S034800

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LUCIO DeHOYOS, Defendant and Appellant.	No. S034800 (Superior Ct. No. C-77640)

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Orange County

THE HONORABLE EVERETT W. DICKEY, JUDGE PRESIDING

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INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the absence of a response to any particular 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, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. For the convenience of the Court, the arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.[1]

[1] In this brief appellant employs the following acronyms for citation to the record in this matter: "AOB" refers to appellant's opening brief, (continued...)

ARGUMENT

I

THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE MINORITY PROSPECTIVE JURORS FROM THE PETIT JURY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

In his opening brief, appellant, who is Hispanic, argued that the prosecutor used race-based peremptory challenges to exclude Hispanics and Blacks from appellant's jury, in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. In so arguing, appellant demonstrated: (1) that the trial court failed to engage in a comparative analysis of the prosecutor's respective treatment of the minority prospective jurors and similarly-situated White prospective jurors; and, (2) that it failed to adequately examine the prosecutor's reasons for exercising the peremptory challenges by referring to the actual record, thereby allowing the prosecutor to repeatedly mischaracterize statements made by the prospective jurors. (AOB 82-127.)

Respondent contends that the trial court properly denied appellant's *Batson/Wheeler* motion because the prosecutor excused the prospective jurors for race-neutral reasons. According to respondent, the trial court

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[1](...continued)
"RB" refers to respondent's brief, and "RT" and "CT" refer to the reporter's and clerk's transcripts, respectively. Finally, all statutory references are to the Penal Code unless otherwise noted.

thoroughly explored the prosecutor's reasons for exercising the peremptory challenges, and credited his reasons, which are supported by substantial evidence. Respondent further contends that a comparative analysis fails to show that the prosecutor's peremptory challenges were based on race. (RB 57-112.) Respondent's contentions are meritless.

B. Applicable Legal Principles

The procedures and standards for a trial court's consideration of a *Batson/Wheeler* motion are well-established. "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 477.)

Both this Court and the United States Supreme Court have held that a reviewing court must give deference to a trial court's ruling on a *Batson* challenge, but only when certain conditions are met. Accordingly, the trial court's ruling is generally sustained if it is supported by "substantial evidence." (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 901, fn 11.) However, this Court has repeatedly stated that deference is only required when the trial court "has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror." (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105, citing *People v. McDermott* (2002) 28 Cal.4th 946, 971.) The United States Supreme Court has held that "a trial court's ruling on the issue of *discriminatory intent* must be sustained unless it is clearly erroneous." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p.

477; emphasis added.) It follows, therefore, that where the trial court does not make a ruling on discriminatory intent, or where the court does not engage in a sincere and reasoned evaluation of the prosecutor's intent, no deference is required.

In *Snyder*, the United States Supreme Court described the trial court's duties when engaging in its evaluation at step three of the *Batson* inquiry.

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, see 476 U.S., at 98, n. 21, 106 S.Ct. 1712, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez*, 500 U.S., at 365, 111 S.Ct. 1859 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

(*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 477.) As the high court recognized, "'[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" (*Id.* at p. 485, quoting *Hernandez v. New York*, *supra*, 500 U.S. at p. 365 (plurality opinion).)

The United States Supreme Court has made clear that comparative juror analysis is an appropriate, even necessary, component of assessing *Batson/Wheeler* claims. (*Miller-El v. Dretke* (*Miller-El II*) (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a black panelist

applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"]; see also *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 483-486; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 369-375; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360-361.)

"Comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike." (*United States v. Collins* (9th Cir. 2008) 551 F.3d 914, 921.)

As the Fifth Circuit Court of Appeals observed in *Reed v. Quarterman*, *supra*, 555 F.3d at p. 376,

> The [United States Supreme] Court's treatment of Miller-El's comparative analysis also reveals several principles to guide us. First, we do not need to compare jurors that exhibit *all* of the exact same characteristics. [*Miller-El II*, *supra*, 555 U.S. at p. 247, fn. 6.] If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects. [*Id.* at p. 241.] Second, if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination. [*Id.* at p. 246.] Third, we must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors. [*Id.* at p. 252.]

(*Reed v. Quarterman*, *supra*, 555 F.3d at p. 376 (emphasis original); see also *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3 ["As a threshold matter, we note that there is no requirement that jurors be

identically situated in order for meaningful comparison to take place"].)

Recent United States Supreme Court decisions relating to the assessment of *Batson* claims have not called into question the importance of comparative juror analysis. In *Thaler v. Haynes* (2010) 130 S.Ct. 1171, 1175, the Supreme Court held that none of its previous decisions clearly established that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. Comparative juror analysis was simply not at issue in that case. Moreover, as appellant has pointed out (AOB 100, fn. 25), the prosecutor's stated reasons in this case were not demeanor-based. Thus, *Thaler v. Haynes* is inapposite.

More important, in *Felkner v. Jackson* (2011) 131 S.Ct. 1305, the United States Court addressed the proper standard with respect to federal habeas review of a state appellate court's ruling on a *Batson* claim. There, the trial court credited the prosecutor's race-neutral explanations for exercising peremptory challenges to two African-American prospective jurors, and the California Court of Appeals "carefully reviewed the record at some length in upholding the trial court's findings." (*Id.* at p. 1307.) The Ninth Circuit Court of Appeals reversed that decision, "offer[ing] a one-sentence conclusory explanation for its decision." (*Ibid.*) The high court concluded that the Ninth Circuit Court of Appeals had no basis for concluding that the state appellate court's decision was unreasonable. (*Id.* at pp.1306-1307.) Given the procedural posture of the instant case, *Felkner*

is inapplicable.[2]

Following *Miller-El II*, this Court has held that evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons. (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) In *Lenix*, this Court declared that "*Miller-El II*, *supra*, 545 U.S. 231, 125 S.Ct. 2317 and *Snyder*, *supra*, 128 S.Ct. 1203 demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Ibid.*)

Where the trial court does not satisfy its *Batson/Wheeler* obligations, the conviction must be reversed. (*People v. Allen* (2004) 115 Cal.App.4th 542, 553.) As this Court has recognized, such "error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'" (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283; see also *People v. Khoa Khac Long* (2010) 189 Cal.App.4th 826, 843.) Indeed, "[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386; see also *United States v. Vasquez-Lopez* (9th Cir. 1994) 22

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[2] Even assuming *Felkner* addresses the issue of how similar jurors must be to be meaningfully compared (see *Felkner v. Jackson*, *supra*, 131 S.Ct. at p. 1307), it is distinguishable. Appellant has amply demonstrated that the jurors subjected to comparative analysis in this case are similarly situated. (AOB 101-125; pp. 21-62, *post.*)

F.3d 900, 902 ["the Constitution forbids striking even a single prospective juror for a discriminatory purpose"].)

In light of these principles, the prosecutor's exercise of the peremptory challenges were improperly race-based, as appellant further demonstrates below.

C. Each of the Excused Jurors Belonged to a Cognizable Group

Hispanics and Blacks are cognizable groups under both *Batson* and *Wheeler*. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 89; *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-279.) However, respondent asserts that the trial court used an overbroad class – i.e., one comprised of both Blacks and Hispanics – in finding a prima facie case that five prospective jurors had been excluded on account of race. (RB 59, fn. 30; RB 80, fn. 36.)[3] To the contrary, a review of the record demonstrates that the trial court correctly found each of the challenged jurors to be a member of a cognizable group. (See Section C.1, *post*.)

1. Procedural Background

After the prosecutor excused M.L., a Hispanic prospective juror, the defense made a *Batson/Wheeler* motion, stating as follows:

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[3] Respondent does not otherwise dispute the trial court's express finding that appellant made a prima facie showing. Accordingly, this Court must focus on the third *Batson/Wheeler* prong and examine whether the prospective jurors were excused due to intentional discrimination. (*People v. Lomax* (2010) 49 Cal.4th 530, 569.)

> This time in the *Wheeler Batson*[4] we feel that the prosecutor is excusing members of the Hispanic – or Black and Hispanic. He has excused [L.M.], who was Black; [E.V.], who was Hispanic; [E.V.], who was [a] mixture of Black and Hispanic.
>
> And we feel that they belong to a cognizable group who would bring to this jury – inasmuch as our client is Hispanic, they would bring in certain life experiences and certain diversity, a certain approach into the Hispanic culture that we feel would assist and is due to our client under the 6th Amendment, the 14th Amendment and the 8th Amendment.

(2 RT Vol. 12 2658-2659.) The defense subsequently advised the court, through its clerk, that it was including the prosecutor's use of a peremptory challenge against A.M.-F., who described himself as "Latin American," in its *Batson/Wheeler* motion. (2 RT Vol. 12 2661-2662.)

The trial court subsequently found that a prima facie case had been made. (2 RT Vol. 12 2663-2664.) In so finding, the court observed that "[t]here is no question that Blacks and Hispanics or Mexican Americans are clearly cognizable groups." (2 RT Vol. 12 2663.)

As respondent notes (RB 59), the prosecutor requested clarification as to whether "the cognizable group . . . is people who are Hispanic or is the group all minorities, or –" The court responded that "[t]he group, as I understood [defense counsel's] motion, was Blacks and Hispanics." (2 RT Vol. 12 2664.) Nevertheless, the prosecutor asked,

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[4] The defense had raised prior *Batson/Wheeler* motions with respect to the prosecutor's peremptory challenges to prospective jurors involved in the medical or psychiatric profession (2 RT Vol. 10 2353-2358; 2 RT Vol. 11 2499-2502, 2543-2546) and to prospective jurors who "[were] not zealous or over-zealous in support or acceptance of the death penalty" (2 RT Vol. 11 2502-2504, 2544).

> Okay. What I am little unclear about is whether or not the exercise of a peremptory challenge as to [M.L.], as a matter of law, requires the process to go forward as to members of other racial groups, if the court follows me.
>
> Because I am not aware –

(2 RT Vol. 12 2664.) The prosecutor subsequently explained that

> what I am trying to decide is how [L.M.] fits into this. She is a Black lady. If the challenge was exercised against a sitting Black juror and that triggered the defense motion, I can understand. But I am not aware that the law addresses that, if the court – if the court understands what I am saying.

(2 RT Vol. 12 2665.)[5]

The court replied, "I really don't, because both Blacks and Hispanics are cognizable groups for that purpose, and they made the motion with respect to both. I don't see any source of confusion here. It is clear that they mention both –" (2 RT Vol. 12 2665.) Still, the prosecutor pressed on:

> Is the court – I understand what they have said. What I don't understand, is the court making a finding that the prosecution, in this case where one Black juror has been excluded by the prosecution, that that constitutes a prima facie case for discrimination against Blacks?

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[5] Contrary to the prosecutor's suggestion (2 RT Vol. 12 2664-2665), appellant's *Batson/Wheeler* motion as to Black juror L.M. was not "triggered" by his *Batson/Wheeler* motion as to either Hispanic juror M.L. in particular or the excused Hispanic jurors generally. Defense counsel specifically and individually objected to the peremptory challenges against each of the five prospective jurors, including L.M. (2 RT Vol. 12 2658-2662.) Of course, it is well established that "[t]he defendant need not be of the same race to object to a prosecutor's race-based exercise of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 415-416 [111 S.Ct. 1364, 113 L.Ed.2d 411].)" (*People v. Burgener* (2003) 29 Cal.4th 833, 863.)

(2 RT Vol. 12 2665-2666.) The court replied as follows:

> It is a prima facie case of discrimination against members of racial minority groups, if that will satisfy you, I think.
>
> I mean, I don't see any need to bifurcate it the way you are suggesting, Mr. Gannon. *But the problem is the same whether you treat it as a separate motion with respect to Black jurors and a separate motion with respect to Hispanic jurors, or you treat it together. You are going to have to justify it in each case.*
>
> *I mean, even one challenge of a juror for a peremptory challenge for an improper purpose is something the court has to review.*

(2 RT Vol. 12 2666; emphasis added.)

The prosecutor stated that he understood the court's position "entirely," and that he understood the court was requiring him to justify his peremptory challenges against L.M., A.M.-F., R.M., E.V. and M.L. The court confirmed that his understanding was correct. (2 RT Vol. 12 2667.)

2. Each of the Prospective Jurors Excused by the Prosecutor Belonged to a Cognizable Group

According to respondent, the trial court did not seem to understand the prosecutor's request for clarification as to which class the trial court found a prima facie case. (RB 59 and fn. 30.) Respondent further contends that the trial court did not seem to understand "that the class is generally more specific, i.e., does not include both Blacks and Hispanics." (RB 59, fn. 30.) As a result, respondent claims, the trial court used an overbroad class which included both Blacks and Hispanics. (RB 59, fn. 30; RB 80, fn. 36.) Respondent's contentions are incorrect.

First, notwithstanding the prosecutor's failure to frame the issue clearly,[6] the trial court explained that each of the jurors belonged to a cognizable group, whether Blacks and Hispanics comprise a single group or two separate groups. As the court pointed out, "the problem is the same whether you treat it as a separate motion with respect to Black jurors and a separate motion with respect to Hispanic jurors, or you treat it together. You are going to have to justify it in each case." (2 RT Vol. 12 2666.) Indeed, the prosecutor acknowledged that he understood the court's position "entirely." (2 RT Vol. 12 2667.)

Second, although the court stated at one point that "it is a prima facie case of discrimination against members of racial minority groups" (2 RT Vol. 12 2666), it repeatedly emphasized that members of two well-established cognizable groups – i.e., Blacks and Hispanics – were involved (2 RT Vol. 12 2664-2666). Defense counsel did not request that members of any racial minority whatsoever be included in the group, nor did the court interpret their position in that fashion. (See 2 RT Vol. 12 2665 [court stated that "both Blacks and Hispanics are cognizable groups . . . and [the defense]

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[6] As described in Section C.1, *ante*, the prosecutor posed the issue in several different ways. He initially requested clarification as to whether "the cognizable group . . . is people who are Hispanic or is the group all minorities, or –" (2 RT Vol. 12 2664.) He then stated, "What I am little unclear about is whether or not the exercise of a peremptory challenge as to [M.L.], as a matter of law, requires the process to go forward as to members of other racial groups, if the court follows me." (2 RT Vol. 12 2664.) The prosecutor subsequently explained that "what I am trying to decide is how [L.M., as a Black juror,] fits into this." (2 RT Vol. 12 2665.) Finally, the prosecutor asked, "[I]s the court making a finding that the prosecution, in this case where one Black juror has been excluded by the prosecution, that that constitutes a prima facie case for discrimination against Blacks?" (2 RT Vol. 12 2665-2666.)

made the motion with respect to both"].) As such, respondent's reliance upon *People v. Davis* (2009) 46 Cal.4th 539, 583, in which this Court affirmed that "people of color" is not a cognizable group, is misplaced. (RB 59, fn. 30.)[7]

Thus, contrary to respondent's claim (RB 59, fn. 30; RB 80, fn. 36), the trial court did not use an overbroad class. Each of the prospective jurors, including L.M., belonged to a cognizable class and was the proper subject of appellant's *Batson/Wheeler* motion.

D. The Prosecutor's Reasons for Exercising the Peremptory Challenges Were Neither Race-neutral Nor Genuine

As a preliminary matter, appellant submits that respondent's understanding of comparative juror analysis is flawed. First, respondent complains that appellant "breaks down each reason the prosecutor gave for the challenged jurors, and compares that reason alone to other seated jurors." As a result, respondent contends, appellant's analysis fails at the outset because he does not compare similar jurors. (RB 79.) In so arguing, respondent apparently believes that a fair comparison requires that the jurors subjected to comparative juror analysis be virtually identical. (RB 79-80.)

Appellant, however, submits that his comparative analysis is consistent with the approach taken by the United States Supreme Court. For instance, in *Miller-El II*, the prosecutor stated that a Black prospective

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[7] In *People v. Neuman* (2009) 176 Cal.App.4th 571, 573-579, the Court of Appeal, relying on *Davis*, held that "people of color" was not a cognizable group for purposes of a *Wheeler/Batson* claim, but went on to determine whether the trial court otherwise erred in concluding that defendant failed to make a prima facie showing.

juror, Billy Jean Fields, had been excused because "[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 243.) But, as the Supreme Court observed, "[i]f . . . Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations." (*Id.* at p. 244.) The Supreme Court then identified several White jurors who expressed views similar to those supposedly expressed by Fields.[8] (*Id.* at pp. 244-245.)

The Supreme Court concluded that the prosecution's proffered reasons for striking Joe Warren, another Black venireman, were comparably unlikely. When asked what the death penalty accomplished, Warren answered as follows:

> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(*Miller-El v. Dretke*, *supra,* 545 U.S. at pp. 247-248.) The prosecution said

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[8] The Supreme Court explained that the prosecutor mischaracterized Fields's testimony, in that Fields had stated unequivocally that he could impose the death penalty regardless of the possibility of rehabilitation. (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 244.)

nothing about these remarks when it struck Warren from the panel, but one of the prosecutors referred to this answer as the first of his reasons when he testified at a later *Batson* hearing, suggesting that Warren's responses were inconsistent. (*Id.* at p. 248.) Here too the Supreme Court reasoned that the plausibility of the prosecution's proffered reason was severely undercut by its failure to object to other panel members who expressed similar views. One panel member, who went on to serve on the jury, said, "sometimes death would be better to me than – being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I['d] just as soon have it over with than be in prison for the rest of your life." Another prospective juror, who was accepted by the prosecution but subsequently struck by the defense, testified that she thought "a harsher treatment is life imprisonment with no parole." Still another prospective juror, who was also accepted by the prosecution but struck by the defense, opined that "living sometimes is a worse – is worse to me than dying would be." (*Ibid.*)

In *Snyder*, the United States Supreme Court engaged in a similar analysis. There, the prosecutor stated that he had excused a Black prospective juror, Jeffrey Brooks, in part because he was a student teacher. The prosecutor claimed he was concerned that Brooks, fearing he would miss his classes, might vote for a lesser verdict at the guilt phase in order to avoid a penalty phase. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478.) The Supreme Court concluded that the implausibility of the prosecutor's explanation was reinforced by his acceptance of White jurors who disclosed conflicting obligations that appeared to have been at least as serious as

those stated by Brooks. (*Id.* at p. 483.)[9] For instance, the prosecutor did not excuse a White juror who had stated that jury service would cause hardship because: (1) he was "a self-employed general contractor" with "two houses that are nearing completion, one [with the occupants] . . . moving in this weekend"; and, (2) he also had demanding family obligations, including increased childcare duties following his wife's recent hysterectomy. (*Id.* at pp. 483-484.) Nor did the prosecutor excuse another White juror, who had advised the court that he possibly would have an important work commitment later that week. The following day, the juror again expressed concern about serving, stating that, in order to serve, "I'd have to cancel too many things," including an urgent appointment. Nevertheless, the prosecution did not strike him. (*Id.* at p. 484.)

In neither *Miller-El II* nor *Snyder* did the United States Supreme Court either make or require a showing that the jurors subject to the comparative analysis were otherwise identical. For instance, in *Miller-El II*, the Supreme Court remarked, "[t]he dissent offers other reasons why these

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[9] The Supreme Court found this reason for striking Brooks to be suspicious because, even assuming Brooks favored a quick resolution, he would have been in a position to shorten the trial by favoring a lesser verdict only if all or most of the other jurors had favored such a verdict; the brevity of Snyder's trial, something which the prosecutor already anticipated, meant that serving on the jury would not seriously interfere with Brooks' ability to complete his required student teaching; Brooks' dean promised to "work with" him to see that he was able to make up any student-teaching time that he missed due to jury service; the dean stated that he did not think this would be a problem; the record contained no suggestion that Brooks remained troubled after hearing of the dean's remarks; and, the trial apparently took place relatively early in the fall semester, so Brooks would have needed to make up no more than an hour or two per week in order to compensate for the time he would have lost due to jury service. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 482-483.)

nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was. . . *In doing so, the dissent focuses on reasons the prosecution itself did not offer.*" (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 245; emphasis added.) Later, the Supreme Court elaborated, "In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences. [Footnote.] But the differences seem far from significant, particularly when we read Fields's voir dire testimony in its entirety." (*Id.* at p. 247.) Finally, the Supreme Court put the matter most starkly as follows:

> But 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. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. *If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.* The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

(*Id.* at p. 252; emphasis added.) Thus, the comparative analyses constituted evidence that the prosecutors' stated reasons were pretextual. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 484-485; *Miller-El v. Dretke*, *supra,* 545 U.S. at pp. 246, 248.)

In *People v. Huggins* (2006) 38 Cal.4th 175, 233, the prosecutor listed numerous justifications for dismissing minority jurors, including their views on the death penalty. This Court found that, although some of the dismissed jurors shared "isolated and discrete similarities" with the seated jurors on other points, "in each case, the prosecutor justified the excusals by

[showing] that he believed the prospective jurors he challenged were dissimilar to those he accepted because members of the former group were at least unlikely – and in some cases would be unwilling – to impose the death penalty." (*Id.* at p. 235.) *Huggins* is thus distinguishable from this case, where despite the supposed dissimilarities identified by respondent, the prosecutor did not rely on any such dissimilar points to justify dismissal.

This Court has accepted the principle that a reviewing court is limited to considering the reasons the prosecutor gave, but appellant acknowledges that it recently announced that it "must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." (*People v. Jones* (2011) 51 Cal.4th 346, 365-366; see also *People v. Lomax*, *supra*, 49 Cal.4th at pp. 573-575 [identifying reasons, apparently not stated by the prosecutor, why he or she may have chosen not to excuse White jurors who shared certain characteristics with excused Black jurors]; *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 902-905 [same].)

Second, respondent asserts that a comparative juror analysis on its own will not be sufficient to overturn a trial court's factual findings. (RB 77-79.) In *Lenix*, this Court stated that "[t]he [United States Supreme C]ourt did not rule that comparative juror analysis, standing alone, would be sufficient to overturn a trial court's factual finding." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 626.) Respondent apparently interprets this statement to mean that comparative juror analysis can *never* suffice to overturn a trial court's factual findings. (RB 78-79.) As appellant pointed out in Section B, *ante*, a close reading of *Lenix* suggests that comparative juror analysis alone may suffice to demonstrate intentional discrimination, at least where the evidence does not reasonably justify a trial court's finding

that the prosecutor's reasons for exercising the peremptory challenge were not impermissibly race-based. (See *People v. Lenix*, *supra*, 44 Cal.4th at pp. 627-628.)

Moreover, appellant finds nothing in either *Miller-El II* or *Snyder* indicating that comparative juror analysis may never suffice to overturn a trial court's factual findings. Rather, in each of those cases, the high court concluded that the totality of factors, including comparative juror analysis, demonstrated that the prosecutor exercised peremptory challenges in violation of *Batson*. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 483-485; *Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 253-265.) Thus, in his opening brief (AOB 106, fn. 33), appellant argued that this Court has interpreted *Miller-El v. Cockrell* (*Miller-El I*) (2003) 537 U.S. 322 and its progeny too narrowly. Although the defense in *Miller-El I* presented evidence of the prosecutor's discriminatory intent other than comparative analysis – e.g., evidence that the prosecutor used peremptory challenges to strike 91% of eligible Black jurors but only 13% of eligible non-Black jurors; the prosecutor used a "jury shuffling" procedure to increase the likelihood that preferable venire members would be empaneled; and, the District Attorney's office had a systematic policy to exclude minority jurors (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 531-535) – the United States Supreme Court has not suggested that such a showing is necessary to establish a *Batson* violation. Indeed, in *Snyder v. Louisiana*, the Supreme Court found a *Batson* violation based upon on nothing more than (1) a comparison of the prosecutor's stated reasons with what the challenged juror actually said, and (2) comparative juror analysis. (*Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-486.)

Respondent points out that this Court has characterized comparative

juror analysis as a form of circumstantial evidence (RB 78, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 627), but does not explain why such evidence, in and of itself, cannot suffice to show discriminatory intent. In a similarly critical context – i.e., the guilt-or-innocence phase of a defendant's trial – circumstantial evidence may suffice to prove any fact. (See *People v. Bean* (1988) 46 Cal.3d 919, 932; *People v. Anderson* (2007) 152 Cal.App.4th 919, 930; CALJIC Nos. 2.00, 2.01 and 2.02; CALCRIM Nos. 223 and 224.) Therefore, appellant submits that, at least under certain circumstances, comparative juror analysis will suffice to show that the prosecutor's stated reasons for exercising a peremptory challenge were pretextual.

1. Prospective Juror L.M.

The prosecutor stated that he excused L.M. for the following reasons: (1) her statement that she was looking forward to sitting on a capital case raised a question as to whether she had a specific reason or agenda; (2) her comment that she was not apprehensive about the case raised a question as to whether she fully understood the gravity of the responsibility; (3) he was skeptical about her claim that she and her daughter had not discussed her daughter's classwork; (4) she recalled an instance when she had expressed her opinion that a death penalty verdict was the wrong decision, but said she never read anything about the death penalty; and, (5) in light of her opinion that the death penalty was wrongly imposed in one instance, he was concerned about her statement that she had no opinion as to whether the death penalty was used too seldom or too often. (2 RT Vol. 13 2684-2688.)[10]

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[10] As respondent notes, defense counsel responded to the prosecutor's stated reasons as to why he excused L.M. by pointing out,

(continued...)

Respondent suggests that, but for the fact that the trial court used an overbroad class that included both Black and Hispanic prospective jurors, it would not have found a prima facie case that L.M. had been excluded on account of race. (RB 80-81 and fn. 36; see also RB 59, fn. 30.) However, as appellant demonstrated in Section C, *ante*, L.M. was a member of a cognizable group, and the defense made a prima facie case that her excusal was race-based.

Respondent further contends that substantial evidence supports the prosecutor's reasons for excusing L.M. and the trial court's determination that the prosecutor's peremptory challenge was race-neutral. (RB 80-92.) Respondent's contention is incorrect. First, respondent suggests that the prosecutor's good faith is indicated by (1) the fact that he passed on the jurors in the jury box at the time appellant used a peremptory challenge on N.J., who was Black; and, (2) the fact that juror G.J., who served on the jury and was on the panel when appellant made his *Batson/Wheeler* motion, was Black. (RB 80-81.) However, it bears pointing out that L.M. was not the only Black juror excused by the prosecutor, in that prospective juror R.M. was both Black and Hispanic. (2 RT Vol. 12 2660.) Moreover, of the 139

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[10](...continued)
among other things, that she said she would follow the law and could vote for the death penalty. (RB 62, citing 2 RT Vol. 13 2714.) Respondent then comments that "[t]he trial court later explained that defense counsel was confused in that just because a juror is not disqualified under *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] does not mean the prosecutor cannot properly use a peremptory challenge to excuse jurors who were reluctant to impose the death penalty." (RB 62, fn. 31, citing (13 RT 2718-2719.) If anything, the trial court misunderstood defense counsel's point, which was that because L.M. was a suitable juror, the prosecutor's reasons for excusing her were pretextual. (2 RT Vol. 13 2712-2715.)

prospective jurors who filled out questionnaires, 86 were excused for cause, for hardship and/or by stipulation. Of the remaining 53, 5 were Hispanic, 3 were Black and 1 was both Black and Hispanic. The prosecutor exercised peremptory challenges to 3 (i.e., 60%) of the eligible Hispanics, 1 (i.e., 33%) of the eligible Blacks, and the lone Black-Hispanic prospective juror, while excusing 15 (i.e., only 29%) of the 52 eligible White jurors.[11] In any event, the prosecutor's willingness to accept one Black juror is insufficient to overcome the strong evidence that he acted with discriminatory intent in striking the five Black and Hispanic jurors. As respondent acknowledges, excluding even a single juror for impermissible reasons requires reversal. (RB 80, fn. 36, citing *People v. Huggins*, *supra*, 38 Cal.4th at p. 227.)

Respondent also dismisses appellant's argument that each of the reasons offered by the prosecutor in support of his peremptory challenge of prospective juror L.M. is either implausible or contradicted by the record. (RB 81-92; see also AOB 107-116.) However, as appellant demonstrates below, respondent's analysis is flawed.

a. The Prosecutor's Suggestion That L.M. May Have Had a Specific Reason or Agenda for Sitting as a Juror

In his opening brief, appellant argued: (1) that nothing in the record supports the prosecutor's claim that L.M.'s statement that she looked forward to sitting on a capital case suggested that she might have a specific

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[11] Twenty-one prospective alternate jurors filled out juror questionnaires, of whom ten were excused for cause, for hardship and/or by stipulation. Of the remaining 11 prospective jurors, 10 were White and 1 was Hispanic; the Hispanic juror was never called to the box, and was excused after the four alternate jurors were selected. (2 RT Vol. 17 3676; Aug./Corr. CT Vol. 13 4123.)

reason or agenda (2 RT Vol. 13 2684-2685); and, (2) the prosecutor's failure to excuse E.C., a White prospective juror who stated that she believed jury service is an experience everyone should have (2 RT Vol. 10 1898-1899), was evidence that the excusal of L.M. was race-based. (AOB 107-109.)

