IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAYMOND JOHNSON, Defendant and Appellant.	Case No.: S070250 CAPITAL CASE

Automatic Appeal from the Superior Court of the State of California
County of Ventura, Case No. 39376
The Honorable Steven Z. Perren, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

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

Additionally, should this Court find multiple errors in connection with the guilt phase and/or the penalty phase, then appellant would ask that they be viewed cumulatively as well as individually, and that the judgment be reversed based on the cumulative errors, under any standard of prejudice. (*e.g.*, *People v. Sims* (1958) 165 Cal.App.2d 108, 116 [state law]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn.17 [*Chapman v. California* (1967) 386 U.S. 18 standard]; *Walker v. Engle* (6th Cir.1983) 703 F.2d 959, 963, and cases cited [*Chapman* standard]; *Harris v. Wood* (9th Cir.1995) 64 F.3d 1432, 1438 [*Strickland v. Washington* (1984) 466 U.S. 668, 687 standard]; *Mak v. Blodgett* (1992) 970 F.2d 614, 622 [*Strickland* standard]; *see also, e.g.*, *United States v. Wallace* (9th Cir.1988) 848 F.2d 1464, 1475-1476; *People v. (Steven) Holt* (1984) 37 Cal.3d 436, 459; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Jackson* (1991) 235 Cal.App.3d 1670,

1681; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Phillips* (1985) 41 Cal.3d 29, 83; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir.1983) 703 F.2d 959, 963; *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.) In such cases, " 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against defendant." (*United States v. Frederick* (9th Cir.1996) 78 F.3d 1370, 1381.)

This request includes, but is not limited to, considering the effect of any and all guilt phase errors with respect to their prejudice at penalty phase as well. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir.1987) 824 F.2d 879, 888.) The Court should also assess the combined effect of all the errors, since the jury's consideration of all the penalty

factors resulted in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett*, *supra*, 970 F.2d at p.622.)

The trial court's error in denying appellant's challenges for cause to ten prospective jurors who were incapable of being fair or impartial, the court's denial to grant appellant an additional peremptory challenge to remove a seated juror who demonstrated a strong bias in favor of the death penalty, and the court's erroneous decision to exclude a prospective juror for cause under the *Witt/Witherspoon* standard resulted in an unfair jury in both the guilt phase and the penalty phase. Taken together, this error, coupled with the trial court's rulings regarding the legality and admissibility of Dr. Patterson's interrogations of appellant, the admission of appellant's prior convictions, the experimental demonstrations of appellant's would ballistics expert Dr. Fackler, the testimony of Deputy District Attorney Kilbride that appellant had suffered prior convictions and was facing a sentence subject to the three strikes law, the testimony of Deputy Fryhoff that he wished he had killed appellant, and the exclusion of appellant's mother's testimony that she did not want him to receive the death penalty and Prosecutor Hardy's numerous instances of prosecutorial misconduct resulted in a fundamentally unfair trial setting, creating such

prejudice against appellant that appellant's conviction and penalty must be reversed.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO TEN PROSPECTIVE JURORS INCAPABLE OF BEING FAIR OR IMPARTIAL.

Robert C., Shirley J., Gregory D., Marguerite S., Raymond L., Ernest M., and Barbara C. all answered questions on the juror questionnaire and during voir dire which indicated that they would automatically vote for death in the instant matter, and thus, each of them lacked a willingness to consider a life sentence as something within the realm of reasonable possibility. Therefore, the trial court's refusal to excuse each of these jurors violated appellant's constitutional rights to a fair and unbiased jury, and due process, inflicting an error upon appellant that requires reversal. Respondent provides little factual support from the record to support its allegation that appellant's claims are "meritless." Respondent is wrong that each juror in question did not present views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," (Respondent's Brief, p.73, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424), thus requiring him or her to be disqualified.

A. Each Prospective Biased Juror Demonstrated That His Or Her Pro-Death Views Would Prevent Or Substantially

Impair Their Ability To Return A Verdict Of Life Imprisonment Without Parole In The Case Before Them.

A juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath; juror's bias need not be proved with unmistakable clarity. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) In the context of persons who favor life without parole, the California Supreme Court has held that a prospective juror's consideration of the death penalty must be a "reasonable possibility." (*People v. Ashmus* (1991) 54 Cal.3d 932, 963.) If the substantial impairment test of *Wainwright v. Witt, supra*, 469 U.S. at p.424 applies equally to prospective jurors with a pro-death bias (*People v. Coleman* (1988) 46 Cal.3d 749, 765), their willingness to consider a life sentence also must be within the realm of a "reasonable possibility." None of the jurors at issue in the instant matter exhibited a willingness to consider a life sentence as a reasonable possibility for sentencing. Therefore, as explained at length herein and in Appellant's Opening Brief ("AOB"), Arg.I, pp.55-112, all of respondent's refutations are erroneous.

Respondent cites *People v. Riggs* (2008) 44 Cal.4th 248, 282, following the *Wainwright* decision clarifying the *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 standard for juror exclusion due to a bias

regarding the imposition of capital punishment. When read in its entirety, the *Riggs* decision is more supportive of appellant's position than respondent's position. Notably, the *Riggs* court also held that "at bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case.[Citations.]" (*People v. Riggs* (2008), *supra*, 44 Cal.4th at p.282.) Respondent also cites *People v. Bradford* (1997) 15 Cal.4th 1229, 1318 in which this Court further specifies that a prospective juror's views must not prevent or substantially impair "the juror's ability to return a verdict of death in the case before the juror." In *Bradford*, the prospective jurors excused by the trial court held anti-death beliefs. One prospective juror stated that she "did not know whether she could impose the death penalty in the present case," after having also revealed that "she found it very difficult to accept responsibility for the decision to render a death verdict." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1319.) The second disputed juror informed the court that he was opposed to the death penalty. He stated that he "could conceive of imposing the penalty only if that would bring the victim back to life," (*Id.*) but that he "would listen to the judge's instructions and follow the law, also stating he would 'to the very last minute resist' imposing the death penalty." (*Id.*)

Using the same standard articulated in *Bradford* and *Coleman, supra*, a prospective juror's views must not prevent or substantially impair

the juror's ability to return a verdict of life imprisonment in the case before the juror. In its opening brief in the instant matter, appellant has provided ample support from the record that each of the jurors whom the trial court did not properly dismiss for cause demonstrated unequivocally that assigning the penalty of a life sentence without parole in the case before them was not a "reasonable possibility". (Robert C.: see AOB pp.57-60; Kristen S.: see AOB, pp.60-62; Shirley J.: see AOB, pp.62-64; Gregory D.: see AOB, pp.64-67; Marguerite S.: see AOB, pp.67-71; Raymond L.: see AOB, pp.71-72; Ernest M.: see AOB, pp.72-75; Robert G.: see AOB, pp.75-78; Michael S.: see AOB, pp.78-81; Barbara C.: see AOB, pp.81-84.)

B. Each Juror's Pro-Death Views Were Expressed Clearly And Unequivocally. Evidence Of Each Juror's Substantial Impairment In The Performance Of The Juror's Duties Is Fairly Supported By The Record, Therefore The Trial Court's Determination Not To Dismiss Each Juror For Cause Is Not Binding On Appeal.

On appeal, the duty of the court is to examine the context in which the trial court denied the challenge, in order to determine whether the trial court's decision that the juror's beliefs would not "substantially impair the performance of [the juror's] duties" is fairly supported by the record. (See *People v. Mincey*, *supra*, 2 Cal.4th 408, 456-457; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224.) Where, as here, a prospective juror has indicated the he or she would automatically vote for the death penalty, that juror is "substantially impaired" within the meaning of *Wainwright v. Witt*, *supra*, 469 U.S. at p.424, and must be excused for cause. (*Morgan v. Illinois*

(1992) 504 U.S. 719, 729; *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86; *People v. Coleman* (1988) 46 Cal.3d 749, 764-765.)

Respondent's reliance on *People v. Cunningham* (2001) 25 Cal.4th 926, 975 ("On appeal, we will uphold the trial court's ruling if it is fairly supported by the record ... when the prospective juror has made statements that are conflicting and ambiguous."), *People v. Holt* (1997) 15 Cal.4th 619, 651 ("If [a juror's responses are not conflicting and equivocal], we will uphold the trial court if the ruling is fairly supported by substantial evidence in the record"), and *People v. Martinez* (2009) 47 Cal.4th 399, 426 ("Thus, when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State," (internal quotations omitted)) to assert that the trial court's determinations are binding on the appellate court, is misplaced.

The *Cunningham* jurors whose defense challenges for cause were denied by the trial court all expressed a strong propensity to impose the death penalty during the initial voir dire questioning. As questioning proceeded they were each "rehabilitated" by the prosecution and each, in turn, stated that they would follow the law. The appellate court thus found that each juror gave conflicting responses, and that the trial court's determination of the true state of mind of each juror was binding. (*People v. Cunningham* (2001) 25 Cal.4th 926, 976-979.) In *Holt* one juror stated

unequivocally that he would not impose death for an unintentional killing, and he subsequently never wavered from that position. (*People v. Holt* (1997) 15 Cal.4th 619, 652.) This was fairly supported by the record. The second disputed *Holt* juror repeatedly expressed an inability to state whether she could vote for death. (*Id.* at p.653.) This juror's responses were continually so equivocal that the trial court was left with no alternative than to grant the prosecution's challenge for cause because it was never clear whether the second disputed juror would be fair and impartial.

The *Martinez* juror in question stated during *voir dire* that "[T]here is a possibility that I could vote for the death penalty. I would have to have all the evidence, all the facts, and it would have to be something that would push me beyond the way I normally feel about the death penalty. But ... that could happen." (*People v. Martinez* (2009) 47 Cal.4th 399, 429.) Subsequently, the same juror stated that it was not "realistic" to think that certain evidence would cause her to vote for the death penalty. (*Id.*) The *Martinez* juror's statements confirm the trial court's expression that the juror gave "a definite impression that she would be unable to fulfill and impartially apply the law." (*Id.* at p.430.)

Similarly, in the instant case, each disputed juror clearly and unequivocally expressed views that would substantially impair that juror's ability to fulfill and impartially uphold the law, although these jurors were

pro-death and were challenged by the defense. Unlike the jurors in the cases cited by the Attorney General, the challenged jurors in the instant case were *not* excused for cause. The defense exercised all of its peremptory challenges for jurors and 1 of its challenges for alternates. (31 R.T. 5926-5999.) After exhausting his allotted peremptory challenges against each of the potential jurors described below, appellant asked for one additional peremptory to use against a seated juror, Barbara C., whom he had unsuccessfully challenged for cause based on her inability to be fair and impartial. (8 C.T. 2207; 31 R.T. 5991; AOB, Arg.I, pp.55-57.) The trial court denied the request. (8 C.T. 2207; 31 R.T. 5993.) This was error, as demonstrated below.

1. Robert C.

The Court: "Third, if and only if the jury finds the defendant guilty of murder of the first degree and finds one or more of the special circumstances to be true, would you always vote for the death penalty in the penalty phase of the trial and refuse to consider life imprisonment without parole, no matter what evidence you heard during the trial?

Robert C: "I've never been in that situation before. I've always felt that if a person was definitely guilty of murder, that they should be subject to the same thing that they did to the person they killed. That they should die for what they did."

The Court: That's not the law.

Robert C: No, it's not the law. It's just the way I feel. (20 R.T. 3609)

Respondent argues that the "trial court reasonably concluded that Robert C. could follow the law. (Resp.Brief, p.91.) However, the trial court recognized that Robert C. had come to the court "with misconceptions" about the law, and that even after the court's explanation of the law Robert C. still "unquestionably favors the death penalty." (20 R.T. 3634-3635.) Robert C.'s responses during *voir dire* were incredibly vague and uncertain as to whether he could possibly consider a penalty of life imprisonment without parole, and he should not have remained in the venire. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.57-60.)

2. Kristen S.

Defense counsel: "In general, do you have some belief that if there's a premeditated, intentional, deliberate murder of a police officer, that that automatically calls for the death penalty?

Kristen S.: Premeditated, thought out – I'd have to say yes. Premeditated, definitely. I'm – I do feel very strongly about – about police officers. I have great respect for police officers. And I believe something that's premeditated, it's done with malice and they know it in

their mind ahead of time, is very vicious. (23 R.T. 4239)

At the outset of *Hovey* examination, Kristen S. clearly stated that she believed that the death penalty was not utilized enough, clarifying the responses on her juror questionnaire by telling defense counsel that people on death row know they are guilty and deserve to be put to death. (23 R.T. 4240-4241.) Nothing in Kristen S.'s subsequent responses indicate that her opinion about the death penalty changed or that she would be able to consider a penalty of life imprisonment without parole. Kristen S. should have been excused for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp. 60-62.)

3. Shirley J.

Defense counsel: I'm saying the person has been convicted of a premeditated murder. I'm asking you, in that circumstance of a premeditated murder, without lawful excuse, without justification, do you believe that that automatically calls for the death penalty?

Shirley J: I would have to say yes. (21 R.T. 3799.)

During *Hovey* examination, Shirley J. stated unequivocally that she would always vote for death. (21 R.T. 3799-3801.) Shirley J.'s views in favor of the death penalty were so strong that her statement to the court that she did not have a quarrel with the proposition that she may not consider "the

deterrent or nondeterrent effect of the death penalty in general or the monetary cost to the state of execution or maintaining a prisoner for life without the possibility of parole," was unbelievable. (21 R.T. 3807.) This statement hardly amounts to the conclusion that Shirley J. had the ability to consider a penalty of life imprisonment without parole. To the contrary, Shirley J. would always vote for death, and should have been excused for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.62-64.)

