondent first contends that the trial court acted properly in excluding any evidence that Linton's first trial had resulted in two first degree murder verdicts that potentially exposed Linton to two consecutive life sentences. (RB 66.) Respondent claims that such evidence, had it been

admitted, would have allowed the jury to "speculate" about Linton's motive for testifying against Mr. Williams and that such speculation is somehow unwarranted. Respondent fails to explain why such speculation is unwarranted, or why the evidence of Linton's two convictions for first degree murder holds "minimal probative value" (ibid.), perhaps because the substantial probative value of this evidence is manifest, and any speculation to which it gives rise is in fact quite plausible. Moreover, respondent is disingenuous in suggesting that any clarifying instruction that Linton's first trial resulted in a mistrial would have caused "an undue consumption of time." (Ibid.) Courts routinely give, and juries routinely consider, such clarifying instructions without trials being derailed.

Respondent next contends that even if the trial court did erroneously limit the cross-examination of Linton, the error was harmless beyond a reasonable doubt because the excluded facts were "**irrelevant details**." (RB 63, emphasis added.)

Respondent either misunderstands what constitutes "relevant evidence," or distorts the term beyond recognition. Relevant evidence "means evidence, *including evidence relevant to the credibility of a witness* or hearsay declarant, having *any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evidence Code §210.) (Accord Black's Law Dictionary, 6th Edition

(1990) at p. 1291, "Relevant evidence" is such evidence "having any tendency to make the existence of any fact that is of consequence to the termination of the action more probable or less probable than it would be without the evidence.")

It is useful to examine the excluded evidence in light of the accepted definitions of the term "relevant."

The State placed substantial stock in the testimonial power of Patrick Linton:

- The prosecution characterized Linton's testimony as "*critical*" for the State's case and "*devastating*" to Mr. Williams (54 RT 4144 (emphases added));

- Indeed, above all other testimony presented by the prosecution, "*if any one piece of evidence all by itself would have sunk this defendant*," Linton's testimony "was it." (54 RT 4145 (emphasis added.).)

Linton had his back against the wall.

- Linton was convicted of not one but *two* counts of first degree murder by the jury in his first trial;

- But for a mistrial Linton would have been sentenced to not one but *two* terms of life in prison -- to be served consecutively.

So the State offered Linton a deal -- a very sweet deal. The offer was extended just as the jury in Linton's second trial was poised to return verdicts on the very same charges of first degree murder on which Linton had previously been convicted.

- Instead of receiving two possible first degree murder convictions, Linton was allowed to pled guilty to a *single, lesser* count of second degree murder.

- And instead of possibly serving to two consecutive life prison terms, Linton was offered a single sentence of *15 years to life*.

Linton took the deal. Linton also agreed to testify against Mr. Williams, who was facing the very same charges for the very same offense for which Linton had been convicted at his first trial.

Against this backdrop, evidence of Mr. Linton's two first degree murder jury verdicts, together with his ultimate plea, is, by any standard, evidence that is "relevant to the credibility of [that] witness" as to why that witness, Linton, might choose to testify against Mr. Williams. Cal. Evidence Code §210, supra. Indeed, such evidence has *considerable* "tendency" -- not merely "any tendency" -- "to make the existence" of an offer of leniency to Linton in return for his testimony against Mr. Williams "more probable" than had such evidence never existed. (Black's Law Dictionary, supra.)

Specifically, Linton's prior jury verdicts showed that:

(1) the prosecution had a powerful case against Linton;

(2) the prosecution would be unlikely to offer a second degree murder plea *absent* Linton's agreement to testify; and,

(3) Linton, who knew the strength of the prosecution's case against him, was highly motivated to make a deal in return for a sentence less than two consecutive life terms.

In short, the two jury verdicts against Linton, in what was subsequently declared a mistrial, could reasonably be understood to provide Mr. Linton the *motive* to plead guilty to the single lesser charge of second degree murder and to testify against Mr. Williams. As such, Linton's jury verdicts were far from "irrelevant": rather, they were central to understanding why Linton testified as he did against Mr. Williams.

In sum, the trial court's refusal to allow defense counsel to ask about the result of Linton's first trial violated Mr. Williams' Fifth, Sixth, and Eighth Amendment rights, and the exclusion of Mr. Linton's two first degree murder verdicts from Mr. Williams' trial was not harmless.

VII. THE PROSECUTOR'S MULTIPLE ATTACKS ON DEFENSE COUNSEL'S INTEGRITY CONSTITUTED EGREGIOUS MISCONDUCT REQUIRING REVERSAL.

A. The Relevant Facts.

The prosecutor made repeated and direct statements that impugned the integrity of defense counsel. Those statements are set forth in Appellant's Opening Brief, see AOB 169-171, and several of those statements are discussed below. It is important to point out, however, that these instances of prosecutorial misconduct were part of a larger pattern of misconduct that singly and in the aggregate infected Appellant's trial with unfairness.

For example, as discussed above, during voir dire the prosecutor systematically purged Appellant's jury of African American women, offering patently specious reasons for why he exercised his peremptory challenges in a blatantly non-neutral manner with respect to race and gender. See Argument I, supra.

During the penalty phase of Appellant's trial, the prosecutor alleged that the jury could rely on Appellant's commission of a 1983 assault with a deadly weapon as a factor it could consider in the death calculus. (35 RT 3488.) As to this incident defense counsel conceded (and the evidence showed) that defendant was convicted of a misdemeanor assault. (33 RT 3298, 34 RT 3400, 35 RT 3496-3470.) But during his penalty phase

opening statement, the prosecutor alleged that the 1983 incident did not involve either simple assault (which was conceded) or assault with a deadly weapon (which was charged). Instead, the prosecutor told Appellant's jury that the incident involved the commission of murder. (32 RT 3177.) The prosecutor made the same point in his closing argument, urging the jurors to consider the 1983 incident as a murder in aggravation:

> In terms of his true culpability for the [1983] crime, he is a murderer. . . . **[H]is true culpability** . . . his culpability for the crime **was that of a murderer**. **He . . . should have . . . been tried and convicted of murder**.

(35 RT 3428 (emphasis added.)) In rhetorically powerful terms, the prosecutor asked the jurors to consider what crime defendant "was truly guilty of" in connection with the 1983 crime, and then told them that the crime was murder. (Id.) This act of legal alchemy – converting a prior misdemeanor assault into murder to secure a death sentence – was unsupported by evidence and exceeded the bounds of prosecutorial decorum.

So too did the prosecutor's comparison of Mr. Williams to a wild beast who could never be tamed. As the prosecutor told Appellant's jury, "what you view here of the defendant has nothing to do with the real person. . . . **[H]e's like a lion** when you see him in the zoo . . . he seems like such an interesting, soft, sensitive creature . . . ." (35 RT 3434 (emphasis

added.)) "But the truth is," the prosecutor continued, "it can **and will become incredibly violent**." (Id. (emphasis added.)) The prosecutor pounded this theme again, that like a wild beast "he's not going to change, and he hasn't changed." (35 RT 3435.)

The prosecutor's improper attacks on Mr. Williams did not end with his dehumanization. After likening Appellant to a wild lion, the prosecutor then appealed to jurors' fears, arguing that this animal likely would attack again. "[I]f you bring in outside influences, **any** outside influences -- and in this case I'm talking about other inmates, prison guards, **anybody else** -- the potential . . . of this true defendant . . . for violence is **always** going to exist . . .," he argued. (35 RT 3434 (emphasis added.)) No evidence, however, supported the prosecutor's assertion that Mr. Williams posed a continuing, much less unending, threat to inmates or prison guards. Indeed, Mr. Williams' criminal history consisted of a single misdemeanor assault.

As the U.S. Supreme Court has observed, such "improper suggestions, insinuations, and . . . assertions of personal knowledge" by a prosecutor "are apt to carry much weight against the accused when they should properly carry none." Berger v. United States (1935) 295 U.S. 78, 88. These remarks by the prosecutor were "patently improper," Bates v. Bell (6th Cir. 2005) 402 F.3d 635, 643, and most certainly warrant censure. See Darden v. Wainwright (1986) 477 U.S. 168, 179-180 (prosecutorial

commentary that likened defendant to an "animal" and implied that the death penalty would be the only guarantee against a future similar act "deserves . . . condemnation"); Berger, 295 U.S. at p. 88 ("while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.")

It is against the larger backdrop of repeated prosecutorial overreaching, rhetorical indiscretion, and argument by epithet that the prosecutor's impugning of defense counsel must be considered, particularly in light of respondent's remarkable assertion that defense counsel was never attacked.

B. The Prosecutor Committed Misconduct by Attacking Defense Counsel's Integrity.

At the outset of his closing argument to the jury at the guilt phase of Mr. Williams' trial, the prosecutor told the jury what he thought of defense counsel in no uncertain terms: "I say he's lying." (28 RT 2966.) The prosecutor was blunt; defense counsel has tried to "mislead you, deceive you, give you false insinuations." (28 RT 2965.)

The prosecutor's impugning of defense counsel carried over into his rebuttal. The deception, he argued, "continued as a perversion through this entire system . . . through closing argument." (28 RT 3084.) Defense counsel had problems with evidence he could not "deceive," "manipulate," or "confuse." (28 RT 3084.)

Respondent parries that these clear, frontal attacks on the integrity of defense counsel "can only be reasonably understood as a comment on the weakness of the defense evidence." (RB 72). To be sure, the prosecutor also pounced on the dearth of defense witnesses, the alleged weaknesses of their testimony, and the paucity of the defense exhibits. But this does not negate or excuse the impropriety of the repeated aspersions cast by the prosecutor on Mr. Williams' attorneys. The record is clear: the prosecutor attacked not only the defense evidence, but also defense counsel.

As this Court stated in People v. Bemore (2000) 22 Cal.4th 809, 846, it is misconduct for a prosecutor to (1) attack the integrity of defense counsel, (2) cast aspersions on defense counsel, or (3) suggest that defense counsel has fabricated evidence. Here, the prosecutor did all three. Respondent's contention that the prosecutor's words were not directed at defense counsel cannot be reconciled with the record.

The prosecutor told the jury that he "had a hard time sleeping last night because" of the many "methods which [defense counsel] used to try to mislead you, deceive you, give you false insinuations." (28 RT 2965.) The prosecutor then evoked for the jury the powerful image of a lengthy laundry list of defense counsel misdeeds. "I started by writing out all of the things he had done from the beginning in his opening statement . . . all the way back to **when he started trying to falsify evidence**." (28 RT 2965,

emphasis added.) In these remarks, the prosecutor was plainly focusing the jury's attention on the character of the defense attorney, not the strength of the defense's evidence. It is inconceivable that jurors would not construe these remarks as an attack on defense counsel.

C. The Error Was Prejudicial and Requires Reversal.

Respondent argues that if the prosecutor attacked trial counsel's integrity, those attacks went unnoticed by the jury because the prosecutor, after launching them, artfully changed course to address the evidence in the case. (RB 68; 28 RT 2965.) In fact, when the prosecutor's closing argument is examined in full, it becomes clear that his attacks on defense counsel infected the entirety of his argument and those attacks were levied in a manner to maximize their prejudicial impact. By prefacing his discussion of the evidence in the case with an assault on defense counsel's veracity, the prosecutor was able to disparage the entire defense case. The prosecutor's rhetorical device was simple: he first told the jury that he could talk at length about points A, B, and C (the improper attacks on defense counsel, which advanced his cause), and then spotlights those very points for the jury. He next told the jury that he instead planned to focus on points D, E, and F (the permissible attacks on the defense evidence, which also advanced his cause), although he did not tell the jury to overlook or otherwise ignore his earlier points. As a result, the prosecutor was able to

convey to Mr. Williams' jurors *all of his points*, including the improper ones. The fact that the prosecutor spent more time covering permissible points does not mean the jury forgot the force and effect of the prosecutor's preceding impermissible remarks.

Respondent contends that Appellant's claim of prosecutorial misconduct is not properly before this Court because trial counsel failed to make a timely objection and to request an admonishment. (RB 70.) The futility of defense counsel responding to the prosecutor's attacks by decrying to the jury "I am not a perjurer," however, is self-evident. Any additional focus of the jurors' attention on this issue would fail to advance Appellant's case and would likely have only further solidified the damage to defense counsel's integrity. Accordingly, this Court should not deem this claim waived. See People v. Hill (1998) 17 Cal. 4th 800, 820 (regarding the preservation of a claim of prosecutorial misconduct, a "defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile.")

X. THE TRIAL COURT'S INSTRUCTIONS ON ACCOMPLICE CORROBORATION AND PROVISION OF A SPECIAL CIRCUMSTANCE THEORY NEVER CHARGED REQUIRE REVERSAL OF THE ROBBERY, SPECIAL CIRCUMSTANCE AND FELONY MURDER CONVICTIONS.

The state charged Mr. Williams with two counts murder with robbery special circumstances and two counts of robbery. (CT 139-141.) As to the murder charges, the jury was instructed on both premeditated and felony-murder theories. (CT 344-348.) The jury returned a general verdict of guilty which did not reveal the theory of murder on which it relied. (CT 381-384.) The jury also convicted on the robbery and robbery special circumstance charges. (CT 381-385.)

The state's main witnesses against Mr. Williams as to all these charges were two accomplices: Dino Lee and Dauras Cyprian. In his opening brief, Mr. Williams contended that reversal was required of the robbery convictions, the robbery special circumstance and the murder charge because the jury was improperly instructed on the required corroboration of accomplice testimony and, in fact, there was insufficient evidence to corroborate the testimony of these accomplices. (AOB 205-215.) In addition, he contended that reversal of the special circumstance allegation was required because the court instructed the jury on a special circumstance theory which had never been charged and of which defendant had no notice. He contended this violated his right to due process (AOB

217-218), the effective assistance of counsel (AOB 218-226) and a reliable determination under the Eighth Amendment. (AOB 226-228.) Finally, he contended that the special circumstance had to be reversed because the jury was not required to agree which special circumstance theory the state had proved. (AOB 228-233.)

Respondent disagrees. As to the accomplice-corroboration issue, respondent argues that (1) the jury was properly instructed, and (2) there was sufficient evidence of corroboration (RB 90-94.) As to the special-circumstance notice issue, respondent argues (1) defendant waived the due process and Eighth Amendment components of the claim, (AOB 91-92, 95), (2) defendant had notice of the new theory (AOB 92-93), and (3) any error was harmless. (RB 94-98.) As to the unanimity issue, respondent argues that a unanimity instruction was not required. (RB 98-101.)

As discussed below, respondent's arguments should be rejected.

A. The Trial Court's Erroneous Instruction On Corroboration Requires Reversal.

The jury in this case was instructed it could rely on the testimony of accomplices Lee and Cyprian if there was corroborating evidence which "tends to connect the defendant with the commission of the crime charged." (CT 334.) Respondent defends this statement of the law, arguing that corroboration is sufficient if it "tend[s] to connect the defendant with the

commission of the charged offense." (RB 88.)

In his opening brief Mr. Williams explained in detail the error in giving this instruction. He cited 12 cases -- nine from this Court -- which stated that corroborative evidence "must relate to some act or fact *which is an element of the crime*." (AOB 207, citing People v. Rodrigues (1994) 8 Cal.4th 1060, 1128; accord People v. Zapien (1993) 4 Cal.4th 929, 982; People v. Sully (1991) 53 Cal.3d 1195, 1228; People v. Garrison (1989) 47 Cal.3d 746, 773; People v. Bunyard (1988) 45 Cal.3d 1189, 1206; People v. Hathcock (1973) 8 Cal.3d 599, 617; People v. Perry (1972) 7 Cal.3d 756, 769; People v. Luker (1965) 63 Cal.3d 464, 469; and People v. Lyons (1958) 50 Cal.3d 245, 257.)

