No. S065233

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

FLOYD DANIEL SMITH

Defendant and Appellant.

(San Bernardino County
Sup. Ct. No. FWV08607

APPELLANT'S REPLY BRIEF

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

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FLOYD DANIEL SMITH, Defendant and Appellant	No. S065233 (San Bernardino County Superior Ct. No. FWV09607)

APPELLANT'S REPLY BRIEF

INTRODUCTION

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

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

ARGUMENT

I

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN DENYING HIS *BATSON/WHEELER* MOTIONS AFTER THE PROSECUTOR USED PEREMPTORY CHALLENGES TO IMPROPERLY STRIKE ALL FOUR AFRICAN-AMERICAN PROSPECTIVE JURORS

The deceased victim in this case was white. Appellant is black. Appellant was represented at trial by two black attorneys.[1] The prosecution struck peremptorily every black potential juror that came before it, with the result that appellant was tried by a jury with no black members.

The trial court found a prima facie case of discriminatory intent and required that the prosecutor provide explanations for the use of peremptory challenges against all of the possible black jury members. Once the prosecution offered explanations for its peremptory challenges, the trial court accepted those explanations and denied appellant's *Batson/Wheeler* challenge.

The prosecutor's use of peremptory challenges to exclude every potential black juror from sitting as a member of appellant's jury was a violation of the principles set forth in *Batson* and its progeny, and the trial court erred in finding lack of discriminatory intent on the part of the prosecutor. Similarly, respondent's arguments in support of these discriminatory acts lack merit and should be rejected.

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[1] The trial court noted this as an additional factor that called for sensitivity in assessing a *Batson/Wheeler* claim. (RT 8:2613.)

A. Applicable Legal Principles

The legal principles applicable to a third-step *Batson* challenge, as is at issue here, are reasonably well-settled. The party against whom the prima facie case of racial discrimination has been made must provide neutral explanations related to the case being tried that demonstrate valid bases for the peremptory challenges other than discriminatory intent. (*Batson v. Kentucky* (1986) 476 U.S. 79, 98; *People v. Wheeler* (1978) 22 Cal.3d 258, 280-282.) Factors to consider in this regard are how reasonable, or how improbable, the explanations are and whether the proffered rationale has some basis in accepted trial strategy. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (hereafter *Miller-El I*).)

The trial court must make a sincere and reasoned effort to evaluate each of the stated reasons for challenging a particular juror. (*People v. Hamilton* (2009) 45 Cal.4th 863, 900-901.) If the trial court engages in this process, its ruling is accorded deference on appeal and is reviewed under the substantial evidence standard. (See *Miller-El I, supra,* 537 U.S. at pp. 339–340.) Under this standard of review, evidence is considered substantial if it is reasonable, credible and of solid value. (*People v. Lenix* (2008) 44 Cal.4th 602, 627.)

This assessment is made by reviewing the record as a whole to determine if the reasons advanced actually explain the party's actions in a manner that supports a nondiscriminatory action. A reviewing court examines the entire record and considers all the circumstances relevant to making a determination whether there has been purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 240 (hereafter *Miller-El II*).)

Among the factors to use in making this determination based on the entire record are statistical evidence reflecting whether the peremptory

strikes were used disproportionately along racial lines and whether comparative analysis of jurors reveals that the challenged party's supposedly neutral rationale for the suspect strikes was applied to jurors who were not stricken.[2] (See *Miller-El I, supra,* 537 U.S. at pp. 341-348; see also *Miller-El II, supra,* 545 U.S. at p 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"].)

The combination of the statistical evidence, comparative juror analysis, and the proffered reasons themselves do not stand the state in good stead in trying to find substantial evidence to support the trial court's finding of nondiscrimination in jury selection. The totality of the record supports the opposite conclusion.

B. The Prosecution's Reasons for Exercising the Peremptory Challenges Were Not Genuine

Substantial evidence does not exist in this record to support a finding that the prosecution exercised its peremptory challenges against all of the black jurors available to sit on appellant's jury in a manner indicating they were based on neutral reasons unrelated to discriminatory intent. The explanations proffered by the prosecution do not withstand scrutiny in this third-step *Batson* case and the only remedy is to reverse appellant's judgment and sentence.

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[2] Respondent asserts that comparative juror analysis cannot be conducted for the first time on appeal. (RB 61-70.) However, at the time respondent filed its brief it did not have the benefit of this Court's decision in *People v. Lenix* (2008) 44 Cal.4th 602, 621-622, which holds to the contrary.

1. Prospective Juror Regina S.

The prosecutor stated that he excused Regina S. because: (1) she had a brother who was a juvenile delinquent; (2) she wore open-toed sandals, a t-shirt and "modified" sweat pants; (3) she had limited education; (4) her housing and job history indicated instability in the community; (5) she felt that race "plays a part" in the criminal justice system; (6) she would require a burden of proof higher than beyond a reasonable doubt; and (7) she lacked suitability in terms of group dynamics. (RT 8:2593-2594, 2598, 2602-2604, 2615-2616, 2620-2621.) Respondent believes these reasons to be meritorious. (RB 49-53.) After examining the record as a whole, these reasons are revealed to be pretextual.

Initially, the prosecutor did not provide the reason that the court ultimately accepted – that Mrs. S. would require a burden of proof higher than beyond a reasonable doubt – until after he listed all of the other reasons denominated above; implausible reasons unrelated to this particular case. (RT 8:2593-2594, 2598, 2602-2604.) It was only after the court called a recess for the prosecutor to review the juror questionnaires that the prosecutor produced the reason relating to the burden of proof. (RT 8:2599-2601.) Even more suspect is the fact that the prosecutor did not give his "group dynamics" justification until after the trial judge had ruled regarding the burden of proof justification and had repeatedly indicated that he did not assess Mrs. S. in the same way as the prosecutor on the other factors. (RT 8:2613-2620.) Also, despite later revealing, when he struck the fourth prospective black juror, Elizabeth K., that he had a scoring system for the jurors (RT 9:2698-2699), the prosecutor never mentioned how he had scored Mrs. S. These circumstances severely undermine the prosecutor's credibility.

a. Mrs. S's Brother

Respondent asserts that the prosecutor's justification for striking Mrs. S. based on her brother's juvenile adjudication was a non-pretextual reason. In support of this, respondent lists cases that generally aver to the fact that those who have had contact with the criminal justice system may be unsympathetic to the prosecution and cases that say the prosecutor may surmise such to be true. (RB 52.) The record in this particular case, however, does not support such beliefs.

Mrs. S. felt her brother was treated fairly and she harbored no negative attitudes toward the justice system on account of her brother. She also stated that her brother had never claimed to have been treated unfairly. (7 SCT 17:4986.) To the more general question of whether she, or a relative or close friend had ever been treated unfairly or mistreated by a law enforcement officer or by a part of the legal justice system, she marked "no." (*Ibid.*) Moreover, Mrs. S. stated that laws for juveniles should be stricter because "they're getting more dangerous than the adults because they get off." (7 SCT 17:4986.) In light of the fact that one of the special circumstances alleged against appellant was a prior murder that occurred when he was a juvenile, this should have made Mrs. S. a particularly strong juror for the prosecution since it confirmed her already-formed beliefs as to the dangers posed by juvenile offenders.

Moreover, that this excuse was a pretext for racial bias is also supported by comparative juror analysis: the prosecutor approved of two alternate jurors and two nonblack potential jurors passed by the prosecution, but struck by the defense, who had close relatives with criminal histories. (See AOB 80.) As noted above, respondent believes that it was valid for the prosecutor to strike Mrs. S. based on her brother's involvement with the

juvenile justice system because "the use of peremptory challenges to exclude prospective jurors whose relatives and/or family members have been involved with the criminal justice system is not unconstitutional." (RB 52.) Respondent cites several cases to support this proposition, but an examination of these cases shows they do not support respondent's position.

The passage extracted above from respondent's brief comes from *People v. Douglas* (1995) 36 Cal.App.4th 1681. The *Douglas* court, however, specifically said this principle applies to family members who have had negative experiences with the criminal justice system. (*Id.* at p. 1690.) That is a rather significant distinction, as well as being a fact pattern not present here.

The remaining cases relied upon by the respondent are similarly inapposite to this case. In *People v. Cummings* (1993) 4 Cal.4th 1233, the struck juror's brother had been convicted of a crime and possibly had been prosecuted by one of the prosecutor's colleagues; the juror said that she was not sure her brother was guilty; and she gave the prosecutor "dirty looks." (*Id.* at p. 1282.) In *People v. Walker* (1988) 47 Cal.3d 605, one struck juror complained that the police had "harassed" her husband by stopping him without sufficient cause and the other believed that the police department had followed her husband home every night for a long period of time. (*Id.* at p. 626.) In *People v. Garceau* (1993) 6 Cal.4th 140, the struck juror related that multiple members of her family had run afoul of the law and been incarcerated and one family member was a fugitive. (*Id.* at p. 172.)

In a more general vein, respondent cites *People v. Cleveland* (2004) 32 Cal.4th 704 and *People v. Calvin* (2008) 159 Cal.App.4th 1377 for the propositions that a prosecutor may reasonably surmise that a close relative's adverse contact with the criminal justice system might make a prospective

juror unsympathetic to the prosecution and that skepticism about the fairness of the criminal justice system is a valid ground for excusing jurors. (RB 52.) While these observations may have some abstract merit, there is no basis to conclude from this record that Mrs. S. would be unsympathetic to the prosecution or that she was skeptical about the fairness of the criminal justice system. Without this, the justification was a pretext for racial bias on the part of the prosecutor.

b. Mrs. S.'s Clothing

The prosecutor said that Mrs. S. "came to court dressed in open sandals – . . . a T-shirt that had various printing on it . . . and modified sweat pants." (RT 8:2593-2594.) The prosecutor posited that this clothing was "completely different from the attire of all the other jurors that we presently have in the box, and as far as I can see is completely different from, except . . . two other . . . prospective jurors." (RT 8:2602.) Supposedly, this is a race-neutral reason for the peremptory challenge.

A peremptory challenge, however, is only race-neutral when shown to be based on a prospective juror's specific bias "relating to the particular case on trial or the parties or witnesses thereto." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276; see also *Batson v. Kentucky, supra,* 476 U.S. at p. 98 [reasons must be "a neutral explanation related to the particular case to be tried"]; AOB 89.) This criteria is not met by Mrs. S.'s clothing.

Respondent argues that Mrs. S.'s clothing was a sufficient reason for a strike because an unconventional manner of dress is a valid reason for the use of a peremptory challenge. (RB 52.) Respondent cites *People v. Wheeler, supra,* 22 Cal.3d at p. 275 to support this argument. But *Wheeler* simply says that a prosecutor may fear bias on the part of a juror because the juror's clothes or hair length may suggest an unconventional lifestyle.

(*Ibid.*) There is no indication from this record that the prosecutor had that fear. All the prosecutor did was describe Mrs. S.'s clothing. She could have been wearing a three-piece suit or hospital scrubs and still not be dressed like the majority of the other jurors, but her manner of dress would say nothing about whether she had a bias.

c. Mrs. S.'s Limited Education

Respondent mistakenly asserts that appellant bears some burden of establishing that the prosecutor's explanation that he struck Mrs. S. because of her limited education, when she actually possessed a bachelor's degree, was something other than a genuine mistake. (RB 53.) This stands the law on its head. The issue here is not whether appellant has overcome some fictitious burden in this regard, but whether the record establishes some genuine mistake on the part of the prosecutor when he asserted a blatantly inapplicable reason for the excusal.[3]

The cases relied upon by respondent in this regard are not availing. In *People v. Williams* (1997) 16 Cal.4th 153, this Court upheld a prosecutor's explanation that the strike was race-neutral when the prosecutor stated that he got the struck juror confused with another juror and the strike was a mistake. This Court noted, however, that the trial court there did a searching inquiry as to whether the prosecutor's explanation was genuine and held that it would defer to that finding. (*Id.* at pp. 189-190.) Here, there was no inquiry by the trial court, so there is no finding to defer to regarding whether the prosecutor's explanation was genuine.

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[3] The prosecutor's actual statement when confronted with the fact Mrs. S. had a B.S.M. from Pepperdine University was that he had not seen it. (AOB 45-46.)

In *People v. Phillips* (2007) 147 Cal.App.4th 810, there was no similar searching inquiry, but the appellate court noted that because the prosecutor fully explained the source of the mistake–two jurors had the same last name–and the prosecutor voluntarily brought the error to the court's attention after it had already ruled in the prosecutor's favor, the circumstances there did not demand a more full inquiry. (*Id.* at p. 819.) Once again, this is markedly dissimilar to the present case and does not support a finding that the prosecutor's mistake in this case was genuine.

There are additional reasons why the prosecutor's explanation should not be deemed race-neutral, even if based on a mistaken foundation. One is that there is no explanation apparent from the record why a limited higher education would render a person an unsuitable prosecution juror in this case. This was not a case involving scientific evidence or complex theories of prosecution. Another is that there were numerous jurors with less or the same level of education that the prosecutor supposedly mistakenly attributed to Mrs. S., and the prosecutor did not peremptorily strike those jurors. (AOB 79.)

In short, there is no reason from the totality of this record to infer that the prosecutor's explanation was genuine, but mistaken. It was simply pretextual.

d. Stability in the Community

The prosecutor also stated that based upon her housing and job history, he did not feel that Mrs. S. was a stable presence in the community. (RT 8:2594; RB 49.) Respondent wisely does not attempt to prop up this explanation. Given that she had been married for eleven years, lived at her current home for three years, and had held two jobs in the preceding 16 years, this reason is insupportable. (7 SCT 17:4948-4951.) It also belies

the fact that the prosecutor did not strike nonblack jurors who had lived at a current address for only one year or who were unemployed. (SCT 22:6411; SCT 23:6665, 6667.) This explanation was not supported by substantial evidence.

e. Race and the Justice System

One of the prosecutor's reasons for striking Mrs. S. was her view that race played a part in the criminal justice system and that race should be put behind and everyone should be given a fair trial. (RT 8:2602-2603.) Mrs. S.'s observation that race plays a part in the justice system is not a particularly alarming view. But even if it were, when put in context, her view was that race sometimes plays a part in the justice system, it should not, and everyone should be given a fair trial. These views hardly seem race-neutral reasons for exclusion. And since the prosecutor offered no explanation for why these views provided a race-neutral reason for striking Mrs. S.–indeed, the prosecutor simply recited her statements as if they were self-explanatory race-neutral justifications–her views on the criminal justice system are not supportable reasons for her exclusion in light of the trial court's prima facie showing of discriminatory intent in the exercise of peremptory challenges.

Another reason for exclusion–which the prosecutor and respondent both seem to link to Mrs. S.'s apparently disturbing view that the justice system be fair–was her view on the O.J. Simpson trial. As with her view that everyone should be given a fair trial, the prosecutor was alarmed by Mrs. S.'s view that if the state could not prove that O.J. Simpson was guilty

of murder the verdict was fair.[4] (See RB 52.) Appellant struggles with how this could possibly be a race-neutral reason for exclusion.

Finally, respondent suggests that this statement by Mrs. S. indicated she would require a much higher level of proof to convict than required by law and that the prosecutor's genuine belief that this answer indicated Mrs. S. would be less likely to follow the law constituted a race-neutral reason for the strike. (RB 52-53.) The problem with respondent's rationale is that there is no evidence it was the prosecutor's rationale. Nowhere in the record did the prosecutor express such a concern.[5] A reviewing court assesses the validity of a *Batson* claim by looking at the prosecutor's stated reasons, not by assessing speculation on the part of respondent.

f. Higher Burden of Proof

A justification that was discussed at trial, and relied upon by respondent on appeal, was the view that Mrs. S. would require a higher burden of proof than required by the law.[6] (RB 49-52.) The prosecutor's

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[4] Respondent attributes other statements regarding the Simpson trial to Mrs. S. to support the prosecutor's strike, but these statements were actually made by prospective juror Sandra D. (See RB 49; RT 8:2594; 7 SCT 17:4966.)

[5] Respondent cites to the concurring and dissenting opinion in *People v. Howard* (1992) 1 Cal.4th 1132, 1208 to support this fictitious reason. (RB 53.) This provides scant support for such a proposition, however, because there the prosecutor specifically averred that the prospective juror's membership in a group promoting civil disobedience gave him reason to believe the prospective juror would not follow the law. (*Ibid.*)

[6] Respondent also asserts that the prosecutor stated Mrs. S.'s views about the death penalty were "extremely scrambled" and either undefined or weak. (RB 49-50.) These observations, however, pertained to Sandra D.,

(continued...)

entire argument regarding Mrs. S.'s feelings about the death penalty and the burden of proof are as follows:

> When asked about the death penalty, her general feelings, she said, I'm for it. But we must absolutely prove guilt.
>
> When asked about rejecting the death penalty and accepting life imprisonment, she said, yes, because - - if there's one thing that we still may not be able to prove, but we still feel he is guilty with reasonable doubt.
>
> Asked about imposing the death penalty or life imprisonment: . . . if we can prove without a doubt that the crime was committed. We must be very careful to listen.
>
> When asked about the imposition of the death penalty in the general community, she stated, that she felt maybe it has been randomly imposed and some criminals seem to get harsher charges than others. It seemed to depend on the situation, the person, the crime. Which quite frankly I think harping back to . . . her feelings concerning race and the Court.

(RT 8:2603; 7 SCT 17:4972,4974.)