4. Gregory D.

The Court: Third, if and only if the jury finds the defendant guilty of murder of the first degree and finds one or more of the special circumstances to be true, would you always vote for the death penalty in the penalty phase of the trial and refuse to consider life imprisonment without parole, no matter what evidence you heard during the trial?

Gregory D.: It would be highly unlikely that I would not vote for the death penalty under that circumstance. (23 R.T. 4155.)

...

Defense counsel: I guess I'm going to have to ask you in the grading of things when you use that phrase, what is the scale that you are using.

Gregory D.: Right. Well, my personal opinion in regards to how the penalty phase of such matters should be handled is purely a matrix-type formula. It's not important to me where the defendant, if proven guilty, grew up, how he grew up. It is just the act itself or what the trial was set forth, in this case, the murder of a police officer in the line of duty.

If that is proven up and murder in the first degree is voted on by the jury and the special circumstances are met, to me it becomes very clear what I would do going in as far as my opinion: the death penalty would be appropriate. (23 R.T.4158.)

Gregory D. believed the appropriate penalty for first degree murder was death. He indicated he would not consider any further information if the murder was deliberate. Mr. D. also indicated he wanted to limit appeals. (18 C.T. 4600-4632.) Mr. D. stated that he believed the death penalty accomplished "[f]air justice—If you murder someone deliberately with malice aforethought—you should pay with your life for your choice of taking someone else's life." (23 R.T. 4145; 5 C.T. 4626, Q.167.) Mr. D. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.64-67.)

5. Marguerite S.

Defense counsel: Well, the question, ma'm: As you sit here right now this morning, do you feel that you have a bias in favor of the prosecution?

Marguerite S.: Yes.

Defense counsel: And could you explain to me why you feel you have that bias?

Marguerite S.: Because of my friends in law enforcement.

Defense counsel: So as you sit here, then, right now this morning, do you feel, then, that you are biased against Mr. Johnson, the defendant in this case?

Marguerite S.: I would say so, yes.

...

Defense counsel: Do you feel that you would have a problem being fair with regards to any defendant who's accused of the first-degree murder of a police officer?

Marguerite S.: Yes. (21 R.T. 3664.)

...

Defense counsel: Do you feel that given the fact that this case does involve the allegation of first-degree murder of a police officer, this is not the right kind of case for you to sit on as a juror?

Marguerite S.: I believe so, yes. (21 RT 3666.)

The prosecutor and the trial judge clearly manipulated the statements of Marguerite S. By moving her from admitting that she would not be a good juror in this case to forcing her into agreeing that she would follow the law is evilly skillful and resulted in a jury containing a very dangerous juror. Although defense counsel used a peremptory challenge to remove Margeurite S., Marguerite S. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.67-71.)

6. Raymond L.

Defense Counsel: Do you feel that the murder of a police officer is the type of crime that is more deserving of the death penalty, just in the abstract?

...

Raymond L.: Okay. I believe so, yes. (20 R.T. 3445-3446.)

Raymond L. believed in the death penalty. Mr. L. indicated he would rank an 8 on a scale of 1 to 10 in favor of the death penalty. (21 C.T. 5458-5490.) Mr. L. repeatedly stated that he did not know if he could be fair to appellant. (20 R.T. 3452; 8 C.T. 5486, Q.175.) Raymond L. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.71-72.)

7. Ernest M.

The Court: If, and only if, the jury finds the defendant guilty of murder of the first degree and finds one or more of the special circumstances to be true, would you always vote for the death penalty in the penalty phase of the trial and refuse to consider life imprisonment without parole, no matter what evidence you heard during the trial?

Ernest M.: Um, yes, uh-huh. (26 R.T. 4985-4986.)

Ernest M. had friends, relatives or co-workers in the L.A. Sheriff's Department, LAPD, and the California Highway Patrol. Mr. M. exhibited an inability to consider imposing a penalty other than death. (26 R.T. 4988-4989.) Ernest M. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.72-75.)

8. Robert G.

Defense counsel: Do you feel that the death penalty should automatically be applied in the case of the first-degree murder of a police officer?

Robert G.: Doesn't make it any easier. I know a few policemen. Personally I think it should be. (21 R.T. 3819.)

Robert G. indicated on his juror questionnaire that death was appropriate where a life is deliberately taken, i.e. the act was premeditated and not accidental. Mr. G. believed the death penalty removed corrupting

influences, was emotionally healing for victims, and acknowledged to society that justice had been rendered and served. (18 C.T. 4732-4764.) Mr. G. explained during Hovey examination that appellant would probably not receive a fair trial from him. (21 R.T. 3822-3823.) Robert G. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg. I, pp.75-78.)

9. Michael S.

Defense counsel: Okay. Do you have some sense that for a premeditated murder, intentional, deliberate murder where there is no accident, no self-defense but it was an – there was an intention to take another person's life, do you have a feeling those premeditated murders automatically call for the death penalty?

Michael S.: Um, if found guilty, I would probably say yes. (24 R.T. 4349.)

Michael S. indicated on his juror questionnaire that his father-in-law had been killed in a shooting accident. Mr. S. had witnessed a murder. He believed that jurors were often railroaded or conned into making emotional judgments. He supported the death penalty for extreme cases of murder that would include the death of a police officer. (25 C.T. 6580-6612.) Michael S. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.78-81.)

10. Barbara C.

Defense counsel: You said that before you were called to jury duty you had an opinion about this case?

Barbara C.: Well, according to what I had read, but I meant just in general. I had always considered that if you committed a murder, then the death penalty was appropriate. (24 R.T. 4542-4543.)

Barbara C. clearly exhibited an inability to consider imposing a penalty other than death. She believed that the death penalty acted as a deterrent, and that it is a justified and necessary penalty. (1 C.T. 159, Q.165; 1C.T. 160, Q.169; 24 R.T. 4541.) Barbara C. should have been removed for cause. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; See AOB, Arg.I, pp.81-84.)

Since all of the statements made by the ten jurors identified above are clear and unequivocal, and fairly supported by the record, the appellate court is not bound by the trial court's ruling, and this error requires reversal.

C. The Jurors' States Of Mind, Fairly Supported In The Record By Their Own Unambiguous Statements, Required Their Removal For Cause. The Trial Court's Error Now Demands Reversal By The Court Of Appeals.

Respondent alleges that each juror described above clearly demonstrated an ability and willingness to follow the law in this case and consider all the circumstances in making guilt and penalty decisions,

regardless of his or her personal or philosophical beliefs regarding the death penalty. (Resp.Brief, p.93.) However, each juror in the current case expressed a firmly held belief that the death penalty was, unequivocally, the only appropriate penalty to assign to a person found guilty of the first-degree murder of a police officer, even though prompting by the prosecutor and trial judge led them to recite the "right" answers when asked if they would consider life without the possibility of parole..

Respondent also cites *Boyette* to support its assertion that an appellate court must defer to a trial court's denial to remove a prospective juror for cause because the trial court is uniquely situated to determine the juror's demeanor and credibility. However, that is not what the *Boyette* court stated. The *Boyette* court reaffirmed the existing rule, stated in *People v. Cunningham*, *supra*, that a trial court's decision to deny a challenge for cause is binding on appellate review if a) the trial court's ruling is "fairly supported by substantial evidence in the record", and b) the prospective juror "has made statements that are conflicting and ambiguous." In the absence of either of these two elements, an appellate court is not required to defer to the trial court's decision. As demonstrated by the facts cited by appellant in the instant matter, neither of these elements is present in the *voir dire* testimony of any of the disputed jurors. Thus, the ruling of the trial court is not binding. This Court is free to review the record *de novo*, and the record as it stands requires reversal for error.

Appellant understands that a juror's understanding of the law can, and does, change from the first moments of *voir dire* to the final impaneling of a jury. As respondent points out, in *People v. Riggs* (2008) 44 Cal.4th 248, 282, this Court stated, "[A] per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during *voir dire* examination." (citing *Mabe v. Commonwealth* (Ky.1994) 884 S.W.2d 668, 671.) However, respondent does not provide the remainder of the *Riggs*' court's statement, which provides, "[t]he test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." (*People v. Riggs* (2008) 44 Cal.4th 248, 282.) Stated another way, regardless of a juror's firmly held beliefs regarding the death penalty, the juror may serve on a jury in a capital case "so long as [he or she] state clearly that [he or she is] willing to temporarily set aside [his or her] own beliefs in deference to the rule of law." (*People v. Martinez* (2009) 47 Cal.4th 399, 427 (a juror's personal beliefs cannot preclude him from engaging in the weighing process and returning a capital verdict.) The disputed *Riggs*' juror originally stated that, with regard to mitigating evidence, she didn't understand why someone's past had anything to do with the crime for which they were currently being tried. Upon further explanation from the court, the *Riggs*' juror concluded that

she could consider all the evidence, including evidence about the defendant's past, in determining what penalty he deserved.

In contrast to juror responses in *Riggs*, in the instant matter, each of the disputed jurors expressed difficulty with the prospect of considering the defendant's background as mitigating evidence and engaging in an analysis of weighing the aggravating and the mitigating factors—and did not change these convictions.

1. Robert C.

Robert C. expressed his convictions as grounded in religion: "Well, it's just kind of like what it says in the Bible. You know, you kill somebody, you should be killed yourself. It's kind of the way – the general way I feel." (20 R.T. 3612-3613.) Robert C. had held this view for "quite some time" (20 R.T. 3613), and had never held a different view. (*Id.*) When asked if he could consider a person's past in mitigation, he responded that he didn't consider background problems, like the way a person was raised, the environment he was raised in, or being a war veteran, an excuse for killing somebody. (20 R.T. 3628.)

2. Kristen S.

Kristen S. stated that she believes that a premeditated, intentional, deliberate murder of a police officer "definitely" automatically calls for the death penalty. (23 R.T. 4239.)

3. Shirley J.

If Shirley J. found, beyond a reasonable doubt, that the murder committed was premeditated and without justification or excuse, the penalty should automatically be the death penalty because, she believes, our society is based on that principle. (21 R.T. 3801.)

4. Gregory D.

When asked whether he would always vote for the death penalty and refuse to consider life imprisonment without parole if the jury finds the defendant guilty of murder in the first degree, and finds one or more of the special circumstances to be true, Gregory D. stated that it would be "highly unlikely" that he "would not vote for the death penalty under that circumstance." (23 R.T. 4155.)

5. Marguerite S.

Upon examination, Marguerite S. told defense counsel that, given the fact that this case involved the allegation of first-degree murder of a police officer, it was not the right kind of case for her to sit on as a juror. (21 R.T. 3666.) She also stated that she did not think it is right for someone who has committed a crime like this [killing a police officer] to continue [to live]. (21 R.T. 3667.) Further, Marguerite S. clearly stated that it was her state of mind to vote for death during the penalty phase if the accused was found guilty of the first-degree murder of a police officer. (21 R.T. 3668.)

6. Raymond L.

On two occasions, at the beginning of *voir dire*, and then further along in the examination, when being questioned by defense counsel, Raymond L. stated that he believed that the murder of a police officer is more deserving of the death penalty that other types of crimes. (20 R.T. 3445, 3456) The record does not reveal that his opinion in this regard changed at any time.

7. Ernest M.

When asked whether he would wait, hear the evidence in aggravation, hear the evidence in mitigation, and then decide what is appropriate at the penalty phase, Ernest M. stated that if the jury got to that point, he felt strongly about the death penalty and he would vote for it. (26 R.T. 4988.)

8. Robert G.

Robert G. believed that imposing the death penalty on a person who committed first-degree murder of a police officer would be offering a kind of protection to other police officers. (21 R.T. 3819.) He stated that, he had a bias toward the prosecution in this case already, because of his friendships with a number of police officers, and the pre-trial publicity that he had seen and heard. He did not believe that background and behavior are

mitigating circumstances—he believed that they are excuses, and that people can overcome these. (21 R.T. 3822-3825.)

9. Michael S.

Michael S. stated that he believed the death penalty is just. (24 R.T. 4347.) Upon further examination, Michael S. stated that when a murder is committed with the intention to take another person's life, he believed the sentence should automatically be the death penalty. (24 R.T. 4349.)

10. Barbara C.

When asked whether she believed that the death penalty is automatically the appropriate sentence in the case of the first-degree murder of a police officer, Barbara C. replied yes, that her philosophical opinion would be yes. (24 R.T. 4540.)

Respondent cites *People v. Carasi* (2008) 44 Cal.4th 1263, 1290, for the principle that a prospective juror is disqualified to serve if his bias prevents him "from acting impartially and without prejudice to any party." That is exactly the case here. Each juror revealed an unshakeable bias in favor of the death penalty and against fairly considering background and behavior as mitigating factors in the weighing process. These jurors' biases constituted a substantial impairment that would prevent each of them from fulfilling and impartially upholding the law. Therefore, each of these jurors

should have been dismissed by the trial court for cause and this error requires reversal.