Respondent ignores these cases. (RB 88.) Instead, applying the same erroneous standard given to the jury, respondent argues that any error was harmless because evidence presented at trial "tended to connect appellant to the robberies." (RB 89.)

The flaw in respondent's argument is that it ignores Rodrigues, Zapien, Sully, Garrison, Bunyard, Hathcock, Perry, Luker and Lyons. Those cases establish that the question is *not* whether there is corroborating evidence which "tend[s] to connect appellant to the robberies," but whether there is corroborating evidence which "relate[s] to some act or fact which is an element of the crime." In his opening brief, Mr. Williams explained why

-- applying the correct standard -- the corroboration was insufficient and reversal was required. (AOB 205-215.) Since, as to this question, respondent says nothing, here is no need to repeat that unrebutted analysis. Reversal is required.

B. The Trial Court's Provision Of A Special Circumstance Never Charged Requires Reversal Of The Special Circumstance Allegation.

Shortly before closing arguments began, the prosecutor for the first time suggested that the special circumstance allegation could be based *not* on the theft of wallets (which had been the theory from the beginning) but on an attempted robbery of cocaine (which had never been advanced). (RT 2882.) Defense counsel twice objected to instructions on this attempted robbery theory. (RT 2883, 2887.) The court overruled these objections and so instructed the jury. (RT 3095-3096.)

In his opening brief, Mr. Williams contended that he received inadequate notice of the attempted robbery theory in violation of his due process right to notice (AOB 217-218), his right to the effective assistance of counsel (AOB 218-226), and his Eighth Amendment right to a reliable determination of culpability in a capital case. (AOB 226-228.)

The state argues no constitutional violations occurred because defense counsel did receive adequate notice of the new special circumstance theory. (RB 92-93.) Alternatively, the state argues that any error was

harmless. (RB 93-94.)

Respondent's argument as to notice need not long detain the Court. Respondent accurately notes that the amended information alleged a robbery special circumstance "within the meaning of [California] Penal Code section 190.2(a)(17)." (RB 92, citing CT 139-140.) Turning to Cal. Pen. Code § 190.2(a)(17), respondent notes that it refers both to robbery and attempted robbery. (RB 92.) Thus, respondent concludes that by alleging that Mr. Williams was "engaged in the commission of the crime of Robbery," the state was really alleging that Mr. Williams was "engaged in the commission of the crime of Robbery *or attempted robbery*." (RB 92.) In other words, although the information said only "robbery," it should be read to incorporate "attempted robbery" from section 190.2(a)(17).

The state's "notice by incorporation" argument is unavailing for two reasons. First, as respondent notes, the amended information was simple and direct: it charged Mr. Williams with committing the crime while "engaged in the commission of the crime of Robbery . . . ." (RB 92, citing CT 139-140.) It simply did not charge him with committing the crime while "engaged in the commission of the crime of Robbery *or attempted robbery*."

More importantly, respondent's argument misses that this is not a debate about technical distinctions between robbery and attempted robbery.

The event charged as the basis for the felony-murder special circumstance -- and against which Mr. Williams was on notice to defend -- was the theft of wallets from the victims. The event added as a basis for special circumstance culpability *was an entirely different act*: the attempted theft of cocaine, which had not been charged and against which Mr. Williams had not been put on notice to defend, either explicitly or by a stealth reference to section 190.2(a)(17).

Respondent's harmless error argument must also be rejected. Respondent argues that any error in convicting Mr. Williams on this theory may be ignored because the record does not show he could have "developed a more persuasive defense" had he actually known the charges against him. (RB 93.) Respondent's approach is illogical. Whether the error here is viewed as a Due Process violation, an Eighth Amendment violation or a violation of defendant's right to counsel, the vice in failing to give a defendant notice of the charges against him is that he will not be prepared to counter the state's case. The record cannot be expected to show that a more persuasive defense could have been developed precisely because the very nature of the error distorted the record. As Judge Trott wrote in Shepard v. Rees (9th Cir. 1989) 909 F.2d 1234, 1237, such errors affect the "composition of the record" and, as a consequence, the absence of prejudice

in the record itself cannot be used to defeat the claim.[8]

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[8] At the end of the case, when the prosecutor first mentioned the possibility that the special circumstance could be based on the attempted robbery of cocaine rather than the theft of wallets, defense counsel twice objected. (RT 2883, 2887.) Nevertheless, as noted above, respondent argues that Mr. Williams has waived his right to appellate review of the Due Process and Eighth Amendment components of his argument. (RB 92, 95.) Respondent does not argue that the Sixth Amendment component of this claim has been waived. (RB 94-95.)

Respondent's waiver thesis as to the Due Process claim is based on defense counsel's trial objection which cited a lack of evidence rather than a lack of notice. (RB 92.) Respondent's waiver thesis as to the Eighth Amendment claim is based on defense counsel's failure to cite the Eighth Amendment.

In connection with the due process argument, and in the context of this case, the distinction respondent proposes between lack of evidence and lack of notice is semantic rather than substantive. The main reason there was no notice was that the state had not focused on attempted robbery in its evidentiary presentation. "Lack of notice" was subsumed under counsel's "lack of evidence." There is no basis for concluding that referring to "lack of notice" in addition to a "lack of evidence" would have made the slightest difference in the trial court's analysis of this issue, and thus there was no waiver. (See People v. Yeoman (2003) 31 Cal.4th 93 (failure to articulate federal ground of objection does not constitute a waiver where statement of the federal ground would not have changed the trial court's analysis).)

Yeoman also controls the Eighth Amendment issue. In that case, defendant objected to certain evidence but did not cite the Eighth Amendment. On appeal, he argued that introduction of that evidence violated the Eighth Amendment. As it does here, the state argued that the Eighth Amendment argument was waived. This Court rejected the claim absent a showing that reference to the Eighth Amendment would have made some real-world difference to the trial court's analysis or conclusion. (31 Cal.4th at pp. 117-118, 224.)

Pursuant to Yeoman, there is no waiver here. Indeed, if there was a

(continued...)

C. The Trial Court's Failure To Require That The Jury Agree On Whether The Special Circumstance Was Based On Robbery Of The Wallets, Or Attempted Robbery Of Cocaine, Requires Reversal Of The Special Circumstance Allegation.

The trial court gave the jury two different offenses on which it could rely to find true the special circumstance allegation: (1) the theft of wallets and/or (2) the attempted theft of cocaine. In his opening brief Mr. Williams contended that the trial court erred in failing to instruct the jury it had to agree on which of these acts the special circumstance verdict was based. (AOB 228-233.)

Respondent disagrees, arguing that (1) a unanimity instruction was not required because the same defense was offered as to each of the two acts (RB 96-97), and (2) any error was harmless because the same defense was offered as to the two acts. (RB 99.)

The legal premise of respondent's argument is correct. When a jury is given two acts to consider as the basis for an offense, no unanimity instruction is required (or there is no harm from the failure to provide such

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[8](...continued)
waiver because a more specific trial level objection would have changed the trial court's conclusion then trial counsel had no tactical reason not to object more elaborately. The objection counsel did make shows that he did not want this theory to go to the jury. There is no conceivable reason for him to object but not to object properly. Thus, if counsel's failure to cite "lack of notice" or "Eighth Amendment" constitutes a waiver, the issues should nevertheless be considered because this failure constituted ineffective assistance of counsel.

an instruction) where the same defense is offered as to each of the two acts and the evidence as to both acts must either be believed or rejected.

The problem with respondent's argument here is that the evidence and defenses as to the two acts was *not* the same. Although Mr. Williams discussed this evidence in some detail in his opening brief (AOB 231-233), respondent ignores this discussion almost entirely (RB 96-99), and there is no need to repeat it. Because different evidence was presented as to the two acts, and the jury could reasonably disagree as to whether a robbery of the wallets, an attempted robbery of cocaine, or both occurred, the failure to give a unanimity instruction was both error and prejudicial. Thus, both the special circumstance findings and the murder convictions must be reversed. (See AOB 233, n.27.)

XI. THE TRIAL COURT'S ADMISSION OF UNCHARGED CRIMINAL ACTIVITY AS EVIDENCE IN AGGRAVATION REQUIRES A NEW PENALTY PHASE.

At the penalty phase the prosecutor introduced evidence of four Cal. Pen. Code "section 190.3(b)" incidents involving violence. Two of these acts were offenses for which Mr. Williams had been tried and convicted years earlier. In his opening brief, Mr. Williams contended that a new penalty phase was required for five reasons:

> (1) The state was permitted to introduce stale evidence of these acts, well beyond the statute of limitations (AOB 246-255);
>
> (2) The state's re-litigation of two of these four acts violated the Double Jeopardy Clause (AOB 255-266);
>
> (3) The state's reliance on conduct committed by others in these section 190.3(b) acts violated the legislature's intent in enacting section 190.3 (AOB 266-276);
>
> (4) The trial court misinstructed the jury on the principles of vicarious liability it needed to assess whether defendant was liable for the section 190.3(b) acts (AOB 276-293); and
>
> (5) The prosecutor relied on a section 190.3(b) crime of which the state had given no notice. (AOB 294-298).

With respect to each of these arguments, respondent disagrees. As discussed below, respondent's responses are without merit and a new penalty phase is required.

A. The Due Process Claim Is Not Waived.

In connection with defendant's stale evidence/Due Process claim, respondent argues (1) the claim is waived because defense counsel did not raise it below, and (2) the Court has already rejected the claim. (RB 99-100.)

Respondent is correct that defense counsel did not raise the issue below. Nevertheless, there is no waiver. In People v. Birks (1998) 19 Cal.4th 108 this Court held that the failure to object in a lower court does *not* waive appellate review of an issue where an objection would have been futile because there was binding authority from a higher court which precluded the objection from being sustained. (Id. at p. 116, n.6.) That is exactly what we have here.

In People v. Heishman (1988) 45 Cal.3d 147 this Court rejected the exact claim Mr. Williams is making here. (*Id.* at p. 192.) Thus, an objection at trial could have done no good at all; the trial court was duty bound to follow Heishman. Pursuant to Birks, there is no waiver.[9]

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[9] The merits of this issue are fully joined by the briefs on file. For the reasons discussed in Mr. Williams' opening brief, this Court should reconsider Heishman.

B. The Double Jeopardy Claim Is Not Waived.

In connection with defendant's double jeopardy claim, respondent argues (1) the claim is waived because defense counsel did not raise it below, and (2) the Court has already rejected the claim. (RB 100-101.)

Respondent is again correct that defense counsel did not object on double jeopardy grounds. For the same reasons discussed above, there is no waiver in connection with this issue. In People v. Melton (1988) 44 Cal.3d 713 this Court rejected the identical argument defendant makes here. (Id. at p. 756, n.17.) Thus, an objection at trial could have done no good; the trial court was duty bound to follow Melton, and pursuant to Birks there is no waiver.[10]

C. The Vicarious Liability Issue In Not Waived.

In connection with defendant's claim that it was improper to admit the violent conduct of others in defendant's penalty phase under section 190.3(b), respondent argues (1) the claim is waived because defense counsel did not raise it below, and (2) the Court has already rejected the claim. (RB 100-101.)

Respondent is again correct that defense counsel did not object on

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The merits of this issue are fully joined by the briefs now on file with the Court. For the reasons discussed in Mr. Williams' opening brief, this Court should reconsider Melton.

this ground below, and again, for the same reasons, there is no waiver in connection with this issue. In People v. Hayes (1990) 52 Cal.3d 577 this Court held that such evidence was properly admitted. (Id. at p. 633.) Thus, an objection at trial on this basis would have been futile; the trial court was required to follow Hayes, and pursuant to Birks there is no waiver.[11]

D. Because The Trial Court Affirmatively Elected To Instruct The Jury On Accomplice Liability, the Trial Court Was Required To Do So Correctly.

The state presented evidence of four distinct section 190.3(b) crimes. One involved a May 1983 assault on Kenneth Moore. There was some dispute as to Mr. Williams' role in this offense; according to the state's eyewitness, defendant *may* have hit Kenneth Moore. (Compare 32 RT 3274-75 (state eyewitness cannot recall if Mr. Williams hit Mr. Moore) and 33 RT 3299 (same) with 32 RT 3187-3194 (same eye witness says Mr. Williams did hit Mr. Moore).) There was no dispute, however, that Eddie Jackson shot Mr. Moore with a gun. (32 RT 3184.)

The state asked the jury to sentence Mr. Williams *not* for what he may have done (the hitting), but for what Eddie Jackson did (the shooting). Thus, the prosecutor urged the jurors to find Mr. Williams culpable for

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11 The merits of this issue are fully joined by the briefs now on file with the Court. For the reasons discussed in Mr. Williams' opening brief, this Court should reconsider Hayes.

assault with a deadly weapon. (35 RT 3428, 3488.) Since it was undisputed that Mr. Williams did not use the weapon, the state was asking the jury to hold Mr. Williams liable for the assault with a deadly weapon as an accomplice.

The state made a similar request in connection with a July 1985 assault. This involved an assault on Mona Thomas and David Williams. Thomas and Williams were driving on July 7, 1985, when someone threw a brick through the window of their car; the two were dragged from the car and beaten. (32 RT 3250.) The prosecutor conceded that Mr. Williams had not thrown the brick (32 RT 3166) , but nevertheless urged the jurors to find Mr. Williams culpable for assault with a deadly weapon. (35 RT 3488.) Once again, since there was no dispute that Mr. Williams did not throw the brick, the state was asking the jury to hold Mr. Williams liable for assault with a deadly weapon as an accomplice.

In instructing the jury on how to evaluate Mr. Williams' culpability, the trial court failed to give any instructions on aiding and abetting liability. Instead, it broadly told the jurors they could rely on the violent prior criminal activity if they believed Mr. Williams "was involved in such criminal acts . . . ." (35 RT 3489.)

In his opening brief Mr. Williams contended that the trial court's failure to instruct on aiding and abetting principles violated his federal and

state constitutional rights to a jury trial. (AOB 276-280.) He separately contended that because the state could not prove the error harmless, a new penalty phase was required. (AOB 281-289.)

Respondent does not dispute that if error occurred, a new penalty phase is required. (RB 103-104.) Instead, respondent argues there was no error because the trial court had no duty to give proper instructions on aiding and abetting. (RB 103-104.) Respondent cites cases from this Court holding that a trial court has no *sua sponte* duty to instruct on elements of crimes presented under section 190.3(b). (RB 103, citing People v. Anderson (2001) 25 Cal.4th 543, 587-588 and People v. Hart (1999) 20 Cal.4th 546, 651.) Respondent argues that "by parity of reasoning" the trial court had no duty to give proper instructions on aiding and abetting liability.

Respondent's analogy to instructing on elements of the offense is flawed. Unlike Anderson and Hart, the trial judge in this case affirmatively took it on herself to instruct on accomplice liability, giving a grossly incorrect instruction. Under this circumstance, the trial court was duty bound to correct its blunder rather than simply ignore it.

Anderson provides a useful contrast. At penalty phase the state introduced evidence of prior violent crimes under section 190.3(b). The trial court did not instruct on any elements of the section 190.3(b) crimes.