The trial court ruled as follows:

> On Regina [S.] and on Mr. [D.], I think a much closer question. I will accept the fact that he was concerned - - I will accept the truth of his statement that he was concerned about those jurors statements about they're [sic] sense of the degree of proof required that exceeds proof beyond a reasonable doubt. I will accept that that is a truthful comment and that that is his - - that is his motivation.

(RT 8:2613-2614.)

Respondent claims this is a credibility finding that this Court must defer to. (RB 50-52.) But as this Court has stated, a deferential standard of

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[6](...continued)
not Regina S., so they must be disregarded here. (See RT 8:2594.)

review is only applied when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as it applies to each challenged juror. (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) The trial court here failed to evaluate each stated reason as applied to Mrs. S. Therefore, the trial court's ruling is not entitled to deference.

Other factors demonstrate that the prosecutor's reason was a sham excuse. Of initial note is that the prosecutor failed to mention this reason until after he had given the baseless excuses about her brother, her clothing, her education, and her stability in the community. The prosecutor did not mention the standard of proof excuse until *after* the lunch break *after* he had time to search through Mrs. S.'s questionnaire for an excuse that the court might accept. (RT 8:2600-2603.)

Respondent points to Mrs. S.'s questionnaire as an indicator that she lacked the ability to impose the death penalty as a reasonable possibility. (RB 51.) Contrary to respondent's claim, Mrs. S.'s answers do not reflect such a lack of ability (7 SCT 17:4972, 4974), or support a claim that she would demand the state fulfill a greater burden than that required by law. Of more significance though in determining whether this was a pretextual reason offered by the prosecutor, is the fact that the prosecutor did not ask for Mrs. S. to appear for *Hovey* voir dire (RT 8:2249-2255), and he did not ask her any questions when she took her seat in the jury box. (RT 8:2545-2578.)

Mrs. S. was one of the original twelve jurors called to the box. (RT 8:2542.) The prosecutor asked the group as a whole questions about the burden of proof and told them that he noted "many people, especially in this type of case, were concerned with whether or not the evidence was going to show absolute guilt," then he stated that the burden of proof in a criminal

case is beyond a reasonable doubt and asked the group whether that would affect anybody's ability to be a juror on the case. (RT 8:2553.) The record indicates that all jurors, including Mrs. S., responded negatively. (*Ibid.*) The prosecutor then acknowledged that the penalty phase could be upsetting and difficult, stated that the burden of proof at the penalty phrase was not to "absolute certainty" and asked if that is the burden of proof, would it "make it impossible for a person to be a juror in this case." (*Ibid.*) Again, the record indicates that the prospective jurors all responded negatively. The prosecutor's failure to further question Mrs. S. regarding her demands as to the burden of proof indicates a lack of genuine concern as to this issue and shows that this reason was a pretext for a racially-motivated peremptory challenge. (*Miller-El II, supra*, 545 U.S. at pp. 244, 246; *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)

A comparison to similar jurors supports the conclusion that the prosecutor's justification based on Mrs. S.'s purported requirement of a higher standard of proof was a pretext for racial bias. Juror 47B stated in her questionnaire regarding her general feelings towards the death penalty that she had mixed feelings about it and that she "must be absolutely sure of guilt to even consider [the death penalty]." (7 SCT 22:6475.) Moreover, in response to questions 74, 75, 79 and 84, Mrs. S. wrote that she was for the death penalty, would vote to keep it in effect and could apply it in an appropriate case; she also wrote that it should be applied, depending on the circumstances. (7 SCT 17:4968, 4973-4974, 4975-4976.) She believed in the deterrent effect of the death penalty. (7 SCT 17:4979.) Her responses were commensurate with, if not more in support of the death penalty than Juror 47B. Where, as here, the prosecution employed a double standard against members of the excluded group in favor of persons permitted to

serve as jurors, it is strongly suggestive of group bias and can in itself warrant the conclusion that the prosecutor used peremptories for pretextual reasons. (See *Miller-El I, supra*, 537 U.S. at p. 343.)

g. Group Dynamics

The prosecutor stated one final reason for striking Mrs. S.: that he did not believe she would work well in a group. (RT 8:2615.) Additionally, the prosecutor stated that Mrs. S. was not suitable because she was "devoid of community or social activities in groups with children or some type of charitable organization that many of the people do." (RT 8:2620.) The prosecutor also stated that "[h]er contact with this community is extremely limited and, again, I'm going by the standard formed by the group of jurors here. We have many, many people who are involved in particular community group efforts, that are charitable in nature or involving children." (*Ibid.*)

The prosecutor's statement about the community group efforts of the jurors as a whole is patently false. Of the seated jurors only two jurors actually did volunteer work – as opposed to just belonging to an organization or club – and only one of them volunteered for an organization that served children. Juror numbers 317 (SCT 24:6927-6928), 380 (SCT 24:7056-7057), 392 (SCT 24:7143-7144), 119 (SCT 23:6669-6670), 192 (SCT 23:6841-6842), 86 (SCT 22:6541-6542) and 87 (SCT 22:6584-6585) responded that they did not belong to any club or group and did not do volunteer work. Of the remaining jurors, juror number 37 reported that she volunteered at a hospital but reported no activities with children. (SCT 22:6413-6414.) Juror number 47 reported being a member of an organization called "Telephone Pioneers" that was involved in community activities – none of which specifically involved children – but reported that

they did not themselves volunteer. (SCT 22:6457-6458.) Juror number 77 reported belonging to "Life Bible Fellowship" but did no volunteering. (SCT 22:6499-6500.) Juror number 370 reported belonging to the "American Legion," which was a group that socialized and engaged in fundraising – none of which specifically involved children – but reported that they themselves did not volunteer. (SCT 24:7013-7014.) *Only one* juror, number 353, who volunteered for an organization that refurbished toys, volunteered for an organization that served children. (SCT 24:6970-6971.)

Respondent cites *People v. Johnson* (1989) 47 Cal.3d 1194, 1220, for support that the prosecutor's "group dynamics" reasoning has been accepted by this Court as proper reasoning for the use of peremptory challenges. (RB 56.) Appellant accedes that this concept may be a proper basis for a peremptory strike when it is actually a legitimate reason. Here, however, the record belies the reason's legitimacy and exposes the prosecutor's excuse for what it actually was: a pretextual reason offered to disguise the discriminatory intent of the peremptory strike. The totality of the record in this case simply does not support the prosecutor's proffered reason for the strike.

2. Prospective Juror Huey D.

The prosecutor gave the following list of reasons for striking Huey D.: (1) his age, health and confusion about the case; (2) his "extremely weak" opinion concerning the death penalty and his "great emphasis" that the standard of proof on the death penalty should be one encompassing no doubt; (3) his "extremely weak" opinion about the status of crime in the community; (4) he was "extremely negative" about the O.J. Simpson case because he was "pro OJ and anti-prosecution"; (5) his opinions regarding

how crime was handled was "anti-law enforcement, or at least weak law enforcement"; and (6) his unsuitability based on group dynamics. (RT 8:2595, 2599, 2605, 2616-2617.) The only one of the prosecutor's reasons explicitly accepted by the trial court was Mr. D.'s questionnaire responses concerning the burden of proof. (RT 8:2613-2615.)

Respondent does not analyze the legal import of the reasons proffered by the prosecutor, but merely lists all of them, along with a general comment by the trial court that it did not question the prosecutor's truthfulness. (RB 53-55.) Appellant assumes, therefore, that respondent is asserting that all of the reasons are valid non-pretextual justifications for a peremptory strike.

a. Age, Health, and Confusion

Mr. D. took medication for hypertension, but said it would not impair his ability to give the trial his complete and full attention. (7 SCT 10:2786; RT 8:2581.) This stands in stark contrast to a nonblack juror, Juror 36/37B, who had both diabetes and high blood pressure and marked her questionnaire "yes" in response to the inquiry as to whether she had a physical condition that would make it difficult for her to serve as a juror. (SCT 22:6440.) Offering Mr. D's health as a race-neutral reason for striking him was clearly a pretext by the prosecutor.

Similarly, there is no evidence, substantial or otherwise, appearing from the totality of the record which supports a peremptory challenge based on Mr. D's age. The fact that he was 70 years old (RB 53), without a further explication as to how this related to his ability to sit as a juror in appellant's case, is meaningless. In the absence of some explanation from the prosecutor as to why being 70 years old was a hindrance in serving on

appellant's jury, this cannot be credited as a race-neutral reason for the peremptory strike.

The record is also devoid of evidentiary support for the prosecutor's assertion that Mr. D. "showed confusion" and "was not too aware of what was going on." (8 RT 2616-2617.) The issue of Mr. D.'s intelligence was raised by defense counsel in regard to an answer he gave on his questionnaire. (RT 8: 2579.) An examination at the bench, however, did not reveal any particular confusion about the issues in a capital case or the principles to be applied. (RT 8:2580.) Nor does respondent point to any evidence in the record to support the prosecutor's assertion that Mr. D. was "confused" about anything relating to appellant's trial. This reason was a pretext.

b. Opinion on the Death Penalty and Standard of Proof

Mr. D. expressed opinions about the death penalty both in his questionnaire and orally during voir dire. On his questionnaire, Mr. D. said he had supported the 1978 Briggs Initiative (7 SCT 10:2782); thought that crime would be worse without the death penalty but that care should be used in sentencing someone to death and that there should be no doubt (7 SCT 10:2778); and that he could sentence someone to death if justice would be served (7 SCT 10: 2780).[7] Orally, Mr. D. continued to express his

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[7] The prosecutor was purportedly disturbed by Mr. D's comment that he had problems with the wording of a questionnaire inquiry as to whether he would never be able to vote for death. (7 SCT 10:2779; RT 8:2604-2605.) However, the prosecutor later admitted that this question was "difficult in its wording" (RT 9:2701), and more significantly, Mr. D. responded "no" to the specific question as to whether his feelings about the death penalty were such that he could never sentence appellant to death. (7

(continued...)

support for the death penalty. He said that he thought the death penalty had its' place if the proof was conclusive that it was necessary. (RT 8:2580.) It is hard to see how these responses rendered Mr. D. "extremely weak" on the death penalty. (RT 8:2595, 2604.)

This is especially so when Mr. D's answers are compared to those of nonblack jurors. For example, Juror 87 did not answer the question asking her general feelings about the death penalty, and claimed not to have negative or positive feelings about it. (SCT 22:6603, 6607.) She also failed to answer any of the questions on a full page of the questionnaire's section on the death penalty. (SCT 22:6608.) Juror 46/47B wrote that she wanted to be "absolutely sure" of guilt before considering the death penalty. (SCT 22:6475.) In her response to question 79, Juror 119 indicated disfavor for the death penalty. She remarked that she could see herself rejecting death and choosing a life sentence, but could not see rejecting life and choosing death, because "giving him imprisonment is just like taking his life away." (SCT 23:6690.) In her response to question 105, she stated that she would be reluctant to personally vote for a death sentence. (SCT 23:6695.) Yet, none of these jurors were apparently "very weak" on the death penalty.

The trial court denied appellant's *Batson/Wheeler* motion because it agreed with the prosecutor that Mr. D. would likely hold the prosecution to an excessively high burden of proof. (See RT 8:2613-2614.) The prosecutor quoted Mr. D.'s questionnaire response that "care should be used

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[7](...continued)
SCT 10:2795.) Further, numerous nonblack jurors wrote critiques on their questionnaires. (AOB 84; see SCT 22:6577; SCT 23:6779; SCT 24:7136; RT 8:2358, 2467, 2470.)

in sentencing someone to death. There should be no doubt." (7 SCT 10:2778.) In response to a different question, Mr. D. wrote, "I feel the death penalty should be used in extreme cases where there is no doubt." (7 SCT 10:2782; RT 8:2605.)

The prosecutor asked Mr. D. questions about the burden of proof on voir dire. He asked, "You indicate that at least on the possible, possible, possible part of this case that may deal with the death penalty, that you would want absolute proof?" (RT 8:2582.) Mr. D. responded, "Yes." The prosecutor then stated that the "burden of proof in a criminal case is proof beyond a reasonable doubt." Mr. D. agreed. The prosecutor then asked, "Not absolute, not beyond any doubt, not all doubt or the absence of any doubt. Can you accept that burden of proof, or would you want a higher burden of proof?" Mr. D. responded, "I can accept it" and the prosecutor did not ask any further questions. (RT 8:2582.) This colloquy severely undermines the prosecutor's reason and the trial court's finding that Mr. D. would require some higher burden of proof than contemplated as acceptable under the law.[8]

A look at the responses of other nonblack jurors also reveals the falsity of this supposedly race-neutral reason. Juror 47B stated on her questionnaire that she "must be absolutely sure of guilt to even consider [the death penalty]." (SCT 22:6475.) Where, as here, the prosecution employed a double standard against members of the excluded group in favor of persons permitted to serve as jurors, it is strongly suggestive of group bias and can in itself warrant the conclusion that the prosecutor used

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[8] One must question exactly what the prosecutor and trial court were contemplating here, since the determination of whether to assess the death penalty is a normative decision and there is no burden of proof.

peremptories for pretextual reasons. (See *Miller-El I*, *supra*, 537 U.S. at p. 343.)

c. Attitude Toward Law Enforcement

The prosecutor's claim that he struck Mr. D. because he did not have any strong opinions about crime or the criminal justice system is belied by the totality of the record. (RT 8:2595, 2604.) The prosecutor supported this reason with a statement that he found it very interesting that Mr. D. did not have any strong opinions about any of the region's recent high profile criminal trials in light of Mr. D.'s education and job as a retired principal. However, the only other juror who had a master's level education and worked in the education field also answered, along with the majority of the jurors, that he had no opinion regarding major crime stories that were in the news at that time. (SCT 24:6937.) Further, the prosecutor failed to address how Mr. D.'s opinions about recent crime stories, including the Simpson case, were relevant to a determination of whether he had a bias regarding appellant's guilt or penalty. (7 SCT 10:2782; RT 8:2609.)

The prosecutor also was troubled by Mr. D.'s answer that from the crime stories in the news he learned what he already knew – "that there are many sides to a story." The prosecutor failed to explain why this answer was unusual or indicated Mr. D. would not make a good juror. (RT 8:2605.) Further, the prosecutor complained that Mr. D. wrote that he could "not think of a better way to solve serious problems" in the criminal justice system, and that he had no suggestions on how to improve it. (RT 8:2604-2605; see 7 SCT 10:2772.) As appellant demonstrated in his opening brief (AOB 81), Juror 36/37B had no opinion regarding what problems existed within the criminal justice system or how it could be improved. (SCT 22:6426; see also question 54 at SCT 22:6427.) Juror 380 also expressed

no opinions regarding the criminal justice system's problems or the most important causes of crime. (SCT 24:7069, 7090.) Juror 192 gave a non-responsive answer to the question regarding the justice system's problems – "all evidence should be entered." (SCT 22:6854.)

The prosecutor also stated that he felt Mr. D.'s sense of the reasons for crime and how crime was handled was anti-law enforcement, or at least demonstrated a weakness toward law enforcement. (RT 8:2599.) What Mr. D. actually said was that he believed crime had increased in recent years due to a "lack of jobs and proper supervision for youth" and suggested that communities should receive greater resources to aid in resolving these problems. (7 SCT 10:2773.) These statements do not suggest that Mr. D. was anti-law enforcement or weak in support of law enforcement.

d. Group Dynamics

Finally, just as with Mrs. S., the prosecutor tacked on the "group dynamics" justification to his laundry list of reasons for striking Mr. D. (RT 8:2615-2621.) Mr. D. had educational, employment and/or community service background that demonstrated his ability to successfully work with others as either a follower or leader. He had undergraduate and graduate degrees, was a member of a national fraternity, and had over twenty years experience as an educator and high-school principal. (7 SCT 10:2756-2757.) Just as with Mrs. S., the court indicated that it did not agree with the prosecutor's assessment on this issue. (RT 8:2615-2620.) There exists no evidence in the record to support the prosecutor's justification.

The previous discussion relating to the prosecutor's treatment of Mrs. S. on this factor applies equally to Mr. D. The prosecutor stated that Mr. D. was not involved in any community activity, which was not true, as defense counsel pointed out (7 SCT 10:2760; RT 8:2619), and in any event,

only two of the seated jurors were actually actively involved in community groups.

3. Sandra D.

Respondent believes that Sandra D.'s questionnaire responses involving her reluctance to be on a jury in a death penalty case, as well as her views on the death penalty, support a race-neutral reason for her peremptory strike. (RB 46-47; see RT 8:2601-2602; 15 Supp. CT #7, 4327, 4329-4334.) Although Ms. D. expressed initial reluctance as far as wanting the responsibility of sentencing someone to death, she clearly and strongly supported the death penalty. (See 7 SCT 15:4327-4331, 4334.) The prosecutor's reason was a pretext and the trial court's ruling is not entitled to deference because the trial court incorrectly recalled the state of the record.

The court accepted the prosecutor's statement that he thought it was close as to whether Ms. D. could be excused for cause for her reluctance to vote for a death verdict as a non-racial basis for striking her. (RT 8:2613.) The court stated that it thought the prosecutor challenged her for cause but did not remember. (*Ibid.*) The court asked the prosecutor to remind it of the *Hovey* proceedings regarding Ms. D., but the prosecutor did not do so and the court did not consult the record. If anyone had done so, they would have seen that the prosecutor did not challenge Ms. D. for cause (RT 8:2341), and she stated during the *Hovey* voir dire that she was willing to serve as a capital juror. (RT 8:2337-2339.) The record does not support respondent's assertion that Ms. D. would not have been able to consider death as a possible punishment. (RB 48.)