Respondent also alleges that substantial evidence supported the trial court's findings that each juror understood his or her responsibility to uphold the law, and that each of them was capable of doing so. (Resp.Brief, p.93.) Respondent is wrong. Respondent states that simply because a juror has stated that he can "consider the evidence presented at trial in making guilt and penalty determinations in this case" (Resp.Brief, re: Michael S., p.98) or "base any judgment in this case upon the evidence presented in court" (Resp.Brief, re: Gregory D., p.94), the statements, in and of themselves, constitute "substantial evidence."

The first definition listed in Webster's dictionary to define the word "substantial" is "consisting of or relating to substance." (Webster's Dictionary, http://www.merriam-webster.com/dictionary/substantial, accessed on February 22, 2011) Any one statement made by a juror cannot rise to the level of "substantial evidence." It is the "substance" of all the statements made by a juror that would constitute "substantial evidence." Taken as a whole, the statements made by each of these jurors represented to the court an unequivocal bias that substantially impaired their ability to be fair and impartial.

D. Appellant Stated A Challenge For Cause, Which Is A Specific Objection, To Each Disputed Juror During Voir Dire, And Therefore Has Not Forfeited His Claims That The Trial Court Erroneously Denied These Challenges.

Respondent miscites the law to assert that appellant has forfeited his claim that the trial court improperly did not excuse prospective jurors Robert G., Michael S. and Raymond L. for cause. Respondent relies upon *People v. Hinton* and *People v. Mickey* to support this assertion. In *People v. Hinton* (2006) 37 Cal.4th 839, 860, defendant failed to challenge the disputed jurors for cause at trial, and the court therefore held that defendant failed to preserve any appellate challenge to those jurors. In *People v. Mickey* (1991) 54 Cal.3d 612, 664, the court held that "[A] defendant may properly raise in this court a point involving an allegedly improper excusal for undue personal hardship only if he made the same point below. The requirement of contemporaneous and specific objection promotes the fair and correct resolution of a claim of error both at trial and on appeal, and thereby furthers the interests of reliability and finality."

However, the facts in the instant matter are distinguishable. Appellant did, in fact, challenge each of these prospective jurors for cause, and contemporaneously provided the court with a specific objection to each. Appellant stated that the challenge for cause for each of these prospective jurors was due to bias in favor of the death penalty. This is sufficient to preserve the challenge for appeal. The contemporaneous and specific objection required by the *Mickey* court demands that defense

counsel state why a challenge is being made during the trial proceedings. A challenge for cause, a challenge to the determination of excusal for personal hardship, or a peremptory challenge, are, by nature, specific objections. To be made contemporaneously means that defense counsel presented the challenge to the court at the time that the trial court was reviewing the prospective juror's qualifications to be impaneled. In the instant matter, appellant met both requirements: first, his challenges were for cause, and thus specific—clearly explained as a challenge due to each prospective juror's bias in favor of the death penalty; and second, his challenges were made to the trial court at the time the court reviewed each juror's capacity to serve on the jury following *voir dire*. (Robert C.: see AOB pp.59-60; Kristen S.: see AOB, pp.61-62; Shirley J.: see AOB, p.63; Gregory D.: see AOB, p.66; Marguerite S.: see AOB, p.70; Raymond L.: see AOB, p.72; Ernest M.: see AOB, pp.73-74; Robert G.: see AOB, p.77; Michael S.: see AOB, p.80; Barbara C.: see AOB, p.83.)

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES IN ORDER TO REMOVE THE SEATED JUROR WHO DEMONSTRATED A BIAS IN FAVOR OF THE DEATH PENALTY.

Appellant's right to a fair and impartial jury was violated by the trial court's denial to one additional peremptory challenge to remove a biased juror, Barbara C. Appellant was compelled through erroneous rulings on his challenges for cause to use nine of his peremptory challenges to remove

the challenged jurors, with the result that, having finally exhausted all such challenges allotted him by law; a juror who was incapable of being fair or impartial was impaneled. Barbara C. was seated on the jury after the trial court wrongly rejected appellant's challenge for cause and appellant's further request for an additional peremptory challenge. (See Arg.I, *supra*; AOB, Arg.II, pp.113-117.) Thus, contrary to respondent's assertion, the seating of juror Barbara C. demonstrates that, at the very least, the jury was biased due to the seating of Barbara C., a juror with a pro-death bias. As a result, appellant was denied a fair and impartial jury, due process, and a reliable determination of his capital sentence. (U.S. Const., Amends Fifth, Sixth, Eighth, and Fourteenth; Cal.Const., Art.I §§15, 16, 17.)

Respondent cites *People v. Bonin* (1988) 46 Cal.3d 659, 679 for the same principle that appellant does, namely that for a defendant to support a claim that he is constitutionally entitled to more peremptory challenges than are provided by statute, the defendant must establish "at the very least that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury." Respondent also cites *People v. Pride* (1992) 3 Cal.4th 195, 231, in which this Court, quoting *Bonin, supra*, stated that "[L]ogic dictates no more lenient standard applies to non-constitutional claims of error in denying additional peremptory challenges." Relying on the law stated in these two cases, and without citing any facts in the record, respondent makes the unsupported allegation that appellant has

"failed to meet the standard of 'likely partiality' that this Court has established." (Resp.Brief, p.105.) Respondent is wrong.

"To demonstrate that his or her right to a fair and impartial trial was affected by any error in the trial court's refusal to sustain the defendant's challenges for cause, a defendant must have employed a peremptory challenge to excuse the juror or jurors in question, exhausted the defendant's peremptory challenges or justified the failure to do so, and communicated to the trial court the defendant's dissatisfaction with the jury ultimately selected." (*People v. Cunningham* (2001) 25 Cal.4th 926, 976, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 444; and see *People v. Williams* (1997) 16 Cal.4th 635, 667.) For the reasons set forth in Argument I *ante*, regarding the denial of his challenges for cause, and the exhaustion of his peremptory challenges to remove the biased jurors described in Argument I *ante*, and appellant's communication of his dissatisfaction with the jury ultimately selected (31 R.T. 5991-5992), appellant has demonstrated a reasonable likelihood that his right to a fair and impartial trial was affected by the trial court's error.

Appellant's jury included Juror 5, Barbara C., who was substantially impaired due to her pro-death bias. (31 R.T. 5991.) Barbara C. should have been excused for cause on the basis of her pro-death bias. During her examination pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, in response to defense counsel's question,

"[D]o you feel that in the case of the first-degree murder with special circumstances of a police officer that the death penalty is automatically the appropriate sentence?"

Barbara C. responded: "I would have said yes, except that Judge Perren said that we need to listen to the mitigating circumstances. I—that we have to consider those other things, not just—in my opinion, my philosophical opinion would be yes."

Defense counsel: "Your philosophical opinion would be yes to the question I just asked you? ("[D]o you feel that in the case of the first-degree murder with special circumstances of a police officer that the death penalty is automatically the appropriate sentence?")

Barbara C., again: "Correct." (24 R.T. 4540.)

As the examination by defense counsel continued, Barbara C. also stated that she had "a preconceived notion that the death penalty was appropriate." (24 R.T. 4541.) Further, Barbara C. recalled from her juror questionnaire that, on a scale from one to ten, ten being strongly in favor of the death penalty and one being strongly opposed, she had rated herself as a ten. When asked to explain this to the court, she reiterated that she had "always felt that if you committed a murder, then you knew that was – that [death] was the penalty." (24 R.T. 4544.) Defense counsel, in trying to elicit a clear, unambiguous statement from Barbara C. with regard to

whether she could put aside what her conscience had always told her to be the correct penalty for murder, namely, the death penalty, restated her testimony and the following exchange occurred (24 R.T. 4550-4551.):

Defense counsel: "Well, as Judge Perren just indicated to you, you indicated to me that you would not automatically impose the death penalty in the case of a first-degree murder with special circumstances of a police officer. And then you seemed to indicate that in the case of a first-degree murder with special circumstances with any victim you would automatically impose the death penalty.

Mrs. C: Well—

Defense counsel: I guess what I'm trying to do is see if you can't explain and tell me what your rationale is.

Mrs. C: Well, it still—just is my philosophical opinion is that is the appropriate penalty for murder, any murder."

Respondent relies upon *People v. DePriest* (2007) 42 Cal.4th 1, 23-24, to allege that appellant's claim that the trial court erred by failing to exercise its discretion in favor of granting appellant an additional peremptory challenge fails because the trial court did not erroneously deny defense challenges for cause against Barbara C. However, the facts upon which the Court relied in *People v. DePriest* are distinguishable from the instant matter. First, in *DePriest*, the Court suggested that the defense had

used several peremptory challenges against persons who presented "no problem at all in terms of being fair and impartial." (*Id.*) The Court never rendered such an opinion with regard to appellant's use of challenges for cause in the instant case.

Second, the disputed prospective jurors in *DePriest* demonstrated a well-formed understanding of the law due to both extensive education and prior direct employment experience, giving them the advantage of credibility in their assertions of impartiality. The *DePriest* defendant could not demonstrate that he was likely to receive an unfair trial before a biased jury if his request was denied. In the instant matter, appellant has clearly demonstrated, through the words of Barbara C. herself, that Barbara C., rather than having a well-formed understanding of the law, either through prior education or experience, held a philosophical belief in the universal propriety of the death penalty as a consequence for the crime of murder, thus placing her credibility in serious dispute. Since Barbara C. was clearly biased and therefore should have been excused for cause, appellant did demonstrate that he would receive an unfair trial if she was impaneled.

Third, the *DePriest* defendant failed to identify any allegedly biased jurors who sat on his jury. Again, the record in the instant matter reveals with certainty the evident bias of Barbara C. in favor of the death penalty, and Barbara C. did sit on appellant's jury.

"[I]f he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different. [Citations.]" (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088; cf. *People v. Mason* (1991) 52 Cal.3d 909, 954 [6th Amend. Claim obviated by exercise of peremptory challenges to exclude prospective jurors not excused for cause, without comment by this court on other potential constitutional claims].) By revealing the strongly held beliefs of Barbara C., as freely expressed by Mrs. C herself, appellant provided the court with clear factual evidence, supported by the record, that, in the absence of at least one additional peremptory challenge, he was reasonably likely to receive an unfair trial before a partial jury. Thus, the trial court violated appellant's right to a fair trial by impartial jurors by denying his challenges for cause and denying him one additional peremptory challenge to remove a biased juror, and his convictions must be reversed. (U.S. Const., Amends. Fifth, Sixth, Eighth and Fourteenth; Cal.Const., art.I, §§15, 16; *People v. Bonin*, *supra*, 46 Cal.3d at p.679.)

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ERRONEOUSLY EXCUSING A PROSPECTIVE JUROR FOR CAUSE UNDER THE *WITT/WITHERSPOON* STANDARD.

In California, a criminal defendant has a state and federal constitutional right to be tried by a fair and impartial jury of his peers. The Court has stated the law with regard to challenges for cause: "The state and federal constitutional guarantees of a trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. [Citation.] '[A] juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by this court's instructions and the juror's oath.' [Citations.] If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, 'the State is disentitled to execute the sentence.'[Citation.]...'" (*People v. Boyette* (2002) 29 Cal.4th 381, 416, citing *People v. Weaver* (2001) 26 Cal.4th 876, 910, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 and *Morgan v. Illinois* (1992) 504 U.S. 719, 729.)

In *Witherspoon v. Illinois*, the Court established the boundaries within which States could exclude jurors who were unable to administer constitutional capital sentencing schemes by not following their oaths.

(*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) The *Witherspoon* decision was also meant to guard against the possibility of creating a jury that was "uncommonly willing to condemn a man to die" by excusing a prospective juror for cause after he or she simply expressed qualms about capital punishment. *Wainwright*, 469 U.S. at p.423 citing *Witherspoon v. Illinois*, *supra*. A juror may be challenged for cause based upon his or her views concerning capital punishment, both pro-death views and pro-life views, only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423; accord *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) The United States Supreme Court has made it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Wainwright v. Witt*, *supra*. As the *Wainwright* court stated, "[T]he quest is for jurors who will conscientiously apply the law and find the facts." *Wainwright*, 469 U.S. at p.423. This is what makes a jury "impartial" under the Sixth Amendment standard.

In the case at bar, prospective juror Ann I. was unequivocal in her answers to *voir dire* questions regarding her ability to perform her duties as a juror in accordance with the instructions and her oath. Thus, the trial court's ruling can be upheld on appeal only if it is supported by substantial

evidence in the record. (*People v. Phillips* (2000) 22 Cal.4th 226, 233.) There is not substantial evidence in the record to support the trial court's excusal of Ann I. for cause.

At the outset of her examination, Ann I. was questioned about her beliefs generally with regard to the death penalty. As the examination continued, Ann I. was asked whether or not, given her beliefs, she could impose the death penalty. Only Ann I.'s responses to questions regarding her ability to uphold her oath as a juror by following the law with regard to the death penalty are relevant for this Court's review for conflict or equivocation. In this regard, Ann I. was consistent and unequivocal that her religious views would not incapacitate her with respect to imposition of the death penalty. Respondent and the trial court conflate the two lines of questioning, assuming that strong religious opposition to the death penalty equates to inability to impose the death penalty if the facts and law dictate. The fact that Ann I. expressed religious convictions about the death penalty should not disqualify her if she has consistent and unequivocal convictions about performing her duties to follow the instructions and her oath as a juror irrespective of her religious convictions. Moreover, doctrinally the Roman Catholic Church does not absolutely oppose the death penalty, but

rather reserves the possibility of imposing capital punishment only in the most extreme circumstances.[1]

There is not substantial evidence to support the trial court's excusal of Ann I. The trial court's error requires reversal of appellant's conviction and the judgment of death.