On appeal, defendant argued that the trial court had a *sua sponte* obligation to provide such instructions. This Court rejected the argument. (25 Cal.4th at p. 588; accord People v. Hart, supra, 20 Cal.4th at p. 651.)

Significantly, the trial courts in both Hart and Anderson had decided not to instruct on the elements of the section 190.3(b) offenses at all. In neither case did the trial courts give manifestly incorrect instructions on elements of the section 190.3(b) offenses the jury was being asked to consider.

But here, rather than stay away from instructing on accomplice liability entirely -- as the trial courts in Hart and Anderson did in connection with elements of the section 190.3(b) charges -- the trial court affirmatively elected to instruct on accomplice liability. Instead of conveying correct accomplice liability principles, the trial court gave a homespun definition which permitted individual jurors to rely on any section 190.3(b) offenses in which they believed Mr. Williams was somehow "involved." (35 RT 3489.)

Thus, as to the 1983 offense, the trial court did not instruct the jury on *any* of the proper principles of accomplice liability, which would have required the jury to find that Mr. Williams (1) committed an act which aided Jackson's assault with a deadly weapon, (2) knew of Jackson's intent and (3) intended to aid Jackson. As to the 1985 offense, the jury was *not*

told it had to find that Mr. Williams (1) committed an act which aided the assault with the brick, (2) knew that this assault was intended, and (3) intended to aid this assault. As to neither offense was the jury told that mere presence at the crime scene, or knowledge that a crime was occurring, was insufficient.

In sum, had the trial court not given any instructions on accomplice liability at all, respondent's analogy to Hart and Anderson -- and the rule governing instructions on elements of section 190.3(b) charges -- might apply. But neither Hart nor Anderson justify a trial court's affirmative *mis*instruction on aiding and abetting liability in connection with section 190.3(b) charges. (See People v. Castillo (1997) 16 Cal.4th 1009, 1015 ("Even if the court has no *sua sponte* duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly.").) Error has occurred. Because the state does not dispute that any error was prejudicial, a new penalty phase is required.[12]

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[12] As to the May 1983 incident, the state gave notice it would be relying on Mr. Williams' role in an assault. (1 RT 5.) At penalty phase, however, it characterized this assault as a murder and urged the jury to impose death because Mr. Williams's "culpability for the crime was that of a murderer." (35 RT 3438.)

In his opening brief, Mr. Williams contended that a new penalty phase was required because the prosecutor relied on a section 190.3(b) crime -- murder -- of which the state had given no notice. (AOB 294-298).
(continued...)

XII. THE TRIAL COURT'S INSTRUCTION ON AN "INVOLVED IN" THEORY OF ACCOMPLICE LIABILITY REQUIRES A NEW PENALTY PHASE.

As discussed above, the trial court instructed the jury on how to assess Mr. Williams' culpability for the acts of others in connection with the 1983 and 1983 section 190.3(b) charges. Rather than provide accurate accomplice liability instructions, however, the trial court simply told the jurors they could rely on any charges they felt Mr. Williams was 'involved in." (35 RT 3489.) As discussed above, in his opening brief Mr. Williams contended this violated his federal and state constitutional rights to a jury trial.

Mr. Williams also contended the trial court's "involved in" theory of accomplice liability violated (1) the Eighth Amendment because it was unconstitutionally vague (AOB 300-308), (2) the state law requirement that permits penalty phase jurors to rely on section 190.3(b) evidence only where the defendant has committed the acts or aided and abetted them (AOB 309-313), (3) his right to the effective assistance of counsel, because counsel had no notice of the "involved in" theory during the evidentiary portion of the trial (AOB 313-317), and (4) his Eighth Amendment right to a reliable penalty phase determination. (AOB 317-318.)

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[12](...continued)
Respondent disagrees. (RB 106-108.) Mr. Williams considers this issue fully joined by the briefs on file and does not address it further here.

Respondent disagrees with each contention. As discussed below, respondent's arguments should be rejected and a new penalty phase ordered.

A. Instruction that the Jury Could Impose Death Based On Prior Crimes It Believed Mr. Williams Was "Involved In" Was Unconstitutionally Vague.

On several section 190.3(b) charges on which the state relied, the evidence is clear Mr. Williams was liable -- if at all -- as an aider and abettor. Yet the jury was never told the proper principles of accomplice liability. Instead, it was told it could sentence Mr. Williams to death if it merely found he was somehow "involved in" these prior crimes

According to respondent, the phrase "involved in" is not vague because it is not technical and can be understood by jurors. (RB 112.)

Respondent's argument is not the solution to the problem; it is indicative of the problem itself. Terms do not have to be technical to be unconstitutionally vague. (See, e.g., Maynard v. Cartwright (1988) 486 U.S. 356 (holding unconstitutionally vague an aggravating factor that permitted death for murders which were "heinous, atrocious or cruel"); Godfrey v. Georgia (1980) 446 U.S. 420 (holding unconstitutionally vague an aggravating factor that permitted death for murders which were "outrageously or wantonly vile"); Arnold v. State (Ga. 1976) 224 S.E.2d 386 (holding unconstitutionally vague an aggravating factor that permitted

death for murderers who had a "substantial" history of "serious assaultive convictions.")).

Contrary to respondent's argument, the vice in phrases which have been held unconstitutionally vague is *not* that they are "technical," but that they employ terms which are so common, and so subjective, that their meaning will vary from juror to juror and from jury to jury. Thus, there is nothing technical about the terms "heinous," "atrocious," "outrageously," "wantonly" or "substantial." All of them are, as respondent argues here, "commonly understood by jurors of average intelligence." (RB 112.) Nevertheless, all of them have been found to be unconstitutionally vague precisely because there could be no assurance that jurors would apply them in a rational, consistent way.

That is exactly what we have here. It is impossible to determine what the phrase "involved in" meant to each juror in evaluating Mr. Williams' vicarious liability for the section 190.3(b) charges. Did it mean he knew of the actual perpetrator's intent? Did it mean he committed an act while aware of that intent? Does it mean he intended to further the perpetrator's act? Did it mean he was merely present with knowledge of the perpetrator's intent? Did it mean he was present with knowledge of the perpetrator's intent and took no affirmative act, but simply did not act to stop the actual perpetrator?

Respondent does not dispute that the broad "involved in" instruction used in this case leaves all these questions unanswered. (RB 112.) The state's position is to throw up its hands, declare that "mathematical precision" cannot be obtained, and urge this Court to approve the "involved in" theory of accomplice liability. (RB 112.)

With all due respect, that is "nonsense upon stilts." Jeremy Bentham, Anarchical Fallacies, in 2 Works of Jeremy Bentham 501 (1843). Mr. Williams is not seeking "mathematical precision." He simply contends that once the trial court decided to instruct on accomplice liability, it should have given the standard CALJIC instructions on the issue, not the vague, erroneous instruction it elected to give. The "involved in" instruction given was vague precisely because it failed to convey a specific meaning to the jurors. It is impossible to know what the jurors decided, whether they agreed on what Mr. Williams did, or whether any conduct on which they may have agreed was even criminal under California law. Under any standard of vagueness analysis, the instruction given was unconstitutionally vague.[13]

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[13] The parties disagree about what vagueness standard should apply to this instruction. (Compare AOB 300-305 (contending that the Eighth Amendment standard applies) with RB 109-111 (contending that the standard set forth in People v. Bacigalupo (1993) 6 Cal.4th 457 applies).) As Mr. Williams noted in his opening brief, the phrase "involved in" is

(continued...)

B. Giving An "Involved In" Theory Of Accomplice Liability Violated State Law.

In People v. Ray (1996) 13 Cal.4th 313, this Court held that "[t]he sentencer in a capital proceeding is entitled to know about other incidents involving the use or threat of violence for which the defendant is shown to be criminally liable beyond a reasonable doubt, whether he participated as an actual perpetrator or in some other capacity." (Id. at p. 351.) The critical limitation in the Ray analysis is in the phrase "criminally liable."

Under Ray a capital sentencer may rely on section 190.3(b) charges only if the defendant is "criminally liable" for those charges. Of course, under California law a defendant may be "criminally liable" either as an actual perpetrator or as an aider and abettor. Implicit in Ray is the recognition that the sentencer in a capital case cannot consider violent incidents for which the defendant is *not* "criminally liable." It would be an odd rule indeed that permitted a capital sentencer to impose death based on violent activity for which the defendant was not criminally liable. Indeed, this Court has frequently noted that in applying section 190.3(b), the state is permitted to introduce evidence showing that defendant aided and abetted a prior crime of violence. (See, e.g., People Hayes, supra, 52 Cal.3d at p. 633

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[13](...continued)
unconstitutional under either standard. (AOB 308, n.42.)

(permitting section 190.3(b) evidence of a crime which defendant "has previously aided and abetted . . . ."); People v. Bacigalupo (1991) 1 Cal.4th 103, 137 (permitting section 190.3(b) evidence of a crime where "defendant would have been liable as an accomplice").)

Here, however, the state takes a significantly more expansive position, arguing that defendant's exposure under section 190.3(b) is not simply to offenses of which he is "criminally liable" as defined by the laws governing accomplice liability in California but to any offense defendant is "involved in" as defined by the new phrase "engage[d] as a participant." (RB 113-114.)

There are no apparent limits to this new category of section 190.3(b) evidence. If the phrase "involved in" is intended to be broader than traditional accomplice liability, it is wrong as a matter of state law. If it is intended to be the same, it is wrong as a matter of state law because it fails to convey the traditional principles applicable to accomplice liability. Although respondent's attempts to dismiss the trial court's instruction as a "minor misreading" of the standard accomplice liability instruction (RB 107), it was in actuality both erroneous and, under the facts of the case, highly prejudicial.

C. Giving An "Involved In" Theory Of Accomplice Liability Violated Mr. Williams' Right To The Effective Assistance Of Counsel.

Trial counsel in this case sought to counter the state's section 190.3(b) evidence. As explained in detail in Mr. Williams' opening brief, through cross-examination as to three of the four section 190.3(b) incidents defense counsel raised significant questions as to Mr. Williams' legal culpability under traditional accomplice principles. (AOB 237-245, 316.)

However, as discussed above, the trial court did not instruct the jury on these traditional accomplice principles. Instead, the trial court told the jury it could rely on any section 190.3(b) incidents it felt defendant was "involved in." (35 RT 3489.)

In his opening brief Mr. Williams contended that the trial court's provision of an "involved in" theory of accomplice liability undercut the tactical decisions his lawyer made in preparing for and presenting his penalty phase case, and violated his right to effective assistance of counsel. (AOB 313-316.) Respondent argues there was no error because the instruction was correct. (RB 115.) Alternatively, respondent argues there was no prejudice because the record does not show defense counsel could have developed a more persuasive defense had he actually known the

theory which the trial court would give to the jury. (RB 115.)[14]

With respect to the merits, respondent is wrong. As discussed above, the trial court's "involved in" theory of accomplice liability was a fundamentally incorrect explanation of accomplice liability under state law. With respect to prejudice, respondent is also wrong. As discussed above in connection with the special circumstance theory that was added at the last minute, the vice inherent in failing to give a defendant notice of a theory advanced against him is that he will not be prepared to counter the state's case. In such a situation, the record cannot be expected to show that a more persuasive defense could have been developed precisely because of the nature of the error. As Judge Trott wrote in Shepard v. Rees, supra, 909 F.2d 1234, 1237 such errors affect the "composition of the record" and, as a

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Respondent also argues trial counsel waived any claim of ineffective assistance of counsel for failing to object on this ground below. (RB 115.) Respondent is correct that defense counsel did not object. There could have been no tactical reason for such a failure. As to three of the four section 190.3(b) incidents, defense counsel's entire cross-examination of the state's case was designed to show that Mr. Williams was not an accomplice to the charged offenses under traditional accomplice principles. As respondent concedes, this was also the thrust of defense counsel's penalty phase closing argument. (RB 105-106, 114.) It is inconceivable that defense counsel would have pursued this defense strategy on cross-examination and during argument, and then have a tactical reason to permit the trial court to undercut it with a broad "involved in" theory of accomplice liability which rendered his cross-examination, and his argument, ineffectual. Because there was no reason not to object, any such failure constituted ineffective assistance of counsel and the issue is properly before this Court.

consequence, the absence of prejudice in the record itself cannot be used to defeat the claim. Reversal is required.[15]

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In his opening brief, Mr. Williams also contended that the trial court's injection of an "involved in" theory of accomplice liability rendered the penalty phase verdict unreliable. (AOB 317-318.) Respondent disagrees, arguing that there is no violation because the instruction was correct. (RB 116.) There is no need to respond to this argument; as discussed above, the instruction was a grossly mis-stated California law.

XIII THE FAILURE TO (1) REQUIRE THE MAJORITY OF JURORS TO FIND TRUE THE AGGRAVATING FACTORS ON WHICH THEY SENTENCED DEFENDANT TO DIE, AND (2) INSTRUCT THE JURY THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTS OUTWEIGH THE MITIGATING FACTS VIOLATES, *INTER ALIA*, DEFENDANTS' SIXTH AMENDMENT RIGHTS AS ARTICULATED BY RING V. ARIZONA AND CUNNINGHAM V. CALIFORNIA.

In aggravation, and pursuant to Penal Code section 190, subdivision (b), the state introduced evidence of four criminal acts: three separate assaults and one possession of a loaded firearm. (32 RT 3175-3180.) Mr. Williams' jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if defendant should die. (35 RT 3486-3487.) The jurors were also told that before they could rely on this evidence, they had to find beyond a reasonable doubt that "defendant . . . (1) did in fact commit such criminal acts or activity or (2) was involved in such criminal acts or activity." (35 RT 3489.) Although the jurors were told that all 12 of them must agree on the final sentence (35 RT 3491-1), they were never told that before they could rely on prior criminal activity as an aggravating factor in the weighing process they had to unanimously agree that, in fact, defendant had committed the prior acts.

If anything, the instructions given in this case conveyed just the opposite message. The jurors were specifically told that as to this

aggravating factor "[i]t is not necessary for all jurors to agree." (35 RT 3489.) Any single juror who believed that defendant committed or "was involved in" this other criminal activity was free to rely on this in deciding if defendant should die. (35 RT 3489.) (See generally AOB Argument XIII.)

The trial court also instructed that it was to determine (1) the existence of aggravating and mitigating factors and (2) whether the aggravating factors outweigh the mitigating facts. However, the jury was *not* instructed that this latter finding should be made beyond a reasonable doubt. (See generally AOB Argument XVIII).

Ring v. Arizona (2002) 536 U.S. 584 held that the Sixth Amendment right to a jury trial applies to all factual findings necessary for imposition of a death sentence. In terms of California's capital sentencing scheme, that means that the Sixth Amendment applies to both the finding and weighing of aggravating factors. Appellant's Opening Brief addresses the violations under the Sixth, Eighth, and Fourteenth Amendments that resulted from the penalty phase instructions given at Appellant's trial, and places particular focus on the two distinct Ring errors which occurred.