An examination of the answers of other nonblack jurors further demonstrates the pretextual nature of this justification. In response to

question 88 ("do you have positive or negative feelings about the death penalty?"), seated Juror 36/37B wrote, "I don't want anyone to die." (SCT 22:6436; see also her response to question 140 at SCT 22:6445.) She also wrote that she was unsure whether she could set aside her personal feelings and follow the law set forth by the trial court. (SCT 22:6438, 6442.)

Respondent asserts that Ms. D.'s answers regarding the death penalty were conflicting and/or ambiguous, and when a juror gives such answers the reviewing court should uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to such a prospective juror's true state of mind. (RB 48.) The problem with that view is that the trial court did not recall Ms. D.'s responses during voir dire and so did not make a determination as to Ms. D.'s state of mind. Consequently, there is nothing to defer to.

As to the other reasons proffered by the prosecution–Ms. D.'s feelings about the Simpson trial, her marital status, her education status, and her stability in the community–the record contains no explanation as to how any of these factors related to her potential bias as to the case being tried. Nor does respondent attempt to prop these reasons up with an explanation from the record as to how they could be justified as race-neutral reasons. Based on the totality of this record, they are not.

Finally, respondent argues that Ms. D.'s lack of leadership characteristics was a valid race-neutral reason for striking her. (RB 48-49.) Respondent supports this argument by citing authority indicating that when the record is unclear, aspects such as the juror's demeanor and overall attitude in the courtroom can be decisive factors in determining the juror's true state of mind and ability to impose the death penalty such that deference must be given to the trial judge regarding this issue. (RB 48-49.)

The trial court did not make a finding regarding Ms. D.'s capacity to function in a group much less indicate that it was relying on her demeanor or any other aspect of Ms. D.'s makeup as to this factor. Once again, there is nothing to defer to as this was not a demeanor-based excusal.

4. Elizabeth K.

The prosecutor felt that Elizabeth K. was a C- juror based on her views of the death penalty. (RT 9:2699-2702.) He was also disturbed by her answers regarding the Simpson trial. (RT 9:2700.) Neither of these factors, though, were the impetus for his peremptory challenge. Indeed, he felt at certain points during the selection process that she would be a good jury member. According to the prosecutor, this changed due to the peremptory challenges exercised by the defense; and this was the reason for the peremptory challenge. (RT 9:2699.) Consequently, if it is to be believed, the race-neutral reason for the prosecutor's strike was a concern for the overall composition of the personalities on the jury.

Following appellant's first *Batson/Wheeler* motion, the prosecution accepted the jury as constituted three times with Mrs. K. in the jury box. (RT 8:2639; RT 9:2672, 2674.) Once the defense accepted the panel as constituted, however, the prosecutor asked to approach the bench and provided the court with a complex and lengthy explanation as to why he was going to strike Mrs. K. (RT 9:2696-2707.) He basically said that because Mrs. K. displayed good leadership skills but was weak in her support for the death penalty, he could no longer have her on the jury because the defense had excused the more pro-death penalty jurors who were strong leaders. (RT 9:2696-2707.) He never identified who those jurors were.

This Court has accepted this type of excuse as a reasonable trial strategy (see *People v. Johnson*, *supra*, 47 Cal.3d at p. 1220), but here the circumstances surrounding the prosecutor's presentation of this justification severely undermines his credibility. The prosecutor stated that he would have removed Ms. K. earlier, but the initial *Batson/Wheeler* motion had created a "chilling effect" on his use of peremptory challenges. (RB 58; RT 9:2697-2699.) The trial court completely ignored this sequence of events and failed to inquire further with the prosecutor about the contradiction between his excuse based on the changing make-up of the jury and his admission that he would have struck Mrs. K. sooner but for the "chilling effect" of the first *Batson/Wheeler* motion.

As appellant argued in the opening brief, although "the [prosecutor's acceptance of] a jury containing minorities 'may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection . . . it is not a conclusive factor.'" (*People v. Gray* (2005) 37 Cal.4th 168, 188, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225; see AOB 101-102.) Here, the timing of the prosecutor's strike and the particular excuse given provide strong circumstantial evidence that it was pretextual. The prosecutor knew that the trial court was "watching him like a hawk" (RT 9:2712), and knew that waiting for several other jurors to be excused by the defense allowed him to make the justification based on the changing composition of the jury under *Johnson*, which he cited to the trial court, and he waited until the last moment – when the defense accepted the constituted jury – before striking her. (See AOB 101-102.)

That the court placed undue weight on the prosecution's justification in light of his admission that he would have struck Ms. K. sooner but for the

court's comments during the first *Batson/Wheeler* motion, is evidenced in the court's ruling. It stated that it accepted the prosecutor's reason because "if it was just based on racial issues, I assume he would have tried to excuse her sooner." (RT 9: 2711.) The court concluded, "I do accept what he says, that given the current make up of the jury - - well, and if he's passed before, and why in the world would he raise this now, knowing that I am - - and he's right - - that I am sitting over his shoulder watching him like a hawk on this issue." (RT 9: 2711-2712; see also RT 9:2718 ["I do think if he was doing it just for racial purposes he would have done it much sooner"].)

The timing of the prosecutor's strike and his admission that he would have struck Mrs. K. sooner but for the "chilling effect" of the first *Batson/Wheeler* motion distinguishes appellant's case from *People v. Ledesma* (2006) 39 Cal.4th 641, 679, which respondent relies upon (RB 60-61), where the prosecutor provided an explanation for the peremptory strike that was consistent with a group dynamics theory.

C. Conclusion

In light of the foregoing discussion, the prosecutor's discrimination against black jurors requires this Court to reverse appellant's judgment and sentence. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282; *Batson v. Kentucky, supra*, 476 U.S. at p. 100.)

II

THE TRIAL COURT ERRED BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON ANY LESSER INCLUDED OFFENSES OF FIRST DEGREE MURDER

There is no disagreement that a trial court has a sua sponte duty to instruct on a lesser included offense when there is substantial evidence to support such an instruction; substantial evidence being evidence a reasonable jury could find persuasive. (AOB 116-118; RB 78-79.) The disagreement arises as to whether such evidence was present in this case and whether the error asserted by appellant has been forfeited due to operation of the invited error doctrine. Such evidence is present in appellant's record and the error is cognizable on appeal.

A. Second Degree Murder as a Lesser Included Offense

The only real argument that respondent makes regarding why an instruction on second degree murder was not warranted is to say that there was overwhelming evidence of premeditation and deliberation and that since appellant's defense was that he did not shoot Mr. Rexford, he was either guilty of first degree murder or not guilty of any offense.[9] (RB 80-82.) What respondent does not do is address any of the contentions set forth by appellant as to why the evidence supports an instruction on second degree murder. (AOB 121-142.) Respondent's approach is ill-advised.

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[9] This response encompasses respondent's assertion in footnote 30 on page 82 regarding appellant's argument as to "aider and abettor" and "felony murder" theories supporting lesser included offenses. (See AOB 135-141.) Although placed in a separate footnote, respondent's assertion is based on the same theory that is rebutted by appellant in the text of this reply.

Respondent misapprehends the appropriate application of the substantial evidence rule when it comes to lesser included offenses generally. When a challenge is being made to the sufficiency of the evidence to support the verdict, the issue is whether "substantial evidence" supports the verdict. (See, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) But where the challenge is to the omission of a lesser-included offense instruction, the issue is whether "substantial evidence" would have supported a verdict on the lesser included offense. (See, e.g., *People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163.)

More specifically, the test for sufficiency of the evidence is whether there is evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 260 [sufficiency of evidence], and the test for instruction on a lesser included offense is whether there is evidence from which a reasonable jury could conclude that the lesser offense, but not the greater offense, was committed (*People v. Breverman*, (1989), 19 Cal.4th 142, 162, 177). In both contexts, the assessment is made by considering the entire record and not by just isolating certain evidence and making a qualitative judgment about it.[10] (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 260 [sufficiency of the evidence to support the judgment]; *People v. Breverman*,

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[10] An example of considering the entire record is this Court's opinion in *People v. Souza* (2012) ___ Cal.4th ____ (2012 WL 1948527). There, the fact that the defendants may have been motivated by revenge in seeking out the victims did not forestall the inquiry as to whether there was sufficient evidence to raise the lesser included offense of voluntary manslaughter. (*Id.* at pp. 15-16.) In other words, the fact that a prosecution theory for conviction may be supportable under the facts does not mean that an instruction consistent with a different theory should not be given to the jury.

supra, 19 Cal.4th at pp. 162-163 [sufficiency of the evidence to support instructions].)

When deciding whether evidence is "substantial" in either context, a court determines only its bare legal sufficiency, not its weight. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177 [lesser included offense instructions]; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [sufficiency of the evidence].) Further, doubts regarding the sufficiency of the evidence to support a judgment are resolved on appeal in favor of the judgment (see, e.g., *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206), and "[d]oubts as to the sufficiency of the evidence to warrant instructions . . . [are] resolved *in favor of the accused.*" (See, e.g., *People v. Ratliff* (1986) 41 Cal.3d 675, 694, italics added.)

More particularly as it relates to this case, respondent takes the position that no instruction on second degree murder was required because appellant testified that he did not commit the murder; thus, he was guilty of first degree murder or no homicide at all. (RB 81.) This view is insupportable under the law.

When there is evidence that the defendant is guilty not of the crime charged, but of a lesser included offense, the court must instruct on the lesser offense even when the defendant claims to be innocent of both the greater and the lesser offense. Further, when the charged offense is one that is divided into degrees or encompasses lesser offenses, and there is evidence from which the jury could conclude that the lesser offense had been committed, the court must instruct on the alternate theory even if it is inconsistent with the defense elected by the defendant. (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7.) This principle applies even if the defendant's own testimony contradicts the factual premise of the lesser

included offense. (See *People v. Barton* (1995) 12 Cal.4th 186, 203 [instruction on lesser offense necessary even when directly contradictory of defendant's testimony].)

There is abundant evidence that if guilty, appellant was guilty only of second degree murder. (AOB 121-141.) Under the principles iterated above, the test is not whether one may believe there was substantial–or even overwhelming–evidence upon which a jury could have based a first degree murder verdict. If there was also substantial evidence from which a jury could have found appellant guilty of second degree murder, an instruction on that offense should have been given by the trial court. As discussed in appellant's opening brief, there was such evidence and the trial court prejudicially failed to give the required instruction.

B. Voluntary Manslaughter as a Lesser Included Offense

Respondent believes there was no evidence from which a reasonable jury could have concluded that "Pupua and/or Badibanga might have provoked Smith into shooting;" thus, there was no call for the trial court to instruct on voluntary manslaughter. (RB 83.) The jury that actually heard the evidence apparently did not agree, since it returned attempted voluntary manslaughter convictions on the attempted murder counts relating to Pupua and Badibanga. The only way the jury could have done this was by finding that appellant was provoked to act rashly without deliberation and reflection. (AOB 143; RB 82-83.)

Respondent overstates the case when it states there was "absolutely no evidence" that appellant was provoked and that appellant only "speculates" that Pupua might have had a gun. (RB 83.) Once again, if there was "absolutely no evidence" of provocation, the jury would hardly have returned attempted voluntary manslaughter verdicts. As to appellant's

"speculation," there was testimony from Pupua's upstairs neighbor that he overheard a voice coming from the front of Pupua's door say: "I couldn't get to my gun in time." (RT 13:4010.) Concluding that this statement provided a foundation for a finding that a reasonable person may have felt provoked does not involve speculation; rather it involves drawing an inference that appellant's jury apparently drew in relation to the Pupua and Badibanga counts.

Respondent does not dispute that the doctrine of transferred intent applies under these circumstances, and that if provoked by Pupua and/or Badibanga, this doctrine would warrant a voluntary manslaughter instruction on the Rexford count. (AOB 147-148.) Consequently, the resolution of this issue turns on whether there is sufficient evidence from which a jury could have returned a voluntary manslaughter verdict as to those two individuals. Since the jury did, respondent's position must fail.

The resolution of whether the voluntary manslaughter instruction was also warranted under the theory of imperfect self-defense largely turns on the same facts discussed above, as well as the facts discussed in appellant's opening brief as they relate to voluntary manslaughter generally. (AOB 144-148.) Respondent believes that this theory is untenable because the aggressive physical movements to which appellant refers in his opening brief (AOB 148) were caused by appellant's gunfire, and thus could not have provoked an act of unreasonable self-defense. (RB 84.) Yet, appellant cites to no evidence in the record supporting this assertion.

The record is equally susceptible to an interpretation that the occupants' physical movements began as soon as they saw that the entrants bore firearms; which certainly could have preceded the shooting itself. To say that Pupua and Badibanga's movements "certainly did not precede the

gunfire" is not an assertion that is warranted by the state of the evidence. Whether the gunfire came first, or the aggressive physical movements came first, was a factual issue for the jury. They should have been given the opportunity to resolve this issue, and in doing so, determine whether appellant was acting in unreasonable self-defense.

C. Reversal is Required

Appellant asserts two bases for reversal due to the trial court's failure to instruct on lesser included offenses. The first is a reversal per se standard because of this Court's misapplication of *Beck v. Alabama* (1980) 447 U.S. 625. (AOB 149-164, 171-172.) The second is that, even assuming the error is not reversible per se, it is reversible under either the federal or state harmless error standards. (AOB 173-200.) Respondent believes that even if there was error, it is not reversible for any reason. (RB 84-87.)

Respondent's answer to appellant's argument regarding *Beck* error is a quote from *People v. Valdez* (2004) 32 Cal.4th 73 and an adoption of the reasoning reflected therein. (RB 85-86.) Appellant fully discusses *Valdez*, and all of the cases relied upon by respondent, in his opening brief. There is no issue but that if the *Valdez* reasoning is correct, appellant's claim is without merit. In other words, respondent has provided nothing to answer that has not already been addressed by appellant in his opening brief.

Respondent goes on to assert globally that if there is error, it is reviewed under the state law standard for error rather than the federal constitutional standard.[11] (RB 87.) This assertion fails to distinguish

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[11] Respondent also generally asserts that error cannot be demonstrated because the jury found the lying-in-wait special circumstance (continued...)

between the type of error reflected by the failure to instruct on second degree murder and that reflected by the failure to instruct on voluntary manslaughter. In any event, both failures should be judged by the federal constitutional standard that the state must demonstrate beyond a reasonable doubt that the error was harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

As to second degree murder, this Court has held a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and the erroneous failure to instruct on a lesser included offense constitutes a denial of that right. (*People v. Elliot* (2005) 37 Cal.4th 453, 475 [*Chapman* test utilized to resolve error revolving around instruction relating to second degree murder as lesser included offense].) Consequently, the failure to sua sponte instruct on second degree murder should be reviewed under the *Chapman* test.

The *Chapman* test is also the standard of review for the failure to instruct on voluntary manslaughter, which has a "unique legal function" under California law. (*People v. Rios* (2000) 23 Cal.4th 450, 459.) When the issue of heat of passion is properly presented in a murder case, the prosecution must prove beyond a reasonable doubt that these circumstances were lacking in order to establish the murder element of malice. (*Id.* at p. 462; see *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-699 [Due Process Clause requires that prosecution prove beyond a reasonable doubt the absence of heat of passion upon sudden provocation when issue properly

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[11](...continued)
to be true. (RB 87.) Appellant addressed the line of cases which support this approach in his opening brief, and since respondent does not directly address appellant's reasoning therein, there is no need to reiterate those assertions in this reply. (AOB 178-181.)

presented in homicide case].) In other words, where there is substantial evidence of reasonable heat of passion, the absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 454, 462; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 189.)

Finally, respondent makes a one-sentence argument that regardless of the standard employed, the evidence was overwhelming and any error was harmless. Appellant argues fully in his opening brief why the error is prejudicial even under the state law standard (AOB 181-200), and sees no reason to merely reiterate that argument in light of respondent's failure to directly address it.

D. This Issue is Cognizable on Appeal

Respondent believes that the invited error doctrine bars appellant from raising this issue on appeal. (RB 74-79; see AOB 164-171 [discussing why invited error inapplicable to this case].) As a general matter, respondent misconstrues the invited error doctrine. As a specific matter, respondent fails to differentiate between the second degree murder instructions and the voluntary manslaughter instructions in applying the facts to its overall view of the law.

The key to applying the invited error doctrine to bar an issue on appeal is a determination that the error was actually *invited* by defense counsel. The invited error doctrine is only applicable when it appears that counsel both intentionally caused the court to err and clearly did so for tactical reasons. (*People v. Dunkle* (2005) 36 Cal.4th 861, 923.) These prerequisites are not present in the instant case.

The issue centers on whether counsel *deliberately* caused the court to fail to fully instruct. This is what makes the error "invited." (*People v.*

Wickersham (1982) 32 Cal.3d 307, 335; see *People v. Lara* (2001) 86 Cal.App.4th 139, 164; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1030.) As to second degree murder, the record reflects that the trial court did not fail to instruct because of any action on the part of the defense. The trial court understood that the decision did not rest with defense counsel, but merely sought to clarify that it was 'also [defense counsel's] request not to instruct on second degree." (RT 14:4563-4564.) The trial court explicitly stated it saw no theory for a verdict on anything other than first degree murder; a view that was never argued to the trial court by defense counsel. (RT 14:4564.) Consequently, the record simply does not support a finding that trial counsel engaged in any action which induced the trial court to not instruct on second degree murder.