Appellant argued that the prosecutor all but put words in her mouth when he asked whether she was "looking forward to" serving as a juror in a potential capital case. (AOB 108-109.) According to respondent, the prosecutor "did not put words in her mouth – he merely asked her the question." (RB 81.) However, the prosecutor's question ignored her previous response, in which she had explained that she was not "eager" to serve on the jury but was willing to "do [her] civil duty." (2 RT Vol. 3 721.) That is, the prosecutor recast her response, thereby "all but put[ting] words in her mouth." Moreover, her response – "In one respect, I guess, you could say yes" – indicated that she was apprehensive but willing to serve as a juror, not that she looked forward to doing so. (2 RT Vol. 3 721.) Under these circumstances, the record does not support the prosecutor's supposed concern that L.M.'s statement suggested that she might have a specific reason or agenda. (2 RT Vol. 13 2684-2685.)

Respondent also suggests that appellant's interpretations of L.M.'s responses is neither relevant nor helpful, and that the issue is whether the prosecutor excused the juror for race-neutral reasons. (RB 81-82.) However, appellant's "interpretation" is relevant insofar as he demonstrates that the prosecutor's proffered reasons were not supported by L.M.'s actual responses, and that therefore those reasons were not subjectively genuine. (See, e.g., *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 477-486; *People v. Khoa Khac Long*, *supra*, 189 Cal.App.4th at p. 843.)

Respondent next contends incorrectly that appellant's comparative analysis is flawed with respect to L.M. (RB 81-92.) First, respondent states that appellant ignores the fact that, in contrast to the jurors to whom appellant draws comparisons, L.M. stated that she was not a strong proponent of the death penalty, and she had discussed a case where she believed the death penalty should not have been given. According to respondent, "*[a]s none of the other jurors made these two statements*, which are legitimate race-neutral reasons for excusing a prospective juror, his analysis fails at the outset." (RB 81; emphasis added.)

Notwithstanding the fact that respondent ignores L.M.'s responses showing that she would have been a suitable juror,[12] the prosecutor did not rely on L.M.'s statement that she was not a strong proponent of the death penalty (2 RT Vol. 13 2684-2688), so it must be disregarded. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252; *People v. Jones*, *supra*, 51 Cal.4th at p. 365.) Moreover, prospective juror E.C., whose responses appellant compared with L.M.'s statement that she looked forward to serving a juror, was no stronger a proponent of the death penalty than L.M. While E.C. thought she would be capable of following the law and making a decision, she did not "relish the thought." (2 RT Vol. 8 1851; see also 2 RT Vol. 8 1858.) She could not recall ever expressing any opinions for or against the death penalty. (2 RT Vol. 8 1858.) She claimed that she "must have" read

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[12] In particular, L.M. affirmed that: she would not be biased by the charges in the case (2 RT Vol. 2 518); she would be impartial and consider all of the evidence before reaching a decision (2 RT Vol. 5 1030, 1120); she could vote for either life without possibility of parole or the death penalty, depending on what the evidence showed (2 RT Vol. 3 705-708, 713, 720, 726); and, she looked forward to fulfilling her civic duty by serving as a juror (2 RT Vol. 3 721).

about death penalty cases, but could not remember any (2 RT Vol. 8 1858), and she admitted that she did not "follow court situations in the paper much" (2 RT Vol. 8 1859).

Respondent is similarly incorrect in rejecting appellant's comparison of L.M.'s response to E.C's statement that she believed jury service is an experience everyone should have. Respondent asserts that, contrary to L.M., E.C. did not look forward to serving on a capital jury, and was very aware of the enormity of the decision. (RB 82.) However, as appellant notes above, L.M. stated that she was not "eager" to serve as a juror in a potential capital case but was willing to "do [her] civil duty." (2 RT Vol. 3 721.) When asked whether she looked forward to it, she responded merely, "In one respect, I guess, you could say yes." (2 RT Vol. 3 721.) Finally, L.M. plainly grasped the gravity of the matter, acknowledging that this was a "severe" case. She then elaborated on that response as follows:

> [Prosecutor]: Did it kind of concern you? Did you think, "Boy, this is pretty serious business," or "I never thought I would be involved in something like that?"
>
> [L.M.]: Well, that thought had crossed my mind. I didn't figure, you know, it would be a case like – that I would be involved in a trial like that.

(2 RT Vol. 3 711.) Thus, a fair reading of the record discloses that any differences between L.M.'s responses and those of E.C. were semantical, not substantive.

b. The Prosecutor's Suggestion That There Was a Question as to Whether L.M. Fully Understood the Gravity of the Matter

In his opening brief, appellant argued that the record undermines the

prosecutor's claim that he also excused L.M. because her comment that she was not apprehensive about the case raised a question as to whether she fully understood the gravity of the responsibility (2 RT Vol. 13 2685). In so arguing, appellant noted that the prosecutor failed to excuse a number of White prospective jurors – including four who ultimately sat on appellant's jury and one of the alternate jurors – who, like L.M., were unfamiliar with the execution of Robert Alton Harris and/or had not previously considered the issue of capital punishment in any depth. (AOB 110-113.)

According to respondent, L.M.'s statement that this was a "severe" case does not necessarily mean that she understood the enormity of the decision facing a juror, and that a contrary inference could reasonably be drawn from the statement. (RB 84.) However, as appellant demonstrated in the previous section, L.M. plainly grasped the magnitude of the responsibility facing a capital juror. (See also AOB 110.) Moreover, L.M. explained that she initially assumed that the case would be a civil matter lasting two or three days, not a "trial like that," i.e., a potential capital trial. (2 RT Vol. 3 711.) Although respondent asserts that a contrary inference could reasonably be drawn from her statement that this was a "severe" case (RB 84), respondent fails to explain why that is so.

According to respondent, appellant is also incorrect in arguing that the prosecutor's assertion that L.M. may have failed to recognize the gravity of the responsibility (2 RT Vol. 13 2685), as well as the factors cited by the trial court in accepting that argument (2 RT Vol. 13 2724-2726), must be rejected when compared to responses given by similarly situated White prospective jurors who were not excused by the prosecutor. (RB 84-91; see also AOB 110-113.) Specifically, as appellant noted (AOB 111), the trial court pointed to L.M.'s statement that she had never had to make any

decision dealing with life or death (2 RT Vol. 13 2724), yet the prosecutor failed to excuse three White prospective jurors (i.e., E.B., T.B. and J.R.) who acknowledged that they had never had to make any decisions concerning the welfare, health or life of another (2 RT Vol. 4 965; 2 RT Vol. 6 1264; 2 RT Vol. 14 3098).[13]

This Court must disregard any reasons cited by the trial court in support of the prosecutor's peremptory challenge which the prosecutor himself never adopted or expressed agreement. In particular, the trial court upheld the prosecutor's excusal of L.M. in part because she had never had to make any decision dealing with life or death, and because she stated that she did not remember the Robert Alton Harris case, in which Harris had been executed the previous year (2 RT Vol. 13 2724-2725). The prosecutor neither cited nor adopted those reasons (see 2 RT Vol. 13 2684-2688, 2724-2736). (Cf. *People v. Booker* (2011) 51 Cal.4th 141, 166 [rejecting the defendant's contention that this Court could not rely on the trial court's "speculations" about the prosecutor's possible reasons for challenging prospective juror where the prosecutor expressly adopted the trial court's reasons, and his additional observations supplemented those of the trial

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[13] T.B. and J.R. were later seated on the jury. (2 CT Vol. 4 1214.) The prosecutor also did not exercise a peremptory challenge against the following White prospective jurors: C.A., who stated that she had never had to deal with a life or death situation in which she had to decide whether another person should continue with medication or treatment that jeopardized his or her life (2 RT Vol. 6 1243); A.B., who stated that she had never been in a position where she had to participate in a decision regarding a person's life or serious health matter (2 RT Vol. 17 3535); and, M.W., who stated that he had never had to make a decision involving life or death (2 RT Vol. 16 3391). M.W. was later selected to be an alternate juror. (2 CT Vol. 4 1227.)

court.].)

In any event, respondent is incorrect in contending that L.M. was not similarly situated with E.B., T.B. and J.R. (RB 84.) For instance, respondent observes that, unlike L.M., none of those jurors had children who took psychology classes, stated that they would look forward to sitting on a capital case, or had an opinion that someone had wrongly been given a death sentence. (RB 84 and 85, fn. 38.) However, appellant is not required to compare identically situated jurors. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6; *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3.)

Respondent is also incorrect in contending that the trial court, like the prosecutor, could have believed L.M. was not being forthright in stating that she did not recall the Harris case, in the hope that she would not give a reason to be excused from the jury. (RB 85.) As noted above, however, the record simply does not support the prosecutor's supposed concern that she may have had a reason or agenda for sitting on the jury.

Moreover, respondent's reliance upon *People v. Lenix*, *supra*, 44 Cal.4th 602 is misplaced. (RB 85.) There, the prosecutor excused juror C.A. in part based on her reaction to receiving a traffic ticket. When the prosecutor asked whether any of the prospective jurors ever had a "hostile, confrontational, [or] adverse" contact with law enforcement, C.A. was the lone juror who raised her hand. In response to the prosecutor's question as to whether C.A. felt the officer was impolite, C.A. said, "Well, no one ever feels they deserve a ticket." She replied "yeah" when the prosecutor asked whether C.A. felt the officer "was shading the truth a little bit." When asked whether she felt she deserved the ticket, C.A. said, "I didn't know if I deserved [the ticket] or not, so I just went along with it." This Court concluded that C.A.'s answers could be fairly characterized as equivocal,

supporting the prosecution's inference that C.A. was not completely forthcoming about the incident and may have harbored some resentment. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 628.)

Here, the trial court concluded that "[the prosecutor's] reservations about [L.M.] on the death penalty are justified in light of her seeming lack of involvement in having given any thought about this issue in the past, which I find very hard to believe, especially after she had been called to the jury box and heard some of the earlier voir dire of the other prospective jurors." (2 RT Vol. 13 2726.) However, there is absolutely no connection between what L.M. had heard from other jurors and whether she had considered the death penalty in the past. Indeed, the trial court simply decided that L.M. was not being truthful in stating that she had not previously considered the death penalty issue and that she had not heard about Harris's execution. (2 RT Vol. 13 2725-2726). It stated no specific reasons for its skepticism (such as a reference to her demeanor) other than the fact that L.M. lived in California around the time of the Harris execution, simply presuming that "[a]nyone living in California at that time" would have been familiar with the case. (2 RT Vol. 13 2724-2725.)

Respondent is also incorrect in dismissing appellant's comparison of L.M.'s responses to those of White prospective jurors – including prospective jurors G.P., J.R., S.M. and R.D., each of whom ultimately sat on appellant's jury (2 CT Vol. 4 1214) – who, like L.M., were unfamiliar with the execution of Robert Alton Harris and/or had not previously considered the issue of capital punishment in any depth, but who were not excused by the prosecutor. According to respondent, the comparisons fail because none of those jurors had a child taking psychology classes, stated that they would look forward to sitting on a capital case, or had an opinion

that someone had wrongly been given a death sentence. (RB 86.) In so contending, respondent again takes the incorrect position that jurors must be identical to engage in a proper comparison. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6; *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3.)

Respondent's attempt to distinguish the jurors from L.M. – specifically, its attempt to show that, unlike L.M., G.P., J.R., S.M. and R.D. realized the gravity of the responsibility of being a juror on a capital case (RB 86-88) – also fails. Appellant amply demonstrated above that L.M. did in fact recognize the gravity of the situation. That she phrased the point differently than other jurors should not be used to penalize appellant. Moreover, respondent's claim that S.M.'s belief that psychiatry and psychology are inexact sciences made her an appealing juror to the prosecutor is unsupported by the record. (RB 87.) Even assuming the prosecutor was genuinely concerned about prospective jurors with too much experience in the field of mental health (see 2 RT Vol. 13 2693-2696 [prosecutor's explanation for excusing prospective juror A.M.-F., who had studied psychology]), that does not mean he wanted jurors who doubted altogether the value of mental health expert testimony. Similarly, while R.D. stated that he considered himself a strong advocate for the death penalty and had long believed that if somebody took a life, he or she should give their life (RB 87-88), it should be noted that L.M. affirmed that she could vote for either life without possibility of parole or the death penalty, depending on what the evidence showed (2 RT Vol. 3 705-708, 713, 720, 726).

In addition, respondent unsuccessfully attempts to distinguish prospective jurors M.B., E.C. K.T., T.S., and C.F., on the ground that,

unlike L.M., they had given thought to the issue of the death penalty. (RB 88-90.) Respondent again takes the incorrect position that jurors must be identical to engage in a proper comparison. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6; *United States v. Collins*, *supra*, 551 F.3d at p. 922, fn. 3.) Although prospective juror M.B.'s responses were somewhat ambiguous, he seemed to have decided that he could vote for the death penalty while seated as a juror in the instant case,[14] not, as respondent suggests, during his previous jury service, four years earlier. (RB 89, citing 2 RT Vol. 17 3611-3612.) In any event, he stated that he had not thought about the death penalty since his previous jury service, when he was excused by peremptory challenge after expressing reluctance that he could vote to impose the death penalty. (2 RT Vol. 17 3611-3612, 3614-3615.)[15] Moreover, although M.B. stated that he had a "prejudice regarding the criminally insane who are released too early and commit another crime," he

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[14] When asked whether he had expressed reluctance to deal with the death penalty during his previous jury service, M.B. responded,

> Yes. I wasn't sure, morally, where I stood on it. I just – you know, until you come to grips with it, you don't always make these decisions. *But here*, I discovered I was going to have to possibly decide between death or not death, and I discovered that yes, I could make that decision.

(2 RT Vol. 17 3612; emphasis added.)

[15] As respondent points out, appellant mistakenly indicated that M.B. was an alternate juror. (RB 88, citing AOB 113.) Nevertheless, contrary to respondent's position (RB 88), M.B. is a proper subject of comparison with L.M. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 902, fn. 12 ["[t]he reviewing court need only consider responses by stricken panelists or seated jurors identified by the defendant in the claim of disparate treatment. [Citation.]"].)

acknowledged it was just that, "merely a prejudice on [his] part." (2 RT Vol. 17 3609.) Such a prejudice does not amount to informed or serious thought about the issue. Contrary to respondent's position (RB 89), this was hardly "far different" than L.M.

Respondent contends that E.C. was aware of cases involving the death penalty, and had an opinion about the death penalty. (RB 89-90.) However, her responses show a lack of serious thought about the issue. In particular, she stated,

> Frankly, I never gave [the death penalty] too much thought but perhaps when I was younger. I don't give it as much thought when you get older. You think about things a little bit more. I would say there are cases where the death penalty probably belongs.

Her answer seemed to suggest that, *if* she thought about the death penalty at all, it was when she was younger. Moreover, she stated that she must have read about cases involving the death penalty but could think of any off the top of her head. (2 RT Vol. 8 1856.) She did not "follow court situations in the paper much." Finally, she would usually hear the beginning of cases that were in the newspaper but would not follow up because she would get over-saturated. (2 RT Vol. 8 1859.)

Prospective juror K.T. could not recall any recent cases in which the death penalty had been imposed. (2 RT Vol. 8 1775.) Although she had heard about the case when Nadia first disappeared, she had heard nothing more about it since. (2 RT Vol. 7 1751.) In any event, respondent fails to explain how her exposure to the initial media coverage of this case demonstrated that she had an opinion about, or had given serious consideration to, the death penalty.

Prospective juror T.S. believed that the death penalty was

"necessary" in some cases, i.e., "when it is really a brutal-type case or something of that nature." (2 RT Vol. 8 1930-1931.) When asked whether he had ever expressed an opinion about the death penalty, T.S. explained that "[o]n certain crimes I have got into with friends that I hear that on the news that they talk about, and I state my opinion on that just as far as conversation in between friends." He also recalled hearing about a case on the East Coast in which the death penalty had been imposed, perhaps the Ted Bundy case, but could not "recall the nature of the case or anything." (2 RT Vol. 8 1938.) He also stated that he did not watch the news much because he worked on the second shift; he was not asked to explain why he could not watch the news at other times of the day, but he did offer that he did not read the newspaper except the sports section. (2 RT Vol. 8 1932-1933.) As such, T.S.'s responses were similar to those of L.M.

Prospective juror C.F. stated that he had given a lot of thought to the responsibility of being a juror in a capital case during the last couple of weeks. (2 RT Vol. 8 1781-1782.) However, it is apparent that he had not given the matter much thought previously. For instance, he was aware of an execution in California in 1992, but could not remember anything about the case. (2 RT Vol. 7 1789.)

As demonstrated above, then, each of these jurors was similarly situated to L.M. within the meaning of *Miller-El* and its progeny.

c. The Prosecutor's Statement That He Was Skeptical about L.M.'s Claim That She and Her Daughter Had Not Discussed Her Daughter's Classwork

The prosecutor stated that he also excused L.M. because he was skeptical about her claim that she and her daughter had not discussed her

daughter's classwork. (2 RT Vol. 13 2686-2687.) In his opening brief, appellant argued that the prosecutor's skepticism was absurd, in that it is entirely conceivable that a parent and her adult child would not discuss the specific details of the child's studies. Moreover, the prosecutor did not excuse a number of White prospective jurors, including seven who were later seated as jurors or alternate jurors, who acknowledged that they had friends or loved ones with whom they did not discuss their work. (AOB 109-110.)

Respondent argues that given the prosecutor's clear pattern of excusing any potential juror with background in psychology, it is not absurd that he would be skeptical of L.M.'s statement that she did not discuss her daughter's classwork, especially when coupled with his feeling she wanted to be on the jury. Respondent further contends that, even accepting appellant's argument that it is "conceivable" that L.M. did not discuss her daughter's classwork with her (AOB 109), it does not translate into an improper reason for excusing her. (RB 83.)

However, the prosecutor's apparent attempt to suggest that L.M. was not forthright in this regard does not withstand scrutiny. For instance, the prosecutor stated

> She also indicated on page 710 that she never discussed . . . her daughter's classwork with her. And her answers during the process indicated that it was her only daughter and that she was living at home and that she had recently gone back to college and that when the court[] inquired of her whether or not her daughter was seeking a degree in psychology she answered on page 660, "Not from what she has told me."
>
> That indicated to me she had spoken to her daughter about her degree plans, about her current educational

> situation. That is at 660; yet on [page] 710 she says she has never discussed the course work with her daughter.
>
> Now, I don't know all of the facts and circumstances but I believe I have enough life experience to justify skepticism about a woman who has a college-age daughter living with her, who is her only daughter, who knows that she is going to school, who has some knowledge about her career plans but never talks to her about her classwork. That may have been an oversight.

(2 RT Vol. 13 2686-2687.) Despite the prosecutor's implication to the contrary, there is simply no conflict between (1) L.M.'s statement that, to her knowledge, her daughter was not seeking a degree in psychology, and (2) her statement that she did not discuss her daughter's classwork. It stands to reason that L.M. would have at least a general sense of her daughter's career plans[16] yet not discuss the specifics of her classwork.

Moreover, L.M. made clear that, although she believed that fields such as psychology and psychiatry are necessary,

> it has never been anything that I have ever, you know, thought about. Those that would enjoy exploring that type of field and learning, you know, it is fine. But it never has meant anything to me.

(2 RT Vol. 5 1037-1038.) She affirmed that she had never come across the area of psychiatry or psychology at work or in her leisure reading. (2 RT Vol. 5 1063-1064.)

Even if the prosecutor genuinely suspected that L.M. discussed her daughter's psychology courses, there was no reason to believe that she was

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[16] L.M. explained that her daughter was taking psychology course in connection with her work. (2 RT Vol. 3 660.)

therefore more likely to accept the expert testimony or to "educate" her fellow jurors regarding mental health issues. (See 2 RT Vol. 13 2693-2696 [prosecutor's explanation for excusing prospective juror A.-M.-F., who had studied psychology].) In addition, the prosecutor's failure to excuse White prospective jurors who claimed that they had friends or loved ones with whom they did not discuss their work constitutes evidence that the excusal was race-based. (See *Snyder v. Louisana*, *supra*, 552 U.S. at p. 485; see also *People v. Jones*, *supra*, 51 Cal.4th at p. 382 (dis. opn. of Werdegar, J.).)

Respondent erroneously contends that the comparisons appellant makes to other jurors – namely, C.S., G.P., A.S., M.H., M.W., and M.B.,[17] who stated that they had friends or loved ones in the legal field with whom they did not discuss their work – miss the mark because those jurors are not similarly situated.[18] According to respondent, appellant misses the point that L.M.'s daughter was taking classes in psychology, a subject the prosecutor was concerned about. (RB 83.) However, the prosecutor's stated concern was that he was "skeptical" that she never talked to her daughter about her classwork when her daughter lived with her, she was L.M.'s only daughter, and L.M. had some knowledge of her career plans. (2 RT Vol. 12 2687.)[19] In other words, his supposed concern was L.M.'s

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[17] Like G.P., C.S. and A.S. were seated on the jury. Like M.W., M.H. was selected as an alternate juror. (2 CT Vol. 4 1214, 1227.)

[18] In his opening brief, appellant inadvertently included a comparison to a Black prospective juror G.J. (AOB 110.) Even after removing him from the analysis, appellant's argument still stands.

[19] Questions 16 through 25 of the juror questionnaire asked whether (continued...)

trustworthiness, not the fact that her daughter studied psychology.

Despite this supposed concern, the prosecutor did not excuse White prospective jurors who knew people in fields such as law and law enforcement and questionably claimed not to speak to such people about their work. For instance, during voir dire, C.S. disclosed to the court that she knew a judge, but was not asked anything further about the matter at that time. (2 RT Vol. 13 2781.) The following day, she explained that she knew "one judge," Judge Robert Kneeland (2 RT Vol. 13 2818), and that they had been good friends for at least 40 years (2 RT Vol. 13 2819). Later that day, she submitted a note stating that she had known Judge Claude Owens and his wife for many years, "as friends – but not close." (2 CT Vol. 4 1207.) The following day, the court noted that Judge Owens, who had since retired, had formerly been the presiding judge of that court. C.S. then explained that she knew Judge Owens from church. (2 RT Vol. 14 3031.) She had not mentioned knowing either judge in her questionnaire. (Aug./Corr. CT Vol. 12 3912-3920.) Tellingly, the prosecutor did not excuse C.S. or even ask her to explain the belated disclosures of her friendships with Judge Kneeland and Judge Owens.

In addition to the prospective jurors listed above, the prosecutor did not excuse the following White prospective jurors who stated that they had friends or loved ones with whom they did not discuss their work, and who were therefore also similarly situated to L.M.: D.B., whose friend was a

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[19](...continued)
the juror was, or knew anyone who was, connected with law enforcement, prosecution or corrections. Question 26 asked whether the juror knew any judges, district attorneys, public defenders or other lawyers practicing criminal defense, or investigators. These matters were obviously important to the case, and therefore important to the prosecutor.

deputy sheriff whom he saw about twice a year (2 RT Vol. 10 2256-2257, 2263, 2282; Aug./Corr. CT Vol. 10 3024);[20] C.F, whose friend was a police officer, though he did not see him very frequently (2 RT Vol. 7 1763; 2 RT Vol. 8 1917-1919; Aug./Corr. CT Vol. 10 3270); T.L., whose former boss now worked as police officer (2 RT Vol. 8 1821, 1879, 1902; Aug./Corr. CT Vol. 11 3540); and, prospective alternate juror A.B., who knew Judge Claude Owens through church (2 RT Vol. 17 3515-3516; Aug./Corr. CT Vol 13 4104).

Even more striking was the prosecutor's failure to exercise a peremptory challenge against T.S., who stated that his friend and former neighbor was a police officer for the Hawthorne Police Department. Although T.S. had accompanied his friend on a couple of "ride-alongs" the previous year,[21] they went to the shooting range together, and he had wanted to be a police officer at one point, the prosecutor apparently accepted T.S.'s claim that he did not talk to his friend about his work. (2 RT Vol. 8 1924-1925, 1935, 1942, 1951-1952; Aug./Corr. CT Vol. 12 3875.)

Finally, this Court must reject respondent's contention that the comparisons fail because they do not involve the juror's child or someone with whom the juror lived. (RB 83.) In so contending, respondent again takes the incorrect position that jurors must be identical to engage in a proper comparison. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6;

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[20] The prosecutor accepted the jury as constituted when D.B. was in the jury panel, and therefore it may be presumed that he would not have excused him. (2 RT Vol. 10 2290.)

[21] During one of the "ride-alongs," the police apprehended a man who was firing a gun into the air; on other occasions, the police took reports regarding a car theft and a burglary. (2 RT Vol. 8 1924-1925, 1935, 1942-1944, 1951-1952.)

United States v. Collins, *supra*, 551 F.3d at p. 922, fn. 3.)

d. The Prosecutor's Statement That L.M. Recalled Expressing an Opinion That a Death Penalty Verdict Was Wrongly Decided, but Also Said She Never Read Anything about the Death Penalty

The prosecutor's fourth stated reason for excusing L.M. was that she recalled expressing an opinion that a death penalty verdict imposed in some case was the wrong decision, but she said that she never read anything about the death penalty. (2 RT Vol. 13 2687-2688.) In his opening brief, appellant pointed out that her statements were not inconsistent, and therefore they raised no questions about her credibility. (AOB 113-114.)

Respondent contends that the prosecutor did not opine that L.M.'s statements were inconsistent or that she was not credible on that point. Instead, respondent contends, the prosecutor stated these as two *separate* reasons, and suggests that it is appellant himself who implies that the prosecutor drew the conclusion that L.M. contradicted herself and was not credible. (RB 91.)

Contrary to respondent's position, the prosecutor discussed the two statements in relation to one another, not as two separate points:

> And then on page 717 of the transcript, in response to a question about whether or not she had ever taken a position with respect to the death penalty, she indicated that she did recall an instance where she had apparently spoken with friends about the death penalty and had taken the position that it was the wrong decision. It should not have been made.
>
> *When I asked her whether or not she had ever read anything about the death penalty, on page 722 she said she never read anything about it. She does not recall what the specifics of the case were wherein she took that position.* But

> apparently she did remember she had taken that position at one time.

(2 RT Vol. 13 2687; emphasis added.) Appellant submits that the prosecutor juxtaposed the statements in this fashion to suggest indirectly that her statements were inconsistent. Yet, as appellant pointed out in his opening brief (AOB 114), there simply was no contradiction between L.M.'s statement that she expressed her opinion in the course of a discussion and her statement that she had not read anything regarding the death penalty.

Indeed, respondent itself concedes that the prosecutor did "tie together" L.M.'s statements that she had no opinion regarding whether the death penalty was imposed too seldom or too often to her statement that she believed the death penalty was wrongly imposed on one occasion. (RB 91.) As appellant argues below, the prosecutor's reasoning on that point was equally suspect.

e. The Prosecutor's Statement That, in Light of L.M.'s Opinion That the Death Penalty Was Wrongly Imposed in One Instance, He Was Concerned about Her Statement That She Had No Opinion as to Whether the Death Penalty Was Used Too Seldom or Too Often

Finally, the prosecutor stated that he excused L.M. because, in light of her opinion that the death penalty was wrongly imposed in one instance, he was concerned about her statement that she had no opinion as to whether the death penalty was used too seldom or too often. (2 RT Vol. 13 2688.) In his opening brief, appellant argued that: (1) the prosecutor's stated reason was "feeble," in that L.M.'s lack of an opinion with respect to the frequency of executions was consistent with her having never read anything

about the death penalty; (2) the prosecutor failed to excuse prospective jurors who, like L.M., had never had to make a life or death decision or who were unfamiliar with capital cases in California; and, (3) there is nothing in L.M.'s voir dire or questionnaire that suggests that she would not impose the death penalty where appropriate. (AOB 114-116.)

According to respondent, the prosecutor's reasoning was not "feeble" because it showed that L.M. thought the death penalty was given too often – at least one time too often. Thus, her answers showed a lack of logic or a lack of candor, either of which is a justifiable reason to exercise a challenge. (RB 91.) However, even if L.M. believed that the death penalty had been wrongly imposed in a single case, she may have believed there were instances in which the death penalty should have been given but was not. In any event, "common sense and logic" would suggest that she understood the prosecutor to be asking whether she believed the death penalty was imposed too often or too seldom *in general*. (See Webster's Third New International Dictionary (2002) p. 1568 [defining "often" as "on many occasions: not seldom: frequently"]; cf. RB 91 [arguing that "common sense and logic dictate that if someone believes a person is wrongly given the death penalty, it is given too often – at least one time too often"].)

Respondent is also incorrect in challenging appellant's comparative juror analysis. (RB 91-92.) Respondent notes that the trial court concluded that the prosecutor was credible, and that he did not use any of his peremptory challenges to exclude members of a racial group. (RB 91-92, citing 2 RT Vol. 13 2734-2736.) However, appellant submits that the trial court's conclusions are entitled to little if any weight. First, the trial court's statement that it was unaware of any instance in which the prosecutor had

deliberately misled it about a matter of importance. (2 RT Vol. 13 2734.) However, the defense did not raise any issues bearing on the prosecutor's credibility, such as a *Batson/Wheeler* argument, during appellant's first trial or during the terminated voir dire which followed the first mistrial; therefore, the trial court had not been required to scrutinize the prosecutor's credibility, at least not to the extent required under *Batson/Wheeler*. Thus, respondent's reliance upon *People v. Stevens* (2007) 41 Cal.4th 182, 198, regarding the evidentiary value of a trial court's evaluation of the prosecutor's demeanor and credibility, is misplaced. (RB 92.)