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[1] Catechism of the Catholic Church, Sections 2266-2267: "The efforts of the state to curb the spread of behavior harmful to people's rights and to the basic rules of civil society correspond to the requirement of safeguarding the common good. Legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offense. Punishment has the primary aim of redressing the disorder introduced by the offense. When it is willingly accepted by the guilty party, it assumes the value of expiation. Punishment then, in addition to defending public order and protecting people's safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party. (citing the Gospel of St. Luke, Chapt.23:4-43.) Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically non-existent." (quoting Blessed Pope John Paul II, *Evangelium Vitae*, p.56.)"

A. Ann I. Directly Stated That She Would Not Automatically Vote For Life Imprisonment. Thus The Record Does Not Support The Trial Court's Conclusion That Ann I. Was Substantially Impaired By Her Religious Beliefs.

Respondent argues that Ann I.'s reliance on her religious scruples substantially impaired her ability to perform her duties as a capital juror. (Resp.Brief, pp.109-111.) This argument is not supported by the facts. From her response to the very first question the Court posed, through the last responses she gave, Ann I. stated her ability to follow the trial court's instructions and obey the law consistently and unequivocally.

Court: Because of your opinions, if any, concerning the death penalty, during the guilt or innocence phase of the trial would you vote not guilty of first-degree murder or find the special circumstances false, no matter what evidence you heard, just to avoid the penalty issue?

Ann I.: No

(20 R.T. 3585-3586.)

...

Court: And lastly, the fourth question. If and only if the jury finds the defendant guilty of murder of the first degree and finds one or more of the special circumstances to be true, would you always vote for life in prison without the possibility of parole in the penalty phase of the trial and refuse to vote for death, no matter what evidence you heard during the trial?

Ann I.: I don't believe so.

(20 R.T. 3586.)

...

Defense counsel: [W]ould it be fair to state that not having heard any evidence so far about this particular case, that you don't know how much of a factor your conscience would play in determining the appropriate punishment were you to get to that stage?

Ann I.: That's correct.

(20 R.T. 3604.)

The fact that Ann I. might be guided by her "conscience" is not a basis to disqualify a juror. Being guided by one's conscience and following the rules of law are not mutually exclusive, but rather, complementary endeavors. If a juror does not rely on his or her conscience to determine the weight of the evidence, the juror arguably becomes ineffective, incapable of making an individual decision, and simply relying on the opinions and influence of others. A juror whose life is grounded in faith and conscience is logically capable of weighing evidence with integrity and honesty, and abiding by his or her oath to uphold the rules of law in determining the outcome of a case. Rather, a prospective juror is subject to disqualification if the "prospective juror would be unable to faithfully and impartially apply the law in the case." *People v. Rodriquez* (1994) 8 Cal.4th 1060, 1147. A

prospective juror is not required by law "to leave behind, if necessary, [her] conscience"[2] in order to prove her ability to fulfill the duties of her juror oath and the court's instructions. In fact, "[j]urors' views of the evidence ... are necessarily informed by their life experiences ..." *In re Malone* (1996) 12 Cal.4th 935, 963.

The trial court employed the court's method of analysis in *People v. Visciotti* (1992) 2 Cal.4th 1, 45, to evaluate Ann I.'s statements regarding her views of the death penalty. However, the trial court erred in its conclusion that this analysis required Ann I.'s excusal for cause. The *Visciotti* court applied the standard articulated in *Witt/Witherspoon* and their progeny: "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Wainwright v. Witt*(1985) 469 U.S. at p.420, citing *Adams v. Texas* (1980) 448 U.S. 38, 45.) The disputed *Visciotti* juror agreed with the court's statement that it was "unmistakably clear that under no circumstance would [he] ever vote for the death penalty." (*People v.*

[2] Prosecutor's question during Ann I.'s *Hovey* examination. (20 R.T. 3591.)

Visciotti (1992) 2 Cal.4th 1, 45.) The court concluded that this direct response constituted an automatic refusal to impose the death penalty in any circumstance.

Ann I.'s *voir dire* answers were plainly not the equivalent of an automatic rejection of the death penalty regardless of the evidence presented; to the contrary, based on the responses that she gave, Ann I. would necessarily be compelled to consider the evidence to determine whether the case before her was serious enough to merit a penalty of death. (*People v. Velasquez* (1980) 26 Cal.3d 425, 438-439.) When asked to assume that appellant was convicted of first degree murder and a special circumstance, Ann I. indicated that she "would not automatically vote for either life without parole or the death penalty. [She] would consider all the evidence and [she] could vote for either depending on the evidence." (20 C.T. 5122, Q.171.)

Respondent relies on *People v. McWhorter* (2009) 47 Cal.4th 318, 341-342 to assert that Ann I. was properly excused because the responses that she gave during her examination were akin to those of *McWhorter* juror Robert C., who was excused for substantial impairment. However, Ann I.'s responses are quite different from Robert C.'s. First, when asked whether he could vote to impose the death penalty if the aggravating circumstances outweighed the mitigating circumstances, Robert C. responded, "I'm not sure I could." *Id.* When posed with the same question,

Ann I. responded that she would follow the judge's instruction with regard to taking into consideration factors in aggravation or mitigation, and that she would not automatically vote for life, but rather, would listen to all of the evidence as it pertains to those factors first, and would then vote. (20 R.T. 3588-3589.) Second, Robert C. indicated that "his church was opposed to the death penalty and that he would feel 'uncomfortable' trying to set aside his faith in voting to impose death." (*People v. McWhorter* (2009) 47 Cal.4th 318, *supra*.) In contrast, Ann I. acknowledged her religious scruples in voting on death, and simply stated she would rely on her religious beliefs and her conscience to determine whether or not appellant committed a crime that was heinous enough to warrant a penalty of death. (20 R.T.3589-3591; See fn.1, p.31 *supra*.)

Respondent further avers that the trial court properly excused Ann I. for cause because she indicated that she would be unable to return a "verdict of death in a case involving a murder of a single police officer." (Resp.Brief, p.111.) However, Ann I. did not make this statement directly, nor do the totality of her responses taken together allow for this inference. To support this argument, respondent relies upon the court's decision in *People v. Friend*, wherein the disputed prospective juror clearly indicated that he "could only consider imposing the death penalty on a Ted Bundy-type serial murderer, whom the state previously had made 'every possible effort' to rehabilitate." (*People v. Friend* (2009) 47 Cal.4th 1, 61.) At no

time during her examination did Ann I. render an opinion similar to the disputed *Friend* juror. Defense counsel asked Ann I. if she would never vote for the death penalty if the charge is murder of a police officer with special circumstances. (20 R.T. 3588.) In response to this question Ann I. stated that she felt that "the death penalty should be reserved for somebody who is a (sic) habitual criminal in a serious way" and that she "wouldn't automatically vote", she would "listen to the evidence first, and then at that point [she'd] want to hear everything before [she'd] vote." (20 R.T. 3588.) Thus, the *Friend* court's analysis and conclusion are inapplicable to the facts in the instant matter.

B. The Trial Court's Error Impinges Appellant's Constitutional Right To A Fair Trial, And Thus Is Not Harmless. Appellant's Conviction And The Penalty Of Death Imposed Upon Him By The Jury Must Be Reversed.

Respondent relies upon *People v. Stewart* (2004) 33 Cal.4th 425, 455 to argue that the type of error committed by the trial court in excusing Ann I. for cause does not impact the decision rendered during the guilt phase. This reading of the *Stewart* decision is overbroad and inaccurate. Although the reasoning of *Stewart* does not require reversal of the guilt judgment or special circumstance finding, it likewise does not prohibit reversal of the guilt judgment under the appropriate circumstances. (*Id.*) Importantly, in *Gray v. Mississippi* (1987) 481 U.S. 648, 660, the U.S. Supreme Court noted that some state and federal courts have already

recognized the full import of the constitutional mandate expressed in *Witherspoon*. Specifically, the Court noted with approval that these state and lower federal courts have "concluded that the improper exclusion of even a single prospective juror from a capital jury required reversal of a death sentence for the reason that it prejudiced a defendant's right to an impartial jury, a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Id.*) The Supreme Court of California has refused to find an erroneous exclusion harmless even though it was suggested that the prosecutor would have used his peremptory challenges to exclude all prospective jurors opposed to the death penalty. (*In re Anderson* (1968) 69 Cal.2d 613, 618-620, cert. denied, *sub nom. Anderson v. California* (1972) 406 U.S. 971.) The *Gray* court identified the relevant inquiry as "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error" (emphasis in original). (*Gray v. Mississippi*, 481 U.S. at p.665, citing *Moore v. Estelle* (1982) 670 F.2d 56, 58.)

The U.S. Supreme Court has recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." (*Chapman v. California* (1967) 386 U.S. 18, 23.) The right to an impartial adjudicator, be it a judge or jury, is such a right. (*Gray v. Mississippi*, 481 U.S. at p.668.) In excluding Ann I., the State produced a jury uncommonly willing to condemn a man to die. This error, coupled

with the trial court's errors in denying appellant's challenges for cause (see *ante*, and AOB, Arg.III, pp.118-132), resulted in a jury that was not only a "tribunal organized to convict," but a "tribunal organized to return a verdict a death." *Id.* These errors require not only the reversal of the penalty of death imposed upon appellant, but also the reversal of appellant's conviction. (See AOB, Arg.III, pp.130-132.) Even if this Court is not persuaded that appellant's conviction should be reversed, at the very least, appellant's penalty sentence must be set aside.

IV. APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE SHERIFF'S OFFICE, THE DISTRICT ATTORNEY'S OFFICE AND THE DISTRICT ATTORNEY'S AGENT, DR. PATTERSON, REPEATEDLY DISREGARDED APPELLANT'S INVOCATIONS OF HIS RIGHT TO REMAIN SILENT AND TO HAVE COUNSEL PRESENT PRIOR TO INTERROGATION, ULTIMATELY COERCING ADMISSIONS AND CONFESSIONS TO THE CRIMES CHARGED. THE ADMISSIONS AND CONFESSIONS WERE ERRONEOUSLY ADMITTED INTO EVIDENCE. THE ERROR REQUIRES REVERSAL.

Respondent first asserts that appellant's statements fall outside the constitutional protection required by *Miranda*[3] because he initiated conversation with the District Attorney's psychiatrist, Dr. Patterson, thereby breaking his silence and opening the door for Dr. Patterson to ask him questions. Secondly, respondent alleges that appellant's words and conduct demonstrated a desire to open, both directly and indirectly, a discussion of the investigation. (Resp.Brief, p.112.) Third, and finally,

[3] *Miranda v. Arizona*, (1966) 384 U.S. 436.

respondent believes that the evidence that the prosecution presented at trial was so strong that even if the trial court had not admitted any portion of appellant's conversation with Dr. Patterson, appellant would still have been found guilty and sentenced to death. Respondent relies on this belief to assert that the trial court's error in admitting portions of appellant's conversation with Dr. Patterson is harmless.

Respondent is wrong. First, appellant's statements fall well within the strictures of *Miranda*. At no time did appellant initiate conversation with Dr. Patterson. Second, appellant did not demonstrate a desire to open a dialogue. Rather, government officers badgered appellant, attempting to elicit a response to their pointed inquiries not once, but seven times in the course of three hours while he was awaiting surgery for his gunshot wound. Government officers tried to wear him down, by planting suggestive ideas in his mind, by coercing him, and by verbally intimidating him. To put it simply, appellant was forced to endure a barrage of inquisitions. Finally, the trial court's error in admitting any portion of appellant's conversation with Dr. Patterson is not harmless. Appellant's conversation with Dr. Patterson is the bedrock foundation of respondent's entire Case in Chief, both during the guilt phase and the penalty phase. Without the ability to parse and misrepresent appellant's words, respondent is left with an evidentiary record that does not support a first degree murder conviction or a penalty of death. Therefore, far from being harmless, the trial court's

admission of appellant's statements to Dr. Patterson inflicts egregious harm.

In sum, the State employees, including law enforcement officers, district attorney staff, and Dr. Patterson, repeatedly, intentionally, and flagrantly ignored appellant's Fifth and Fourteenth Amendment rights by refusing to scrupulously honor his repeated invocations of the right to silence and the right to counsel, coercing admissions and confessions later admitted by the trial court, and this error must be reversed.

A. Summary Of Facts.

Appellant was arrested and taken into custody in the early evening on July 17, 1996. Having been shot in the chest, appellant was transported to Ojai Valley Community Hospital. (13 R.T. 2268.) Appellant arrived at the Ojai Valley Community emergency room at about 6:15 p.m. (2 C.T. 256, 529.) During a three and a half hour period, while suffering from blood loss, and while being treated and stabilized by medical personnel, appellant was interrogated by representatives of the Ventura County Sheriff's Office and the District Attorney's Office no less than seven times. (2 C.T. 251-252, 270-271, 279, 333-334; 5 C.T. 1106-1107, 1143-1144, 1150, 1158, 14 R.T. 2310.) The following is a simple timeline of events related specifically to the government officers' interrogations of appellant and appellant's invocations of his rights.

Appellant's Admittance to the Ojai Valley Community Hospital: 6:15 p.m. (2 C.T. 256, 529.)