Respondent argues at length that trial counsel did not want an instruction on second degree murder as a tactical matter. (RB 75-78.) First, appellant disagrees that the record contains the type of express tactical decision that is required to meet the invited error doctrine. The entire expression of defense counsel on this issue is his answer to the court's question as to whether he wanted the court to instruct on second degree murder. He said he did not and that he had discussed it with appellant. (RT 14:4563-4564.) This hardly shows that defense counsel "thoroughly thought out the matter" (RB 75) of whether there should be an instruction on second degree murder. (See *People v. Wickersham*, *supra*, 32 Cal.3d 333-334 [test for invited error not whether reviewing court can infer from record as a whole that counsel made deliberate tactical decision to suggest, resist, or accede to erroneous instructions].) It is certainly not the type of expression of a deliberate tactical purpose that is required by the law.

The second problem with respondent's argument, and the reason that the law requires that the error be invited by an expression of a deliberate tactical decision, is that a trial court has the obligation to instruct the jury on lesser included offenses whenever the evidence warrants the instructions, whether or not the parties want it to do so. This duty arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. (*People v. Beames* (2007) 40 Cal.4th 907, 926; see *People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8 [counsel's explicit concession to erroneous omission of instruction did not invite error in absence of expression of deliberate tactical purpose].) That is why the bar is set so high for invited error when it comes to lesser included offenses. This case does not come close to meeting that threshhold.

As to voluntary manslaughter, the record is even weaker regarding the invited error doctrine. All that occurred in this regard was that the trial court asked whether everyone agreed there was "no manslaughter here?" To which trial counsel said "yes." (RT 14:4563.) This is nothing more than an acquiescence in an incorrect ruling by the trial court. This Court has been clear that this type of action does not constitute invited error. (See *In re Mosher* (1969) 1 Cal.3d 379, 393 [counsel did not invite error by merely acceding to erroneous instruction in absence of expression of deliberate tactical purpose].)

E. Conclusion

The trial court's error in failing to instruct on lesser included offenses of murder forced appellant's jury into an all-or-nothing choice regarding the homicide of Josh Rexford. The harm, as asserted by appellant in his opening brief (AOB 198-200), is most succinctly pointed out by the fact that even though the prosecutor argued that appellant possessed the

same intent with respect to all three victims–since he did not know which individual was Josh Rexford–the jury, which was properly instructed as to the Papua and Badibanga counts, returned attempted voluntary manslaughter verdicts on those counts. However, since the jury was not properly instructed on the Rexford count, the jury did not have that option, and believing appellant guilty of something, made the only choice available to it–murder.

Forcing appellant's jury to make this type of decision when substantial evidence raised legitimate issues of appellant's guilt of second degree murder or voluntary manslaughter constituted a violation of both state and federal law. Appellant is entitled to a trial where a properly-instructed jury is able to fully consider the range of offenses encompassed by his actions. That can only be achieved by a reversal of his judgment and sentence.

III

TROY HOLLOWAY'S OUT-OF-COURT STATEMENTS AND TRIAL TESTIMONY WERE INADMISSIBLE BECAUSE THEY WERE INVOLUNTARY AND COERCED

Troy Holloway gave a statement to the police in 1995 relating to the manner in which he obtained a nine-millimeter pistol; the statement did not inculpate appellant. Two years later, after a coercive telephone interrogation by Detective Franks, which occurred while Holloway was under the watchful eye of his military superiors, he changed his story and incriminated appellant. He then testified against appellant at trial in a manner that tracked his coerced statement. Respondent believes there was no coercion; that if there was coercion the taint of the coercion dissipated by the time of the trial; and if there was coercion and the taint had not

dissipated, the admission of the evidence was harmless error. Respondent is wrong on all counts.

A. Troy Holloway's Out-of-Court Statements Were Involuntary Because They Were Obtained by Coercion

A witness's statements are coerced if they are the product of police conduct which overcomes the person's free will. (*People v. Lee* (2002) 95 Cal.App.4th 772, 782.)[12] This determination is made by assessing the totality of the circumstances surrounding the interrogation (*People v. Hill* (1992) 3 Cal.4th 959, 981), and this Court independently reviews the record to make a determination regarding coercion. (*People v. Boyer* (2006) 38 Cal.4th 412, 444.) A significant factor in assessing the coercive nature of the interrogation in this case is the setting in which it took place–aboard a navy ship in the presence of three superior officers. (AOB 212-213.) Respondent does not assert that this type of setting is not a factor which is inherently coercive, so it should be taken as a given that it is.

Basically, respondent contends that the telephone interview of Holloway was not coercive because Detective Franks did not tell Holloway what to say or that he had to testify in any particular manner, but rather that he merely told Holloway to tell the truth. It is this emphasis on the assertion that Franks's ultimate goal was simply to get Holloway to tell the truth that causes respondent to dismiss Franks's threats to have Holloway jailed and

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[12] Respondent takes appellant to task for relying upon cases pertaining to coerced statements taken from a defendant; asserting that such cases do not bear on the analysis of this issue. (RB 92.) This is incorrect. When determining whether coercion was present, courts use the same analysis when considering a witness's statements as they would use when considering a defendant's statements. (*People v. Lee, supra,* 95 Cal.App.3d at p. 785; *U.S. v. Gonzalez* (10th Cir. 1999) 164 F.3d 1285, 1289, fn. 1.)

his misrepresentations that the trial court was mad at Holloway and that Franks was acting as an agent of the trial court. (RB 93.) It also causes respondent to dismiss appellant's assertion that Holloway changed his statement only because of a desire for leniency. (RB 94.) Respondent's construction of the record, however, begs reality.

It is true that at one point Franks told Holloway that the judge would force him to come to court and tell the truth, but this statement followed a long diatribe which essentially told Holloway that nobody believed his original statement, that the trial court had told Franks to call Holloway and report back to him, and that the trial court would then determine whether it should call Holloway's commanding officer and have him taken into custody. (AOB 204.) It is clear that Holloway interpreted this as a threat that he should change his testimony, because his follow-up question to Franks was whether the judge could hold Holloway in contempt if he told the truth but the judge did not believe him. (AOB 205.) Rather than make clear to Holloway that the only requirement was that he tell the truth, as respondent asserts, Franks made an ambiguous statement to Holloway that conveyed the impression there were people willing to contradict his story, so it would not be believed; inferentially supporting Holloway's fear that the judge might hold him in contempt if he chose to not believe him. (AOB 205.)

In fact, even after this supposed urging to simply tell the truth, Holloway maintained that his original statement was the truth. (AOB 205.) Franks continued with the interview and ultimately told Holloway directly that the judge had ordered him to speak to Holloway and take him into custody if he did not believe Holloway's story. Then Holloway would be taken before the judge and held in contempt if the judge did not believe his

story. (AOB 206-207.) Franks followed this by telling Holloway that his best hope in avoiding this fate was to work with him to put appellant "behind bars." (AOB 207.)

Only after the exchanges described above, and a few extra garnishes–like telling Holloway that he could be a cooperative witness (cooperative apparently meaning one who told the story Franks wanted to hear) or wind up in handcuffs–did Holloway alter his statement to reflect what Franks sought. (AOB 208.) The facts of the interview hardly reflect the attitude or conduct of an officer who merely was exhorting a witness to tell the truth.

Respondent's assertion that there was no coercion because Franks did not tell Holloway what to say requires a rather cribbed reading of the record. A commonsense reading of the record demonstrates that he did tell Holloway what to say by providing to him a scenario that fit the prosecution's theory of the case. (AOB 205-206.) Holloway then took what had been told to him, added a few minor facts, and recited it all back to Franks. (AOB 208.) His eagerness to adopt the theory provided to him is reflected by his final query of Franks as to whether the whole story had now come together with what he said. Franks, of course, having now heard his own theory of prosecution recited back to him, acknowledged that it had now all come together. (AOB 209.) While respondent is correct that Franks did not literally tell Holloway the exact words to say, that is hardly the point.

Respondent also misconstrues the record, and misunderstands the thrust of the law, when it concludes that because Holloway was never charged with an offense, leniency could not be at issue here. (RB 94.) Telling Holloway that if he changed his statement to reflect the facts that fit

Franks's theory of the offense would make him a cooperative witness, whereas sticking to his original statement would put him in peril of both military and civilian custody, constitutes a promise of leniency for changing his statement. The fact that he had not been charged with an offense is meaningless.

B. The Coercion Affected Holloway's Trial Testimony

Both parties agree that the resolution of whether Holloway's trial testimony should have been excluded rests upon whether the testimony presented at trial can be considered to be the result of coercion. (AOB 219; RB 92.) Respondent believes that any coercion that existed at the time Holloway was pressured into changing his statement to conform to the prosecution's theory of the case can be distinguished from his trial testimony. (RB 93.) Given the circumstances of this case, that is not a realistic assessment.

Respondent's view that there was no coercion at the time of Holloway's trial testimony is essentially based upon two premises: 1) two months passed between the time of the telephone interview with Franks; and 2) the defense extensively cross-examined Holloway regarding his trial testimony. (RB 92-93.) The factual premises may be accurate as a literal matter, but they neither negate the effect of the coercive interview nor do they operate to render the trial testimony freely and voluntarily given as a matter of law.

Respondent cites to *People v. Boyer* (2006) 38 Cal.4th 412 to support its proposition that an "ample period of reflection" existed in this case to ameliorate any taint from the coercive interrogation. (RB 93.) Surely, respondent jests. In *Boyer*, the time period at issue was nine years. (*Id.* at p. 445.) Here, it was two months. Hauling the phrase "ample period

of reflection" from *Boyer*, as respondent does, and inserting it into this case is unwarranted.

Of further import in assessing whether there was an "ample period of reflection" is whether there is an indication there existed intervening factors that may have served to remove the earlier coercion. In *Boyer*, this Court pointed to the fact that during the intervening nine years the witness realized that the police could not in fact take her children, as she earlier feared. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 445.) In other words, this Court found the trial testimony was untainted by any earlier coercion because there was a nine-year lapse of time during which the witness realized that the threats made by the police could not be effectuated. Neither of those factors exist in this case, so respondent's use of *Boyer* is unavailing.

This case also presents a unique circumstance that appellant has not found to be present in other cases discussing this issue: the fact that the police interrogator told the witness in a direct and confrontational fashion that he was acting on behalf of the trial court and that if the trial court was not satisfied with the nature of the witness's testimony the witness would be placed in jail. Two months after telling this to Holloway, Holloway found himself sitting in front of the judge who was supposedly the person responsible for Detective Franks's coercive interrogation. It is hard to see how the taint of the coercive interrogation would have dissipated under these circumstances.[13]

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[13] Respondent also asserts that the taint was dissipated because the record does not demonstrate that military personnel were present during Holloway's testimony. (RB 93-94.) This is of no moment. Holloway was still in the military at the time of his trial testimony and it had been made

(continued...)

Nor does the fact of cross-examination serve to remove the effect of the coercive interview. (RB 92-93.) While it is true that the ability to cross-examine the witness can be a factor to consider in assessing whether a defendant was denied a fundamentally fair trial (see *People v. Douglas* (1990) 50 Cal.3d 468, 503), it is not a factor that automatically renders the trial fundamentally fair. In other words, the fact that the defendant was afforded the right of confrontation does not end the inquiry as to whether the trial testimony was coerced but is merely a circumstance to consider. It is of negligible value here, where the coercive statement was obtained so close to the trial and the witness believed himself to be under the same threat of incarceration by the judge as he had been at the time he provided the coerced statement.

C. Appellant Was Prejudiced

Respondent's view that the admission of this evidence did not prejudice appellant is based upon the premise that there was other evidence supporting the two significant areas addressed by Holloway's statement and his testimony. Consequently, the admission of Holloway's evidence could not have been prejudicial. (RB 94-95.) This approach overstates the value of the other evidence and ignores the dynamic of how this particular trial unfolded.

The first area addressed by respondent is Holloway's testimony that appellant gave him a nine-millimeter handgun after Josh Rexford was shot. Respondent asserts that Holloway's testimony could not have been harmful

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[13](...continued)
clear to him by Franks that if he did not cooperate he could be subject to both military and civilian arrest. He hardly needed the physical presence of military officers to remind him of this threat.

because Patrick Wiley testified to the same fact. (RB 95.) Respondent underplays the conflicts surrounding this issue, and by so doing underplays the significance of Holloway's testimony.

Contrary to how it appears from respondent's recitation, there was more testimony on this issue than just that of Wiley and Holloway. Two of Holloway's friends testified that rather than see appellant hand a nine-millimeter pistol to Holloway, they saw a black male hand him a tightly rolled up paper bag. (RT 12:3615-3617, 3770-3772.) Bennet Brown testified he did not see anyone give anyone anything while at Holloway's house. (RT 11:3390-3392, 3401.) Appellant testified he did not give Holloway a gun. (RT 15:4827.) And, of course, in his pre-coercion statement to the police, Holloway said he received the gun from Steve Blackshire. (4 SCT 1:1139-1142.)

Eliminating Holloway entirely from the equation, the evidence would create a stark conflict between appellant and Patrick Wiley, with other evidence presenting an exchange of some object in a paper bag by some unidentified person to Holloway; although Bennet Brown's testimony places even that in doubt. With Holloway's testimony, however, the equation significantly changes. Now there are two persons presenting affirmative testimony that appellant handed Holloway a nine-millimeter gun; one of them being the recipient of the gun. There is no way that it can be found that the state has shown that adding Holloway's coerced testimony to this mix was harmless beyond a reasonable doubt.[14]

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[14] Respondent does not contest that the harmless error test to apply in this instance is the test set forth in *Chapman v. California* (1967) 386 U.S. 18, 25. (AOB 221.)

The second area addressed by respondent relates to whether appellant was actually looking for Josh Rexford prior to the shooting. Respondent relates this to planning activity and offers that the record contains an abundance of evidence relating to planning activity. (RB 95.) Respondent's approach, however, decontextualizes the testimony.

The key point about Holloway's testimony is that it related appellant's activities to a search for Josh Rexford, as opposed to an inquiry about another person named Josh, whose last name was unknown. (See RT 11:3445-3448, 3455-3458, 3468-3469; 12:3556-3557.) Contrary to respondent's assertions, Holloway's testimony also made it seem as if Linda Farias's testimony about how appellant and others were talking about "Josh," must certainly have meant Josh Rexford. (See RT 11:3431; 15:4706.) It could not be stated any better than Holloway himself asserted to Detective Franks: "The whole story comes together now that I have told you." (3 SCT 3:846.) An assertion that caused Franks to respond: "I know." (3 SCT 3:846.)

Respondent also asserts that virtually all of the testimony relating to appellant's activities at the apartment complex renders harmless the admission of Holloway's testimony. (RB 95.) This fails to account for the fact that appellant testified and provided an explanation for his presence and the activities that ensued. The issue for the jury was not whether the activities described by respondent took place, but whether to credit appellant's explanation of them. It was here that Holloway's testimony was most harmful. Its significance was not related to planning activity, as respondent asserts, but to motive. Holloway's testimony provided the missing link to the prosecution's motive theory and was critical to refuting appellant's explanation for his presence at the apartment complex. The

state cannot show beyond a reasonable doubt that the admission of the evidence for this purpose was harmless.

IV.

THE TRIAL COURT ERRED BY DENYING APPELLANT THE RIGHT TO REPRESENT HIMSELF DURING THE PENALTY PHASE CLOSING ARGUMENT

In the context of sentencing, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." (*Green v. United States* (1961) 365 U.S. 301, 304 [addressing right of allocution under federal rules while acknowledging that right itself dates to 1600's].) This fundamental right—the right to represent oneself and to plead one's own case directly to those holding the power of lenience—was violated in this case for no better reason than a belief by the trial court that appellant lacked good judgment and appellant's attorneys were better suited to the task. This decision was error and mandates reversal.

Respondent incorrectly argues that the motion was "untimely" despite making no showing that granting the motion would have delayed the proceedings and despite proffering only insubstantial allegations that self-representation would have caused any disruption to the ongoing trial. Proceeding from the flawed premise that the motion was untimely, respondent asserts that the ruling was sound based primarily on two factors: 1) that trained defense counsel was in the best position to tell the jury the meaning of the penalty phase evidence; and 2) that allowing appellant to argue risked "generating considerable objection by the prosecution" which would upset appellant, who theoretically might voice anger. (RB 100.) These arguments are nothing but poorly concealed efforts to turn into

legitimate considerations the trial court's erroneous reliance on appellant's lack of legal training as a basis for denying self-representation.

A. Analysis of the Timeliness of a *Faretta* Motion Must Only Consider the Disruption and Delay Posed by a Motion for Self-Representation

As explained in detail in appellant's opening brief, there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice. (AOB 224-230.) Cases analyzing the timeliness of motions brought pursuant to *Faretta v. California* (1975) 422 U.S. 806, to the extent that they have construed "timeliness" in a manner which allows trial courts to deny motions that are allegedly "untimely" but present no threat of delay or disruption, erect an unconstitutional barrier to defendants' *Faretta* rights.

Respondent fails to challenge appellant's interpretation of the timeliness requirement at all, instead simply concluding—incorrectly—that *all* motions filed after the beginning of trial are "untimely" and thus can be denied within the trial court's discretion. (RB 98.) Respondent's simplistic analysis of timeliness, performed in a conclusory manner completely divorced both from the purposes which the timeliness requirement is meant to serve, and from the context of the motion itself, contradicts this Court's understanding of the principle.