Second, the trial court surmised that it was unlikely the prosecutor was concerned about minority jurors unduly identifying with the defendant since the victim was also Hispanic. (2 RT Vol. 13 2734-2735.) However, the prosecutor may have had other improper, race-based for excusing Black and Hispanic jurors. For instance, he may have believed that Black and Hispanic jurors were more likely than White jurors to distrust police officers and/or prosecutors, notwithstanding the victim's ethnicity. (See, e.g., *Batson v. Kentucky*, *supra*, 476 U.S. at p. 89 [a prosecutor may not challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant].)

Moreover, while respondent correctly notes that excusing a juror because she is not a strong advocate of the death penalty is race-neutral (RB 92, citing *People v. Davis*, *supra*, 46 Cal.4th at p. 584, *People v. Ledesma* (2006) 39 Cal.4th 641, 678, and *People v. Panah* (2005) 35 Cal.4th 395, 441), that was not one of the prosecutor's stated reasons for excusing L.M., and therefore it must be disregarded. (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252; *People v. Jones*, *supra*, 51 Cal.4th at pp. 365-366.)

f. The Prosecutor's Reasons for Excusing L.M., and the Trial Court's Determination That Those Reasons Were Race-neutral, Were Not Supported by Substantial Evidence

For the reasons stated above and in appellant's opening brief, respondent is incorrect in asserting that substantial evidence supports the prosecutor's reasons for excusing L.M. and the trial court's determination that the peremptory challenge was race-neutral. (RB 79, 92.) Accordingly, deference to the trial court's findings are not required. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

2. Prospective Juror E.V.

The prosecutor stated that he excused prospective juror E.V. because: (1) he lacked sufficiently broad life experience, work history and/or education to make a suitable juror, e.g., to critically analyze the mental health testimony to be presented by the defense; (2) he appeared to be somewhat deferential and very easily could be overwhelmed by the mental health evidence; and, (3) he stated that he did not believe that some crimes are so serious that the offender has forfeited his right to live in society. (2 RT Vol. 13 2689-2692.)

Respondent contends that the prosecutor's stated reasons for excusing E.V. were supported by the record. In particular, respondent contends that the prosecutor excused E.V. for a race-neutral reason, i.e., that E.V. did not have a broad life experience. (RB 93.) Respondent also contends that what it calls "appellant's attempt at comparative analysis fails

because the jurors to whom he compares E.V. are not similar." (RB 94.)[22] Respondent's contentions are incorrect.

First, as appellant has noted (AOB 116), E.V.'s life experience was relatively broad, and certainly broad enough that he would have been a suitable juror. E.V. was a father, a husband, and had a job; he had attended one year of college, where he had majored in art; and, his hobbies were art and cars. (Aug./Corr. CT Vol. 12 40424-4044.)

Second, a close review of the record reveals that respondent's challenge to appellant's comparative juror analysis fails. As respondent points out, juror R.D. was, among other things, 40 years older than E.V., a widower, had served in the army, and had had supervisory duties in his job as a produce manager. (RB 94.) Nevertheless, he lacked sufficiently broad life experience, particularly insofar as the prosecutor claimed that he wanted jurors who could "critically analyze and evaluate and independently make judgments with respect to" mental health testimony. (2 RT Vol. 13 2691 [prosecutor's explanation for excusing E.V.].) As appellant noted in his opening brief (AOB 117), R.D. had attended two years of high school and had studied real estate at a college; he did not belong to any clubs or organizations or do any volunteer work; he watched television almost every evening, and did not read books for pleasure; and, he had never studied

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[22] In support of its contention that the prosecutor did not excuse any Hispanic jurors based on their race, respondent observes that one of the seated jurors was Hispanic and that appellant excused two Hispanic prospective jurors. (RB 93.) However, "'the fact that the jury included members of a group allegedly discriminated against is not conclusive . . . .' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 203.) Moreover, this Court has recognized that the propriety of the prosecutor's peremptory challenges must be determined without regard to defense counsel's exercise of peremptory challenges. (*People v. Snow* (1987) 44 Cal.3d 216, 225.)

psychology or psychiatry. (Aug./Corr. Vol. 10 3192-3194, 3197-3198.)

Similarly, contrary to respondent's assertion (RB 95), prospective juror T.S.'s life experience was not significantly broader than that of E.V. T.S. was a factory worker, did no volunteer work, was not a church member, and belonged to no clubs or organizations. (Aug./Corr. CT Vol. 12 3872, 3874.) He had not attended college and had never studied psychology or psychiatry. (Aug./Corr. CT Vol. 12 3873, 3878.) His hobbies were weightlifting, bike riding, and handgun shooting, and his favorite "books" were the magazines *Guns and Ammo*, *Bikes*, and *Hot Rod*. (Aug./Corr. CT Vol. 12 3874, 3877.) Although he had thought about becoming a police officer, he never actually pursued that line of work. (2 RT Vol. 8 1924-1925, 1932, 1935.)[23]

Moreover, in his opening brief, appellant noted that the prosecutor did not comment on T.S.'s preferred reading material (i.e., the magazines *Guns and Ammo*, *Bikes*, and *Hot Rod*), whereas he noted that E.V. read *Hot VW*. (AOB 117, fn. 40.) According to respondent, there was no comparative analysis done in the trial court, so there would be no reason for the prosecutor to remark on an excused juror. (RB 95, fn. 43.) Yet, if the prosecutor was truly concerned about a juror's ability to properly consider mental health testimony, as he stated in explaining his excusal of E.V. (2 RT Vol. 13 2689-2692), it stands to reason that he would have excused T.S. as well, or at least questioned him further with respect to this area of purported concern.

Similarly, the prosecutor's failure to excuse prospective juror C.B. is

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[23] Respondent states that T.S. had accompanied his friend, a police officer, on "a few" ride-alongs. (RB 95.) In fact, he had only gone on two ride-alongs. (2 RT Vol. 8 1925, 1944.)

evidence that the prosecutor's excusal of E.V. was pretextual. As appellant has pointed out (AOB 117), C.B. was a retired department store manager and buyer; he had earlier worked as a grocery clerk and a drug store clerk; and, he did not read books for pleasure. (Aug./Corr. Vol. 10 3062-3063, 3067.) Moreover, C.B. had never studied psychology or psychiatry. (Aug./Corr. Vol. 10 3068.)

In upholding the prosecutor's excusal of E.V., the trial court noted that E.V. had misspelled several words in *his* questionnaire. (2 RT Vol. 13 2726-2728.) That was not one of the prosecutor's stated reasons for excusing E.V., nor did the prosecutor adopt that reason (see 2 RT Vol. 13 2726-2736), and therefore it must be disregarded. (*Miller-El v. Dretke*, *supra,* 545 U.S. at p. 252; *People v. Jones*, *supra*, 51 Cal.4th at pp. 365-366; cf. *People v. Booker*, *supra*, 51 Cal.4th at p. 166.) In any event, C.B. also misspelled several words in his questionnaire (Aug./Corr. CT Vol. 10 3062, 3063, 3066), but the prosecutor did not exercise a peremptory challenge against him. Under these circumstances, if the prosecutor was truly concerned about a juror's ability to consider complex mental health testimony, he would have excused C.B.

The prosecutor also stated that he excused E.V. because "he had been involved . . . in work and family responsibilities since a relatively young age, about 20 years old." (2 RT Vol. 13 2689.) However, prospective juror N.W., who was 37 years old, had been a mother since she was approximately 21 years old. (Aug./Corr. CT Vol. 12 4059, 4061.) She had finished high school but had not attended college or vocational school. (Aug./Corr. CT Vol. 12 4060.) She did not belong to any organizations or do volunteer work, nor did she read books for pleasure. (Aug./Corr. Vol. 12 4061, 4064.) Although she worked, read the newspaper, and was hardly

ever home because of her daughters' participation in softball (2 RT Vol. 5 1031; Aug./Corr. Vol. 12 4059-4060, 4064), this did not translate into life experience significantly more broad than E.V.'s.

Respondent is similarly mistaken in contending that prospective juror C.A.'s life experience was not comparable to E.V.'s. (RB 97-98.) Like E.V., C.A. began a family at a young age – in her case, when she was approximately 22 years old. (Aug./Corr. CT Vol. 10 2966, 2968.) As appellant noted in his opening brief (AOB 118), C.A. was a homemaker who had last worked 17 years earlier as a dental assistant; she was a member of a church, but belonged to no clubs or other organizations; her favorite books were *Hunt for Red October*, *The Firm* and *The Rising Sun*; and, she had never studied psychology or psychiatry. (Aug./Corr. Vol. 10 2966-2968, 2971-2972.)

As respondent notes, C.A. indicated in her questionnaire that her brother, two nephews, and a niece were all police officers. (RB 97, citing Aug./Corr. CT Vol. 10 2969.)[24] However, nothing C.A. stated in her questionnaire or on voir dire suggested that that fact had any real bearing on her *own* life experience. Although C.A. agreed that she "[had] had quite a bit of exposure [to police officers] in the family" (2 RT Vol. 6 1331), it appears she was referring simply to the number of police officers in her family, not to any familiarity with their work.

Respondent further contends that appellant's comparison of E.V. and

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[24] During voir dire, C.A. explained that her brother no longer worked as a police officer. Oddly, she also stated that three of her nephews, not two nephews and a niece, were police officers. (2 RT Vol. 6 1330-1332.) She was not asked to explain why she had responded differently in her questionnaire.

prospective juror S.S. is of no evidentiary value. (RB 98.) However, the fact that the prosecutor excused two prospective jurors before the defense excused S.S. (2 RT Vol. 6 1369-1370) has at least some relevance to show that the prosecutor's excusal of E.V. was pretextual. As appellant noted (AOB 118), S.S. was an electrical technician who had graduated from high school but had not attended college or vocational school; apparently did not belong to any church member, clubs or organizations, had no hobbies, and did no volunteer work; watched television almost every evening; and, had never studied psychology or psychiatry. (Aug./Corr. CT Vol. 12 3904-3906, 3908, 3910.) Moreover, like E.V., S.S. began a family at a relatively young age, i.e., when he was approximately 24 years old. (Aug./Corr. CT Vol. 12 3904, 3906.) Thus, contrary to respondent's position (RB 98), S.S.'s life experience was not broader than E.V.'s.

Finally, respondent attempts to distinguish *People v. Snow*, *supra*, 44 Cal.3d 216, cited by appellant in support of his argument that E.V. was "excused after giving routine, acceptable responses" to questions during voir dire, an indication of discriminatory use of peremptory challenges by the prosecution (AOB 118). Specifically, respondent contends that, in contrast to the instant case, the prosecutor in *Snow* failed to give any reasons for excusing the challenged prospective jurors, and the trial court expressed serious concerns that the prosecutor was exercising peremptory challenges against Black jurors for impermissible, race-based reasons. (RB 99, citing *People v. Snow*, *supra*, 44 Cal.3d at p. 226.)[25]

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[25] To be precise, the trial court in *Snow* "inexplicably declined" to require the prosecutor to explain his reasons for excusing the jurors even though it seemed to recognize that defense counsel had adequately

(continued...)

However, the mere fact that the trial court in this case, unlike the trial court in *Snow*, required the prosecutor in this case to state reasons for his peremptory challenges is not dispositive. The very point of *Wheeler*, *Batson* and their progeny is to bar the use of peremptory challenges to excuse otherwise acceptable prospective jurors for race-based reasons. (See, e.g., *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 263.) Upon a comparison with the responses of similarly situated White jurors who were not excused by the prosecutor, it cannot be said that the prosecutor gave race-neutral, credible reasons for excusing E.V.

Under these circumstances, respondent is incorrect in asserting that substantial evidence supports the prosecutor's reasons for excusing E.V. and the trial court's determination that the peremptory challenge was race-neutral. (RB 99.) Accordingly, deference to the trial court's findings are not required. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

3. Prospective Juror A.M.-F.

The prosecutor stated that he excused prospective juror A.M.-F. because: (1) as a psychology major, he had taken approximately 25 psychology courses; (2) he had taken a post-graduate course in psychology and was considering getting a master's degree in psychology; (3) he had taken classes regarding, and also had administered, the M.M.P.I., a test administered by a number of the psychologists in this case; (4) his sister had

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[25](...continued)
demonstrated a prima facie case of group bias. (*People v. Snow*, *supra*, 44 Cal.3d at p. 226.)

been in and out of jail; (5) he had driven with a suspended license in violation of a court order or directive from the Department of Motor Vehicles; and, (6) the last book he had read was Adolph Hitler's *Mein Kampf*. With respect to A.M.-F.'s experience with psychology, the prosecutor raised a concern that he would be predisposed to accept mental health evidence presented by the defense and that he would become a source of information for the other jurors. (2 RT Vol. 13 2693-2696.)

Respondent first notes that A.M.-F. did not appear to be Hispanic and did not have a Hispanic surname. (2 RT Vol. 13 2693-2694, 2729.) Thus, respondent contends, for appellant's argument that A.M.-F. was improperly excused based on his race to be tenable, the prosecutor had to have improperly excused him based on the fact that he described himself as "Latin-American" in his questionnaire (Aug./Corr. CT Vol. 11 3594). (RB 99.) Respondent also notes (1) that, when appellant included A.M.-F. in "*Batson/Wheeler*" motions raised on the ground that the prosecutor was impermissibly exercising his peremptory challenges to excuse those in the psychiatric profession, he did not also complain that the excusal was race-based (2 RT Vol. 10 2361-2362; 2 RT Vol. 11 2602-2604); and, (2) that appellant did not include A.M.-F. in his first *Batson/Wheeler* motion alleging the improper excusal of Black and Hispanic jurors, but instead did so after returning from a break (2 RT Vol. 12 2660-2661). (RB 100.) Finally, respondent contends that comparative juror analysis shows that the prosecutor excused A.M.-F. for race-neutral reasons. (RB 100-106.) Respondent's contentions are incorrect.

First, the prosecutor obviously had read A.M.-F's questionnaire, for he referred to it in conducting his voir dire of A.M.-F. (2 RT Vol. 7 1731-1732.) At a minimum, then, it can be presumed he was aware that A.M.-F.

described himself as Latin-American. (Aug./Corr. CT Vol. 11 3594.) Indeed, the prosecutor explained that, "*but for his response in the questionnaire* that his – Question 38, he was Latin-American, at least in terms of appearance I had no idea that he had such heritage, given the name that he had." (2 RT Vol. 13 2693; emphasis added.)

Second, appellant's argument is not defeated by the fact that, in his *Batson/Wheeler* motions based on the excusal of jurors who had backgrounds in psychology, he did not also allege that the prosecutor excused A.M-F. on the basis of his race. (2 RT Vol. 10 2361-2362; 2 RT Vol. 11 2602-2604.) Appellant was addressing an altogether different, non-race-related ground in those instances when he invoked *Batson/Wheeler* principles in objecting to the excusal of prospective jurors with experience or education relating to psychology or psychiatry. (See also 2 RT Vol. 11 2499-2504, 2543-2546; 2 RT Vol. 13 2928; 2 RT Vol. 14 3033-3034, 3079-3080.) In any event, appellant did include A.M.-F. in his *Batson/Wheeler* based on improper race-based peremptory challenges. (2 RT Vol. 12 2660-2661.) Although appellant did not include A.M.-F. when he first raised the latter motion, he did so after a single, relatively short, morning recess. (2 RT Vol. 12 2660-2661; 2 CT Vol. 4 1203.)

Contrary to respondent's position (RB 101), appellant's argument regarding the prosecutor's lack of credibility is not disingenuous. As defense counsel argued (2 RT Vol. 13 2697), and appellant noted in his opening brief (AOB 91, 119-120), A.M.-F. was the type of juror the prosecutor presumably would want in light of his comments regarding the need for jurors who could understand technical mental health testimony. (See 2 RT Vol. 13 2689-2692 [in explaining his excusal of E.V., the prosecutor stated that he was concerned about his ability to analyze and

evaluate mental health testimony].) In addition, he repeatedly affirmed that he would be a fair juror and that he could handle the responsibility of reaching a penalty verdict. (2 RT Vol. 7 1572, 1619, 1624-1625, 1718-1719.) Thus, appellant's argument is not simply that A.M.-F. would have been a suitable juror (see RB 100), but that his obvious ability to handle mental health testimony suggests that the prosecutor's reasons for excusing him were pretextual.

Third, respondent is incorrect in asserting that appellant's comparisons of A.M-F. to prospective jurors T.B., G.P., D.H., C.S., and D.B., because none of those jurors had as extensive a background in psychology as A.M.-F. (RB 102-103.)[26] However, the comparisons are relevant to show that the prosecutor's reason for excusing A.M.-F. was pretextual. (See AOB 120-121.) Again, the prosecutor purported to be concerned about E.V.'s ability to analyze and evaluate mental health testimony (2 RT Vol. 13 2689-2692), yet he excused A.M.-F., who was not only eminently qualified to evaluate such testimony, but he affirmed that he would be a fair juror and that he could handle the responsibility of reaching a penalty verdict. (2 RT Vol. 7 1572, 1619, 1624-1625, 1718-1719.)

Fourth, respondent is similarly incorrect in asserting that prospective juror C.S., whose son and daughter had extensive histories of legal and mental health problems, was not similarly-situated to A.M.-F., whom the prosecutor excused in part because his sister had been in and out of jail. (RB 103-105.) In excusing A.M.-F., the prosecutor stated, "His sister has been in an [*sic*] out of jail, in and out of prison I believe, and there was

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[26] Like T.B., G.P., and C.S., D.H. was a seated juror. (2 CT Vol. 4 1214.)

extensive questioning about whether he had had contact with her." (2 RT Vol. 13 2694.) However, a review of A.M.-F.'s responses make clear that, although he cared for his sister, he had chosen to distance himself from her precisely because, as respondent notes (RB 104), her legal problems were ongoing. (2 RT Vol. 7 1619-1623, 1626.) In contrast, C.S. appeared to have been very familiar, even closely involved with, her children's legal cases and mental health treatment. (2 RT Vol. 13 2786-2792, 2806-2810.) In addition, she remained close to them. (2 RT Vol. 13 2790, 2806.)

Fifth, respondent is incorrect in asserting that prospective juror D.T., who had been arrested and paid a fine for driving under the influence (Aug./Corr. CT Vol. 13 4204; 2 RT Vol. 17 3564-3565), and prospective juror W.H., who had been arrested and apparently convicted[27] for driving under the influence (2 RT Vol. 7 1768-1769), were not similarly situated to A.M.-F., whom the prosecutor excused in part because he had driven with a suspended license in violation of a court order or directive. (RB 105-106.)[28] A.M.-F. explained that, after failing to pay the fines or go to court "about two or three traffic tickets," and accumulating too many "points," his license was suspended. He later had to go to court for driving on the suspended license. (2 RT Vol. 7 1568.) While A.M.-F.'s actions were undoubtedly serious, the actions of D.T. and W.H. arguably were far more so, in that driving under the influence represents a greater danger to the

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[27] W.H. stated that, after appearing before a judge, he went to school for four weekends "or something like that." (2 RT Vol. 7 1768-1769.)

[28] W.H. was later seated as a juror, and D.T. as an alternate juror. (2 CT Vol. 4 1214, 1227.)

public than driving with a suspended license.[29]

Under these circumstances, respondent is incorrect in asserting that substantial evidence supports the prosecutor's reasons for excusing A.M.-F. and the trial court's determination that the peremptory challenge was race-neutral. (RB 106.) Accordingly, deference to the trial court's findings are not required. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

4. Prospective Juror R.M.

According to the prosecutor, he excused prospective juror R.M. because: (1) in light of the charged offenses it was doubtful whether R.M., who had been the victim of a crime, could be fair; (2) he was not a strong advocate of the death penalty; (3) the degree to which he had vacillated over the course of voir dire raised a concern as to whether he would be able to make definite decisions with respect to mental health testimony and at the penalty phase; (4) he described himself as emotional; (5) he had concerns about viewing photographs; (6) he had never before disclosed the he had never before disclosed his victimization,[30] which raised a concern as to whether it would interfere with the decision-making process; (7) he

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[29] Respondent correctly points out that appellant inaccurately stated in his opening brief that D.T. had been arrested "for drugs," but was instead a witness in that case. (RB 105; see also 2 RT Vol. 17 3561-3563; Aug./Corr. CT Vol. 13 4203.) Appellant apologizes for his misreading of the record. Nevertheless, he submits that the comparison remains valid in light of D.T.'s arrest for driving under the influence, as described above.

[30] R.M. disclosed that, for a number of years when he was growing up, he had been sexually molested by an adult. He had never before disclosed that fact to an adult. (2 RT Vol. 9 2076-2077.)

stated that human life was the most precious thing regardless of what the person had done; and, (8) he said that he had never had to make any calls regarding a medical emergency during the six years he worked with disabled children. (2 RT Vol. 13 2699-2702.) The prosecutor later added that R.M. said he doubted he could be fair. (2 RT Vol. 13 2715, citing 2 RT Vol. 9 2079, 2082, 2085.)

Although R.M. allowed that he was not a "strong advocate" for the death penalty, he also affirmed that he could vote for either life imprisonment without possibility of parole or the death penalty, depending on the evidence. (2 RT Vol. 9 2092-2093, 2096-2098.) Moreover, appellant maintains that R.M.'s responses stating that human life is the most important thing (2 RT Vol. 9 2081, 2097) demonstrate concern for victims, not reluctance to vote in favor of the death penalty. As noted in his opening brief (AOB 122-123), R.M. described the lengths that appellant would have to go to convince R.M. that he was innocent:

> [R.M.:] When somebody does take another person's live [*sic*] away *I think it is a pretty horrendous crime, just murder in itself and for that person to be proven innocent as far as I am concerned it has to be a lot presented to me to be able to change my mind or for me to have an open mind about it.*

(2 RT Vol. 9 2081; emphasis added.) Even assuming that R.M.'s statement that "human life is the most precious thing there is. No matter what this person has done, and so forth" (2 RT Vol. 9 2097) reflected a philosophical preference for life imprisonment without parole over the death penalty, he explained immediately afterwards that he would "have to follow the law" as to "what the punishment should be" (2 RT Vol. 9 2098).

Respondent is also incorrect in contending that a comparative

analysis of R.M.'s responses to those of T.B., J.R., W.S. and R.S. – White prospective jurors who had expressed reservations about the death penalty but who were not excused by the prosecutor – does not further appellant's argument. (RB 107-109.) As appellant has explained (AOB 122), R.M. initially expressed concern that his feelings about the charges would be so strong as to impair his ability to be a fair juror in this case, but he consistently affirmed that he could set aside his feelings and judge the case fairly. (2 RT Vol. 9 2074-2087, 2090-2091, 2100-2102, 2112.) He also affirmed that he could vote for either life imprisonment without possibility of parole or the death penalty, depending on the evidence. (2 RT Vol. 9 2092-2093, 2096-2098.)

The distinctions raised by respondent are insignificant. (RB 108-109.) For instance, appellant observed that juror T.B. stated that he would vote to keep the death penalty, but would be reluctant to do so for fear that someone innocent or not entirely guilty was executed. (AOB 123, citing 2 RT Vol. 14 3104.) Respondent, however, contends that the prosecutor would not be concerned with T.B. in light of his statement that there were people society should not have to "put up with" (2 RT Vol. 14 3101), and his statement that "in extreme cases, I really think that some people should be taken off the streets" (2 RT Vol. 14 3104). (RB 108.) Arguably, these statements referred to life imprisonment without possibility of parole, not death. In any event, based on these responses, it cannot be said that R.M. was any more reluctant to vote for the death penalty than T.B.

Appellant also noted that juror J.R. said that she was not strongly in support of the death penalty. (AOB 123, citing 2 RT Vol. 4 961.) She also stated that, "without hearing all the facts and evidence and so forth, it is hard for me to make that determination. I think death should not be taken

lightly, and I don't feel it is strictly up to me to make that decision." (2 RT Vol. 4 961-962.) Respondent asserts that this was not nearly as strong a statement as R.M.'s statement that he was not a strong supporter of the death penalty, and that "human life is the most precious thing there is. No matter what this person has done." (RB 108.) However, as appellant has explained, R.M.'s comment referred to his concern for victims, not a reluctance to vote for the death penalty. As such, he was similarly situated to J.R.

W.S., who was later seated as a juror (2 CT Vol. 4 1214), commented that "[d]eath is a very serious penalty and I would have to be positive beyond a reasonable doubt before I would even look at death as being a penalty." (2 RT Vol. 9 2014.) Respondent, however, contends that W.S. is not comparable because he had previously sat as an alternate juror in a death penalty case, and said he did not have any reservations about undertaking the responsibility of determining whether appellant should live or die. (RB 108, citing 2 RT Vol. 9 2008-2009, 2017.) However, W.S. acknowledged that, as an alternate juror, he had not actually participated in the verdict. (2 RT Vol. 9 2007.) In any event, as noted above, R.M. also affirmed that he would be willing to vote for the death penalty, depending on the evidence. (2 RT Vol. 9 2092, 2096-2098.) Thus, R.M. and W.S. were indeed similarly situated.

Finally, prospective juror R.S. stated that she would vote for the death penalty to be legal, were that the subject of an election, but added that the penalty decision was not to be taken lightly. (2 RT Vol. 4 823, 827.) She said she could consider both life imprisonment without possibility of parole and death, but the decision would be extremely difficult. (2 RT Vol. 4 826.) She characterized herself as not a strong supporter of the death

penalty, but somewhere in between. (2 RT Vol. 4 827.) Although, as respondent observes (RB 109), R.S. indicated that she would have strong feelings in a case involving a child victim, she did not indicate that she would be more likely to vote for death in such a case.

Thus, respondent is incorrect in asserting that substantial evidence supports the prosecutor's reasons for excusing R.M. and the trial court's determination that the peremptory challenge was race-neutral. (RB 109.) Accordingly, deference to the trial court's findings are not required. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

5. Prospective Juror M.L.

The prosecutor stated that he excused prospective juror M.L. because: (1) in her questionnaire she indicated that no one close to her had been the victim of a crime, but on voir dire she revealed that her cousin had been murdered; and, (2) during voir dire, she stated she had forgotten to include in her questionnaire the fact that her brother had been arrested a number of times. The prosecutor suggested that these facts raised a question as to whether M.L. was paying enough attention to the process and to her responsibilities in the case. The prosecutor added that, at one point, M.L. said she did not think it is right to give the death penalty to a defendant. (2 RT Vol. 13 2705-2708.)

Respondent contends that the prosecutor believed M.L. was not forthcoming with crucial information, and that that constituted a race-neutral reason for excusing her. (RB 110, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 628.) Here, too, respondent's reliance upon *Lenix* is misplaced. (See *ante* at p. 29.) Again, the prosecutor in that case excused prospective juror C.A. in part based on her reaction to receiving a traffic

ticket. C.A. had indicated that she had had a "hostile, confrontational, [or] adverse" contact with law enforcement. When asked whether C.A. felt the officer was impolite, she responded, "Well, no one ever feels they deserve a ticket." She replied "yeah" when the prosecutor asked whether C.A. felt the officer "was shading the truth a little bit." When asked whether she felt she deserved the ticket, C.A. said, "I didn't know if I deserved [the ticket] or not, so I just went along with it." This Court concluded that answers given by excused juror C.A. could be fairly characterized as equivocal, supporting the prosecution's inference that C.A. was not completely forthcoming about the incident and may have harbored some resentment. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 628.)

Indeed, despite C.A.'s claim that "I didn't know if I deserved [the ticket] or not, so I just went along with it," her responses betrayed obvious resentment and hostility towards the officer. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 628.) Here, however, M.L.'s statements regarding her cousin and brother satisfactorily explained why she had forgotten to mention them in her questionnaire. It had been approximately eight years since her cousin had been murdered, he had been five years older than her, and he had lived in another city. (2 RT Vol. 12 2645-2646; Aug./Corr. CT Vol. 11 3545.) Her brother's arrests involved minor alcohol-related matters, such as drinking in public or public intoxication, he was older than M.L., and she had not seen him since their father's death in 1989. (2 RT Vol. 12 2626, 2646–2647.) In any event, M.L. did not fail to be fully forthcoming – she *disclosed* the information at issue. (Cf. *People v. Lenix*, *supra*, 44 Cal.4th at p. 628.)

As noted above (*ante*, pp. 37-38), C.S. disclosed to the court that she knew a judge, but was not asked anything further about the matter at that

time. (2 RT Vol. 13 2781.) The following day, she explained that she knew "one judge," Judge Robert Kneeland (2 RT Vol. 13 2818), and that they had been good friends for at least 40 years (2 RT Vol. 13 2819). Later that day, she submitted a note stating that she had known Judge Claude Owens and his wife for many years, "as friends – but not close." (2 CT Vol. 4 1207.) The following day, C.S. explained that she knew Judge Owens from church. (2 RT Vol. 14 3031.) She had not disclosed in her questionnaire that she knew the two judges. (Aug./Corr. CT Vol. 12 3912-3920.) Tellingly, the prosecutor did not excuse C.S., nor did he suggest that her belated disclosures of those friendships raised a question as to whether C.S. was paying enough attention to the process and to her responsibilities in the case.