Interrogation 1: 7:01 p.m.	Ventura County Sheriff's Detective Bob Young entered appellant's hospital room and advised appellant of his *Miranda* rights. Appellant clearly and unequivocally invoked his right to remain silent. Appellant responded "no" to a request that he waive his rights. Detective Young did not ask appellant any further questions at this time. (2 C.T. 251, 333-334; 5 C.T. 1106, 1143-1144.)
Interrogation 2: 7:05 p.m.	Ventura County District Attorney Michael Bradbury entered appellant's hospital room and asked appellant if he could understand him, if appellant had been advised of his right to remain silent, if he understood everything he was told regarding his rights, and if it was correct that he did not want to talk about the incident. According to Bradbury, appellant answered in the affirmative to all of Bradbury's questions. (2 C.T. 1205-1206.)
Interrogation 3: 7:30 p.m.	Ventura County District Attorney's Investigators Haas and Fitzgerald, and Detective Young, entered appellant's

hospital room. They did not re-advise appellant of his rights. (2 C.T. 257, 338-340.) These interrogators asked appellant for consent to search the residence at 122 North Encinal. (2 C.T. 338-340; 12 R.T. 2017.) Investigator Haas asked appellant, *inter alia*, if he would be willing to talk to a psychiatrist, but did not explain that the psychiatrist would not be a treating doctor, but rather, would be acting as the District Attorney's forensic analyst. (12 R.T. 2025.) Appellant responded, "Yes, the last time I talked to one was probably a year and a half ago." (5 C.T. 1147; R.T. 2025.)

Interrogation 4: 8:30 p.m.

Detective Young entered appellant's hospital room for the third time in an hour and a half, and did not re-advise appellant of his *Miranda* rights. Detective Young again initiated questioning of appellant, asking him if he wished to talk about the incident at 122 North Encinal. Appellant invoked his right to remain silent, for a second time, and added that he wished to be represented by counsel. (2 C.T. 252, 336; 5 C.T. 1106, 1150.) The trial court acknowledged that appellant invoked his right to counsel at this point. (16 R.T. 2724.)

Interrogation 5: 8:45 p.m.	Detective Young entered appellant's hospital room for the fourth time, did not advise appellant of his rights, and did not ask appellant any questions. (5 C.T. 1114.) Detective Young engaged in a verbal tirade against appellant, berating him as an unproductive human being, accusing him of killing Deputy Officer Peter Aguirre, and generally emphasizing what a despicable person Young believes appellant is. (10 R.T. 1634.)
Interrogation 6: 10:04 p.m.	At Chief District Attorney Ronald Janes' request, psychiatrist Dr. Donald Patterson approached appellant at Ventura County Medical Center (where appellant had been transferred) and informed appellant, "I'm Dr. Patterson. I'm a psychiatrist from Santa Barbara. [T]he DA's Office asked me to come and talk with ya." (2 C.T. 278-279.) Dr. Patterson advised appellant of his rights under *Miranda* and asked appellant whether he would be willing to talk. Appellant responded, "Uh, I don't think so. I'm facing very serious charges and I think I'd rather talk to a lawyer first." (2 C.T. 279.)

Dr. Patterson turned on a tape recorder while appellant received x-rays and surgery preparation (2 C.T. 280.) There is no indication on the

tape that Dr. Patterson terminated the interview. (2 C.T. 273-327.) That Dr. Patterson turned on the tape contradicts his later testimony that he was there only to observe appellant's demeanor. (10 R.T. 1655.)

Interrogation 7: post-x-ray (approx. 10:20 p.m., almost three and a half hours after Dr. Patterson initially read appellant his *Miranda* rights).

Dr. Patterson approached appellant while he was being x-rayed. (10 R.T. 1753.) Dr. Patterson followed appellant from the x-ray room back to his room. (10 R.T. 1757.) Appellant said, "Still here, huh?" Dr. Patterson responded, "Yeah, just, just in case you're—I can, I can, whatever." Appellant continued, and then said, "The last psychiatrist I talked to, maybe you know him?" Dr. Patterson answered appellant's question with a question, "[Y]ou know who it was?" (2 C.T. 281; 5 C.T.1160.) Dr. Patterson's question to appellant opened the door, which resulted in a long dialogue between appellant and Dr. Patterson. Dr. Patterson subsequently told appellant that they could talk about appellant's prior interactions with psychiatrists, stating, "...[C]ause you don't mind and we could just talk about what has happened or something." (2 C.T. 282; 10 R.T. 1663.) At the outset of this encounter appellant also told Dr. Patterson "I think I'd be better off talking about mental states than about actual specific facts." (8 C.T. 2011.) This further demonstrates appellant's reluctance to talk with Dr. Patterson.

Prior to trial, the defense moved *in limine* to suppress the statements made by appellant to Investigator Haas and Dr. Patterson on the grounds that appellant's Fifth and Fourteenth Amendment rights had been violated

by the state's failure to observe appellant's repeated invocations of the right to remain silent and the right to counsel. (2 C.T. 528-546.)

As to the statements to Investigator Haas, the trial court ruled, "the initial consent for the purpose of gaining consent [sic], is fine. The remainder of the statement I don't believe is admissible and would not be admitted." (16 R.T. 2722.) When asked to clarify his ruling, as to the admissibility of the remainder of the statement made by appellant to Investigator Haas, the trial judge said, "I think it was questions asked other than for booking information. I don't think that's permitted. He [appellant] didn't initiate it; they did, they came in. They asked, they're not allowed to." (16 R.T. 2722-2723.)

As to the statements made to Dr. Patterson, the court found: (1) that Detective Young gave a full and complete *Miranda* advisement and appellant refused to waive; (16 R.T. 2712.) However, (2) appellant "initiated the conversation [with Dr. Patterson], controlled the conversation, directed the conversation and took it to the place he wished it to go;" (16 R.T. 2715.) (3) Appellant knew and understood the nature of the rights that he had and he waived those rights; (16 R.T. 2717-2718.) And, (4) Not all of the content would be admissible. (16 R.T. 2718.)

Based on the Court's ruling, the prosecution filed a motion to admit during the guilt phase certain portions of appellant's statement to Dr. Patterson. (8 C.T. 1983-1987.) The prosecution argued that only these

portions of the statement were relevant and admissible to explain appellant's actions on July 17, 1996.[4] The prosecution argued that the rest of the statement was irrelevant or inadmissible hearsay. In response, appellant filed a motion to admit the full statement under California Evidence Code section 356[5], and under the federal Constitution. (8 C.T. 2120-2127.) Defense counsel argued that appellant's entire statement is an explanation of his belief that the shooting was a product of his mental illness. (8 C.T. 2121.) The trial court denied appellant's motion to admit the complete statement. (29 R.T. 5749.) (See Arg.V, *infra.*)

B. Appellant's Fifth And Fourteenth Amendment Rights Were Not Scrupulously Honored: He Was Continually Badgered By Law Enforcement Officers And Dr. Patterson For More Than Three Hours In The Hospital On The Evening Of July 17, 1996.

On July 17, 1996, Ventura County government officers interrogated appellant. Appellant invoked his Fifth and Fourteenth Amendment right to remain silent and right to counsel. Appellant did not initiate conversation with any Ventura County government officers who interrogated him on July 17, 1996. At no time did appellant initiate conversation with Dr.

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[4] The people selected only statements relating to events surrounding the day in question. (8 C.T. 1986.)

[5] Section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Patterson. Appellant's rights were not scrupulously honored by the interrogating government officers, thus violating appellant's constitutional rights. In *Miranda v. Arizona* (1966) 384 U.S. 436, 479, the United States Supreme Court held that an accused has a Fifth and Fourteenth Amendment right to remain silent and have counsel present during custodial interrogation. (See also *Edwards v. Arizona* (1981) 451 U.S. 477, 482.) The Fifth and Fourteenth Amendments prohibitions against compelled self-incrimination requires that any custodial interrogation be preceded by advice to the suspect that he has the right to remain silent and also has the right to the presence of an attorney. (*Ibid.*)

If the accused indicates that he wishes to remain silent, "the interrogation must cease," and if he requests counsel, "the interrogation must cease until an attorney is present." (*Miranda v. Arizona*, *supra*, 384 U.S. at p.474.) The invocation of the right to counsel also operates as an invocation of the right to silence and creates an absolute bar to further questioning. "[A]n accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare v. Michael C.* (1979) 442 U.S. 707, 719.) The presence of counsel during an interrogation mitigates the dangers of untrustworthiness of the police, reduces the likelihood that police will practice coercion, and increases the likelihood that the statement given by the accused is accurate and will be accurately reported. (*Davis v. United States* (1994) 512 U.S. 452, 459.)

For *Miranda* purposes, "interrogation includes both direct questioning and its "functional equivalent." (*People v. Boyer* (1989) 48 Cal.3d 247, 273.) "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely [from the suspect's perspective] to elicit an incriminating response from the suspect..." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.)

Here, appellant's counsel was not present when he was effectively subjected to seven interrogations within a three-hour period. Furthermore, when his conversation with Dr. Patterson took place appellant was in a hospital bed, unable to move, deprived of his freedom of mobility, and arguably in a setting just as isolated as a police interrogation room or a cell. Appellant was also in a significant amount of pain (2 C.T. 274-277) and was told that he would not receive medication for the pain until Dr. Patterson was finished interrogating him. (2 C.T. 276.) There was psychological coercion. Government officers attempted to dominate appellant by continuously entering his hospital room and asking him the same questions. Appellant was arguably kept for hours on end in the interrogation process—the entire time that he was in his hospital room awaiting x-rays and surgery—and after his transfer from Ojai Valley Community emergency room to Ventura County Medical Center. The

atmosphere was not pleasant—appellant was subjected to a verbal tirade by Detective Young, and numerous berating insinuations by all of the government officers who entered his hospital room. Leading questions were asked over and over again, not merely questions that would allow officers clarity in understanding. There was an overriding attempt, both conscious and subconscious, to subjugate appellant's will to the will of his examiners.

C. At No Time Did Appellant Initiate Conversation With Any Ventura County Government Officers, Including Dr. Donald Patterson.

Once a suspect has invoked the right to counsel sufficiently clearly that a reasonable police officer would understand the request, all questioning must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477.) "*Edwards* set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel. (Citation omitted.) In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. (Citation omitted)." (*Smith v. Illinois* (1984) 469 U.S. 91, 98.) The United States Supreme Court and lower federal courts have strictly enforced the "bright-line rule" of Edwards. Thus, a suspect's responses to further questioning

cannot be used to cast doubt upon the adequacy of his initial request. (*Smith v. Illinois* (1984) 469 U.S. 91, 97-99 (per curiam).)

The conditional exception to the bright line rule is where "the accused himself initiated further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 485.) Even when further communication is initiated by the accused, the burden still remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.) According to the court in *People v. Mickey* (1991) 54 Cal.3d 612, "findings on whether the accused effectively initiated further dialogue relating to the investigation ... is also a predominantly factual mixed question ... reviewed for substantial evidence or "clear error." (*People v. Mickey* (1991) 54 Cal.3d 612, 649 (Cf. *United States v. Poole* (9th Cir. 1986) 806 F.2d 853, 853 [holding that "[t]he determination whether a defendant was subjected to custodial interrogation is essentially factual, and is reviewable under the [federal] 'clearly erroneous' standard'].)

Respondent cites *People v. Waidla* (2000) 22 Cal.4th 690 (Resp.Brief, p.121) to support the notion that appellant initiated a conversation with Dr. Patterson when he followed appellant from the x-ray room back to his room. (10 R.T. 1757.) The facts in *Waidla* are significantly distinctive from the facts in the instant case. In *Waidla*, when

the defendant saw a law enforcement officer from California whom he recognized at the police station where defendant was incarcerated in New York, he spontaneously asked the detective, "What can I do for you[?]," "What do you want from me?," and "What can I do to help you[?]" (*Waidla*, *supra*, 22 Cal.4th at p.731.) The court cited these three inquiries from the defendant as "substantial evidence for the finding of initiation in and of itself," going on to say, "Waidla's words and conduct can fairly be said to represent such a desire with respect to Pietrantoni's investigation into Viivi's murder and the related burglary and robbery and other offenses. In fact, their only apparent referent is that investigation, and nothing else." (*Id.*)

Waidla is distinguishable from the instant matter because when appellant spoke with Dr. Patterson, he began by talking about his prior medical treatment with other psychiatrists, and then slowly recounted details of the events leading up the incident on July 17, 1996. Only a small portion of appellant's words to Dr. Patterson described the incident on July 17, 1996 itself, thus lacking any inference that the only "apparent referent" for their conversation was the investigation into the events of July 17.

Secondly, in *Waidla*, each time the defendant asked him a question, the Detective asked the defendant not to speak until the Detective was able to read him his *Miranda* rights. Each time, the Detective advised the defendant of his *Miranda* rights, and each time the defendant waived his

rights. When Dr. Patterson entered appellant's room after appellant had undergone x-rays, he did not administer *Miranda* warnings, but rather, tried to engage appellant in further interrogation. (2 C.T. 281; 5 C.T. 1160.)

Finally, *Waidla* is distinguishable from the instant matter because appellant never unambiguously waived his rights prior to his conversation with Dr. Patterson. In addition, in *Waidla*, the court held that the defendant's questions indicated that he affirmatively took steps to "help" or "offer assistance" to the detective. In the instant matter, appellant's question to Dr. Patterson, "[T]he last psychiatrist I talked to, maybe you know him?" was not an offer of appellant's assistance to Dr. Patterson and had nothing to do with the July 17th incident, but rather, was an innocuous statement to a person "with a kind face" whom appellant thought was a psychiatrist there to help him. (2 C.T. 281; 5 C.T. 1160.)