As discussed in the Opening Brief, the first error concerned the failure of Mr. Williams' jurors to unanimously find the aggravating factors at issue in the case. As Argument XIII explained, the instruction given in

this case permitted jurors to impose death by relying on prior criminal activity involving violence on which they had not agreed, in violation of Ring and Blakely v.Washington (2004) 542 U.S. 296.[16]

The second error concerned the failure of Mr. Williams' jurors to find beyond a reasonable doubt that the aggravation outweighed the mitigation in this case. As Argument XVIII explained, under California law a jury cannot impose a death sentence absent a factual finding that aggravation outweighs mitigation. Once that finding is made, the jury must then select the appropriate sentence. Because this factual finding exposed defendant to a harsher sentence, Ring requires that it be made beyond a reasonable doubt. Because that was not done here, reversal is required.[17]

With respect to both of these errors respondent observes correctly that "this Court has repeatedly" rejected Appellant's arguments. RB 119, 205.

In its 2006 Term, the United States Supreme Court issued its

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16 This argument was entitled, "The trial court violated defendant's rights under the sixth, eighth and fourteenth amendments by permitting jurors to sentence him to die based on aggravating factors which a majority of the jurors were not required to find true."

17 This argument was entitled, "The failure to instruct the jury that it must find beyond a reasonable doubt that the aggravating facts outweigh the mitigating facts violated defendant's rights under the fifth, sixth, eighth, and fourteenth amendments; reversal is required."

decision in Cunningham v. California (2007) 549 U.S. ___, 127 S. Ct. 856. In Cunningham, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The Court held that, except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' (citation omitted)." (Cunningham, 127 S.Ct. at p. 869.) In so ruling, the U.S. Supreme Court rejected the reasoning used by this Court (and relied upon by respondent) to find that Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring have no application to the penalty phase of a capital trial.

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California (as in Arizona) the answer is "Yes." More precisely, before any California jury may even consider death as an option, it must first find that aggravating factors outweigh mitigating factors. This is a factual finding which exposed defendant in this case to a significantly greater punishment than that authorized by the murder with a special circumstance finding alone. That, according to Apprendi and Cunningham, is the end of the Sixth Amendment inquiry. California's failure to require

the requisite fact finding in the penalty phase to be made unanimously and beyond a reasonable doubt violates the United States Constitution.

"Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (Ring, supra, 536 U.S. at p. 609.)

XV. DEFENSE COUNSEL RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE REQUIRING REVERSAL.

A. Introduction.

Respondent argues that Mr. Williams' trial counsel, Ronald LeMieux, and the attorney who selected Mr. Williams' jury, Douglas McCann, provided adequate representation throughout Mr. Williams' case. Respondent makes this argument after discussing, *seriatim*, each of counsels' blunders, and claiming, *seriatim*, that each blunder did not rise to the level of deficient performance.

Two points must be made at the outset. First, not once during its 80-page discussion of trial counsels' performance does respondent mention, or even allude, to the authoritative standards that govern the duties and conduct of capital counsel cited repeatedly throughout Appellant's Opening Brief: the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). To the contrary, respondent, apparently unaware of the genesis of or reasons for the ABA Guidelines, erroneously contends that "Appellant has not pointed to any special expertise that [trial counsel] needed in order to handle the penalty phase of a capital trial, nor has he identified how the procedures or methods used in a penalty phase differ in any material respect from any other type of trial." (RB 124.) A quick glance at the ABA Guidelines,

however, reveals that it "is **universally accepted** that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master." (ABA Guidelines, Guideline 1.1 - Commentary, Introduction, emphasis added). "Because of the extraordinary complexity and demands of capital cases, **a significantly greater degree of skill and experience on the part of defense counsel is required** than in a noncapital case" (ABA Guidelines, Guideline 1.1 - History of Guideline, emphasis added.) See also, ABA Guidelines, Guideline 1.1 - Commentary, Introduction ("death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases. . . . "'Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.'"(citation omitted.).)

The heightened skill and experience required of capital counsel "are not aspirational." (Id.) Nor do they apply simply to cases with court-appointed counsel. Rather, the ABA Standards apply to "**all persons** facing the possible imposition or execution of a death sentence," including those with means to retain private counsel, and "embody the current consensus about what **is** required to provide effective defense representation in capital cases" (Id., emphases added)

It is difficult to fathom how respondent can purport to assess trial counsels' performance without any reference to the prevailing "norms." See Wiggins v. Smith (2003) 539 U.S. 510, 522 ("Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining" what capital counsel are expected to do throughout their representation of the client); id. at p. 524 (describing the ABA Guidelines as "well-defined norms"); Florida v. Nixon (2004) 543 U.S. 175 (applying the ABA Guidelines of 2003 to a 1984 trial.) See also Hamblin v. Mitchell (6th Cir. 2003) 354 F.3d 482, 488 (adopting the 1989 and 2003 ABA standards for attorneys representing death penalty prisoners in 1982 and holding that counsel's failure to adhere to those guidelines constituted ineffective assistance of counsel.) Equally puzzling is how respondent determined that trial counsels' professional obligations were met using an analysis completely unmoored from objective standards.

Second, respondent wholly fails to consider the cumulative impact of counsel's many shortcomings. It is plain dereliction for respondent to nowhere address the aggregate impact of the more than 30 separate failures of trial counsel infecting Mr. William's case from start to finish -- from counsel's failure to subpoena or even interview his so-called "absolutely essential material witness" (16 RT 1267) to his failures to interview or subpoena ***any*** eyewitnesses or alibi witnesses, file pretrial motions, take

notes during the trial, prepare a closing guilt phase argument, request investigative funds or experts for the penalty phase, seek a continuance between guilt and penalty phases despite having done nothing to prepare for the penalty trial, investigate or rebut aggravating evidence, or investigate and present mitigating evidence at the penalty trial.

Respondent, in short, refuses to confront the aggregate scope of counsel's ethical and professional violations. In respondent's view, each blunder is a lone tree bearing no relation to any surrounding trees. Even when the many trees have been felled, respondent continues to insist on the existence of a healthy forest.

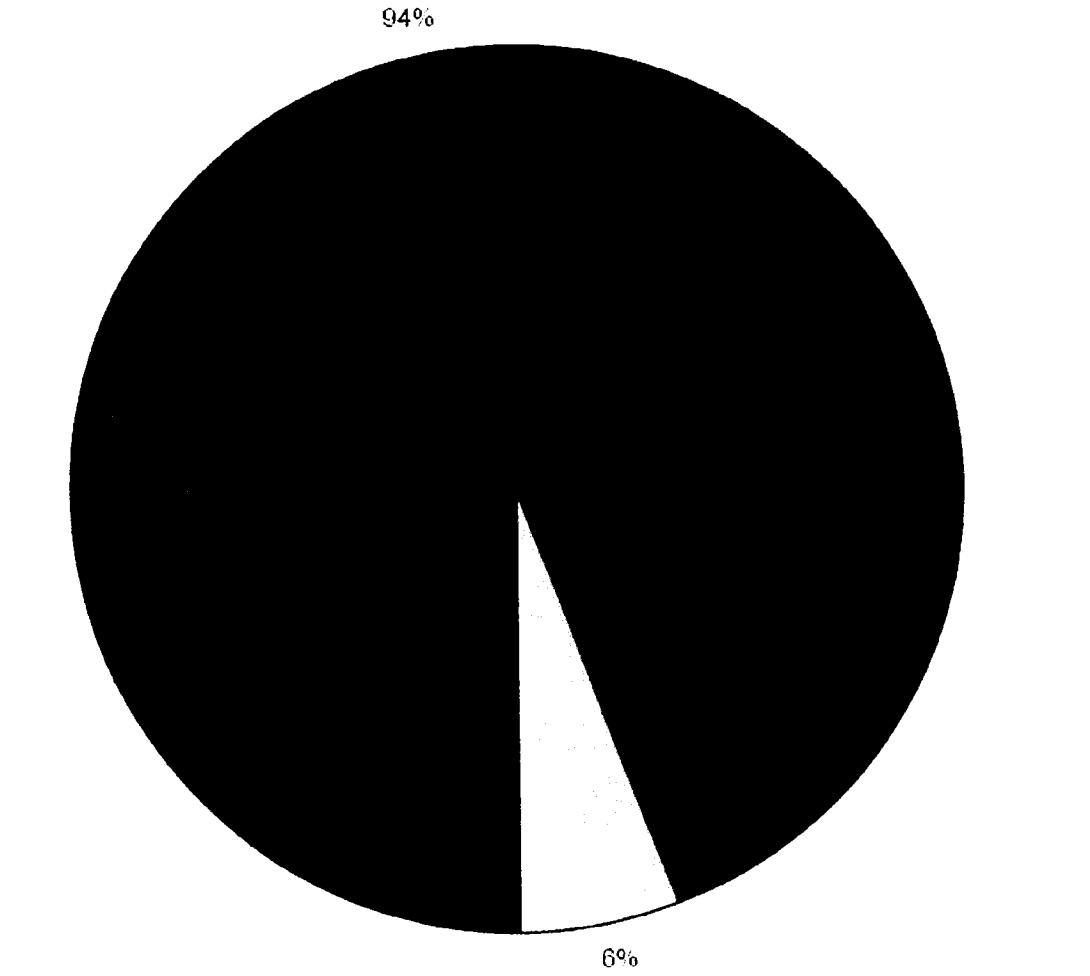
In fact, trial counsel effectively clear-cut his way through the standards for professional performance of capital counsel. The ABA Guidelines set forth 27 performance standards to which capital counsel are expected to adhere. Of those 27 standards, 17 are applicable to the facts and posture of this case. Of the 17 applicable standards, trial counsel violated 16.

Ineffective Assistance of Counsel			
Applicable ABA Guidelines 2003	**Guideline Topic**	**Violated**	**Met**
1.1	Purpose and Scope of Guidelines	X	
4.1	The Defense Team and Supporting Services	X	
5.1	Qualifications of Defense Counsel	X	
6.1	Workload	X	
8.1	Training	X	
9.1	Funding and Compensation	X	
10.2	Applicability of Performance Standards	X	
10.3	Obligations of Counsel Respecting Workload	X	
10.4	The Defense Team	X	
10.5	Relationship with Client	X	
10.7	Investigation	X	
10.8	The Duty to Assert Legal Claims	X	
10.9.1	The Duty to Seek an Agreed-Upon Disposition		✓
10.10.1	Trial Preparation Overall	X	
10.10.2	Voir Dire and Jury Selection	X	
10.11	The Defense Case Concerning Penalty	X	
10.13	The Duty to Facilitate Work of Successor Counsel	X	

	Ineffective Assistance of Counsel (continued)		
TOTAL NUMBER OF APPLICABLE ABA GUIDELINES: **17**		**TOTAL NUMBER OF ABA GUIDELINES *VIOLATED*: 15**	***MET*: 1**

The percentages reflected by these numbers are striking:

Ineffective Assistance of Counsel



To employ a different metaphor, Mr. Williams' trial counsel batted a trifling .058 average when it came to fulfilling professional performance standards. Respondent apparently has no qualms about fielding players of such caliber in capital cases, where lives (not just liberty or lucre) are at stake. But as Appellant's Opening Brief makes clear – and respondent is hard-pressed to refute – Mr. Williams' trial counsel was ill-suited for major league litigation by dint of training or experience.[18]

Respondent would have this Court turn a deaf ear and blind eye to the "extraordinary efforts on behalf of the accused" that capital counsel must undertake (ABA Guidelines, Guideline 1.1, Commentary, Introduction). Specifically, respondent would have the Court disregard counsel's duty, *inter alia*, to:

- "utiliz[e] . . . expert witnesses and evidence,"
- "undertake. . . broad investigation and preparation for both the guilt and penalty phases,"
- "promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist,"
- "independently investigate the circumstances of the crime and

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Setting to one side trial counsel's actual performance, the $15,000 fixed fee salary that trial counsel quoted his client (CT 472) was a paltry, minor league asking price to investigate and try a capital case which even respondent acknowledges contained "a voluminous amount of materials" (RB 124).

all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client,"

- "find[], interview[], and scrutiniz[e] the backgrounds of potential prosecution witnesses, [and] also search[] for any other potential witnesses who might challenge the prosecution's version of events, and subject[] all forensic evidence to rigorous independent scrutiny,"

- "rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death,"

- "comprehensively investigate . . . the defendant's behavior and the circumstances of" prior convictions and uncharged prior misconduct, and

- "raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion."

ABA Guidelines, Guideline 1.1, Commentary, Representation At Trial. See also Hamblin, 354 F.3d at p. 487 n.2 ("The 2003 ABA Guidelines at section 10.7 contain **ten pages of discussion** about counsel's 'obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.'") (emphasis added).

B. Trial Counsel Lacked Training and Qualifications to Try a Capital Case, Failed to Assemble a Qualified Defense Team and Wholly Abdicated Responsibility for Voir Dire. (Violating ABA Standards 4.1, 5.1, 8.1, 10.4, and 10.10.2.)

The ABA Guidelines clearly articulate the need for trained and qualified defense counsel in capital cases. See, e.g., ABA Guidelines 5.1, 8.1. The Guidelines also underscore the importance of assembling a core team to defend a capital case at both the guilt and penalty phases of trial. The core team consists of two lawyers, an investigator, and a mitigation specialist, with one of those team members qualified to screen for mental health issues. The team approach is essential regardless of whether counsel is appointed or privately retained. See, e.g., Guidelines 4.1 and 10.4. By any measure, trial counsel failed to meet these ABA requirements.

Trial counsel's lack of training and qualifications are set forth in Appellant's Opening Brief and will not be repeated here. (See AOB, Arg XV.A.1.) Respondent tries to rebut counsel's lack of professional qualifications by noting that counsel "*may have* prepared for a penalty phase" trial at some earlier point in his career, that notwithstanding counsel's failure to attend any courses or lectures on capital case work, he "had done *some* reading on the subject"; and that with respect to Mr. Williams' penalty phase, counsel had "done *some* reading and inquiry and preparation," though it is unclear what counsel actually read. (RB 121-122, emphases added.)

Respondent, however, entirely ignores the authoritative ABA Guidelines, against which counsel's lack of training and qualifications are conspicuous. In fact, respondent makes no reference to any independent standards by which to assess counsel's qualifications.

Trial counsel might have been able to partially overcome his lack of capital training and capital trial experience had he associated *more experienced* counsel and assembled a seasoned team of experts to assist him with the investigation and presentation of both the guilt and penalty phases. Indeed, the ABA Guidelines envision such a team approach even where lead counsel possesses considerable skill and capital experience. (See ABA Guidelines 4.1 and 10.4.) But instead of creating a defense team, trial counsel pursued an idiosyncratic, largely solitary approach to Mr. Williams' case. As respondent acknowledges, trial counsel lacked so much as "a secretary, a paralegal, or any kind of support staff." (RB 122, 125.)

1. Fear and Trembling.

Respondent wanly tries to recast trial counsel's solo effort as a strength, arguing that by isolating himself counsel was forced to take a "hands-on approach" and "do the work himself," which purportedly gave counsel a "much better feeling for the case." (RB 125, quoting RT 3667-3668, 3810-3812.) See also RB 149 (twice reiterating and emphasizing trial counsel's "hands-on" style.) But this characterization of "hands-on" trial

counsel cannot be squared with the fact that counsel refused to sink his hands into guilt or penalty investigation, motion drafting, witness interviewing, and expert consultation. Respondent lauds trial counsel's desire "to do investigations himself" (RB 149) and his purported philosophy of "interviewing witnesses himself because it gave him a much better feeling for a case." (Ibid.).[19] But respondent nowhere contradicts the record evidence that trial counsel failed to interview any of the State's witnesses, including any of the eyewitnesses or co-defendants prior to trial, or even locate (much less interview or subpoena) the person whom trial counsel told the jury was the lynchpin witness for the defense case. (See AOB Arg. XV.A.3 (e) and (f).)