Because respondent relies heavily on cases interpreting *People v. Windham* (1977) 19 Cal.3d 121 in the capital context, it is necessary to clarify potential confusion deriving from this Court's uncritical repetition of certain dicta in *Windham*: an ambiguous suggestion in a footnote that an

"untimely" *Faretta* motion is "based on nonconstitutional grounds." (*Id.* at p. 129, fn. 6.)

Appellant's position is that *Windham* itself is completely compatible with *Faretta* to the extent that it provides guidance on how to *implement* the federal constitutional right of self-representation when it is invoked in a fashion that may threaten to disrupt the trial process. (AOB 227-228; see *Martinez v. Court of Appeal of Cal.* (2000) 528 U.S. 152, 162 [noting that lower courts have imposed timeliness requirements which reflect the view that "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"].) This Court's subsequent unsupported statements that an untimely *Faretta* motion is based on "non-constitutional grounds" (see, e.g., *People v. Bloom* (1989) 48 Cal.3d 1194, 1220) are confusing and incorrect, at least as this Court has applied the right of self-representation in the capital context.

Not only does there not exist a right to self-representation in California (*People v. Sharp* (1972) 7 Cal.3d 448 disapproved by *Faretta v. California* (1975) 422 U.S. 806), but self-representation in capital cases is specifically prohibited under California law. (See Pen. Code, § 686, subd. (b) [defendant in capital case "shall be represented in court by counsel at all stages of the preliminary and trial proceedings"]; see also *People v. Taylor* (2009) 47 Cal.4th 850, 872, fn. 8 ["*Sharp* remains good law as to the California Constitution and Penal Code. . . . and the Penal Code (§ 686.1) now provides that capital defendants 'shall be represented in court by counsel at all stages' of trial"].) The only source of authority for departing from settled state law on the matter is the existence of contrary federal law: *Faretta* itself.

If a supposed "untimely" *Faretta* motion had no basis in the federal Constitution, California trial courts sitting in capital cases would have no authority to grant it, contrary to decades of jurisprudence of this Court sanctioning mid-trial grants of *Faretta* motions in capital cases. (Cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1220 [affirming judgment where trial court granted supposedly untimely *Faretta* motion]; *People v. Clark* (1992) 3 Cal.4th 41, 109 [same], *People v. Bradford* (1997) 15 Cal.4th 1229, 1367 [same].) Thus, the only fair reading of *Windham* is that it provides guidance to trial courts in deciding how to *implement* the defendant's federal constitutional rights when the proximity to trial could possibly upend the orderly administration of justice if the motion is granted.

Given that *Windham* implements the federal constitutional right recognized under *Faretta*, this Court is not permitted to limit the right of self-representation beyond the framework—analyzing threats of delay and disruption—dictated by *Faretta*. "However well advised such a development might be, this court is not empowered to narrow the established scope of a federal constitutional right [to self-representation]." (*People v. Butler* (2009) 47 Cal.4th 814, 829.)

B. Timeliness is Not Based Upon a Fixed and Arbitrary Point in Time But on a Functional Analysis of the Threat of Disruption and Delay

Respondent provides, without analysis, a simplistic syllogism in order to conclude that appellant's motion for self representation was untimely: 1) only *Faretta* motions "invoked *within a reasonable time before the start of the trial*" are timely; 2) appellant's motion was made at the conclusion of penalty phase; 3) therefore, the motion was untimely and properly denied. (See RB 98, 102, italics in original.)

Although decisions by this Court have occasionally provided seemingly absolute formulations of timeliness such as that cited by respondent (see e.g., *People v. Burton* (1989) 48 Ca1.3d 843, 852), this Court has recently clarified that timeliness is a flexible and functional inquiry made with an eye to the purposes that evaluations of "timeliness" are meant to serve.

"*Faretta* nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case," nor do this Court's "prior cases preclude a trial court from considering the totality of the circumstances in assessing the timeliness of a request for self-representation." (*People v. Lynch* (2010) 50 Cal.4th 693, 724.) "Timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Ibid.*) An analysis based on these considerations "is in accord with the purpose of the timeliness requirement, which is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'[Citation.]" (*Ibid.*)

This Court has delineated several factors that should be considered when evaluating the "totality of the circumstances," aside from the precise timing of the motion, to determine whether self-representation poses a threat of disruption. These are "factors [such] as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726.) Such factors— which ultimately focus on the

underlying purpose of the timeliness requirement—weigh against a finding that appellant's motion was untimely in this case.

The *Lynch* factors–even given their broadest import–do not favor a finding of untimeliness because all that was left here was a brief summation and clarification of the meaning and import of the evidence introduced at penalty. (RT:18:6041.) Thus, none of the factors that may otherwise be a source of delay or disruption were present here.

Although appellant could conceivably have requested to proceed pro se for penalty argument at an earlier date, his desire to present his own argument was triggered in large part by the jury's rejection of his testimony at guilt. (See RT18:6041 [appellant wished to present argument to jury to show that he "personally accept[ed] their verdict because of the evidence that they were given"].) Appellant could not arrive at this conclusion until after the guilty verdict. (Cf. *People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5 [arguably tardy request for self-representation should be granted where the "very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion"].) To hold a motion for self-representation made by a defendant untimely when the "earliest opportunity" to make the motion arises at a time when an interpretation of the law would make it already tardy "would effectively thwart defendant's constitutional right to proceed in propria persona as established in *Faretta v. California* (1975) 422 U.S. 806." (*People v. Herrera* (1980) 104 Cal.App.3d 167, 174 [motion made on the eve of trial timely where reason for requesting self-representation arose at that point].)

Perhaps of equal importance, there is no reason appellant would have thought that an earlier request would be necessary—and there existed good reason for him to think such a request would actually be disruptive. When

appellant had previously voiced dissatisfaction with his attorneys, they were relieved by the trial court. (RT 1A:1.) Had appellant voiced a desire to proceed pro se at an earlier juncture, he would understandably be concerned that the court would force him to present the entire penalty phase himself or possibly disrupt the proceedings by appointing new counsel to assist him. (Cf. *People v. Dent* (2003) 30 Cal.4th 213, 221-222 [regardless of alleged proximity to trial, *Faretta* motion timely where its purpose "was to expedite the proceedings and avoid the delay inherent in the appointment of entirely new counsel"].) The most natural and *least* disruptive time for appellant to approach the court was precisely when he did: when all that remained of the defense case was a presentation of argument to the jury.

Tellingly, respondent never asserts that appellant was attempting to "misus[e] the motion to unjustifiably delay trial or obstruct the orderly administration of justice," the very evil that the timeliness requirement attempts to avoid. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 724.) Instead, respondent relies heavily upon the trial court's "valid" concern that a closing argument by appellant might generate objection by the prosecution which, in turn, would upset appellant, who might voice his frustration. (RB 100-101.) As discussed in more detail below (see, *infra*, C.3) *every* closing argument by a pro se litigant risks objection and potential frustration. Trial courts do not have blanket authority to deny self-representation due to factors present in all cases.

The "possibility of disruption or delay, . . . exists to some degree with virtually all pro se litigants and the mere possibility alone is not a sufficient ground to deny self-representation. Only when the pro se litigant 'is and will remain' so disruptive as to significantly delay the proceedings or render them meaningless and negatively impact the rights of the [litigant]

in a prompt and fair hearing may the court exercise its discretion to deny self-representation." (*In re Angel W.* (2001) 93 Cal.App.4th 1074, 1085.)

In short, aside from a purely mechanical application of timing which this Court has rejected, under the totality of the circumstances in this case, there existed no threat that the trial would be delayed or meaningfully disrupted by granting appellant's motion. Had the motion been granted, appellant would have presented his argument to the jury and the trial proceedings would have concluded with the jury beginning deliberations at the conclusion of argument. (Cf. *People v. Hardy* (1992) 2 Cal.4th 86, 196 [affirming trial court's denial of *Faretta* claim asserted prior to penalty phase where "[w]e interpret the trial court's comments as meaning the trial had progressed too far to make a change, with all the delay such a change would engender."].) Therefore, because the timing of the motion did not implicate the concerns undergirding *Windham*, the motion was timely and should have been granted.

C. Even Assuming the Motion Was Untimely, the Trial Court's Denial of Appellant's *Faretta* Motion Was Error

As noted in appellant's opening brief, in assessing an untimely *Faretta* motion under *Windham*, the trial court must consider factors such as: 1) the quality of counsel's representation; 2) the defendant's prior proclivity to substitute counsel; 3) the reasons for the request; 4) the length and stage of the proceedings; and 5) the disruption or delay which might reasonably be expected if the motion were to be granted. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

Respondent cites three of these factors—quality of counsel's representation, the length and stage of the proceedings, and the potential disruption—and concludes they all weigh "heavily against" appellant. (RB

100-101 & fn. 33.) Respondent also tangentially discusses the reason for the request, suggesting that it was motivated by a mere difference in trial tactics. (RB 101.) Respondent's conclusions are flawed.

1. The Reason for the Request Was Not a Mere Disagreement Over Trial Tactics and Itself Implicated Constitutional Rights

The purpose of the *Windham* timeliness requirement is "to prevent the defendant from misusing the [*Faretta*] motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton*, *supra*, 48 Cal.3d at p. 852.) The "reasons for the request" factor is therefore not simply one among many. As recognized in *Windham* itself, if this factor is found to favor the defendant, it is dispositive: "When the lateness of the request . . . can be reasonably justified the request should be granted." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.)

Appellant simply wished to represent himself for the penalty phase closing argument. Respondent presents no explanation as to why it would even have occurred to appellant to make a request for self-representation for the penalty phase closing argument well before the beginning of the guilt phase. (See *People v. Hardy*, *supra*, 2 Cal.4th at p. 194 [guilt and penalty phase are considered one trial for purposes of *Faretta* motion].) Moreover, because appellant's prior attorneys had previously been relieved, appellant had good cause for concern that an earlier request to proceed pro se would in fact *disrupt* the trial process, the precise problem that *Windham* intends to avoid. Because appellant only wished to represent himself for the final portion of trial, his allegedly tardy invocation of the *Faretta* right was "reasonably justified" and the the request should have been granted. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.)

The "reason for the request" factor not only considers the justification for the delay in proffering the motion, but also the legitimacy of the basis for the defendant's desire to proceed without counsel. In *Windham* itself, for example, the "sole reason put forth by defendant to support his request was the claim that his admittedly competent counsel had been unable to present a stronger case on the theory of self-defense." (*People v. Windham*, *supra*, 19 Cal.3d at p. 129.) Reviewing the overwhelming evidence undercutting this theory, the *Windham* court found it "no small wonder that defense counsel had a difficult task in presenting such a defense" and found the defendant's complaints about his attorney without basis. (*Ibid.*)

Respondent characterizes the basis of appellant's request as a mere "difference in trial tactics" which does not support a grant of an untimely request for self-representation. (RB 101.) Respondent marginalizes the importance of the constitutional right appellant attempted to invoke and misconstrues the meaning of this factor.

Where self-representation is requested for a legitimate reason, and where there is no request for a continuance and no reason to believe there would be any delay or disruption, the trial court's denial of a *Faretta* motion is an abuse of discretion. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 593; see also *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [trial court abused discretion where "[t]here is no indication that appellant sought to delay the proceedings or that his self-representation would obstruct the orderly administration of justice," there was no illegitimate proclivity to substitute counsel and defendant "had a 'profound' difference of opinion with defense counsel regarding the manner in which the case should proceed"].)

At bottom, appellant's desire to represent himself stemmed from his heartfelt desire to "look at these people in their faces, in their eyes, and address them to the best of my ability before they go in that jury room and deliberate on my life." (RT18:6042.) These goals reach to the heart of the type of normative decision that the jury faces in deciding between life and death in a capital case and represents the type of "profound" need that transcends petty differences over trial tactics. (See *People v. Rogers*, *supra*, 37 Cal.App.4th at p. 1057 [profound difference in approach to case supported grant of untimely *Faretta* motion].) The United States Supreme Court has directly recognized the unparalleled emotional force that a direct plea for lenience from a criminal defendant may have. (*Green v. United States*, *supra*, 365 U.S. at p. 304.) As put by one court, denying the defendant an opportunity to address his sentencer face-to-face is "tantamount to denying him his most persuasive and eloquent advocate" and denies the sentencer "the opportunity to take into consideration [the defendant's] unique perspective on the circumstances relevant to his sentence, delivered by his own voice." (*United States v. Adams* (3d Cir. 2001) 252 F.3d 276, 288.)

Thus, respondent's repeated assertions that appellant's attorneys were "in the best position" to conduct the intended trial "strategy" during closing argument at penalty misses the point entirely. (RB 100, 102, fn 33.) It is precisely *because* appellant was not a lawyer paid to employ "strategy" to defend his client that an argument directly from appellant's mouth would have the capacity to sway the jury in a way that no other voice could. The desire to make a direct plea for mercy to the sentencer presents a compelling basis for requesting self-representation. Because appellant's request was grounded in "a legitimate reason" and because there was no

request for a continuance, nor a reason to believe there would be any delay or disruption, the trial court's denial of appellant's *Faretta* motion constituted an abuse of discretion. (*People v. Nicholson*, *supra*, 24 Cal.App.4th at p. 593.)

2. The Trial Court's Focus on Quality of Representation at Trial Was Erroneous

Respondent argues that the trial court's finding that the quality of representation by appellant's attorneys was "wonderful" is a factor weighing heavily in support of the denial of self-representation. (RB 100; RT18:6043.) Respondent misapprehends the meaning of this factor.

The *Windham* factors exist to facilitate the efficient administration of justice, rather than to protect a defendant's rights. (*People v. Clark, supra*, 3 Cal.4th at p. 109.) Thus, the reason for assessing the quality of representation is not to compare the quality of a defendant's lawyers to the capabilities of other attorneys generally to see how well the defendant's lawyers are protecting the defendant's rights. Nor is it to compare the capacity of trial counsel to that of the client. Indeed, this Court has repeatedly stated that the capacity of the defendant to represent himself with the skill of a trained professional is irrelevant under *Windham*. (*People v. Hamilton* (1988) 45 Cal.3d 351, 369 [defendant's lack of competence in law irrelevant consideration].)

To evaluate trial counsel in comparison with a *pro se* litigant or other attorneys in capital cases would make no sense: even in cases where an attorney's performance is mediocre, this fact would not itself transform a request for self-representation into a good idea which trial courts should generally support. (Cf. *People v. Salazar* (1977) 74 Cal.App.3d 875, 888 [*Faretta* right exists "because the defendant has a personal right to be a

fool"].) In fact, this Court has never impugned the quality of any attorney in the numerous cases in which it has analyzed the *Windham* factors.

The reason the quality of the attorney's representation is relevant is because it sheds light on the reasons underlying the request and, correspondingly, informs the ultimate purpose of the rule—avoidance of disruption and delay. If there is a genuine basis for the defendant's dissatisfaction with attorney representation, it supports the conclusion that the request is not made for purposes of delay. (See *People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn.5 [discussing hypothetical case in which defendant disagrees with attorney's desire for continuance].) On the other hand, if the attorneys are performing well and resolving disputes with their clients in good faith, this may support a finding that the request has the intent or effect of simply delaying or disrupting the proceedings. (See *People v. Roldan* (2005) 35 Cal.4th 646, 684 [court properly relied on finding that defendant's attorneys where "excellent" where it supported conclusion "that no irreconcilable rift had occurred between client and counsel, and that defendant was merely attempting to delay the trial"].)

For these reasons, respondent's citation to *People v. Marshall* (1996) 13 Cal.4th 799 actually undercuts its argument. In *Marshall*, the defendant expressed concern with the progress of the investigation and voiced a belief that "he alone could attempt an inquiry of certain witnesses that would elicit the truth for the jury." (*Id.* at p. 827.) It was in this context that the trial court "noted trial counsel's competence did not appear to be in question, and observed that the sort of investigation defendant appeared to contemplate would be infeasible given defendant's custodial status." (*Ibid.*) In other words, the trial court in *Marshall* properly assessed trial counsel's performance in the context of determining that there was no legitimate need

for self-representation, which, as contemplated, would be "infeasible"—*i.e.* likely to cause disruption and/or delay if the request was accommodated.

As explained above, the reason for appellant's request was that he wished to address the jury with his own voice, look at the jurors eye to eye, and demonstrate that he accepted their verdict. (18RT:6041-6042.) Unlike exaggerated or baseless disagreements with trial counsel addressed in many other cases (see, e.g., *People v. Ruiz* (1983) 142 Cal.App.3d 780, 784 [defendant concerned that public defender collaborating with prosecutor and not investigating theory he had been framed by victim]), appellant's request centered upon a legitimate and undeniably valid concern: that he and no one else was the "expert" on his own life and was in the best position to ask for it to be spared. (RT18:6041; *United States v. Adams, supra*, 252 F.3d at p. 288 [recognizing defendant has "unique perspective on the circumstances relevant to his sentence"].) Thus, the trial court's assessment of the professionalism of counsel during trial, as opposed to the bearing counsel's performance had on the basis for the request, focused on the wrong issue entirely and contributed to its abuse of discretion.