Respondent also cites *Oregon v. Bradshaw* (1983) 462 U.S. 1039 to assert that the trial court was correct in finding substantial evidence that appellant initiated the conversation with Dr. Patterson. (Resp.Brief, pp.121-122.) We disagree. The facts of *Oregon v. Bradshaw* are also distinguishable from the instant matter. In *Oregon v. Bradshaw*, the court stated, "[A]s we have said many times before, this determination [as to whether the defendant initiated a conversation] depends, "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." (*Oregon v.*

Bradshaw, supra, 462 U.S. at p.1046, *citing North Carolina v. Butler* (1979) 441 U.S. 369, 374-375,(*quoting Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

The *Oregon* court held that even though respondent's question was ambiguous, it evinced a willingness and a desire for a generalized discussion about the investigation -- it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. The officer in *Oregon* could reasonably have interpreted the defendant's question *as relating generally to the investigation.* And, in fact, it is apparent that this was the officer's interpretation, based on the fact that he immediately reminded the accused that "you do not have to talk to me," and only after the accused told him that he "understood" did they have a generalized conversation." (*Oregon v. Bradshaw* (1983) 462 U.S. at p.1046.) Again, this is distinguishable from the instant matter. In *Oregon*, the officer immediately reminded the accused that he didn't have to talk to him. When Dr. Patterson approached appellant, rather than reminding appellant that he didn't have to talk with him, Dr. Patterson effectively questioned appellant, by stating "'cause you don't mind and we could just talk about what has happened or something." (2 C.T. 282; 10 R.T. 1663.) Clearly, Dr. Patterson was interrogating appellant here about the July 17th incident.

The *Oregon* court also held that, "...there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not

be held to "initiate" any conversation or dialogue." (*Oregon v. Bradshaw* (1983) 462 U.S. at1045.) The instant case is one such situation, where the "bare inquiry" of appellant to Dr. Patterson should not be held to "initiate" any conversation or dialogue.

Finally, respondent cites *People v. Mickey* (1991) 54 Cal.3d 612 (Resp.Brief, p.123) for the authority that a defendant may initiate a conversation even though police have taken the action of coming into his cell, thus insinuating that appellant's hospital room was analogous to a prison cell. In *People v. Mickey*, defendant was extradited from Japan to the United States. While en route to the United States in police custody, defendant divulged, of his own motivation, that he was sorry that things had turned out the way they did. (*People v. Mickey*, *supra,* 54 Cal.3d at p.645.) Upon arrival and disembarkment, defendant told one of the officers, "Curt, I would like to continue our conversation at a later time." (*Id.* at p.646.) The officer was instructed to return to the jail where defendant was being held; ask defendant if he desired to speak with the officer further about the crimes; if he responded in the affirmative, the officer was to advise defendant of his *Miranda* rights and obtain a waiver; and then commence interrogation. (*Ibid.*) When the officer met defendant in an interview room at the jail, "Defendant acknowledged that it was at his request that [officer] was present. [Officer] advised defendant of his *Miranda* rights, and defendant proceeded to make a waiver. Interrogation ensued. [Officer]

asked questions about the killing of [the two victims], and defendant gave answers implicating himself in the deed and also in its planning and aftermath... [At the end of the session], Defendant stated that he had spoken voluntarily and had not been coerced in any way." (*People v. Mickey, supra,* 54 Cal.3d at pp.646-647.)

In *People v. Mickey*, there was no evidence in the record of express questioning by any of the officers; there was only the obvious desire of the defendant to justify, excuse, or at least explain his conduct and the events surrounding the incidents at issue. (*Id.* at p.650.) These facts are distinguishable from the facts in the instant matter. Appellant was subject to seven interrogations by law enforcement officers within the span of three and a half hours. (2 C.T. 251-252, 270-271, 279, 333-334; 5 C.T. 1106-1107, 1143-1144, 1150, 1158, 14 R.T. 2310.) During these interrogations, appellant clearly and unambiguously invoked his right to remain silent two times, and affirmed that right a third time. Appellant also invoked his right to an attorney two times. (2 C.T. 251-252, 270-271, 279, 333-334; 5 C.T. 1106-1107, 1143-1144, 1150, 1158, 14 R.T. 2310.) In addition, Dr. Patterson's words to appellant when he followed him into his hospital room following his x-ray procedure, were reasonably likely to elicit an incriminating response, i.e. "...[C]ause you don't mind and we could just talk about what has happened or something." (2 C.T. 282; 10 R.T. 1663.)

Thus, the court's disposition in *People v. Mickey* does not assist respondent in furthering its allegations.

D. At No Time Did Appellant Waive His Right To Counsel.

Consistently and unambiguously throughout the seven interrogations that appellant was subjected to on July 17, 1996, he invoked his right to remain silent and his right to an attorney. A waiver of these rights is normally considered an intentional relinquishment or abandonment of a known right or privilege. "*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.'" (*Moran v. Burbine* (1986) 475 U.S. 412, 421, *citing Miranda v. Arizona*, *supra*, 384 U.S. at p.444.) "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 *citing Aetna Insurance Co. v. Kennedy* (1937) 301 U.S. 389, 393; and *Hodges v. Easton* (1882) 106 U.S. 408, 412; *See also Ohio Bell Telephone Co. v. Public Utilities Commission* (1937) 301 U.S. 292.) "The courts must presume that a defendant did not waive his rights, the prosecution's burden is great... ." (*North Carolina v. Butler* (1979) 441 U.S. 369. *See also Haynes v. State of Washington* (1963) 373 U.S. 503, 512-513, and *Haley v. State of Ohio* (1948) 332 U.S. 596, 601 ("Knowing and intelligent waiver" required to relinquish constitutional rights).) The court requires that the

totality of the circumstances surrounding the putative waiver, not just the suspect's words, be considered in determining the intent to waive. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.) Appellant did not voluntarily, knowingly and intelligently waive his right to counsel.

1. Appellant Did Not Voluntarily Waive His Right To Counsel.

By his words and actions appellant did not voluntarily waive his right to counsel. Voluntariness is still the constitutional standard. It continues to govern the admissibility of the "fruits" of statements made in a custodial interrogation, and the admissibility of statements challenged as unconstitutionally obtained even with the interrogator's compliance with *Miranda*. (*Davis v. United States* (1994) 512 U.S. 452, 457-458, *citing Withrow v. Williams* (1993) 507 U.S. 680.) "A statement is involuntary when, among other circumstances, it "was 'extracted by any sort of threats… , [or] obtained by any direct or implied promises, however slight… ."'" (*People v. Neal* (2003) 31 Cal.4th 63, 79, *citing Hutto v. Ross* (1976) 429 U.S. 28, 30 (by the court). In *People v. Neal* (2003) 31 Cal.4th 63, 68, the court concluded that the confessions, obtained in deliberate violation of *Miranda*, were not only inadmissible in the People's case-in-chief because they were obtained in violation of *Edwards*, but also that they were inadmissible for any purpose because they were involuntary.

To determine whether or not a confession was voluntary by taking into account the "totality of the circumstances," the court has determined if an accused's "will has been overborne and his capacity for self-determination critically impaired." (*Culombe v. Connecticut*, (1961) 367 U.S. 568, 602; *see also People v. Neal* (2003) 31 Cal.4th 63, 79, *citing Withrow v. Williams* (1993) 507 U.S. 680, 688-689.) To determine whether a defendant's will has been overborne in a particular case, the Court has considered the following factors: The youth of the accused, *Haley v. Ohio* (1948) 332 U.S. 596; lack of education, *Payne v. Arkansas* (1958) 356 U.S. 560; low intelligence, *Fikes v. Alabama* (1957) 352 U.S. 191; lack of any advice to the accused of his constitutional rights, *Davis v. North Carolina* (1966) 384 U.S. 737; repeated and prolonged nature of the questioning, *Ashcroft v. Tennessee* (1944) 322 U.S. 143; use of physical punishment such as the deprivation of food or sleep, *Reck v. Pate* (1961) 367 U.S. 433. The significant factor in all of the cases listed above is that none of them was decided on the presence or absence of a single criterion, each reflected the court's scrutiny of all of the surrounding circumstances. (*Miranda v. Arizona*, *supra*, 384 U.S. 436.)

In the instant matter, appellant invoked his right to counsel twice, once when Detective Young interrogated him, and again when Dr. Patterson interrogated him. Young asked appellant if he would waive his rights, and appellant told him no. Deputy District Attorney Bradbury also

asked appellant if he would waive his rights, and again, appellant told him no. In addition, in evaluating the "totality of the circumstances," this Court should find that appellant's "capacity for self-determination" was critically impaired due to a number of circumstances. Appellant is mentally ill, having been diagnosed as a paranoid schizophrenic. (49 R.T. 9094-9096; 50 R.T. 9185.) Appellant was wounded, having been shot in the chest, during the entire course of the numerous interrogations that took place on July 17, 1996. (13 R.T. 2268.) The interrogations lasted over three hours, and appellant was subjected to seven different inquiries. (2 C.T. 251-252, 270-271, 279, 333-334; 5 C.T. 1106-1107, 1143-1144, 1150, 1158, 14 R.T. 2310.) Thus, in light of the foregoing circumstances, coupled with his words and actions, appellant did not voluntarily waive his right to remain silent or his right to counsel.

2. Appellant Did Not Knowingly And Intelligently Waive His Right To Counsel.

Appellant responded to Dr. Patterson's overtures to talk with him without having a full understanding of the right that he was abandoning, or the consequences of his decision to abandon his right to remain silent. "The inquiry has two distinct dimensions." (*Edwards v. Arizona*, *supra*, 451 U.S. at p.482.) "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have

been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725, *see also North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.)

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Johnson v. Zerbst*, *supra*, 304 U.S. at pp.464-465, *citing Patton v. United States* (1930) 281 U.S. 276.) "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (*Carnley v. Cochran* (1962) 369 U.S. 506.) In the instant matter, the record shows that the accused repeatedly invoked his right to counsel. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine* (1986) 475 U.S. 412, 422-423.) There is no evidence in the

record in the instant case to suggest that appellant was ever aware of the State's intention to use his statements to secure a conviction.

Respondent states that appellant's level of intelligence did not impair his ability to handle himself during the discussion with Dr. Patterson, and that fact is one that the court should consider in determining whether appellant actually exercised a voluntary, knowing and intelligent waiver of his rights. (Resp.Brief, pp.125-128.) However, appellant's level of intelligence is not at issue. What is at issue is his understanding of his options on the evening of July 17, 1996 when Dr. Patterson walked into his hospital room—whether appellant understood that his statements to Dr. Patterson would be used against him. "*Miranda* speaks of intelligent waiver [in the sense] that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom." (*Collins v. Brierly* (3d Cir.1974) 492 F. 2d 735.) Appellant invoked his right to remain silent. Appellant invoked his right to counsel. Appellant invoked both of these rights to Dr. Patterson. Yet, when the hospital medical staff were taking x-rays of appellant, Dr. Patterson was omnipresent, talking to appellant and trying to get appellant to respond. Counsel for appellant was not provided; instead, Dr. Patterson's attempts at initiating dialogue with appellant never ceased. Echoing the trial court, respondent argues that it was proper for Dr. Patterson to wait around until appellant changed his mind, if for nothing

more than to observe appellant's state of mind and demeanor. (Resp.Brief, p.124; 16 R.T. 2720.) The trial court stated, the "District Attorney's Office has no alternative but to pursue a line of that nature, certainly in a case such as this." (16 R.T. 2713.) This is factually and legally incorrect. Factually, Dr. Patterson did not merely sit in a room, but followed appellant from room to room, pursuing appellant. Legally, pursuant to *Edwards v. Arizona* (1981) 451 U.S. 477, a suspect's request for an attorney terminates an interview and means that the interviewer must leave, not simply sit and observe. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *Smith v. Illinois* (1984) 469 U.S. 91, 97-9.)

Respondent asserts that appellant's reliance on *People v. Neal* (2003) 31 Cal.4th 63 is misplaced. (Resp.Brief, p.126.) We disagree. In *People v. Neal*, the court held that the circumstance that "weighed the most heavily against the voluntariness of defendant's initiation... is the fact that in the course of the first interview, [the detective] intentionally continued interrogation in deliberate violation of *Miranda* in spite of defendant's repeated invocation of both his right to remain silent and right to counsel. ...[The detective] would not honor defendant's right to silence or his right to counsel until defendant gave him a confession." In *Neal*, a police detective ignored defendant's nine invocations of his right to remain silent, and of his right to counsel. In the instant case, appellant was interrogated seven times within a period of less than four hours. Appellant invoked his

right to remain silent two times, and affirmed that right a third time. Appellant invoked his right to counsel two times. Ventura County government officers intentionally continued interrogation of appellant in deliberate violation of *Miranda.*

Respondent cites *Michigan v. Mosley* (1975) 423 U.S. 96 for the rule that *Miranda* does not "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." (Resp.Brief, p.128, citing *Michigan v. Mosley* (1975) 423 U.S. 96, 102-103.) Further, respondent cites the *Mosley* court's finding that, after the defendant invoked his right to remain silent, the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." (*Id.* at p.106.)