Nor can respondent's appreciation of trial counsel's "hands-on" approach be squared with:

- trial counsel's belief that "investigation is [not] the best trial tactic in every single case," (52 RT 3777);
- counsel's admission that he "had not filed a discovery motion in 22 years of practice" (52 RT 3695);
- counsel's failure to investigate any of the physical evidence in the case (see AOB Arg XV.A.3(b));

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19 Respondent fails to explain how trial counsel's insistence on interviewing witnesses himself would have enabled him to interview the prosecution's main eyewitness, Irma Sazo, or the prosecution witness Jose Pequeno, neither of whom spoke English and both of whom testified through a court interpreter. (See 21 RT 2141; 22 RT 2230.)

or – in a remarkable "hands-*off*" approach to lawyering – counsel's refusal to even show up for jury selection (see AOB Arg XV.A.1(d), and discussion infra.).

Nor can respondent's re-packaging of trial counsel's performance be made to fit with counsel's acknowledgment that at critical moments of the trial "I was caught with my pants down." (52 RT 3747.) See also 52 RT 3756-57 (counsel noting he was ill-prepared to proceed with guilt phase after failing to subpoena the person he identified as the key defense witness); (52 RT 3776-77) (counsel stating he did no independent investigation of any of the aggravating incidents); 53 RT 4005, 53 RT 4024, 52 RT 3728, CT 478 (counsel failed to interview a critical witness identified by his client); 53 RT 4005; CT 478 (same failure, different witness); 52 RT 3732; CT 580, 583 (same failure, different witness). See Wiggins, 539 U.S. at pp. 537-38 (holding that counsel's decision not to expand investigation beyond a few perfunctory measures was unreasonable.)

Respondent even quantifies the time that trial counsel spent laying hands on Appellant's case, stating "LeMieux eventually spent over 200 hours preparing" for the capital trial. RB 139. But respondent neglects to offer a proper reference point for assessing counsel's time commitment. The ABA Guidelines, once again, provide an objective anchor. As the Guidelines observe, "studies indicate that **several thousand hours** are

typically required to provide appropriate [capital] representation." Guideline 6.1 - Workload, Commentary (emphasis added.) Assuming *arguendo* that Appellant's case did not require "*several* thousand hours" to prepare, but only two thousand hours to prepare, trial counsel gave, at most, a *ten percent* effort.[20]

It is ironic that respondent repeatedly invokes the expressions "hands-on" and "better feel[]" to bolster trial counsel's decision to work alone, while elsewhere respondent acknowledges that trial counsel "**had a tremor in his arms that rendered him unable to write**" during trial. (RB 132 (emphasis added.)) See also RB 135 (noting trial counsel's "inability to take notes during trial"); accord 52 RT 3689, 53 RT 3804.

Apparently, trial counsel's purported "hands-on" preparation style and his "feel" for the case did little to ease his mind when it came to defending his client. In fact, as respondent notes, counsel was gripped by crippling fear, "suffer[ing] . . . 'panic attacks ' . . . during the trial." (RB 133, emphasis added, citations omitted).

Whether trial counsel's debilitating bouts of fear and perpetually

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At guilt phase, trial counsel introduced 14 exhibits and presented the testimony of four witnesses whose cumulative testimony lasted less than five hours - not even one full court proceeding. By contrast, the State introduced over 150 guilt phase exhibits and called 25 witnesses who testified over a period of ten days. See CT 296.

trembling hands were indications of some cognitive disorder is unclear. But such a scenario is entirely plausible, for as *respondent* acknowledges, counsel "had an **inability to concentrate for more than five to seven minutes and would periodically experience a 'muddled feeling' where his mind would go 'blank.'** (RB 133, emphasis added, citations omitted).

In light of this confluence of maladies, it is difficult to excuse trial counsel's determination to fly solo through Mr. Williams' trial. If ever there were a need to associate second counsel in a criminal trial, lead counsel's manifestation of chronic lapses of concentration, periodic memory loss, sudden onset of crippling anxiety attacks, and severely palsied hands should trigger this need.

Respondent downplays the significance of trial counsel's infirmities, arguing, for example, that trial counsel's "[c]ontemporaneous note-taking [during trial] was . . . unnecessary" because counsel "would receive daily transcripts" each evening for review. (RB135.)[21] But respondent overlooks

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As noted in Appellant's Opening Brief, trial counsel requested that the court cancel the first Friday of trial "for medical reasons," 16 RT 1260, and also asked the court generally "that we not be in session on Fridays." Id. The record also includes references to trial counsel's poor health during the trial. See, e.g., 16 RT 1309; 21 RT 2169; and 23 RT 2442. But contrary to Respondent's claim, Appellant nowhere contends that trial counsel, apart from that first Friday, blamed his "health problems" for his inability or unwillingness to represent Appellant in court each and every Friday during the course of the trial. See RB 135. Rather, Appellant

(continued...)

the need for even skilled counsel at the top of their game to have a contemporaneous record of at least some portion of a witness's testimony in order to confidently undertake cross-examination or re-direct (or re-cross) examination of the witness when such questioning occurs on the same day as the direct examination. This need is even greater for counsel who is unable to concentrate for more than "five to seven minutes," who suffers "panic attacks," and whose mind periodically gets "muddled" or goes "blank." In such a circumstance, a reporter's transcript delivered at the end of the day comes too late to be of help.

In Mr. Williams' case, no fewer than 31 of the 37 witnesses (84%) who testified at trial completed their testimony – direct examination, cross examination and any re-direct and re-cross – on the same day they began it. Of the six remaining witnesses whose testimony spanned more than one day, at least four, all called by the State, underwent cross-examination by defense counsel on the same day they completed their direct testimony. In other words, defense counsel lacked the benefit of "dailies" and an evening to review them for 35 (94%) of the trial witnesses.

Nor does respondent's argument account for the fact that it is not

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[21](...continued)
observes that the record contains multiple possible explanations for trial counsel's abbreviated work-week, including acute familial strife and ongoing State Bar disciplinary proceedings. See generally AOB Arg XV.A.2.

uncommon for the "dailies" to contain material inaccuracies – inaccuracies that contemporaneous note-taking can often uncover and correct. As the Order Re: Parties' Stipulated Corrections of the Transcripts attests, the original Reporter's Transcript provided appellate counsel contained numerous material errors and omissions requiring correction. (Supp. 1 CT Vol. 1 at p.16.) As a result, Mr. Williams' trial counsel, with his inability to take notes and his serious concentration and memory problems, was at a distinct disadvantage when it came to knowing and evaluating what was actually said in open court.

2. Voir Dire.

To the limited extent trial counsel relied on anyone else, he substituted even *less* experienced and *less* qualified counsel, Douglas E. McCann, to conduct voir dire. Trial counsel then removed himself from the voir dire process, leaving McCann to select Mr. Williams's jury on his own. In other words, trial counsel did not "team up" with McCann in any conventional sense – there was no symbiosis, no back-and-forth, no ostensible creation of information and ideas by two partners. Instead, trial counsel replaced himself with a neophyte, absented himself from the courtroom during the 14 days of jury selection, and had only minimal contact with that surrogate attorney during this period. When jury selection ended and Mr. Williams' trial began, McCann vanished and defense counsel

LeMieux re-appeared to conduct the entirety of Mr. Williams' trial on his own. These abrupt discontinuities in representation during this critical part of the proceedings must surely have confused the jurors and had a negative impact on them.

In his Opening Brief, Appellant details McCann's lack of felony and capital experience that rendered him even less qualified than trial counsel to conduct a capital voir dire. (See AOB Arg. XV, A.1.(d) and A.4.) The fact that McCann agreed to undertake by himself a capital voir dire having never before conducted one, and without the benefit of trial counsel's theory of the case, knowledge of trial counsel's evidentiary plans for the guilt phase, the state's evidence in aggravation, or the defense evidence in mitigation -- indeed, *without trial counsel even in the courtroom* -- attests to McCann's inexperience, lack of foresight, and poor judgment, not to mention his separate failure to adhere to the ABA Guidelines.

Nonetheless, respondent seems untroubled by McCann's inexperience and blunders. Respondent places particular stock in the fact that "[a]lthough McCann had never handled a death penalty case before, he had previously worked for the Los Angeles County Public Defender's Office . . . ." (RB 128.) In addition, respondent credits trial counsel's reasons for retaining McCann to conduct voir dire as honorable and thus legally sufficient. In respondent's words, "LeMieux hired McCann because he had previously

worked with McCann, regarded him 'highly,' and thought that McCann would do a 'very good job' during jury selection because McCann had a '*brilliant young mind*,' was a '*fast thinker*,' and had an *'agreeable personality.*'" (RB 128, emphases added).

McCann's published career as a Los Angeles County Deputy Public Defender, however, casts doubt on respondent's endorsement of McCann's professional experience, or, for that matter, why trial counsel so "highly" regarded McCann, what relevant skills and experience McCann possessed that rendered him fit to serve as substitute counsel for purposes of a capital voir dire, or any hint of McCann's "brillian[ce]"or "agreeable personality."

Neither trial counsel's or respondent's endorsements of McCann account for McCann's 1988 conviction for "multiple acts of contempt" of court. In June of 1990, only a few weeks before voir dire began in this case, the Second Appellate District, in a published decision, upheld McCann's contempt conviction and fine that McCann incurred as a Los Angeles County Deputy Public Defender handling a low-level DUI case. See McCann v. Municipal Court (1990) 221 Cal.App.3d 527, 532.

As the Second Appellate District concluded, McCann's "conduct was **indefensible**" and his behavior "**beyond control**," id. at p. 541, indeed "**extreme**." Id. at p. 545. The appellate court did not reach this conclusion lightly. It first observed that the contempt power is a court's "ultimate

weapon," and is to be exercised with "great prudence" to promote the respect due the administration of the laws. Id. at pp. 536-37 (citations omitted). The court continued:

> As any judge with trial court experience realizes, there inevitably arises that one case in a thousand when the tensions of the argument and the over-zealousness of counsel cause righteous anger to overcome normal tolerance and serenity. If at that moment of humanly understandable rage the judge lashes out in response, the resultant contempt citation not infrequently fails to survive appellate review. . . .

Id. at p. 537 (quoting In re Buckley (1973) 10 Cal.3d 237, 259 (Mosk, J., dis.). The court recognized the wide latitude to be afforded defense counsel before a contempt citation should attach or be upheld, acknowledging that "attorneys must be given substantial freedom of expression in representing their clients."

Even with these caveats, the appellate court found McCann's conduct to be "indefensible" and "extreme," and was incredulous that McCann "claimed ignorance of [the trial court's sidebar] procedure. . ." and "offer[ed]s no explanation for refusing to use this procedure [to] make his objection known and simultaneously avoid a contempt citation. Id. at pp. 540-541, 545.

The Second District affirmed the trial court's findings that McCann was "loud, insolent, and disrespectful" "in the immediate view and presence of the jury and an audience seated in the courtroom." Id. at p. 535. Both the

trial and appellate courts described McCann as "**rude, disrespectful, insulting, offensive, and demeaning**." Id. (emphasis added.) See also id. at p. 540 ("The . . . comments of contemnor were rude, obnoxious, offensive, and insulting"), and id. at p. 541 ("There can be no defense for" certain comments by McCann in open court.)

Nor was McCann's misconduct limited to speech. **"Contemnor's threatening approach to the judge sitting at her desk . . . resulted in a protective reaction by the Marshal."** Id. at p.542 (emphasis added). Apparently, to trial counsel and respondent, such actions were indicative of McCann's "agreeable" character.

Not only was McCann's charm lost on the Second Appellate District, but so were his "brilliant young mind" and "fast think[ing]." The court characterized as "meritless" and "disingenuous[]" the substance of McCann's legal arguments on behalf of his client and in support of his own appeal of his contempt citation, see id. at p. 544 ("meritless"), and at p. 541 ("disingenuous[]"); see also id. at p. 538 ("[McCann] is wrong on both [factual] points.); id. at p. 539 ("Contemnor was wrong on the evidence."); id. ("contemnor incorrectly asserts that the trial judge eventually ruled in favor of the argument"); id. ("Again [McCann] is incorrect" (that the prosecutor was wrong to claim that McCann misstated the evidence during his final argument)); id. at p. 541 (McCann "[m]isconstrued two cases and

ignor[ed] the applicable statute"). Moreover, the court of appeal called into question McCann's professional judgment when it came to protecting his self-interest, noting McCann "apparently took no action to obtain representation for over three days" to help him defend against his multiple contempt citations. Id. at p. 544.

The published appellate decision in McCann v. Municipal Court leaves the reader incredulous that McCann possessed the character and skill to carry out the diverse responsibilities inherent in capital jury selection, including (but not limited to) establishing a strong rapport with the judge and potential jurors. And, when it came to actual capital voir dire experience, the record is clear that McCann had none.

Of course, trial counsel may have been unaware of McCann's published contempt conviction. After all, the record is replete with evidence that trial counsel did not place much stock in investigation, legal research, and due diligence when it came to representing his capitally-charged client. (See AOB Arg XV, A.3.) It stands to reason that counsel might not have adequately vetted a colleague on whom he sought to delegate a critical stage of capital litigation.

Alternatively, trial counsel may have felt that McCann's acts of contempt were a product of youthful indiscretion (albeit by a 30 year-old attorney), and that McCann had reformed and matured in the months

following his contempt conviction. Trial counsel might have surmised that McCann's personal run-in with the justice system might have had a rehabilitative effect. But such explanation is belied by the fact that **in the weeks preceding voir dire in Mr. Williams's case Mr. McCann committed, was arrested for, and pled guilty to a criminal felony** involving violence. (See In re Douglas McCann, Stipulation as to Facts and Discipline Pursuant to Rules 405-407 of the Transitional Rules of Procedure of the State Bar of California (5/06/92), State Bar Case No. 91-C-5739.)

Trial counsel and McCann appear to be birds of a feather. After all, trial counsel was himself under State Bar investigation during the entire time of Mr. Williams' trial. (52 RT 3680; RB 131). These attorneys might not have been "fast thinkers," but they left in their wakes a bevy of disgruntled clients who filed official complaints with the State Bar accusing them of being too fast – and too loose – with their legal research, their professional legal obligations, and their clients' money. The sordid details of the numerous allegations, subsequently **proven true** by multiple State Bar Court investigations, are not within the appellate record and so will be set forth in Mr. Williams's petition for habeas corpus. Mr. McCann's conviction for contempt of court, the State Bar and California Supreme Court orders privately and publicly reproving him, ordering him inactive, suspending him from the practice of law and ultimately disbarring him, and Mr. LeMieux's

lengthy disciplinary record, including two separate suspensions from the practice of law by the California Supreme Court – both suspensions occurring within three years of Mr. Williams' trial – are matters of public record and resulted in published decisions by this Court, and so are judicially noticeable for purposes of this appeal.