Relying on *People v. Panah*, *supra*, 35 Cal.4th at p. 442, respondent also contends that the fact M.L.'s brother had been arrested constituted a race-neutral reason for excusing her. (RB 110.) In *Panah*, this Court held that "the arrest of a prospective juror or a close relative is a gender-neutral reason for exclusion. [Citations.]" (*People v. Panah*, *supra*, 35 Cal.4th at p. 442.) Accordingly, this Court concluded that the prosecutor had properly excused a prospective juror whose niece had been arrested or charged with a crime, and another whose brother had been arrested or charged with drunk driving and theft. (*Id.* at pp. 439, 441-442.)

However, appellant submits that the arrest of a prospective juror's close relative is relevant only if the juror would unduly identify or sympathize with the relative, such that he or she would be unable to fairly evaluate the evidence (e.g., the testimony of police officers). In this case, there was little if any danger that the arrests of M.L.'s brother would compromise her ability to fairly serve as a juror. Although M.L.'s brother

was a "close relative" in that he apparently was a blood relative,[31] it can reasonably be inferred that he and M.L. were not close to one another. They had lost touch and she had not seen him in approximately four years. (2 RT Vol. 12 2626, 2647.) He was "[w]ay older" than M.L. (2 RT Vol. 12 2646.) She believed his offenses were "nothing big." (2 RT Vol. 12 2646.) And she clearly believed that his problems were of his own making, stating that he was "[j]ust reckless of himself, I guess. Drinking in public or making a scene at places, stuff like that." (2 RT Vol. 12 2646.)

Under these circumstances, respondent is incorrect in asserting that substantial evidence supports the prosecutor's reasons for excusing R.M. and the trial court's determination that the peremptory challenge was race-neutral. (RB 110.) Accordingly, deference to the trial court's findings are not required. (Cf. *People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

E. The Prosecutor's Improper Peremptory Challenges in this Case Requires That the Entire Judgment Be Reversed

The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva, supra*, 25 Cal.4th at p. 386; see also *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1255, fn. 4.) In this case, not one but five prospective jurors were excluded for race-based reasons.

"[A]s to all [five] of the challenges the inadequacy of the prosecutor's reasons was compounded by the court's apparent acceptance of

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[31] M.L. explained that he was one of "the three older sons from his first marriage, so my step-brothers – ever since my father passed away, we lost touch so I don't see him." (2 RT Vol. 12 2647.)

those reasons at face value." (*People v. Turner* (1986) 42 Cal.3d 711, 727; see also *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 ["The trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."].) As in *Turner*, not only did the prosecution fail "to sustain its burden of showing that the challenged prospective jurors were not excluded because of group bias [citation]," but also "the court failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor [citation]." (*People v. Turner, supra*, 42 Cal.3d at p. 728; see also *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264, overruled on other grounds by 8 U.S.C. § 2254, subd. (c) [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error]; *Williams v. Woodford* (9th Cir. 2005) 396 F.3d 1059, 1069 ["A *Batson* violation is structural error for which prejudice is generally presumed"].) The trial court's failure to engage in comparative juror analysis and other critical measures virtually guaranteed that it would accept the prosecutor's reasons as proper and race-neutral. (See *Kesser v. Cambra, supra*, 465 F.3d at p. 358 ["We hold that the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine."].)

Thus, for the reasons stated above and in appellant's opening brief, reversal of the judgment of death is required because the record clearly

reveals that the prosecution's purported race-neutral explanations were pretexts for purposeful discrimination. (See *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1172, 1182 [concluding that where "'an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's non-racial grounds,' we are 'compell[ed] [to conclude] that his actual and only reason for striking [the relevant juror] was her race'"].)

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II

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING STATUTORILY INADMISSIBLE TESTIMONY DURING THE PROSECUTOR'S CROSS-EXAMINATION OF DR. SEAWRIGHT ANDERSON AT THE GUILT PHASE

In his opening brief, appellant argued that the trial court erred by allowing the prosecutor to elicit the testimony of a psychiatrist, Dr. Seawright Anderson, that appellant knew the difference between right and wrong. Appellant demonstrated that Dr. Anderson's testimony on that point was not only irrelevant and misleading as to the question of appellant's guilt or innocence, but was also statutorily impermissible. (AOB 128-136.)

Respondent contends that cross-examination of Dr. Anderson regarding appellant's thought process, including whether he knew the difference between right and wrong, was relevant and not misleading. Respondent further contends that any argument that it violated Penal Code sections 28 and 29 was forfeited by appellant's failure to object on that ground; moreover, respondent contends, the cross-examination of Dr. Anderson did not violate sections 28 and 29 because it did not elicit testimony regarding whether appellant had the mental state for the charged crimes. Finally, respondent contends that admission of the testimony did not violate appellant's federal constitutional rights. (RB 112-125.)

Appellant has adequately raised this argument in his opening brief, and here responds only to respondent's assertion that the argument has been waived.

Ordinarily, "[e]rror must be predicated upon rulings which the court makes respecting the merits of objections to the admission of evidence. *It cannot be predicated upon the overruling of objections when the particular*

grounds of the objection are not stated, unless they are obvious, or otherwise known to the court." (*People v. Modell* (1956) 143 Cal.App.2d 724, 730 (emphasis added); see also Evid. Code, § 353 [providing in pertinent part that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless," among other things, "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].) This Court has explained that "[w]hat is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Here, Dr. Anderson testified on direct examination that he had been appointed to evaluate appellant pursuant to Penal Code section 1026. (2 RT Vol. 25 5474.) His testimony on direct examination focused on that evaluation, and, as appellant explained in his opening brief (AOB 128), was essentially limited to the following: that, after evaluating appellant, he concluded that appellant suffered from Schizo-Affective Disorder, a history of polysubstance abuse, a history of head injuries, and Organic Personality Disorder; and an explanation of the information upon which he relied in forming that opinion. (2 RT Vol. 25 5474-5488, 5563.) Significantly, defense counsel did *not* elicit Dr. Anderson's opinion as to whether appellant was incapable of knowing or understanding the nature and quality of his act, or of distinguishing right from wrong at the time of the

commission of the offenses. (See Pen. Code, § 25, subd. (b).)[32]

On cross-examination, the prosecutor elicited Dr. Anderson's agreement that he was "appointed under Penal Code section 1026, which is the Penal Code section that requires the court to appoint doctors when there has been a plea of not guilty by reason of insanity . . . ." (2 RT Vol. 25 5488.) Later, the prosecutor asked Dr. Anderson whether he concluded that appellant knew the difference between right and wrong when he killed Nadia Puente. Appellant objected that the question called for testimony which was irrelevant, immaterial and exceeded the scope of direct examination, but the objection was overruled. (2 RT Vol. 25 5597-5598.)

Under these circumstances, both the prosecutor and the trial court would have understood the rationale behind appellant's objection: it called for testimony which was "[i]rrelevant and immaterial" and "[b]eyond the scope" precisely because such testimony lay outside the bounds of permissible guilt-phase mental health evidence set by Penal Code sections 28 and 29, and implicated a matter properly reserved for the sanity phase.[33]

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[32] Penal Code section 25, subdivision (b), provides that, "[i]n any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense."

[33] Penal Code section 28, subdivision (a), provides that

> [e]vidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or

(continued...)

Respondent's reliance upon *People v. Riggs* (2008) 44 Cal.4th 248, 324, and *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 113, is misplaced. (RB 115.) In *Riggs*, the defendant objected to the prosecutor's use during argument of a chart containing enlarged copies of 12 handwritten responses from jury questionnaires, in which then-prospective jurors, some of whom were later seated on the jury, stated their views regarding the purpose served by the death penalty. Specifically, he objected to the use of the chart on the following grounds: (1) it constituted part of an improper argument to the jury concerning the general societal purposes for the death penalty, not argument specifically directed to the circumstances of defendant's case; (2) the chart improperly encouraged the jurors to place undue weight on their pretrial statements, rather than their view of the

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[33](...continued)
malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Penal Code section 29 provides that

> [i]n the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

appropriateness of the death penalty after having heard the evidence presented at trial; (3) the chart's individual quotes improperly directed the argument to the juror who wrote that particular quote, rather than to the jury as a whole; and, (4) use of the chart was cumulative, unnecessary and "extremely prejudicial." On appeal, the defendant did not renew any of those objections, but instead argued that use of the chart was misconduct because it constituted an argument based upon facts not in evidence; i.e., the jurors' questionnaire responses. This Court held that, because the defendant did not object at trial to the use of the chart on that specific ground, he had forfeited such a claim on appeal. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 324.) In contrast to the instant case, Riggs's objection did not inform the trial court of the basis of the argument later raised on appeal.

Similarly, in *Coffman*, defendant Marlow argued that the testimony by his former wife, Katherine Davis, and her mother, Marlene Boggs, presented during co-defendant Coffman's case in mitigation essentially constituted nonnoticed evidence in aggravation and improper evidence of his propensity for violence. At trial, however, Marlow did not object to the evidence on the ground that it had not been included in the notice of aggravating evidence, but rather questioned its relevance to Coffman's case in mitigation and asserted that it constituted nonstatutory aggravating evidence. Therefore, this Court held, he had forfeited his contention for appellate purposes. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 113.) As in *Riggs*, the defendant's objection did not inform the trial court of the basis of the argument he raised on appeal.

Accordingly, as argued in the opening brief, reversal of the entire judgment is required.

III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING AN EXPERT WITNESS' DISPOSITION OF MATERIAL IN A PREVIOUS CASE

In his opening brief, appellant argued that the trial court erred in permitting the prosecutor, Deputy District Attorney Robert Gannon, to cross-examine an expert witness, Dr. Susan Fossum, regarding her handling and disposition of her raw notes and tape recordings of her interview with a defendant in another case, *People v. Sturm*. Specifically, appellant argued that (1) the trial court should have excluded evidence relating to her conduct in *Sturm* because it was irrelevant, and (2) the court's error violated state law and his federal constitutional rights to due process and to reliable guilt and penalty determinations. (AOB 137-144.)

According to respondent, Dr. Fossum's destruction of evidence in *Sturm*, in the context of her failure to fully comply with the subpoena duces tecum in this case and failure to turn over notes of her interview with appellant, went directly to her bias, and was therefore relevant. Respondent further contends that, even if the trial court erred in allowing such testimony, appellant was not prejudiced. (RB 126.) As appellant demonstrates below, however, respondent's analysis is incorrect.

A. The Examination of Dr. Fossum Regarding Her Handling of Interview Tapes and Other Material

On direct examination, Dr. Fossum testified that, during her interview of appellant, she wrote some of her notes on a laptop computer and wrote the rest by hand. (2 RT Vol. 26 5775-5777.) On cross-examination, she explained that she did not print out the notes she had typed

on her computer. Rather, she stored the information on a computer disk, transferred the notes from the computer disk to her computer, then incorporated into her report those portions of the notes she deemed psychologically significant.[34] She placed the computer disk in a drawer so that it would be available for re-use, but she did not know whether in fact she had re-used it.[35] She did not think about the computer disk when she responded to a subpoena sent to her by the prosecution. (2 RT Vol. 27 5848-5850.)

Dr. Fossum further testified on cross-examination that, in responding to a subpoena from the prosecution, she submitted a declaration explaining that she had not sent "test equipment," some of which she could not photocopy, because she needed it on a daily basis; she also explained in her declaration that she could arrange to have identical equipment viewed either in a clinical psychology office near the courthouse or in the courtroom itself. (2 RT Vol. 26 5790-5792, 5795, 5802-5803.) She also acknowledged that she did not send: test manuals, which she considered to be part of the test equipment (2 RT Vol. 26 5789, 5795-5796, 5798, 5807); a copy of the book explaining how to administer the Rorschach test (2 RT Vol. 26 5791-5793); administration and scoring manuals for the intelligence test, the achievement test, and the Bender-Gestalt test (2 RT Vol. 26 5793); items which could not be photocopied, such as blocks and puzzle parts (2

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[34] Presumably, she meant that she transferred the notes from the computer disk to a second computer.

[35] Although Dr. Fossum sometimes referred to computer *disks* (2 RT Vol. 27 5849-5850), this apparently reflected her general practice of storing used disks for later use, not a statement that she had used more than one disk in this case. In any event, whether she used one or more disks is immaterial to the merits of this argument.

RT Vol. 26 5795); seven binders of material, which she had received from the defense investigation firm (2 RT Vol. 26 5797, 5839-5840); and, copies or photographs of items she showed to appellant (2 RT Vol. 26 5799).

The prosecutor, Mr. Gannon,[36] then asked, "In a previous criminal case [i.e., *Sturm*], Dr. Fossum, wherein you were appointed to work as a defense expert, is it correct that you interviewed the defendant, tape-recorded the interviews and then destroyed the tapes?" Defense counsel objected that the question called for irrelevant and immaterial testimony. (2 RT Vol. 27 5850.) Mr. Gannon asserted that her testimony was relevant to the issue of bias, then the trial court asked both counsel to approach the bench. (2 RT Vol. 27 5850.)

At bench, the following exchange occurred:

The Court:	Are you referring to a particular case?
Mr. Gannon:	Yes, the *Sturm* case. [¶] *I have talked to the prosecutor about it. She testified to that.*
* * *	
Mr. Gannon:	She testified last year is my understanding.
The Court:	When was the defendant interviewed in that case, do you know, by the doctor?
Mr. Gannon:	I am not sure, Your Honor. It has been within the last 18 months.
[Defense counsel]:	Let me interject. [¶] The doctor interviewed – if I understand correctly, the doctor interviewed the defendant in that case, wrote her report,

[36] Appellant refers to the prosecutor in the instant case as "Mr. Gannon" to avoid confusing him with the prosecutor in the *Sturm* case.

destroyed her tape. Police officers do that all the time. [¶] However, in this case, she interviewed the defendant. She says she has the disks in a drawer. It is not the same procedure. She may still have the disk. [¶] So what's the relevancy of what she did in another case, if it is not the same in this case?

The Court: How do you think it tends to show bias, Mr. Gannon?

Mr. Gannon: The primary notes that are taken during an interview of a defendant for purposes of psychological evaluation are obviously just –

* * *

Mr. Gannon: The primary notes – that assumes one who interviews a defendant, those notes that are taken contemporaneous with the interview are obviously very significant and important, and can be. And to the extent that those notes are not preserved, I believe that it is relevant if, in fact, they have been deliberately destroyed.

And in this case, we already have evidence that, in fact, she took a laptop in there and did not print out those raw notes. She only selectively did that. And the fact that she did it on a previous occasion, which is the only other occasion where she has testified in a homicide, a capital homicide case, she did the same thing, I think it is relevant.

Mr. Gannon:[37] Did the prosecutor make an issue out of that in the trial?

Mr. Gannon: *My understanding is that that's what she admitted during her testimony.*

(2 RT Vol. 27 5850-5852; emphasis added.)

Defense counsel then interjected that Mr. Gannon had not answered the court's question. The trial court, in turn, observed that evidence of Dr. Fossum's conduct in the *Sturm* case "would only tend to show bias if [Mr. Gannon thought] that she was made aware that that was depriving the prosecution [in *Sturm*] of something they needed and then deliberately did it again that way." (2 RT Vol. 27 5852.)

Mr. Gannon conceded that Dr. Fossum may have inadvertently re-used the tapes she had used to record her interview Sturm, but suggested that it was no coincidence raw data was missing in both cases. (2 RT Vol. 27 5853.) The trial court subsequently agreed that "it does seem a little strange to me that she doesn't comply with a subpoena and has, in effect, within the only other capital case she has been on in the last year and a half in Orange County, that she has also deprived the prosecution of something that they needed." (2 RT Vol. 27 5853-5854.) Again defense counsel pointed out that they did not know whether Dr. Fossum had deprived the prosecution of anything they had asked for or that they had told her was important. (2 RT Vol. 27 5854.)

After the trial court stated that Dr. Fossum did not comply with the subpoena insofar as she had left materials in her Sacramento office, defense

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[37] Viewed in context, it appears the trial court, not the prosecutor, asked this question.

counsel reminded the court that she had provided a declaration listing the items she was not going to bring, and which asked that the prosecution contact her if they wished her to bring those items. (2 RT Vol. 27 585-5855.) Defense counsel further explained that,

> She told us last evening that Mr. – I think it was Lew Rosenblum in the *Sturm* case, that she did the same thing in the *Sturm* case. She supplied the gross amount of the material and stated in the declaration the inconvenience and the lack of practicality to supply everything. Rosenblum told her that was a fine procedure, and so that's why she operated this way – that way in this case.

(2 RT Vol. 27 5855.)

Nevertheless, the trial court responded, "All right. That may be, but I do think it does tend to show bias and it is relevant to that reason. It affects the credibility of the witness." (2 RT Vol. 27 5855.) The trial court then overruled appellant's objection, but explained that he would have an opportunity to rehabilitate Dr. Fossum on redirect examination. (2 RT Vol. 27 5856.)

B. Contrary to Respondent's Position, the Cross-examination Was Improper Because it Did Not Show Bias

As respondent has pointed out, "[t]he trial court has considerable discretion in determining the relevance of evidence." (RB 131, quoting *People v. Williams* (2008) 43 Cal.4th 584, 634.) Still, evidence must be relevant to be admissible. (Evid. Code, § 350.) "Relevant evidence" is "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." (Evid. Code, § 350.) Therefore, "[t]he trial court has broad discretion in

determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

As noted above, the trial court recognized that evidence of Dr. Fossum's conduct in the *Sturm* case "would only tend to show bias if [the prosecutor thought] that she was made aware that that was depriving the prosecution of something they needed and then deliberately did it again that way." (2 RT Vol. 27 5852.) Appellant demonstrates below that Mr. Gannon failed to establish either (1) that Dr. Fossum was made aware that she had deprived the prosecution in the *Sturm* case of material that they needed, or (2) that she deliberately deprived the prosecution in the instant case of material that she had been obligated to disclose.

First, contrary to respondent's position (RB 131-133), Mr. Gannon's offer of proof failed to establish that Dr. Fossum had been aware of the import of the tape recordings before the prosecutor in this case questioned her about them. Mr. Gannon initially stated, "I have talked to the prosecutor [who handled *Sturm*] about it. [Dr. Fossum] testified to that [i.e., that she tape-recorded her interviews with Sturm, and later destroyed the tapes]." (2 RT Vol. 27 5850.) Later, Mr. Gannon stated,

> [a]nd in this case, we already have evidence that, in fact, she took a laptop in there and did not print out those raw notes. She only selectively did that. And the fact that she did it on a previous occasion, which is the only other occasion where she has testified in a homicide, a capital homicide case, she did the same thing, I think it is relevant.

(2 RT Vol. 27 5852.) The trial court asked whether the "prosecutor [in *Sturm*] ma[d]e an issue out of that," and Mr. Gannon responded, "My understanding is that that's what she admitted during her testimony." (2 RT Vol. 27 5852.)

Under these circumstances, it cannot be assumed that Dr. Fossum was cross-examined during the *Sturm* trial regarding her failure to preserve and turn over the tape recordings. It is equally possible she had simply *explained* to the jury how she had handled discovery materials in that case. Even if the subject arose on cross-examination, it cannot be assumed that the prosecutor "made an issue" out of her handling of the tapes. For this reason, respondent is incorrect in asserting that her "admission clearly showed she was aware" that her failure to preserve her raw notes in this case could become an issue. (RB 132.)

Similarly, respondent asserts that Mr. Gannon made clear that he believed Dr. Fossum "admitted" in the *Sturm* trial that she only selectively preserved her "raw notes." (RB 132, citing 2 RT Vol. 27 5852.) However, even if Dr. Fossum "admitted" (to use Mr. Gannon's characterization) that she destroyed the tape recordings, he failed to establish that she *realized or was made aware* that she had failed to comply with the subpoena. At most, his offer of proof established that Dr. Fossum had technically failed to comply with the subpoena.

Second, because Mr. Gannon failed to establish that Dr. Fossum was ever made aware during the *Sturm* trial that she had deprived the prosecution in that case of anything they needed, he also failed to establish she had deliberately deprived him of material he needed in this case. Defense counsel explained that, according to Dr. Fossum, she "operated . . . that way in this case" because the prosecutor in the *Sturm* case had *approved* of her handling of her material in that case. (2 RT Vol. 27 5855.) Therefore, the record simply fails to support respondent's contention that her disposition of the computer disks in this case showed Dr. Fossum's "feeling of hostility towards the party against whom [s]he [was] called,"

i.e., the prosecution. (RB 131.)

Thus, the trial court was incorrect in finding that Dr. Fossum's destruction of the interview tapes in the *Sturm* case was relevant to show bias and to her credibility. (2 RT Vol. 27 5855.) The court's ruling was particularly untenable given that it conceded that the prosecutor in *Sturm* may have approved of the manner in which she had handled the materials. (2 RT Vol. 27 5855.)

Respondent's reliance upon *People v. Williams*, *supra*, 43 Cal.4th 584 is misplaced. (RB 131.) There, the defense called as a witness Kristi Daffron, the former girlfriend of prosecution witness Kenny Dustin, who had named Williams as the victim's killer. (*Id.* at p. 604.) Daffron testified about, among other things, Dustin's dishonesty, racism, and drug abuse; his physical and emotional abuse of her; and, statements he had made to her in which he had admitted participating in the crimes. She also testified that she repeatedly had complained to Williams's original prosecutor, Steven Polacek of the Fresno County District Attorney's Office, regarding Dustin's incriminating statements and abusive treatment of her, but Polacek did not respond. (*Id.* at p. 632.) Over defense objection, the trial court permitted the prosecution to elicit evidence establishing that Daffron's husband then resided in state prison, having been convicted of three offenses when the Fresno County District Attorney's Office prosecuted him some two or three years after Daffron's contact with Polacek. (*Id.* at p. 633.)

On appeal, Williams argued that the trial court erred in permitting the prosecutor to impeach Daffron's credibility with evidence of her husband's felony convictions. (*People v. Williams*, *supra*, 43 Cal.4th at p. 633.) Specifically, he asserted that: (1) Kristi's bias was no longer in dispute; (2) the evidence was not relevant to bias, because of the interval of

two and one-half years between Daffron's contact with the prosecutor and the purported source of the bias, i.e., her husband's incarceration; and, (3) the evidence had no tendency to demonstrate her bias against the prosecution. (*Ibid.*)

This Court rejected each of these contentions. First, this Court concluded, the issue of Daffron's bias was by no means conceded, but was the focus of the prosecutor's cross-examination. (*People v. Williams*, *supra*, 43 Cal.4th at p. 634.) Second, this Court reasoned that evidence that the Fresno County District Attorney's Office (whose representative was examining Daffron as a witness) prosecuted Daffron's husband, leading to his incarceration in state prison at the time of trial, had an obvious "tendency in reason" to bias her against that office and explain her hostile demeanor on the witness stand toward the prosecutor. (*Ibid.*)

By contrast, there is nothing in the record to suggest that Dr. Fossum harbored any such "feelings of hostility" towards the prosecution, or that she had any reason to do so. (Cf. *People v. Mickle* (1991) 54 Cal.3d 140, 196 [holding that the trial court did not err in allowing the prosecutor to ask defense expert whether he was opposed to the death penalty, because "[q]uestions seeking to elicit a partisan expert's philosophical views on capital punishment might disclose some bias bearing on his credibility as a witness at the penalty phase"]; *People v. Rich* (1988) 45 Cal.3d 1036, 1088 [holding that the prosecutor did not commit misconduct by questioning defense expert about the large number of cases in which he had testified for the defense that various defendants were insane or suffered from diminished capacity, because it is proper to elicit testimony tending to show bias].)

Respondent's reliance upon *People v. Zambrano* (2007) 41 Cal.4th

1082 is similarly misplaced. (RB 131-132.) In that case, defense expert Jiro Enomoto, a former Director of the Department of Corrections, testified that, based on Zambrano's pretrial jail records, he would not pose a safety risk to prison staff or inmates if sentenced to life without parole. (*Id.* at p. 1164.) On cross-examination, the prosecutor elicited Enomoto's admissions that he frequently testified for criminal defendants on prison-adjustment issues, and had done so perhaps three or four times in the past year. The prosecutor then asked, "In fact, a few weeks ago you testified across the hall in the case of the gentleman that was convicted of four separate murders and six attempted murders that he would adjust well to prison life also; is that correct?" Enomoto responded, "That's correct; yes." The defense did not object. (*Ibid.*)

On appeal, Zambrano argued that the prosecutor's question unfairly impugned Enomoto's credibility, compromising a reliable penalty determination in violation of the Eighth Amendment to the federal Constitution. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1164.) This Court held that Zambrano's failure to object had waived the issue. (*Id.* at pp. 1164-1165.) This Court further held that, "[d]espite arguable differences in the facts of the two cases, they involved 'similar issues' of the expert's views on prison adjustment." (*Ibid.*) Accordingly, the prosecutor was entitled to expose Enomoto's bias by showing his propensity to advocate for criminal defendants even in extreme cases. (*Ibid.*)

In his opening brief, appellant pointed out that the prosecutor lacked a good faith belief that Dr. Fossum actually destroyed any of the tape recordings of her interview with Sturm; that she was aware that she was depriving the prosecution in the *Sturm* case of material to which it was entitled; or, that she was aware that she had a duty to turn over the computer

disk, yet chose to disobey that duty. (AOB 141.) Respondent asserts that appellant has missed the point, which was that Dr. Fossum had not provided the tapes in *Sturm*, had not properly preserved them, and knew that the prosecutor wanted them by virtue of the cross-examination in *Sturm*, then failed to properly preserve and turn over the raw notes in the instant case. (RB 133.) However, Mr. Gannon not only failed to establish what he purported to establish, but he lacked a good faith belief that his offer of proof was sufficient.

Appellant further argued that Mr. Gannon lacked a good faith belief that Dr. Fossum was aware that she was depriving the prosecution in the *Sturm* case of material to which it was entitled, or that she was aware that she had a duty to turn over the computer disk, yet chose to disobey that duty. (AOB 141.) Respondent contends that the cross-examination of Dr. Fossum in *Sturm* case was relevant to show that she was aware of the import of preserving the interview tapes (RB 133), but in fact Mr. Gannon did not establish that she was cross-examined about the matter at all. Therefore, contrary to respondent's position (RB 133), it is by no means clear that Dr. Fossum became aware of the import of the "tapes" and that they should have been preserved and turned over to the prosecutor.[38]

For the same reasons, the evidence was not relevant to Dr. Fossum's credibility. As appellant observed (AOB 141, fn, 46), Mr. Gannon's offer of proof failed to establish that evidence of Dr. Fossum's conduct in *Sturm* constituted *past misconduct* admissible to impeach her credibility. As this Court has explained, to be relevant, i.e., to have "any tendency in reason to

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[38] Respondent refers to "tapes," but Dr. Fossum had recorded her original notes in this case on computer disks, not tapes.

prove or disprove" (Evid. Code, § 210) a witness's character for truthfulness, the misconduct must directly implicate dishonesty, or otherwise must involve moral turpitude, a "readiness to do evil." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) There was no showing of dishonesty, let alone a "readiness to do evil," in this case.

According to respondent, however, the cross-examination in *Sturm* was not admitted to show Dr. Fossum's past misconduct; rather, respondent suggests, it showed that she became aware of the import of preserving the interview tapes. Her failure to preserve and turn over the raw notes showed her bias. (RB 133-134.) As appellant has amply demonstrated above, respondent's position is simply incorrect.

C. The Trial Court's Error Violated Appellant's Constitutional Rights

In his opening brief, appellant demonstrated that the error violated appellant's federal constitutional rights as well as state law. (AOB 143-144.)

Specifically, the admission of the evidence denied appellant due process of law under the Sixth and Fourteenth Amendments by rendering his trial fundamentally unfair. Moreover, appellant had a Fourteenth Amendment due process liberty interest in having California's evidentiary standards applied to his case. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Lisenba v. California* (1941) 314 U.S. 219, 236; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [recognizing "fundamental fairness" standard].)

The trial court's admission of evidence regarding Dr. Fossum's conduct in *People v. Sturm* also ran afoul of appellant's due process right

not to be convicted of crimes committed while he was insane. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 17; see also *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456; §§ 25, subd. (b), and 1026.)

Finally, the court's error precluded the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

Respondent contends that appellant's federal constitutional rights were not violated, noting that "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights. (RB 134, quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1229.) However, for the reasons set forth in the previous section, the trial court's admission of evidence regarding Dr. Fossum's handling of the tapes and notes in *People v. Sturm* was error of constitutional dimension.

D. The Trial Court's Error Was Prejudicial

Respondent further contends that, even if the trial court erred in allowing Mr. Gannon to cross-examine Dr. Fossum about her handling of the *Sturm* case, the error was not prejudicial. (RB 134-137.) Respondent's contention is incorrect.

