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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL LEE WHALEN, Defendant and Appellant.	**S054569** **Automatic Appeal** **(Capital case)** **Stanislaus County** **Superior Court** **No. 25297**

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior
Court of the State of California for the County of Stanislaus

HONORABLE JOHN G. WHITESIDE, JUDGE

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REDACTED

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S REPLY BRIEF

INTRODUCTION

This matter is an automatic appeal from a judgment of death made directly to this Court pursuant to Penal Code section 1239.[1] In this reply brief, appellant does not attempt to cover every issue raised on appeal. The purpose of this brief is merely to respond to those contentions made by respondent which require further comment. For a complete discussion of the issues raised on appeal, please see appellant's opening brief ("AOB") on file herein.

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

STATEMENT OF CASE AND FACTS

Appellant hereby incorporates the statement of the case and statement of facts contained in appellant's opening brief.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REPEATEDLY 'REHABILITATING' DEATH-PRONE JURORS BY ASKING LEADING AND SUGGESTIVE QUESTIONS ON VOIR DIRE, WHICH STACKED THE JURY IN FAVOR OF A DEATH SENTENCE, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.

As to Argument I, respondent's brief ("RB") alleges that appellant has "waived any claim of error during voir dire by agreeing to the final jury before exhausting his peremptory challenges." (RB 17-20.) This is erroneous for several reasons.

First, respondent misconstrues this claim as one of *voir dire* error for failure of the trial court to dismiss individual jurors for bias. As a result, respondent fails to engage one of the main points of the argument, that the improper "rehabilitation" and stacking of the jury pool with objectionable jurors rendered futile further defense peremptory challenges or a challenge to the final panel, as the pool from which it was chosen was so pro-death that further challenges would have meant only the replacement of one

objectionable juror with another, or, worse, risked replacing the obviously biased with the extremely biased. (*See* AOB at 86, 98, 169-170.)

As discussed in detail in appellant's opening brief (AOB at 45-174), the trial court frequently intervened in *voir dire* questioning of the jury panel to "rehabilitate" jurors that, on the basis of their questionnaire answers, would otherwise have been subject to challenges for cause by the defense.[2] The Court's interventions on behalf of pro-death jurors were clearly designed to have them change their questionnaire answers. These interventions and "rehabilitations" through leading and suggestive questions, were specifically objected to by the defense[3] *and the prosecution,* and were so numerous and "skillful" (*see* RT at 564-565) that they had the inevitable effect of stacking appellant's jury pool with pro-death-penalty jurors. (AOB at 59-170.)

Consequently, respondent's allegation that the defense "agree[d] to the jury before exhausting his peremptory challenges" (RB at 17) entirely misses the point of this argument. Although the defense did not exhaust all of its peremptory challenges, it had *already objected* to the Court's method of questioning, tactics, and the "rehabilitations" that ultimately resulted in the

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[2] It was agreed in pre-trial motions that the jury room was to be filled with prospective jurors and they were to be brought out individually for *voir dire* questioning. (Reporter's Transcript [hereafter "RT"] at 74-75.)

[3] As respondent admits. (RB at 17 n.7.)("Defense counsel objected on this basis during voir dire.")

stacking of the jury pool. Even the prosecution joined in this objection, for good reason, as it went well beyond the bounds of objective judicial questioning.[4] Additionally, objectionable members of the panel had already been individually challenged.[5] The defense was not required to exhaust all peremptory challenges or to make an overall objection to the panel in order to preserve error as to this issue. The argument is not, as respondent frames it

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[4] The following colloquy ensued at the time of the objection:
DEFENSE COUNSEL: My second objection is that the court's using leading questions in [an] attempt to lead the jurors down the path towards rehabilitation. I mean, if it's this particular juror and in particular is a clear cut case where you can take someone who initially answering the questionnaire with no pressure on them will set out some very strong preconceived notions concerning the death penalty and the course of trial and through skillful leading questions have them in effect do a 180 degrees turn while standing before the court. I think that basically causes the juror to hide their true biases and [prevents] a reasonable exercise of challenges for cause.
THE COURT: Thanks for the "skillful phraseology."
DEFENSE COUNSEL: Nothing but skillful. There is nothing about that. You were skillful as a lawyer. You are skillful as a judge.
PROSECUTOR: Your Honor, except as to different areas of questioning, I think I need to join Mr. Spokes' objection.
THE COURT: You think I'm, skillful in those areas too, Mr. Palmisano?
PROSECUTOR: Yes, your Honor. I think you are very skillful. That's the problem.
(RT 564-565.)

[5] In his opening brief, appellant discusses the individual challenges for cause to the overwhelming majority of the improperly-rehabilitated jurors (*See* Argument II(a) through II(o), AOB at 175-180; e.g., challenge for cause as to juror Edwards denied, RT 427; challenge for cause as to juror Williams denied, RT 650-653; challenge for cause as to juror Caselli denied, RT 563; challenge for cause as to juror Evans denied, RT 689-691; challenge for cause as to juror Jones denied, RT 597, etc.).

(RB at 17-52), simply a claim of trial court error in failing to remove an individual juror or jurors for bias, but an argument regarding the overall prejudicial effect of the court's questioning, *which was specifically objected to,* and which resulted in an improperly-constituted jury panel composed of prospective jurors whom the defense had already individually challenged for cause.

Additionally, the defense peremptory challenges were rendered irrelevant before they were exhausted, as a biased jury would still have resulted due to the Court's ability and demonstrated inclination to "seed" the panel with pro-death-biased prospective jurors in a quantity sufficient to overwhelm the defense peremptory challenges. It would have been futile to peremptorily challenge too many of the objectionable jurors who had already been challenged for cause, beyond those who were extremely biased, if the remaining eligible pool had an equal or possibly even higher proportion of objectionable jurors, which it clearly did.[6]

But the effect of the court's questioning went well beyond merely rendering the defense peremptory challenges irrelevant. As discussed in the AOB, the court's questioning actually inhibited and chilled the exercise of additional peremptory challenges. The presence in the pool of so many

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[6] *See* Appendix A to appellant's opening brief detailing the composition of the juror pool.

improperly "rehabilitated" jurors with extreme pro-death-penalty biases was a very prejudicial factor for the defense, as a peremptory challenge to the moderately-biased risked their substitution with the extremely-biased. Thus, the fact that the defense did not exercise all its peremptory challenges is not only irrelevant, but actually illustrates the chilling effect of the Court's *voir dire* questioning procedure. Respondent's treatment of the question as one of individual *voir dire* error entirely misconstrues the issue.

Respondent's brief also ignores appellant's facts and argument regarding the trial court's disparate treatment of the pro-and-anti-death-penalty prospective jurors.[7] The suggestive and leading questioning of many pro-death-penalty jurors facilitated and encouraged the concealment of their disqualifying biases, as shown on their questionnaires, and basically led them to completely change their answers on the basis of the Court's suggestive "guidance." In contrast, prospective anti-death-penalty jurors were

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[7] The anti-death-penalty prospective jurors who were swiftly excused were: 1) John Layman (RT 219); 2) Johann Broussard (RT 406); 3) Matthew Figures (RT 524); 4) Beatrice Hampton (RT 668); 5) Gale Fordmellow (RT 685); 6) Neva Clark (RT 698); 7) Oliver Bauman (RT 719); 8) Carmen Zamora (RT 964); 9) Antonina Mendes (RT 1070); 10) Rose Rodriguez (RT 1141); and 11) Billie Costa (RT 1154) Other prospective jurors harboring views inimical to the prosecution were also summarily dismissed. For instance, prospective juror Douglas Smith was excused on the basis of only one answer on the jury questionnaire, that under certain circumstances he would tend to not believe the testimony of a law enforcement officer and in certain circumstances it would be difficult for him to fairly evaluate that testimony. (RT 634-635.)

peremptorily excused without any corresponding rehabilitative efforts by the Court or questioning by the attorneys.[8] (This is Argument III in appellant's brief.)

Appellant was prejudiced by these actions as he had to use peremptory challenges against these biased jurors who should have been excused for cause. But much more importantly, the cumulative effect of the court's improper rehabilitative questioning was to skew the panel lopsidedly in favor of the State and in favor of a death verdict.[9] As discussed above, no matter how many peremptory challenges the defense had at their disposal, the panel was composed of so many pro-death-biased prospective jurors that the defense peremptory challenges were irrelevant and insufficient to correct this bias.

Respondent chooses to treat Argument I simply as individual *voir dire* error in failing to excuse Prospective Juror X or Y, instead of what it plainly is, a challenge to the trial court's prejudicial and skewed questioning that ensured appellant's jury was predisposed to a guilty verdict and a sentence of death. Appellant's argument is *not* simply that "the presence of Juror X on appellant's jury deprived him of a fair trial" or "the defense had to waste a

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[8] *See* Appendix A to the AOB for a summary of the treatment of the jury panel. This summary highlights the disparate treatment of the pro-and-anti-death penalty jurors.

[9] Thus, the "cumulative" effect refers to the overall impact on the panel as constituted, not from one juror hearing another juror's questions, as they were brought out individually for *voir dire* questioning. (RT 74-75.)

peremptory challenge on biased Juror Y to remove her from the jury" as respondent's brief would have it. (RB at 20-50.). The cumulative effect of the court's questioning is the gist of this argument,[10] viewed in conjunction with Arguments II and III. Nowhere does respondent discuss this issue in terms other than relating to individual prospective jurors or groups of prospective jurors.

Thus, respondent's citation of such cases as *People v. Farnam* (2002) 28 Cal.4th 107 and *People v. Williams* (1997) 16 Cal.4th 635 (RB at 17) are inappropriate, as they relate only to claims of failure to remove individual jurors for bias. Although these cases buttress respondent's "waiver" argument, as discussed *supra,* there was no waiver here due to the defense objections to the court's questioning methods and challenges for cause to individual jurors *and* because the court's questioning had a chilling effect on the exercise of the defense peremptory challenges.

No less than 23 prospective jurors who should have been excluded by

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[10] *See* Argument I(x) ("The cumulative effect of this improper rehabilitation deprived Appellant of a fair jury, caused his counsel to expend many peremptory challenges on prospective jurors that were subject to challenges for cause, rendered futile the exercise of defense peremptory challenges for cause, and resulted in a pro-death bias to Appellant's jury"), AOB at 169-171; Argument II(p) ("The cumulative effect of the denial of these defense challenges deprived Appellant of a fair jury and a fair trial"), AOB at 180; and Argument III ("Appellant was deprived of a fair trial because his jury was composed of biased and pro-death jurors"), AOB at 181-210.

challenges for cause were improperly "rehabilitated," and all are discussed in detail in appellant's opening brief. Several of these otherwise excludable jurors made their way onto Appellant's jury. (*See* Appendix A to the AOB.)

Although respondent argues that the conduct of voir dire is left to the broad discretion of the trial judge, he also cites *Mu'Min v. Virginia* (1991) 500 U.S. 415 for the proposition that "[t]o be an abuse of discretion, the trial court's conduct of voir dire must render the defendant's trial fundamentally unfair." (RB at 18.) Appellant has shown extensively how the overall impact of the trial court's conduct of the voir dire resulted in a lopsidedly pro-prosecution jury which directly implicated the fundamental fairness of the trial. It is a distortion of this argument to claim that appellant is arguing simply for "a constitutional entitlement to a particular manner of voir dire" (RB at 19) when the argument implicates the trial court's methodology in general. The only "particular manner" of *voir dire* to which appellant is entitled is one which would have ensured him a fair and impartial jury. Respondent's treatment of the claim as one of individual juror bias or *voir dire* error, without considering the cumulative impact of the of the court's actions, lead to these distortions of the argument and the unwarranted reliance on the "waiver" argument.

A. Prospective Jurors Julie O'Kelly, Yvonne Caselli, Jacqueline Marchetti, Robert Zabell, Steve Witt, Frank Gatto, Mami Aligire, Cleo Parella and Moises Serna (Arguments I(b), (e), (l), (m), (o-r), and (u)).

As to these prospective jurors, respondent argues only that

> appellant cannot show prejudice resulting from any alleged errors made by the court during voir dire or in denying defense challenges for cause...None of the nine were called as prospective jurors during the final phase of jury selection. Therefore, appellant never had to use a peremptory challenge to excuse any of them.
> (RB at 21.)

Again, respondent's treatment of this claim as one of individual *voir dire* error which caused the expenditure of an unnecessary challenge leads to a distortion of appellant's argument and this simple and misleading rejoinder. As discussed *supra,* the prejudice is clearly evident: these nine prospective jurors, although not called, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile, dangerous, and self-defeating the further exercise of defense peremptory challenges. Further defense peremptory challenges were hazardous because the inclusion of these objectionable potential jurors in the pool meant that the defense risked ending up with them on appellant's jury had further peremptory challenges been exercised. Simply stated, the probabilities of a fair and impartial jury were lessened from what they should have been had jury selection been conducted fairly. The presence of these uncalled jurors in the panel is a sufficient showing of prejudice in conjunction with and considered

cumulatively with the other prejudicial effects of the court's actions.

B. Prospective jurors Isabelle Williams, Diane Oliver, Eleanor Smith and Genevieve Timmerman (Arguments I(c-d), (t) and (w)).

These jurors were challenged for cause by the defense, the challenges were denied, and they were excused through the use of defense peremptory challenges. (AOB 71-77, 157-159, 167-168.) Respondent again argues, as with the above group of jurors, that "appellant can show no prejudice from any alleged error committed by the trial court." (RB at 21.)

Here again, respondent's argument depends on this claim being considered as one of individual *voir dire* error. Respondent's treatment of this argument as improper individual denial of defense challenges for cause to these jurors leads to the conclusion that appellant can show no prejudice as to these prospective jurors. (RB at 21.) Here again, the prejudice is just as evident, as the presence of these prospective jurors in the final pool caused appellant's jury to be biased and unfair as it was finally constituted. Appellant's argument is not just that he was prejudiced by having to waste peremptory challenges on these biased prospective jurors, but that the erroneous inclusion of these prospective jurors in the pool played a part in denying him a fair jury. Respondent again treats this sub-claim in isolation, as if it pertains merely to these individual prospective jurors, without reference to the cumulative effect of the trial court's actions on the entire juror pool.

C. Prospective jurors L. G.-H., C. P., L. H. , M. C. and C. H. (Arguments I(h-k) and (s)).

These jurors gave disqualifying answers on their questionnaires and on *voir dire*, were not excused through the use of defense peremptory challenges, and actually sat on appellant's jury. (AOB 98-118, 154-156.) Here again, respondent falls back on the argument that any error in having them sit on appellant's jury was waived through a failure to exercise a defense peremptory challenge as to any of them or to exhaust all peremptory challenges. (RB at 22.)

Here again, there was no waiver, as earlier in the voir dire process the defense objected to the trial court's leading and suggestive questioning which resulted in their eventual inclusion on appellant's jury. (RT 564-565.) Although the defense did not challenge these jurors for cause, the court's ruling on that earlier objection meant that any further challenges would have been futile or dangerous. Appellant has shown how the juror pool which resulted from the court's questioning was composed of so many objectionable jurors that if the defense had challenged any of these individuals, their potential replacements were at least equally biased. (*See* Appendix A to the AOB.) Prejudice is evident because they actually sat on appellant's jury after giving answers that should have disqualified them from such service.

Respondent again treats this claim as error resulting from the inclusion

of a particular juror or group of jurors. This does not address the cumulative effect of the trial court's questioning and "rehabilitative" efforts.

D. Prospective juror Juanita Edwards (Argument I(a)).

Ms. Edwards (Argument I(a)) gave very disqualifying answers in her juror questionnaire, and even after direct *voir dire* questioning by the trial court, still harbored opinions that left strong doubts whether she could serve as an impartial juror. (AOB 59-65.) As to this prospective juror, respondent first offers very lengthy extracts from her testimony in an attempt to show that she would not automatically vote for the death penalty. (RB at 23-28.) However, these extracts chosen by respondent actually show that Ms. Edwards, even after considerable prompting and urging by the court, still harbored doubts that she could afford appellant a fair trial. For instance, as to Question 12, she was "not sure" whether everyone convicted of a crime such as charged against Mr. Whalen should automatically receive the death penalty "regardless of the evidence regarding penalty which is introduced by the People and the defendant." (CT 1471; RB at 23.)

As respondent points out in his brief, at the *voir dire* questioning by the court, the following colloquy transpired:

> Q. For example, suppose it was presented that the defendant was abused as a child. Is that something you'd disregard and vote for the death penalty because...
>
> A. Probably.

Q. So you believe that as you sit there right now, any evidence of the defendant's personal history or personal events that occurred to him during his life which might be considered by other jurors as a circumstance in mitigation, that you would automatically disregard that evidence if it was about his person?

A. It's hard to answer. I can't say I would automatically do it. I would probably lean that way.

Q. As you sit there today, you're more inclined to vote for the death penalty than you would be to vote for life without possibility of parole if the defendant were convicted of murder, robbery, and the special circumstance of having committed the murder in the course of the robbery?

A. I think so.

Q. Can you think of any circumstances under which you would not vote for the death penalty if the defendant were convicted of those charges?

A. I don't...I don't know.

Q. Can you think of anything that would cause you to believe that the penalty of life without possibility of parole would be appropriate if the defendant were convicted of those charges?

A. Not really.

Q. So, in other words, there's no evidence that would cause you to vote for life without possibility of parole?

A. I don't know. But I'm saying I would lean toward that. I really don't know what the evidence could be to make me vote one way or the other.
I mean I know that's not what you want, but I don't know how to answer it, because I don't know what I would do. I'm just saying what I think, that I would lean that way.

Q. That's not what I'm...I appreciate that answer. But I think the real question that I'm trying to find out from you is can you think of any

evidence that could be presented by a person who's been convicted of murder in the course of a robbery and special circumstances, can you think of any evidence that might cause you to vote for life without possibility of parole?

A. Well, right now, no.

MR. SPOKES: Challenge for cause, Your Honor.
(RT 426-427; RB at 25-26.)

This extract, selected and highlighted by respondent in his brief, hardly inspires confidence that this prospective juror would be impartial to appellant. Respondent then attempts to show that leading questioning by the prosecutor somehow negated these objectionable views. (RB at 27.) This questioning was a long hypothetical question that did not relate to the facts of this case at all, with details such as the defendant "sav[ing] children from a burning orphanage, or he is a decorated war hero. His problems didn't start until after the war and after his war experiences." (RT 428; RB at 27.) Then Ms. Edwards stated she could consider this evidence. (RT 428-429; RB at 27.) She was then asked whether she could "listen open mindedly" to all evidence, and she replied affirmatively. (RT 430; RB at 27.) Respondent points out that, in response to a question from Mr. Spokes, Ms. Edwards stated she could vote for life if there were no aggravating and no mitigating evidence and if the Court instructed that a vote for death was proper only when the circumstances in aggravation outweighed those in mitigation. (CT 430; RB at 27-28.) Based on these changes to her questionnaire answers, the defense did not renew its

challenge and the juror was not excused. (RT 430; RB at 28.)

Here again, respondent treats the argument as if it is limited to the consideration of Juanita Edwards in isolation, not in relation to the overall effects of the court's questioning on the composition of the pool from which appellant's jury was ultimately chosen. As discussed *supra,* the argument is not just that the inclusion of Ms. Edwards on the panel was error, but that her inclusion, together with the other improper inclusions and exclusions, resulted in a jury that was biased and unfair to appellant. Even affording the trial court's conduct of *voir dire* "great deference," by any objective standard the conduct was unreasonable in both "rehabilitating" and denying the challenge for cause as to this prospective juror.

Appellant was prejudiced because he had to use a peremptory challenge to excuse her. Much more importantly, as the panel was seeded with multiply-objectionable potential jurors, the exercise of defense peremptory challenges was rendered both futile and dangerous.

E. Prospective juror Mozella Evans (Argument I(f)).

Ms. Evans gave disqualifying answers on her questionnaire and on voir dire and the defense exercised a peremptory challenge as to her. (AOB 86-92; also Argument II(d), AOB at 177.) As to this prospective juror, respondent argues that "[a]lthough Ms. Evans's written statements on her questionnaire, in isolation, seemingly indicated a pro-death-penalty bias, her voir dire

responses negated that inference." (RB at 35.)

After reviewing Ms. Evans's pro-death-penalty questionnaire (RB at 30), respondent turns to her answers at voir dire. (RB at 31-35.) In his brief, respondent highlights the following colloquy:

> Q. First of all, in answer to question 15 you indicated that you thought —well, the question was, "Do you feel that the death penalty should be mandatory for certain types of crimes? Please explain." You said, "Yes. Certain types of murder."
> You understand—did you understand by the term "mandatory" that any person who is convicted of that crime would automatically be put to death?
>
> A. Yes, sir.
>
> Q. Okay. What kind of murder did you have in mind exactly?
>
> A. When he murders somebody deliberately. You set out to kill him.
>
> Q. Okay.
>
> A. I think you should be put to death.
>
> Q. Okay. Do you feel—you understand that in this particular case there are two phases. Right?
>
> A. Um-hmm.
>
> Q. First phase is the guilt phase where evidence would be brought in to show that the whether (sic) the defendant did or did not commit the crime?
>
> A. Um-hmm.
>
> Q. Okay. And whether the special circumstances are true, and in this case the special circumstances is (sic) that the defendant committed the crime during a robbery, you understand that?

A. Um-hmm.

Q. Okay. And if the jury found the defendant did commit the crime and that it was during a robbery as a special circumstance, you would then get to the penalty phase where you would have to decide whether the punishment for that crime would be life without possibility of parole or the death penalty. You understand that?

A. Yes.

Q. Okay. Are your feelings about the particular crime that's alleged here, that is a murder that was committed during a burglary or robbery, I should say as you understand it, are your feelings such that you believe that the death penalty should be mandatory? In other words, that you would automatically vote for it?

A. I would need to know a little bit more about it. You know, did he bring the gun with him. Did he know the guy was going to be there. Was it accidental. Were they fighting over the gun. You know. I just need to know a little bit more.

Q. Well, assume for the moment that you found that the defendant brought the gun with him—well, in any event, do you feel—do you feel that if the evidence showed that the crime was premeditated that you would automatically vote for the death penalty?