Respondent also takes issue with the idea that anyone but trial counsel would be suited to make a plea for mercy to the jury because legal "strategy" concerning the presentation of penalty phase evidence dictated the proper course of presenting a closing argument. (RB 100, 102, fn. 33.) This is simply not the case. Closing arguments "should 'sharpen and clarify the issues for resolution by the trier of fact,' [Citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 6.) One powerful answer is for the defendant to present a personal argument for leniency.

Therefore, in the context of this motion, the trial court's focus on trial counsel's alleged skill during trial was erroneous.

3. Threat of Disruption and Delay

Appellant was fully prepared to present final argument on his own behalf without the necessity of a continuance. (AOB 232.) While the fact that appellant did not seek a continuance may not be determinative (*People v. Hamilton,* (1985) 41 Cal.3d 408, 421), because avoidance of disruption and delay underpins the entire *Windham* rationale (*People v. Burton, supra,* 48 Cal.3d at p. 852), it is obviously an important factor.

Respondent does not assert, nor could it credibly assert, that the record supports a view that granting self-representation would have inevitably delayed the trial; it is therefore uncontested that this component completely favors appellant. Instead, respondent focuses on two issues: 1) the trial court's concern with the potential risk of prosecutorial objection to improper argument; and 2) the risk that appellant would voice frustration at adverse rulings. (RB 100-101.) Because both factors are legally insufficient to support a denial of self-representation, the trial court's decision constituted an abuse of discretion.

a. The Risk of Potentially Improper Argument Alone Was a Legally Irrelevant Consideration

Respondent contends that the trial court had a valid concern that appellant would accidentally provide additional testimony instead of pure argument. (RB 100.) Although a trial court may generally have grounds to believe that a defendant might not fully understand all legal rules governing argument, such lack of legal knowledge does not empower a trial court to deny self-representation.

Pro se litigants lack the legal education lawyers have been afforded, a source of knowledge that aids in navigating the complex rules governing any trial. Every case in which a litigant represents himself or herself therefore poses a heightened risk of objection at every stage of the proceedings, including argument. (See *In re Angel W.*, *supra*, 93 Cal.App.4th at p. 1085.) Objections to improper argument are, however, hardly unique to arguments of pro se litigants. In fact, the specific legal error which concerned the trial court—that an advocate would improperly inject factual material during statements at trial instead of simply relying upon the evidence—is so pervasive that an admonition against this error has been included in the canon of instructions. (See CALJIC No. 0.50.)

Despite the ever-present threat of objection to improper argument by both parties in a criminal case, the legislature has wisely determined that ruling on such objections is the duty of the trial court. (See Pen. Code, § 1044.) Although the temptation to provide non-record evidence during closing argument may be increased by self-representation, that is a fact in every case in which a defendant chooses self-representation. Courts have long managed to address this issue without incident or the necessity of denying self-representation.

The trial court expressly found that appellant had no intention of testifying during argument (RT18:6044), and made no finding that appellant would wilfully disregard its rulings should he mistakenly cross the line and present testimony. There was no suggestion below that appellant would ignore the trial court's guidance before presenting his argument or after objections arose. Nor is there any reason to believe that the jury could not be admonished to disregard improper statements during argument, a commonplace occurrence in criminal trials, if the issue arose despite

precautionary measures. The trial court's focus upon the heightened *risk* that objections would occur therefore serves largely to disguise factors irrelevant to the trial court's consideration: appellant's lack of legal education and "breathtakingly bad judgment." (RT18:6044.) The trial court's reference to the risk of objection, alone, is an improper basis upon which to deny self-representation.

b. The Record Does Not Support the Legal Conclusion that Appellant Would Have Disrupted the Trial Had the Motion Been Granted

The only link to the potential of disruption was the trial court's reference to a concern that appellant might "lose [his] temper" in response to any objections during argument. (RT18:6044.) The trial court itself, however, conceded that there was "not really much of a record to base this [concern] on." (RT18:6044.) Respondent attempts to bolster the trial court's admittedly ungrounded claim that appellant would "lose his temper" and disrupt the trial by citing an isolated use of profanity by appellant after his motion was denied. (RB 98, 101.)

Appellant was understandably frustrated with the trial court's erroneous rejection of his request that he be allowed to conduct closing argument. Although this does not excuse his decision to use profanity to express his frustration, the isolated use of profanity does not interfere with the administration of justice in a constitutionally meaningful respect. (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 185 [regrettable use of profanity by stand-by defense counsel in front of the jury did not interfere with defendant's *Faretta* rights].)

When determining whether to revoke or deny self-representation based on a defendant's disruptive misconduct, the trial court "must

undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*People v. Welch* (1999) 20 Cal.4th 701, 735.) Factors courts consider in making this determination include "the nature of the misconduct and its impact on the trial proceedings;" "the availability and suitability of alternative sanctions;" "whether the defendant has been warned that particular misconduct will result in termination of in propria persona status;" and whether the defendant "has 'intentionally sought to disrupt and delay his trial.'[Citation.]" (*People v. Carson* (2005) 35 Cal.4th 1, 10.) The trial court did not even begin to undertake an analysis of these factors; an analysis which would have conclusively demonstrated that granting appellant's motion would not have threatened undue "disruption" as understood by this Court's decisions.

Denying the right to self-representation based on a threat of disruption does not serve the goal of precluding even slight risks of disturbance in the trial process. For example, even a "demonstrably dangerous defendant" may not be denied his right to self-representation if measures may be taken to ensure courtroom security. (*People v. Butler* (2009) 47 Cal.4th 814, 829; *People v. Hamilton, supra*, 45 Cal.3d at p. 369.) With regard to more common trial disruptions, this Court's decision in *People v. Welch, supra*, 20 Cal.4th 701, is instructive.

In *Welch*, this Court affirmed the trial court's decision to deny self-representation where "a review of the record of pretrial proceedings prior to deciding the *Faretta* motion ... reveal[ed] a number of instances in which defendant engaged in disruptive behavior." (*People v. Welch, supra,* 20 Cal.4th at p. 735.) Specifically, the record showed the defendant had

"belligerently denied awareness of a calendar date that was set in his presence; he turned his back on the trial court when addressing it; he interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point; he accused the court of misleading him; he refused to allow the court to speak and he refused several times to follow the court's admonishment of silence." (*Ibid.*) The Court explained that, "*while no single one* of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol." (*Ibid.*, italics added.)

In contrast, the trial court here denied appellant's request without citing a single instance of courtroom misconduct. Respondent seeks to support the denial of the *Faretta* request with a single instance of misconduct made *after* the denial of the *Faretta* motion and without any prior warning that the use of profanity would negatively impact the right to self-representation. (Cf. *People v. Carson*, *supra*, 35 Cal.4th at p. 10 ["The court should . . . consider whether the defendant has been warned"].) Apart from the obvious fact that this instance of misconduct played no part in the trial court's decision to deny self-representation, there is no indication that the trial court considered whether alternative sanctions might have rectified or corrected the potential for disruptive behavior. (*Ibid.* [court should consider "availability of alternative sanctions" and whether conduct might be "subject to rectification or correction"].) Although this Court has made clear that "[a] constantly disruptive defendant" may be denied the right to self-representation (*People v. Welch*, *supra*, 20 Cal.4th at p. 734), the trial

court's conclusion that appellant fell into this category without any evidence of courtroom misconduct constituted an abuse of discretion.

4. The Defendant's Prior Proclivity to Substitute Counsel

As explained in appellant's opening brief, appellant's proclivity to substitute counsel did not support the trial court's order, in that he made only one unequivocal *Marsden* motion prior to this request—a motion which was granted. (RT 1A:1.) Respondent does not seem to contest that this factor weighs in appellant's favor.

5. The Length and Stage of the Proceedings

Respondent argues that because appellant's request came at the end of trial, the factor of the length and stage of the proceedings "worked heavily against" him. (RB 101, fn. 33.) Respondent reasons that because the evidence was already presented by appellant's attorneys, appellant "was not as likely to understand the defense strategy (i.e., the purpose for the evidence), and hence, he was more likely to generate the objections and disruption envisioned by the trial court." (*Ibid.*) Respondent also notes that *Windham* addressed a request made just before closing argument in the guilt phase of a non-capital trial. (*Ibid.*; see *People v. Windham, supra*, 19 Cal.3d at p. 130.)

As discussed at length above, respondent's contention that appellant was not sufficiently trained to understand a sophisticated defense "strategy"is merely an attempt to reformulate an attack on his lack of legal education. This reasoning would apply to all *Faretta* motions. And in this particular case, there is no indication that the trial court was unable to manage improper argument through routine means: warning the defendant

prior to argument, sustaining proper prosecutorial objection, and admonishing the jury.

It is true that *Windham* addressed a request for self-representation late in trial, stating that "denial of the motion merely precluded defendant from presenting material to the jury while not under oath or subject to cross-examination." (*People v. Windham*, *supra*, 19 Cal.3d at p. 130.) However, the distinctions between this case and *Windham* are critical. First and most importantly, unlike in *Windham*, appellant had not "already presented his own version" at penalty. (*Id.* at p. 130.) Thus, allowing self-representation at closing argument was not merely a redundant exercise in presenting the defendant's story in defendant's own voice an additional time. Second, it was precisely because appellant had testified previously at guilt in this case that it was so critical that he be allowed to address the jury and convey that he "personally accept[ed] their verdict." (RT18:6041.) Third, unlike *Windham,* this was a penalty phase argument in which appellant sought to address a normative question about whether he deserved to live, a question which he was arguably in the best position to answer. Courts and commentators have long recognized the value of a defendant personally addressing the sentencer and requesting lenience, unlike the understandable hesitance courts have shown to allow self-representation during other trial proceedings. (See *Green v. United States*, *supra*, 365 U.S. at p. 304; Thomas, *Beyond Mitigation Towards a Theory of Allocution* (2007) 75 Fordham L.Rev. 2641, 2655-2657, 2666-2672 [allowing defendant to address sentencer directly serves to mitigate punishment and humanize defendant]; Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity* (1997) 97 Columbia L.Rev. 787,

805-806 [allowing defendants to speak at sentencing reminds jury of responsibility toward defendant as fellow human being].)

Ultimately, the timing of the motion presented no threat of disruption or delay. Therefore, in the circumstances of this case, the timing supported granting the motion.

E. Appellant's Penalty Judgment Must be Reversed

As explained in appellant's opening brief, the trial court's error warrants automatic reversal. (AOB 236-240.) Respondent does not contest that this is the proper remedy for a *Faretta* violation.

V.

THE USE OF APPELLANT'S JUVENILE CONVICTION TO PROVE THE PRIOR MURDER SPECIAL CIRCUMSTANCE WAS FEDERAL CONSTITUTIONAL ERROR

Appellant was made eligible for the death penalty in this case, in part, because he suffered a prior conviction for a murder committed when he was 16 years old. Appellant contends that it is unconstitutional to utilize a prior murder conviction obtained when a defendant was a juvenile for the purpose of imposing the death penalty (AOB 241-262); a contention that respondent disputes (RB 102-112). Respondent asserts both that the claim is not properly before this court and that even if it were, it is meritless. Respondent is wrong from both a procedural and substantive standpoint. It was reversible error to use appellant's prior juvenile murder conviction to satisfy the prior-murder-conviction special circumstance. (AOB 241-262.)

A. Appellant's Claim is Cognizable on Appeal

Prior to trial, defense counsel filed a motion to strike the prior-murder-conviction special circumstance allegation. Counsel asserted that the expunged conviction was not a basis for a special circumstance

allegation, was not admissible in the guilt phase of the trial to prove the truth of the special circumstance, and that Welfare and Institutions Code section 1772 did not provide for the use of an expunged conviction as the basis for a special circumstance because the statute failed to address special circumstances specifically. (CT 2: 321-324.)

At the hearing on the motion, defense counsel argued that the precise issue at stake in this case had never been dealt with by the California Supreme Court and distinguished *People v. Pride* (1992) 3 Cal.4th 195, 256-247. Defense counsel acknowledged that in *Pride* this Court held that Welfare and Institutions Code Section 1772 allowed a prior expunged conviction to be used to enhance punishment. (RT 4: 791.) But in this case, defense counsel argued, the issue was whether there is an exception to Welfare and Institutions Code section 1772 such that a prior expunged conviction could be used to form the basis of a special circumstance. (RT 4: 791-792.) Defense counsel asserted that the legislature provided for exceptions if a defendant was charged with being an ex-felon with a firearm, or when considering enhancing punishment, but that the statute did not provide for an exception when using the conviction as a basis for a special circumstance allegation. (RT 4: 792.) Counsel's essential contention was that a juvenile murder conviction could not be used to determine death eligibility. (RT 4: 792-795.)

Trial counsel raised the same argument being raised here, albeit without the perspective of *Roper v. Simmons* (2005) 543 U.S. 551 (*Simmons*). That argument was sufficient to preserve for appeal the claims asserted herein. Obviously, as respondent concedes, trial counsel could not have raised this argument under *Simmons* because it had yet to be decided at

the time of appellant's trial. (RB 104.) The underlying claim, however, is essentially the same.

There are also other well-settled principles that make this claim cognizable on appeal. First, this Court has consistently considered "as applied" challenges to California's death penalty law, such as this one, on their merits even when the precise challenge asserted on appeal was not raised at trial. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863; see also *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau* (1993) 6 Cal.4th 140, 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323.)

Second, because the prior-murder-conviction special circumstance found true in this case was invalid, the death sentence imposed based on that special circumstance is unauthorized. Under Penal Code section 1260, no specific objection is required to challenge an unauthorized sentence on appeal. (*People v. Lawley* (2002) 27 Cal.4th 102, 171-172 [sentence imposed on invalid special circumstance is unauthorized]; see *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be challenged on appeal notwithstanding lack of objection].)

Third, whether or not the juvenile conviction in this case could be used as the basis for finding the prior-murder-conviction special circumstance true is cognizable on appeal under "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations]." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118, 133; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Consideration of a theory not argued below is proper where the factual record is complete. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 139.)

Here, the trial court was fully aware of Smith's intent to reserve all of his objections on the issue. In fact, although not framed in the language of *Simmons*, the import of the objection was the same: the prior juvenile murder conviction could not be used to make Smith death eligible. Or, put another way, the prior juvenile murder conviction could not form the basis for the prior-murder-special circumstance allegation.

Finally, respondent alleges that Smith's equal protection argument, and argument based on the constitutionality of transfer procedures between juvenile and adult court, are forfeited because they were not raised at trial. (RB 104.) In making this assertion, respondent cites to cases regarding objections to admissibility of evidence, specifically *People v. Alvarez* (1996) 14 Cal.4th 155, 186 and *People v. Smith* (2003) 30 Cal.4th 581, 629-630. Appellate courts, however, have the authority to address any issue where the issue does not involve the admission or exclusion of evidence. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.) Further, constitutional issues may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 ["A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental constitutional rights. [Citations]"]; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Valladoli* (1996) 13 Cal.4th 590, 606; *Hale v. Morgan, supra,* 22 Cal.3d 388, 394; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Moreover, it would have been futile for defense counsel to raise these objections because the substantive law at the time permitted the execution of minors. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law"].)

To not consider this claim on appeal would be contrary to this Court's practices and work an injustice on both appellant and the criminal justice system; whereas no party is disadvantaged by such consideration. This claim is cognizable.

B. *Roper v. Simmons* Precludes Death Eligibility Based on a Prior Juvenile Murder Conviction

Respondent disagrees with appellant's assertion that the principles espoused in *Simmons* support the proposition that a prior murder committed when a defendant was a juvenile cannot be used to establish death eligibility. (RB 104-107.) Respondent is accurate in the literal sense, in that *Simmons* does not specifically address the issue being considered here. Appellant's contention, however, is that the reasoning employed by the *Simmons* Court to bar execution of persons who committed capital crimes when under the age of 18 also applies to bar the use of a prior murder committed when the person was under the age of 18 to make that person eligible for the death penalty.

Death-eligibility factors are designed to "narrow" the universe of offenders punishable by death to those who reliably can be classified among the worst and whose extreme culpability makes them the most deserving of execution. (*Simmons*, *supra*, 543 U.S. at p. 560.) Juveniles, by virtue of their age and the vulnerabilities it entails, are categorically less culpable for their criminal actions, and thus juvenile offenders cannot with reliability be classified among the worst offenders. (*Id.* at pp. 568-572.) Since *Simmons* stands for the proposition that juveniles are categorically less culpable than adults, and their actions are less morally reprehensible, then it follows that a murder committed by a juvenile should be viewed differently than a murder committed by an adult; a difference that renders that murder ineligible to be

used as a factor to render a defendant deserving of execution. It is analytically incoherent to admit that a juvenile is categorically less culpable than an adult, but then rely on an offense committed while a juvenile as the very circumstance that demonstrates an adult defendant's extreme culpability. (See, e.g., *Commonwealth v. Romadan* (Pa. Com. Pl. 2005) 70 Pa.D.&C. 521, 525, fn. 4 ["If juveniles cannot be executed, as the Supreme Court recently held in *Roper v. Simmons*, due to a lack of maturity, then the use of juvenile adjudications to support an aggravating circumstance in a death penalty case will in all likelihood be revisited"].)

Confusing Smith's eligibility argument, respondent argues that the increased punishment is directed at the current offense and not the prior offense. (RB 105.) Respondent misses the point. This is not a situation involving an increased punishment, such as a recidivist statute. Nor is the prior-murder special circumstance a penalty-phase factor, designed to enhance punishment because of a prior act by the defendant. The prior-murder special circumstance is being used to determine death eligibility. It is in essence an element of the crime that is decided at the guilt phase. (See *People v. Odle* (1988) 45 Cal. 3d 386, 412.) Respondent misapprehends the basic nature of the claim.