First, respondent incorrectly contends that evidence of Dr. Fossum's failure to preserve her raw notes in the *Sturm* case would not have made a difference in the outcome because (1) she was able to explain why she failed to comply with the subpoena and (2) she explained that she did not destroy the tapes, but simply may (or may not) have taped over them. (RB

135, citing 2 RT Vol. 27 5850, 5856-5859.) However, the fact that she was able to explain her conduct is one of the reasons it was irrelevant in the first place!

Contrary to respondent's position, cross-examination on these matters was prejudicial, for it ineluctably suggested that Dr. Fossum had conducted herself in a biased, unethical manner. That is, as a result of the trial court's ruling, the prosecutor was able to impeach Dr. Fossum with extremely prejudicial yet wholly irrelevant information, and the jury likely would have disregarded her testimony altogether. (See 2 CT Vol. 4 1438-1439 [CALJIC No. 2.20 (Believability of Witness)]; 2 CT Vol. 4 1442 [CALJIC No. 2.21.2 (Witness Willfully False)].) Indeed, the evidence would have reinforced the prosecutor's repeated suggestions during closing argument that the defense experts, including Dr. Fossum, were biased and that their opinions had been colored by their interest in making money and their commitment to assist and please the defense attorneys. (2 RT Vol. 29 6707-6717, 6723, 6804-6813.)

For this reason, respondent is also incorrect in suggesting that it is unlikely the jury would discredit her testimony and diagnoses because she had failed to preserve her raw notes in this case and in *Sturm*. (RB 135.) Rather, it is likely that the jury disregarded her testimony, guided by the instructions and Mr. Gannon's argument.

Second, respondent incorrectly contends that Dr. Fossum's testimony was largely duplicative of the other expert witnesses. (RB 135.) Dr. Berg diagnosed appellant as having, among other things, a schizophrenic disorder (2 RT Vol. 21 4912) and a severe personality disorder which included elements of Borderline Personality Disorder and Schizotypal Personality Disorder (2 RT Vol. 21 4697-4700, 4913; 2 RT Vol. 22 4948-4949). Dr.

Anderson reached a diagnosis of schizoaffective disorder. (2 RT Vol. 25 5484, 5487, 5558, 5575.) And, as respondent points out, Dr. Fossum noted that the Orange County jail also diagnosed appellant with schizoaffective disorder. (2 RT Vol. 26 5775.) However, Dr. Fossum reached a related but nevertheless *distinct* diagnosis, i.e., chronic Schizophrenia of the Paranoid Type (2 RT Vol. 26 5752-5762, 5765, 5767-5768, 5770-5775, 5777-5779, 5785-5787, 5808, 5842; 2 RT Vol. 27A 6048-6049, 6113, 6127-6128, 6137). (See Diagnostic and Statistical Manual of Mental Disorders ["DSM-IV"] (4th ed. 1994) pp. 274-290 [regarding schizophrenia] and 292-296 [regarding schizoaffective disorder].)

Similarly, Dr. Fossum's diagnosis of chronic Schizophrenia of the Paranoid Type (2 RT Vol. 26 5752-5762, 5765, 5767-5768, 5770-5775, 5777-5779, 5785-5787, 5808, 5842; 2 RT Vol. 27A 6048-6049, 6113, 6127-6128, 6137) was not the equivalent of Dr. Berg's opinion that appellant had a personality disorder which included elements of Borderline Personality Disorder and Schizotypal Personality Disorder (2 RT Vol. 21 4697-4700, 4913; 2 RT Vol. 22 4948-4949), or Dr. LaCalle's opinion that appellant suffered from Organic Personality Disorder (2 RT Vol. 22 5065-5066; 2 RT Vol. 23 5163, 5243, 5256; 2 RT Vol. 24 5328, 5376-5377). (See DSM-IV pp. 274-290 [regarding schizophrenia], 634-638 [regarding paranoid personality disorder]; Diagnostic and Statistical Manual of Mental Disorders ["DSM-III"] (3rd ed. 1980) pp. 118-119 [regarding Organic Personality Syndrome].)

It is likely that, in the absence of the improper impeachment, the jury would have found Dr. Fossum's testimony to represent a fuller and more powerful explanation for appellant's conduct than the testimony of the other experts. At a minimum, the jury may have been more familiar with, and

therefore more willing to accept a diagnosis of, schizophrenia than other disorders. Alternatively, the jury may have considered that disorder to represent a more profound pathology than, say, a personality disorder.

Dr. Fossum also concluded that appellant suffered from Narcissistic Personality Disorder with features of Borderline Personality Disorder. (2 RT Vol. 26 5752-5762, 5765, 5767-5768, 5770-5775, 5777-5779, 5785-5787, 5808, 5842; 2 RT Vol. 27A 6048-6049, 6113, 6127-6128, 6137.) Contrary to respondent's position, her opinion was similar to, but by no means the same as, Dr. Berg's opinion that appellant was a "very narcissistic or egotistical man who needed constant affirmation and constant reassurance," a trait he connected to appellant's personality disorder. (2 RT Vol. 21 4697-4698.) Similarly, Dr. Fossum's opinion was consistent with, but not the same as, Dr. Purisch's opinion that a psychological test indicated that appellant was narcissistic and egocentric, which he connected to his diagnosis that appellant suffered from Organic Personality Syndrome, Explosive Type. (2 RT Vol. 28 6291, 6294.)

But for the improper impeachment, the jury may have found that Dr. Fossum's opinion compellingly explained how appellant's egotism and narcissism bore on his mental state at the time of the crimes. For instance, Dr. Fossum explained at length how Narcissistic Personality Disorder, along with schizophrenia, contributed to the rapid disintegration of appellant's cognitive processes, to the point that he was confused and consumed by rage at the time of the crimes. (2RT Vol. 26 5754, 5763-5764, 5842-5844; 2 RT Vol. 27A 6114-6122, 6128-6137, 6149-6155,

6160-6162.)[39]

Under these circumstances, the trial court's error was devastating. Because the state cannot establish that the error was harmless beyond a reasonable doubt, the entire judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Moreover, the entire judgment must be reversed even if the error is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836, because it is reasonably probable that a verdict more favorable to appellant would have occurred in the absence of the error.

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[39] Respondent is therefore incorrect in asserting that it is unclear how appellant would have been helped by Dr. Fossum's testimony that he had a narcissistic personality disorder. (RB 136.)

IV

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT LIMITED THE SCOPE OF DR. FOSSUM'S OPINION REGARDING THE EXTENT TO WHICH EVENTS IN APPELLANT'S WORKPLACE CONTRIBUTED TO THE COMMISSION OF THE CHARGED OFFENSES

In his opening brief, appellant argued that the trial court's refusal to allow Dr. Fossum to testify regarding the extent to which events in appellant's workplace might have triggered or led to the instant offenses denied his rights to present a defense, to due process and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law. (AOB 145-155.)

Respondent contends that the trial court did not exclude testimony regarding whether the events in appellant's workplace contributed to his commission of the offenses, only Dr. Fossum's testimony based on studies about how getting fired affects people such that they commit homicides. According to respondent, the trial court properly excluded such testimony because Dr. Fossum lacked qualifications for such testimony, and it was not a proper subject for expert testimony. Respondent further contends that even if it was error to exclude such testimony, appellant was not prejudiced. (RB 138-145.)

However, while respondent is correct that the trial court did not bar all evidence relating to whether events in appellant's workplace contributed

to the offenses, the trial court prejudicially erred in excluding testimony regarding studies on how people are affected by getting fired.

A. The Trial Court Erred in Limiting Dr. Fossum's Testimony

1. The Voir Dire Examination of Dr. Fossum and the Trial Court's Rulings

According to respondent, the trial court ruled that Dr. Fossum could testify that appellant's job loss was a factor that contributed to his mental state, and what his mental state was, but could not testify in general based on studies about how getting fired affects people such that they commit homicides. (RB 142.) A review of the record, however, demonstrates that the scope of testimony admitted by the court was far more limited than respondent acknowledges.

Dr. Fossum testified that she was asked to analyze the extent to which events in appellant's workplace might have triggered or led to the instant offenses. (2 RT Vol. 26 5698, 5701-5702.) During a voir dire examination with respect to her qualifications to make such an assessment, she testified that she obtained her doctorate in January, 1989, from the Fielding Institute, a graduate school. (2 RT Vol. 26 5703-5704.) There she had taken doctoral level examinations relating to psychological assessments. (2 RT Vol. 26 5704-5705.)

After the prosecutor renewed his objection "as to lack of foundation, speculation and no qualification to give the opinion with respect to the effect of the firing or quitting" (2 RT Vol. 26 5705-5707), Dr. Fossum further testified on voir dire that: she had obtained extensive training and clinical experience with respect to identifying and assessing the various stressors, including the effect of workplace stress or being fired, that affect

the behavior of her patients (2 RT Vol. 26 5707-5710, 5722); she had conducted a psychological and clinical evaluation of appellant (2 RT Vol. 26 5711); in 1974, she had obtained a master's degree in clinical psychology from San Francisco State University (2 RT Vol. 26 5712); she had qualified as an expert in approximately 50 to 75 cases (2 RT Vol. 26 5715-5716); she had testified in a previous death penalty trial in which she considered his job loss to be a "moderate" factor, though not the critical one, in the defendant's psycho-social history (2 RT Vol. 26 5715-5716, 5718-5721); and, she had reviewed reports from other experts in this case, Dr. Arnold Purisch, Dr. Jose LaCalle, and Dr. John Reid Meloy (2 RT Vol. 26 5721-5722).

The trial court ruled that whether appellant's loss of a job caused or triggered the homicidal act was not a proper subject of expert testimony under Evidence Code section 801. For instance, the trial court stated:

> It is my judgment, as I said before that jurors already know enough about the importance of a job and in their lives and in the lives of most people that they would realize that that loss will be a significant factor in a person's mind.
>
> It is likely if the person felt he or she had been treated unfairly it could trigger a rage, which is what has already been testified existed in the defendant's mind at the time of the homicide.
>
> So I really don't see that an expert opinion would be helpful to the trier of fact on that specific question. In other words, how the loss of a job would be any more likely to trigger the rage which led to the homicide than any other stressful factors, which might impact upon the defendant's state of mind.

(2 RT Vol. 26 5727.) The trial court also ruled that there had not been a

sufficient showing that Dr. Fossum was qualified to answer that question, in that she had neither studied nor testified about the matter in sufficient depth. (2 RT Vol. 26 5725-5731.)

The defense subsequently requested an opportunity to make a further showing, explaining that Dr. Fossum had "gather[ed] all printed data and research material on this particular issue; and that is, a person having been fired from employment, then committing a homicide." (2 RT Vol. 26 5733.) The defense argued that her testimony would assist the jury because instances in which a person commits a homicide after being fired are rare, and she could explain the effect of appellant's firing in light of his mental dysfunction or mental illness. (2 RT Vol. 26 5733-5735.)

On further voir dire, Dr. Fossum testified that she had contacted the National Institute of Occupational Safety and Health (NIOSH), requesting that it conduct a search on this subject. According to Dr. Fossum, NIOSH provided her with five articles, none of which was sufficiently pertinent to the subject. (2 RT Vol. 26 5736-5737.) She explained that "[t]here's virtually a dearth of formal empirical research in this area." (2 RT Vol. 26 5737.) The trial court sustained the prosecutor's objection to Dr. Fossum's statement that there was no research in the field. (2 RT Vol. 26 5737-5738.)

Dr. Fossum listed the five articles she had received from NIOSH, each of which related to workplace homicides. One of those articles, a Wall Street Journal article entitled *Disgruntled Workers Intent on Revenge Increasingly Harm Colleagues and Bosses*, reported that workplace homicide was the fastest-growing form of murder in the United States. (2 RT Vol. 26 5739-5741.) She acknowledged that she had found no articles relating to situations in which a person is fired, then harms strangers at a

different location. (2 RT Vol. 26 5741-5744.)

Responding to the trial court's suggestion that Dr. Fossum's testimony regarding her research did not add anything to the defense's earlier showing, defense counsel maintained that her research was relevant to provide insight into the anger experienced by employees towards supervisors and co-workers in workplace homicide cases, and that appellant's anger toward his co-worker (i.e., Maryann Scott) could be "extrapolate[d]" to the victim. (2 RT Vol. 26 5744-5745.) The trial court, however, concluded that the defense already had presented its position that appellant's anger toward Scott led to or had something to do with the crime. The court added that, absent studies showing a relationship between a person's workplace problems and violent acts at a different place and time, Dr. Fossum would not say anything that the jurors could not figure out for themselves. (2 RT Vol. 26 5745-5746.)

Accordingly, the trial court ruled as follows:

> Well, see, she certainly can express an opinion about [appellant's] state of mind at the time that she interviewed him, and whether or not that's a changing state of mind that's likely to have been the same three years earlier.
>
> I am not precluding her testifying about things like that, but I just don't see that her opinion is going to be of any assistance to the jury on the question of whether or not his firing is what precipitated a rage at a different location several hours later, sufficient to cause a violent criminal act against a stranger.
>
> I will adhere to the ruling I made this morning, then.

(2 RT Vol. 26 5746-5747.) Defense counsel then stated for the record that they objected to the trial court's ruling under the Sixth, Eighth and

Fourteenth Amendments to the federal Constitution. (2 RT Vol. 26 5747.)

The court and counsel then agreed that the defense would be permitted to elicit Dr. Fossum's opinion as to how appellant's mental defects affected his ability to form specific intent. (2 RT Vol. 26 5747-5752.) Accordingly, Dr. Fossum testified that she had diagnosed appellant with various mental disorders,[40] and explained how those disorders affected him at the time of the offenses. (2 RT Vol. 26 5752-5845; 2 RT Vol. 27 5862-5936; 2 RT Vol. 27A 6033-6138.)

Among other things, Dr. Fossum opined that the "castigation" of appellant by his supervisor, Maryann Scott, triggered a decompensation of the narcissistic personality, i.e., a disintegration of his cognitive processes (including faculties such as judgment, reasoning, and the ability to control his impulses) related to his Narcissistic Personality Disorder and Schizophrenia. (2 RT Vol. 27A 6130-6132.) Shortly thereafter, defense counsel elicited her opinion as to whether there was anything distinguishing appellant's mental state on the date of the offenses from his mental state on a prior date, when he had taken 15-year-old Dalila Flores to a motel room. (6 RT Vol. 27A 6138-6139.) Specifically, Dr. Fossum reiterated that "[t]he castigation of [appellant] by [Scott] triggered a decompensation of the narcissistic personality." (2 RT Vol. 27A 6139.)

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[40] Specifically, Dr. Fossum had reached the following diagnoses: Organic Personality Syndrome, Explosive Type; Chronic Schizophrenia of the Paranoid Type; Narcissistic Personality Disorder with features of Borderline Personality Disorder; and Sociopathic Personality Disorder. (2 RT Vol. 26 5762; 2 RT Vol. 27A 6048-6049, 6113, 6137.) She also had concluded that appellant's right frontal lobe, right and left temporal lobe, right parietal lobe, and, probably, his limbic system, were marked by extensive dysfunction. (2 RT Vol. 26 5765, 5842; 2 RT Vol. 27A 6127-6128.)

The prosecutor objected and moved to strike this testimony on the ground that it violated the trial court's ruling with respect to the scope of Dr. Fossum's testimony. After defense counsel confirmed that "[t]he question is whether there is anything distinguishing about the mental state" on the two dates, the trial court reasoned, "She appears to be talking about something other than mental state." (2 RT Vol. 27A 6139.) The prosecutor continued, saying, "I would ask that the court admonish the witness to remain within the ruling of this court with respect to those matters that she is – there has been a foundation for her testimony and not to give any opinions or conclusions about those matters." (2 RT Vol. 27A 6139-6140.)

The trial court then purported to clarify its earlier ruling, saying that it had not intended to preclude Dr. Fossum from testifying that appellant's job loss might have contributed to his behavior. Instead, according to the court, it had ruled that she was precluded from testifying, based on "studies and so forth," about how getting fired affects people in general and how being fired related to workplace homicides. (2 RT Vol. 27A 6139-6143.) In so ruling, the trial court agreed with the prosecutor's contention that Dr. Fossum was not qualified to give an opinion that appellant's job loss triggered the murder. (2 RT Vol. 27A 6143.) The trial court then sustained the prosecutor's objection that Dr. Fossum's answer was nonresponsive and granted his motion to strike. (2 RT Vol. 27A 6144-6145.)

Ultimately, the trial court would not permit Dr. Fossum to opine about "what distinguished [appellant's] mental illnesses on those two days," but did allow her to testify as to the factors that contributed to his decompensation. (2 RT Vol. 27A 6144.) Accordingly, Dr. Fossum testified that Scott's severe castigation of appellant – which represented a "narcissistic insult" contributing to his rage and fear and the consequent

inability to control his behavior between the time of their confrontation and the time of the crimes – was a factor in his decompensation. (2 RT Vol. 27A 6146, 6149-6154.) She also concluded that the fact appellant thought he had been fired "very definitely" was another factor. (2 RT Vol. 27A 6146.)[41]

2. The Trial Court's Limitation on Dr. Fossum's Testimony Improperly Eviscerated its Force

According to respondent, the trial court properly limited Dr. Fossum's testimony, permitting her to testify that appellant's job loss was a factor that contributed to his mental state, and what his mental state was. On the other hand, respondent contends, her proposed testimony that a job is important and the loss of a job would be significant was not "'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*People v. Watson* [(2008) 43 Cal.4th 652,] 692; Evid. Code, § 801, subd. (a).)" (RB 142.) Respondent's position is incorrect.

First, the trial court's original rulings, contrary to its later "clarification" (2 RT Vol. 27A 6139-6143), unequivocally barred defense counsel from eliciting Dr. Fossum's testimony as to whether the loss of his job caused or triggered appellant's crime. (2 RT Vol. 26 5725-5731.) Indeed, both counsel understood the trial court's ruling to mean that Dr. Fossum was precluded from offering an opinion regarding the effect of

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[41] Prior to that point, Dr. Fossum's only testimony regarding this matter was to say that, in her report, she had briefly addressed appellant's contact with Scott; she had included opinions as to whether he quit or was fired; and, her assessment of the events of March 20, 1989, relating to Scott was partially based on the information the defense had provided to her. (2 RT Vol. 27 5867-5868.)

appellant's job loss. For instance, in ruling that Dr. Fossum was not to testify regarding the effect of appellant's job loss, the trial court commented, "I think I have made the record clear enough as to asking her the question that was referred to her by defense counsel in 1992; as far as asking that in front of the jury. [¶] Have I made it clear?"[42] Defense counsel replied, "You made it clear." (2 RT Vol. 26 5730.) Later, the prosecutor stated his understanding that the trial court had ruled that Dr. Fossum was not qualified to offer an opinion that job lob loss was a factor contributing to appellant's mental state. (2 RT Vol. 27A 6139-6141.) Finally, after the trial court "clarified" its earlier ruling, defense counsel asked the court, "May I have a moment with [Dr. Fossum] while we are walking back to our seats so I can let her know she can testify as to job loss?" (2 RT Vol. 27A 6144.) Under these circumstances, it is clear why defense counsel had not to that point elicited Dr. Fossum's opinion concerning the effect of appellant's job loss on his mental state.

Second, although the defense ultimately was permitted to elicit Dr. Fossum's testimony that appellant's belief that he had lost his job "very definitely" was a factor in his decompensation (2 RT Vol. 27A 6146), the force of her testimony was blunted by the fact that she was precluded from drawing a more direct link between appellant's job loss and the crimes. (See, e.g., 2 RT Vol. 26 5746 [trial court stated, "So her opinion that there was a direct relationship would be based on what? [¶] That's the question,

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[42] The trial court surely was referring to Dr. Fossum's testimony that in 1992 she had been appointed to assist the defense, and that she was asked to analyze the extent to which events in the in the defendant's work place might have triggered or led to the instant offense. (2 RT Vol. 26 5701-5702.)

isn't it? [¶] Nothing that would assist the jurors that I could see"].)

At a minimum, the force of Dr. Fossum's testimony was undermined because she was not allowed to testify about the effect of job loss generally. Even if the jurors understood that the loss of a job would be significant to most people, it cannot be assumed that they understood why, in rare instances, an employee commits a workplace homicide. For instance, had Dr. Fossum been allowed to testify that her research suggested that homicides related to job loss are rare, it is likely the jury would have better understood that losing his job was uniquely devastating to appellant, particularly in light of his mental disorders and his history of failure in virtually every aspect of his life. In turn, the jury would have more readily accepted the defense theory that appellant's anger toward his co-worker (i.e., Maryann Scott) could be "extrapolate[d]" to the victim. (2 RT Vol. 26 5744-5745.)[43]

Contrary to respondent's position (RB 143), the trial court should have permitted Dr. Fossum to testify regarding the link between job loss and homicidal acts generally. It cannot be said that such a link is a matter of "common experience" within the meaning of Evidence Code section 801.[44] As appellant has demonstrated (AOB 153-154), Dr. Fossum was

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[43] Given the specificity of defense counsel's offer of proof, respondent is incorrect in asserting that it is unclear what further testimony appellant requested, or how it would have assisted his defense. (RB 143.)

[44] Evidence Code section 801 provides as follows:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common

(continued...)

eminently qualified to offer an opinion as to the connection between appellant's job loss and the instant offenses. Moreover, as respondent acknowledges (RB 143), Dr. Fossum "attempted to research the issue to be better qualified."

True, Dr. Fossum had not conducted any research or published any papers regarding the effect of an individual's firing on a subsequent homicide, and that she had never interviewed an individual other than appellant who had been fired or quit his job and then committed a homicide on the same day. (2 RT Vol. 26 5703, 5713.) However, "[p]ractically no one has seen, on a regular basis, people who had been fired or quit and committed homicides." (2 RT Vol. 26 5714.) Under these circumstances, respondent is incorrect in suggesting that Dr. Fossum's qualifications went to her ability to testify to what the court allowed – i.e., that appellant's job loss was a factor contributing to his mental state, and to his mental state – but not to her ability to testify in general based on studies about how getting fired affects people such that they commit homicides. (RB 143-144.)

If instances of workplace homicides are rare, and if the homicides against strangers triggered by workplace stresses even rarer, this fact

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[44](...continued)
experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

arguably speaks to the severity of appellant's mental disorders, and to the complexity of the connection between the trigger (i.e., the workplace confrontation) and the instant offenses. Given Dr. Fossum's training and experience, her testimony would have been crucial to the jury's assessment of appellant's mental state. That is, such general testimony would have helped the jury understand Dr. Fossum's conclusion that, as a result of his mental disorders, appellant was confused and consumed by rage at the time of the offenses in this case. (2 RT Vol. 27A 6114-6122, 6136-6137, 6150-6153.)

B. The Trial Court's Rulings Violated Appellant's Rights under the Federal Constitution

As respondent notes, "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (RB 144, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1229.) However, as appellant has amply demonstrated (see AOB 154-155), the trial court's error *in this case* denied appellant's right to present witnesses or evidence in support of his defense, violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution (*Webb v. Texas* (1972) 409 U.S. 95, 98; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787); the right to reliable guilt convictions under the Eighth and Fourteenth Amendments (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638); and, the right to a reliable penalty verdict under the Eighth Amendment (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

C. The Trial Court's Error Was Prejudicial

According to respondent (RB 145; see also RB 122-124), the evidence against appellant was overwhelming, and therefore he was not prejudiced under either the *Watson* standard for state law error or the *Chapman* standard for constitutional error.[45] Moreover, respondent contends, appellant was not prejudiced because he was able to present testimony from Dr. Fossum and other experts as to how his job loss affected him. (RB 145-146.)

However, as appellant explained in Section A, *ante*, general testimony regarding the effect of job loss, not to mention testimony drawing a direct connection between the job loss and the crimes, were critical components of appellant's attempt to explain why and how *his* job loss affected his mental state. None of the admitted testimony covered this ground. Without expert testimony fully elaborating the link between the loss of appellant's job and the charged crimes, the jury likely would have accepted the prosecution's argument that appellant had planned beforehand to commit the offenses, that he acted with the requisite mental states, and that he later lied to the police and defense experts. (2 RT Vol. 29 6687-6723, 6798-6827.) Thus, appellant's convictions must be reversed because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 368 U.S. at p. 24.) Moreover, the entire judgment must be reversed even if the error is reviewed under *People v. Watson*, *supra*, 46 Cal.2d at p. 836, because it is reasonably probable that a verdict more favorable to appellant would have occurred in the absence of

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[45] See *Chapman v. California* (1967) 368 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.

the error.

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V

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT EXCLUDED CRITICAL LAY WITNESS OPINIONS SUPPORTING APPELLANT'S MENTAL HEALTH DEFENSE

A. Introduction

In his opening brief, appellant argued that the trial court prejudicially erred when it refused to allow three defense witnesses to testify as to matters relevant to the defense theory that he suffered from longstanding mental impairments, and that, because of those impairments, he did not form the mental states necessary to sustain convictions of the charged offenses. The trial court's refusal to allow this critical lay opinion testimony denied appellant his constitutional rights to present a defense, to due process and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law. (AOB 156-161.)

Respondent contends that the trial court properly exercised its discretion in sustaining the prosecutor's objections to the questions asked of these three witnesses by defense counsel because the questions were vague, ambiguous, called for speculation, and called for irrelevant information. Moreover, respondent contends that, assuming error, appellant was not prejudiced because the facts underlying the witnesses' testimony were admitted at trial. (RB 146-156.) Respondent's contentions are incorrect.

B. The Trial Court Abused its Discretion in Excluding Testimony of the Lay Witnesses Relevant to Appellant's Mental State

1. Applicable Law

As appellant noted in his opening brief (AOB 162-163), the range of permissible lay opinion is relatively broad, and has included lay opinion relating to the defendant's mental state. *People v. Manoogian* (1904) 141 Cal. 592 is particularly illustrative. There, this Court held that the trial court erred in excluding lay opinion testimony as to whether the defendant was acting rationally or irrationally. In so holding, this Court explained:

> Certain questions are of such a nature that it is impossible for a witness to convey to a jury an adequate conception of the ultimate fact except by announcing the result of his observation. This is particularly true in regard to the qualities suggested by Mr. Justice Temple in the portion of his opinion in *People v. Arrighini* [(1989) 122 Cal. 121, 123, disapproved on another ground in *People v. Zerillo* (1950) 36 Cal.2d 222, 229], quoted above. As was said in *Holland v. Zollner* [(1894) 102 Cal. 633, 639], "To say that a man acts rational or irrational, is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness, easy of detection and difficult of explanation. Such conduct is not so much a matter of judgment as of observation."
>
> As was said of the person whose sanity was in question in that case, so here no one will doubt but the facts in relation to the conduct of defendant were admissible in evidence, and that could the witnesses have explained every look, gesture, expression, and motion, it would have been competent to do so. All that the doctrine asserted in the cases cited seeks to do is in such a case, "by reason of the impossibility of giving form to all these varied manifestations, to permit the witness from necessity to produce the result of the manifestation as a

> whole." The right of cross-examination affords the person against whom such testimony is given full opportunity to show whether the conclusion of the witness is warranted by the facts.

(*Id.* at p. 597.) This Court further explained that such questions "did not call for the opinion of the witnesses as to the mental sanity of the defendant, but for the result of their observations at the various times they came in contact with him, as to his appearance in the respects suggested." (*Id.* at p. 595.)

2. The Trial Court Abused its Discretion in Excluding the Lay Opinion Testimony, Which Was Both Relevant and Admissible under the Foregoing Authority

According to respondent, the excluded testimony was either irrelevant, speculative, or improper lay witness testimony. (RB 151.) As appellant demonstrates below, respondent's position is incorrect.

a. The Trial Court Abused its Discretion in Excluding the Opinion of Paul Shawhan

During the direct examination of Paul Shawhan, who was appellant's work supervisor in 1988, defense counsel asked whether he had observed anything about appellant which he considered to be strange, abnormal or different. (2 RT Vol. 18 3989-3990.) The trial court sustained the prosecutor's objection that the question was vague and ambiguous. Defense counsel then asked Shawhan whether he had had any conversations with appellant that struck him as abnormal. Again, the trial court sustained the prosecutor's objection that defense counsel's question was vague and ambiguous. (2 RT Vol. 18 3990-3991.) The trial court subsequently stated that it did not think counsel could ask a lay witness if someone was

"abnormal." Instead, the court ruled, defense counsel could ask whether something unusual was said, have the witness relate what it was, and let the jury decide whether it had any significance, so long as the information had been provided to expert witnesses. (2 RT Vol. 18 3991-3992.)

Respondent contends that Shawhan's characterization of appellant's actions as "abnormal" was irrelevant; instead, respondent suggests, what was relevant was Shawhan's observations of what appellant did. (RB 151.)

"A lay witness may express an opinion based on his or her perception," at least "where helpful to a clear understanding of the witness's testimony (Evid. Code, § 800, subd. (b)), 'i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed.' [Citation.]" (*People v. Hinton, supra*, (2006) 37 Cal.4th 839, 889.) Here, although Shawhan was permitted to testify as to his observations of appellant's conduct and statements (see AOB 157), he was not permitted to explain what his "impression" of what that conduct and statements amounted to (see *People v. Hinton, supra*, 37 Cal.4th at p. 889), or, in other words, "to produce the result of the manifestation as a whole" (*People v. Manoogian, supra*, 141 Cal. at p. 597).