The State Bar was unable to complete its investigations of McCann and Lemieux in time to spare Mr. Williams from either lawyer. McCann was first disciplined by the State Bar in July 1992, less than a year after Mr. Williams' jury selection and five months before Mr. Williams' sentencing. McCann was later suspended and disbarred. For his part, LeMieux entered into a stipulation with the State Bar Court concerning his first suspension from the practice of law less than six weeks after the conclusion of Mr. Williams' trial. This first suspension became official by order of the California Supreme Court a few months later. (See In re Ronald Jerome Lemieux on Discipline (July 1, 1993) Case No. S032467.)[22]

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Respondent notes that "disciplinary action against an attorney, standing alone, does not establish that an attorney was ineffective." (RB at n.29). Respondent, however, ignores the fact that formal state bar disciplinary actions are of central relevance to assessing whether counsel was qualified to accept and to handle a capital case consistent with the performance standards established by the ABA Guidelines. (See generally, ABA Guideline 5.1, "Qualifications of Defense Counsel.")

C. Respondent's Excuses for Trial Counsel's Blunders are Contradictory, Baseless, and Flout Controlling Standards of Capital Defense Lawyering.

1. Introduction .

Prosecutor: *I'm shocked at what [trial counsel] has done.*

Trial Court: *I know.*

(26 RT 2875.)

The above side-bar colloquy between prosecutor and judge encapsulates the exasperation that trial counsel's myriad blunders and prevarications caused at Appellant's trial. Appellant's Opening Brief catalogues and discusses trial counsel's multiple and egregious blunders dating from the time he accepted the case through both phases of trial and the Motion for New Trial proceedings. (See AOB Argument XV.)

Respondent, in turn, offers a series of responses to counsel's shortcomings and misdeeds which are unconvincing when considered singly – and preposterous when viewed in the aggregate. For example, and as discussed in more detail below, respondent claims that trial counsel did not need an investigator (invoking counsel's "hands-on" style), but then emphasizes the weakness of the defense case resulting from trial counsel's failure to investigate or present key witnesses or evidence that counsel put at issue in his opening statements to Mr. Williams' jurors. Respondent also insists that trial counsel was justified in failing to investigate avenues urged

by his client because his client purportedly gave *varying* accounts regarding those matters. But then respondent insists that trial counsel was justified in not investigating avenues urged by his client even though his client gave *consistent* accounts of those matters. And, to cover all bases, respondent argues that trial counsel was justified in not investigating certain avenues about which his client was *silent*, or, if expressive, not immediately forthcoming.

In this same vein, respondent, on the one hand, absolves trial counsel of any responsibility to investigate mitigating evidence because his client briefly opposed presentation of mitigation, but see Hamblin, 354 F.3d at p. 492 ("ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested"), while on the other hand crediting counsel for ignoring his client's directives to pursue other investigatory paths. Moreover, despite respondent's apparent recognition of Appellant's inconsistent ability to assist counsel, intermittent obstinance and sporadic recall, respondent wholly accedes to trial counsel's lay opinion that Appellant did not exhibit "any type of mental disorder . . . at all" and so endorses counsel's refusal to retain a mental health expert. (RB 188.) Finally, respondent advances a series of bizarre justifications for counsel's failure to interview key prosecution witnesses that, when viewed collectively, reduce to an endorsement of the

"ignorance is bliss" school of capital defense lawyering – an approach flatly repudiated by the accepted and controlling standards of professional practice.

In other words, in excusing everything, respondent justifies nothing. By condoning each and every decision by trial counsel not to pursue fundamental, material leads in the preparation and presentation of the defense case, respondent weaves a web of logical inconsistencies and legal contradictions. As a result, singly and in the aggregate, respondent's arguments in support of trial counsel's performance ring entirely hollow.

Appellant stands by the arguments set forth in his Opening Brief and so will not address, *seriatim*, each rebuttal levied or each fact marshaled by respondent on behalf of trial counsel. Instead, Appellant will contrast respondent's assessment of counsel's duties with the law's core commitment to providing qualified and capable counsel to capital defendants.

2. Respondent Claims that No Defense Investigator Was Needed While Acknowledging that the Defense Case Was Crippled By the Failure to Properly Investigate.

Respondent argues that trial counsel did not need to seek or obtain investigative funds or retain professional investigative assistance to develop the defense case because it was entirely appropriate for counsel to pursue a solitary, "hands-on" approach to representing Appellant. (RB 148-149.) Respondent holds fast to this claim notwithstanding the ABA Guidelines to

the contrary. See, e.g., ABA Guideline 1.1, History ("it is imperative that counsel begin . . . assembling the defense team as early as possible"); Guideline 4.1, "The Defense Team and Supporting Services" ("the defense team should consist of no fewer than two [qualified] attorneys . . . an investigator and a mitigation specialist."); Guideline 10.4, "The Defense Team." See also ABA Guideline 4.1, Commentary, "The Team Approach to Capital Defense" (observing that "national standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate 'supporting services . . . .' This need is particularly acute in death penalty cases.")[23] At the same time,

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As Appellant observed in his Opening Brief, trial counsel, using private client funds, briefly retained an investigator to conduct a very limited investigation (costing between $500 and $1000) but even then failed to follow up the few resulting leads. Additionally, defense counsel was unaware the same investigator had been appointed by the court at the request of Appellant's previous counsel. Moreover, trial counsel did not consult with the investigator about the investigator's prior work on the case until *after* Appellant's trial commenced. When the trial court offered to "re-appoint the investigator at public expense, trial counsel initially stated he would prepare a court order for that purpose but neglected to do so. AOB Arg XV A.3.d. Nowhere does respondent attempt to square these blunders with the obligation of counsel to "*promptly* obtain the investigative resources necessary to prepare for both phases, including, at minimum, the assistance of a professional investigator . . . ." ABA Guideline 1.1, Commentary (emphases added).

Respondent excuses not only trial counsel's scant use of an investigator and counsel's failure to accept a court-appointed investigator, but also trial counsel's failure to employ basic day-to-day administrative

(continued...)

respondent skewers the strength of the defense case and praises the relative strength of the prosecution's evidence. (See, e.g., RB 72, commenting on "the weakness of the defense evidence.")

But respondent cannot have it both ways. Respondent cannot simultaneously approve of counsel's determination to fly solo while chastising counsel for not hitting the mark or being outmaneuvered by the State. Indeed, respondent's argument for the adequacy of trial counsel's unaided advocacy is undone by respondent's long string of tacit admissions that trial counsel's "hands-on" strategy stalled at virtually every juncture.

As respondent notes, trial counsel "did not make any effort to subpoena or interview" Detective Tony Moreno, the witness whom trial counsel considered the cornerstone of the defense case "until September 16" – the first day of trial – and then "made no additional efforts to locate" this law enforcement officer after an initial, half-hearted attempt did not yield immediate results. (RB 158.) Respondent then quotes from the record, observing that counsel was rendered "helpless" by his inability to locate Moreno. (RB 155.) (See also RB 159) (respondent noting that trial counsel "decided to include [Moreno] in his opening statement even though he had

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[23](...continued)
assistance. (RB 125.) ("Although LeMieux did not have a secretary, a paralegal, or any kind of support staff, there is nothing to indicate that these are prerequisites to effective representation . . . . . LeMieux had a "hands-on approach" and preferred to do the work himself . . . .")

not interviewed Moreno, served him with a subpoena, or investigated the underlying facts of the case." (Citations omitted.) Respondent further acknowledges that trial counsel then simply "dropped the subject" of trying to locate, interview, or subpoena Moreno. (RB 158.) See also RB 159-160 (trial counsel failed to interview certain potential alibi witnesses because "appellant could not provide [counsel] with their whereabouts.") .

Respondent nowhere tries to reconcile counsel's refusal to timely and consistently retain and use a defense investigator with counsel's inability to develop and pursue fundamental investigatory leads that counsel considered central to the defense case. Nor does respondent even suggest that counsel was ethically obligated to do more than "drop[]" investigative leads (RB 158), abandon "effort[s] to subpoena or interview" key witnesses (id.), declare "helpless[ness]" in the face of bureaucratic obstacles (RB 155), or throw up one's hands because the client is able to provide only limited information (RB 158). See, e.g., ABA Guideline 1.1., Commentary (describing counsel's duty to "fully investigate . . . relevant facts," "undertake . . . broad investigation and preparation," See also Williams v. Taylor (2000) 529 U.S. 362 (O'Connor, J., concurring) (effective assistance of counsel includes "diligent investigation"); People v. Shaw (1984) 35 Cal.3d 535 (finding ineffective assistance of counsel where counsel failed to investigate and subpoena potential witnesses for an alibi defense); People v.

Rodriguez (1977) 73 Cal.App.3d 1023 (same).

3. Respondent Claims that Trial Counsel Was Justified in Not Investigating Avenues Urged by Appellant When Appellant Purportedly Offered Varying Accounts of Those Matters.

Respondent argues that trial counsel was justified in not investigating certain matters and in discounting entirely Appellant's statements to counsel when Appellant provided varying accounts of those matters. For example, "Appellant . . . told [trial counsel] to interview Carlos or Collis Brazil. However, [trial counsel] did not locate Brazil because appellant's statements regarding where he had been and who he had been with on the night of the murders "varied from time to time." (RB 160.) See also RB 167 (Trial counsel "doubted that these witnesses could credibly provide an alibi for appellant because his statements to [counsel] regarding the identities of his companions varied from time to time."). Respondent appears to suggest that because Appellant might have provided counsel with varying or inconsistent statements about critical issues, including potential alibi witnesses, it was appropriate for counsel to simply "discount[] them" as not "credible." (RB 160.) Accord RB 167 ("Because [trial counsel] logically believed that questionable alibi evidence would only assist the prosecution he reasonably decided not to waste additional time investigating these witnesses.")

Rather than ignoring Appellant's various statements, diligent defense

counsel, committed to a "broad investigation and preparation" of the defense case, ABA Guideline 1.1, would investigate the multiple, even contradictory leads gleaned from methodical client interviews in order to definitively rule out leads which are fruitless, develop those which have merit, and gain a fuller understanding of the client's ability and willingness to accurately recognize, recall, and relate material events. Only *after* conducting a thorough and diligent investigation would counsel be able to determine what additional evidence gathering and development is warranted, and what would "waste additional time." Respondent nowhere admits that thorough investigation, rather than no investigation, is the legally appropriate response when capital counsel is confronted with seemingly conflicting scenarios. Respondent's ratification of trial counsel's decision not to pursue matters about which Appellant provided varying accounts must be assessed against the backdrop of respondent's championing of trial counsel's failures to adequately pursue *all other* matters brought to trial counsel's attention.

4. Respondent Claims that Trial Counsel Was Justified in Not Investigating Avenues Urged by Appellant Even When Appellant Did Offer Consistent Accounts.

As noted above, respondent absolves counsel of the duty to investigate matters about which Appellant's statements "varied from time to time." (RB 167.) On the other hand, respondent also countenances trial

counsel failure to investigate (or even question) material issues when Appellant's accounts of those matters did *not* vary from time to time. According to respondent counsel was justified in accepting, at face value, those facts about which Appellant appeared to be clear. Thus, for example, trial counsel "reasonably based his [opening] statements regarding [the potential alibi witness LAPD Detective] Moreno on the conversations [counsel] had with appellant" (RB 180.) And, trial counsel reasonably "opted to forego an investigation on [one of the aggravating incidents argued by the prosecution at the penalty trial] because appellant had admitted that the underlying facts were true." (RB 190.)[24] But see Rompilla v. Beard (2005) 545 U.S. 374, 385-386 ("Counsel had a duty to make all reasonable efforts to learn . . . about [prior] offense"); Summerlin v. Schriro (9th Cir. 2005) 427 F.3d 623, 630 (en banc) ("Defense counsel should . . . personally review all evidence that the prosecution plans to introduce in the penalty phase proceedings, including the records pertaining to criminal history and prior convictions"); Frierson v. Woodford (9th Cir. 2006) 463 F.3d 982, 992 (characterizing as "post-hoc rationalizations" counsel's reasons for failing

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[24] In addition, respondent further countenances trial counsel's failure to adequately or independently investigate various other matters about which Appellant informed counsel, including, *inter alia*, the ownership of the pager found at the crime scene, the make of automobile owned by Appellant at the time of the crime, and the transfer of possession of the guns found at the crime scene. See AOB XVA.5.a. and RB 176-178.

"to adequately investigate and prepare" the case.)

As discussed in detail in Appellant's Opening Brief, even though Appellant informed trial counsel of Detective Moreno, and counsel made Moreno the centerpiece of the defense case during his opening statement to the jury, counsel failed to investigate, interview or even subpoena Moreno. See AOB XVA.5.a.

Incomprehensibly, respondent finds no fault in, and claims no prejudice resulted from counsel's omission. Specifically, respondent argues that when Moreno finally was subpoenaed by new defense counsel as part of the Motion for New Trial hearing, "Moreno's testimony . . . clearly established that he would *not* have been a helpful witness for appellant." (RB 168.) Respondent is wrong. As detailed in Appellant's Opening Brief, see Arg XV.C.1.(b), had Moreno's testimony come in at trial, competent counsel could have woven it into compelling arguments for use at both the guilt and penalty phases.

If we assume, *arguendo*, that respondent is correct and that Moreno's testimony was useless to the defense, respondent would then be hard-pressed to deny the serious damage done to Mr. Williams' case when trial counsel, in his opening statement to the jury, held Detective Moreno out to be the centerpiece of the defense case, cast Detective Moreno as the star witness for the defense, and suggested that this law enforcement official would deliver

Mr. Williams' alibi and ultimate exoneration – notwithstanding the fact that defense counsel had never spoken to Moreno, investigated Moreno, or even subpoenaed Moreno.

Respondent cannot have it both ways. If Moreno was unhelpful as a defense witness, then trial counsel did irreversible damage to his client's case on day one of his trial when counsel focused the jury's attention on Moreno and promised the jurors that Moreno held the key to his client's freedom. If, however, Moreno was an important witness for the defense, then trial counsel prejudicially and inexcusably neglected to take the steps necessary to procure his testimony.

5. Respondent Claims that Trial Counsel Was Justified in Not Investigating Avenues About Which Appellant was Silent.

As noted above, respondent excuses counsel's failure to investigate matters about which Appellant gave varying accounts, as well as matters about which he gave consistent accounts. As it so happens, respondent also excuses counsel for failing to investigate matters about which Appellant gave *no* account, but about which counsel learned from sources other than Appellant.

With respect to counsel's failure to investigate Moreno, discussed above, respondent observes that before Appellant told counsel about Moreno, the prosecutor provided counsel with a fax from the FBI describing

Appellant's role as a police informant for Detective Moreno. Counsel responded to this dramatic news by doing nothing.[25] He did not investigate, interview, or subpoena Moreno.

Respondent again finds no fault in counsel's inaction, explaining: "Because appellant had not previously informed [counsel] about his informant activities or Moreno, [counsel] was not ineffective for previously failing to investigate or locate Moreno." (RB 166.) Respondent adds that counsel "could have reasonably concluded that Moreno did not need to be investigated at that point because appellant had not mentioned his relationship with Moreno or in any way indicated that Moreno should be investigated." (RB 166.) Accord RB 157 ("Appellant 'never said one breath' about his informant status"); RB 159-160 (counsel justified in not interviewing potential alibi witnesses where Appellant "could not provide . .

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The prosecutor divulged the FBI fax mentioning Appellant's connection to Detective Moreno during voir dire. But diligent trial preparation would have alerted trial counsel to Moreno's existence and his connection to the case much earlier. As the record further reveals, **Moreno's name appears in the murder books** (26 RT 2873; 28 RT 3041) and other documents which trial counsel chose not to access pretrial, even though they were offered up to counsel by the prosecution. See 14 RT 1096 (prosecutor noting that as of the eve of trial, trial counsel had "never taken that opportunity to look at the[] [murder] books." See also 53 RT 3857. The duty of trial counsel to make some effort to learn the information possessed by the prosecutor and police is incontrovertible. See ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) ("investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.")