Respondent also asserts that expunged juvenile convictions can and should play a role in the imposition of the appropriate penalty. (RB 106.) Again, respondent is focused on imposition of penalty rather than the issue of eligibility. A jury may be entitled, in determining penalty, to know that a defendant committed the capital crime undeterred by a prior successful felony prosecution, but this would be handled in a penalty determination, not an eligibility determination, which is what Penal Code section 190.2, subdivision (a)(2), addresses. The sentencing phase, unlike the guilt phase,

is inherently an information-driven inquiry wherein a particular defendant's entire history and character may be relevant. Eligibility factors, by contrast, serve a different purpose. They are meant to narrow the class of all defendants for whom a death sentence is an available option to the "worst of the worst" or, in other words, to those for whom death is proportionate.

Respondent also contends that prior juvenile murder convictions have long been available for use pursuant to Penal Code section 190.2, subdivision (a)(2), and cites to *People v. Andrews* (1989) 49 Cal.3d 200 and *People v. Trevino* (2001) 26 Cal.4th 237. (RB 106.) Both of these cases deal with a prior juvenile murder conviction in the context of an out-of-state prior conviction; specifically, these cases interpret the language regarding out-of-state convictions in Penal Code section 190.2: "For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree." (Pen. Code, § 190.2, subd. (a)(2).)

In *Andrews*, the defendant had a prior murder conviction in Alabama, based on a crime he had committed when he was 16 years old. Under Alabama law at the time, most minors 16 to 18 years of age came under the jurisdiction of the adult criminal court, while in California their cases were usually adjudicated under juvenile court law. The defendant in *Andrews* argued that it was improper to use the Alabama conviction as a special circumstance under Penal Code section 190.2, subdivision (a)(2). This Court held that a special circumstance existed and interpreted Penal Code section 190.2, subdivision (a)(2), to require only that the minor would have been liable to punishment for murder in California. Since it would have been possible to punish the defendant as an adult for a murder

committed while he was 16 years of age, this Court found that the special circumstance applied to him. (*People v. Andrews*, *supra*, 49 Cal.3d at p. 222.)[15]

In *People v. Trevino* (2001) 26 Cal.4th 237, this Court attempted to deal with the issue left open by *Andrews*; the use of a foreign murder conviction based on a crime committed by a person who was under 16 years of age at the time of the offense. In *Trevino*, the defendant was found guilty of murder with the prior murder special circumstance that he had previously been convicted of murder in Texas. Defendant was an adult at the time he committed the California murder, but had been only 15 when he committed the Texas murder. This Court held:

> [A] conviction in another jurisdiction may be deemed a conviction of first or second degree murder for purposes of California's prior-murder special circumstance if the offense involved *conduct* that satisfies all the elements of the offense of murder under California law, whether or not the defendant, when he committed that offense, was old enough to be tried as an adult in California. . . . Under the construction we adopt for the prior-murder special circumstance, it makes no difference, when determining the appropriate sentence for the latter crime, committed when defendant was unquestionably

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[15] In addition, this Court held that as long as the guilt ascertainment process in the foreign jurisdiction was not itself constitutionally flawed, there would be no equal protection bar against treating a murder conviction in that jurisdiction as a special circumstance under the California statute. (*People v. Andrews, supra,* 49 Cal.3d at p. 223.) Under this reasoning, where the guilt ascertainment process in juvenile convictions is constitutionally flawed, there would be an equal protection bar against treating a juvenile murder conviction as a special circumstance, as also argued by appellant herein.

> an adult, that he could not have been tried as an adult in California in 1978.

(*Id.* at p. 244; emphasis in original.)

This Court in *Trevino* reasoned that individual characteristics of the defendant are not relevant to the prior-murder special circumstance inquiry. (*People v. Trevino, supra,* 26 Cal.4th at p. 241.) Instead, "the focus is the *conduct*, not the age or other personal characteristics of the person who engages in that conduct. It is the *offense*, and not necessarily the offender, that must satisfy statutory requirements for punishment under California law as first or second degree murder." (*Ibid.*, emphasis in original.) In support of its opinion, *Trevino* cites both legislative and voter intent, asserting that since Penal Code section 190.2, subdivision (a)(2), is identical to the Legislature's 1977 death penalty law, the voters must have intended that it would have the same meaning as the Legislature's prior provision. Further, that since the Legislature knows how to draft a provision that requires consideration of a defendant's age, lack of such language indicates the Legislature's lack of intent to require consideration of the defendant's age. (*Id.* at pp. 241-242.)

Both *Andrews* and *Trevino* were decided before *Simmons*. As a matter of federal constitutional law, *Simmons* mandates consideration of the characteristics of the person who engages in the conduct, specifically age and its inherent attributes. Thus, even though *Trevino* allows for use of a prior juvenile murder conviction based on state legislative intent, the California legislature was dealing with these issues under reasoning that predated *Simmons*. In light of *Simmons*, the language of Penal Code section 190.2, subdivision(a)(2), must be revisited so that it is read in a manner that comports with the federal Constitution.

C. Use of Prior Juvenile Murder Convictions to Prove the Prior Murder Special Circumstance Violates the Equal Protection Guarantees of the Fourteenth Amendment

Respondent conflates appellant's argument that there is an equal protection violation where juveniles who have suffered an adult conviction are eligible for the death penalty, with his argument that juvenile transfer procedures in California are unreliable and arbitrary. (RB 110.)

Respondent posits that despite the fact juveniles who have suffered murder adjudications in juvenile court will not later be subject to Penal Code section 190.2, subdivision (a)(2), based on those adjudications, whereas juveniles who have suffered murder convictions in adult court will be subject to that provision, there is no equal protection violation because the two classes of juveniles are equally subject to the adult court transfer procedures. (RB 108.) In essence, there is no equal protection violation as long as the juveniles are not subject to differing transfer procedures. (*Ibid.*) Appellant, however, contends that the equal protection violation arises because two juveniles, having both committed murder, can each end up in a different court, juvenile court versus adult court, based initially on whether a petition is filed, and then suffer either an adjudication or conviction based on that destination, making the latter eligible for the death penalty.

Respondent bases its argument on the claim that in 1984 appellant would have undergone a fitness hearing prior to his transfer to adult court. (RB 110.) Respondent is mistaken. In 1984, under Welfare and Institutions Code section 707, appellant would have been *presumed to be unfit* for juvenile court adjudication and the burden was upon him to ask the juvenile court to order a probation investigation. (AOB 249.) There is no evidence in the record that such a petition was filed or that any subsequent evaluation

ensued. This requirement produces an unequal result. The current transfer procedures produce the anomaly that a defendant is subject to the special circumstance only because his prior offense was tried in adult court rather than adjudicated in juvenile court. This could be because his attorney failed to file a petition, forgot to file a petition, or if a petition was filed, because the juvenile did not meet the criteria enumerated for whatever reason. Thus, under this scheme, a defendant whose prior juvenile offenses are elevated to adult court, for whatever reason–whether related to the nature of the offense or offender or not, are later treated more harshly than those whose offenses were kept under juvenile court jurisdiction. No legislative rationale has been suggested for such a distinction in treatment, and drawing such a distinction violates equal protection.

D. It is Constitutionally Impermissible to use a Prior Juvenile Murder Conviction to Make an Individual Death Eligible

Death penalty eligibility procedures must provide for heightened reliability. (*Simmons*, *supra*, 543 U.S. at p. 568.) Appellant maintains that juvenile transfer procedures in California violate this requirement because they are unreliable and arbitrary, creating an unconstitutional basis for death eligibility. The presumption in California's juvenile transfer procedures is that the juvenile is unfit and may only remain under juvenile court jurisdiction where certain criteria are found by the juvenile court judge. (Welf. & Inst. Code, § 707.) Hence whether one juvenile is subject to juvenile court or adult court, and thus death eligible, is by its nature a decision subject to arbitrary application. Arbitrary death eligibility is unconstitutional. (*Gregg v. Georgia* (1976) 428 U.S. 153, 188.)

Further, the juvenile court does not have to evaluate a juvenile's eligibility for adult court (such as his or her level of maturity), and thus his

or her death eligibility, before transferring the juvenile to adult court. In addition, a prosecutor can file the case directly in adult court, completely bypassing any judicial evaluation. Without proper consideration of the circumstances of the crime and the defendant, this constitutes an unreliable basis for death eligibility. (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 [death-eligibility determination must be principled and make rationally reviewable the process for imposing a sentence of death]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Dillon* (1983) 34 Cal.3d 441, 481-483, discussing and quoting *Enmund v. Florida* (1982) 458 U.S. 782, 798-801.)

Current transfer procedures, allowing for a presumption of unfitness or direct filing in adult court without consideration of the individual juvenile, contradicts the Supreme Court's rationale in *Simmons* that juveniles are different and require a distinct consideration under the law. Juvenile crime may not serve as a death-eligibility factor where the juvenile's culpability, maturity, or capacity for treatment and consideration as an adult were never individually considered.

In *State v. Davolt* (2004) 84 P.3d 456, 459, the Arizona Supreme Court held that juveniles automatically waived to adult court without an individualized hearing in juvenile court could not be charged with a capital crime. While *Davolt* preceded *Simmons*, its rationale is particularly relevant post-*Simmons*. *Davolt* addressed Arizona's automatic transfer statute, which waived any juvenile older than fourteen charged with first degree murder to adult court without the benefit of a hearing. At the time, *Stanford v. Kentucky* (1989) 492 U.S. 361, 393, instructed that the death penalty was not, per se, a disproportionate punishment for sixteen-year-old children. Nonetheless, *Davolt* construed *Stanford's* proportionality analysis

to require a comparison of the gravity of the offense – "understood to include not only the injury caused, but also the defendant's culpability" - with the harshness of the penalty. (*State v. Davolt*, *supra*, 84 P.3d at p. 480, quoting *Stanford v. Kentucky* (1989) 492 U.S. 361, 393.) The *Davolt* court reasoned that the capital statutes upheld in the Supreme Court's death cases all provided for an "individualized assessment" of the juvenile's relative culpability. (*Ibid.*) In *Stanford*, the statutory scheme at issue satisfied the constitutional mandate for individualized consideration in part because it required a juvenile transfer hearing that provided for a consideration of that individual's maturity and moral responsibility as a pre-condition for trial as an adult. (*Stanford v. Kentucky*, *supra*, 492 U.S. at pp. 375-376.) In the end, the *Davolt* court concluded that Arizona's automatic waiver statute was constitutionally lacking because it failed to provide for an individualized culpability determination. The same finding should be made here. This same individualized assessment requirement should be applied as a prerequisite to juvenile murder convictions offered as death-eligibility factors.

Particularly in the wake of *Simmons*, a juvenile must receive some special, status-based consideration, including individualized consideration. The Supreme Court said as much in *Kent v. United States* (1966) 383 U.S. 541, holding that "[i]t is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile," and then listing factors that should guide a juvenile judge's transfer decision, including consideration of the juveniles rehabilitative prospects and his or her maturity. (*Id.* at pp. 556, 566-567.) Although a state can bypass this mandate where it automatically removes certain juveniles from the juvenile court's jurisdiction, *Kent* provides the

foundation that a judicial officer should actually weigh and pass upon an individual juvenile's culpability before a juvenile conviction may be used as an eligibility factor. These cases, coupled with *Simmons*, establish that children should receive special status-based consideration where death eligibility is to be implicated. Under California's current transfer procedures no such required consideration exists.

E. Prejudice

Respondent claims that any error is harmless. (RB 110.) Respondent ignores, however, the very real consequence that the presence of a special circumstance with an unconstitutional basis inflated the risk that appellant's jury would impose the death penalty. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [death penalty reversed based on vacation of prior felony conviction where prosecutor relied on prior conviction as basis for urging imposition of death penalty].) This is especially true when the special circumstance is a prior murder; perhaps the single most damning of all the eligibility factors when it comes to determination of whether a defendant should live or die.

Although another special circumstance was found to be true in this case, appellant asserts that this special circumstance should also be set aside. (AOB 313-315.) Under those circumstances, the case would be left with no valid special circumstance finding. Even if that special circumstance is not set aside, the existence of more than one special circumstance undoubtedly would have influenced the jury in this case. (*People v. Harris* (1984) 36 Cal.3d 36, 65.) Finally, the Eighth Amendment requires a heightened degree of reliability in the penalty phase of a capital case. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885.) A special

circumstance with an unconstitutional basis offends this constitutional requirement.

VI

THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT INSTRUCTED THE JURY TO NOT REFER TO THE GUILT PHASE INSTRUCTIONS WHILE OMITTING FROM THE PENALTY PHASE INSTRUCTIONS ANY GUIDELINES FOR HOW THE JURY WAS TO EVALUATE THE EVIDENCE

The trial court instructed the jurors at the penalty phase with CALJIC No. 8.41.1, and admonished them to disregard all previous instructions given by the court; specifically telling them that the guilt phase instructions "don't apply to this part of the case." (RT 18:5986; admonishment repeated at RT 18:5987, 5988.) That instruction, coupled with the trial court's failure to give any new instructions at the penalty phase relating to the evaluation of evidence, was prejudicial error.

Initially, respondent asserts that appellant invited the error when trial counsel acquiesced in the giving of CALJIC No. 8.41.1. (RB 112-113; RT 18:5818.) This Court, however, has held that defense counsel's simple agreement that CALJIC No 8.41.1 should be given does not absolve a trial court of its "obligation under the law to instruct the jury on the general principles of law that were closely and openly connected to the facts and that were necessary for the jury's understanding of the case." (*People v. Moon* (2005) 37 Cal.4th 1, 37.) As in *Moon*, here defense counsel may have agreed to CALJIC No. 8.41.1, but he "did not, however, request or invite the trial court to omit from the penalty instructions those instructions he now claims were important." (*Id.* at p. 37.) And thus here, as in *Moon*, appellant did not forfeit the claim of error.

And error it was. This Court has previously "cautioned [] trial courts not to dispense with evidentiary instructions at the penalty phase." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1073, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1222.) Respondent cites *Brasure* for the proposition that a trial court's failure to instruct the jury with general evidentiary instructions stands to benefit a capital defendant, as it might expand the jury's consideration of mitigating evidence or avoid focus on aggravating evidence. (RB 113; *People v. Brasure, supra*, 42 Cal.4th at pp. 1072-1074.) Respondent's focus on a single quote from *Brasure* ignores the import of that decision.

In *Brasure*, the Court, following *People v. Carter, supra,* 30 Cal.4th 1166, held that when a trial court fails to reinstruct on evidence evaluation at the penalty phase, yet directs the jury to disregard guilt phase instructions, courts must assess the possible prejudice stemming from such a decision. (*People v. Brasure, supra*, 42 Cal.4th at p. 1073.) That is, reviewing courts should avoid simply speculating as to the effect of the error.[16]

Respondent's examination of *Carter* and comparison to the case at hand is of similarly narrow focus as its treatment of *Brasure*. In noting that the Court found no prejudice resulted from the instructional error in *Carter*,

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[16] As set forth in his opening brief (AOB 267-268), appellant maintains that if, as indicated by the court's opinion in *People v. Carter, supra*, the Court has previously found appellant bears the burden of demonstrating some tangible impact that the failure to reinstruct had on the jury's evaluation of the evidence, when appellant is barred from seeking or admitting evidence concerning a juror's mental state during evaluations, the Court should reconsider its position rather than encourage the type of speculative exercise the Court condemned in *Brasure*.

respondent asserts that similarly no prejudice resulted here, because the jury never requested clarification of the instructions, and the penalty evidence appears to be uncomplicated and straightforward. Respondent's general argument that juries are able to accomplish their tasks fails to properly assess the unique circumstances of the case at hand. (RB 114-115.)

As the Court made clear in *Moon*, when presented with this type of instructional error, a reviewing court must examine "the nature of the evidence presented to determine whether it was likely the omitted instructions affected the jury's evaluation of the evidence." (*People v. Moon, supra*, 37 Cal.4th at p. 38, accord *People v. Carter, supra,* 30 Cal.4th at pp. 1220-1222; *People v. Brasure, supra*, 42 Cal.4th at p. 1073.) In *Carter*, the Court found the trial court's failure to reinstruct on evidentiary guidelines harmless because in that case the evidence presented was of an ambiguous nature; it was impossible to tell if the failure to provide evidentiary instructions helped the defendant by allowing the jury to focus more on the mitigating aspects of the evidence or harmed the defendant by allowing the jury to focus more on the aggravating aspects. (*People v. Carter, supra,* 30 Cal.4th at pp. 1220-1221.) In *Brasure*, the Court found such error harmless for several reasons, including again the ambiguous result of the failure to reinstruct (it could have helped as easily as it might have hurt), and the presence of a specific jury instruction at the penalty phase that addressed the defendant's concern that jurors might speculate about his failure to testify. (*People v. Brasure*, *supra*, 42 Cal.4th at pp. 1073-1074.)