The words "strange," "abnormal" and "different" are terms of common usage, not terms of art. Shawhan did not need scientific, psychiatric or other training or knowledge to form and express an opinion as to whether any of appellant's behavior seemed strange, abnormal or different. (See *People v. Chatman* (2006) 38 Cal.4th 344, 397 [lay witness testimony that the defendant seemed to enjoy kicking a school custodian was proper because he was a percipient witness and was competent to testify that the defendant's behavior and demeanor were consistent with enjoyment]; *People v. Gurule* (2002) 28 Cal.4th 557, 621 [prosecution

properly elicited testimony of law enforcement officer as to whether he had observed "any delusional or hallucinatory speech or conduct on the part of" a prosecution witness, as his testimony reflected his own observations as a layperson].)[46] Indeed, such an opinion would have been rationally based on his personal observations, as required by Evidence Code section 800. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1307.)[47]

According to respondent (RB 151), defense counsel's question whether Shawhan had had any conversations with appellant that struck him as abnormal was vague because it is unclear what standards Shawhan used to evaluate what was "normal." Yet, even the cases cited by respondent make clear that lay opinion, even as to relatively "vague" matters, is admissible where it is rationally based on the witness's perceptions, and therefore support *appellant's* position. For instance, in *People v. Hamilton* (2009) 45 Cal.4th 863, an appeal from a penalty retrial, the trial court had admitted the lay opinion of a prosecutor (who had prosecuted the defendant's first trial) that the victim's husband was heartbroken and overwhelmed at the murder of his wife, that the murder haunted him for the rest of his life, and that "it was finally the end of him." This Court upheld the admission of the testimony, reasoning that it was rationally based on the witness's perception. (*Id.* at p. 929.) In *People v. Hinton*, *supra*, 37 Cal.4th at p. 889, the trial court properly admitted a witness's lay opinion that the

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[46] It can be assumed that, as a supervisor (2 RT Vol. 18 3989-3990), Shawhan had worked with a wide array of personality types and that he had experience in evaluating an employee's conduct, performance and ability to work with and relate to fellow employees.

[47] Because Shawhan was not testifying as an expert witness, respondent's reliance upon Evidence Code section 801 is misplaced. (RB 151.)

defendant "was the person who was directing [victim] Landis Barnes in [the drug-related] operation" which gave rise to the offenses. Finally, this Court has held that the trial court erred in excluding the opinions of lay witnesses as to whether the defendant was acting rationally or irrationally. (*People v. Manoogian*, *supra*, 141 Cal. at p. 597.) Under these circumstances, the trial court abused its discretion in excluding Shawhan's testimony.

b. The Trial Court Abused its Discretion in Excluding the Opinion of Sam Morrison

As set forth in appellant's opening brief (AOB 158-159), when defense counsel asked witness Sam Morrison whether he had ever observed appellant behave in an impulsive manner, the trial court sustained the prosecutor's objection that the question called for speculation and lacked foundation. (2 RT Vol. 18 4018-4019.)

Respondent contends that Morrison's testimony about whether he ever saw appellant act "impulsively" called for speculation in that he would not know what triggered appellant's actions. (RB 151.) However, as noted above, lay opinion testimony is admissible "where the concrete observations on which the opinion is based cannot otherwise be conveyed." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 889.) Here, Morrison testified that he knew the meaning of "impulsivity." (2 RT Vol. 18 4018.) Moreover, Morrison did not need any scientific, psychiatric or other training or knowledge to form and express an opinion as to whether he ever observed appellant behave impulsively. (See *People v. Williams* (1988) 44 Cal.3d 883, 915.) Morrison was familiar with the concept of impulsivity, at least insofar as it is used by laymen. (See *ibid.* ["[t]he manifestation of drug intoxication and withdrawal are no less subtle than those of alcohol intoxication, and, unfortunately may be sufficiently common today that lay persons are

capable of recognizing them"].) In addition, his opinion as to whether appellant acted impulsively would have been based on his observations (2 RT Vol. 18 4017-4022, 4027-4030), and would have permitted him to explain what he believed that conduct and statements amounted to – in other words, "to produce the result of the manifestation as a whole." (*People v. Manoogian*, *supra*, 141 Cal. at p. 597; Evid. Code, § 800.)

If anything, Morrison's opinion as to whether appellant acted impulsively would have been less speculative than other types of lay opinion evidence which has been held to be admissible. (See, e.g., *People v. Gurule*, *supra*, 28 Cal.4th at p. 621; *People v. Manoogian*, *supra*, 141 Cal. at p. 597; see also AOB 162-163.) Those cases held admissible lay opinion testimony which involved a greater degree of speculation by the witness into the mental processes of another individual than was called for in the instant case.

Contrary to respondent's contention (RB 151), Morrison's bare descriptions of appellant's actions were insufficient, for they could not convey his impressions of appellant's actions. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 889; *People v. Manoogian*, *supra*, 141 Cal. at p. 597.)

Thus, the trial court abused its discretion in excluding Morrison's opinion testimony.

c. The Trial Court Abused its Discretion in Excluding the Opinion of Maria Esparza

During the direct examination of appellant's ex-wife, Maria Esparza, the trial court excluded her opinion testimony regarding: (1) whether appellant was "out of control," "wild" or "savage-acting" during a fight with her brother; (2) whether she knew why appellant attacked her on one occasion; and, (3) whether appellant had ever attempted to commit suicide

during their marriage. (2 RT Vol. 25 5628-5629, 5633-5634.) As appellant demonstrates below, respondent's contentions that Esparza's opinions were inadmissible are incorrect.

Respondent first contends that whether appellant had threatened to commit suicide when he was married to Esparza eight or nine years prior to the crimes did not lead logically, naturally, and by reasonable inference to establish disputed material facts (e.g., his intent), and therefore was irrelevant. (RB 152.) However, this evidence was relevant to the defense theory that appellant lacked the requisite mental states due to his various mental disorders. For instance, the jury may have found that Esparza's opinion corroborated evidence such as: Dr. Paul Berg's opinion that appellant suffered from personality disorders which had caused difficulties for him long before the date of the offenses, so much so that "[t]here was nothing this man touched that didn't turn to dirt" (2 RT Vol. 21 4696-4698, 4880; 2 RT Vol. 22 4967); Dr. Anderson's opinion that appellant's mental disorder, coupled with the stressors he faced around the time of the crimes, made him more frustrated, suicidal, and depressed, which in turn decreased his judgment, insight, and ability to control his inner impulses and frustrations (2 RT Vol. 25 5509, 5593, 5606-5607); Dr. Jose LaCalle's opinion that appellant suffered from various mental disorders, which were demonstrated by, among other things, a history of unstable relationships, impulsive decisions, and incidences of rage and uncontrollable violence, which sometimes occurred when he was contradicted or challenged (2 RT Vol. 22 5018-5024); and, Dr. Susan Fossum's opinion that appellant suffered from various mental disorders – including Organic Personality Syndrome, Explosive Type, and chronic Schizophrenia of the Paranoid Type – which resulted in numerous problems, including great emotional

lability, a distortion of reality and the inability to assess reality correctly, and continual, intense flows of bad feelings and intrusive thoughts (2 RT Vol. 26 5754, 5762-5764, 5766; 2 RT Vol. 27A 6048-6049, 6113, 6128-6130, 6134-6135, 6137-6138, 6160-6162).

Next, respondent contends that Esparza's testimony as to whether appellant was "out of control" was inadmissible because it called for speculation. Respondent further contends that Esparza properly could describe appellant's actions, but it was for the jury to decide whether appellant's actions were "out of control." (RB 152.) However, as noted above, lay opinion testimony is admissible "where the concrete observations on which the opinion is based cannot otherwise be conveyed." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 889.) Esparza's opinion as to whether appellant was acting "out of control," "wild" or "savage-acting" would have been based on her observations (2 RT Vol. 25 5625-5627, 5630-5631, 5638-5642, 5646; 2 RT Vol. 26 5652-5655), and would have permitted her to explain what she believed appellant's conduct and statements amounted to. (See *People v. Manoogian*, *supra*, 141 Cal. at p. 597; Evid. Code, § 800.) Here, too, the opinion testimony at issue was less speculative than other lay opinion testimony that has been held to be admissible. (See, e.g., *People v. Medina* (1990) 51 Cal.3d 870, 887; *People v. Williams*, *supra*, 44 Cal.3d at pp. 914-916; *People v. Gurule*, *supra*, 28 Cal.4th at p. 621; *People v. Manoogian*, *supra*, 141 Cal. at p. 597.) For the same reasons, respondent is incorrect in contending that Esparza's testimony regarding why appellant attacked her was speculative. (RB 152.)

Under these circumstances, the trial court abused its discretion in excluding Esparza's opinion testimony.

C. The Trial Court's Rulings Violated Appellant's Rights under the Federal Constitution

As respondent notes, "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (RB 152, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1229.) However, as appellant has amply demonstrated (see AOB 168), the trial court's error *in this case* denied appellant the right to present witnesses or evidence in support of his defense, thereby violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution (*Webb v. Texas* (1972) 409 U.S. 95, 98; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787); his due process right not to be convicted of crimes committed while he was insane (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 17; see also *Ballard v. Estelle* (9th Cir. 1991) 937 F2d 453, 456; §§ 25, subd. (b), & 1026); his right to reliable guilt verdicts under the Eighth and Fourteenth Amendments (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638); and, his right to a reliable penalty verdict under the Eighth Amendment (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

D. The Trial Court's Error Was Prejudicial

According to respondent (RB 153; see also RB 122-124), the evidence against appellant was overwhelming, and therefore he was not prejudiced under either the *Watson* standard for state law error or the

Chapman standard for federal constitutional error.[48] Moreover, respondent contends, appellant was not prejudiced because the excluded evidence would not have altered the outcome of the proceedings. (RB 153-156.) Respondent's contentions are incorrect.

Respondent first contends that although Shawhan was not allowed to testify that appellant was "abnormal," he was allowed to testify to all of appellant's actions that led Shawhan to conclude that he was "abnormal." (RB 153-154.) However, as defense counsel argued, Shawhan's testimony was relevant as evidence of appellant's grandiosity (i.e., his tendency to boast, exaggerate and tell untruths about matters of common knowledge), which was a symptom of his mental illness. (2 RT Vol. 18 3991.) Moreover, had the trial court permitted Shawhan to testify that he considered appellant's conduct and statements to be *abnormal*, it is likely that the jury would have been more likely to accept that appellant's statements and/or conduct reflected one or more of the mental disorders described by the defense experts, and that he therefore lacked the requisite mental states for the charged offenses.

Among other things, Shawhan's testimony would have provided additional support for the following evidence: Dr. Berg's testimony that, due to appellant's personality disorders, appellant was a narcissistic man who needed constant affirmation and reassurance, and that on the day of the crimes those personality disorders were exacerbated by stressors which precipitated his actions that day (2 RT Vol. 21 4698-4700, 4777-4779; 2 RT Vol. 22 4934-4935); Dr. LaCalle's testimony that, under the influence of

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[48] See *Chapman v. California* (1967) 368 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.

uncontrollable rage associated with his mental illness, appellant's thinking processes were impaired at the time he committed the crime (2 RT Vol. 22 5070-5071; 2 RT Vol. 23 5129-5130, 5269-5270, 5290-5292; 2 RT Vol. 24 5290-5292, 5331, 5422); Dr. Anderson's testimony that appellant's mental disorders decreased his judgment, insight, and ability to control his inner impulses and frustrations, which was exacerbated when he lost his job and when a tax refund check he was expecting did not arrive (2 RT Vol. 25 5509, 5535-5541, 5593, 5596-5597, 5606-5607); Dr. Fossum's testimony that, as a result of his mental disorders, appellant suffered rage reactions in which his brain was unable to exercise normal controls to stop the response, he had a propensity for "acting out" non-volitionally, and, at the time of the crimes, he was confused and consumed by rage (2 RT Vol. 26 5763; 2 RT Vol. 27A 6114-6122, 6135-6138, 6150-6153); Dr. Purisch's testimony that appellant's crimes were part of an explosive outburst that he could not control, and were a product of his mental disorder (2 RT Vol. 28 6281, 6294-6296, 6299-6301, 6418, 6438, 6501-19-6501-22, 6501-37-6501-40, 6501-43, 6501-46, 6501-49-6501-50); Dr. Monte Buchsbaum's testimony that a person with the sort of damage he observed in appellant's brain would have problems controlling impulsivity and rage and inhibiting violence (2 RT Vol. 28 6314-6322, 6329); and, the testimony of Dr. Arthur Kowell that, as a result of abnormalities in appellant's frontal lobe, appellant might have had rage attacks or difficulty controlling his temper (2 RT Vol. 18 4134-4137).

In the absence of the lay opinion testimony issue at here, however, the jury likely would have believed that this evidence suggested merely that appellant was nothing more than a "hothead" or a troublemaker. Although defense counsel was permitted to ask Shawhan whether he ever observed

appellant do anything "unusual," that phrase is far less powerful and descriptive than "strange," "abnormal" and "different." Thus, contrary to respondent's position (RB 151), it is immaterial that Shawhan was permitted to testify about appellant's unusual conduct and statements.

Respondent next contends that although Morrison did not testify that appellant was impulsive, that was clear from other witnesses' testimony. (RB 154.) However, had the trial court admitted Morrison's opinion testimony, the jury would have been more likely to credit evidence that, as a result of his serious mental disorders, appellant did not harbor the requisite mental states necessary to sustain the convictions, including the following: Dr. Berg's observations concerning appellant's suspiciousness, confusion, paranoia, and boastfulness about his sexual exploits and general competence (2 RT Vol. 19 4328-4329, 4349-4350); 2 RT Vol. 21 4696); Dr. LaCalle's testimony regarding aspects of appellant's history which related to his mental illness, including a history of making impulsive decisions (e.g., suddenly getting married, suddenly leaving his wife and children, leaving the army without authorization, and getting into conflicts with a manager or co-worker, then leaving the job for another one) and a history of alcohol and drug use (2 RT Vol. 22 5018-5022, 5044-5048); Dr. Anderson's testimony that appellant's impairments, which included a history of poly-substance abuse, resulted in defects in his testing of reality, including his perceptions of what was happening with Nadia Puente (2 RT Vol. 25 5484, 5487, 5541-5545, 5548-5549, 5558, 5563, 5566-5576, 5584-5585, 5612-5615); Dr. Fossum's testimony that appellant was afflicted with mental disorders which (1) rendered him unable to read social cues, exercise judgment and reason, and solve abstract problems, (2) involved significant emotional lability, (3) rendered him unable to correctly assess

reality, and (4) rendered him socially inappropriate and naive (2 RT Vol. 26 5754, 5763-5764, 5842-5844; 2 RT Vol. 27A 6137-6138); Dr. Purisch's opinion that the deficiencies in appellant's brain may have accounted for the long-term behavioral problems he demonstrated, such as aggressive, odd and erratic behavior and a deficient ability to interpret how other people reacted to him in social situations (2 RT Vol. 28 6281, 6295-6296); and, Dr. Buchsbaum's testimony that a person with the sort of damage seen in appellant's brain would have problems controlling his or her impulsivity and rage and inhibiting violence (2 RT Vol. 28 6329). (See also RB 154.) However, in the absence of an opinion as to whether he believed appellant acted impulsively, the jury likely determined that Morrison viewed appellant as a mere "class clown." (See 2 RT Vol. 18 4107.)

Respondent next contends that although Esparza did not testify that appellant threatened suicide during their marriage, other witnesses established that he was suicidal at the time of the crimes. (RB 154-155.) However, had the trial court admitted Esparza's opinion testimony regarding the nature of and reasons for his attack on her, the jury likely would have found that Esparza's opinion corroborated evidence such as the following: Dr. Berg's opinion that the attack was part of a pattern in his life, i.e., an act of uncontrolled rage which came out when he felt most insecure, followed by remorse (2 RT Vol. 19 4345-4347); his opinion that, as a result of his mental disorders, appellant had a very intense need to be with women and, if he could not control them, he often became jealous and enraged (2 RT Vol. 19 4340-4341, 4349-4350; 2 RT Vol. 21 4696-4699; 2 RT Vol. 22 4967); Dr. LaCalle's testimony regarding the aspects of appellant's history which related to his mental illness, including multiple incidences of rage and uncontrollable violence (2 RT Vol. 22 5018-5019,

5021-5022); and, Dr. Fossum's opinion that appellant was afflicted with mental disorders which continually bombarded him with intense flows of bad feelings and intrusive thoughts, and which resulted in rage reactions his brain was unable to stop (2 RT Vol. 26 5763; 2 RT Vol. 27A 6128-6130, 6132, 6134-6135, 6137-6138, 6160-6162).

In each instance, the trial court's ruling essentially prevented appellant from eliciting the essential *meaning* of the witness' testimony. Thus, appellant's convictions must be reversed because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 368 U.S. at p. 24.) Indeed, the entire judgment must be reversed even if the error is reviewed under *People v. Watson, supra*, 46 Cal.2d at p. 836, because it is reasonably probable that a verdict more favorable to appellant would have occurred in the absence of the error.

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VI

THE TRIAL COURT ERRED IN GIVING A PREJUDICIAL JURY INSTRUCTION REGARDING THE APPOINTMENT OF EXPERT WITNESSES AND INVESTIGATORS

In his opening brief, appellant argued that the trial court erred in giving an instruction regarding applications for ancillary services (i.e., investigators and expert witnesses), the review of such applications by the court, and how the jury was to consider the fact of the court's decision to appoint an expert witness. Specifically, appellant argued that the trial court erred in giving the instruction for the following reasons: (1) the instruction highlighted the costs associated with appellant's trial, injecting an irrelevant, impermissible consideration into the jury deliberations; (2) because it accepted as true the prosecutor's mistaken assertion that defense counsel had repeatedly elicited testimony that the expert witnesses had been appointed by the court, and thereby had insinuated that the court had validated their testimony; and, (3) the instruction was misleading because the jury would have understood it to mean that the court must determine whether the ancillary personnel were reasonably necessary, but not that the court was also required to determine whether the *funds* requested were reasonably necessary. The reasonably likely effect of the instruction was to unfairly highlight the cost to the public of both prosecuting and defending appellant. (AOB 170-180.)

Respondent contends that any error in giving the instruction was invited error, as appellant requested the instruction, or at least forfeited due to his failure to object. Moreover, respondent contends, the instruction was proper because it correctly stated the law, and was necessary so the jurors would not be misled based on appellant's questioning of his expert

witnesses, which respondent suggests implied that the witnesses were unbiased and credible because they were appointed by the court. Finally, respondent contends that even if there was error, it was harmless. (RB 156-170.) Respondent's contentions are incorrect.

A. Procedural Background

As respondent notes, defense counsel requested that the trial court give a special instruction explaining the process for appointing expert witnesses; that instruction had been given at appellant's first trial. (RB 159; see also 2 RT Vol. 29 6658; 1 CT Vol. 3 771.) In discussing the prosecutor's proposed modification, which referred to declarations submitted by the defense in support of their requests for ancillary support, defense counsel argued that

> it seems to me that planting this seed in the jury's mind about these declarations being submitted by the defense attorney is somewhat prejudicial to the defense in this case, and definitely to the defendant.
>
> The implication, in spite of what the prosecution is arguing, is that we the defense brought in all these doctors and we are paying them all of this money, and we did it just for ourselves without any approval of the court. And I think that's prejudicial to [appellant].
>
> If we could go into the cost of what the prosecution pays to prosecute this type of case, and pulled out all the details and how much for this person and that person, it would – we couldn't do that because we don't have those figures.
>
> So I just don't think it is necessary to direct and focus in on these declarations by the defense attorneys, because what he is trying to infer [*sic*] is that we either gave false declarations or nobody checked the declarations and we have run up thousands and thousands of dollars to defend this person.

(2 RT Vol. 29 6667-6668.)

Ultimately, the trial court gave a version similar to the one given at the first trial, but added the italicized language below:

> Under the law an indigent defendant (or his attorney) may apply to the Court for public funds to employ investigators, experts and others reasonably necessary for the preparation or presentation of the defense. For this purpose a defendant is "indigent" if he does not have the financial means to secure those services himself. The application is confidential until disclosed by the defense before or during the trial. The purpose of this law is to ensure that an indigent defendant is not deprived of an effective defense because of his financial condition, since the investigation and presentation of the prosecution is paid for with public funds.
>
> The Court is involved in the reviewing and processing the application *submitted by the defense attorneys*, and in appointing the investigators, experts, and others *requested in the application*, only for the purpose of ensuring that the persons appointed are reasonably necessary for the preparation or presentation of the defense, and to monitor the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose.
>
> Neither the approval of such a request, nor the appointment of such an investigator, expert, or other person by the Court to assist with the defense, should be taken by the jury as an indication that the Court has taken any position with respect to the credibility of such person when that person later testifies as a witness. It is for you, the jury, to determine the credibility if [*sic*] any such witness and the weight to be given to the testimony of such a witness.

(2 CT Vol. 4 1450; italics added.)

B. Because the Error Was Neither Invited Nor Forfeited, the Instant Argument Is Cognizable on Appeal

This Court has explained that "'if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find "invited error"; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.' [Citation.]" (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Respondent contends that appellant requested the challenged instruction (except for the modification which, respondent incorrectly asserts, is not a subject of his argument on appeal) based on a conscious and deliberate tactical choice, and therefore any error is invited and not cognizable on appeal. (RB 161, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1293.) Respondent's position is incorrect.

The thrust of appellant's objection was that the prosecutor's proposed instruction – which contained language explaining the process by which the defense submits a declaration in support of its application for section 987.9 funds – would have led the jury to infer that: (1) either defense counsel submitted false declarations or that the court failed to check the veracity of those declarations; and, (2) that the defense had "run up thousands and thousands of dollars" to defend appellant. (2 RT Vol. 29 6658, 6668.) Accordingly, defense counsel's objection clearly expressed their concern that the jury would infer they had engaged in unethical or irresponsible conduct by submitting false declarations and squandering public funds, *and* that the experts they had retained were unduly biased in appellant's favor.

As appellant argued in his opening brief (AOB 173-174, fn. 57), defense counsel's objection to the prosecutor's proposed language regarding the submission of applications by the defense (2 RT Vol. 29 6658, 6661-6663, 6667-6668) applies equally well to the instruction as modified by the court. Though it referred to investigators, experts and others "requested in the application" "submitted by the defense attorneys" rather than to "declarations," the instruction as given very likely directed the jury's focus upon the defense's role in obtaining ancillary services and the expenditure of public funds on appellant's behalf. Moreover, the instruction likely suggested to the jury that the defense was able to procure biased experts, with little if any oversight by the court and at great expense to the public. Thus, contrary to respondent's contention (RB 162), the instruction as modified did not serve defense counsel's tactic of showing the funds were reviewed by the court, and that the fees were monitored, so that the jury would infer that the fees were reasonable. In addition, contrary to respondent's assertion (RB 162-163), this was precisely the thrust of appellant's argument on appeal as well. (AOB 174-178.)

Notwithstanding defense counsel's *express objection* to an instruction concerning the payment of funds for ancillary services rendered on appellant's behalf, or, at least, one which discussed the role of the defense in that process, they expressed no tactical purpose for suggesting or acceding to such an instruction. Indeed, defense counsel could have had no tactical reason for requesting an instruction which injected improper considerations – such as suggestions of irresponsible, even unethical, conduct; bias by the experts; and, expense to the public – into the jury's deliberations.

Respondent further contends that, if defense counsel did not want the

instruction to be given, he could have merely changed his questioning so as not to imply that the witnesses were neutral because they had been appointed by the court. Thus, respondent suggests, it was a tactical decision to proceed with the questioning of witnesses, and to offer the instruction to counter the prosecutor's cross-examination of witnesses about how much they were being paid as expert witnesses. (RB 162.) However, as defense counsel noted, the prosecutor "made a quite a deal of who [the experts] were being paid for, or by[,] Your Honor." (2 RT Vol. 29 6662.) Also, it should be noted that, during appellant's first trial, the prosecutor questioned the experts regarding their fees and the extent to which they testified on behalf of criminal defendants. (1 RT Vol. 9 2006-2008, 2148-2150, 2175-2176, 2228-2230; 1 RT Vol. 10 2280-2282, 2290; 1 RT Vol. 11 2680-2701.) It defies common sense that he would not have done so at the retrial too, whether or not defense counsel asked the experts how they were appointed.[49]

Under these circumstances, then, this argument is cognizable on appeal. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

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[49] During appellant's first trial, the prosecutor himself had elicited testimony demonstrating that, almost as a matter of course, prosecutors cross-examine expert witnesses on this subject. Specifically, at appellant's first trial, the prosecutor asked Dr. LaCalle, "Is it fair to say that 90% of the time you're asked [by the prosecutor] how much you're billing on a case?" Dr. LaCalle responded that prosecutors had cross-examined him about that subject in 100% in which he had testified. (1 RT Vol. 10 2280-2281.)

C. The Jury Instruction Was Improper Because it Unfairly Highlighted the Cost to the Public of Both Prosecuting and Defending Appellant

Respondent next claims that the instruction was not only legally accurate, but was appropriate because appellant, in questioning the expert witnesses, "made a point to ask them if they were appointed by the court – thereby giving the impression that the court endorsed the witness to enhance the witness's credibility, and to show the lack of bias." Respondent contends that defense counsel's questions caused the prosecutor to "follow-up with questions asking more specifics about the appointment process, to accurately portray the court's role." (RB 163.)

Respondent also contends that the cases cited by appellant all concern the impropriety of giving an "*Allen* charge" to a deadlocked jury, and that appellant's reliance upon those cases is misplaced. (RB 164-166.) Although respondent makes much of the fact that the cases cited by appellant arise from a different procedural context, those case make clear that the cost of a defendant's trial is as improper a consideration as the cost of a retrial. (See AOB 174.) For instance, in *People v. Hinton* (2004) 121 Cal.App.4th 655, 660, the Court of Appeal held that the challenged jury instruction was defective because, among other things, "the judge emphasized the costs of the trial and implied that it would be necessary to expend further costs in a retrial. Near the beginning of his remarks, the judge directly referred to the time and resources devoted to the trial, as well as the other expenses incurred." Indeed, as this Court has explained, "[c]onsideration of expense 'may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government.'" (*People v. Barraza* (1979) 23 Cal.3d 675, 685, quoting Note, *The Allen*

Charge: Recurring Problems and Recent Developments (1972) 47 N.Y.U. L.Rev. 296, 304.)

Contrary to respondent's position (RB 166), it is likely that the consideration of the cost of the trial had a coercive effect, particularly since the jury was aware that this trial was itself a retrial. For example, the instruction may have led the jurors to reach verdicts even if they did not believe appellant was guilty beyond a reasonable doubt of the charged offenses. At the very least, the instruction would have led the jurors to believe that defense counsel had engaged in unethical or irresponsible conduct, and that the defense experts were unduly biased in appellant's favor, nothing more than "hired guns." (See AOB 174.)

In addition, respondent, like the prosecutor and trial court below (2 RT Vol. 29 6659-6667, 6669, 6674-6678), accuses defense counsel of eliciting testimony that expert witnesses were appointed by the court in order to suggest that the court had validated their credentials. (RB 163, 166.) Respondent further asserts that the instruction was relevant to explain the process for judicial review and appointment of expert witnesses, so the jurors could properly assess the expert witnesses' credibility. (RB 166.)

However, Evidence Code section 722, subdivision (a), expressly provides that "[t]he fact of the appointment of an expert witness by the court may be revealed to the trier of fact." Indeed, this Court has pointed out that "court appointment of an expert does not itself constitute vouching and would not be seen as such by a jury." (*People v. Coddington* (2000) 23 Cal.4th 529, 616, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Therefore, appellant was entitled to elicit testimony as to who appointed the experts, and did not mislead the jurors by doing so.

Respondent asserts that appellant "also complains that the instruction was not supported by the facts because defense counsel did not repeatedly elicit testimony that the expert witnesses had been appointed by the court, thereby insinuating the court had validated their testimony." (RB 166.) However, as appellant has already explained (AOB 175-176), in almost every instance, defense counsel made clear the nature of each expert's appointment. First, although defense counsel in his opening statement told the jury that "a number of doctors appointed by the court have examined [appellant] and have tested [appellant]" (2 RT Vol. 17 3725), he also singled out the one expert who had been appointed as an independent expert witness. Specifically, he explained, "And without exception, without exception, *including a doctor – Dr. Anderson who was appointed independent of counsel for the defense, appointed by the court*, and without exception they will all testify to their opinion and you will have to judge credibility and weigh their opinion." (2 RT Vol. 17 3725-3726; italics added.) Thus, the jury would have understood correctly that the others had been appointed by the court, but not independent of counsel.