A. Yes, sir.

Q. And that would be regardless of whatever evidence was introduced during the penalty phase? That is, factors in aggravation and mitigation. Aggravation being those things that tend to indicate that the penalty should be imposed, and mitigation, tend to indicate that it should not be imposed. In other words, you feel—you feel that regardless of those factors if you believe that the crime was premeditated you would vote for the death penalty?

A. I think—yeah, if it was premeditated it would be the death penalty, yes.

Q. And that's regardless of these other factors?

A. I don't know what other factors you would be referring to.

Q. Well, things about the defendant's background?

A. No. Would have no bearing on it.

Q. Nothing about the defendant's background would have any bearing at all?

A. No.

Q. So he could bring in any kind of evidence that he wanted about how tough life he's had and so forth and so on and you would not take that into consideration?

A. No.
(RT 687-689; RB at 31-32.)

Contrary to respondent's arguments, these answers indicate that Ms. Evans would not be impartial, as she was unwilling to consider mitigating evidence and would always impose the death penalty for murder. As respondent notes, the defense challenged this prospective juror for cause. (RT 689; RB at 32.) The prosecution attempted to rehabilitate Ms. Evans by asking her whether she could follow the law. (RT 690.)

The defense then questioned her, as summarized by respondent in his brief:

MR. SPOKES: As you sit there right now is it your belief that premeditated, deliberate first-degree murder should be punished by death?

A. Yes.

Q. The law says that deliberate, premeditated first-degree murder by

itself isn't punishable by death. It takes what's called special circumstances. And one of the special circumstances which allows the death penalty is the murder which is committed during the course of a robbery.

A. Um-hmm.

Q. If you found the defendant guilty of premeditated, deliberated first-degree murder and found it true the special circumstances of robbery, would you believe that the death penalty should be automatic in that case?

A. If I understood it correctly that made it special circumstances, yes.

MR SPOKES: Renew the challenge, your Honor.
(RT 690-691; RB at 33.)

The prosecution's rationale, accepted by the Court, was as follows:

MR PALMISANO: Your Honor, the problem with the questions is not for all of the respondent's (sic) to the questionnaire but obviously....For Ms. Evans, that the questions are phrased in a way that they are asking for the personal opinions of the jurors, which is fine, but you need to indicate to the jurors that how they feel isn't necessarily the law, and if they are indicating that they can put aside their personal feelings and follow the law and I don't think that the challenge for cause exists just because in a general sense they feel that the law should be something different than it is."
(RT 691-692; RB at 34.)

The Court, agreeing, stated "All right." (*Id.*)

Even respondent's selective summary of the colloquy shows that, despite being multiply disqualified because of her answers to the questionnaire and at *voir dire*, the Court still attempted to rehabilitate her by asking her whether she would be able to follow his instructions "regardless of the fact, if I understand you correctly, that it is your belief that it automatically

should be imposed." (RT 692.) Even then, the best that Ms. Evans could promise was "I would *tend to* follow your instructions." (Emphasis added) (RT 693; RB at 34-35.) The defense challenge was then denied. (RT 693.)

Far from showing that Ms. Evans "conveyed a willingness to put aside her personal feelings and follow the court's instructions" (RB at 35), even the answers selectively highlighted by respondent continued the pro-death-penalty bias exhibited in her questionnaire.[11] Even after extensive prodding by the court, and many leading and suggestive questions, her willingness to follow the law was tentative at best. In actuality, the suggestive nature of the questions rendered Ms. Evans's answers highly suspect, and, given their coercive nature, the fact that she still harbored doubts shows that she could not be impartial. Respondent's arguments as to this juror do not comport with the record.

Here again respondent argues that there was a waiver of any error because of appellant's failure to exhaust his peremptory challenges. (RB at 36). However, as previously pointed out, defense counsel objected both generally, to the court's methods (RT at 564-565), and specifically, in challenging this prospective juror for cause (RT 693). He was not required to object a third time when the panel was constituted, or to risk an even more biased jury by exercising all of his peremptory challenges in the face of a

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[11] For a fuller summary, see appellant's brief at 86-92.

dangerously pro-death-penalty pool from which the replacement jurors would be chosen. Respondent's arguments again treat this claim in isolation and fail to consider the court's actions regarding this prospective juror as part of an overall pattern of bias and prejudicial unfairness.

Appellant was prejudiced because he had to exercise a peremptory challenge but, more importantly, because Ms. Evans constituted a part of an unfairly biased pro-death panel from which the defense should not have been forced to choose had she and many others been properly excluded. The exercise of the peremptory challenge only resulted in other equally-biased and equally-objectionable jurors replacing her and ultimately sitting on appellant's jury.

F. Prospective juror Jessica Jones (Argument I(g)).

This prospective juror gave objectionable answers and a defense challenge for cause was denied by the trial court. (CT 2368-2395; AOB 92-100.)

In her juror questionnaire, Ms. Jones indicated that she strongly supported the death penalty (CT 2370) and that these views have grown stronger over time (Question 11). (CT 2371.) She felt the death penalty is used "too seldom, because if a defendant is found guilty and sentenced to death or to life without parole then why should taxpayers pay to feed and shelter them until they die anyway?" (Question 14). (CT 2372.) In Question

17, Ms. Jones thought the death penalty appropriate for child molesters (CT 2372) and that it was *never* an inappropriate punishment. (Question 18) (CT 2372.) As to Question 19, she wrote that she would automatically vote for the death penalty if the defendant was convicted of first degree murder "probably because I don't understand if they are going to die in prison why should taxpayer[s] pay to feed them 3 times a day, house them, etc." (CT 2373.) In Question 22, Ms. Jones wrote that she believed in the adage "an eye for an eye" because "if you do something to someone the punishment should be the same as what you did first." (CT 2373.) She also indicated, in Question 29, that the costs of keeping a person in prison for life would be a consideration in deciding on the penalty because "why keep someone in prison for the next 30-40 years when they are going to die in there anyway?" (CT 2375.) In the same question Ms. Jones objected to the cost of providing appellate process for the defendant, as "when I'm a tax-paying citizen I look at the most cost effective." (CT 2375.) Respondent summarizes some but not all of these answers in his brief. (RB at 36-37.)

Respondent then summarizes some of the court's questioning of Ms. Jones:

> THE COURT: Do you feel that if you were to find the defendant guilty and to find the special circumstances true that you would, when you got into the penalty phase, that you would automatically vote for the death penalty or would you have to listen to the evidence that would be presented during the penalty phase at first?

JONES: I would listen to the evidence but more than likely for the death penalty.

THE COURT: Okay. All right. You understand that during the penalty phase evidence would be introduced in what's called aggravation, which would mean evidence which the prosecution believes would indicate that the death penalty should be imposed, and evidence would be introduced in what's called mitigation, which means that evidence or factors which the defense believes the jury should consider in which would tend to indicate that the sentence should be life without the possibility of parole. Do you understand those?

JONES: Yeah.

THE COURT: Do you believe that you would be able to listen to those various factors that are presented and determine whether the factors in aggravation outweigh the factors in mitigation?

JONES: I'd listen to it, but like I said, I'd probably pick the death penalty.

THE COURT: Okay. Well, I'm going to ask you one more thing. You understand that this is a crime which the death penalty is authorized but it is not mandatory. Do you have a problem with that?

JONES: No.

THE COURT: Okay. You understand that if the defendant's found guilty and if the special circumstances are found true, then he would be put to death only if the factors in aggravation were found to outweigh the factors in mitigation and the jury so found?

JONES: Yeah.

THE COURT: You understand that?

JONES : UM-hmm.

THE COURT: You believe you'd be able to objectively weigh those factors, or do you believe that you would tend, because of the way you feel about it, to weigh the factors in aggravation more and vote towards

the death penalty?

JONES: I think I could be objective, do it, whatever.

THE COURT: In other words, are you saying, so I'm clear about this, you understand that the death penalty is not mandatory in this case?

JONES: Right.

THE COURT: It would be imposed only if you found, as a juror and the rest of the jurors, found that the factors in aggravation outweigh the factors in mitigation?

JONES: Um-hmm.

THE COURT: You understand that?

JONES: Um-hmm.

THE COURT: Now once again, I'm going to ask you do you feel that you would be objective about it? Given the way you've answered previously, do you feel you could be objective about it, listen to those factors, weigh them and see whether those factors weigh more heavily than the factors in mitigation that you would be told about?

JONES: Yeah, I would be objective.
(RT 593-595; RB at 37-38..)

Respondent's summary of Ms. Jones's questioning continues:

THE COURT: In answer to question 29 you said, "In deciding penalty, that is life in prison without possibility of parole or death, would the cost of keeping someone in jail for life be a consideration for you?" And you said, "Yes. Why keep someone in prison for the next 30 to 40 years when they're going to die in there anyway."
We need to know whether that's—or I need to know whether that's a consideration that you'd exercise or whether that is something—a simple—simply a general feeling that you have about such matters?

JONES: It's just a general opinion.

THE COURT: In other words, in deciding this case are you telling me that if you go to that point you would dismiss from your mind any thoughts about the cost of keeping the defendant incarcerated?

JONES: Pretty much, if I was instructed to do so. I mean, I would be objective.

THE COURT: And you believe that you could do that?

JONES: Um-hmm, yes.

THE COURT: Likewise you answered: "Would the cost of providing appellate process be a consideration?" And you said, "Yes. I'm a tax paying citizen. I look at most cost effective." Is that a statement have something that you consider in this case or is this again a general statement?

JONES: Again just a general.

THE COURT: Okay. Is it your representation to the court that you would not let that factor enter into your deliberations in deciding what the appropriate penalty is in this case?

JONES: No.

THE COURT: You would not?

JONES: No, it would be just.

THE COURT: You would just consider it on solely on the aggravating and mitigating factors and not on the question of...

JONES: Right.
(RT 596-597; RB at 38-39.)

Prospective juror Jones was then challenged for cause by the defense on the basis of her answers to questions 10, 12, 15, 19, 22, and 29. (RT 597.) The Court ruled that "based on the court's examination of the juror [it] is of

the opinion that the juror would fairly consider the evidence. The challenge is denied." (RT 597.)

Here too, this prospective juror's answers on the juror questionnaire meant she would have been successfully challenged for cause by the defense, but for the Court's improper "rehabilitation." Even on *voir dire*, and even in the selections highlighted by respondent, her predisposition toward the death penalty without hearing any mitigating evidence was clearly evident, and only after a series of leading and suggestive questions in which the Court virtually ordered her to be objective, were the desired qualifying answers forthcoming.

Respondent's assertion that the defense challenge for cause was properly denied "since Ms. Jones repeatedly assured the court that she could put aside her personal views and be objective" (RB at 40) is contradicted in the very sections respondent has chosen to quote in his brief. The waiver argument has been discussed *supra*. The complete exercise of all defense peremptory challenges was not necessary to preserve error here, as there was a general objection to the court's "rehabilitative" questioning and a specific challenge for cause, both of which were denied. Under these circumstances, the full exercise of all peremptory challenges would have been at best potentially prejudicial to appellant and at worst positively dangerous. Respondent again views this argument only individually and piece-meal, as one of claimed error as the result of the inclusion of a specific Juror X, and not

as a pattern of conduct that cumulatively denied appellant a fair trial.

Appellant was also prejudiced because he had to exercise a peremptory challenge and, more importantly, because Ms. Jones constituted part of an unfairly biased pro-death panel from which the defense should not have been forced to choose had she and others been properly excluded at voir dire. The exercise of peremptory challenges against Ms. Jones and other biased panel members only resulted in their replacement with other equally-biased objectionable jurors, some of whom actually sat on appellant's jury.

G. Prospective juror Ray Lindsay (Argument I(n)).

In his juror questionnaire (CT 3629-3655), prospective juror Ray Lindsay gave answers that should have caused him to be subject to a defense challenge for cause, but the defense challenge for cause was denied (RT 889), and the defense used a peremptory challenge to exclude him from appellant's jury (RT 1183.)

As respondent notes, in his questionnaire, Mr. Lindsay, in Question 9, indicated that he strongly supported the death penalty. (CT 3630.) In Question 10, asked to explain his views, Mr. Lindsay wrote that "if someone takes a life with premeditation or during the act of another crime I believe that person should not live." (CT 3631.) The next question, number 12, gave details of the allegations in this case and asked "[d]o you think everyone convicted of

such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?" Mr. Lindsay answered "Yes." (*Id.*) As to his attitudes as to whether the death penalty was used too frequently or not enough (Question 14), Mr. Lindsay answered "I feel it is not used too often. If it is imposed I think it should be carried out quickly." (CT 3632; RB at 40-41.)

Respondent admits Mr. Lindsay wrote that he would automatically vote for the death penalty and against life imprisonment, referring to his answer as to Question 12. (RT 3632-33; RB 41.) Mr. Lindsay, on Question 21, which asked what he would want to know about the defendant before he voted to impose sentence, wrote "Nothing—people must be responsible for their actions." (RT 3633.) As to Question 22, whether he believed in the adage "an eye for an eye," Mr. Lindsay wrote "If someone kills someone else on purpose or while committing a crime they should lose their life." (RT 3633.) Mr. Lindsay also wrote in his answer to the next question that he could not put the "eye for an eye" principle out of his mind and apply the law the Court will give him. (RT 3634.)

This prospective juror also indicated that the costs of keeping a person in prison for life would be a consideration in deciding the penalty. (Question 29) (RT 3635.) In another answer that should have automatically disqualified him, Mr. Lindsay wrote, in response to Question 31, that his feelings about the

death penalty were such that if there was a penalty phase of the trial, he would automatically vote for the death penalty rather than life in prison without the possibility of parole, and referred to his answer to Question 10, where he stated that if someone took the life of another, that person should be put to death. (RT 3636.)

In support of his argument, respondent also quotes the following portions of Mr. Lindsey's testimony at voir dire:

> THE COURT: In your mind if you listen to the evidence in the guilt—in the penalty phase of the trial, if you got there, in your mind, the factors in mitigation indicating it [the death penalty] should not be imposed outweighed those factors in aggravation which indicate that it should, would you have any hesitancy in voting for life without possibility of parole as opposed to death?
>
> MR. LINDSAY: Yes. I would have a little problem with that.
>
> THE COURT: You feel that regardless of what evidence was put in about mitigation you would vote for the death penalty anyway?
>
> MR. LINDSAY: I would lean heavily that way. Yes.
>
> THE COURT: And you don't—you don't believe that you would be able to impartially weigh the various factors and make a decision based on those factors as opposed to your preconceived beliefs about this?
>
> MR. LINDSAY: Well, I think I could consider them, but I still would be very heavily influenced the other way.
>
> THE COURT: Under these circumstances do you believe that you could fairly try this case if you got to the penalty?
>
> MR. LINDSAY: To the penalty phase?
>
> THE COURT: Yes.

MR. LINDSAY: I think so.

THE COURT: Well, do you think you would be fair?

MR. LINDSAY: I think so.
(RT 881; RB at 41-42.)

Respondent also quotes the following testimony:

THE COURT: With respect to your answer to Question 15, the question was" "Do you feel the death penalty should be mandatory for any particular type of crime? Please explain."
You say: "See the answer to Number Ten," which was your feelings about the death penalty.
Do you mean by that, sir, that you feel that if the defendant were convicted in this case it's your view that he should be put to death automatically without any kind of a further hearing as to what penalty was appropriate?

MR. LINDSAY: Not automatically. No. I think—

THE COURT: So when you said, "mandatory"___
MR. LINDSAY: —process—

THE COURT: —mandatory, did you mean that it should be always imposed or did you mean that that is one of the sentences that could be imposed?

MR. LINDSAY: Did I put "mandatory?"

THE COURT: Well, that was one of the—a lot of people had difficulty with this question. You would not be the first to misunderstand.
Did you mean anyone convicted should be automatically put to death or did you mean that should be one of the punishments which should be available?

MR. LINDSAY: I think that should be one of the punishments which should be available.
(RT 882-883; RT at 42-43.)

Respondent also quotes Mr. Lindsay's answers to the question

regarding the costs of imprisonment:

> THE COURT: In answer to Question 29, you said: "In deciding penalty, that is, life in prison without the possibility of parole or death, would cost of keeping someone in jail for life be a consideration for you?"
> You said, "Yes. We waste too much money in death row inmates now. Unfair to victims' families."
> I think actually what the intent of the question was probably was would you vote for the death penalty just to avoid the cost of having somebody kept in prison for the rest of their lives. I think that was what counsel were trying to get at.
> But in any event, regardless of what the intent of the question was, if you get to that phase, penalty phase, you would be instructed on what you can and—what you can consider in determining death versus life without the possibility of parole. I think that you will find that none of the factors have anything to do with how much it would cost to keep a person if you voted for life without possibility of parole.
> Can you promise me that if you got to that phase you would not consider that as a factor in making your life or death decision?
>
> MR. LINDSAY: Putting it that way, no, I would not.
> (RT 884; RB at 43-44.)

Respondent quotes further testimony which shows that, even after all this rehabilitation, Mr. Lindsay still had trouble answering in a way that would not disqualify him, and further prompting was needed:

> THE COURT: In answer to Question 32 you said: "Are your feelings about the death penalty such that if there were a penalty phase of a trial you would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole?"
> You checked, "Yes. See number Ten."
> Is that still your answer?
>
> MR. LINDSAY: Well, again, if—if all the circumstances were the same and the results were the same, and it was—it leads to the same thing, of course I would.

THE COURT: Well, see, the question, this question was paired with the one in the previous thing. They're mirror images of each other. What they ask, are you automatically going to vote for the death penalty in every case if—if the defendant is found guilty, if the special circumstances are found true.
We have had some discussion here in which you indicated or at least I think you have indicated that you would not. I just want to clarify—

MR. LINDSAY: Well, I said that it depends. The way the question was presented and the way you just described it seem, you know, a little bit different. But again, my answer would probably be yes, I would, if the situations were the same.

THE COURT: What do you mean by, "the situations being the same," sir?

MR. LINDSAY: Well, I think we are getting questions confused here again. But if—if they were convicted, special circumstances, and you know, it follows down that same line again, I would be weighted towards the—

THE COURT: Yeah. You indicated you were weighted towards it, but that's not exactly the same thing as saying in every case that you would.

MR. LINDSAY: No, not in every case I would not.

THE COURT: In other words, it would depend not only on whether the defendant was guilty, found guilty, and where the special circumstances were found true, but what evidence was presented afterwards about what should happen to him?

MR. LINDSAY: I think so. Yes.

THE COURT: Is that correct?

MR. LINDSAY: Yes.
(RT 886-887; RB at 45-46.)

The defense challenged Mr. Lindsay for cause based on his answers to

questions 8, 10, 12, 13, 15, 17, 19, 20, 23, 29, 30, 32, 78, and 87. (RT 887.) The challenge was denied. (RT 889; RB at 46-47.) The defense was forced to use a peremptory challenge to exclude Mr. Lindsay. (RT 1183.)

Respondent argues that this colloquy shows that Mr. Lindsey was willing to put aside his personal opinions regarding the death penalty, could fairly listen to the evidence, and would not automatically vote for the death penalty. (RB 47.) However, this interpretation ignores the repeated, extensive and very persuasive coaching by the court which prompted the answers. Even the selective quotations above, which appear in respondent's brief, clearly show the impermissibly coercive effect of the coaching. Mr. Lindsay was left with little or no leeway when asked questions such as "Do you think you would be fair?" or "Can you promise me that if you got to that phase you would not consider that as a factor in making your life or death decision?" (RT 881-889, *supra.*) Respondent's arguments that the questioning showed that he did not "fully understand" the questionnaire or that he would listen to the evidence (RB at 47-48) ignore the tremendous persuasive effect of the court's efforts to have Mr. Lindsay and the rest of the panel change what were clearly disqualifying views. These efforts far exceeded the bounds of permissible probing for bias, and, because they were aimed at the goal of "rehabilitation" by forcing a change in the questionnaire answers, they actually served to effectively cover up his disqualifying biases.

Respondent's alleged "waiver" argument has been discussed *supra.* (RB at 48.) Appellant was prejudiced not simply because he was forced to use a peremptory challenge on this prospective juror, but because the cumulative effect of the improper rehabilitations meant that the panel, and ultimately the actual jury, were seeded with objectionable jurors that should not have been there had the Court not improperly "rehabilitated" them.

H. Prospective juror Larry Vessel (Argument I(v)).

Similar to his treatment of the prospective jurors discussed *supra,* respondent contends the trial court did not improperly rehabilitate Mr. Vassel. (RB at 48-50.) As respondent admits, when asked to explain his views on the death penalty in Question 10, Mr. Vessel wrote that "I believe in the death penalty." (CT 3181; RB 48.) Respondent also notes that as to Question 12, which asked whether everyone convicted of a murder-robbery of an elderly man with a shotgun, without regard to the mitigating evidence, should receive the death penalty, Mr. Vessel wrote "yes," explaining "if you kill someone in the first degree, should receive the death penalty." (CT 3181; RB 48.) He thought the death penalty was used too seldom. (Question 14)(CT 3182.) He also felt it should be mandatory for "first degree murder." (Question 15)(CT 3182.) Contrary to respondent's contention that Mr. Vessel would not automatically vote for the death penalty (RB 48), Mr. Vessel, asked in Question no. 19 if he felt that he would automatically vote for the death

penalty for a defendant convicted of first degree murder, wrote "yes, first degree murder should be the death penalty." (CT 3182.) All that he wanted to know about the defendant in deciding the penalty of life or death was "whether he was guilty or not." (Question 21)(CT 3183.) Mr. Vessel also believed in "an eye for an eye" (Question 22) and stated it was based upon a religious conviction. (CT 3183; RB 48.)

As respondent quotes in his brief, at *voir dire*, the Court asked him, "So would it be fair to say then that you would not automatically vote for the death penalty just because the defendant was convicted of the crime?" Mr. Vessel answered "No." (RT 786; RB 49.) The Court continued with its leading questions as to his opinion on the scope of a "mandatory" death penalty for certain crimes. The Court asked, "In other words, you didn't mean by that that anybody convicted of a crime should automatically be put to death. You meant that it should be considered?" Vessel answered "Yes." (RT 786-787; RB 49.)