. . their whereabouts.")[26] Thus, for respondent, Appellant's silence negates the need for investigation occasioned by the extraordinary facts literally handed to trial counsel by the State.

6. Respondent Claims that Trial Counsel Was Justified in Acquiescing to Appellant's Fleeting Desire Not to Investigate Mitigating Evidence.

Having declared it acceptable not to investigate matters about which Appellant seemed unsure, about which Appellant seemed certain, and about which Appellant was purportedly silent, respondent next condones trial counsel's failure to investigate critical matters about which Appellant – temporarily – remained veiled. Specifically, respondent absolves trial counsel from any duty "to ask for any funds or request an investigator, mitigation specialist, law enforcement expert, or a mental health expert because appellant initially said he did not want [counsel] to present any

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Respondent elsewhere contends that trial counsel's failure to investigate and elicit Appellant's police informant activities was inconsequential with respect to the penalty trial because such activities "were [not] necessarily mitigating." (RB 191.) It is remarkable that the State's chief law enforcement agency argues that cooperating with law enforcement might not be viewed as mitigating. See U.S. Sentencing Guidelines Manual (2005) § 5K1.1 (providing that a defendant may receive a downward departure for providing "substantial assistance" to the government.) See also Alexandra Natapoff, "Snitching: The Institutional and Communal Consequences," (2004) 73 U. Cin. L. Rev. 645, 645-646, 649 (observing that "law enforcement . . . recruits and relies on ever greater numbers," of "predominantly young African American men" to serve as informants, particularly in "drug enforcement.")

mitigating evidence and did not want him to oppose any aggravating evidence." (RB 188). Cf. RB 195 ("Although [counsel] may not have conducted detailed interviews with appellant's mother or sisters, this was caused by appellant's initial directive that [counsel] not present any mitigating evidence or call relatives to the witness stand."); RB 186 (counsel "may have reasonably believed that a continuance [of the start of the penalty trial] was not necessary because appellant had initially instructed him not to present any mitigating evidence.")

On the one hand, respondent argues that trial counsel is justified in ignoring his client's firm wishes for investigation,[27] while simultaneously contending that trial counsel is fully justified in slavishly adhering to his client's subsequently retracted wish to do nothing. Although the contradictory nature of respondent's positions should be sufficient to undermine their persuasiveness, it must be observed that respondent's argument is without merit on other, more basic grounds.

First, respondent's argument is belied by the record. Whatever opposition Appellant initially voiced about pursuing mitigation, Appellant

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27 As discussed above and in Appellant's Opening Brief, Appellant urged trial counsel, *inter alia*, to locate and interview certain alibi witnesses, and investigate the ownership of the pager found at the crime scene, the transfer of guns prior to the crime, and Appellant's car at the time of the crime. See AOB XVA.5.a.

subsequently dropped that opposition, at the "strong urg[ing]" of the prosecutor. See 31 RT 3154-55. Contrary to respondent's assertion, trial counsel had *every* reason "to ask for any funds or request an investigator, mitigation specialist, law enforcement expert, or a mental health expert." (RB 188.)

Second, respondent's claim is refuted by law. The argument that counsel had no obligation to pursue mitigation over the objection of his client is gainsaid by the standards of practice for capital counsel. As the ABA Guidelines make clear, capital defense counsel "is obligated to conduct a thorough investigation of the defendant's life history and background." ABA Guidelines for the Appointment of Performance of Counsel in Death Penalty Cases (1989), Guideline 8.1 (Commentary). Accord, Hamblin, 354 F.3d at p. 492 ("ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested.") Such an investigation is necessary to enable a defendant to make informed choices as to how the trial should be conducted, even if he ultimately elects not to present the evidence turned up by the investigation. See Williams v. Taylor, 529 U.S. at p. 363 (rejecting the argument that counsel's failure to conduct an adequate investigation had been a strategic decision); Outten v. Kearney (3rd Cir. 2006) 464 F.3d 401, 416-417, 419 (finding unreasonable trial counsel's "limited investigation" that provided

only "rudimentary knowledge" of client's background from a "narrow set of sources.")

Third, respondent appears oblivious to the fact that the purported dispute about mitigation took place long *after* trial counsel was obligated to investigate and prepare his client's case in mitigation. See, e.g., ABA Guideline 1.1, History ("it is *imperative* that counsel begin investigating mitigating evidence . . . *well before* the prosecution has actually determined that the death penalty will be sought") (Emphases added); id., Representation at Trial ("Investigation and planning for *both phases* must begin immediately upon counsel's entry into the case") (Emphasis added); ABA Guideline 10.2, Commentary ("early investigation to determine weaknesses in the State's case and uncover mitigating evidence is a necessity, and should not be put off . . ."); ABA Guideline 4.1, Commentary ("the presentation to be made at the penalty phase [should be] integrated into the overall preparation of the case rather than being hurriedly thrown together.")

The apparent disagreements between Appellant and his trial counsel to which respondent points occurred after the guilt verdict was rendered. But by this time it was already too late. Trial counsel should have completed the mitigation investigation well before the eve of the penalty trial, aided by a mitigation specialist, an "indispensable member" of the

defense team. ABA Guideline 4.1, Commentary. Accord, Hamblin, 354 F.3d at p. 487 (stating that mitigation investigation "should be conducted before the guilt phase of the case"); Blanco v. Singletary (11th Cir. 1991) 943 F.2d 1477, 1501-02 (noting that the "time consuming task of assembling mitigating witnesses [should not wait] until after the jury's verdict in the guilt phase . . . .")

7. Respondent Claims that Despite Appellant's Purported Equivocation, Silence, and Obstinacy, Trial Counsel was Justified in Not Retaining a Mental Health Expert.

As discussed at some length in Appellant's Opening Brief, there is weighty record evidence that trial counsel suffered his own serious mental and physical health problems before and during trial which substantially impaired his ability to carry out the manifold responsibilities of capital counsel for which he was already ill-prepared by dint of training or experience. (See AOB XV.A.2.(a)-(b).) It strains credulity that trial counsel, unlettered in medicine or psychology, was in a position to reliably ascertain whether his client was emotionally or cognitively impaired.[28] Nevertheless, respondent uncritically accepts trial counsel's specious explanation that he did not need to retain a mental health or mitigation

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[28] As respondent freely admits, trial counsel's scrutiny of Appellant's background was "not intensive" and counsel collected only "a little bit of information here and there," about his client. (RB185, 193.)

expert because (to quote respondent quoting counsel) "there was no indication that 'that there was any type of mental disorder involved in this case at all.'" (RB 188.)

For the reasons just stated, trial counsel's conclusion that his client was of sound cognitive and mental health amounted to unsupported conjecture. That conclusion is indefensible. To conclude as he did, counsel would have had to disregard precisely those behaviors that counsel argued (and respondent agreed) relieved counsel of his duty to investigate. Specifically, counsel would have to ignore Appellant's purported tendency to: (1) tell conflicting or inconsistent stories, (2) withhold or forget material information,[29] and (3) stridently protest the unearthing of his personal and family history. Counsel would also have to overlook Appellant's habitual and prolific drug and alcohol use, see 17 RT 1557-59, 1566-1567, 21 RT 2142-47, 2163; 22 RT 2200; 24 RT 2448, a classic sign of potential mental health problems. Neither trial counsel nor respondent, however, entertains --

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[29] Respondent notes that Appellant "had not mentioned Moreno or his informant status" to counsel until the eve of trial "because [Appellant] was protecting Moreno 'out of a sense of loyalty' and because he hoped Moreno would help him avoid prosecution in this case." (RB 157.) Respondent, however, never analyzes Appellant's purported position – that an LAPD detective would orchestrate a sudden halt to capital trial proceedings that were part-and-parcel of a quadruple prosecution for a double murder if only Appellant kept silent about the officer's role in the crime. Arguably, such reasoning calls into question Appellant's cognitive abilities.

even briefly -- the probability that these bizarre behaviors might be symptomatic of some peculiarity in Appellant's brain.

The ABA Guidelines state in no uncertain terms that "the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." ABA Guideline 4.1.A.(2). See also Summerlin, 427 F.3d at p. 630 (Penalty phase investigations in capital cases should include inquiries, *inter alia*, into potential mental impairment, physical health history, and history of drug and alcohol abuse); Frierson, 463 F.3d at p. 991 ("The most evident lapse in professional competence was counsel's failure to prepare and present evidence of [his client's] chronic substance abuse for purposes of mitigation"); Poindexter v. Mitchell (6th Cir. 2006) 454 F.3d 564 (finding ineffective assistance of trial counsel where counsel failed to request funds to enlist a psychological or psychiatric expert, consult with an investigator or mitigation specialist, request medical, educational, or governmental records that would have given insight into client's background and cognitive abilities); Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223, 1226 ("Counsel . . . [has] an obligation to conduct an investigation which will allow a determination of what sort of experts to consult"); id. at p. 1254 (""[w]e have repeatedly held that counsel may render ineffective assistance if he is on notice that his client may be mentally impaired, yet fails to

investigate his client's mental condition . . ."); id. at p. 1226 (finding defense counsel ineffective for failing to consult an appropriate expert even though counsel retained three other types of medical experts.)

Trial counsel did not have to hazard guesses about Appellant's mental well-being: he need only have adhered to the standards of practice and allowed a trained professional to properly assess his client. There is no justification for counsel's failure to do so, or for respondent's ready excusal of this failure.

Dr. Michael Coburn, a psychiatrist who testified in 1992 at Mr. Williams' Motion for New Trial proceedings, echos the Guidelines requirements and underscores the relevance of a mental health work-up in this case. As Dr. Coburn noted, "basically any death penalty case . . . must be investigated," and that to not investigate "the psychology, the sociology, the background of the defendant" is "crazy." 53 RT 3992. When asked to assist the defense in a capital case, Dr. Coburn requests that the trial attorney "obtain the services of a clinical psychologist" to administer a battery of psychological tests, and he also "require[s] . . . the attorney [to] obtain evaluative interviews" by "psychological interviewers," namely, "individuals capable of interviewing family members" and others who are trained in "special techniques" to elicit "information . . . this is withheld, avoided, forgotten or otherwise difficult to obtain because of its reasonably

painful [or obscure] nature to the people . . . involved . . . ." 53 RT 3791-93. Dr. Coburn further noted if the initial life history background warranted, that he would then recommend neurological testing and psychiatric examination of the defendant. 53 RT 3873. No life history was ever obtained in Mr. Williams' case.

Dr. Coburn was retained by Douglas Otto, the attorney appointed Mr. Williams for the Motion for New Trial, and in that context Dr. Coburn conducted a "preliminary evaluation" of Appellant. That evaluation lasted a little more than an hour. CT 573. In that brief time, Dr. Coburn uncovered several bits of data highly relevant to the development and presentation of Mr. Williams' case, at both the guilt and penalty trials, of which trial counsel, LeMieux, was either ignorant or inexplicably failed to pursue.

Specifically, Dr. Coburn learned that Mr. Williams was born out of wedlock to an adolescent mother. CT 575. Mr. Williams was placed in foster care after his biological great grandmother and maternal grandmother could not agree whether to raise him. Id. See also 53 RT 3984 (following his biological family's "profound rejection" of him, Mr. Williams was placed into foster care.)

At approximately two years of age, Mr. Williams suffered a serious, disfiguring head injury at the home of his foster parents. Id.

Though Mr. Williams was eventually adopted by his foster family,

Mr. Williams knew and remained in contact with his troubled biological family, and visited them on a regular basis, re-experiencing the rejection of his biological mother. Id.; CT 577.

"Beginning about the age of 14," Mr. Williams' adoptive parents "would lock him out of the house . . . forcing him to . . . survive on the streets of South Central Los Angeles at night" when he stayed out past his curfew.

Beginning at about the same time, age 14, Mr. Williams became a persistent, heavy drug user, ingesting "$2000 of PCP a week and $40 of marijuana a day" throughout his adolescence and until the age of at least 26. CT 576; 53 RT 3979-80. At some point, Mr. Williams recognized that he "stutter[ed]," "could not find words to express himself, . . . could not pronounce words correctly . . . [and] experienced memory loss." CT 576.

In light of these preliminary findings, Dr. Coburn observed that "[t]his is not a case where we have a history devoid of potentially important events or potentially important patterns. **This is a case . . . which cr[ies] out for a full evaluation.**" 53 RT 3988 (emphasis added.) See also CT 577 ("a more thorough work-up is mandated.")[30] Specifically, Dr. Coburn stated

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Attorney Otto never was authorized by the court – and never attempted – to undertake a thorough life history investigation and mental health evaluation. Rather, Otto, who was appointed solely to conduct the

(continued...)

that "competent defense counsel would have had the defendant evaluated by a psychologist or psychiatrist who would have administered a battery of tests, taken a social history, and otherwise identified psychological, social, medical, and neurological issues in the defendant's life." CT 578.

Trial counsel could have obtained the information elicited by Dr. Coburn with minimal effort. This information, in turn, is precisely the type of evidence that the Supreme Court has deemed "powerful." Wiggins, 539 U.S. at p. 534. Counsel, however, failed to retain any expert assistance that would have enabled him to uncover the basic building blocks of his client's life history which in turn would have provided the defense team with a road map for investigating and preparing the penalty phase of the case.

8. Respondent Absolves Trial Counsel of All Failures to Adequately Investigate and Prepare the Defense Case.

As *respondent* observes: "**Before an attorney acts or refuses to act, he must make a rational and informed decision based on adequate investigation and preparation.** (In re Lucas (2004) 33 Cal.4th 682, 721-722.) Thus, counsel has a duty to make a reasonable investigation or to

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[30](...continued)
Motion for New Trial proceedings, sketched for the court many of trial counsel's failures, shortcomings, afflictions and infirmities. Otto, however, did not undertake the investigation that should have been, but was never done by trial counsel, and, as a result, Otto did not re-present the defense case as it should have been presented at trial.

make a reasonable decision that makes a particular investigation unnecessary. . . ." (RB 140, citations omitted, emphasis added.) Accord ABA Guideline 1.1, Commentary, Representation at Trial ("An attorney representing the accused in a death penalty case must *fully* investigate the relevant facts.") (Emphasis added.)

In addition to the excuses proffered by respondent discussed above, respondent proceeds to repeat several additional rationales offered by trial counsel for failing to undertake fundamental investigatory steps. When viewed singly and together these excuses are unavailing.

For example, respondent gets stuck in an epistemological quagmire when arguing that counsel somehow knew that the prosecutor has given him everything he needed even though counsel did not know what the prosecutor had in his possession. Thus, respondent argues that trial counsel "did not file a discovery motion or a request for production of physical evidence because he had received 'everything' he needed or requested through an informal process." (RB 170-171.) But counsel had no sound basis for believing that the prosecution had provided him with all relevant trial materials in advance of comprehensively requesting such materials. Nor does counsel (or respondent) acknowledge the obvious legal importance served by a formal request for discovery, namely to put the State on notice of its obligations to timely disclose a broad range of relevant information to

the defense and to safeguard defendant's rights should the prosecution withhold or belatedly disclose evidence that is "favorable" to the defense because it is either exculpatory or impeaching for purposes of the guilt or penalty trials. See Brady v. Maryland (1963) 373 U.S. 83. Indeed, it is fair to question the basis of counsel's certainty that he possessed "everything" he needed from the State when (1) Appellant's prior counsel, on the eve of being replaced by trial counsel, understood and articulated the need to propound formal "discovery motions" in this case to "safeguard" his "client's interest[s]," RT 1 (Jan. 25, 1991), and (2) counsel acknowledged that he "had not filed a discovery motion in **22 years** of practice." (52 RT 3695, emphasis added.)