Moreover, in its discussion of the issue, respondent omits critical details provided by the experts in their testimony regarding the nature of their appointments. For instance, respondent notes that Drs. Jose LaCalle, Susan Fossum and Arnold Purisch told the jury that they were appointed by the court to evaluate appellant. (RB 167.) In fact, defense counsel asked Dr. Fossum, "[W]ere you appointed by the superior court to act as a consultant in assisting us in this case?" She then answered "That is correct." (2 RT Vol. 26 5701.) Similarly, Dr. Purisch testified on direct examination that he had been appointed by the court at the defense's request. (2 RT Vol. 27A 6180.) Finally, although Dr. Jose LaCalle testified

on direct examination that it was his understanding that he had been appointed by the Orange County Municipal Court (2 RT Vol. 22 5015), the prosecutor subsequently clarified that he had been appointed as a psychological expert for the defense (2 RT Vol. 23 5097-5099, 5192).

Respondent also asserts that Dr. Kowell said he was sent records from the court. (RB 167, citing 2 RT Vol. 18 4090.) However, a review of the record reveals that Dr. Kowell immediately clarified the source of the records he received:

[Dr. Kowell]:	Recently I was sent records by the court.
[Prosecutor]:	Do you have correspondence from the court?
[Dr. Kowell]:	All that I have is – well, actually, it is from Christine Knowles of Sandberg Investigation.

(2 RT Vol. 18 4090.)

Finally, respondent asserts that defense counsel made a number of speaking objections in which he gave the jury the impression that the experts were appointed by the court. (RB 167.) For instance, respondent apparently complains that defense counsel explained that Dr. LaCalle was on a panel of doctors reviewed and accepted by the courts to conduct psychological evaluations for defendants. (RB 167, citing 2 RT Vol. 22 5004-5005.) However, defense counsel's objection was essentially correct. As the Court of Appeal in *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1010, explained, "Section 987.9 was part of that 1977 statutory scheme, and provides in pertinent part that in 'the trial of a capital case . . . the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense.' (§

987.9, subd. (a).)" Indeed, addressing another of the so-called "speaking objections" complained of by respondent (RB 167), the prosecutor responded, "If counsel wants to stipulate the court is paying for this, I will accept the stipulation." (2 RT Vol. 26 5771.) Finally, respondent notes that defense counsel objected that the prosecutor's question assumed a fact not in evidence – i.e., that Dr. Buchsbaum was assisting the defense – and added that "[h]e has evaluated [appellant]." (RB 167, citing 2 RT Vol. 28 6334.) Significantly, that objection was sustained (2 RT Vol. 28 6334), suggesting that the trial court recognized that defense counsel's point was well-taken.

Second, while respondent cites to the testimony of the expert witnesses who said that they were being paid by the court (RB 167, citing 2 RT Vol. 18 4069; 2 RT Vol. 26 5701; 2 RT Vol. 28 6501-10), such testimony was essentially correct, even if, as the prosecutor complained, expert witnesses are actually paid by the county. (2 RT Vol. 29 6665.) As noted above, section 987.9 provides that an indigent defendant in a capital case may request the *court* for funds for the payment of investigators, experts, and others for the preparation or presentation of the defense. (*Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at p. 1010.)

Respondent further disputes appellant's argument that the instruction was misleading, contending (1) that appellant did not request that the court advise the jury regarding the guidelines referred to in the instruction, and (2) that the instruction sufficiently explained the process for appointment of expert witnesses. (RB 167-168.) Respondent mistakenly suggests that appellant has interpreted section 987.9 to require the court to determine the reasonableness of the funds, but not the reasonableness of the appointment itself. (RB 168.) This is simply not so, and a fair reading of appellant's

opening brief shows that his argument concerned both aspects of section 987.9. In particular, appellant argued that the instruction was misleading because "[t]he jury would have understood it to mean that the court must determine whether the ancillary personnel were reasonably necessary, but not that the court *was also* required to determine whether the funds requested were reasonably necessary." (AOB 176; emphasis added.)

As appellant has argued (AOB 176-177), the instruction stated that the court "monitor[ed] the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose," but it failed to explain the nature or purpose of those guidelines. It is reasonably likely, then, that the jury understood this portion of the instruction to mean only that an expert (or other ancillary personnel) could not receive any fees unless the court had determined that his or her services were reasonably necessary. Thus, notwithstanding respondent's contention that further details on *how* the court decided the fees was not necessary (RB 168), the instruction was misleading in that it failed to explain that the court was also required to determine whether the *funds* requested were reasonably necessary.

Respondent maintains that appellant's reliance upon *People v. Barraza*, *supra*, 23 Cal.3d at p. 685 is misplaced because the instruction in the instant case was not an "*Allen* instruction," and therefore there is no concern about pressuring or coercing the jurors to reach a verdict. (RB 168-169.) However, as appellant noted above, it is reasonably likely that the instruction had a coercive effect insofar as it improperly injected the subject of the cost of this trial into their deliberations. Moreover, the instruction would lead jurors to view defense counsel as unethical or irresponsible, and the defense experts as unduly biased.

D. The Error Was Prejudicial

Respondent contends that even if the claim is cognizable, and this Court finds that the instruction was improper, appellant was not prejudiced by any error because: (1) the evidence against appellant was overwhelming; and, (2) the instruction did not focus on the costs of the defense, nor did it state how much the trial, retrial, prosecution or defense cost. (RB 169-170.) For the reasons set forth below, respondent is incorrect.

Contrary to respondent's claim (RB 169), the evidence against appellant was not "overwhelming." In particular, whether appellant harbored the mental states necessary to sustain convictions for the charged offenses was very much at issue. Therefore, it was critical that the jury be properly instructed with respect to how they were to evaluate the evidence bearing on his mental states.

As the jury was surely aware, the defense case was heavily dependent upon the work of investigators, as various witnesses testified that they had spoken to or otherwise had contact with defense investigators. (See 2 RT Vol. 18 3987, 4090; 2 RT Vol. 19 4167-4168, 4356; 2 RT Vol. 20 4479; 2 RT Vol. 21 4706, 4718, 4723, 4748, 4764, 4792, 4796, 4798, 4858, 4890, 4892; 2 RT Vol. 23 5131, 5150, 5170, 5187, 5224; 2 RT Vol. 24 5336-5337, 5339-5341, 5351, 5360, 5394; 2 RT Vol. 25 5497-5498, 5534, 5576; 2 RT Vol. 26 5783-5785, 5797, 5799-5800, 5802, 5839-5840; 2 RT Vol. 27 5861-5862, 5866, 5871-5888, 5900, 5960, 5968, 6027-6028; 2 RT Vol. 27A 6034, 6083, 6085, 6149; 2 RT Vol. 28 6336, 6345, 6473.) More important, the testimony of the eight expert witnesses presented at the guilt phase was central to appellant's theory that, as a result of longstanding mental impairments (including brain damage and various mental illnesses),

and perhaps the use of alcohol and/or drugs, appellant lacked the mental states necessary to sustain convictions for the charged crimes.

It is reasonably likely that the jury inferred from the instruction that the defense experts were biased and came at great cost to the public, and that it discounted their testimony. In addition, because the instruction injected the matter of cost in what was already a retrial, it is reasonably likely the jury would have felt greater than usual pressure to reach a verdict. In the absence of the instructional error, it is reasonably likely the jury would have accepted the defense theory, and would have found appellant not guilty of the charged offenses.

It is immaterial that the instruction did not state how much the trial, the retrial, the prosecution or the defense cost. The jury certainly would have recognized the significant public expense involved in, among other things, sending police officers to Texas to question appellant, housing him in the county jail, paying for the prosecutor, defense attorneys, expert witnesses and investigators, and trying him not once, but twice. Although the instruction did not state the actual costs involved in trying appellant, it could only have drawn the jury's attention to the subject of costs and to the role of defense counsel in retaining "investigators, experts and other[]" ancillary services. (2 CT Vol. 4 1450.) Even assuming this is a matter of common knowledge, at least in general terms, the instruction invited speculation and resentment against appellant about those costs.

The trial court's error in giving the instruction allowed the jury to consider irrelevant, unduly prejudicial information, denying appellant his rights to a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15.) Moreover, by reducing the reliability of the jury's determination and creating the risk that the jury would make

erroneous factual determinations, it violated his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17).

For the reasons set forth above, there can be no question that the error requires reversal whether this error is viewed as one of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24) or as one of state law (*People v. Watson* (1956) 46 Cal.2d 818). Even if this Court concludes that the instruction was merely ambiguous, the entire judgment must be reversed because it is reasonably likely that the instruction led the jury to consider the costs expended in bringing appellant to trial, and to find him guilty simply to avoid the costs of a retrial. (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

Accordingly, the entire judgment must be reversed.

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VII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF EVIDENCE OF HIS PRIOR ACTS OF MISCONDUCT

In his opening brief, appellant argued that the trial court erred by denying his request that it give an instruction advising the jury that it could consider evidence of his alleged prior misconduct – in particular, evidence relating to appellant's assaults against Gloria Lara and Maria Esparza – only to the extent that the expert witnesses relied upon such evidence in support of their opinions. The court's failure to so limit the evidence violated appellant's constitutional rights to due process, to have a properly instructed jury find all the elements proven beyond a reasonable doubt, and to a fair and reliable trial under the state and federal Constitutions. (AOB 181-188.)

Respondent contends that: (1) appellant never submitted an instruction to limit the evidence in the manner raised in his argument, so he has forfeited his claim of error on appeal; (2) even had he preserved his claim, it lacks merit, as the trial court properly limited the evidence such that it would not be considered as propensity evidence; and, (3) even if there was error, he was not prejudiced. (RB 171-179.) Respondent's contentions are incorrect.

A. The Instant Argument Is Cognizable on Appeal

As appellant acknowledged in his opening brief (AOB 185-186, fn. 64), he does not contend that the trial court erred in giving CALJIC Nos. 2.50, 2.50.1. and 2.50.2. Those instructions were necessary to advise the jurors that they were not to consider evidence of prior misconduct as establishing that appellant was a person of bad character or that he had a

disposition to commit crimes. (2 CT Vol. 4 1426-1427; see also Evid. Code, § 1101.) Instead, he argues that the instructions were incomplete because they did not also advise the jurors that they could consider evidence of appellant's alleged misconduct only to the extent it was relied upon by the defense experts.

Respondent, however, asserts that appellant has forfeited his claim of error because the trial court adopted "both of" his proposed modifications, and that he did not subsequently submit or suggest any further modifications to the standard instruction. (RB 175.) A review of the record demonstrates that respondent's contention is incorrect.

The standard version of CALJIC No. 2.50 reads in pertinent part as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial.

(CALJIC No. 2.50 (5th ed. 1988).) After withdrawing their own request for CALJIC No. 2.50, and objecting to the prosecutor's request that that instruction be given, defense counsel requested that it be modified to refer to "an act similar to those constituting a crime" rather than to "crime" or "crimes." (2 RT Vol. 29 6568, 6570-6572, 6585.) Defense counsel argued that it would be improper to assume that a prior act was a crime where the defendant had not been convicted of such a crime. (2 RT Vol. 29 6573, 6577.) Ultimately, the trial court modified the instruction to read "crimes or acts other than that for which he is on trial." (2 RT Vol. 29 6577, 6590-6593; 2 CT Vol. 4 1426.) Although defense counsel agreed to that modification, it is clear they were troubled by the inclusion of the word "crimes." (2 RT Vol. 29 6585-6586, 6591-6593 [recognizing that the trial

court intended to include the word "crime" in the instruction, defense counsel reiterated their request that the instruction also include a phrase to the effect of "or acts similar to those constituting crimes"].)

Defense counsel also observed that CALIC No. 2.50 failed to instruct the jury as to the purpose for which the defense introduced evidence relating to appellant's prior acts of alleged misconduct. (2 RT Vol. 29 6578-6580.) Accordingly, defense counsel requested that the court modify the instruction to state that the evidence was also introduced "for the purpose of showing evidence that the doctors relied on for his – as evidence of his mental defect." (2 RT Vol. 29 6581.) The court instead used the phrase, "which may show that the defendant committed crimes or acts other than that for which he is on trial." (2 RT Vol. 29 6582-6583; 2 CT Vol. 4 1426.) Although defense counsel requested that modification, they did so only after objecting to the instruction in its entirety, at least insofar as it failed to adequately instruct the jury as to the *defense's* use of the evidence. (2 RT Vol. 29 6583.)

Thus, contrary to respondent's claim (RB 175), the court did not adopt both of appellant's proposed modifications. Rather, defense counsel acceded to the modifications imposed by the court, but only after making clear that they objected to the entire instruction, as it failed to address the purpose for which they had introduced such evidence. (See 2 CT Vol. 4 1426-1427 [CALJIC No. 2.50].)

Moreover, contrary to respondent's claim that it is not clear from the record what a further instruction would have told the jury (RB 175), the nature and scope of the limitation requested by defense counsel was clear. Specifically, defense counsel took the position that the jury could consider the evidence regarding those incidents only to the extent it was relied upon

by the expert witnesses as evidence of appellant's mental defect. (2 RT Vol. 29 6578-6581, 6583.) Therefore, defense counsel sufficiently advised the trial court as to the nature of the requested limiting instruction, and the trial court's failure to give such an instruction was error.

Contrary to respondent's contention (RB 175), it is immaterial that CALJIC No. 2.50 as given in this case was legally correct. As appellant discusses in greater detail in Section B, *post*, that instruction failed to guide the jury in considering evidence of appellant's prior misconduct to determine whether he harbored the requisite mental states (particularly, premeditation and deliberation), the most critical issue raised by the defense evidence.

Under these circumstances, the instant argument is cognizable on appeal. (Cf. *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial"].)

B. The Trial Court Erred in Failing to Give a Limiting Instruction as Requested by the Defense

In his opening brief, appellant argued that, in the absence of a proper limiting instruction, it reasonably likely that the jurors believed CALJIC No. 2.50 applied only to evidence introduced by the prosecution, and therefore it is also reasonably likely that they considered evidence regarding appellant's alleged attacks on Gloria Lara and Maria Esparza as propensity evidence. Moreover, in the absence of the requested limiting instruction, it is reasonably likely the jury did not understand that the testimony of Lara

and Esparza constituted evidence of mental illness. (AOB 185-188.)[50]

Respondent contends that the evidence was not admitted to show appellant's propensity. (RB 177.) However, although a jury is ordinarily presumed to have understood and followed the court's instructions (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005, fn. 9), it is unlikely that it did so here. First, CALJIC No. 2.50.1 told the jury that "[t]he *prosecution* has the burden of proving these facts [referred to in CALJIC No. 2.50] by a preponderance of the evidence." (2 CT Vol. 4 1428, italics added.) Because CALJIC No. 2.50.1 did not refer to the defense, the jurors likely believed that CALJIC No. 2.50 did not apply to defense evidence. Second, the prosecutor's argument explicitly drew from the language of CALJIC No. 2.50, whereas defense counsel did not. (See 2 RT Vol. 29 6822-6823 [prosecutor argued that the Esparza incident showed appellant's knowledge as to the means to accomplish his goal in committing the instant offense].) Thus, even if the evidence was not introduced to show propensity, the jurors likely interpreted CALJIC No. 2.50 to mean that they could consider the evidence of other crimes, or at least the Lara and Esparza incidents, for that purpose.

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[50] In his opening brief, appellant argued that, in the absence of the requested limiting instruction, it is reasonably likely the jury did not understand that the testimony of Lara and Esparza constituted evidence of mental illness within the meaning of CALJIC No. 3.32 (2 CT Vol. 4 1434 [evidence of mental disease – received for limited purpose]). (AOB 187.) According to respondent, this argument is inconsistent with his argument that the evidence should have been limited "to the extent that the expert witnesses relied upon the evidence." (RB 178, fn. 55, citing AOB 182.) Not so. It is reasonably likely the jury would have understood that that evidence constituted evidence of mental illness largely, if not entirely, insofar as it was relied upon and explained by the defense experts.

Respondent suggests that "[w]hich party has the burden of proof (as explained by CALJIC No. 2.51) is a different concept than the purpose for admitting the evidence (as explained by CALJIC No. 2.50)." (RB 177.) While these are indeed distinct concepts, CALJIC No. 2.50.1 clearly relates to the burden of proving other crimes within the meaning of CALJIC No. 2.50. It cannot be presumed that the jurors would have realized that although CALJIC No. 2.50.1 applied to the prosecution alone, CALJIC No. 2.50 applied to both parties.

Respondent further argues that CALJIC No. 2.50 was correct because it advised the jury, among other things, that it could consider the evidence of prior misconduct to determine whether appellant had the intent to rape, sodomize and murder Nadia. (RB 176-177.) In support of this contention, respondent notes that the trial court pointed out, and defense counsel agreed, that appellant was using the evidence to show his lack of intent. (RB 176, citing 2 RT Vol. 29 6580.)[51] However, appellant relied on this evidence with respect to issues beyond his intent, i.e., to show that he

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[51] The exchange cited by respondent was as follows:

[The Court]:	[The prosecutor] is trying to show that the defendant has criminal intent because some of his crimes require criminal intent.
[Defense counsel]:	But are we going --
[The Court]:	You are trying to show that he doesn't act with that intent.
[Defense counsel]:	Right.

(2 RT Vol. 29 6580.)

suffered mental defects bearing on his intent and mental state(s) at the time of the offenses. (2 RT Vol. 29 6578-6579, 6581.) The trial court's failure to give a limiting instruction as requested by defense counsel therefore may have precluded the jury from considering, or at least fully considering, the purposes for which the defense had relied on the evidence of prior misconduct. In particular, CALJIC No. 2.50 as given did not advise the jury that they could consider such evidence to determine whether the appellant premeditated and deliberated Nadia's killing. In the absence of such an instruction, the jury may have disregarded the defense evidence relating to the prior misconduct in support of its argument that the killing was not premeditated and deliberate. (2 RT Vol. 29 6780-6786, 6788-6793, 6797-6798; see also 2 CT Vol. 4 1434 [CALJIC No. 3.32].)

Under these circumstances, the trial court's failure to provide a further limiting instruction was error.

C. The Trial Court's Error Was Prejudicial

Respondent contends that even if appellant's argument is cognizable on appeal, and the trial court erred by failing to give an instruction further limiting the use of the evidence, appellant was not prejudiced thereby.

Respondent again claims that the evidence against appellant was "overwhelming." (RB 179.) However, while it was uncontested that appellant committed the crimes against Nadia, the central issue at the guilt phase was whether appellant harbored the mental states necessary to sustain convictions for the charged offenses. It was critical, therefore, that the jury be properly instructed with respect to how they were to evaluate the evidence bearing on his mental states.

It was particularly important that the trial court properly instruct the

jury as to how they were to consider appellant's prior acts of misconduct, evidence which the jury would certainly have considered inflammatory otherwise. Even if the prosecutor's argument referred only briefly to the Esparza incident during his closing argument, and did not refer to the Lara incident at all, it is almost inconceivable that the jury would have viewed those incidents as "insignificant." Thus, respondent is incorrect in asserting that the limiting instruction requested by defense counsel would not have made a difference in the outcome. (RB 179.)

For the reasons set forth above and in the opening brief, the trial court's error violated appellant's rights to a fair trial and due process of law (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15), his right to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17). Therefore, the state cannot prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the error is viewed as one of state law, it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.) Accordingly, the entire judgment must be reversed.

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VIII

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING HEARSAY EVIDENCE THAT APPELLANT REGISTERED FOR TWO GUESTS AT THE HA' PENNY INN

In his opening brief, appellant argued that the trial court erred in ruling that a motel receipt from the Ha' Penny Inn constituted an admission, and in admitting testimony, based on that receipt and another motel record (i.e., a "registration card"), that appellant had registered for two people on the day of the crime. Appellant further argued that the evidence was inadmissible under the business records exception to the hearsay rule because the motel records failed to satisfy the requisite criteria. (AOB 189-200.)[52]

Respondent contends that the trial court properly exercised its discretion in allowing the testimony because it was admissible under two exceptions to the hearsay rule: the one for admissions (Evid. Code, §§ 1220, 1221) and that for business records (Evid. Code, §§ 1270, 1271) . Respondent further contends that even if admission of the testimony was error, appellant suffered no prejudice. (RB 180-190.) Respondent's contentions are incorrect.

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[52] As respondent points out (RB 182, fn. 58), appellant incorrectly stated that the trial court did not admit the motel records (and that, as a result, the prosecutor was mistaken in telling the jurors that they would have the exhibits in the jury room). (AOB 200, fn. 71.) Nevertheless, the motel records, like the testimony of Tom Nixon and Vereen Kennelly based upon those records, were inadmissible for the reasons set forth in appellant's opening brief and in the instant argument.

A. The Motel Records and Testimony Based on Those Records Constituted Inadmissible Hearsay

1. The Records and Testimony Were Not Admissible as Admissions

Respondent first contends that the trial court properly exercised its discretion in admitting the motel documents as admissions. (Evid. Code, §§ 1220, 1221.)[53] According to respondent, appellant, by affixing his signature to the documents, manifested his adoption or his belief in their truth. Respondent also contends that appellant presumably had knowledge of their contents, or else he would not have signed them. (RB 183-186.)

According to respondent, appellant's argument that there was no evidence that he reviewed the records prior to signing them, or that he told a motel employee that there would be two people in the motel room (AOB 193), overlooks the testimony of Thomas Nixon, who had been the motel's assistant manager on the date of the offenses (2 RT Vol. 17 3756), that the entries were on the receipt prior to the guest signing it. (RB 184.) However, in so arguing, respondent itself ignores certain critical facts.

Respondent argues that, in light of Nixon's testimony that entries were entered on motel receipts prior to the guest signing it, it is a reasonable inference that appellant reviewed the receipt before signing it. (RB 184,

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[53] Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Evidence Code section 1221 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

citing 2 RT Vol. 17 3767-3768.) Not so. First, the testimony regarding the motel's registration process was unclear, if not altogether inconsistent. Nixon testified that, when *checking in* a guest, the motel employee fills out a receipt (among other things), which is in triplicate. The guest then signs the receipt. (2 RT Vol. 17 3756-3757, 3778.) Similarly, Vereen Kennelly, who was the office manager on the date of the offenses, testified that the entries on the motel's receipts are generally made at or about the time the guest paid for the motel room, i.e., at the time the guest checked in. (2 RT Vol. 17 3774-3776, 3781; see also Exhibit 8 [copy of receipt].) However, Nixon also testified that he wrote all of the entries except for appellant's signature on Exhibit 6, another copy of the receipt, at the time appellant *checked out* of the motel. (2 RT Vol. 17 3769-3770.)

Second, the evidence was inconsistent as to whether the motel's registration procedure required that the motel clerk document the number of guests registered to a room. Specifically, Nixon testified that there was no provision for documenting how many people rented a particular room, yet (1) he subsequently testified that he had entered the number of people registered to appellant's room on the receipt (2 RT Vol. 17 3757, 3759), and (2) Vereen Kennelly testified that there was no provision for finding out how many people were going to be in the room "other than what the guest told us and if we could see anyone else obviously in the car" (2 RT Vol. 17 3777).

Third, respondent is incorrect in contending that appellant filled out the registration card that indicated the room was rented for two guests. (RB 184, citing 2 RT Vol. 17 3775, 3777.) According to Nixon, former motel employee Parley Kennelly filled out a portion of the registration card, including the notation indicating that the motel room was being rented for

two persons. (2 RT Vol. 17 3766-3767, 3770-3771.)[54] Nixon acknowledged that he was not present when Kennelly filled out the registration card, and he did not know whether Kennelly took that information from appellant or wrote the "2" on his own accord. (2 RT Vol. 17 3771.) Similarly, Vereen Kennelly testified that she could not testify with certainty as to whether her son, Parley Kennelly, was told or somehow concluded that the room was being rented for two people. (2 RT Vol. 17 3780.)

Respondent attempts to distinguish *People v. Maki* (1985) 39 Cal.3d 707, which appellant cited in support of his argument that the motel records did not constitute adoptive admissions because there was no evidence as to the source of the information that appellant had registered for two guests, or that he had reviewed either the receipt or registration card before signing them (AOB 194-195). Specifically, respondent contends that, in the instant case, (1) two motel employees (i.e., Thomas Nixon and Vereen Kennelly) testified as to how the documents were prepared, and described the circumstances surrounding the signing of the document (2 RT Vol. 17 3756-3760, 3765-3768, 3770, 3771, 3774-3778)[55]; and, (2) Nixon explained that the receipt was signed after it contained all the information on it (2 RT Vol. 17 3767-3768). (RB 185-186.) However, as noted above, the evidence was unclear as to *when* appellant signed the documents. Moreover, neither Nixon nor Vereen Kennelly testified that appellant did in

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[54] Nixon testified that he was familiar with Parley Kennelly's handwriting. (2 RT Vol. 17 3766, 3771.)

[55] Respondent inadvertently cites page 3711 of the Reporter's Transcript, which reflects a portion of the prosecutor's opening statement, rather than page 3771.

fact review the documents before signing them.

Under these circumstances, the evidence failed to establish that appellant had read the documents before signing them. Thus, the evidence was insufficient to show that appellant either made or adopted an admission that he had registered for two guests.

2. The Records and Testimony Were Not Admissible under the Business Records Exception to the Hearsay Rule

Respondent next contends that the motel documents were separately admissible under the business records exception.[56] According to respondent, the testimony of Thomas Nixon and Vereen Kennelly established that the sources of information and method and time of preparation were such as to indicate their trustworthiness within the meaning of the business records exception (Evid. Code, § 1271).[57]

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[56] As appellant observed in his opening brief (AOB 196), and respondent has acknowledged (RB 186), the trial court did not cite the business records exception as a basis for admitting the records.

[57] Evidence Code section 1271 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(continued...)

Specifically, respondent claims that: Kennelly testified that the writings were made in the regular course of the motel's business, and that they were made at or about the time the transactions occurred (2 RT Vol. 17 3776-3777, 3781); and, that Nixon and Kennelly testified as to the identity of the documents and their mode of preparation (2 RT Vol. 17 3756-3760, 3765-3768, 3770, 3771, 3774-3778). (RB 187.)

However, as appellant demonstrated in his opening brief (AOB 196-197), the prosecutor failed to make a sufficient showing that they fell within the business records exception to the hearsay rule. In particular, Nixon and Kennelly presented conflicting testimony concerning the method of preparation of motel records. First, there was conflicting testimony as to whether the motel records were completed by motel guests or employees. Whereas Nixon testified that the motel employee filled out the registration card and receipt, which were then signed by the guest (2 RT Vol. 17 3756-3760, 3766-3771), Kennelly testified that the guest, not the motel employee, filled out the registration card (2 RT Vol. 17 3773-3778, 3781).

Second, the testimony of both Nixon and Kennelly makes clear that the motel had no procedure for reliably documenting how many guests checked into a particular motel room. Again, Nixon testified that there was no provision for documenting how many people rented a room (2 RT Vol. 17 3757), while Kennelly testified that there was no provision for finding out how many people were going to be in the room "other than what the guest told us and if we could see anyone else obviously in the car" (2 RT Vol. 17 3777). Indeed, neither Nixon nor Kennelly was able to state with

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[57](...continued)
(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

certainty how Parley Kennelly came to indicate that appellant was registering for two people. (2 RT Vol. 17 3771, 3780.)

Third, as noted in the previous section, the testimony was inconsistent as to whether appellant signed the motel records when he checked in or checked out of the motel. Nixon testified that, when *checking in* a guest, the motel employee fills out, then signs, a receipt. (2 RT Vol. 17 3756-3757, 3778.) Similarly, Kennelly testified that the entries on the motel's receipts were generally made at or about the time the guest checked in. (2 RT Vol. 17 3774-3776, 3781; see also Exhibit 8.) However, Nixon also testified that he wrote all of the entries except for appellant's signature on Exhibit 6, another copy of the receipt, at the time appellant *checked out* of the motel. (2 RT Vol. 17 3769-3770.)

Under these circumstances, the motel records lacked sufficient indicia of reliability, and therefore those records, and the testimony based on those records, were inadmissible under the business records exception.

Respondent apparently concedes that there was conflicting testimony as to whether the guest or the motel clerk prepared the motel records, but contends that both Nixon and Kennelly testified that steps were taken to verify the trustworthiness of those records. (RB 187-188.) Kennelly explained that the motel clerk checked the guest's state-issued identification to verify his or her driver's license number, address, photograph and signature. (2 RT Vol. 17 3775; see also 2 RT Vol. 17 3757 [Nixon testified that the motel required that the guest present valid identification, such as driver's license or identification card].) However, verification of that information does not constitute a means for verifying, let alone reliably so, the number of guests in a room.

Respondent further contends that there was no inconsistency with

respect to the testimony as to how the motel documented the number of guests in the motel. According to respondent, "the witnesses established the records were accurate to the extent the guest reliably told them how many guests would be in the room." (RB 188.) However, the testimony *was* inconsistent on this point. While Kennelly testified that there was no provision for finding out how many people were going to be in the room "other than what the guest told us and if we could see anyone else obviously in the car" (2 RT Vol. 17 3777), Nixon simply testified that there was no provision for documenting how many people rented a room (2 RT Vol. 17 3757). In addition, neither Nixon nor Kennelly knew how Parley Kennelly had come to indicate that appellant was renting the room for two guests. (2 RT Vol. 17 3771, 3780.) In light of the witnesses' inconsistent testimony, it cannot be said that the motel employed a reliable, trustworthy procedure for documenting the number of guests renting a room.