Defense counsel challenged based on questions 12, 15 and 19, but the Court denied the challenge. (RT 788.) Neither defense counsel nor the prosecution asked Vessel any questions.

Even the sections of the voir dire questioning selectively quoted by respondent confirm the impression that this was a very pro-death potential juror who was led by the court's prompting to change his questionnaire answers. Appellant was prejudiced not only because he was forced to use a

peremptory challenge on this defendant (RT 1186) but, more importantly, as with the other prospective jurors, the cumulative effect of the Court's "rehabilitations" meant that more improperly-biased, pro-prosecution jurors were seated than would have been the case had the Court not improperly "rehabilitated" them.

I: The cumulative effect of this improper rehabilitation deprived Appellant of a fair jury, caused his counsel to expend many peremptory challenges on prospective jurors that were subject to challenges for cause, rendered futile the exercise of defense peremptory challenges for cause, and resulted in a pro-death bias to Appellant's jury (Argument I(x)).

Respondent offers no argument or opposing authority as to this argument, even though it is the heart of this entire claim of error. Respondent's failure to address the cumulative effect of this trial error is central to the failure of respondent's arguments, and shows why they miss the mark. As discussed *supra,* respondent treats Arguments I, II and III simply as individual *voir dire* error in failing to excuse Prospective Juror X or Y, instead of what they plainly are, a challenge to the trial court's prejudicial and skewed questioning that ensured appellant's jury pool was composed of objectionable pro-death jurors, and ensured that appellant's actual jury was predisposed to a guilty verdict and a sentence of death.[12] These arguments are

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[12] Argument II, the trial court's denial of challenges for cause against biased jurors, although it deals with the individual challenges, also deals with the cumulative effect of those challenges, a biased jury, which was a direct result of the questioning procedure challenged by the defense and dealt with in Argument I. Argument III, dealing with the overall

not simply that "the presence of Juror X in the jury pool or on appellant's jury deprived him of a fair trial" as respondent would have it. (RB at 20-50.). The cumulative effect of the individual inclusions and exclusions are the gist of the arguments, not just individual errors in rehabilitating prospective juror X or Y.

Ultimately, all of the court's actions must be seen cumulatively, and even if no one improper rehabilitation can be seen as depriving appellant of a fair trial, the cumulative effect was overwhelming. It caused many mandatory death jurors to escape challenges for cause and ultimately led to several such jurors sitting on appellant's jury as it was finally constituted. As respondent fails to address this argument, or offer argument in opposition, appellant is entitled to a reversal.

J. Respondent's "waiver" argument.

The failure of the defense to exhaust peremptory challenges does not defeat this argument, as respondent alleges. As argued *supra,* the defense peremptory challenges were rendered irrelevant, as a biased jury would still have resulted even if all challenges were used, due to the Court's ability and demonstrated inclination to "seed" the panel with pro-death-biased prospective jurors in a quantity sufficient to overwhelm the defense peremptory challenges. The Court's rehabilitative efforts also inhibited and

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composition of the jury, also was a direct result of the improper questioning.

prejudiced the exercise of defense peremptory challenges, as it would have been futile to challenge too many of the earlier-chosen objectionable jurors, beyond the extremely biased, if the remaining eligible pool had an equal or possibly even higher proportion of objectionable jurors.[13] Additionally, the presence in the pool of so many "rehabilitated" jurors with extreme pro-death-penalty biases was another prejudicial factor for the defense, as challenging the moderately-biased risked their substitution with the extremely-biased. Thus, the fact that the defense did not exercise all its peremptory challenges is not only irrelevant, but actually illustrates the chilling effect of the Court's *voir dire* questioning procedure.

Equally important, the *voir dire* process employed by the Court was not designed to ferret out disqualifying biases, especially crucial in a capital case, but rather to "change" objectionable views and render them "non-objectionable." This accomplished nothing but hiding these biases. The *voir dire* process failed to perform its primary function of assuring the defendant a fair and objective jury that would listen to his mitigating evidence without pre-judging it or discounting it on the basis of prejudicial beliefs or attitudes. In the circumstances described here, a fair trial for appellant was impossible.

Respondent's argument is predicated virtually entirely on the "waiver" argument, the failure of the defense to exhaust all peremptory challenges. (RB

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[13] *See* Appendix A to the AOB.

at 17 *et. seq.*) As discussed above, this argument misses the gist of the argument that the court's *voir dire* resulted in a panel that could not be effectively challenged. It also ignores the fact that there were challenges to the court's methodology and individual challenges to the prospective jurors. Respondent does not directly engage appellant's arguments under the Sixth Amendment to the United States Constitution, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726.)

By this standard, in light of the extensive evidence presented in appellant's brief and herein, the jury chosen for this case can hardly be seen as impartial. As discussed in appellant's brief (AOB at 59-169), whether a prospective capital juror is impartial within the meaning of the Sixth and Fourteenth Amendments is determined in part on the basis of their opinions regarding the death penalty. A prospective capital juror is not impartial and "may be excluded for cause because of his or her views on capital punishment

[if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; citing *Adams v. Texas* (1980) 448 U.S. 38, 40.) A prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury. (*Witherspoon v. Illinois* (1968), 391 U.S. 510; *Morgan v. Illinois* (1992), 504 U.S.719 at 728, 733-734.)

That standard was amplified in *Wainwright v. Witt* (1985), 469 U.S. 412, where the Court, adopting the standard previously enunciated in *Adams v. Texas* (1980), 448 U.S. 38 at 45, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (*Witt, supra*, 469 U.S. at 426) that the juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.* at 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

Thus, this Court's duty is to

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.

(*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

The extensive extracts from both the questionnaires and the voir dire presented in appellant's opening brief and herein, and even those selected by respondent quoted *supra*, show that this standard was repeatedly violated in the seating of Mr. Whalen's jury. A review of these jurors questionnaires and *voir dire* leaves the "definite impression" that they were so strongly in favor of the death penalty that their ability to follow the law was substantially impaired within the meaning of *Witt*. Hence, their "rehabilitation" by the trial court was error.

Respondent's "waiver" contention fundamentally misunderstands the nature of the errors which appellant has demonstrated were committed by the trial court. As has already been discussed, appellant contends that the court erred both substantively -- by applying different and more stringent criteria to evaluate pro-life jurors than were applied to pro-death jurors – and procedurally, by "rehabilitating" pro-death jurors and failing to use its powers to question jurors evenhandedly. Respondent limits his waiver contention to the *substantive* claim of error, the failure to disqualify biased pro-death jurors, treating the claim as one of separate error for "failure to remove a juror for bias." (RB at 17.) It is therefore important to note that there no claim by respondent that the procedural claim of disparate standards was waived (as

there could not be as *both* sides objected to it).

We have discussed above why no further objection to the panel, or the complete use of all peremptory challenges was necessary. The issue on appeal is whether the trial judge's decisions with respect to pro-life and pro-death jurors were made in accordance with the law as annunciated by this Court and the United States Supreme Court. It is the trial court's decision-making process which is in issue here, as evidenced by the reasons it stated for excusing pro-life jurors and its behavior and reasons for denying defense challenges to pro-death jurors. The court's actions on all of the pro-death jurors were contested in the general objection to the form of the questioning, in which even the prosecution joined.

Respondent does not argue that in order to perfect an appeal on an issue, the appellant must have taken exception to the trial court's ruling after the court made it and re-litigated or re-urged the issue in that court. Unless this Court is going to require that in addition to contesting the actions of the court, an appellant must make another objection to the composition of the panel after the court had denied the objection, appellant did all he was required to do – contest the court's qualification of pro-death jurors. Appellant submits that individually and collectively the disparate treatment accorded the pro-death jurors, both substantively and procedurally, resulted in the determination of whether appellant should live or die being entrusted "to a tribunal organized

to return a verdict of death." (*Witherspoon, supra,* 391 U.S. at 521.)

In other cases in which such disparate treatment of jurors has been found, the result has been reversal *per se*. (*Witherspoon, supra*; *Morgan v. Illinois* (1992) 504 U.S. 719.) That is the appropriate result here. The showing that the Court applied strenuous efforts to retain pro-death jurors is enough to invalidate the process under *Witherspoon*. Reversal *per se* is appropriate and consistent with the long-established rule that when even one pro-life juror is erroneously excluded, reversal of the penalty phase verdict is required. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) It is even more appropriate where the error resulted in systematic bias. Moreover, for the reasons stated in Appellant's Opening Brief, and not addressed by respondent, reversal of the guilt verdict is appropriate as well because the court's methodology in jury selection resulted in a jury predisposed to find appellant guilty.

K. The Court's disparate treatment of the jurors is structural error not susceptible to harmless error analysis, contrary to respondent's arguments.[14]

Respondent treats the arguments relating to the voir dire as simple trial error involving individual challenges to specific jurors, without considering the over-all effects of the trial court's questioning methods.

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[14] This "structural error" section applies to all of the voir dire arguments (Arguments I, II, and III).

But the pervasive and unrelenting effort of the Court to salvage **only** pro-death jurors so skewed the jury selection process, and the available pool of potential jurors, that it amounts to a **structural** flaw not susceptible to harmless error analysis. This is one of those "very limited class of cases" where the "defects in the constitution of the trial mechanism, ... *defy analysis by 'harmless-error' standards* [,]" (*Arizona v. Fulminante* (1991), 499 U.S. 279, 309 (emphasis added)), and affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310."

i) The facts show that the remaining panel of potential jurors was extremely biased towards death.

As discussed *supra,* the available pool was so stacked with objectionable potential jurors that it inhibited the exercise of the defense's peremptory challenges. From the analysis of the jury pool (*see* Appendix A to the AOB) one can readily see how the Court's rehabilitations rendered the pool biased and unfair. The best evidence of how dramatically the pool was stacked against appellant is to examine the potential jurors that remained in the pool after jury selection was completed. These were the only available possibilities had the defense exercised all their peremptory challenges as respondent argues they should have. These uncalled potential jurors were nine in number. Contrary to respondent's dismissive and

simplistic argument that "appellant cannot show any prejudice whatsoever resulting from the court's questioning" because "[n]one of the nine were called as prospective jurors during the final phase of jury selection" (RB at 21), the prejudice is plainly evident as these jurors were the only remaining candidates for the jury, and the resulting Hobson's choice for the defense was a direct consequence of the court's biased questioning. These nine uncalled potential jurors were:

1) Julie O'Kelly (Argument I(b)).

Many questionnaire answers of prospective juror Julie O'Kelly (CT 1588- 1617) indicated that she would be subject to a challenge for cause by the defense. In that questionnaire, she wrote that she supported the death penalty for any crime that was "voluntary."[15] She also believed in "an eye for an eye." (CT 1591, 1593.) Asked to explain how her views about the death penalty have changed over time, Ms. O'Kelly wrote "the way the world is going, if you just kill someone because they are in your way they deserve the same." (CT 1591.) A disqualifying answer was given to Question 12, whether anyone who was convicted of a murder committed during a robbery should receive the death penalty, regardless of the evidence introduced by the defense at the penalty phase. (CT 1591.) Ms.

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[15] "If it proves to be voluntary I suppose it should be an eye for an eye." (CT 1591.)

O'Kelly wrote that death should be mandatory, explaining "if they kill someone just because they are there it should be considered for them." (CT 1591.) Asked about her feelings about whether the death penalty was used too seldom or too frequently, she wrote "[too] seldom. There are people sitting on death row that we are paying for as taxpayers that aren't going anywhere." (CT 1592.) Ms. O'Kelly felt the death penalty should be mandatory for first degree murder (Question 16) (CT 1592.)

Another strong disqualifying factor was this prospective juror's attitude toward mitigating evidence. Asked "[w]hat would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole," she wrote "I don't think I would want to know anything about him." (CT 1593.)

As to her belief in the adage "an eye for an eye," she wrote that "whatever that person has done to another person, it should be done to them." (CT 1593.) Ms. O'Kelly wrote that the costs of keeping someone in prison without the possibility of parole would be a consideration for her (Question 29). (CT 1595.)

Additionally, she was the victim of a mugging in 1992, which figured in several of her answers, and it had affected her to the extent that after the incident, she "looked at everyone like they were going to attack me and take what I have." (CT 1601-1602, 1604.) Just from reading the

questionnaire, she had formed an opinion on the case, that "alcohol and drugs were a factor." (CT 1613.)

Despite these disqualifying answers, the Court attempted, through leading and suggestive questioning, to rehabilitate her by coaxing her to change her answers. Virtually all of the "questioning" of Ms. O'Kelly was not a court inquiry, but a series of admonitions and statements which demanded rather than suggested the "answers." Even then, she still had doubts:

> Q. Okay. I think in answering question 29 you said, "In deciding between...deciding penalty would the costs of keeping somebody in jail for life be a consideration for you" and you said yes.
> Does that mean you're more likely to favor the death penalty because you want to save the state a few bucks or do you want him to keep a person in jail?
> A.. Not necessarily. It would depend.
> (RT 443-445.)

The defense asked only one question of this prospective juror, and she was then passed for cause. (RT 450.) Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning that left no doubt as to the answer being sought, this juror would have been subject to a challenge for cause by the defense.

2) Yvonne Caselli (Argument I(e)).

The answers of prospective juror Yvonne Caselli on her juror questionnaire (CT 1859-1885) should have given the Court notice that she was subject to a defense challenge for cause. She wrote that she "strongly supports" the death penalty. (CT 1860.) Asked for an explanation of her views, she wrote "If 'you' think life is inconsequential–prepare to pay the ultimate penalty!–if you decide to take that person's life." (CT 1861.) Asked "[d]o you think everyone convicted of such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?" Ms. Caselli answered "Yes. The murder was probably not necessary." (CT 1861.)

As to whether the death penalty is used too frequently or too seldom, Ms. Caselli answered "Too seldom—death row is overcrowded with convicted and sentenced criminals way overdoing the appeal time—too much money spent supporting these folks!" (CT 1862.) She felt that the death penalty should be imposed for any murder. (CT 1862.) The next question asked whether the death penalty should be a possible sentence for any crime other than first degree murder, and Ms. Caselli answered "Yes. Any murder." (CT 1862).

She was asked "[w]hat would you want to know about the defendant

before deciding whether to impose the death penalty or life imprisonment without possibility of parole?" Indicating a disregard for mitigating evidence, Ms. Caselli wrote "Why he had such little disregard for another human life." (CT 1863.) Ms. Caselli believed in the adage "an eye for an eye" with an explanation that "if you sin against another and take their life prepare to lay down your own." (CT 1863.) Even more revealingly, Ms. Caselli admitted that she would *not* be able to put the "eye for an eye" principle out of her mind and apply the Court's principles, even though it was explained that California had not adopted the "eye for an eye" principle. (Question 23) (CT 1864.) Ms. Caselli stated that she had religious or moral training regarding the death penalty and she did not know whether she could set aside this training and decide the case according to the law. (CT 1864.) In a similar vein, when asked "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you?" the answer was "no." (CT 1864.)

Ms. Caselli did not know whether she could accept the Court's instruction that life without the possibility of parole meant exactly that (CT 1865); and she admitted that the costs of keeping someone in prison for life would be a consideration in deciding the penalty. (CT 1865.) Asked "Are your feelings about the death penalty such, that if there was a penalty phase

of a trial, you would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole?" Ms. Caselli answered "Yes."[16]

Ms. Caselli was formerly employed by a sheriff's department in Wyoming (CT 1871); had been mugged in 1981 (CT 1871); had been the victim of a residential burglary (CT 1872); and admitted that she felt fearful of violent crime on a daily basis. (CT 1874.) She thought that "high-priced 'bought' experts" should not be allowed to testify at trial. (CT 1876.)

These answers to the questionnaire clearly indicated that Ms. Caselli could not follow California law and be fair to appellant, and she should have been excused for cause. A juror with equally extreme attitudes opposing the death penalty would have been immediately excused, as several were. Yet when she was questioned at *voir dire*, the Court went to extraordinary lengths to rehabilitate Ms. Caselli, leading her to contradict everything she answered in the questionnaire. Even with this prodding, the juror still harbored disqualifying doubts and opinions and her answers still revealed a strong predisposition towards death:

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[16] Given her answers in the entire questionnaire as well as this question, her answer to the previous question, which stated the same question in terms of automatically voting against the death penalty, her "yes" answer to that question is an obvious error. (CT 1866.)

"THE COURT: Understanding that would you be able to listen to the evidence and if the evidence in aggravation outweighed the evidence in mitigation, would you be able to vote for the death penalty?
CASELLI: I believe I could.
THE COURT: Yes?
CASELLI: Yes.
THE COURT: And on the other hand, if you listen to the evidence and you believe that the factors in mitigation outweigh the factors in aggravation, could you vote for the sentence of life without possibility of parole?
CASELLI: I really don't, I really don't know at this point, your Honor."
(RT 555-556.)

The Court then virtually lead Ms. Caselli by the hand through her answers (*See, e.g.* RT 556 *et seq.*.) This prospective juror was led through more troubling questionnaire answers in which she still expressed doubts:

THE COURT: ...You said, "In deciding penalty that it's life in prison without possibility of parole or death would the cost of keeping someone in jail for life be a consideration?" You said "Yes."
"And would the cost of providing appellate process be a consideration?" You said "Yes."
Did you mean that by that that you would—when you got back there and you were thinking about whether this case if you got to that point deserved the death penalty or life without possibility of parole that you would tend to vote for the death penalty because that way you would save some dollars for the state because the defendant wouldn't have to be warehoused?...
CASELLI: That was my reasoning behind my answer, yes.
THE COURT: Well, are you going to let that influence you in deciding which penalty to decide on?
CASELLI: No, I don't think so.
(RT 559.)

The defense challenged Ms. Caselli for cause based on her answers to questions 12, 19, 23, 28, 29 and 32. (RT 563.) The Court denied this

challenge for cause. (*Id.*) Appellant was prejudiced because this prospective juror remained in the prospective juror pool at the end of jury selection. Along with many other multiply-objectionable prospective jurors discussed herein, their presence inhibited and rendered futile further defense exercises of peremptory challenges, as their potential replacements were equally or more objectionable.

3) Jacqueline Marchetti (Argument I(l)).

In her juror questionnaire (CT 2398-2425), prospective juror Jacqueline Marchetti gave answers that would have caused her to be subject to a defense challenge for cause. Ms. Marchetti indicated that she strongly supported the death penalty (CT 2400) and that her support of it has become stronger over time. (Question 11)(CT 2401.) She felt the death penalty was used "too seldom! There are too many convicted murderers sitting on death row for years." (CT 2402.) Asked in the next question when the death penalty should be mandatory, Ms. Marchetti answered "when there is a conviction based on hard evidence--not circumstantial." (CT 2402.) She also believed in the death penalty for any "crimes involving children as victims" (RT 2402) and for child molesters. (*Id.*). In the next question, Ms. Marchetti believed the death penalty was inappropriate only when the evidence is circumstantial. (RT 2402.)

Revealingly, Ms. Marchetti wrote that she would automatically vote

for the death penalty "if the conviction was based on hard evidence" regardless of the circumstances of the crime or the mitigating evidence (RT 2403.) She would reject plea-bargain-based testimony. (RT 2406.)

Here too, despite these pro-death answers, the Court engaged in an attempt to rehabilitate this juror who would otherwise have been successfully challenged for cause by the defense. The following was part of the Court's exchange with this juror:

> THE COURT: In answer to question 15 you said—the question was, "Do you feel the death penalty should be mandatory for any particular type of crime? Please explain."
> You said, "Yes. If it's a conviction based on hard evidence not circumstantial evidence."
> Okay, when you say "mandatory" did you have in mind that if the defendant is convicted of the crime he would be put to death regardless of any other circumstances?
> MARCHETTI: I could not think of any other circumstances that would be relevant if it was a conviction based on facts, eye-witnesses, whatever.
> ...
> THE COURT: Okay. Is it your position that if the defendant were convicted of the crime, that you are going to vote for the death penalty regardless of the evidence in aggravation and mitigation?
> MARCHETTI: I don't think so. I would say no.
> (*see* RT 604-606.)

On the basis of these answers, this juror was "skillfully" led down the path toward rehabilitation, with questions from the Court about which there could be little doubt as to the desired answer. A common theme of the questioning was repeated here, with the Court prompting and virtually putting into the prospective juror's mouth the idea that the questionnaire

reflected her views in general but the *voir dire* questioning reflected her views in this specific case.[17] Of course, this purported general/specific distinction was not pursued with any anti-death penalty jurors, nor, based on the questionnaire questions and answers, did it have any basis in fact.

The defense challenged Ms. Marchetti for cause based on her responses to answers 15, 19 and 28 in the questionnaire. The challenge was denied, the Court stating that "based on my examination of the juror I believe that she can fairly judge the case." (RT 610-611.)

4) Robert Zabell (Argument I(m)).

In his juror questionnaire (CT 2908-2935), prospective juror Robert Zabell gave answers that would have caused him to be subject to a defense challenge for cause. Mr. Zabell indicated that he strongly supported the death penalty (CT 2910), with the comment "do it more often." (CT 2911.) Mr. Zabell thought that everyone convicted of a crime similar to what appellant was charged with should be given the death penalty, regardless of the mitigating evidence. (CT 2911.) Without explanation, this prospective juror felt that the death penalty should be mandatory for some crimes and should be a sentence for crimes other than first degree murder. (CT 2912.)

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[17] *E.g.*, "so if I understand your answer to [question] 15 correctly what you mean by that is that you would favor death penalty (sic) in cases of this type but you would not necessarily do it this (sic) an individual case?" (RT 605-606.).

Revealingly, Mr. Zabell indicated that if the defendant was convicted of first degree murder with special circumstances, he would automatically vote for the death penalty and against life imprisonment. (CT 2912.) Showing a closed mind on this subject, asked what he want to know about the defendant before imposing a life or death sentence, he wrote "nathing" (sic) (CT 2913.) He also believed in the adage "an eye for an eye." (Question 22) (CT 2913.) He could not accept the Court's instructions that a sentence of life without the possibility of parole meant exactly that. (CT 2915.) The costs of keeping someone in prison for life would be a consideration for this prospective juror (CT 2915) as would the costs of the appellate process. (Question 29) (CT 2915.)