Counsel's excuse for refusing to file a discovery motion or request for production of physical evidence also fails on a fact-specific level. As the record makes clear, Appellant's previous attorney, H. Clay Jacke, was deeply skeptical that the State had voluntarily disclosed all the information in its possession materially relevant to the defense during the final months that he represented Appellant. As attorney Jacke stated on the record at pretrial hearings, he believed:

- "there is a **wealth of information** that has to be provided to me . . . ." (RT 2, Sept. 26, 1990, emphasis added.)
- "There is a **significant amount** of discovery still outstanding concerning the case, as well as transcripts from one of the . . .

> co-defendant's trial (sic)." (RT 4, Sept. 27, 1990, emphasis added.)

Against this backdrop, trial counsel had little reason to trust that the State would fully meet its discovery obligations through informal processes alone.

Respondent also endorses trial counsel's rationale for failing to interview key prosecution witnesses for both the guilt and penalty trials, including the eyewitnesses to the events that took place at and near the crime scene before and shortly after the shootings, and Mr. Williams' co-defendants, two of whom were present at the shootings.[31] As respondent notes, trial counsel "believed . . . it would be harmful to 'go out and alert people' regarding the questions that would be asked at trial." (RB 190.) But such a belief can hardly be squared with counsel's "make a rational and informed decision based on adequate investigation and preparation." (RB 140.) See Outten, 464 F.3d at p. 422 (observing that it "is **nearly always the case**" that "not all of the evidence . . . counsel failed to investigate is favorable to" the client, and stating that this fact does not justify counsel's failure to undertake adequate investigation); id. ("while it is true that trial counsel may not have introduced into evidence all of [the records that he might have] procured [had he undertaken investigation] . . . the records most

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31 Trial counsel's shortcomings in these regards are detailed in Appellant's Opening Brief. See AOB XV.A.3(e), (f); AOB XV.A.5(a); AOB XVA.6.(f)-(h).

certainly would have informed counsel's preparation.") In fact, respondent acknowledges that trial counsel did not even have the benefit of reviewing a prior cross-examination of the State's leading eyewitness, Irma Sazo, who testified at both of co-defendant Patrick Linton's two trials, because Sazo was never cross-examined at those trials. (RB 152, n.36.) Given this dearth of information, it was highly *un*reasonable of counsel not to attempt to interview this witness before Appellant's trial.

With respect to the State's penalty case, respondent approvingly quotes trial counsel's failure to "contact any of the witnesses to any of the aggravating incidents" on the ground that it was counsel's "strategy . . . to 'down play' appellant's involvement in the incidents, rather than "try those cases in front of the jury and magnify their importance." (RB 189.) (See also, RB 190) But this "strategy" puts the cart before the horse and flatly contradicts the principle mouthed by respondent that "[b]efore an attorney acts or refuses to act, he must make a rational and informed decision based on adequate investigation and preparation." (RB 140.) Accord Rompilla, 545 U.S. at p. 377 (holding that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.")

A reasonable trial strategy must be predicated upon a thorough investigation. Strickland v. Washington (1984) 466 U.S. 668, 690-691 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); Wiggins, 539 U.S. at p. 527 ("a reviewing court must consider the reasonableness of the investigation said to support [a trial] strategy"); Shaw, 35 Cal.3d at p. 542 (where "counsel acted without adequately investigating his client's defense" counsel's "decisions relative to the tactics . . . were not 'informed' decisions" "and so effectively deprived defendant . . . of a potential meritorious defense.")

One does not, as trial counsel (and respondent) would have it, forgo investigation based upon a pre-ordained "strategy." Stated differently, it would be inherently *unreasonable* to adopt and hold fast to a pretrial and trial strategy that, by its terms, *precluded* investigation of critical issues and facts. But this is exactly what trial counsel did. Counsel's purported choice to "down play" Appellant's involvement in the aggravating incidents, whether strategically right or wrong, is entirely unrelated to whether or not counsel should have independently investigated the nature of those incidents. That investigation, had it been undertaken, would then have informed the relative merits of the strategic choices counsel faced in deciding how best to defend against a death verdict. See Rompilla, 545 U.S. at pp. 385-386

(holding that "counsel had a duty to make all reasonable efforts to learn . . . about [their client's prior] offense. Reasonable efforts certainly included obtaining . . . readily available [information] on the prior conviction to learn what the [State] knew about the crime, to discover any mitigating evidence the [prosecution] would downplay and to anticipate the details of the aggravating evidence the [prosecution] would emphasize."); id. at p. 386 n.4 (noting "[t]he ease with which counsel could examine the entire file [of his client's prior offense] makes application of [reasonable performance] standard correspondingly easy.")

Respondent pays mere lip service to the precept that "a rational and informed decision" must be "based on adequate investigation and preparation," RB 140, while in practice repeatedly repudiating this principle and excusing each of trial counsel's failures to investigate. See, e.g., RB 190 ("In regards to the 1983 assault with a deadly weapon on Officer Carl Sims, [trial counsel] did not 'try to dig up evidence' to exculpate appellant . . . [Instead, trial counsel] preferred to "let [the record] sit . . . and rely on cross-examination . . . ."); id. (invoking for a second time trial counsel's justification for failing "to investigate or strongly rebut" the aggravating incidents "because [counsel] did not want to alert the witnesses to his potential cross-examination questions."). See also, RB 167 (calling into question respondent's understanding of commitment to an "adequate"

investigation when respondent excuses trial counsel's failure to "investigate some of the alleged eyewitnesses because . . . appellant could not provide [counsel] with their possible whereabouts."). But see Rompilla, 545 U.S. at p. 386 (observing that absent proper investigation of the State's aggravating evidence, "[c]ounsel could not effectively rebut the aggravation case or build their own case in mitigation."); id. at p. 387 ("Counsel must . . . investigate prior convictions . . . that could be used as aggravating circumstances or otherwise come into evidence." (quoting ABA Guideline 10.7, Commentary.))

Respondent acknowledges that "[b]ecause [trial counsel] had never handled a penalty phase in a capital case, he 'naively believed' that he would be given 30 days to prepare for the penalty phase. As a result, [trial counsel] did not conduct any investigation for the penalty phase until appellant had been found guilty." (RB 170.) But respondent evades the force and effect of these several scandalous facts – namely, that trial counsel, *who refused to assemble a defense team*, (1) was so inexperienced that he was facing a penalty phase trial for the first time, (2) was so uninformed about capital procedure that he erroneously believed that he had an extra *month* to prepare his client's penalty case, and (3) was so untrained in the techniques of amassing mitigation, and so unmindful of how demanding and time-consuming this task is that he foolishly put it off until the completion of the

guilt phase. See ABA Guidelines 1.1, 4.1, and 10.2.

Further, respondent ignores how these facts bear upon counsel's duty to "make a rational and informed decision based on adequate investigation and preparation." RB 140. Instead, respondent engages in a sweeping *non-sequitur*, arguing that because "[t]here is nothing to show that the trial court would have granted" a request for a continuance, RB 172, trial counsel was somehow absolved of his failures. Respondent employs the same *non-sequitur* when arguing that trial counsel not be deemed ineffective for failing to request experts, or second counsel. (See RB 172, 173.) But whether the trial court would have granted counsel's motion to continue the penalty trial is not, and cannot be, the test for whether counsel was ineffective in failing to bring the motion; if it were, a defendant could never show that any failure to defend by bringing motions was ineffective, because the defendant could never establish that the trial court would have granted the motions. Cf. Adoption of Michael D. (1989) 209 Cal.Appl.3d 122, 137 (faulting trial counsel for failing to seek a continuance after being unable to marshal important defense evidence in a timely fashion.)

When examined collectively, respondent's arguments on behalf of trial counsel's performance can be encapsulated by the axiom: "ignorance is bliss." Counsel's excuses can be summarized by the following precepts:

- You know what you need to know in advance of searching for it.
- If you do not search for it, you do not need to know it.
- If you learn a little bit, there is no need to learn more.
- If someone might have information you seek, it is better not to ask them for it if doing so might yield potentially harmful information or alert them to what you are seeking.
- And, if it is not easy to find, it either does not exist or is not worth having.

In place of "rational and informed" decision-making, RB 140, respondent would require capital defense counsel to investigate only those matters about which they have not already formed a preconceived hunch, and only then if they harbor no fear that further investigation might uncover some "bad" facts or divulge a potential defense strategy to the other side. Respondent, in other words, would replace thorough investigation and preparation with perfunctory, seat-of-the-pants lawyering. Cf. 52 RT 3747 (trial counsel noting: "I was caught with my pants down.")

In sum, the standards of practice articulated by respondent in the course of defending trial counsel's performance highlight the radical incompatibility of respondent's position with the Constitution's core

commitment to ensuring effective representation by counsel in capital cases. To be sure, respondent quotes Strickland v. Washington, supra., for the proposition that reviewing courts should eliminate the distorting effects of hindsight (RB 172). But Strickland was directed at Monday-morning quarterbacking by subsequent counsel, not admissions of deficient performance by trial counsel himself. Here, trial counsel himself acknowledged he was ineffective (see, e.g., RB 157, 172). Respondent, in turn, merely repeats a series of perfunctory defenses of trial counsel's performance, defenses which, when viewed in the aggregate, inexplicably countenance malperformance of startling magnitude in a capital case.

In his guilt phase closing argument the prosecutor repeatedly assailed defense counsel for over-promising during his opening statement what the defense expected the evidence to show and then consistently under-delivering that evidence to the jury. (See 26 RT 2872-75, 27 RT 2911-12, 2965-66.).[32] The prosecution, of course, was right: Trial counsel did over-promise. (See AOB Argument XV.A.5.(a)) (describing promises made by trial counsel to both the jury and the court.) The prosecution was also correct that trial counsel under-delivered to the jury.

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Respondent's overeagerness to defend trial counsel's performance is all the more incongruous given the trial prosecutor's sharp criticism of counsel's shortcomings which he exploited at trial and in closing argument.

Respondent minimizes the extent to which defense counsel under-delivered. It is as if trial counsel inhabited an alternate universe where:

- Trial counsel can equip himself to try a capital case by reading a few articles;
- Trial counsel can go missing for the entire voir dire;
- Less investigation is better (that way counsel is less likely to learn something counsel might not like);
- Pretrial motions are unnecessary (because opposing counsel can be trusted to give you everything you need);
- Co-defendants, eyewitnesses and other State witnesses need not be interviewed for fear of tipping them off about the defense strategy (even though a sound defense strategy is predicated, in part, upon knowing how the State's witnesses plan to testify);
- Opening statements are a forum to float unexplored theories of the case;
- Promises made to the jury are meaningless;
- Note taking is superfluous (the court reporter will eventually type up a transcript of what was said);
- Mental health experts are not needed if the client does not look crazy to someone with no mental health training (even though he may act irrationally); and
- Penalty phase investigation and preparation is unnecessary before the guilt verdict.

It is telling that respondent relies so heavily on the U.S. Supreme Court decision in Strickland, decided nearly a quarter of a century ago, and not at all on the ABA's Guidelines for the Appointment and Performance of

Defense Counsel in Death Penalty Cases, which form the basis for the Court's current capital jurisprudence in cases like Wiggins, Rompilla and Nixon. When viewed against the proper backdrop of the duties of defense counsel, trial counsel's pervasive failures to provide adequate representation -- before trial, during jury selection, and at the guilt and penalty phases -- rendered Mr. Williams' trial fundamentally unfair.

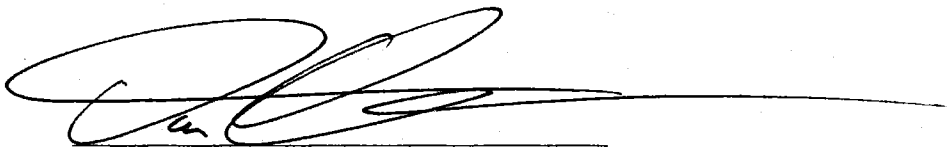
"Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused." (ABA Guidelines, Guideline 1.1, Commentary, Introduction.) Here, what was extraordinary was counsel's lack of effort coupled with his lack of ability. By virtue of the qualifications and performance of Mr. Williams' trial counsel, Mr. Williams' trial lost its essential character as a confrontation between adversaries, and Mr. Williams' Sixth Amendment rights were violated. United States v. Cronic (1984) 466 U.S. 648, 656-657, 666. But even if a showing of case-specific prejudice is required, an assessment of the cumulative impact of counsel's multiple errors undermines confidence in the outcome of trial. Strickland, 466 U.S. at p. 694. The sheer scope of counsel's professional and ethical violations ineluctably point to prejudice to Appellant sufficient to require reversal of the death judgment.

CONCLUSION

For all of the reasons stated above and in Appellant's Opening Brief, the judgment of conviction and sentence of death must be reversed.

DATED: April 2, 2007

Respectfully submitted,

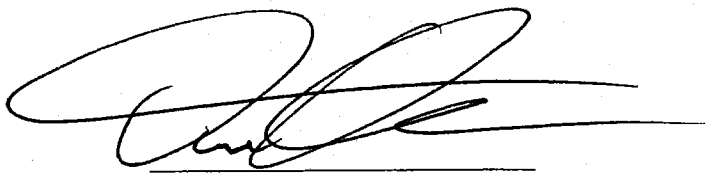


DANIEL N. ABRAHAMSON
Counsel for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.620(b)(1)(B))

I, Daniel N. Abrahamson, am counsel of record appointed by the Court to represent Appellant, George Brett Williams, in this automatic appeal. I hereby certify that I conducted a word count of this brief using WordPerfect word processing software. On the basis of that computer-generated word count, I certify that this brief is 34,853 words in length, excluding the tables and certificates.

Dated: April 2, 2007



Daniel N. Abrahamson

DECLARATION OF SERVICE BY MAIL

CASE: People vs. (George Brett) Williams

CASE NO: California State Supreme Court Case No. S030553
Los Angeles County Superior Court Case No. TA006961

I am employed in the City of Berkeley and County of Alameda, California. I am over the age of eighteen years and not a party to the within action; my business address is 819 Bancroft Way, Berkeley, California 94710.

On April 2, 2007, I served the following document:

APPELLANT'S REPLY BRIEF

on each of the following, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of attorney Daniel N. Abrahamson for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of this law office on the date last written below.

TYPE OF SERVICE	ADDRESSEE
B	Supreme Court of California Office of the Clerk 350 McAllister St. San Francisco, CA 94102
A	George Brett Williams P.O. Box H-61000 San Quentin, CA 94974

A General	Stephanie Miyoshi Deputy Assistant Attorney General Office of the State Attorney 300 South Spring Street, Suite 500 Los Angeles, CA 90013
A	California Appellate Project Attn: Michael Millman 101 Second St., Suite 600 San Francisco, CA 94105
A	Clerk: Death Penalty Desk Los Angeles Superior Court - Criminal Division 210 West Temple, Room M3 Los Angeles, CA 90012-3210

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of April, 2007, in Berkeley, California.

Daniel N. Abrahamson
Declarant