In the instant matter, contrary to respondent's assertion, law enforcement did interrogate appellant within the meaning of *Miranda* after he invoked his rights. Appellant was the subject of "custodial interrogation." The issue in *Mosley*, was "whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* "guidelines," so as to render the statement inadmissible in evidence against Mosley at his trial." (*Id.* at p.100.) At no time during the

questioning did the *Mosley* defendant indicate a desire to consult a lawyer. (*See also People v. Martinez* (2010) 47 Cal.4th 911, 951 (at no time did defendant invoke his right to remain silent, rather, he waived it.)

This too is distinguishable from the instant matter, in which appellant requested an attorney more than once. In addition, government officers in the instant case actually persisted in repeated efforts, seven times in three and a half hours on the evening of July 17, 1996, to wear down appellant's resistance and make him change his mind, to elicit inculpatory information. In contrast to the instant matter, in *Mosley* the police did not fail to honor the decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. (*Michigan v. Mosley*, *supra*, 423 U.S. at pp.105-106.)

"The critical safeguard identified in the passage at issue is a person's right to cut off questioning. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting." (*Michigan v. Mosley*, *supra*, 423 U.S. at pp.103-104, *citing Miranda v. Arizona, supra*, 384 U.S. at p.474.) Therefore, under the *Miranda* protocol,

the court must employ an analysis as to whether defendant's right to cut off questioning was "scrupulously honored." (*Id.* at p.104.)

In the instant matter, on July 17, 1996, government officers and Dr. Patterson failed to scrupulously honor appellant's right to remain silent and his right to counsel. As respondent points out, Sergeant Young ("Young") scrupulously honored appellant's right to remain silent by ceasing all further questioning after appellant invoked his right during the first interrogation with Young. (2 C.T. 334.) Young did not adhere to this modicum of discipline in his subsequent pursuit of appellant's testimony. Young entered appellant's room four times in less than two hours. Three times he asked appellant questions, even though appellant had twice invoked his right to remain silent, and once invoked his right to counsel. Moreover, when Young walked into appellant's hospital for the third time, he engaged in a highly intimidating barrage of diatribes against appellant. Following Young's barrage, Dr. Patterson was the next person who entered appellant's room to interrogate him. It is reasonable to infer that appellant's state of mind was more vulnerable to suggestion and intimidation following Young's visit, and thus, that appellant would be more likely to make an incriminating statement.

District Attorney Bradbury ("Bradbury") did not scrupulously honor appellant's right to remain silent. Bradbury's questions, four minutes after Young had interrogated appellant, were designed to elicit an incriminating

response from appellant, not simply to ensure that appellant understood his rights. Bradbury went into appellant's hospital room immediately after Young told him that appellant had refused to waive his *Miranda* rights and discuss the incident, but appellant had not yet requested legal counsel. (2 C.T. 270; 11 .R.T. 1883.) It defies reason to suggest that Bradbury went into appellant's hospital room simply to "clarify" what Young had told appellant. (2 C.T. 270-271.) Respondent suggests that Bradbury believed that Young had not told appellant that appellant would have to initiate conversation with the law enforcement officials if appellant wanted to discuss the incident with them. (11 R.T. 1911-1912) Respondent further alleges that Bradbury simply wanted to make sure that the protocol for investigating homicide cases was being followed. (11 R.T. 1911) This is a highly suspect assertion, since it is wholly unsupported by the facts. There is nothing in the record indicating that Young incorrectly administered the *Miranda* protocol to appellant, or that appellant sustained a lack of understanding of his Fifth and Fourteenth Amendment rights as a result of Young's administration of the *Miranda* protocol. Moreover, the *Miranda* protocol necessarily must be the same for the investigation of non-homicide and homicide crimes, so to insinuate, as respondent does, that there is some special *Miranda* protocol during the investigation of homicide cases, as respondent does (Resp.Brief, p.112) is false. Bradbury wanted another bite at the apple, he wanted to personally persuade appellant to talk about the

incident. He wanted to wear appellant down in the hopes that appellant would make an inculpatory statement.

Investigator Haas' ("Haas") and Sergeant Young's ("Young") subsequent contact with appellant did not merely involve the request for permission to search appellant's residence. Respondent asserts that Haas did not intend to interrogate appellant, but merely wanted to find out if appellant was a resident at 122 North Encinal, and if so, whether appellant would give consent for the police to search the residence, *citing People v. Ruster* (1976) 16 Cal.3d 690. (Resp.Brief, p.127.) In *People v. Ruster*, the court held "[A]t the conclusion of the booking interview, which was recorded and transcribed, defendant consented to a search of his automobile." (*Id.* at p.699.) In *Ruster*, it was clear that defendant gave his consent, he stated "yes" in response to the officer's direct question as to whether he consented freely and voluntarily. Also, the ownership of the automobile that the police wanted to search was not in question: the *Ruster* defendant claimed the car as his own. This is distinguishable from the facts in the instant matter. Haas initially asked if the 122 North Encinal house was appellant's residence. When appellant responded that he did not own the house, Haas' questioning of appellant should have stopped. Instead, Investigator Haas continued.

Respondent states that Dr. Patterson did not violate appellant's Fifth and Fourteenth Amendment rights, was entirely respectful in observing

appellant and did nothing to wear down his resistance, equating Dr. Patterson's behavior with "scrupulously honoring" appellant's rights, as government agents did with defendant in *United States v. Hsu* (9th Cir. 1988) 852 F.2d 407, 409. (Resp.Brief, p.130.) However, *Hsu* is distinguishable from the instant matter. In *Hsu*, the agents exerted no pressure on the defendant, each agent *Mirandizing* him, and then asking him if he understood his rights, and then initiating questioning. Immediately upon the defendant's assertion that he would like to remain silent with the first agent, she ceased interrogation. Subsequently, the first agent drove the defendant to another location, and a short while later a second agent, who did not know that the defendant had invoked his right to remain silent, undertook exactly the same process that the first agent had engaged in. The *Hsu* defendant voluntarily waived his right to remain silent, and agreed to answer the second agent's questions at that time. Thus, the defendant was *Mirandized* a second time, and made a voluntary, knowing, and intelligent waiver before he answered any of the questions of the second agent. In addition, the defendant was subject to a change of scenery which, the government argued, "served as an intervening event to help alleviate any pressure that Hsu may have felt to waive his rights back at the [original location]." (*United States v. Hsu*, *supra*, 852 F.2d at p.412.)

In the instant matter, appellant was subjected to Dr. Patterson's inquiries in rapid succession within the same space, his hospital room and

the examining room where his x-rays were taken. Dr. Patterson had been apprised of the fact that appellant invoked his right to remain silent, and his right to counsel. In fact, appellant invoked his right to counsel in response to Dr. Patterson's questioning. However, Dr. Patterson still decided to interrogate appellant. Dr. Patterson exerted verbal and physical pressure on appellant with his continuous presence and constant inquiries.

The *Hsu* court held that the crucial factor in determining whether or not defendant's invocation of his rights has been scrupulously honored is the provision of a fresh set of *Miranda* rights. (*United States v. Hsu*, *supra*, 852 F.2d at p.411, *citing U.S. v. Heldt* (1984) 745 F.2d 1275, 1278.) When Dr. Patterson approached appellant during his x-ray examination, and followed appellant into his hospital room immediately thereafter, and asked appellant, "You know who it is?" in reference to the last psychiatrist that appellant had been seen by, Dr. Patterson did not administer *Miranda* warnings to appellant.

Appellant did not waive his right to counsel, either before or after his encounter with Dr. Patterson, but rather, unambiguously invoked this right more than once. Dr. Patterson testified that he considered his purpose in contacting appellant to determine his mental state at the time of the homicide. (10 R.T. 1652, 1655.) Respondent suggests that Dr. Patterson was not attempting to elicit incriminating information for the District Attorney. (Resp.Brief, p.118; 10 R.T. 1655.) This is belied by the fact that

Dr. Patterson turned on the tape recorder during his multiple interrogations of appellant. Arguably, since Dr. Patterson's testimony in this regard is false, the remainder of his testimony can be disregarded. Respondent further suggests that Dr. Patterson "at no point ... insert[ed] any strong injunction for him to talk to me about the crime." (Resp.Brief, p.118.), and that Dr. Patterson did not at any time direct the conversation to incriminating areas. (Resp.Brief, p.118.) This is not true. During every interaction with appellant Dr. Patterson planted suggestive and coercive ideas into appellant's mind regarding Dr. Patterson's availability to listen to appellant's story about the events of the day. Respondent goes on to say that after appellant said that he wanted an attorney, Dr. Patterson did not believe it was unethical to observe him because he had said that he was willing to talk to a psychiatrist. (Resp.Brief, p.119; 11 R.T. 1868-1869.) Respondent surmises that Dr. Patterson therefore believed that appellant's invocation of counsel was equivocal.(Resp.Brief, p.119; 11 R.T. 1876.) However, Dr. Patterson and respondent are wrong.

Appellant had unequivocally invoked his right to counsel at least twice. First, during the fourth interrogation of the evening, when Detective Young approached appellant at 8:30 p.m., appellant invoked his right to remain silent and added that he wished to be represented by counsel. (2 C.T. 252, 336; 5 C.T. 1106, 1150.) The trial court acknowledged that appellant had unequivocally invoked his right to counsel at this point. (16

R.T. 2724.) Appellant reiterated his invocation of his right to counsel when Dr. Patterson entered appellant's room to engage in the sixth interrogation of the evening on July 16, 1996. Dr. Patterson left appellant's room for five to ten minutes to tell Senior Deputy District Attorney Holmes that appellant had refused to waive his rights. (10 R.T. 1750.)

When appellant consented to talking with a psychiatrist, he consented to *receiving care*, not to *being interrogated.* When Dr. Patterson posed the question, "[y]ou know who it was?" (2 C.T. 281; 5 C.T. 1160), he opened the door to what appellant presumed was a conversation between himself and his *treating physician*. Dr. Patterson told appellant that the name of the last psychiatrist he saw was Dr. Peace. At this point, appellant inferred from Dr. Patterson's response that Dr. Patterson was aware of some of the details of appellant's medical history, and was thus perhaps a treating psychiatrist like the others whom appellant had seen. Furthermore, when Dr. Patterson told appellant that they could talk about appellant's prior history of medical treatment by psychiatrists, he stated, "[C]ause you don't mind and *we could just talk about what has happened or something.*" With this highly suggestive statement Dr. Patterson effectively planted two fundamental concepts into appellant's mind—first, that Dr. Patterson was a psychiatrist who could provide appellant with medical treatment, and second, that the medical treatment that Dr. Patterson could provide would assist appellant in navigating through his own confusion about the events

surrounding the incident that took place on July 17, 1996. As such, appellant was coerced by Dr. Patterson to talk about his mental illness, his history of drug and alcohol abuse, past criminal history, and ultimately admissions about what led up to the July 17th incident and the July 17, 1996 incident itself. (8 C.T. 1988-2044.)

E. The Error Is Not Harmless And Requires Reversal.

Respondent *cites People v. Cunningham* (2001) 25 Cal.4th 926 and *Chapman v. California* (1967) 386 U.S. 18 to generally assert that even if the trial court erroneously admitted appellant's statements to Dr. Patterson, whether these statements were involuntary or coerced under *Miranda/Edwards*, the error is harmless. We disagree. The trial court's admission of appellant's statements as voluntary, or admissible under *Miranda/Edwards* constitutes error that requires reversal. The court's admission of appellant's confession can in no way be construed as an error that is "harmless beyond a reasonable doubt." The state's persistent and systematic refusal to observe appellant's multiple invocations rendered appellant's statements to Dr. Patterson inadmissible. The admission of the statements at trial was error. Because the statements were devastating to the defense, the error compels reversal.

When an involuntary confession is admitted at trial, the error is one of federal constitutional dimension and is therefore tested under the standard of prejudice enunciated in *Chapman v. California* (1967) 386 U.S.

18, 24 (*Arizona v. Fulminante* (1991) 499 U.S. 279, 303.) Such errors compel reversal of the conviction and the resulting death sentence unless the prosecution can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p.24.) The state cannot carry this burden here.

"A defendant's confession is 'probably the most damaging evidence that can be admitted against him'" *Arizona v. Fulminante* (1991) 499 U.S. 279, 292, *citing Cruz v. New York* (1987) 481 U.S. 186, 195. As the Ninth Circuit has states, "[a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him...[T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (*Colazzo v. Estelle* (9th Cir.1991) 940 F.2d 411, 424, *quoting Bruton v. United States* (1968) 391 U.S. 123, 139-140.)

In the instant case, appellant did not testify at trial. The prosecution used appellant's statements to Dr. Patterson, in both its Guilt and Penalty Cases in Chief to provide the basis for the People's contentions regarding

the mental elements for the crimes charged, as well as the two special circumstances.

During the guilt phase, the prosecution played an edited version of appellant's conversation with Dr. Patterson to convince the jury that appellant was guilty of first degree murder. (39 R.T. 7119.) The prosecution argued three theories of murder: deliberate and/or premeditated, felony murder, and lying in wait. The prosecution argued that appellant's own statements proved deliberate and premeditated murder and felony murder. (44 R.T. 8151-8153, 8141, 8157-8158, 8164-8165.) The prosecution also used appellant's statements to convince the jury that both charged special circumstances were true. (44 R.T. 8166-8167.) Without any foundation that appellant's affectation and manner of speech at the time of the Patterson interview was in any way relevant to a determination of appellant's state of mind at the time of the murder, and without the jury having the entire interview for context, the prosecution argued: "And as I had suggested before, ladies and gentlemen, all you have to do, all you have to do is listen to that tape to hear the cold and to hear the ice." (44 R.T. 8157.) This argument is inflammatory, and principally aimed at arousing the passions of the jury. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251.) Having heard appellant's taped statements, and the prosecution's argument, the jury convicted appellant on all five counts and found both special circumstance allegations true. (10 C.T. 2706-2708, 2709-2723.)