The following was part of the court's exchange with Mr. Zabell which showed he still harbored biases despite the court's coaching:

> THE COURT: Do you feel that you would automatically vote the death penalty regardless of the evidence that is presented in the penalty phase of the trial if the defendant were convicted of the crime?
> ZABELL: Depends on the circumstances.
> (RT 640.)
> ...
> THE COURT: In Question 15, you said—the question was, "Do you feel the death penalty should be mandatory for any particular crime? Please explain."
> You said, "Yes."
> What did you—what types of crimes were you thinking of, sir?
> ZABELL: Like murder and stuff like that.
> (RT 641-642.)

The Court continued to lead this prospective juror through a number of answers to the jury questionnaire that likewise left little doubt as to the desired answer. (RT 643-645.) Not surprisingly, this prospective juror was challenged for cause by the defense, based on his answers to jury questionnaire numbers 12, 15, 19, 28, and 87. (RT 645.) The challenge was denied based on his *voir dire* answers. (*Id.*)

5) Steve Witt (Argument I(o)).

In his juror questionnaire (CT 4739-4767), prospective juror Steve Witt gave answers that caused him to be subject to a defense challenge for cause. Mr. Witt indicated that he supported the death penalty. (CT 4740) and indicated that these views have become stronger over time. (Question 11) (CT 4741.) Mr. Witt also wrote that "the death penalty would be equal to the crime if found guilty" (CT 4741) and that the death penalty is used "too seldom, according to what I see in the news." (Question 14) (CT 4742.) Mr. Witt also believed that the rape of a child should also be subject to the death penalty (CT4742) as should a "prearranged killing." (Question 16) (*Id.*) He also wrote that he believed in the adage "an eye for an eye," adding that "you take a life with a prearranged plan, you give your life." (CT 4743.) Mr. Witt was "not sure" whether he could put this belief out of his mind and apply the principles given to him by the Court. (Question 23)(CT 4744.) The costs of keeping a person in jail for life

would be a consideration for him. (CT 4745.) Mr. Witt had also been a member of the John Birch Society, a far-right extremist organization. (CT 4759.)

Despite these answers which would have disqualified him from serving on appellant's jury, and despite the extraordinary lengths the court went to in order to rehabilitate this prospective juror, Mr. Witt still harbored disqualifying doubts and opinions:

> THE COURT: And your job as a juror would be to weigh the factors in aggravation against the factors in mitigation and determine which one is appropriate. In other words, whether the death penalty is appropriate or whether life without the possibility of parole is appropriate. Do you think you would be able to do that impartially?
> MR. WITT: Not positive on that, Your Honor.
> (RT 976.)

In his questionnaire, Mr. Witt wrote that he would suffer a loss of income and pay if chosen for the jury; that he was just emerging from bankruptcy; and that based on his personal situation, he would not be able to give the case his full and undivided attention. (RT 983-985.) Mr. Witt told the Court that the problems he mentioned "will interrupt my thinking." (RT 985.) The Court answered, "I'm sure they will." (*Id.*) The defense challenged Mr. Witt for cause, based on his statement that he would not be able to pay full attention to the case. (RT 985.) Mr. Witt stated that he could give the case five hours a day and the challenge was denied. (RT 985.)

6) Frank Gatto (Argument I(p)).

In his juror questionnaire (CT 4558-4585), prospective juror Frank Gatto gave answers that caused him to be subject to a defense challenge for cause. Mr. Gatto indicated that he supported the death penalty (CT 4560) and these views had not changed over time. (CT 4561.) He also indicated that an "individual who commit (sic) a crime with the possible results of a victim's death must or should be held accountable and face possible death." (CT 4561.) Mr. Gatto wrote that "anyone using a weapon in a crime that results in a victim's death should receive or be consider (sic) for the death penalty." (CT 4561.) He also felt that the death penalty should be mandatory for "any individual who commits a crime that results in a cruel/sadistic murder." (CT 4562.) Mr. Gatto believed in the adage "an eye for an eye," writing that "if you take a life you should be accountable for your actions." (CT 4563.) He twice wrote that he favored the death penalty. (CT 4563, 4566.)

Despite these answers showing that Frank Gatto had a predisposition to impose the death penalty, and despite the Court's attempts at rehabilitation, this prospective juror still had doubts and disqualifying opinions:

> THE COURT: So you're saying that regardless of your personal beliefs you would follow the Court's instructions?
> MR. GATTO: I would hopefully be strong enough, and I think I am,

to separate that and realize what my duties are.
(RT 1001-1002.)
...
THE COURT: Do you think you would listen to the evidence and base those factors and determine which in your mind prevailed over the other?
MR. GATTO: I hope so. I would believe based on the evidence and based on the Court's instruction and discussing that with the jurors at the conclusion.
(RT 1003-1004.)
...
THE COURT: ...Did you mean that the death penalty should be automatic in such a case or that that's one of the available penalties?
MR. GATTO: ...So I basically just made a general statement. If someone dies because of a crime where that person who committed the crime has—basically creates a murder, where that person was cruelly punished and then—and died, yes. I would feel—but it's a hard question to answer for me unless I was given time to really think about it...
(RT 1005.)
...
THE COURT: I guess we are asking the way you feel about it.
MR. GATTO: I—I probably feel pretty strongly that that person if there was a cruel crime which resulted in murder, I would feel very strongly about that person receiving the death penalty.
(RT 1006.)
...
MR. SPOKES: Will you be able to set aside your personal belief that the death penalty is appropriate and weigh the circumstances in aggravation and weigh the circumstances in mitigation with an open mind, with fairness towards both the defense and the prosecution, and reach a verdict based on the facts that are presented and the instructions that the Court gives you?
MR. GATTO: I—I would hope. I think this in all honesty, that I would base it on the evidence that is presented in the Court.
MR. SPOKES: Can you assure us that you will be able to set aside your personal—
MR. GATTO: I can't assure you a hundred percent. I don't know if I can. I would hope. I think that basically I would in all honesty base it on the evidence.
MR. SPOKES: But you cannot give us a hundred percent assurance?

MR. GATTO: Well, I don't know. I'm trying to be as honest as I can.
(RT 1009)
...
MR. SPOKES: Okay. So you—let's go back to the first question. Can you assure us that in your mind you're a hundred percent sure that you will be able to set aside your personal feelings and follow the Court's instruction?
MR. GATTO: No.
MR. SPOKES: Challenge for cause.
(RT 1010.)

The prosecutor then asked a few questions and Mr. Gatto replied that he was still not sure he could give full assurances that he would set aside his personal feelings. (CT 1010-1011.) Yet when the challenge for cause was renewed, the Court rejected it. (CT 1011.)

7) Mami Aligire (Argument I(q)).

In her juror questionnaire (CT 4320-4345), prospective juror Mami Aligire gave answers that would have caused her to be subject to a defense challenge for cause. Ms. Aligire indicated that she supported the death penalty (CT 4320), adding that "[i]t serves a purpose to the extent that the perpetrator will not/cannot repeat the offense, as many murderers do that are released. [a]n 'eye for an eye.'" (CT 4321.) Ms. Aligire wrote that she thought that everyone convicted of a murder such as the one appellant was charged with should receive the death penalty, regardless of the evidence regarding penalty, adding that "the operative word is—convicted—he's been found guilty of 1st degree murder with special circumstances. What

more needs to be said." (CT 4321.) She felt the death penalty appropriate for "a repeat offender, serial murderer" and for abduction and sexual assault or exploitation of children." (CT 4322.) This prospective juror wrote that she believed in the adage "an eye for an eye," adding that "you take a life, unless in self-defense, you show a total disregard for a human being, you should forfeit your life for the one you took." (CT 4323.) Ms. Aligire also expressed reservations when asked to accept the Court's representation that a sentence of life without the possibility of parole meant exactly that, because "I would expect reassurances from the court that in no instance would this sentence be overturned." (CT 4325.)

Despite these disqualifying answers, the Court continued with its pattern of leading the prospective juror through leading questions that strongly suggested the correct answers. But disqualifying doubts still remained:

> THE COURT: Okay. Is there any feeling in your mind right now that if you found the defendant guilty of the special circumstances true that you would automatically vote for the death penalty without considering the evidence in aggravation and mitigation?
> MS. ALIGIRE: I would consider it.
> THE COURT: You would consider it. Okay.
> If you found that in your own mind that the evidence in mitigation outweighed that evidence in aggravation, would you have any hesitancy to vote for life without possibility of parole?
> MS. ALIGIRE: It would be difficult for me, to be perfectly honest.
> THE COURT: Okay. That's because you tend to think that death penalty would be more appropriate for the circumstances as you know them in this case?

MS. ALIGIRE: (Nods head.)
THE COURT: What you know about it or what is your—what is it you're saying?
MS. ALIGIRE: If the evidence showed that the defendant were guilty of the crime—
THE COURT: Right.
MS. ALIGIRE: Of murder with special circumstances.
THE COURT: Right. Which is that it was done during a robbery.
MS. ALIGIRE: Yes. Than I would feel that probably the death penalty would be most appropriate, but I would be willing to consider any mitigating information that was submitted.
(RT 1047-1048.)
...
THE COURT: Okay. You indicated that in answer to question 15 you said, "Do you feel the death penalty should be mandatory for any particular type of crime?"
You said, "A repeat offender, serial murderer."
Does that mean someone who has killed more than once, is that what you're talking about?
MS. ALIGIRE: Yes.
THE COURT: Okay. And when you say "mandatory" there, you mean that if he—if–did you mean that if he's found done that (sic) more than once he should automatically receive the death penalty?
MS. ALIGIRE: Yes. I could say death penalty.
THE COURT: On the other hand, but do you feel it should be mandatory in those circumstances, or do you feel that there's room for life without possibility of parole in under (sic) these circumstances?
MS. ALIGIRE: Depending on the information that's provided. You're asking us to look at any kind of mitigating evidence so—
THE COURT: Right. And aggravating information.
MS. ALIGIRE: Um-hmm. So I think it would weigh on that but—
THE COURT: Okay.
MS. ALIGIRE: But like I said, I tend to probably go more for the death penalty in those circumstances.
(RT 1049-1050.)

Based on her questionnaire and her *voir dire* answers, the defense challenged this prospective juror for cause. (RT 1053.) The Court denied

the challenge (*Id.*) even though her answers were so obviously biased against the defense that the prosecutor joked "I think we found a foremen for Ernie [Spokes, defense attorney]...This lady." (RT 1053.) The prosecutor's joke inadvertently highlights how biased and pro-death this panel was, as many shared Ms. Aligire's attitudes and were even more pro-death biased.

8) Cleo Parella (Argument I(r)).

In her juror questionnaire (CT 4859-4885), prospective juror Cleo Parella gave many "mandatory death" answers that would have caused her to be subject to a defense challenge for cause. This prospective juror's answers were among the most extremely pro-death-biased of the entire panel, yet the Court denied the defense's challenge for cause. Ms. Parella, when asked her feelings about the death penalty, checked the line that indicated she "would always impose regardless of the evidence" in total disregard of any mitigating evidence. (CT 4860.) Asked to explain her views on the death penalty, Ms. Parella wrote "take a life/pay the price." (CT 4861.)[18] In a significantly disqualifying answer, when asked whether she thought someone convicted of a murder with similar circumstances to that allegedly committed by appellant should receive the death penalty, Ms.

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[18] But had this opinion been reversed, in favor of a life sentence, the prospective juror would have been excused in short order, as many were.

Parella answered "yes," adding *"non-negotiable."* (CT 4861.) She thought the death penalty was used too seldom and that it should be mandatory for first degree murder, or even "victim death because of assault-such as a heart attack." (CT 4862.) As to Question 17, she thought the death penalty was appropriate for any "willful intent, planned" murders, and inappropriate only when there was "no victim loss of life," which of course would not be murder. (CT 4862.) When asked what she would want to know about the defendant before deciding his penalty, this prospective juror wrote "I would hope to be considering crime only, and not unfortunate childhood, etc.," indicating an unwillingness to consider mitigating evidence. (CT 4863.)

Ms. Parella believed in the adage "an eye for an eye," adding "take a life, give your own." (CT 4863.) She also admitted in the next question that she could not put "an eye for an eye" out of her mind even though the Court instructed to do so. (CT 4864.) She was also not willing to accept the Court's representation that life without the possibility of parole meant that the sentence would be exactly that. (CT 4865.) Ms. Parella stated that the costs of keeping someone in prison for life would be a consideration for her in deciding the penalty. (CT 4865.)

In another series of disqualifying answers, Ms. Parella stated that if she found the defendant guilty of first degree murder, her feelings about the death penalty would not automatically cause her to vote against it, but she

"would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole." (CT 4866.) Asked about her feelings about serving on the jury, Ms. Parella wrote "I favor the death penalty for first degree [murder]. This may not favor the defendant." (CT 4867.) Additionally, she was "disgusted" at the outcome of the O.J. Simpson trial. (CT 4882.)

These extreme answers should have mandated that this prospective juror be immediately excused for cause. Yet, in keeping with the pattern discussed herein, the Court led Ms. Parella through a series of leading questions aimed at "rehabilitation."

In response to questioning from defense counsel Mr. Spokes, Ms. Parella admitted she would still have difficulty in being a fair juror for Appellant:

> MR. SPOKES: If you were the defendant in this case, would you feel comfortable with a juror with your mind set sitting on the jury?
> MS. PARELLA: No.
> MR. SPOKES: You wouldn't?
> MS. PARELLA: I would not feel it was fair to put someone with my mind set on the death penalty on this type of jury because of that reason.
> MR. SPOKES: So as you sit there now in your mind you do not believe that you would be a fair and impartial juror in this case; is that correct?
> MS. PARELLA: With the judge's definitions I would have an open mind.
> MR. SPOKES: Okay. Well, if you were the defendant would you want someone with your mind set sitting on your jury?
> MS. PARELLA: It's a risk. I don't know how he would feel about

it.
(RT 1099.)

Additionally, this prospective juror also knew people in the district attorney's office and had worked there for two months just a few months before the trial. (RT 1102.)

Ms. Parella had in the most unambiguous terms given the Court a reason to exclude her for cause: her own frank admission that it would not be fair to the defendant if she sat on his jury. Despite this, the Court denied the defense challenge "based on the answers here in court. The juror has assured the court that she can follow the court's instructions and did not fully understand the original answers given." (RT 1102.)

The disparate treatment given pro-and-anti-death penalty prospective jurors is clearly shown here. An anti-death-penalty individual who admitted they should not be on the jury because of their beliefs would not have been afforded the treatment given to Ms. Parella or the others discussed herein.

9) Moises Serna (Argument I(u)).

The answers of prospective juror Moises Serna on his jury questionnaire were some of the most extremely pro-death of all prospective jurors, and he gave disqualifying answers to several questions. Mr. Serna wrote that he "strongly support[ed" the death penalty and explained his

views with the statement "take a life, eye for eye." (CT 3150-3151.) Asked whether he thought everyone convicted of a robbery-murder of a person should receive the death penalty regardless of the penalty phase evidence, he checked the "yes" line. (CT 3151.) As to whether he thought the death penalty was used too frequently or not enough, he wrote "No, there are lots of criminals walking in the street, or in jail (people who got it easy in the trial)." (CT 3152.) Asked in the next question whether he thought the death penalty should be mandatory for any crime, he wrote "No, only people who kill at will." (CT 3152.) He believed the death penalty was appropriate for "murders" and inappropriate only "when it is self-defense or the person(s) was not aware do to (sic) the mind." (CT 3152.) As to questions which asked whether he would automatically vote against or for the death penalty if the defendant was convicted of first degree murder, he apparently mixed up his intended answers, as seen by his prior answer to Question 15 in which he said it should be automatic for murder, and as he wrote in answer to Question 20, which asked if he would automatically vote against the death penalty and for life, and he answered with relish "Yes! If so he should suffer like the people he hurt."[19] (CT 3153.) The only thing this prospective juror wanted to know about the

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[19] The Court likewise interpreted his answer to these questions as indicating a mandatory-death view. (RT 1112-1114.)

person in deciding whether to impose a life or death sentence was "what was he thinking." (CT 3153.)

Mr. Serna believed in "an eye for an eye." (CT 3153.) Although he wrote that his religious training held that it was wrong to take another person's life (CT 3154), at *voir dire* questioning he indicated he did not believe in this tenet of his Catholic religion. (RT 796.)[20]

Additionally, Mr. Serna believed that the costs of keeping someone in prison for life would be a consideration in his decision at the penalty phase, writing "it is keeping some who would do you harm if this person had a chance." (CT 3155.) Mr. Serna again unequivocally stated his mandatory death views when he answered "yes" to the question which asked whether his feeling about the death penalty were such that he would automatically vote for it. (CT 3156.) Mr. Serna described himself as a Republican. (CT 3157.) He also had a very negative attitude toward drug users, writing that drugs "destroy and confuse the mind" and his thoughts about why people become addicts were "nothing else to do and lazy." (CT 3166.)

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[20] "I'm a Catholic and it's against, you know, our religion to be put to death...but if it was a fair trial and, you know, it was a fair case and the person got what he deserved that would be fine with me. As long as, you know, that person wouldn't blame like, 'Oh, I was under the influence of something...'" (RT 796.) Of course, this belief had significant meaning given Appellant's history of drug addiction and methamphetamine use at the time of the crime.

At voir dire, this prospective juror still harbored doubts and opinions that should have disqualified him:

> A. Some people, you know, act stupid, you know, and excuse me for using that, you know, they try to blame things on other things. And if somebody did something they knew what they were doing, you know, why blame something else, 'cause, you know. They should have thought about that before.
> Q. Okay.
> A. That's how I feel. I'm a Catholic and it's against, you know, our religion to be put to death...but if it was a fair trial and, you know, it was a fair case and the person got what he deserved that would be fine with me. As long as, you know, that person wouldn't blame like, 'Oh, I was under the influence of something,' or, you know what I mean?
> Q. Um-hmm.
> (RT 794-796.)

The defense challenged this prospective juror based on his answers to questions 12 (automatic vote for death in these circumstances), 15 (mandatory death for those who "kill at will") and 32 (automatic vote for death based on feelings about the death penalty). (RT 798.) Neither the defense nor the prosecution asked this prospective juror any questions. The Court denied the challenge "based on the answers of the juror in open court." (RT 798.)

Summary.

Thus, had the defense exercised all peremptory challenges, these were the only possible replacements. *All nine* were clearly unpalatable and objectionable for the defense, and this was a direct result of the court's voir

dire questioning. Remarkably, *eight of the nine remaining potential jurors had already been challenged for cause by the defense and the challenges had been denied* (Caselli, Marchetti, Zabell, Witt, Gallo, Aligere, Parella, Serna.) Under these circumstances, further peremptory challenges would have been futile, as no amount of challenges in this case could have improved this jury. Had the defense exercised all peremptory challenges, the result would have inevitably been even more prejudicial than the panel that was accepted.

ii) This was structural error.

This pervasive packing of the panel with biased, pro-death potential jurors is the kind of error that has been held to be structural and not subject to harmless error analysis. In determining whether an error is subject to harmless-error analysis, a reviewing court must determine whether the error is a "classic 'trial error,' " such as the improper admission of evidence. (*Arizona v. Fulminante* (1991), 499 U.S. 279, 309.) In *Fulminante,* the Supreme Court defined "trial error" as "error which occurred during the presentation of the case to the jury, and *which may therefore be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt." (*Fulminante,* 499 U.S. at 307-08) (emphasis added.) "Structural" errors, in

contrast, are "defects in the constitution of the trial mechanism, which *defy analysis by 'harmless-error' standards* [,]" (*id.* at 309 (emphasis added)), and affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at 310.) *Fulminante* also defined structural error as affecting "[t]he entire conduct of the trial from beginning to end" and depriving the defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." (*Id.*)

Some commentators have treated harmless-error jurisprudence as establishing a strict dichotomy between trial error, which is subject to harmless-error analysis, and structural error, which is per se reversible. (*See* "Twenty-Fourth Annual Review of Criminal Procedure," 83 *Georgetown L.J.* 665, 1365 (March-April 1995.)) The case law does not appear to establish such a rigid dichotomy, however. In *Brecht v. Abrahamson* (1993) 507 U.S. 619, the Supreme Court characterized the divergence between trial and structural errors as a " *spectrum* of constitutional errors" rather than a rigid dichotomy. (*Brecht,* 507 U.S. at 629 (emphasis added.) *See also Fulminante,* 499 U.S. at 290-91 (White, J., dissenting) ("our jurisprudence on harmless error has not classified so neatly the errors at issue" so as to establish a "meaningless dichotomy between 'trial errors' and

'structural defects.' "))

Tumey v. Ohio (1927) 273 U.S. 510 held that a biased presiding judge was structural error. *See also Neder v. United States* (1999) 527 U.S. 1 (holding that the presence of a biased decisionmaker is structural error "subject to automatic reversal"); *Edwards v. Balisok* (1997) 520 U.S. 641 (holding that "[a] criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him"); *Rose v. Clark* (1986) 478 U.S. 570, 577-578; *Quintero v. Bell* (6th Cir. 2001) 256 F.3d 409, 413-415 (holding that counsel's failure to object on jury-bias grounds created a structural error that was per se prejudicial under *United States v. Cronic* (1984) 466 U.S. 648.)

Thus, it is clearly established that the Supreme Court views the denial of the right to an impartial decisionmaker, whether judge or jury, to be error that taints any resulting conviction with constitutional infirmity. *Chapman v. California* (1967) 386 U.S. 18, 23. *See also Fulminante,* 499 U.S. at 309 (holding that "structural defects in the constitution of the trial mechanism" are per se prejudicial); *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630 (holding that the existence of structural errors "requires automatic reversal of the conviction because they infect the entire trial process.")

The error in this case---the systemic packing of the jury pool with pro-death and biased potential jurors---is more akin to these systemic errors that go to the very heart of the fairness of a trial. It is simply not amenable to harmless-error analysis. First, unlike typical trial errors, this error did not "occur[ ] during the presentation of the case to the jury[.]" (*Fulminante,* 499 U.S. at 307.) Instead, it occurred before the presentation of the case, at voir dire. The resulting biased pool influenced and inhibited the exercise of all of the defense's peremptory challenges and ultimately the composition of appellant's jury. Thus, this was an ongoing feature of the trial.