B. The Trial Court's Error Was Unduly Prejudicial

According to respondent, the evidence against appellant was overwhelming, and therefore he was not prejudiced under either the *Watson* standard for state law error or the *Chapman* standard for federal constitutional error.[58] Respondent further contends that, contrary to appellant's position, he was not prejudiced in the penalty phase because the aggravating factors – particularly the circumstances of the offense – were substantial. (RB 189-190.)

However, as appellant observed in his opening brief (AOB 198-199), evidence that he registered the motel room for two people improperly

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[58] See *Chapman v. California* (1967) 368 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.

undermined the defense evidence that he acted while in the throes of mental illness. The evidence would have been relevant to issues such as planning or intent, if at all, only if the documents were reliable and trustworthy. In this case, they were not. The error was compounded by the prosecutor's argument, who, during his closing argument, referred to the motel records in support of his contention that the charged offenses were planned (2 RT Vol. 29 6817-6820) and that, "[l]ike a predator, he goes out to find a target" (2 RT Vol. 29 6819).

According to respondent, Dr. Berg's testimony that appellant told him he did not realize he checked into the motel for two guests (2 RT Vol. 21 4756) would negate any intent or argument that appellant planned to bring someone to the motel. (RB 189.) However, evidence relating to the number of guests improperly undermined *all* of the mental health evidence introduced by the defense, including the testimony of Dr. Berg, particularly when coupled with the trial court's error in excluding testimony regarding how getting fired affects people (see Argument IV, *ante*); its refusal to allow three of the defense witnesses to provide opinion testimony as to matters relevant to appellant's defense theory that he suffered from longstanding mental impairments, and that, because of those impairments, he did not form the mental states necessary to sustain convictions of the charged offenses (see Argument V, *ante*); its error in giving an instruction regarding applications for ancillary services, the review of such applications by the court, and how the jury was to consider the fact of the court's decision to appoint an expert witness (see Argument VI, *ante*); and, its error in denying the defense's request that it give an instruction advising the jury that it could consider the evidence of prior misconduct only to the extent that the expert witnesses relied upon such evidence in support of

their opinions (see Argument VII, *ante*).

Respondent also suggests that the damaging evidence contained in the motel records was the uncontested fact that appellant checked into the motel earlier that day. (RB 190.) However, that fact, along with evidence that appellant had approached Sandra Cruz as well as Nadia Puente, would have been answered by the testimony of appellant's expert witnesses, but for the errors which improperly undermined that testimony.

Similarly, evidence that appellant registered for two guests was also prejudicial at the penalty phase, where the prosecutor argued that the fact appellant registered for two guests showed that he was not mentally ill. (2 RT Vol. 34 8634.) As appellant noted in his opening brief (AOB 200), the jurors would have viewed the offenses as particularly heinous if they believed appellant had planned to commit them. Similarly, if the jury believed that the evidence showed planning, it would have been more likely to reject, or even disregard altogether, the evidence in mitigation.

Thus, appellant's convictions must be reversed because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 368 U.S. at p. 24.) Indeed, the error requires reversal under either of the prejudice standards set forth above.

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IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH ONE COUNT OF SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant has argued that, by instructing his jury that they could convict him of felony-murder in violation of Penal Code section 189 when he was charged only with malice murder in violation of Penal Code section 187, the trial court exceeded its jurisdiction and violated appellant's rights to due process, a jury determination on every element of the charged crime, adequate notice of the charges against him, and a fair and reliable capital guilt trial. (AOB 201-209.)

Respondent contends that appellant's argument should be rejected based on previous decisions of this Court. (RB 191-193.) Appellant has already addressed that point in his opening brief and will not repeat that discussion here.

Accordingly, as argued in the opening brief, reversal of the entire judgment is required.

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X

THE TRIAL COURT'S FAILURE TO MODIFY CALJIC NO. 4.01 AS REQUESTED BY APPELLANT DENIED HIM A FAIR SANITY PHASE

In his opening brief, appellant argued that the trial court erred because it failed to modify CALJIC No. 4.01, an instruction concerning the effect of a verdict of not guilty by reason of insanity, to explain that, given the crimes for which he had been convicted, there would be a mandatory period of in-patient treatment. Specifically, appellant argued that by failing to advise the jurors that the law would prohibit appellant's immediate release were he to be found legally insane, CALJIC No. 4.01 likely led them to disregard the evidence of his insanity in violation of the state and federal Constitutions. (AOB 210-228.)

Respondent contends that the trial court properly instructed the jury with CALJIC No. 4.01, and that it properly refused appellant's proposed instruction because it would have been misleading to the jury. (RB 193-207.) Respondent's contentions are incorrect.

A. Procedural Background

During appellant's first trial, the trial court modified CALJIC No. 4.01 by deleting the reference to outpatient status, lest the jury get the impression that he would be released to outpatient status if found not guilty by reason of insanity. (1 RT Vol. 16 3761-3762, 3766-3767.) In so ruling, the court observed that, under Penal Code section 1600, a defendant found to be not guilty by reason of insanity cannot be considered for outpatient status until he has been confined in a state hospital for a minimum of six months. (1 RT Vol. 16 3762-3763.) Thus, CALJIC 4.01, as given at the

first trial, read in pertinent part as follows:

> A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, he will remain in confinement while the courts determine whether he has fully recovered his sanity. If he has not, he will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of his present mental illness.
>
> Moreover, he cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had he been found guilty.

(1 CT Vol. 3 894.)

The trial court then denied defense counsel's request that he be allowed to argue to the jury that, given the seriousness of the case and the severity of appellant's mental illness, appellant would most likely spend the rest of his life in a mental institution. According to the court, the whole point of the instruction was to advise the jurors that they were not to consider or discuss what happens to a defendant found to be insane. (1 RT Vol. 3767-3768.)

During the instant trial, the trial court initially stated that it should again modify CALJIC No. 4.01 for the same reasons it had stated during the first trial. (2 RT Vol. 33 8076.) After further review of the matter, however, the trial court concluded that deleting the reference to outpatient treatment would be misleading because it would suggest that appellant could never be removed from hospital placement until he had either recovered his sanity or served a maximum period of confinement. (2 RT

Vol. 33 8082-8083.) Accordingly, the court modified the instruction to explain that, if appellant were found legally insane, his placement depended on both the seriousness of the crimes for which he had been convicted and the seriousness of his mental illness. (2 RT Vol. 33 8080-8082; 2 CT Vol. 5 1601-1602.) Thus, the instruction at issue read in pertinent part as follows:

> A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, he will remain in confinement while the courts determine whether he has fully recovered his sanity. If he has not, he will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of his present mental illness and the seriousness of the crimes for which he has been convicted in the guilt phase of this trial.
>
> Moreover, he cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had he been found sane.

(2 CT Vol. 5 1601.)[59]

Appellant argued that the modified instruction was misleading because it failed to explain that, given the crimes for which he had been convicted, there would be a mandatory period of in-patient treatment. Instead, the instruction implied that outpatient treatment could be immediately available to him, which the jurors would see as a frightening

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[59] The trial court also changed the last word of the instruction's second paragraph from "guilty" to "sane," explaining that, "I think it is clearer to the jurors what it meant by the use of the word sane there than it would be by the use of the word guilty." (2 RT Vol. 33 8084.)

possibility. (2 RT Vol. 33 8084, 8086.) Appellant subsequently reiterated his request that CALJIC No. 4.01 be given, but objected to the inclusion of language regarding outpatient treatment. (2 RT Vol. 33 8086-8087, 8095-8096.)

Although the trial court agreed that the average juror would be frightened by the prospect of appellant being released for outpatient treatment, it maintained that the modified instruction served the purpose of instructing the jury not to speculate on whether the court or the Department of Mental Health would properly carry out their duties. (2 RT Vol. 33 8085.) Thus, the trial court overruled the objection, concluding that its modification represented the best compromise in light of its duty not to mislead the jury and its duty to instruct the jurors not to speculate about what would happen to appellant after a verdict of not guilty by reason of insanity. (2 RT Vol. 33 8095-8096.)

B. The Trial Court Erred in Refusing Appellant's Request That it Modify CALJIC No. 4.01 by Deleting Language Regarding Outpatient Treatment

Respondent incorrectly contends that the trial court accurately advised the jurors as to the consequences of a verdict of not guilty by reason of insanity, and that it did need not to further advise them as to the length of a defendant's commitment. (RB 197.) However, the instruction did not explain to the jurors that, based on his crimes, the law (specifically, Penal Code section 1601, subdivision (a)) *mandated* in-patient treatment "for 180 days or more" if they were to find appellant not guilty by reason of insanity.[60] To that extent, at least, the instruction was not legally accurate.

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[60] The offenses specifically enumerated in Penal Code section 1601, (continued...)

Respondent's reliance upon *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1141, fn. 14, is misplaced. (RB 197.) There, the defendant argued on appeal that the trial court erred in refusing his proposed instruction concerning the consequences of finding him not guilty by reason of insanity. (*People v. Dennis*, *supra*, 169 Cal.App.3d at p. 1139.) Addressing his argument, the People suggested that the jury should be informed of the minimum number of days the defendant may be confined. The Court of Appeal disagreed, stating that "[t]he jury can no more be concerned with the possible length of a defendant's commitment than with the possible length of a prison term." (*Id.* at p. 1141, fn. 14.) It should be noted, however, that the Court of Appeal's particular concern was that the defendant's proposed instruction did not accurately reflect the commitment procedures established in Penal Code sections 1026 through 1026.2. (*Id.* at p. 1140.) Significantly, *Dennis* did not address the mandatory confinement provision of Penal Code section 1601.[61]

Respondent asserts that "[c]ommon sense would dictate that a convicted child murderer and rapist would be a serious category of crime, which would dictate longer inpatient treatment." (RB 197.) Although respondent lays claim to "common sense," it is by no means clear that the jury would have interpreted the instruction in this manner. As appellant

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[60](...continued)
subdivision (a), include murder, a violation of section 207, and a violation of Section 288. Appellant was found guilty of those three offenses. (2 CT Vol. 4 1379-1381, 1384-1387, 1505-1513, 1527-1532.)

[61] Like the trial court in the instant case (2 RT Vol. 33 8074, 8076), appellant is unaware of any decisions specifically addressing a challenge to CALJIC No. 4.01 insofar as it refers to outpatient treatment and/or fails to address section 1601.

observed in his opening brief (AOB 214), it is not enough to speculate that the jury may have surmised that the seriousness of his crimes made it unlikely he would be released immediately; there is nothing in the record to support such speculation, and neither CALJIC No. 4.01 nor any other instruction explicitly told them so. Jurors also may have feared that, even if appellant were to be placed in inpatient treatment, a court could release him after determining (perhaps inaccurately) that his sanity had been fully restored.

For this reason, and contrary to respondent's claim (RB 197), the first sentence of the instruction – which told the jury that "[a] verdict of 'not guilty by reason of insanity' does not mean the defendant will be released from custody" – would not have assuaged such concerns. For the same reason, respondent is also incorrect in asserting that the modification effectively told the jurors that appellant would not be subject to immediate release because his placement in outpatient treatment depended upon the seriousness of his present mental illness and the seriousness of the crimes for which he was convicted in the guilt phase. (RB 197-198.)

Finally, respondent also dismisses appellant's argument that the trial court's failure to modify the instruction by either incorporating section 1601, subdivision (a), or deleting the reference to outpatient treatment, would have *encouraged* uninformed speculation as to where appellant would be placed if he were to be found legally insane (AOB 215-217). (RB 198-199.) According to respondent, appellant's argument ignores the essence of the instruction, which told the jurors that appellant "[could not] be removed from [his] placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period

equal to the maximum period of imprisonment which could have been imposed had he been found sane"; that "[w]hat happens to the defendant under these laws is not to be considered by you in determining whether the defendant was sane or insane at the time he committed his crimes"; and, that they were not to "speculate as to if, or when, the defendant will be found sane." (2 CT Vol. 5 1601-1602.) However, in the absence of language modifying the instruction in the manner suggested by appellant, the jury was far more likely to speculate about what would happen to appellant if they found him not guilty by reason of insanity. (See *People v. Moore* (1985) 166 Cal.App.3d 540, 554 ["Empirical data indicates that regardless of whether an instruction is given jurors *do* concern themselves with the consequence of the insanity verdict; indeed, such speculation has been shown to be 'one of the most important factors' in jury deliberations"].) At the very least, language informing the jurors that appellant would be confined "for 180 days or more" likely would have boosted their confidence that the Department of Mental Health and the courts would properly carry out their responsibilities, which the instruction directed them to assume. (2 CT Vol. 5 1602.)

Under these circumstances, the trial court failed to instruct the jury properly regarding the consequences of a verdict of legal insanity. (*People v. Dennis*, *supra*, 169 Cal.App.3d at pp. 1139-1140; *People v. Moore*, *supra*, 166 Cal.App.3d at pp. 556-557.) Moreover, for the reasons stated in appellant's opening brief (AOB 217-218), the error violated his right to due process, his right to a jury trial, and his right to a jury trial before a properly instructed jury under the state and federal Constitutions.

C. The Trial Court's Error Was Prejudicial

Respondent contends that appellant's mental health evidence and sanity phase evidence was conflicting and weak. (RB 200.) To that end, respondent recites at some length what it calls the "conflicting and inconsistent" sanity phase testimony with respect to the diagnoses of appellant, whether appellant was insane at the time of the crimes, and when his insanity began and ended. (RB 200-203.)

It is hardly surprising that the experts reached various opinions on these difficult issues. Psychiatry and psychology are indeed inexact sciences. The United States Supreme Court itself has pointed out that "[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment . . . ." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 81.) Nevertheless, the Supreme Court recognized that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." (*Id.* at p. 83.)

In any event, their testimony was strongly consistent with respect to the most critical questions at issue. Most important, each of the defense experts presented at the sanity phase opined that appellant was legally insane at the time of the crimes. (2 RT Vol. 30 7232 [Dr. Consuelo Edwards]; 2 RT Vol. 31 7504-7506 [Dr. Jose LaCalle]; 2 RT Vol. 31 7549-7550, 7552, 7555 [Dr. Paul Berg]; 2 RT Vol. 32 7664 and 2 RT Vol. 33

7981-7982 [Dr. John Reid Meloy].) Moreover, each of the experts concluded that appellant's mental disorders were genuine despite instances in which he had, or possibly had, malingered or otherwise engaged in manipulative behavior (2 RT Vol. 30 7191-7193, 7195-7197, 7256-7259, 7271-7272 [Dr. Edwards]; 2 RT Vol. 31 7516-7517, 7520, 7536 [Dr. LaCalle]; 2 RT Vol. 31 7556-7558, 7569 [Dr. Berg]; 2 RT Vol. 33 7999-8000 [Dr. Meloy]).

Respondent also contends that appellant's sanity case was further weakened because he testified. (2 RT Vol. 203-205.) However, appellant submits that CALJIC No. 4.01 as given – which, as shown above, would have led the jurors to believe that appellant could receive an early release if found legally insane – likely swayed them to view the evidence as simply unbelievable rather than as demonstrating legal insanity.

Accordingly, the sanity verdicts must be vacated because the People cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 17.) The sanity verdicts must be vacated even if the error is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836, because it is reasonably probable that appellant would have obtained a more favorable result but for the trial court's error in giving CALJIC No. 4.01 without the modification he requested.

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XI

THE PROSECUTOR'S ARGUMENT REGARDING A SOCIAL CONTRACT MINIMIZED THE JURORS' SENSE OF RESPONSIBILITY REGARDING THE CAPITAL SENTENCING DECISION IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In his opening brief, appellant argued that the prosecutor's penalty phase closing argument improperly lessened the jurors' sense of responsibility regarding their role in assessing a death sentence, in violation of *Caldwell v. Mississippi* (1985) 472 U.S. 320 and the Eighth and Fourteenth Amendments to the federal Constitution. (AOB 229-234.)

Respondent contends that the prosecutor's closing argument did not state or imply that the responsibility for determining the appropriateness of appellant's sentence rested elsewhere, but instead made clear that the sentencing determination rested exclusively with the jurors. Therefore, respondent claims, appellant's constitutional rights were not violated. (RB 207-211.) Respondent's contentions are incorrect.

Appellant has adequately demonstrated that the prosecutor committed *Caldwell* error by suggesting that the jury's role was to act as a proxy for "society" and, in that capacity, to impose a verdict of death. In so arguing, the prosecutor indirectly minimized the importance of the jury's responsibility to determine the appropriate penalty. (AOB 230-232.) By interjecting extrinsic community expectations into the deliberative process – – i.e., the suggestion that the jury's duty was to was to "correct" the wrong in a manner "commensurate with that type of wrong" (2 RT Vol. 34 8661), which essentially amounted to an argument that it should be guided by the principle of "an eye for an eye" – the prosecutor's argument created a risk

of "substantial unreliability as well as bias in favor of [a] death sentence[]." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 330.)

Appellant has further demonstrated that the prosecutor's error was not cured by his reference to the choice between a sentence of death and one of life imprisonment without the possibility of parole, or by the jury instructions. (AOB 232-233.) Therefore, appellant here addresses only the prosecutor's contention that he was not prejudiced by any *Caldwell* error because the evidence against him was overwhelming. (RB 210-211.)

At the penalty phase, appellant presented a wide array of mitigating evidence. First, a number of family members and other lay witnesses testified regarding appellant's good character (including testimony that he behaved appropriately with children and the effect on his family were he to be executed) as well as matters bearing on his mental condition (e.g., head injuries and a lifelong history of odd behavior). (See 2 RT Vol. 34 8305-8322 [Teodora Munoz DeHoyos], 8323-8336 [Erundina Itzel Martinez], 8338-8349 [Edna Maritza Carrera], 8351-8360 [Rubin Dario Martinez], 8495-8497 [Lucio DeHoyos, Sr.], 8498-8502 [Lucio DeHoyos, Jr.], 8503-8511 [Alexander DeHoyos], 8512-8518 [Martha DeHoyos], 8542-8553 [Gloria Villareal, also referred to as Gloria Lara], 8554-8560 [Sandra DeHoyos].)

Second, Dr. William Logan, a psychiatrist, opined that the following factors had had an impact on appellant's behavior and life adjustment: (1) appellant suffered from physical abuse when he was a child, had a very disturbed relationship with his mother, and witnessed violence at home; (2) he was sexually abused as a young boy; (3) he was exposed to and exhibited odd religious beliefs; (4) as a child, he had suffered from a physical deformity (i.e., his eyes were deviated outward) which significantly affected

his self-esteem; (5) he had suffered a number of head injuries which had directly affected his behavior and his ability to control his impulses, regulate his emotions, and exercise appropriate judgment while under stress; (6) his abuse of sedatives and stimulants, which dated back to his childhood, had affected his ability to adjust to life successfully; (7) he suffered from paraphilia, or abnormal sexual development; (8) he had reported a history of experiencing psychotic phenomena (e.g., hearing voices) during periods of stress; and, (9) beginning early in 1988 and progressing through the time of the offense, appellant's functioning had deteriorated significantly. (2 RT Vol. 34 8420-8491.)

Lastly, Norman Morein, a sentencing consultant, opined that appellant could adjust to the prison setting if sentenced to life imprisonment without possibility of parole. (2 RT Vol. 34 8361-8367, 8380-8413.)

It is likely that the jury would have found the mitigation evidence compelling had it deliberated with a proper understanding of its role. However, because the juror likely believed its ultimate role was to impose a penalty "commensurate with that type of wrong" (2 RT Vol. 34 8661), i.e., death, they would have ignored that evidence.

Reversal is required under both federal and state law because respondent has not proven beyond a reasonable doubt that appellant was not denied due process and a fair trial as a result of the prosecutor's misconduct, and because the prosecutor used particularly reprehensible means to persuade the jury to sentence appellant to death. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Appellant argued in his opening brief that many features of California's capital sentencing scheme violate the United States Constitution. (AOB 235-252.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 211-220.) Accordingly, no reply is necessary to respondent's contentions.

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XIII

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO AGGRAVATED AND/OR CONSECUTIVE TERMS ON COUNTS 2, 3, 5 AND 6 BECAUSE IT RELIED UPON (1) INAPPLICABLE FACTORS AND (2) FACTORS NOT FOUND TRUE BEYOND A REASONABLE DOUBT BY THE JURY

In his opening brief, appellant argued that the trial court erred in imposing the upper terms and/or consecutive sentences as to the non-homicide offenses because (1) they were imposed in violation of the sentencing procedures set forth in Penal Code section 1170, subdivision (b), and former rule 420 of the California Rules of Court; and, (2) they were based on factual determinations made by the judge, did not meet the required standard of proof, and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt. (AOB 253-273.)[62]

Because respondent concedes that appellant's Sixth Amendment right to a jury trial was violated because the factors used by the trial court to impose the upper term as to Counts 2, 3, 5 and 6 were not determined by a jury,[63] appellant here addresses only respondent's contentions that the error

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[62] Respondent concedes that appellant's failure to object to imposition of the determinate sentence does not forfeit his claims on appeal. (RB 221-222, fn. 65, citing *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4, and *People v. Stitely* (2005) 35 Cal.4th 514, 575.)

[63] In light of its concession, respondent does not address appellant's argument that the trial court erred by using inapplicable factors to impose the upper term on Count 2, and for failing to state its reasons for imposing the upper term as to Counts 3, 5 and 6. (RB 223, fn. 66.)

was harmless. (RB 221-227.)[64]

According to respondent, it is clear beyond a reasonable doubt that the jury would have found appellant's crimes justified imposition of the upper term. (RB 225.) First, respondent asserts that the crimes were committed with a high degree of cruelty, viciousness and callousness. In support of its assertion respondent argues as follows:

> Taking a nine year old girl to a motel after school, raping and sodomizing her, then holding her head underwater to drown out her screams shows his cruelty, viciousness and callousness. His acts after raping and sodomizing her also showed his cruelty, viciousness and callousness. He stuffed her in a trash can like a piece of trash, drove her in the trunk of his car, and discarded her wet body.

(RB 225.)

However, at least some of these facts constitute elements of the crimes, or constitute the crimes themselves, and therefore should not have been used to impose the upper term. (See, e.g., *People v. Lincoln* (2007) 157 Cal.App.4th 196, 203; Cal. Rules of Court, rule 4.420, subd. (d)[65] [fact charged and found as an enhancement may only be used to justify an upper term if the enhancement can be and is stricken].) For instance, appellant was found guilty of kidnapping for the purpose of child molestation (Pen.

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[64] Since the filing of appellant's opening brief, the United States Supreme Court held that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny do not apply to a sentencing judge's decision whether to impose consecutive sentences. (*Oregon v. Ice* (2009) 555 U.S. 160, 129 S.Ct. 711, 717; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1324.) Therefore, appellant does not further address his argument that the trial court's imposition of the full maximum consecutive term as to Count 3 violated the federal Constitution. (AOB 266-271.)

[65] Formerly Cal. Rules of Court, rule 441, subd. (d).

Code, § 207, subd. (b) [Count 2]) essentially because of his "taking a nine year old girl to a motel." (2 CT Vol. 4 1506.) Respondent also notes that appellant "rap[ed] and sodomize[d]" the victim, improperly relying on the crimes themselves to justify imposition of the upper terms (2 CT Vol. 4 1507 [Pen. Code, § 261, subd. (2); Count 3], 1508 [Pen. Code, § 286, subd. (c); Count 5]). (RB 225.)

Second, respondent contends that the victim was particularly vulnerable. As appellant argued in his opening brief (AOB 257-261), the trial court erred in relying upon Nadia's vulnerability to impose the upper term as to the conviction for kidnaping for the purpose of child molestation. Because the elements of section 207, subdivision (b), include the kidnaping of a child under the age of 14, rule 441, subdivision (d), operated to preclude the imposition of the upper term based on Nadia's age.[66] (See, e.g., *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [noting that vulnerability based on age is generally not a proper sentencing factor where age range is an element of the offense]; Cal. Rules of Court, rule 4.420, subd. (d) [formerly rule 441, subd. (d)].)

Moreover, respondent incorrectly suggests that the victim was vulnerable in that she was a school child, walking home from school. According to respondent, appellant used the time and place (school getting out) as an opportunity to use a ruse to get her into the car. (RB 226.) However, as appellant has pointed out (AOB 259-260), this rationale relates

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[66] As respondent observes, this argument would also apply to Count 5 (sodomy with a person under 14 and with a 10 year age differential) and Count 6 (child molestation). (RB 226.) However, the trial court specifically cited the victim's vulnerability only with respect to Count 2. (2 RT Vol. 35 8812-8813.)

directly to the elements of section 207, subdivision (b), which proscribes the kidnaping of a child by means of "false promises, misrepresentations, or the like." Although the imposition of an upper term based on vulnerability may be permissible where the trial court makes a finding as to the victim's *specific* fear or dependency, no such findings were made by the trial court in this case. (Cf. *People v. Estrada* (1986) 176 Cal.App.3d 410, 418; *People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1141-1142.) Therefore, rule 441, subdivision (b), precluded imposition of the upper term.

Respondent contends that "[c]ontrary to what defendant claims, a crime victim can be deemed vulnerable for reasons not based solely on age, including the victim's relationship with the defendant and his abuse of a position of trust." (RB 226, quoting *People v. Stitely*, *supra*, 35 Cal.4th at p. 575.) Respondent's reliance upon *Stitely* is misplaced. There, the trial court imposed the upper term for the defendant's rape (Pen. Code, § 264, subd. (a)) of Valery C., and made that term consecutive to the death sentence, relying on "both the youth and vulnerability of the victim" in making these decisions. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 575.) This Court rejected the defendant's claim that the trial court cited insufficient reasons to support its sentencing choices, upholding its finding that the victim was "particularly vulnerable" in that she was pregnant, depended on the defendant for shelter, and had no other apparent place to go. (*Ibid.*)

In contrast, appellant had no "special status" vis-a-vis the victim within the meaning of rule 421, subdivision (a)(11). (Cf. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694-1695, overruled on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [rejecting defendant's

argument that he had no "special status" vis-a-vis the victim where he had cultivated a relationship with the four-year-old victim over a long period of time]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 338 [defendant was victim's stepfather]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [defendant was victim's biological father].) And, again, the victim's age range was an element of the offense at issue in this case, which was not so in *Stitely.*

Lastly, respondent disputes appellant's argument that the sentencing error was prejudicial because, as in *People v. Sandoval*, *supra*, 41 Cal.4th at p. 841, his level of personal culpability was "hotly contested" (AOB 273). (RB 226-227.) As respondent points out, the jury in *Sandoval* rejected the prosecution's view of the evidence, and found the defendant guilty of voluntary manslaughter rather than murder. (*People v. Sandoval*, *supra*, 41 Cal.4th at pp. 841-843.) Nevertheless, appellant presented substantial mitigating evidence (including extensive testimony regarding his mental impairments) disputing the prosecutor's account of his culpability. Indeed, it cannot be said beyond a reasonable doubt that absent the errors bearing on the jury's evaluation of the mental health evidence and other mitigation – errors which occurred at the guilt phase (see Arguments II through IX, *ante*), sanity phase (see Argument X, *ante*), and penalty phase (see Arguments XI and XII, *ante*) – it would have authorized the upper term sentence for the noncapital crimes.

Under these circumstances, appellant's case must be remanded to the trial court for resentencing in a manner consistent with the determinate sentencing law (DSL) as amended in light of *Cunningham v. California* (2007) 549 U.S. 270.

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XIV

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 274-281.) Respondent simply contends no errors occurred, and that any errors which may have occurred were harmless. (RB 227-228.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's contentions is necessary.

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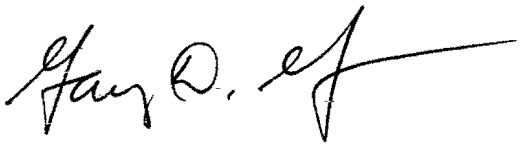
CONCLUSION

For all the aforementioned reasons, appellant's convictions and his sentence of death must be vacated.

DATED: August 8, 2011

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



GARY D. GARCIA
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Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(1)(c))

I, Gary Garcia, am the Deputy State Public Defender assigned to represent appellant Richard DeHoyos in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 47,423 words in length.

DATED: August 8, 2011

GARY GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. DeHOYOS No. S034800

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF

was served on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

DOUGLAS P. DANZIG
Deputy Attorney General
P. O. Box 85266
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MICHAEL LAURENCE
Habeas Corpus Resource Center
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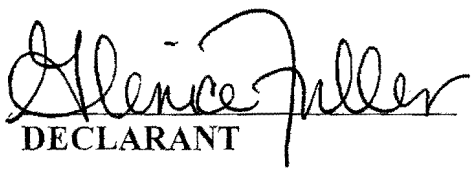
RICHARD L. DeHoyos
San Quentin State Prison
Box H-91600
San Quentin, CA 94974

Each said envelope was then, on August 8, 2011, deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 8, 2011, San Francisco, California.



DECLARANT