The situation here is quite different. As noted in appellant's opening brief, Felton Manuel's testimony provided significant aggravating evidence, despite the fact an Evidence Code section 402 hearing was necessary to

determine his ability to testify. Yet, the jury was not instructed at penalty phase with CALJIC Nos. 2.20 and 2.92, and was thus left without sufficient guidance on how to consider credibility and the factors used to assess witness identification evidence. (AOB 268-269.) Unlike in *Carter* or *Brasure*, then, the failure to instruct the jury with general evidentiary guidelines did not have any beneficial effect of opening up the jury's consideration of mitigating evidence. Indeed, to again use the Manuel evidence as an example, the jurors were left with an instruction, a modified version of CALJIC No. 2.91, that focused their attention on Manuel's damaging testimony, without the corresponding evidentiary instructions that provide guidance on how to critically assess that testimony. Unlike in *Carter* or *Brasure*, this evidence was not of an ambiguous nature; it cut squarely against appellant, and the jury was not provided with the evidentiary guideline instructions that normally accompany such evidence.

Further, in contending the trial court's error here was harmless, respondent compares the current case to cases that generally fall into two categories of failure to instruct: cases where the reviewing court found the jury could have relied on the guilt-phase instructions for guidance, such as *People v. Danielson* (1992) 3 Cal.4th 691, 722, and *People v. Holt* (1997) 15 Cal.4th 619, 685, and cases wherein the trial court did not properly fully reinstruct at the penalty phase, but nevertheless did present the jury with penalty-phase instructions that touched on how to process the major evidence presented, such as *People v. Melton* (1988) 44 Cal.3d 713, 758.

A closer examination of the case at hand reveals that cases such as *Danielson* are inapplicable. Unlike *Danielson,* et al, the trial court made emphatically clear to the jurors that they were not, under any circumstances, to rely on the guilt-phase instructions. This Court distinguishes between a

trial court's simple failure to inform the jury that it should follow the previously given guilt-phase instructions, in which case it is not reasonably likely a jury would fail to understand it is expected to apply those instructions, and a trial court's affirmative admonition not to refer to or use the previously-given instructions. (*People v. Ervine* (2009) 47 Cal.4th 475, 803-804.) When the trial court, as here, clearly and repeatedly instructed the jury not to refer to the guilt-phase instructions, we presume the jury followed that command. (*People v. Carter, supra,* 30 Cal.4th at pp. 1219-1220.)

Cases such as *Melton* are equally inapplicable. In *Melton*, the trial court did not reinstruct the jury with *all* of the guilt-phase evidence instructions at the penalty phase, but it did offer instructions regarding expert testimony (an expert testified in the case) and stipulations. Here, as the respondent's mere recitation of the elements-of-the-crimes instructions given by the trial court at the penalty phase unintentionally highlights (RB 115), there were no cautionary instructions or instructions providing guidelines for assessing the specific evidence to be considered by the jury. As demonstrated by the following issue in this brief, the lack of such guidance is extremely prejudicial; that is the reason such instructions exist.

In short, respondent is correct that cases such as *Carter* and *Brasure* should guide the Court in reviewing this claim of error; a reviewing court must carefully assess the prejudice of a trial court's admonishment not to rely on the guilt-phase instructions, combined with its failure to re-instruct on fundamental evidentiary principles at the penalty phase. Respondent is incorrect, however, in stating that the facts of this case mirror those of *Carter* and *Brasure*. A reviewing court must assess the particular evidence and facts of the case to determine if this unique type of instructional error

prejudiced the defendant. The trial court's error in this case clearly prejudiced appellant and deprived him of fundamental state and federal constitutional rights. (AOB 264.)

VII

THE TRIAL COURT'S ERROR IN FAILING TO INSTRUCT THE JURY WITH CALJIC NO. 2.71.7 WAS NOT HARMLESS

Respondent does not dispute that the trial court erred in failing to instruct the jury with CALJIC No. 2.71.1. (RB 116-117.)[17] Respondent contends, however, that the trial court's error in failing to so instruct was ultimately harmless because: 1) the only issue regarding the alleged pre-offense admission was whether appellant made the statement, not the words used or their meaning; 2) the jury was sufficiently instructed on witness credibility; and 3) appellant's trial attorney sufficiently attacked the credibility of witnesses to the pre-offense admission during closing argument to warn the jury to carefully analyze and weigh the testimony of those witnesses. Respondent is mistaken on all counts.

Respondent cites to *People v. Dickey* (2005) 35 Cal. 4th 884, 906, for the proposition that when there is no conflict as to the words, meaning or accuracy of the oral admission, but simply a straight denial by the

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[17] Respondent asserts that the applicable standard of review for determining the prejudicial effect of the trial court's error is "whether it is reasonably probable that the jury would have reached a result more favorable to [appellant] had the instruction been given." (RB 117.) Thus presumably respondent only agrees that the trial court's failure to instruct here was state law error. Respondent never directly addresses appellant's contention that the trial court's error also violated appellant's federal constitutional rights to a reliable guilt determination, due process, a fair trial by a properly instructed jury, and freedom from cruel and unusual punishment, as set forth by appellant in the opening brief. (AOB 272.)

defendant that he made the statement in question, an omission of the cautionary instruction is generally harmless. (RB 117-118.) Respondent contends "[t]here was no conflict in the wording or language actually used by [appellant]. The statements were either made by [appellant] or they weren't," and thus the trial court's error was harmless. (RB 118.)

This is not an accurate assessment of the record. As appellant noted in the opening brief, the record indicates that in addition to conflicting evidence regarding whether appellant ever actually made the statement, the words used, and the meaning of those words, was very much in conflict. (AOB 277-280.) Linda Farias offered several different versions of the conversation that she purported to overhear at her brother Manuel Farias's funeral reception. She initially never mentioned the conversation, later stated appellant was present for it, later still stated he did much of the talking, before finally testifying that she overheard appellant and others talking about contacting "Josh" in order to find "Brian." (AOB 272-274, 277-279.) In addition to Ms. Farias's own shifting account of the conversation, Christina Hogue testified that she overheard the conversation about "Brian" at the funeral reception, but she did not hear anyone mention "Josh," and was unsure about appellant's contributions to the conversation. (RT 12:3566, 3579-80.)

Similarly, Mr. Holloway's account of the conversation changed several times. In fact, Mr. Holloway could not even keep straight *who* participated in the conversation he had with appellant, whether Mr. Brown was the only witness, or two females instead, or Mr. Brown and two females. (RT 11:3457, 3491, 3549.) Nothing about the alleged pre-admission statement made by appellant was settled; the content and meaning of the statement were very much in conflict

Just as a finding that the words of a pre-offense statement are not in dispute tends to show the absence of CALJIC No. 2.71.7 was not prejudicial, "[c]onversely, when the evidence concerning the statements is conflicting, the failure to give cautionary instructions is *more likely* to result in prejudice to the defendant." (*People v. Bemis* (1949) 33 Cal.2d 395, 400-401, italics added.)

In addition, although respondent interprets *Dickey* as setting forth only one relevant factor to consider when analyzing prejudice, whether the words and meaning of the admission are in dispute, that factor is properly only part of the calculus reviewing courts consider. After all, "[t]he purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Dickey, supra,* 35 Cal.4th at p. 905, citing *People v. Beagle* (1972) 6 Cal.3d 441, 456.) The Court should consider other factors as part of an overall prejudice analysis.

For example, courts should also examine whether the oral admissions were reported by biased witnesses,[18] and the importance of the admissions to the case. (*People v. Lopez* (1975) 47 Cal.App.3d 8, 14.) The *Lopez* Court reasonably held that last factor, the importance of the admission to the issues in the case, as the most important factor to consider when examining whether the trial court's error in failing to instruct the jury on pre-offense admissions was prejudicial. (*Ibid.*) Here, as noted in appellant's opening brief, the prosecution's entire theory as to appellant's motive revolved around the pre-offense statements appellant allegedly made to Farias and Troy Holloway. (AOB 272, 281.)

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[18] The biases of Farias and Holloway are well documented in appellant's opening brief. (See AOB 276-280.)

Respondent also contends that although the trial court failed in its duty to instruct the jury with CALJIC No. 2.71.7, that failure was harmless because the jury was sufficiently instructed, via other instructions, on judging witness credibility, and thus was alerted to view the testimony with caution. (RB 118.) But to say that general instructions regarding witness credibility are adequate to warn the jury to view a pre-offense statement with caution, is to say that CALJIC No. 2.71.7 is superfluous. That California imposes a sua sponte duty on trial courts to instruct juries with CALJIC No. 2.71.7 when appropriate cuts against the view that the instruction is unimportant and redundant.

This Court has recognized that oral admissions are a special category of evidence, with a commensurate special ability to prejudice a defendant, and they thus require a special cautionary instruction. (See *People v. Bemis*, *supra*, 33 Cal.2d 395, 400; 5 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 614, p. 877.) It is true, as respondent notes, that in *Dickey* the Court factored in the presence of other instructions in finding the failure to give the cautionary instruction regarding admissions harmless. (*People v. Dickey, supra,* 35 Cal.4th at p. 906.) In *Dickey*, however, the Court pointed to other specific cautionary instructions. There, "[t]he jury was properly instructed to view Popham's testimony, as an accomplice, with distrust (CALJIC No. [3:18]), [and] that Johnson's prior felony conviction could be considered in weighing his credibility (CALJIC No. 2.23)." (*Ibid.*) Here, respondent merely points to standard general credibility instructions. (RB 118.) It cannot be that the potential prejudice of failing to present such a carefully tailored instruction when the facts demand it is completely dissolved simply by pointing to general instructions.

Finally, respondent contends that the trial court's failure to carry out its sua sponte duty to instruct the jury to view evidence of appellant's oral admissions with caution was harmless because appellant's trial counsel argued that neither Holloway nor Farias were credible witnesses. "'[A]rgument of counsel cannot substitute for instructions by the court." (*Carter v. Kentucky* (1981) 450 U.S. 228, 304, quoting from *Taylor v. Kentucky* (1978) 436 U.S. 478, 489.)

> While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority [that] permits us to use argument as a substitute for instructions that should have been given. Logically, this is so, because the jury is informed that there are three components to the trial-evidence presented by both sides, arguments by the attorneys and instructions on the law given by the judge. Jurors are told their decision must be based on the facts and the law and if counsel says anything that conflicts with the instructions that are given by the judge, they must follow the instructions.

(*People v. Miller* (1996) 46 Cal.App.4th 412, 426, fn. 6, italics omitted.)

The jury here was admonished to treat attorney argument as just that, argument, and to follow the law as set forth by the trial court. The jury was thus admonished to, if not disregard counsel's warnings, at least discount them in favor of the admonishments set forth by the trial court. (*People v. Gray* (2005) 37 Cal.4th 168, 231 [presumption that jurors understand and follow court's instructions].) There is a reason the law places an affirmative duty on trial courts to caution the jury about this specific type of testimony, rather than placing that burden on a defendant.

Given the inconsistent and contradictory evidence presented by biased actors regarding the alleged pre-offense admission, there existed a reasonable probability that the jury would have found that the statements either were not made or were not reported accurately. (*People v. Beagle, supra,* 6 Cal.3d at p. 455.) Given the importance of these statements to the prosecution's theory of motive, and given the importance of motive in convicting appellant, the failure to give CALJIC No. 2.71.5 was prejudicial error.

X.

BASING A LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING ON THE FACTS OF THIS CASE VITIATES THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND VIOLATES APPELLANT'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

Respondent meets appellant's assertion that California's lying-in-wait special circumstance violates the Eighth Amendment by citing to previous cases from this Court holding that it does not. (RB 127-128.) Respondent is correct that this Court has so held, but this Court was incorrect in so holding.

Appellant acknowledges that the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, but the Court's construction of this prong excludes such a narrowing function. This Court has held that the lying-in-wait special circumstance requires no fixed, quantitative minimum time, rather the "lying in wait" must continue for long enough for a person to premeditate and deliberate, conceal one's

purpose, and wait and watch for an opportune moment to attack. (*People v. Bonilla* (2007) 41 Cal.4th 313, 333.) The victim need not be the object of the "watching" in order for this special circumstance to apply, as a period of "watchful waiting" for the arrival of the victim will satisfy this requirement. (*People v. Sims* (1993) 5 Cal.4th 405, 433.)

This expansive conception of lying in wait "threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*People v. Stevens* (2007) 41 Cal.4th 182, 213 (conc. opn. of Werdegar, J.).) In particular, the Court's holding in *Sims* that the period of watchful waiting need be no more than the time required for premeditation and deliberation, undercutting the requirement that this period be "substantial," results in a construction of the special circumstance that renders it indistinguishable from premeditated and deliberate first degree murder. (See *id.* at p. 219 (conc. and dis. opn. of Moreno, J.) & pp. 214-216 (conc. and dis. opn. of Kennard, J.).)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first degree murder under the lying-in-wait special circumstance from other premeditated murders. This Court has, however, also adopted an expansive construction of the first prong of the lying-in-wait special circumstance (concealment of purpose), and its case law has construed the meaning of lying in wait to include not only killing in ambush, but also murder in which the killer's purpose was concealed. (*People v. Morales* (1989) 48 Cal.3d 527, 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong

fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *id.* at p. 557 [concealment of purpose characteristic of many "routine" murders].) As for the third prong (a surprise attack from a position of advantage), it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. (See *id.* at p. 575 (conc. and dis. opn. of Mosk, J.).)

In light of the broad interpretation that the Court has given to the lying-in-wait special circumstance, the class of first degree murders to which this special circumstance applies is enormous. (See, e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman v. Georgia* (1972) 408 U.S. 238.

Respondent is correct that this Court has repeatedly rejected the contention appellant makes that the lying-in-wait special circumstance is unconstitutional because there is no significant distinction between the theory of first degree murder by "lying-in-wait" and the special circumstance of "lying-in-wait." (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148.) This concept needs revisiting.

This Court in *People v. Moon* (2005) 37 Cal.4th 1, 22, noted the "slightly different" requirements of lying-in-wait first degree murder and the lying-in-wait special circumstance. The Court has noted two factors that differentiate them: (1) the special circumstance requires an intent to kill; and (2) the murder must be done while "lying-in-wait" rather than by

means of "lying-in-wait." (See *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.)

This Court has held that what distinguishes lying-in-wait murder from the special circumstance is that "'[m]urder by means of "lying-in-wait" requires only a wanton and reckless intent to inflict injury likely to cause death[,]" while the special circumstance requires "'an intentional murder'" that "'take[s] place during the period of concealment and watchful waiting[.]'" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that murder by means of lying-in-wait requires only a wanton and reckless intent to inflict injury likely to cause death. Moreover, adding intent to kill as an element of the special circumstance is an illusory distinction. If the other factors for "lying-in-wait" are met, including watchful waiting and concealment of a murderous purpose, it is hard to imagine how the killing can occur without the defendant having an intent to kill.

According to this Court, "lying in wait" as a theory of murder is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Ruiz* (1988) 44 Cal.3d 589, 614.) Therefore, a showing of "lying in wait" obviates the necessity of separately proving premeditation and deliberation. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) However, as pointed out by the dissenting judge in *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 313 (dis. opn. of McDonald, J.):

> If by definition "lying-in-wait" as a theory of murder is the equivalent of an intent to kill, and "lying-in-wait" is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent

> to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires only implied malice appears incorrect because the concept of "lying-in-wait" is the functional equivalent of the intent to kill.

In addition, California juries instructed on lying-in-wait first degree murder are told the murder must be immediately preceded by "lying in wait" (CALJIC No. 8.25), thereby indicating, as does the special circumstance, that there can be no clear interruption separating the period of "lying in wait" from the period during which the killing takes place. (CALJIC No. 8.81.15.) Thus, while this Court may interpret the special circumstance differently than lying-in-wait first degree murder, California juries are not provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them"].)

Furthermore, the element of immediacy of the killing, the purported distinguishing feature of the special circumstance, has been weakened by cases which have held that the murder need not occur while "lying in wait" as long as there is a continuous flow of events after the concealment and watchful waiting end. (See, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558; *People v. Michaels* (2002) 28 Cal.4th 486, 517.)

Additionally, the Eighth Amendment demands more than mere narrowing of the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. The lying-in-wait special circumstance, as interpreted by this Court, fails to provide the requisite meaningful distinction between murderers. There is simply no reason to believe that murders committed by "lying in wait" are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of the Court have long recognized this fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Stevens, supra,* 41 Cal.4th at p. 213 (conc. opn. of Werdegar, J. ["the concept of "lying-in-wait" threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have merely committed first degree premeditated murder"); *id.* at p. 224-225 (conc. and dis. opn. of Moreno, J. ["the lying-in-wait special circumstance . . . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"]; see also *People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.).)

In sum, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first degree murder. This special circumstance therefore violates the Eighth Amendment's narrowing requirement.

CONCLUSION

For all of the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on Appeal, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: June 20, 2012

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, BARRY P. HELFT, am the Chief Deputy State Public Defender, and am appellate counsel for FLOYD DANIEL SMITH in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 28,144 words in length.

DATED: June 20, 2012

BARRY P. HELFT
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Floyd Daniel Smith Cal. Supreme Ct. No. S065233

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

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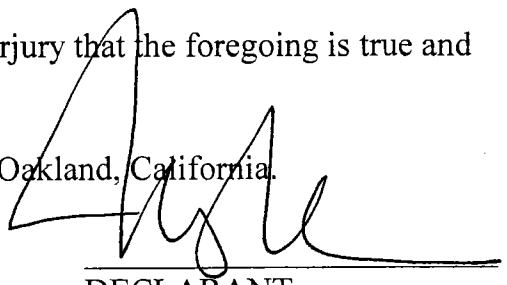
Each said envelope was then, on June 20, 2012, sealed and deposited in the United States Mail in San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on June 20, 2012, at Oakland, California.



DECLARANT