Second, this error, unlike the error in *Fulminante,* may *not* be "*quantitatively assessed in the context of other evidence presented* in order to determine whether it[] was harmless beyond a reasonable doubt." (*Id.* at 308) (emphasis added.) In *Fulminante,* the Court held that the admission of a defendant's coerced confession was subject to harmless-error analysis. (*Fulminante,* 499 U.S. at 295.) In its harmless-error analysis, the Court looked at the erroneously admitted evidence and compared it to other evidence the government had mustered against the defendant. It was able to evaluate the impact of the error because it was able to weigh the coerced confession relative to other known and tangible evidence. It also had an entire trial record as a frame of reference against which to compare the

erroneously admitted confession. Given all of the information it had, and given its institutional ability to weigh such evidence, the Court in *Fulminante* had a rational basis on which to assess the particular harm and to conclude that the erroneous admission of the coerced confession was not harmless.

To apply a harmless-error analysis in this context would fly in the face of the demonstrated facts showing the bias of the panel as shown *supra.* Respondent would be hard-pressed to bear its burden of proving that the seating of this panel did not harm appellant. (*United States v. Olano* (1993) 507 U.S. 725, 734) [under harmless error review, government bears the burden of persuasion with respect to prejudice].) Another obstacle to harmless-error review here is the lack of information concerning what went on in the jury room. To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than sheer speculation. In the context of an appeal based on denial of a fair jury and panel, there is inadequate evidence for an appellate court to determine the degree of harm resulting from the selection of the panel despite evidence showing strong anti-defendant bias. (*See also United States v. Noushfar* (9th Cir.1996) 78 F.3d 1442, 1445-46 [holding that it was

structural error for district court to allow jury to listen to audio tapes that had not been played during the trial, and emphasizing that reviewing court "cannot assess the impact" on the jury's deliberations]; *Guam v. Marquez* (9th Cir.1992) 963 F.2d 1311, 1316 [holding that it was structural error for trial court to give written instructions to jury in lieu of reading them in open court, and explaining that the error "prevents an appellate court from conducting a harmless error analysis because the record is silent regarding whether any of the jurors read the instructions," making it "impossible to determine if [the] error was prejudicial."].)

II.

THE COURT ERRED IN DENYING CHALLENGES FOR CAUSE TO MANY PROSPECTIVE JURORS WHO HAD DISQUALIFYING OPINIONS, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.[21]

Respondent treats these claims, relating to the trial court's errors in denying challenges for cause, together with Argument I. (RB at 17-50.) Here again, respondent treats this claim only as one of individual voir dire error in failing to remove certain jurors, which leads to the unwarranted

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[21] As explained in the AOB, this argument discusses the Court's actions in denying challenges for cause against pro-death-penalty jurors; the prior argument discussed the Court's improper "rehabilitation" of pro-death jurors, some of whom were not challenged for cause. Hence, there is some overlap as some, but not all, jurors were both rehabilitated and challenged for cause by the defense.

reliance on the "waiver" argument.[22] However, this argument, similar to Argument I, is a challenge to the trial court's methodology and questioning, which *was* objected to by the defense. The defense objected to the court's questioning and improper "rehabilitation," and the defense again objected when these prospective jurors were challenged for cause.

Appellant's arguments have been discussed in the prior argument, both in his brief and *supra* in his reply. Appellant incorporates by reference herein the factual statements and arguments as to Argument I.

A. The cumulative effect of the denial of these defense challenges deprived Appellant of a fair jury and a fair trial. (Argument II(p)).

Here too, respondent fails to discuss the cumulative impact of these errors, treating the claim as one of individual *voir dire* error, and does not address Argument II(p). As pointed out in his opening brief, the prejudicial effect of the denial of these defense challenges must not only be seen individually, but cumulatively. Even if no single denial was erroneous, the cumulative effect of all of the denials caused the juror pool to be stacked against the defense and had an inhibiting effect on the use of defense

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[22] As discussed *supra,* Argument II, the trial court's denial of challenges for cause against biased jurors, although it deals with the individual challenges, also deals with the cumulative effect of those challenges, a biased jury, which was a direct result of the questioning procedure challenged by the defense and dealt with in Argument I. Argument III, dealing with the overall composition of the jury, also was a direct result of the improper questioning.

peremptory challenges. The challenges for cause were all well taken and should have been granted, because these juror's views would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Appellant's conviction and sentence of death must therefore be reversed.

III.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE HIS JURY WAS COMPOSED OF BIASED AND PRO-DEATH JURORS.

This argument looked only at those who actually served on Appellant's jury, while the prior arguments looked at those prospective jurors who were subject to challenges for cause but were improperly rehabilitated by the trial court. Appellant hereby incorporates by reference the facts and arguments from the prior issues, as they have a strong bearing on, and explain the composition of the panel that ultimately resulted.

Respondent again claims this argument has been waived by the failure of defense counsel to object to the jury as seated. (RB at 51.) Respondent claims the individual jurors were properly questioned and seated, and the voir dire did not induce a pro-guilt or pro-death jury. (*Id.*) Respondent also argues that as the court alone did not conduct the voir dire, both parties had an opportunity to probe for bias. (*Id.*) This last argument

ignores the fact that the court led the jurors away from objectionable answers; overruled many objections for cause to biased jurors; ignored both parties' objections to the court's handling of the voir dire; and treated pro-and-anti-death penalty jurors in a disparate manner.

Respondent fails to discuss any of the extensive list of factors that indicated that appellant's jury was biased against him and was unfairly pro-death, as well as the fact that it was caused by the Court's unfair questions and rehabilitative efforts. (AOB 182-208.) Appellant has shown in this argument that the results of the Court's rehabilitative efforts are reflected in the actual composition of appellant's jury.[23] Of the twelve, nine supported or strongly supported the death penalty and four would consider it, and none had negative or even slightly negative opinions about it.[24] Four were crime victims or had families who were crime victims; two jurors had opinions regarding mental health testimony (both were doubtful or negative); five jurors had connections with or were related to law enforcement and one of these was related to a Stanislaus County prosecutor; and a remarkable twelve out of twelve had experience with alcohol or drug

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[23] Argument I discusses the prejudicial effects of all of the Court's "rehabilitations," including those prospective jurors who did not sit on appellant's jury.

[24] One juror, L. H. , checked both the "support" and the "will consider" box on the questionnaire. (RT 5698.)

abuse or knew their effects, especially important given the facts of the case. As constituted, appellant's jury was unconstitutionally biased against him, and he was thereby deprived of a fair trial. Respondent fails to discuss any of these specifics, relying again on his "waiver" argument (RB at 51-52.) which has been extensively discussed in Argument I.

By its efforts in constituting the jury in this unbalanced manner, the trial court violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, to a fundamentally fair jury trial and to a reliable verdict. (*Wardius* v. *Oregon* (1973) 412 U.S. 470; *Beck* v. *Alabama* (1980) 447 U.S. 625) As the Supreme Court has held, "Any claim that the jury was not impartial, therefore, must focus not on [just the juror peremptorily challenged],[25] but on the jurors who ultimately sat." (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86.)

In reviewing the juror questionnaires and during voir dire, the trial court was placed on notice that several of the prospective jurors held views that rendered them partial to the prosecution. Under these circumstances, the trial court had a duty to conduct an inquiry to determine whether these potential jurors could fairly and impartially assess the evidence and apply the relevant law. "Without an adequate voir dire, the trial judge's

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[25] As was done in Argument II.

responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729-730).

Here, the trial court failed to conduct an adequate inquiry into the biases of prospective jurors and permitted biased jurors to sit on appellant's jury in violation of his Sixth and Fourteenth Amendment rights to a fair trial, to an unbiased jury, and to due process of law. *See* Arguments I and II in appellant's opening brief, which are incorporated herein by reference.

As discussed in those arguments, under *Wainwright v. Witt* (1985) 469 U.S. 412, 424, criminal defendants have a Sixth Amendment right to remove from the panel jurors who, because of their views regarding the death penalty, would be substantially impaired in the performance of their duties. This standard applies to jurors whose views in favor of the death penalty would impair their ability to judge the case impartially, as well as to those jurors whose opposition to the death penalty has such effect. (*Morgan v. Illinois* (1992) 504 U.S. 719.)

Given that appellant's jury included actually and presumably biased jurors, reversal is required without a particularized showing of prejudice. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.)

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JURORS MATTHEW FIGURES AND BEATRICE HAMPTON PRIMARILY BASED ON THEIR WRITTEN ANSWERS TO THE QUESTIONNAIRE, WITHOUT ANY EFFORTS TO REHABILITATE THEM.

A. Respondent's discussion of the facts.

Respondent claims that prospective jurors Matthew Figures and Beatrice Hampton were properly excluded from appellant's jury "since they maintained that they would not be able to impose the death penalty under any circumstances." (RB at 53.) This argument ignores the fact that, based primarily on their written answers to the juror questionnaire, the trial court excused prospective jurors Figures (RT 524-525) and Hampton (RT 668-670) without making rehabilitative efforts similar to those made for the pro-death-penalty prospective jurors. The answers Figures and Hampton gave to the questionnaire established that they were opposed to the death penalty, but their voir dire questioning was short and quick, did not involve the "do you understand" leading and suggestive questions the trial court used with pro-death-penalty jurors, and was designed to quickly eliminate them. Reversal of appellant's death judgment is required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668.)

Matthew Figures (RT 524-525) stated in his questionnaire that he opposed the death penalty (CT 2250) but added "I don't know how I would

feel if the crime involved one of my family." (CT 2252.) Although he stated he would automatically vote against the death penalty (CT 2253, 2256) many such "automatic" answers in favor of the death penalty were made by prospective jurors who were later "rehabilitated" by the Court.[26] Figures also wrote that he "can't see spending tax dollars on appells (sic) for death penalty verdicts." (CT 2254.) At voir dire, he was still somewhat equivocal, stating that in regard to the death penalty, that "I don't believe I could" impose the death penalty, as respondent points out in his brief. (RT 525; RB at 54.) But the dialogue ends here, and the court failed to ask whether Mr. Figures could follow the law and apply the death penalty if the facts called for it. The court failed to delve into this or ask questions such as those asked to prospective jurors who were inclined to give the death penalty in all cases of murder, discussed in Arguments I and II *supra*.

As to Beatrice Hampton, she wrote in her questionnaire that she opposed the death penalty, but not that she would always oppose it regardless of the evidence. (RT 3060.) She agreed to listen to the evidence with an open mind (CT 3061) and believed the death penalty was inappropriate "under no circumstances." (RT 3062.) Additionally, she indicated that she would not automatically vote against the death penalty if

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[26] *See, e.g.,* discussions of prospective jurors Cleo Parella, and Ray Lindsay and actual jurors C. P., J. A., M. C. and C. E., *supra,* Arguments I, II, and III.

the defendant was convicted of first degree murder. (CT 3063.) She also stated that she could put aside her own feelings about the death penalty and follow the law as instructed by the Court. (CT 3064.) Ms. Hampton did answer that she would hesitate to vote for first degree murder to avoid the task of deciding the penalty (CT 3065) and would vote against death automatically (CT 3066) but her earlier answer and her willingness to follow the Court's instructions contradicted this answer.

These answers were much less disqualifying than those of many pro-death-penalty prospective jurors who were "rehabilitated" by the Court through leading and suggestive questions. However, no similar efforts were made with Ms. Hampton. (RT 668-670.)

Respondent points to the following exchange at *voir dire*, where the Court asked Ms. Hampton just a very few questions that again *leaned toward and suggested disqualifying answers*:

> Q. I'm not clear here on some of your answers exactly what you feel here.
> Is your feeling about the death penalty such that under no circumstances could you vote to approve it?
>
> A. Under no circumstances.
>
> Q. None whatsoever?
>
> A. None whatsoever.
>
> Q. Okay. So if—even if this were the most horrible crime in history?

A. Even if.
(RT 668-669; RB at 55.)

This prospective juror was not asked whether, despite these views, she could she could follow the Court's instructions, whether she could set aside these views if instructed to do so, and whether she could follow the law, as was done with many pro-death-penalty prospective jurors.

B. Respondent's argument.

Respondent argues that *Wainwright v. Witt,* (1985) 469 U.S. 412 supports the exclusion of these prospective jurors as their "voir dire responses established that they were each unwilling to impose the death penalty under *any* circumstances." (RB at 56-57.) This argument would be viable had Figueres and Hampton been further examined regarding their views, instructed on the law, and asked if they could follow the court's instructions, as was done with many pro-death-penalty jurors. However, the bare-bones questioning ended abruptly without this necessary inquiry. A jury assembled "by excluding veniremen for cause simply because they expressed general objections to the death penalty or voiced conscientious or religious scruples against its infliction" violates the Sixth Amendment guarantee of an impartial jury and the Fourteenth Amendment's guarantee of due process. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522-523.)

In *Gray v. Mississippi* (1987) 481 U.S. 648, 658, the Supreme Court

held that the "standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment...is 'whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" (quoting *Witt,* 469 U.S. at 424.) The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* (quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Further, the Supreme Court significantly circumscribed the state courts' role in excusing jurors for cause in capital cases. It held that

> [t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stacks the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.
> *Id.* at 658-659 (quoting *Witt,* 469 U.S. at 423 and *Witherspoon,* 391 U.S. at 523.)

The same standard is dictated by the California Constitution. (*See, e.g., People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Ghent* (1987)

43 Cal.3d 739, 767.) The simple fact that a prospective juror says that he or she does not believe in capital punishment does not justify excusal of that juror for cause. (*Szuchon v. Lehman* (3rd Cir. 2001) 273 F.3d 299, 328.) "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." (*Dutton v. Brown* (10th Cir. 1986) 788 F.2d 669, 675.)

Respondent attempts to distinguish *People v. Richard Stewart* (2004) 33 Cal.4th 425, on the basis that "where this Court reversed the penalty judgment when the trial court granted five challenges for cause based solely on somewhat ambiguous responses in the jury questionnaires." (RB at 57.) While the challenges here were not *solely* based on the questionnaires, they were largely so based, as Figures and Hampton were not given the opportunity to affirm that they would follow the court's instructions and the questioning was very brief. This failure is particularly striking in light of the trial court's eagerness to engage in detailed questioning of the pro-death-penalty jurors.

This Court's opinion in *Stewart* reiterated the United States Supreme Court's holding that personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case:

> "'Not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so

> long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'" (*People v. Stewart*, *supra*, 15 Cal.Rptr.3d at 675, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

Recently, the Ninth Circuit has reaffirmed that excusing a juror for cause in a capital case based on their view of the death penalty is unconstitutional, absent evidence that the juror would not follow the law. (*Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946.) In *Brown,* the Ninth Circuit reaffirmed that the erroneous exclusion of jurors who expressed scruples against the death penalty was not subject to harmless error analysis, citing the Supreme Court's holding in *Davis v. Georgia* (1976) 429 U.S. 122, 123-24, that

> surely established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause...the instant case presents yet another opportunity for this Court to adopt a harmless-error analysis and once again we decline to do so.
> (*Brown,* 451 F.3d at 954, quoting *Gray,* 481 U.S. at 659-60.)

In the sections of the questioning selected by respondent (RB at 54-55), Mr. Figures and Ms. Hampton's responses do not indicate that their views on capital punishment would have "substantially impair[ed] . . . the performance of [their] duties as a juror in accordance with [the court's] instructions and [her] oath." (*Witt,* 469 U.S. at 424.) Their answers indicated they opposed the death penalty, but did not establish that those

views would force them to disobey the Court's instructions. In fact, Ms. Hampton indicated she could set aside her own opinions and follow the court's instructions. (CT 3064.) Standing alone, Mr. Figures' and Ms. Hampton's answers to the questionnaires did not establish that they were unable to follow the controlling California law if instructed to do so.

Perhaps further inquiry by the court or counsel would have established that Mr. Figures and Ms. Hampton were not fit to serve as jurors in a death penalty case. Conversely, any doubts regarding their suitability may have been allayed, particularly had the court led them toward rehabilitation as it did with the pro-death penalty jurors. In any case, this necessary inquiry was not done.

As appellant argued in his brief (AOB at 215-224), with such deficient and disqualification-prone *voir dire*, the answers Mr. Figures and Ms. Hampton gave on their questionnaires were insufficient as a matter of law to establish that they were unqualified to serve as jurors because of their views on the death penalty. The trial court excused them "without first clarifying that [they] opposed the death penalty to a degree which would have made it impossible for [them] to follow the law." (*Mayes v. Gibson* (10th Cir. 2000) 210 F.3d 1284, 1292.) At most, and without further inquiry, their responses "appear[ed] ambiguous" and therefore "[did] not justify dismissal for cause." (*United States v. Chanthadara* (10th Cir. 2000)

230 F.3d 1237, 1271.)

Mr. Figures and Ms. Hampton were prospective jurors who "merely express[ed] personal opposition to the death penalty," and therefore were not properly subject to excusal. (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) As this Court has held, "A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (*Ibid.*)

Appellant's death judgment must therefore be reversed.

V.

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION FOR A DIRECTED VERDICT BASED ON THE FACT THAT THERE WAS INSUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE.

A. Respondent's discussion of the facts.

Respondent argues that the court properly denied the motion for a directed verdict based on the fact that there was insufficient non-accomplice corroborating evidence. (RB at 58-65.) Appellant has argued that the facts establish that the three main witnesses against him, Melissa Fader, Michelle Joe and John Ritchie, were all accomplices, and hence there was insufficient non-accomplice corroborating evidence to sustain the conviction. Appellant incorporates that argument herein. (AOB 224-228.)

Ritchie was an accomplice because he knew there was going to be a

burglary, as he testified he overheard Michelle Joe say she was looking for someone to help her with a burglary.[27] (RT 1342, 1343, 1382.) Ritchie then gave Joe the gloves (RT 2005-2006),[28] and since the weather was not cold at this time, the gloves were not needed for what they are normally intended, to keep one's hands warm.[29] Ritchie therefore knew what the gloves were for and that made him an aider and abettor, as the defense argued. (RT 2264 *et. seq.*) This belies respondent's assertion that "[n]or was there evidence that Ritchie knew that appellant and Joe needed the gloves to commit a crime." (RB 64.)

Respondent's argument also ignores Ritchie's position as the intermediary in the fencing of the stolen goods: he was the person who went to Saso's house and informed him that he had some guns that Saso might be interested in buying. (RT 1429-1430.) Ritchie also looked after Joe's daughter while she participated in the crime (RT 1344) which would be aiding and abetting. The exchange of the stolen goods for the drugs also

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[27] This hearsay was not objected to by the defense.

[28] Respondent's assertion that "Joe's testimony demonstrates that she did not remember and was confused about who had given her the gloves" (RB at 64) is not born out by Joe's testimony on cross-examination, cited in respondent's brief: "Q. Did you get the gloves from John Ritchie? A. Yes." (RT 2006; RB 63.) Her earlier equivocations were obviously the result of a reluctance to admit this fact.

[29] Joe also testified that Ritchie had given her the gloves. (RT 2005-2006.)

occurred at Ritchie's apartment, and he shared in the proceeds.

Ritchie's position as an accomplice is thus much broader than merely furnishing the gloves: it involves assisting the participants beforehand and furnishing them with instrumentalities of the crime, his knowledge of the planned crime, helping Joe with necessary child care during the burglary, fencing the proceeds afterwards, and furnishing the locale for the transfer of the stolen goods. Ritchie's actions after the crime show his status as an accomplice: when the participants returned to his apartment, instead of surprise or anger at the deed, he continued his assistance in obtaining a fence for the proceeds.

Even in final argument at the guilt/innocence phase, the prosecution itself admitted that it was not clear whether or not Mr. Ritchie was an aider and abetter: "John Ritchie either may or may not be an aider and abettor to this crime....If he's an aider and abettor, his testimony needs to be corroborated..." (RT 2236.) However, Ritchie's own testimony, and that of Joe, makes his status as an accomplice clear. Clearly, the defense met their burden to show that Ritchie was an aider and abettor, and hence there was insufficient non-accomplice corroboration.

Nor does Rick Saso's testimony provide sufficient corroboration, as respondent claims (RB at 64-65.) Saso was not present at the scene of the crime but was involved in the fencing of the property, as respondent

indicates. (*Id.*) This connects appellant only to the exchange of some guns for drugs, not the homicide, as Saso had sold the guns to a Mr. Martinez who was deceased at the time of the trial (RT 1437) and the guns were unavailable and not introduced as evidence at the trial. (RT 1438.)

B. Argument.

Appellant incorporates herein his argument from appellant's opening brief. (AOB 226-228.)

VI.

THE TRIAL COURT'S ERROR IN FAILING TO INSTRUCT THE JURY THAT MELISSA FADER, MICHELLE JOE AND JOHN RITCHIE WERE ACCOMPLICES AS A MATTER OF LAW REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

Appellant hereby incorporates by reference the facts from the previous Argument.

A. Respondent's argument.

Respondent, in section V of his brief (RB 66-68) argues that the court "instructed the jury that Melissa Fader and Michelle Joe were accomplices as a matter of law, and that it was up to the jury to determine whether John Ritchie was an accomplice." (RB 66.)

This argument does not center around Fader and Joe's status as accomplices, but Ritchie's. The court instructed the jury that if a murder was committed, then Fader and Joe were accomplices as a matter of law,

but the court erred when it refused a defense request for the same instruction as to Ritchie, and instructed the jury that it must determine whether he was an accomplice, adding that the defense had the burden of proving that he was by a preponderance of the evidence. (RT 2227-2228.) As discussed above, Ritchie could have been prosecuted as an aider and abetter of the murder. The evidence shows he furnished the gloves before the murder, and provided child care during it, with prior knowledge of a planned burglary. These facts belie respondent's assertion that "Ritchie was not involved in the plan to burglarize the Nebraska house" and "the evidence showed that his involvement did not begin until after the robbery and murder were completed." (RB 68.)

The defense argued that Ritchie therefore knew the intended purpose of the gloves and that made him an aider and abettor (RT 2264 *et. seq.*) as he acted with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing the offense or of encouraging or facilitating the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

When trial testimony establishes as a matter of law that a witness is an accomplice, the trial court has a *sua sponte* duty to so instruct the jury. (*People v. Zapien* (1993) 4 Cal.4th 929, 982; *People v. Robinson* (1964) 61 Cal.2d 373, 394.) Because the testimony of Fader, Joe, and Ritchie himself

shows that Ritchie was an accomplice as a matter of law, the trial Court erred in failing to instruct the jury *sua sponte* with CALJIC No. 3.16. This violated appellant's right to due process under the Fourteenth Amendment of the United States Constitution and his corresponding rights under the California Constitution. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *see also Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) This error further violated appellant's federal constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, non-statutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].) The error was prejudicial for the reasons stated in appellant's opening brief. (AOB 233.)

VII.

THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT THE ACCOMPLICE TESTIMONY OF MS. JOE, MS. FADER AND MR. RITCHIE WAS TO BE VIEWED WITH DISTRUST.

A. Respondent's argument.

Respondent treats this argument in section V of his brief, along with the prior argument. (RB 66-68.) The facts and argument from the prior section and from the AOB are incorporated herein.

VIII.

THE PROSECUTOR ENGAGED IN NUMEROUS ACTS OF MISCONDUCT WHICH BOTH INDIVIDUALLY AND COLLECTIVELY DEPRIVED APPELLANT OF A FAIR TRIAL.

A. Respondent's argument.

Respondent argues that there was a fair trial and no prosecutorial misconduct. (RB 69-86.)

VIII(a): Prosecutorial misconduct for mentioning Appellant's priors to prospective juror Thomas Pereira and thereby causing him to be excused.

Respondent argues that the prosecutor's mention of appellant's prior convictions to prospective juror Thomas Pereira was an "inadvertent mistake" and "did not constitute misconduct" and "was immediately cured when the court excused this juror." (RB 69-72.) Pereira was a prospective

juror whom the defense passed on a challenge for cause but who was challenged by the prosecution, but the challenge was denied (RT 466) and he can therefore be seen as potentially favorable to the defense. Coupled with the serious problem discussed in the first three arguments which resulted in a lopsidedly pro-death jury, this juror's exclusion exacerbated the pro-death-penalty tilt of appellant's jury. Even if this misconduct was inadvertent, it seriously compromised the fairness of the jury selection, and for sound reasons of policy, such conduct must not be sanctioned.

VIII(b): Prosecutorial misconduct in eliciting testimony regarding Appellant's prior record of incarcerations.

During the examination of State's witness John Ritchie, the prosecutor elicited comments from him that appellant had "mysteriously disappeared," from which the jury would have readily concluded that he was imprisoned during this time. (RT 1332-1333.) Respondent argues that this "did not indicate to the jury that appellant had been incarcerated during that time." (RB 73.) Appellant incorporates his arguments from his opening brief (AOB 240-241.)

VIII(c): Prosecutorial misconduct for failure to turn over handwritten notes and photographs from a State's expert.

This argument concerns the failure of the prosecution to timely provide handwritten notes of John Miller, a criminalist with the Department of Justice for the State of California, which prevented effective defense

cross-examination of the witness. (AOB 241-243.) Respondent argues that there was nothing exculpatory in the notes and the failure was not prejudicial. (RB 73-78.)

Respondent argues that respondent has failed to show the exculpatory value of the evidence by augmenting the record, which erroneously construes the argument as a claim under *Brady v. Maryland* (1963) 373 U.S. 83, which it is not. (RB 78; AOB 241-243.) This is a claim of prosecutorial misconduct. (*Berber v. United States* (1934) 295 U.S. 78, 85-88.) Respondent ignores the fact that because of the lateness of the discovery, the defense was prevented from using the evidence at trial in order to attack the criminalist's speculative construction of the crime scene, which prejudiced appellant. The court's order to produce the evidence and notes at trial was an inadequate remedy, as some of the photos were of shoe prints, and if the defense had them when they should have, well prior to trial, they "may have been able to track down some shoes." (RT 1625.) Now, two years later, "[t]here's not much chance [the defense is]... going to be able to find those shoes." (RT 1625.) Additionally, the evidence was unavailable at the time of the trial, as "once [the criminalist] had finished viewing the physical evidence that was provided by the District Attorney's office, it was packaged back up, and... it's now back in the hands of the Stanislaus County Sheriff's Department." (RT 1625.)

This non-disclosure was the partial basis of a defense motion for a mistrial. (RT 1618.) Defense attorney Mr. Spokes explained that he had served the prosecutor with a motion for informal discovery, including all handwritten notes by criminalists and all photographs of the crime scene. (RT 1620.) Mr. Miller went through his file accompanied by defense counsel and seven rolls of film were discovered therein. (RT 1620.) But the notes and photographs were not turned over. (RT 1621.) The Court later granted the defense motion for discovery of all handwritten notes and all photographs of the crime scene and ordered the prosecution to deliver them to the defense not later than December 29, 1995. (RT 1621.) But the first time defense counsel saw this material was in the middle of the trial, in June of 1996. (RT 1621.) This prejudiced the defense as their "investigator has [had] absolutely no opportunity to follow up in his investigation to determine the evidentiary value and/or value to the defense of these seven rolls of film and approximately...half an inch thick sheet of handwritten notes." (RT 1621-1622.) As a result, the defense did not "have the benefit of those handwritten notes at the time that [they] consulted with a defense criminalist..." (RT 1622.) As defense counsel stated, "had those handwritten notes been available to me at that time, I may have been able to direct the criminalist in a new direction. Without those handwritten notes, the criminalist was unable to reach any conclusion other than that which

[Modesto police crime lab expert] Duane Lovaas had reached." (*Id.*)[30]

VIII(d): Prosecutorial misconduct for failure to disclose evidence by Melissa Fader that she alleged that Appellant had raped her.

Respondent argues that "the prosecutor did not act in bad faith when questioning Melissa Fader on direct examination. Rather he learned for the first time during her testimony of the allegation that appellant had raped her." (RB 81.) However, the facts do not support this interpretation, given the pattern of questioning leading up to the incident,[31] which suggest some prior knowledge of what Ms. Fader was going to say. Additionally, it is not reasonable to believe that the testimony of one of the two main witnesses against appellant had not been reviewed by the prosecution before the trial. It is standard procedure to interview and prepare both prosecution and defense witnesses for trial, especially one involving capital murder charges and a witness as central to the prosecution's case as Ms. Fader. In the course of trial preparation with the prosecution, this incident would have inevitably come up. The prejudice to appellant is clear, contrary to respondent's argument (RB 82), as the false rape allegation made him seem

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[30] This conclusion was that a 20-gauge shell was loaded into the shotgun and then a 12-gauge shell was loaded on top of it and the 12-gauge shell set off the 20-gauge shell. (RT 1622.) The defense was thus unable to explore the possibility that two rounds had been fired by different people or that two different persons had loaded the firearm, both viable defense theories.

[31] *See, e.g.* RT 1515, 1614-1615, 2143.

more violent and callous. It thus had a prejudicial effect at both phases of the trial.

VIII(e): The prosecutor improperly commented on Appellant's right to remain silent by mentioning his "lack of remorse."

At the closing argument of the penalty phase, the prosecutor stated "Here's another aggravating factor. Evidence of the defendant's remorse which is nonexistent." (RT 2502.) This was an indirect comment on appellant's right to remain silent. Respondent argues the comment was proper, citing *People v. Ochoa* (2001) 26 Cal.4th 398.

However, in *Griffin v. California* (1965) 380 U.S. 609, the United States Supreme Court held that an argument by the prosecutor that invited a jury to consider the defendant's failure to testify as evidence of his guilt was prohibited by the privilege against compelled self-incrimination clause of the Fifth Amendment. The Court stated, "[C]omment on the refusal to testify...is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Id.*, at 614.)

"The test for determining whether a prosecutor's remarks constitute a comment on a defendant's silence is a two-fold alternative one: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury

would naturally and necessarily construe it as a comment on the defendant's silence." (*United States v. Mackay* (5th Cir. 1994) 33 F.3d 489, 495.) The comment here passes both tests, as the use of the words "remorse which is nonexistent" could have only had the effect of drawing the jury's attention to the fact that appellant did not testify, and, since it was a direct comment on his alleged lack of remorse, it would almost necessarily have been construed by the jury as a comment on appellant's silence.

The prohibition includes both direct and indirect references to a defendant's silence. *United States v. Martinez* (5th Cir. 1998) 151 F.3d 384, 391. The fact that appellant did not testify at the trial suggests that there was a high probability that the prosecutor's statement influenced the jury verdict.

VIII(f): The prosecutor improperly double-counted aggravating factors and counted factors that were not proper.

Respondent argues that the prosecution's listing of the aggravating factors was proper and "there is no possibility the jurors would have understood that the guilt phase crimes and special circumstances could be counted more than once as aggravating factors." (RB 85.)

The prosecutor had listed as aggravating factors the following: 1) the fact that the victim was a 67-year-old man (RT 2500); 2) that he was a diabetic (RT 2500); 3) that he had a useless left hand (RT 2501); 4) that

the robbery occurred inside of a person's home rather than out on the street (RT 2501); 5) that the victim was trying to help folks out when he was murdered (RT 2501); 6) that his hands were tied behind his back at the time that he was murdered (RT 2502); 7) what "the last ten or fifteen minutes of that man's life were like" (RT 2502); 8) that the last thing he ever heard was "Get right with God. I'll be back in a minute" (RT 2502); 9) that evidence of the defendant's remorse was non-existent (RT 2502); 10) that "you can consider [as an aggravating factor] as you go through the weighing process... the impact on his family" (RT 2503); 11) the impact on his brother, Bill Robbins, and his wife Alvina. (RT 2503); 12) the impact on Sharon Robbins and Sherman's nephew (RT 2503); 13) the experience of mopping up his blood off of the floor, off of the couch, off of wherever it splattered in that room (RT 2504); and 14) that Sharon Robbins walked in and she saw the victim dead (RT 2504.)

Respondent's bald and unsupported assertion that there was "no possibility" that these redundant and sometimes irrelevant circumstances could have been double-weighed (RB 85) is contradicted by the very words of the prosecutor's argument in which he specifically labeled each of the fourteen factors as *a separate aggravating factor.* The form of the prosecutor's argument ("here's another aggravating factor," "here's another," etc.; *see, e.g.,* RT 2502-2503) virtually demanded that the jury

consider them separately and keep a running numerical tally of these factors as he reeled them off. Additionally, the prosecutor made specific reference to the weighing decision that had to be made by the jury at the completion of this listing of aggravating factors: "I'm asking you to go into the jury deliberation room, weigh the factors in mitigation, which are nearly nonexistent, against the factors in aggravation, and bring back the appropriate verdict." (RT 2505.)

The special aggravating factors enumerated by the prosecutor were not distinct from the circumstances of the crime. A reasonable juror, following the prosecutor's argument, would have thought that a strict numerical score should determine their weighing decision, and the court's instructions did nothing to dispel that view.

Respondent points to the court's instruction that they "may not double weigh any prior conviction...[or] any circumstances of the offense which are also special circumstances." (RT 2482; RB 85.) Yet this would have done nothing to dispel a reasonable juror's belief that each of the 14 enumerated circumstances of the offense listed by the prosecutor could and should be weighed as separate aggravating factors, as it was not clear that they were also special circumstances. Most, indeed, were not. If the jury simply followed the urging of the prosecutor, and considered the factors individually, there was not only "double-weighing," but multiple-weighing.

Respondent's pointing to the "double-weighing" language of section 190.3 and the court's instruction against "double-weighing" does not alleviate the prejudice, nor is it helpful. The concept of "double-weighing" was at best amorphous and vague for the jurors, as the prosecutor enumerated a list of repetitious, irrelevant and redundant factors all relating to the crime itself. All of the 14 separate factors were slightly different ways of seeing the crime, and the jurors could have reasonably thought that if they individually considered each factor only once this would not be the impermissible "double-weighing" they were warned against. For instance, a juror could have thought she could consider *all* 14 factors listed above, as long as they did not duplicate a special circumstance, which none of the factors specifically did. The prosecution's aggravating factors list was padded with so many irrelevant factors that it created the illusion of a large numerical disparity between aggravating and mitigating evidence that weighed in favor of a death verdict.

The argument concerns the prosecutor's terming of many details of the crime itself as separate aggravating factors. In a "weighing" state such as California, where the jurors are asked to determine whether the factors in aggravation are outweighed by those in mitigation, any improper loading of the scales with improper aggravating factors seriously compromises the penalty phase verdict. The United States Supreme Court has held that the

weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. (*Stringer v. Black* (1992) 503 U.S. 222, 232.) Additionally, double-counting (or, as here, multiple-counting) has a tendency to skew the process so as to give rise to the risk of an arbitrary, and thus unconstitutional, death sentence. (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111 ["there may be a thumb on the scale in favor of death '[i]f the jury has been asked to weigh the same aggravating factor twice'"].) With improper counting, or multiple-counting of aggravating factors, there is no way to tell with certainty if the errors contributed to an unreliable verdict, or if the jury would have voted for life without the improperly-counted aggravation, but in view of the large number of "aggravating factors" enumerated by the prosecutor, it is highly likely that it did.

Respondent does not address the fact that the argument was also impermissible and prejudicial on the basis that the enumerated "aggravating factors" were unconstitutionally vague. Ensuring that a sentence is not infected with bias or caprice is the "controlling objective when we examine eligibility and selection factors for vagueness." (*Tuilaepa v. California* (1994) 512 U.S. 967, 973.)

The argument was improper because many of the factors the jury was asked to consider as factors in aggravation were elements of the crime

itself, robbery-murder. Almost all of the 14 aggravating factors listed above fall into this category. Many courts have held such "double-counting" to be unconstitutional. The Nevada Supreme Court, in *State v. McConnell* (Nev., 2004) 102 P.3d 606, held that the aggravating circumstance based on a burglary failed to perform its constitutional function of narrowing death eligibility because the burglary also served as an element of felony murder. (*McConnell* at 620.) The Court addressed the question whether, in a felony-murder prosecution, the underlying felony can be considered as an aggravating circumstance. *Id.* The Nevada Supreme Court resolved that it could not, holding that

> [I]n cases where the State bases a first-degree murder conviction in whole or in part on felony murder, to seek a death sentence the State will have to prove an aggravator other than other than one based on the felony murder's predicate felony...[I]f it (the State) charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both. Without the return of such a form showing that the jury did not rely on felony murder to find first-degree murder, the State cannot use aggravators based on felonies which could support the felony murder.
>
> We further prohibit the State from selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose" and using one to establish felony murder and another to support an aggravating circumstance. For example, in a case like this one, the burglary could not be used to establish first-degree felony murder while the associated robbery was used as an aggravator to support a death sentence.

(*McConnell, supra,* 102 P.3d at 624-625.)[32]

In Mr. Whalen's case there was improper counting of the aggravating factors which also served as elements of the crime itself. Respondent's brief addresses this argument only in the meaningless terms of "double-counting," and ignores the fact that many of the aggravating factors were in themselves improper.

VIII(g): The cumulative effect of these instances of prosecutorial misconduct deprived Appellant of a fair trial.

Respondent argues there was no cumulative error. (RB 86.) Appellant hereby incorporates his arguments from his opening brief. (AOB 249-252.) Respondent does not address the argument that the United States Supreme Court has made it clear that the prosecutor may not "attach the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.) A prosecutor's improper closing argument violates the due process clause of the Fourteenth Amendment if it was so prejudicial that it "infected the trial with unfairness." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) This is exactly the situation here.

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[32] Recently, the Nevada Supreme Court has held that the *McConnell* holding is to be applied retroactively. (*Bejarano v. State* (Nev., 2006) 146 P.3d 265.)

IX.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE FINDING OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES WAS NOT ITSELF AN AGGRAVATING FACTOR IN THE DETERMINATION OF PENALTY.

A. Respondent's argument.

Pursuant to factor (a) of Penal Code section 190.3, the trial court instructed the jury that, in determining penalty, it shall consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (RT 2482; CT 868.) That instruction was misleading. It suggested that the jury could consider the fact of appellant's first degree murder conviction with special circumstances as an aggravating "circumstance[] of the crime," because the defendant's conviction could certainly be viewed as a "circumstance[] of the crime," and the special circumstance findings established the "existence of any special circumstance found to be true."

Respondent argues in section VII of his brief that the instruction was proper and the failure of the defense to object to the language of the instruction waived the issue. (RB 87-88.) However, in light of the very prejudicial closing argument by the prosecutor, discussed *supra* in Argument VIII, this error was extremely prejudicial and left the jury with

the distinct impression that they were supposed to count all of the 14 "aggravating" factors in their penalty determination, even though these were elements of the crime itself and the special circumstances.

The court's instruction required the jury to consider *both* the "circumstances of the crime" *and* the "special circumstances," because the court employed the conjunctive "and" when it enumerated the aggravators to be considered. (RT 2482; CT 864.) The special circumstances were in no sense distinct from the circumstances of the crime. By focusing the jury's attention on these duplicative factors rather than the single set of facts surrounding the case, the aggravating effect of the circumstances of the crime was artificially increased.

In *People v. Melton* (1988) 44 Cal.3d 713, this Court recognized the risk that "a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances,'" pursuant to the statutory language that "tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances.'" (*People v. Melton, supra,* 44 Cal.3d 713, 768.) This Court concluded that "the robbery and the burglary [that occur in a single incident of criminal activity] may not each be weighed in the penalty determination *more than once* for exactly the same purpose." (*Ibid.*) In appellant's case, the Court's instruction employed the statutory

language that this Court observed was susceptible to an improper interpretation by the jury. (RT 2482; CT 864; CALJIC No. 8.85.)

In *Melton,* this Court held that "the possibility of actual prejudice seems remote" when a jury considers the aggravating effect of *both* the "circumstances of the crime" and the "special circumstances." (44 Cal.3d 713, 768.) This Court reasoned that, "[e]xercising common sense, [the jury] was unlikely to believe it should 'weigh' each special circumstance twice on the penalty 'scale.'" (*Id.* at 769.) Yet here, with the prosecution's admonition to do just that, common sense would have compelled such a double-weighing. Thus, the risk of prejudice from an instruction that expressly permits double-counting the circumstances of the crime (*see People v. Melton, supra,* 44 Cal.3d 713, 786) cannot be viewed as harmless.

In his argument to the jury, the prosecuting attorney explicitly named numerous aggravating factors without ever indicating whether these aggravating factors were components of the special circumstances, or were other aggravating factors in addition to the special circumstances.[33] These

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[33] As discussed in the prior argument, the factors listed in the prosecutor's argument were: 1) the fact that the victim was a 67-year-old man (RT 2500); 2) that he was a diabetic (RT 2500); 3) that he had a useless left hand (RT 2501); 4) that the robbery occurred inside of a person's home rather than out on the street (RT 2501); 5) that the victim was trying to help folks out when he was murdered (RT 2501); 6) that his hands were tied behind his back at the time that he was murdered (RT 2502); 7) what "the last ten or fifteen minutes of that man's life were like" (RT 2502); 8) that the last thing he ever heard was "Get right with God. I'll

arguments created an intolerable risk that the jury would make an arbitrary and unreliable penalty determination. It was violative of the constitutional requirement that a capital sentencing procedure "guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death" (*Jurek v. Texas* (1976) 428 U.S. 262, 273-27) so as to avoid "the arbitrary and capricious infliction of the death penalty" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.)

As discussed in the prior argument, the Nevada Supreme Court, in *State v. McConnell* (Nev., 2004) 102 P.3d 606, held that the aggravating circumstance based on a burglary failed to perform its constitutional function of narrowing death eligibility because the burglary also served as an element of felony murder. (*McConnell* at 620.) Courts have widely condemned the "double counting" which was urged upon appellant's jury in order to sentence him to death.

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be back in a minute" (RT 2502); 9) that evidence of the defendant's remorse was non-existent (RT 2502); 10) that "you can consider [as an aggravating factor] as you go through the weighing process... the impact on his family" (RT 2503); 11) the impact on his brother, Bill Robbins, and his wife Alvina. (RT 2503); 12) the impact on Sharon Robbins and Sherman's nephew (RT 2503); 13) the experience of mopping up his blood off of the floor, off of the couch, off of wherever it splattered in that room (RT 2504); and 14) that Sharon Robbins walked in and she saw the victim dead (RT 2504.)

B. There is no waiver by failure to object at trial.

Respondent asserts this argument is waived because of the failure of trial counsel to "object and request clarifying language." (RB at 87.) However, this issue presents a pure question of law based on undisputable facts and may be raised for the first time on appeal, even though it was not objected to at trial. (*People v. Welch* (1999) 5 Cal.4th 228, 235; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Moreover, constitutional claims may be considered when presented for the first time on appeal when the asserted error fundamentally affected the validity of the judgment, or important issues of public policy are at issue. (*Hale v. Morgan, supra,* 22 Cal.3d 388; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

The jury's penalty determination was skewed in favor of death in violation of appellant's constitutional rights to due process and to be free of "the arbitrary and capricious infliction of the death penalty." (*See Godfrey v. Georgia, supra,* 446 U.S. 420, 428; United States Constitution, Fifth, Eighth and Fourteenth Amendments.) This error was particularly prejudicial in light of the court's inclusion on the jury panel of pro-death jurors who should have been excused. Neither the trial court's other instructions nor the arguments of counsel remedied the problem by explaining that the jury should avoid multiple use of those facts.

Accordingly, the judgment of death must be reversed.

X.

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE.

Respondent argues that this Court has repeatedly rejected this claim and any instructional error was harmless. (RB at 89-90.) Appellant would submit this argument on the facts and arguments discussed in his brief. (AOB at 262-271.)

XI.

APPELLANT WAS DENIED DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE MEANING OF THE WORDS "AGGRAVATING" AND "MITIGATING."

Respondent argues that "[t]his Court has repeatedly held that 'aggravating' and 'mitigating' are commonly understood terms that need not be defined for the jury." (RB at 91.)

Appellant would submit this issue on the facts and argument discussed in his brief. (AOB at 271-272.)

XII.

THE DEATH SELECTION PROCESS USED TO CONDEMN APPELLANT TO DEATH VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

Respondent argues that appellant's arguments have been rejected by

this Court and that he waived the argument by reason of trial counsel's failure to object. (RB at 92-99.)

Appellant's argument (AOB at 272-302) is that the death selection factors upon which the jury was instructed were unconstitutionally vague, unreliable, and failed to channel the jury's discretion; the trial court instructed the jury on the factors without any effort to narrow or define any of the vague and overbroad language; the instructions favored and weighted aggravating evidence, and disfavored and minimized mitigating evidence; certain definitions were inaccurate, misleading or unconstitutional; procedural safeguards present when a person is charged for an infraction were not given; and the weighing process upon which the jury was instructed was confusing and incorrect. (*Id.*)

One factor of the statute, its failure to narrow eligibility for the death penalty (*see* AOB argument XII(A), at 273-276), bears further discussion here, as respondent completely fails to discuss the federal constitutional implications of this aspect of the argument as set forth in appellant's brief. The California statutory scheme violates appellant's rights as set forth in, among other cases: *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153; *Maynard v. Cartwright* (1988) 486 U.S. 356; *California v. Ramos* (1983) 463 U.S. 992; *Zant v. Stephens* (1983) 462 U.S. 862; and *Godfrey v. Georgia* (1980) 446 U.S. 420. The statute under which

appellant was convicted and sentenced to death fails to adequately narrow the class of persons eligible for the death penalty and creates a substantial and constitutionally unacceptable likelihood that the death penalty will be imposed arbitrarily and capriciously (*Furman*, 408 U.S. at 313 (White, J., concurring) [death penalty statute must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not"].)[34] A capital murder statute must take into account the Eighth Amendment principles that death is different (*Ramos* 463 U.S. at 998-99), and that the death penalty must be reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens*, *supra,* 462 U.S. at 877, n.15.)

California's death penalty statute, which was enacted by an initiative measure, violates the Eighth Amendment by multiplying the "few" cases in which the death penalty is possible into the many. Further, it was enacted

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[34]In *Furman*, the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. Because each of the justices in the majority wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. Justices Stewart and White concurred on the narrowest ground, arguing that the death penalty was unconstitutional because a handful of murderers were arbitrarily singled out for death from the much larger class of murderers who were death-eligible. (*Id.* at 309-10 [Stewart, J., concurring]; *id.* at 311-13 [White, J., concurring]. In *Gregg v. Georgia* (1972) 428 U.S. 153, the plurality understood the Stewart and White view to be the "holding" of *Furman, id.* at 188-89, and in *Maynard v. Cartwright* (1988) 486 U.S. 356, a unanimous Court cited to the opinions of Stewart and White as embodying the *Furman* holding. (*Id.* at 362.)

for precisely this unconstitutional purpose. The proponents of the initiative measure ("Proposition 7"), as part of their Voter's Pamphlet argument that the initiative statute was necessary, described certain murders that were not covered by the existing death penalty statute, and then stated:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*

1978 Voter's Pamphlet, p. 34, "Argument in Favor of Proposition 7."

As of the date of the homicide charged in the present case, the large number of "special circumstances" that existed under California Penal Code section 190.2, embracing every type of murder likely to occur, meant that death eligibility was the rule, not the exception, as required by the Eighth Amendment. The number of special circumstances has continued to grow, and is now 32. Different types of felony-murder special circumstances are counted separately; for example, the robbery-murder special circumstance (*see* Pen. Code sec. 190.2(a)(17)(A)) is considered distinct from the rape-murder special circumstance. (*See* Penal Code section 190.2(a)(17)(c).)

At the time of the decision in *Furman*, the evidence before the United States Supreme Court established, and the justices understood, that approximately fifteen to twenty percent of those convicted of capital murder

were actually sentenced to death. Chief Justice Burger so stated for the four dissenters (408 U.S. at 386, n. 11), and Justice Stewart relied on Chief Justice Burger's statistics when he stated in his concurring opinion: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . ." (408 U.S. at 309.) In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those states that authorized capital punishment." (*Gregg* 428 U.S. at 182, n. 26 [citing *Woodson*, 428 U.S. at 295-96, n. 31].) Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than fifteen to twenty percent of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

In order to meet the concerns of *Furman*, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory

> aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant*, 462 U.S. at 878.)

It was the Supreme Court's understanding that, as the class of death-eligible murderers was narrowed, the percentage of those in the class receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline.

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

(*Gregg*, 428 U.S. at 222 [White, J., concurring].)

In 2002, the Governor's Commission on Capital Punishment in Illinois, in recommending the elimination of fifteen of the twenty death-eligibility factors, explained the importance of the narrowing function:

> Reducing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied in Illinois, and provide greater clarity in the statute, while retaining capital punishment for the most

> heinous of homicides. . . . The continued expansion of the list of eligibility factors has placed significant burdens on the criminal justice system, as prosecutors and courts struggle to fairly apply the ever evolving list of factors making a defendant eligible for the death penalty. The resulting capital prosecutions have over-taxed the resources of the criminal justice system, and, more important, reflect a degree of arbitrariness, when decisions across the state are compared.

(Report of the Governor's Commission on Capital Punishment (April 15, 2002) at 67-68.)

Recently, the Massachusetts Governor's Council on Capital Punishment articulated the flaws of capital-sentencing statutes, including California's, that fail to narrow the class of persons eligible for the death penalty:

> In many jurisdictions today, the statutory list of "aggravating circumstances" has expanded to the point that it now covers a substantial proportion, perhaps even more than half, of all first-degree murders. In California, for example, there are now 22 "special circumstances" that can lead to the imposition of the death penalty. In Illinois, there are now 21 such "aggravating factors;" the Governor's Commission in that state recently acknowledged the possibility that, due to the large number of eligibility factors, nearly every first-degree murder in Illinois could be eligible for the death penalty under one theory or another.
>
> This expansion of death eligibility is understandable, but regrettable. It typically occurs because particular heinous murders

provoke a demand for the death penalty, which in turn leads responsive legislators to add new "aggravating circumstances" to the statutory list. This process occurs repeatedly, and it is one-sided – new "aggravating circumstances" are added to the list, but existing ones are never removed from the list.

The main problem with the expansion of death-eligibility is that the statutory list of "aggravating circumstances" is the one and only place, in the entire death-penalty system, where substantive limits can be imposed on the death penalty that are not discretionary. If the statutory list is overly broad, then the discretionary decisions of prosecutors, judges, and juries must carry the entire burden of ensuring that the death penalty is applied narrowly and reasonably consistently. If the statutory list includes virtually all first-degree murders, then discretionary decision-makers must carry the entire burden of selecting, from such a large pool, the small handful of the "worst of the worst" murders for which the death penalty will be imposed. Moreover, discretionary decision-makers often do not even get to see all of the cases in the pool – juries, for example, see only one case, and thus cannot easily compare that case to other death-eligible crimes.

The same expansion of death-eligibility also contributes directly to the serious and well-documented problem of racial disparity in the application of the death penalty. When various decision-makers within the criminal justice system, and especially the jury (whose decisions are essentially unreviewable), possess too much discretion over capital sentencing within a large pool of death-eligible murders, then overt and hidden prejudices can influence the decision.

> By narrowly restricting the categories of death-eligibility to a small number of precisely defined and extremely heinous murders, and thereby restricting the discretion of capital-case decision-makers, the problem of racial disparity can be addressed in the most meaningfully possible way.

(Report of the Massachusetts Governor's Council on Capital Punishment (May 3, 2004) at 10-11.)

The Council concluded that the burden of narrowing a large pool of death-eligible murders down to the "worst of the worst" is simply too much to expect the discretionary decision-makers to handle effectively.

Under the California scheme, the class of first-degree murderers is narrowed to a statutorily death-eligible class by the special circumstance provisions set forth in California Penal Code section 190.2. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 467-68.) There are, however, so many special circumstances, so broadly construed, that the special circumstances accomplish very little narrowing. There is some slight additional narrowing as a result of the exclusion of minors. (Penal Code section 190.5.)

Under the capital sentencing scheme in effect at the time of the offense, the vast majority of murder cases in California met the factual requirements for the finding of a special circumstance. A statutory scheme under which most first-degree murderers are death-eligible does not "genuinely narrow" the class of death eligibility. (*See Wade v. Calderon*

(9th Cir. 1994) 29 F.3d 1312, 1319, *overruled on other grounds*, *Rohan ex rel Gates v. Woodford* (9th Cir. 2003) 334 F.3d 803, 813.) As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of first-degree murder is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Furman,* 408 U.S. at 309-310 [Stewart, J., concurring].) Accordingly, appellant's death sentence must be set aside.

XIII.

THE TRIAL COURT'S ERRONEOUS AND UNCONSTITUTIONAL FAILURE TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY REQUIRES REVERSAL OF THE ROBBERY AND MURDER CONVICTIONS, THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING AND THE DEATH JUDGMENT.

A. Respondent's argument.

Respondent argues that the court had no duty to instruct on theft, that there was no evidence there was a theft, and if there was error, it was harmless. (RB at 100-102.)

The jury was instructed that it could convict appellant of first degree murder in Count One based upon a robbery-murder theory. (CT 798, 800; RT 2215, 2220, 2223-2225.) The jury also was instructed on a robbery-murder special circumstance (CT 798, 812; RT 2223-2224.) and the substantive crime of robbery in Count Two. (CT 798-799, 817; RT 2223-

2224.) The jury, however, never was instructed on the lesser included offense of theft, despite the fact that there was evidence that theft-related activity on appellant's part took place *after* the fatal assault of Mr. Robbins, and therefore a reasonable jury could have found that appellant committed theft and not robbery.[35]

To clarify, it is important to note that appellant *does not* represent that the record indicates that all items were removed from the house after the victim had been shot (RB at 102), because it does not so indicate. Nor does this argument depend on such a reading of the record. Respondent is correct that there was testimony from Fader regarding the taking of various items while the victim was alive (RT 1574), the location of the victim's wallet (RT 1578), the removal of the jar of pennies (RT 1580), and the placement of several items in the car while the victim was alive. (RT 1582.) Joe also testified regarding the demands for the victim's wallet (RT 1898) and the removal of certain items to the car (RT 1902, 1907) while the victim was alive. While Fader and Joe did testify that these items were moved while the victim was alive, "appellant's representation of the record regarding the timing of the taking" (RB at 102) is that the main proceeds,

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[35] The court did instruct on the crime of receiving stolen property, a lesser crime to that of robbery in Count 2. (RT 2229-2230.) However, this does not excuse the failure to instruct on theft, as the activity relating to the receiving of stolen property allegedly occurred after the murder of Mr. Robbins.

and the only proceeds alleged to be directly taken by appellant, the guns, were removed from the house only *after* the victim had been shot.[36] Joe testified that *after* hearing a shot, appellant came out of the house carrying a shotgun (RT 1589), and then he allegedly reentered the house and came back with a second rifle or shotgun. (RT 1591.) Likewise, Fader testified that she heard a shot while she was in the car and then appellant came out of the house carrying a shotgun (RT 1912); he then allegedly went back to the house and returned with the other gun. (RT 1913.) The guns were the major proceeds of the burglary and the only stolen items appellant allegedly personally removed and later allegedly exchanged for drugs, and hence there was a reasonable argument to be made for a theft charge. This argument does not depend on testimony or the jury's belief that *all* items were stolen after the murder, as the jurors could reasonably have ascribed the theft of the items other than the guns (the items removed before the victim's death) to Joe and Fader.

This reasonable inference was all the more supportable here when the jurors have been read CALJIC No. 2.01, which instructed them that if

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[36] Thus, appellant's reference in his brief to "any theft-related activity" (AOB 303), "intent to steal" (AOB 307), and that "the testimony of Melissa Fader and Michelle Joe was that the victim was first killed and the property was then removed from the house" (AOB 305) is meant to refer only to the guns, the principal proceeds of the robbery. Appellant apologizes for the lack of clarity in the AOB.

any interpretation of circumstantial evidence favorable to the defendant is reasonable, that is the interpretation which *must* be adopted. Intent, of course, is inherently an issue of circumstantial evidence. (*E.g., People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380; *People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.) Thus, if there was a reasonable interpretation of the evidence by which jurors could have had a reasonable doubt as to appellant's intent – or the *timing* of appellant's intent, the jurors were *required* to adopt it. There was such a reasonable inference here as to the guns. And, "[s]ince there was evidence that defendant was guilty only of theft rather than robbery, the court had a *sua sponte* duty to instruct on theft as a lesser included offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 529-530.)

Further, by failing to give lesser included offense instructions on theft, the court prevented the jury from considering all of the issues in the case, thereby truncating appellant's right to a fair jury trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Finally, the erroneous failure to instruct on theft as a lesser included offense of robbery also violated appellant's right to federal due process (U.S. CONST., 14th Amend.), as it arbitrarily deprived him of a liberty interest created by state law – i.e., the right to instruction on lesser included offenses where warranted by the evidence. (*Hicks v. Oklahoma* (1980) 447

U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488-489.)

XIV.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE THE "NOTICE OF AGGRAVATION" AND THE PRIOR CONVICTIONS AND TO HAVE THE JURORS MAKE A SPECIAL FINDING AS TO THE FACTORS IN AGGRAVATION AND MITIGATION.

A) Respondent's argument.

Respondent argues that the court properly denied the defense motion to strike the "notice of aggravation" as it gave appellant "a reasonable opportunity to prepare a defense to the allegations." (RB at 103-105.) This misconstrues and, as a result, fails to discuss the main contention of this argument.

The grounds for the motion were that the prosecution failed to provide discovery as to "many of the facts and circumstances surrounding the incidents described in this notice...the notice does not list the addresses of the witnesses the prosecution intends to call." (CT 680.) Additionally, the notice did not give specific information about appellant's prior convictions, only that the prosecution, as the defense argued in the motion, "will rely on 'documentation and necessary testimonial evidence' to prove five prior felony convictions. The notice also states that the "People are presently investigating these matters." (CT 683.) Thus, the defense argued that the notice provided "no knowledge of what defendant must defend

against at trial and provides no limitations on the prosecution. Most significantly, it does nothing to allow defendant to prepare his case." (CT 683.)

Respondent attempts to reduce this argument to a contention that "because the notice failed to identify the specific evidence that the prosecution planned to introduce---for example, the testimony of a particular witness and that witness's address---the notice was deficient" (RB at 104). This is misleading because it omits the importance of the crucial missing discovery. Additionally, since the prosecution was in possession of the details of the priors and the witnesses they intended to call, there would have been no reason not to have provided this information in full to the defense.[37]

Appellant was put "on notice" that the prosecution intended to rely on "documentation and necessary testimonial evidence" to prove five prior felony convictions. (CT 683, 687-691). This bare-bones notice prevented appellant from making "any meaningful pretrial preparation for the penalty phase" (CT 683) as they did not have any details as to the locations and addresses of the proposed witnesses so that they could have their investigator talk to them. Second, it compromised the defense *voir dire*, as

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[37] The court in denying the motion ruled that there was no requirement to tell the defense exactly the witnesses they will call. (RT 94-97.)

either the trial court or defense counsel "may often feel the need to ask questions regarding specific aggravating evidence during voir dire in order to insure that jurors would not have such a reaction to that one piece of evidence that they would decide the penalty question on that piece of evidence alone." (CT 683.). In this case, had the prosecution complied with the requirements of Sec. 190.3 or if the trial court had compelled compliance, specific details regarding the prospective juror' attitudes regarding the priors could have been included in the juror questionnaires. This knowledge would have been essential in the choosing of an unbiased and impartial jury. Yet there was no compelling reason for the prosecution's failure, as the information sought by the defense was readily accessible to the prosecution. Since the prosecution was unwilling or unable to provide sufficient details about the priors, the trial court should have either granted the motion to strike the "Notice of Aggravation" or the priors, or have ordered compliance with the notice requirements of Sec. 190.3. It did neither.

XV.

THE COURT'S INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Respondent argues that the jury instructions did not dilute the standard of proof below a reasonable doubt and that they were proper. (AB

at 106-112.)

A. The instructions on circumstantial evidence undermined the requirement of proof beyond a reasonable doubt (CALJIC Nos. 2.90, 2.01, 8.83, and 8.83.1).

As to these instructions, respondent argues that as they "refer to an interpretation of the evidence that 'appears to you to be reasonable' and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt" (RB at 109) and that this Court has previously found these instructions permissible. Appellant recognizes the cases cited by respondent (RB at 109), but urges that they should be reexamined. Appellant herein incorporates his argument from the AOB as to this issue. (AOB at 316-322.)

There is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other instructions also vitiated the reasonable doubt standard (CALJIC Nos. 1.00, 2.21.1, 2.22, 2.27, and 2.51)

As to CALJIC No. 1.00, respondent argues that this contention was rejected in *People v. Wade* (1995) 39 Cal.App.4th 1487 at 1491 (RB at 107) and the instruction "did not contradict the court's instructions on CALJIC No. 2.90." (RB at 108.)

This instruction informed the jurors, in plain English, that their

ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (*See Sullivan v. Louisiana* (1993) 508 U.S.275, 277-278; *In re Winship* (1970) 397 U.S. 358, 364.)

As to CALJIC 2.21.1, 2.21.2, 2.22, and 2.27, respondent argues that "these instructions informed the jury that it was the sole judge of a witness's believability. They contained no language altering the court's instructions on the burden of proof beyond a reasonable doubt and thus did not violate *Winship.*" (RB at 111.) CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 792; RT 2212), likewise was flawed in its erroneous suggestion that the defense, as

well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that the homicide was not a felony murder and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

CALJIC 2.51, regarding motive, informed the jury:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish

> guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.
>
> (CT 822; RT 2225.)

As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 (a "mere modicum" of evidence is not sufficient)). Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See, e.g., United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104,1108-09 (motive based on poverty is insufficient to prove theft or robbery). The instruction allowed the jury to determine guilt based on motive alone.

Similarly, CALJIC 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (CT 1050-51) (emphasis added.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (*See People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness'

testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[38] The essential mandate of *Winship* – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (*See Sullivan*, 508 U.S. at 278; *Winship*, 397 U.S. at 364.)

This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find premeditation in order to convict appellant of first degree murder or, intent to kill to find him guilty of second degree murder, or to find true the special circumstances. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all twelve, of the jurors so concluded. (*See, e.g., Francis v. Franklin* (1985)

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[38]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-57, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. (*But see Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-25(CALJIC 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde v. California* (1990) 494 U.S. at 384-85, [error not cured by correct reasonable doubt and presumption of innocence instructions].)

471 U.S. 307, 322.)

Further, CALJIC 2.51 (CT 822; RT 2225) informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*Winship*, 397 U.S. at 368.) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (*See Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [reliability concerns extend to guilt phase]).

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or

she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court should reconsider its prior rulings upholding the defective instructions.

Appellant has argued in the AOB that this Court should reconsider its rulings upholding these instructions (AOB 329-333). Those arguments need not be repeated and those arguments are incorporated herein.

Accordingly, for the reasons set forth in the AOB, the judgment must be reversed.

XVI.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

The trial court instructed the jury under former CALJIC No. 2.51 (5th ed.)(Court's Instruction No. 21):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.
> (CT 822; RT 2225.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to

appellant to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The instruction allowed the jury to determine guilt based on motive alone.

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. (CT 822; RT 2225.) As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See, e.g., United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].) Here, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (*See People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (Brown, J., concurring) [deductive reasoning underlying the Latin phrase "inclusio unius est exclusio alterius"

could mislead a reasonable juror as to the scope of an instruction].) Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

B. The instruction impermissibly lessened the prosecutor's burden of proof and violated due process.

The jury was instructed that an unlawful killing during the commission of robbery is first degree murder when the perpetrator has the specific intent to commit robbery. (CT 800; RT 2216-2217.) Later in the instructions, the trial court defined the mental state required for robbery. (CT 817; RT 2223-2224.) However, by informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded – i.e., that the jury find that Appellant had the intent to rob the victim. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (*See Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or

insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony murder allegation was that appellant killed the victim Sherman Robbins in order to steal from him. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.] (*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> A person could not kidnap and carry away his victim to commit robbery if the i*ntent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping. (*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have

> misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy." (*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)
>
> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: 'But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'" (*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.)

Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if appellant had the intent to rob, but

was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The instruction shifted the burden of proof to imply that Appellant had to prove innocence.

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. (CT 822; RT 2225.) The instruction effectively placed the burden of proof on Appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Appellant to be convicted without the prosecution having to present the full measure of proof. (*See Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is required.

The prosecution's only theory of first degree murder was felony-murder. One of the crucial questions in this case was whether Appellant was guilty of robbing the victim Mr. Robbins, and, thus, of first degree felony-murder and the corresponding special circumstance. Whether

Appellant intended to steal from the Robbins' house and, if so, when that intent arose were critical to the jury's determination as to guilt. Accordingly, this Court must reverse the judgment because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at 24.)

XVII.

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

In response to the claims raised in Argument XVII of appellant's opening brief, respondent correctly notes that these claims have been previously rejected by this Court. (RB 115-118.) But to date, this Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that

system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[39] *See also*, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability. For the reasons set forth in the opening brief, appellant

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[39]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527.)

continues to maintain that the Court's decisions on these issues were wrongly decided, and that California's capital sentencing scheme is unconstitutional. (*See* AOB 339-414.)

A. *Blakely, Ring, Apprendi, Cunningham* and CALJIC 8.85.

As discussed in his opening brief, appellant submits that the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. 296, requires this Court to reconsider its determination that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 do not apply to the penalty phase of a capital trial in California, and to thus reconsider its rejection of claims that the California sentencing instructions are unconstitutional to the extent that they (1) fail to require proof beyond a reasonable doubt as to any finding that an aggravating factor exists, (2) fail to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and (3) fail to require that any aggravating factor relied upon as basis for death be found by a unanimous jury. (AOB 358-377.)

Penal Code section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists, and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to CALJIC 8.88, which the Court has described as California's "principal sentencing instruction"

(*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself."

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[40] These determinations are essential before the sentencing jury can even consider whether death is the appropriate sentence.

In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the United States Supreme Court held that a state may not impose a sentence greater than that authorized by the jury's verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the

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[40] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460.)

jury and proved beyond a reasonable doubt. (*Id.,* at 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment, the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment. In *Ring v. Arizona, supra,* 536 U.S. 584, the high court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that required findings necessary for imposition of a death sentence must be made by a jury, and must be made beyond a reasonable doubt.

Further, *Ring* and *Apprendi* make clear that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Apprendi, supra,* 530 U.S. at 478; *Ring, supra,* 536 U.S. at 593.)

Pursuant to *Ring* and *Apprendi*, it has been argued in this Court that, under California's capital sentencing scheme, findings (1) that one or more aggravating factors exist, and (2) that the aggravating factor or factors outweigh any mitigating factors, have to be found beyond a reasonable doubt by a unanimous jury. This Court has rejected these contentions, finding that "the *Apprendi* and *Ring* decisions do not apply to the penalty phase of a capital trial under California's death penalty law." (*See People v.*

Cox (2003) 30 Cal.4th 916, 971-972; *People v. Snow* (2003) 30 Cal.4th 43 at 126, fn. 32.)

This Court's reasoning for this determination was set forth in *People v. Cox, supra,* 30 Cal.4th 916, where it stated:

> Defendant, however, asks us to reconsider this position in light of two recent United States Supreme Court cases, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428]. Specifically, defendant argues that the two cases read together mandate that the aggravating circumstances necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt. We disagree. As this court recently stated in *Snow, supra,* 30 Cal.4th at page 126, footnote 32: "We reject that argument for the reason given in *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, footnote 14: '[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.' The high court's recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428] does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at p. ___ [122 S.Ct. at p. 2440].) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose

> one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt." (Accord, *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto* (2003) 30 Cal.4th 226, 275.)

(*People v. Cox, supra,* 30 Cal.4th 916, 971-972, emphasis added.)

This Court should reconsider this determination for three reasons. First of all, this Court's rationale for its conclusion that "[u]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense" has the same infirmity as the rationale of the Arizona Supreme Court in *Ring*. The California first-degree murder statute "authorizes a maximum penalty of death only in a formal sense ...." (*Ring v. Arizona, supra,* 536 U.S. at 603-604.)

As discussed *supra,* in order for a criminal defendant to be sentenced to death at the penalty phase of a capital trial in California, two necessary factual findings must be made at that phase of the proceedings. The jurors must find the existence of one or more aggravating circumstances, because if no aggravating circumstance is found to exist, the aggravating circumstances cannot be found to substantially outweigh the mitigating circumstances, and the jury cannot select death as the appropriate sentence.

The jury must also conclude that the found aggravating circumstances substantially outweigh the found mitigating circumstances, and unless it so concludes, it cannot impose a death sentence.

Secondly, this Court's claim that the jurors do not need to find the existence of any aggravating factor, but must simply find that the circumstances in aggravation outweigh those in mitigation ignores reality. Before aggravating circumstances can be weighed against mitigating circumstances, the aggravating circumstances must obviously be found to exist.

Thirdly, this Court's statement that the decision between death and life without the possibility of parole made at the penalty phase of the trial was similar to "a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another" is called into question by the recent decisions by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 127 S. Ct. 856, because these cases hold that it is unconstitutional for a sentencing court to find facts necessary to increase a defendant's punishment.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of

"substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.* at 300.) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the

facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham v. California* (2007) __U.S.___, 127 S. Ct. 856, the Supreme Court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham, supra*, 868-873.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's DSL. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.* at 863.) As the Supreme Court held, "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, at 868.)

Cunningham also examined this Court's extensive development of why an interpretation of the DSL and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, at 870.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court has held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[41] indicates,

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[41]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at 862.)

Likewise, even with the finding of aggravating factors that were required to support a death sentence in *Ring*, the judicial sentencing choice between life and death remained discretionary, because the statute specified that a life sentence should be imposed, if there were "mitigating circumstances sufficiently substantial to call for leniency." (*Ring, supra,* 536 U.S. at 593; former Ariz.Rev.Stat. 13-703(f).) *Ring* nevertheless held the statute unconstitutional, because the finding of aggravating circumstances was not made by a unanimous jury. (*Ring, supra*, 536 U.S. at 609.) Instead, *Ring* held that the Sixth and Fourteenth Amendment requirement of a unanimous jury finding applied to any "aggravating circumstance necessary for imposition of the death penalty." (*Ibid.*)

Moreover, unlike *Williams v. New York* (1949) 337 U.S. 241, a

California death sentence cannot be given with "no reason at all." *Apprendi* makes clear that the distinction is between sentencing schemes requiring a factual finding, and those which allow a judge to impose an increased sentence as a discretionary choice, as long as the increased sentence is still within the maximum range permitted, based on the facts admitted by defendant's guilty plea, or necessarily established by the guilty verdict. (*Apprendi, supra,* 530 U.S. at 487.)

Thus, the findings of aggravating circumstances are necessary under California law to increase a sentence for special circumstances murder from life imprisonment without the possibility of parole to death. This requirement is present for several reasons.

First, both Penal Code section 190.3 and CALJIC No. 8.88 require the jury to find that the aggravating circumstances outweigh mitigating circumstances, in order to return a death sentence. (*See, e.g.*, CALJIC No. 8.88: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.") Manifestly, before substantial aggravating circumstances can outweigh mitigating circumstances, there must first be aggravating circumstances to consider. The mere finding of guilt on special circumstances murder is insufficient, because the California Supreme Court

has repeatedly recognized that Penal Code section 190.3, factor (a), the circumstances of the crime, may be mitigating as opposed to aggravating in any given case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189; *People v. Smith* (2003) 30 Cal.4th 581, 639; *People v. Haskett* (1990) 52 Cal.3d 210, 229, fn. 5.) Thus, the jury has to find something that is truly aggravating, which is defined as "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport* (1985) 41 Cal.3d 247, 289; accord, CALJIC No. 8.88.)

Second, as explained above, not only must the jury find the presence of aggravating circumstances but, further, it must find that they are so substantial, in comparison to mitigation, that death is warranted. As this Court recognized in *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027, in order to vote for the death penalty, a juror "must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather than society's next most serious punishment, life in prison without parole." (*See also People v. Breaux* (1991) 1 Cal.4th 281, 316 [a jury can "return a death verdict, only if aggravating circumstances predominated and death is the appropriate verdict"].)

Third, the California requirement that a death sentence cannot be returned, unless there is not only aggravation, but it is so substantial in

comparison to mitigation that it warrants death, is similar to the Arizona standard, which was found unconstitutional in *Ring* because of the failure to honor the Arizona defendant's Sixth and Fourteenth Amendment rights to a jury finding on any aggravating circumstance necessary to support a death sentence. As observed by the United States Supreme Court in *Ring*, the Arizona statute permitted a defendant to be sentenced "to death, only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" (*Ring, supra*, 536 U.S. at 593.)

Of course, a California capital defendant does have the right to have a unanimous jury decide the ultimate question of life or death. The Sixth Amendment, however, requires more than the mere right to a jury trial; the right to jury trial is meaningless without the corollary requirements of a unanimous finding, beyond a reasonable doubt, on each fact essential to a death sentence. Indeed, *Ring* specifically holds that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. 584, 602.) Further, *Apprendi v. New Jersey, supra*, 530 U.S. 466, 483, and *Blakely*, *supra*, 542 U.S. 296, 313, expressly require these findings to be made by a unanimous jury.

Moreover, lest there be any doubt about whether aggravating factors constitute the type of finding covered by the Sixth Amendment, Justice Scalia, concurring in *Ring, supra*, 536 U.S. at 610, stated "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." As Justice Scalia concluded: "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Id.* at 612.)

Therefore, *Apprendi, Ring*, *Blakely* and *Cunningham* all apply to the California death penalty statute and, thus, under the Sixth Amendment, the charging document must specifically allege any factors which the prosecution contends are aggravating, and the jury must unanimously make written findings, beyond a reasonable doubt, of the truth of any factors in aggravation upon which it bases any death sentence.

Further, although *Booker, Apprendi*, and *Ring* each articulate exceptions for the fact of a prior conviction, that exception is based on *Almendarez-Torres v. United States* (1998) 523 U.S. 224, in which the

majority found that the Sixth Amendment right to jury trial did not apply to prior conviction allegations. However, Justice Thomas, who was a member of the 5-4 majority in *Almendarez-Torres,* has since admitted that he was wrong, having made "an error to which I succumbed." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 520 [Thomas, J., concurring].) Thus a majority of the present United States Supreme Court believe that *Almendarez-Torres* was wrongly decided, and that the requirements of the Sixth Amendment apply to prior convictions which are used to increase a sentence.

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, *Blakely* and *Cunningham.* In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The Supreme Court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed

normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at 304-305.) Thus, under *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[42]

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[42] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of . . . moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" (*Leatherman*, *supra*, 532 U.S. at 429.)

This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at 437, 440.)

In California, as referenced above, absent additional findings of fact at the penalty phase of a capital trial, the maximum sentence that can be imposed is life without the possibility parole. (Pen. Code, § 190.4, subdivision (b).) The only way that a death sentence can be imposed is if the jurors first find the existence of one or more aggravating circumstances, and then find that the found aggravating circumstances substantially outweigh the found mitigating circumstances. Thus, additional factual findings are clearly required at the penalty phase trial to justify imposition of a death sentence, and those findings must be found by a unanimous jury beyond a reasonable doubt.

Therefore, this Court should reconsider its rejection of claims that the California sentencing instructions are unconstitutional to the extent that they (1) fail to require proof beyond a reasonable doubt as to any finding that an aggravating factor exists, (2) fail to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and (3) fail to require that any aggravating factor relied upon as basis for death be found by a unanimous jury.

Leatherman thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

Additionally, in his opening brief, appellant argued that the giving of CALJIC 8.85 violated his fundamental state and federal constitutional rights by improperly directing the jury to consider aggravating evidence of alleged unadjudicated criminal conduct and by inviting the jury to consider inapplicable aggravating and mitigating factors. (*See* AOB 256, 273, 282, 295.) Respondent counters by citing several of this Court's decisions which rejected similar claims. (*See* RB 92, 95, 97.) Appellant has previously acknowledged this Court's rejection of such claims, while urging this Court to reconsider those rulings. (*See, e.g.*, AOB 256 *et seq.*)

Respondent fails to rebut appellant's arguments and offers no basis, aside from stare decisis, for continuing to follow precedents that are fundamentally flawed. (*See Lawrence v. Texas* (2003) 539 U.S. 558, 577 ["The doctrine of stare decisis . . . is not . . . an inexorable command."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [although doctrine of stare decisis serves important values, it "should not shield court-created error from correction"].) Due to the defects in CALJIC No. 8.85 detailed in the opening brief, this Court should hold that it violated appellant's state and federal constitutional rights and reverse the death judgment.

B. Eighth and Fourteenth Amendment grounds.

The very broad death penalty scheme employed in California, and the regular use of death in this state as a punishment for murders of all

kinds, also violates the Eighth and Fourteen Amendments. The United States Supreme court in *Atkins v. Virginia* (2002) 536 U.S. 304, held that the Eighth and Fourteenth Amendments prohibited the execution of the mentally retarded. In the recent case of *Roper v. Simmons* (2005) 543 U.S. 551, the Court declared that the imposition of the death penalty on juvenile offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment.

The Supreme court stated in *Atkins*, and reiterated in *Simmons* that capital punishments "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Atkins v. Virginia*, 536 U.S. at 319; *Roper v. Simmons,* 543 U.S. 551.) The Supreme Court also stated in *Simmons* that "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." (*Ibid.*, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 (plurality opinion).) California's capital punishment scheme does not constitutionally limit those subject to the death penalty to a "narrow category" of offenders who have committed "the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Nor does California's capital punishment scheme give "narrow and precise definition to the aggravating

factors that can result in a capital sentence."

Even assuming *arguendo*, California's capital punishment scheme were not in violation of the Eighth Amendment under existing interpretations of the federal constitution, the United States Supreme Court in *Simmons* once more affirmed "the propriety and . . .the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." (*Id.* at 1190, citing *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plurality opinion).) Those evolving standards of decency already put the execution of juveniles, mentally retarded persons and the insane outside the pale of civilized behavior. In addition, it is now the law that a death sentence cannot be upheld if trial counsel did not conduct a thorough investigation into the social history of the defendant so counsel could effectively marshal all the mitigating evidence. (*Wiggins v. Smith* (2003) 539 U.S. 510; *In re Lucas* (2004) 33 Cal.4th 682, 689-690.) Clearly, the evolving standards of decency have strongly moved in recent years towards embracing the "culture of life," and toward a questioning of the efficacy of using the death penalty in any circumstance.

The Supreme Court of the State of Missouri brought its independent judgment to bear in deciding that the execution of a juvenile violated the

Eighth Amendment (*State ex rel. Simmons v. Roper* (Mo. 2003) 112 S.W. 3d 3997 (en banc)), as did the United States supreme Court in reviewing and affirming the Missouri Supreme Court. (*Simmons, supra*, 125 S. Ct. at 1191-1192.) It is proper for this Court to bring its independent judgement to bear on this issue and declare that capital punishment for any California citizen violates the Eighth Amendment.

Although inter-case proportionality review is a method of protection against arbitrariness in capital sentencing, this Court has refused to acknowledge that such review is constitutionally required. (*See Pulley v Harris* (1984) 465 U.S. 37, 51; *People v. Farnam* (2002) 28 Cal.4th 107, 193.) But the minimal narrowing effected by the special circumstances coupled with the open-ended nature of the aggravating factors lead to flagrant arbitrariness. The capital sentencing scheme in this state does not operate to ensure consistency in penalty-phase verdicts, and it does not operate in a manner that prevents arbitrariness in capital sentencing. Inter-case proportionality review is constitutionally necessary. The failure to provide such review for appellant mandates a reversal of the death verdict.

XVIII.

APPELLANT'S SENTENCE OF DEATH IS DISPROPORTIONATE TO THE OFFENSE AND TO HIS PERSONAL CULPABILITY, AND CALIFORNIA'S PROCEDURES MAKING PROPORTIONALITY

REVIEW AVAILABLE IN NON-CAPITAL BUT NOT CAPITAL CASES VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS.

Appellant argues that the lack of any requirement of intra-case and inter-case proportionality and of any such meaningful undertaking in this case violated his rights to equal protection, U.S. Const., 14th Amend., since such review was afforded non-capital inmates at the time, and the Fifth, Sixth, Eighth and Fourteenth Amendment requirements that any death penalty not be arbitrarily or capriciously imposed, *Gregg v. Georgia* (1976) 428 U.S. 153, that all potential mitigating factors be considered by the sentencer, and that a death-sentenced defendant receive meaningful appellate review. In addition, lack of such review violates the Eighth and Fourteenth Amendments' heightened reliability requirements for the sentencing process in a capital case. (AOB at 415-416).

Respondent's brief fails to deal with this issue at all, and hence appellant's arguments are uncontroverted.

Appellant's sentence was disproportionate to his offense and to his personal culpability, since the offense was a single-victim felony murder not involving a relationship of trust or a victim in a position of authority or unusual vulnerability. Appellant was not convicted of multiple murders, the murder of a child, a police officer, or other circumstances generally

regarded as making the offense more heinous. The trial testimony strongly suggests that the crime was a spur-of-the moment, unpremeditated, drug-fueled action in a routine residential burglary committed while all the participants, especially appellant, were under the influence of methamphetamine and other stimulants, who had not slept for several days under the influence of these stimulants, and who lacked the mental capacity to formulate the specific intent to commit capital murder. The two co-defendants both received sentences less than life, despite evidence that the crime was instigated by one of them and suggested to Appellant by one of them. There is no compelling reason why this case was charged as a capital crime, and compelling reasons why it should not have been so charged.

XIX.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT.

In his opening brief, appellant argued that capital punishment violates the Eighth Amendment's prohibition because it is contrary to international norms of human decency. Appellant further argued that even if capital punishment itself does not violate the Eighth Amendment, using it as a regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does. (*See* AOB 411-

415; 416-422). Respondent offers only one paragraph of argument in response to appellant's claim (argument E of Claim XVII) that California's death penalty violates international norms, and the Eighth and Fourteenth Amendments. (RB at 118; AOB at 416-422.) Additionally, respondent does not address Claim XIX, that the California death penalty scheme also violates international law. (AOB 416-422).

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. Appellant is aware that this Court has continued to reject the argument in several decisions handed down after the AOB in this matter was filed with this Court. (*See, e.g.*, *People v. Harris* (2005) 37 Cal.4th 310; *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Blair, supra*, 36 Cal.4th at 754; *People v. Ward, supra*, 36 Cal.4th at 222; *People v. Panah* (2005) 35 Cal.4th at 500-501; *People v. Smith, supra*, 35 Cal.4th at 375.)

Respondent's opposition to appellant's claims rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 118.) Appellant respectfully requests this Court to reconsider and disapprove them.

Recent developments in Eighth Amendment jurisprudence further support appellant's claims. In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down death as a constitutional penalty

for juvenile offenders. In holding that the execution of juvenile criminals is cruel and unusual punishment, the Court looked to international-law standards as informing the Eighth Amendment:

> "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ('The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime'). . . ."
> (*Roper,* 543 U.S. at 575.)

Respondent has not addressed the merits of appellant's argument that the use of death as a regular punishment violates international law as well as the Eighth and Fourteenth Amendments.

Similarly, in *Lawrence v. Texas* (2003) 539 U.S. 558, the United States Supreme Court held unconstitutional a Texas law that made consensual, private, adult sexual behavior between same-gender adults unlawful. While this holding may seem to have little relevance to this case, it does demonstrate the increasing degree to which the federal high court will consider international norms in determining the constitutionality of our state penal laws. Overturning *Bowers v. Hardwick* (1986) 478 U.S. 186, in

Lawrence, the U.S. Supreme Court placed great emphasis on the fact that criminalization of private consensual homosexual conduct was at odds with the European Convention on Human Rights, "[a]uthoritative in all countries that are members of the Council of Europe . . . ." (*Id.*, at p. 573.) The high court recognized that, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding had been rejected by the European Court of Human Rights, and other nations had also affirmed the right of adult homosexuals to engage in intimate, consensual conduct.

The death penalty now enjoys a comparable lack of support in the international community, particularly in Western Europe. As previously noted in the AOB (at 417), 102 nations have abolished the death penalty and only ten, including the United States, China, Iran, the Congo, and Saudi Arabia have accounted for an overwhelming majority of state executions. (*See, Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. And Civ. Confinement 339, 366; *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. Opn. of Harrison, J.].) All nations of Western Europe, and our immediate neighbors, Canada and Mexico, have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/

ENGACT500052000.

Appellant asks this Court to reconsider its position on this issue and, accordingly, to reverse the death judgment.

XX.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant's Opening Brief summarized the many errors which appellant contends occurred during his trial and the manner in which these errors had a "negative synergistic effect, rendering the degree of unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill* (1998), 17 Cal.4th 800, 847.) Respondent does not directly address the *Hill* case or appellant's arguments. Rather, respondent simply denies there were any errors and avers that "appellant has failed to demonstrate prejudice." (RB 119.)

Respondent's arguments are not helpful to the Court in deciding the issues raised in this argument. It is, of course, up to this Court to determine whether appellant's contentions of error have merit, and these contentions have been fully briefed in the previous arguments. If, as respondent contends, there were no errors, then appellant's cumulative error argument

is a moot point. If this Court does find multiple errors, then the issue becomes what relief, if any, is appropriate. Appellant and respondent have both offered their views on the relief appropriate for each individual error. If this Court finds that an individual error requires relief, then the question of cumulative error may be academic. Thus, the issue addressed in this argument is, assuming that this Court finds errors which it concludes do not by themselves require the relief appellant is seeking, whether the combination of errors it finds justifies relief.

Where this Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (*See, e.g., People v. Catlin* (2001) 26 Cal.4th 81, 180 ["Any errors we have identified, whether considered singly or together, are non-prejudicial and do not undermine the reliability of the death judgment under the Eighth and Fourteenth Amendments or create a risk that the sentence erroneously was imposed."]; *People v. Jones* (2003) 29 Cal.4th 1229, 1268 ["Our careful review of the record convinces us the trial was fundamentally fair and the penalty determination reliable. No basis for reversal appears"].)

Assuming *arguendo* that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated compel reversal of the judgment. When all of the errors and constitutional violations are

considered together, it is clear that appellant has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair and accurate trial and his right to an accurate and reliable penalty determination, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

The prejudicial impact of each of the specific allegations of error presented in this direct appeal must therefore be analyzed within the overall context of the evidence introduced against appellant at trial. No single allegation of error is severable from any other allegation set forth in this appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381; *see also United States* v. *Wood* (10th Cir. 2000) 207 F.3d 1222, 1237.)

Appellant's conviction, sentence, and confinement were obtained as the result of a myriad of errors constituting multiple violations of his fundamental constitutional rights at every phase of his trial. Justice demands that appellant's murder convictions, special circumstance findings and sentence of death be reversed because when considered cumulatively,

the errors and violations alleged herein are prejudicial and rendered the trial fundamentally unfair and unreliable.

The cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and violate due process and equal protection guarantees under the Fourteenth Amendment and the right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination under the Eighth Amendment. (*See Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 962.)

When considered together, the number and synergistic effect of errors is sufficient to violate due process and render the entire trial fundamentally unfair. (*People v. Hill, supra*, 17 Cal.4th at 847.)

Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: January 12, 2012.

Respectfully submitted,

A. RICHARD ELLIS
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the attorney appointed by this Court to represent Appellant, Daniel Lee Whalen, in this automatic appeal. I conducted a word count of this reply brief using my office's computer software (WordPerfect 12). On the basis of that computer-generated word count, I certify that this reply brief, excluding tables and certificates, is 41,785 words in length.

Dated: January 12, 2012

A. Richard Ellis
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On January 12, 2012 I served the within

APPELLANT'S REPLY BRIEF

on the interested parties in said action listed below, by placing a true and correct copy of the same in a sealed envelope, with 1st class postage affixed thereto, and placing the same in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on January 12, 2012.

A. RICHARD ELLIS