During the penalty phase of trial the prosecutor played another, less edited, version, of the tape, and gave each juror a copy of the tape transcript. This tape contained a more substantial portion of appellant's conversation with Dr. Patterson (52 R.T. 9667.) Additionally, based on appellant's statements to him, Dr. Patterson testified at great length about appellant.

The prosecution used appellant's statements to urge the jury to impose death. (47 R.T. 8577-8591; 54 R.T. 10047-10068.) During closing argument in the penalty phase the prosecutor argued:

> "Cold-blooded and arrogant. And when he talked to Dr. Patterson later, when he talked to Dr. Patterson, it wasn't just the 'what' that happened. He was asked about the 'why.' And what did he say? 'You don't wonder why. It was just a reaction.' That's as cold as it gets. That's not a delusion. That is the horror, the horror, that's implanted in the minds of everyone who was there that day that will never end." (54 R.T. 10057.)

Having heard the statements by appellant, the jury returned a verdict of death. (54 R.T. 10136-10137.)

Respondent mischaracterizes a number of facts in the record, attempting to cast them in a light more favorable to its argument, to suggest that the prosecution's evidence, even without appellant's admissions and confession to Dr. Patterson, was extremely strong, strong enough for the jury to arrive at the same conclusion during the guilt phase and the penalty phase. However, the following excerpts from the record demonstrate that

the defense evidence did in fact undermine the prosecution evidence. With regard to testimony provided during the guilt phase, the forensic and coroner's testimony does not clearly reveal that one of appellant's fatal shots was directed downward at the victim's head while the victim was on the floor. (35 R.T. 6549, 6618; 39 R.T. 7170-7172.) The evidence in this regard, as testified to by both experts, is unclear. Appellant's wound ballistics consultant did not abandon his conclusion as to the position of Deputy Aguirre's head when shot could not be determined. Dr. John Thornton, a forensic scientist, specializing in interpreting blood spatters and blood stain distributions as part of crime-scene reconstruction, reviewed all investigative and autopsy reports, photographs and transcripts, related to physical evidence. (41 R.T. 7371-7379.) Dr. Thornton did not believe it possible to determine with certitude the sequence of the shots. He believed one of the head shots was while Deputy Aguirre was erect, and was certain the other occurred while Deputy Aguirre was close to the floor, but that his head was not on the floor. He believed that Aguirre was falling when the last shot was delivered, and the evidence was consistent with the shooter running as he shot. (41 R.T. 7383-7385, 7390-7395, 7397-7398, 7411-7412.)

Appellant's police expert, Roger Clark, a former Lieutenant with the Los Angeles Sheriff's Department for more than 27 years, did not acknowledge that a reasonable officer in Deputy Aguirre's position would

believe it necessary to take immediate action to protect his partners. In fact, based on a hypothetical, essentially setting forth the facts present as police officers arrived at Encinal and leading up to the shooting, Clark opined a reasonable police officer would not believe that immediate entry was necessary to prevent a threat of eminent danger to him or others. Clark opined, "[t]here [was] no evidence of an emergency inside the house;" there was absolutely nothing emanating from inside the house to indicate that there was a crime being committed or that someone was in danger, which would create the emergency to go in. (41 R.T. 7578-7589.) Appellant's vision expert, Rodney Gilliland, an Optometrist, testified that if a person with appellant's uncorrected vision was 44 inches away[6] from a uniformed Sheriff, appellant would be able to see that the form was a human being; he would be able to make out the head of the person, be able to see the badge on his chest and his gun belt. (42 R.T. 7557-7561.)

At the penalty phase, appellant's medical experts provided compelling testimony as to appellant's mental state. Dr. Lisa Kus, a team psychologist with the Ventura County Behavioral Health Department, met with appellant in August and December, 1994. Dr. Kus told appellant at that time that her diagnosis was the presence of delusional material, delusional thinking after a long history of drug abuse. Her ultimate

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[6] The prosecution and defense stipulated that from Johnson's right eye to the tip of his fingers on his right hand was 32 inches.

diagnosis was called Organic Delusional Disorder. (48 R.T. 8923-8925.) When Dr. Kus saw appellant in December 1994, she tested appellant as an intelligent person. In her experience, intelligent people can have delusional disorder. The fact that appellant was able to go through the program at ADP (Alcohol and Drug Program) and go to college did not change her opinion that he was suffering from mental illness. Delusional symptoms, paranoid symptoms, can often be very focal. They can be imperceptible to people who are around the person who is suffering. (48 R.T. 8939-8947.)

Dr. Dale Peace, who examined appellant on January 11, 1995, was a psychiatrist with Ventura County Behavioral Health. During his twenty-minute interview with appellant on that day, Dr. Peace found appellant "somewhat delusional." Dr. Peace prescribed Haldol for appellant, an antipsychotic primarily used to alleviate psychosis, delusions and hallucinations. (49 R.T. 9064-9067.) Dr. Charles Hinkin provided his expert opinion that the shooting and other offenses committed by appellant on July 17, 1996, were the direct product of his paranoid schizophrenia. Schizonphrenia is a chronic, debilitating disease of the brain that affects a person's ability to distinguish fantasy from reality. Johnson's reasoning and his capacity to conform his conduct to the requirements of the law were impaired as a result of his mental disease or defect. (49 R.T. 9094-9096; 50 R.T. 9185.) Dr. Hinkin's opinion was based on his thorough examination of appellant. Dr. Hinkin was a neuropsychologist at the U.C.L.A. School of

Medicine. He was also a staff psychologist at the V.A. Hospital treating veterans. (49 R.T. 9087.) Dr. Hinkin spent about eight hours with appellant, and twenty to thirty hours reviewing thousands of pages of material, including police reports, testimony and psychological material. (49 R.T. 9093-9094.) Dr. Hinkin gave appellant various psychological tests, and determined that appellant had exhibited the same schizophrenic problems from 1974 to the current time. (49 R.T. 9133-9140, 9153-9154; 50 R.T. 9162-9185.)

The Prosecution's entire case, both guilt and penalty phases, relied heavily on appellant's statements made to Dr. Patterson. Under these circumstances, the prosecution cannot demonstrate that the error in the admission of appellant's statements to Dr. Patterson was harmless beyond a reasonable doubt. Reversal is compelled. (*Chapman v. California*, *supra*, 386 U.S. at p.24.)

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING ONLY SELECT PORTIONS OF APPELLANT'S STATEMENTS TO DR. PATTERSON, WHILE EXCLUDING THE MAJORITY.

A. The Trial Court Violated California Evidence Code Section 356, By Excluding Relevant Portions Of Appellant's Conversation With Dr. Patterson.

Under California Evidence Code section 356, it was error for the trial court to admit only select portions of appellant's conversation with Dr. Patterson, particularly during the guilt phase, while excluding the majority

of the recorded and transcribed conversation because this created a misleading impression of appellant's state of mind and motive at the time of the crime. (*People v. Pride* (1992) 3 Cal.4th 195, 235.) As explained in Section B, *infra*, this error also resulted in the denial of appellant's state and federal constitutional rights to due process. The legal authorities relied upon by respondent to counter appellant's argument actually provide additional support for appellant's contention that his entire conversation with Dr. Patterson should have been admitted into evidence by the trial court. This Court should reverse the trial court's error.

Respondent argues that appellant's "proffered statements had no bearing or connection with the evidence in admission." (Resp.Brief, pp.136-137.) This is not true. Appellant made statements to Dr. Patterson while he was under the impression that Dr. Patterson was a treating physician. As such, appellant believed that Dr. Patterson was going to *help* him. It was with this frame of mind that appellant divulged circumstances from his life, illustrating his ongoing mental illness; appellant believed guileless, complete, and honest reporting was in his best interest..

Respondent first cites *People v. Lewis* (2008) 43 Cal.4th 415, 458, to support the argument that the statements excluded by the Court had no bearing or connection with the statements that were admitted into evidence. However, *Lewis* supports appellant's argument. The *Lewis* court excluded statements on the same subject that would have violated codefendants'

rights, but allowed the defendant to cross-examine the witnesses "to bring out his own hearsay statements that exculpated him or lessened his own role in the crimes." (*Id.* at p.458.) Importantly, the court noted that the *Lewis* defendant's admissions were consistent in both the unredacted and the redacted versions as to acts he himself performed. The court in *Lewis* also noted that "nothing that was omitted was exculpatory." (*People v. Lewis, supra*, 43 Cal.4th at p.458.) The redactions "did not distort defendant's role in the crimes or alter any of his explicit admissions as to his own actions in any material way." (*Ibid.*)

Here, by redacting the portions of appellant's statements that he sought to include, the court distorted appellant's then-existing mental state to the jury, the jurors were deprived of critical information as to the mental influences that shaped appellant's state of mind. The excluded statements were also exculpatory, supporting the alternate theory of mental illness as to the motive for appellant's behavior. Without knowledge of all of appellant's statements, the jury was left with only the motive theory of premeditation and deliberation that the prosecution argued at trial.

Respondent next cites *People v. Zapien* (1993) 4 Cal.4th 929, arguing that statements must "have some bearing upon, or connection with, the admission or declaration in evidence." (*Id.* at p.959.) Ironically, the prosecution in *Zapien* offered the entire testimony of the defendant from a prior hearing, arguing that the three portions of the testimony that the

defense had offered were inadequate for the jury to place defendant's inconsistent statements in the proper context. The *Zapien* prosecutor relied upon *People v. Hamilton* (1989) 48 Cal.3d 1142 which states in relevant part, "[i]n the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. ... [Citations omitted.]." (*Id.* at p.1174.) This Court agreed with the prosecution, stating that the prosecution was entitled to introduce the remainder of the defendant's testimony "for the purpose of placing her allegedly inconsistent statements in their proper context." (*People v. Zapien, supra,* 4 Cal. 4th at p.959.) Similarly here, the excluded portions of appellant's testimony place the admitted statements in their proper context. For example, the Court admitted appellant's statement, "[Y]eah, cause I mean that's what I noticed at least this time because I felt these intense emotions that were kinda overwhelming." (2 C.T. 288.) This statement was appellant's reply to Dr. Patterson's observation to him that forming close emotional bonds worsens thought disorders. The jury was deprived of this context because it did not hear Dr. Patterson's initial suggestion to appellant, which elicited appellant's admitted response.

In *People v. Breaux* (1991) 1 Cal.4th 281, also cited by respondent, this Court interpreted Evidence Code Section 356 to mean that portions of a defense witness's conversation that are "on the same subject" or "which are necessary for understanding of the statements already introduced" may permissibly be admitted. (*Id.* at p.302.) This Court reasoned that "everything that remotely related" to the time that the defense witness spent with the defendant was admissible. Following this reasoning, appellant is entitled to offer other portions of his conversation with Dr. Patterson, even if self-serving, if they "have some bearing upon, or connection with" the statements already offered into evidence because they are "necessary for understanding...the statements already introduced." (*People v. Breaux*, *supra,* 1 Cal.4th at p.302.)

Respondent also relies upon *People v. Williams* (1975) 13 Cal.3d 559. However, *Williams* was determined on the issue of prejudice, not admissibility. In *Williams*, this Court acknowledged that it may have been error to refuse to allow defendant to cross-examine a witness concerning the remainder of an out-of-court conversation between the witness and the defendant. Importantly, however, this Court held that the exclusion of the remainder of the conversation had not prejudiced the defendant because the excluded statements could not have vitiated the significance of other testimony provided by defendant. (*Id.* at p.566.)

These facts are distinguishable from the facts in the instant matter. First, appellant did not provide testimony at trial. Therefore, no testimony existed that would have had greater significance, or would have controverted, the statements made during appellant's conversation with Dr. Patterson. Second, it is reasonably probable that a result more favorable to appellant would have been reached if the jury knew the entire context and substance of appellant's conversation with Dr. Patterson, because this would have provided the jury with a plausible basis for appellant's actions other than the one offered by the prosecution.

Finally, respondent states that "[n]o special psychiatric expertise was necessary to make arguments about the declarant's demeanor on the tape." (Resp.Brief, p.138.) Appellant agrees that his description of the facts relevant to his state of mind was simple and direct, and thus capable of evaluation by the triers of fact. Appellant does not suggest that special psychiatric expertise was necessary. Rather, appellant is arguing that an average juror would be assisted in his or her determination of appellant's motive if the juror were presented with all of the relevant evidence available to ascertain appellant's state of mind. Contrary to respondent's assertion, appellant did not make self-diagnoses regarding his mental health when he spoke to Dr. Patterson about his mental state at the time of the crime, as respondent suggests. (Resp.Brief, p.135.) Rather, as demonstrated below, appellant told Dr. Patterson critical facts from his life

that influenced his mental capacity and the formation of the thoughts that he had on July 17, 1996.

While appellant was recounting his psychological history to Dr. Patterson, at one point Dr. Patterson pointed out that taking Haldol, a drug that appellant mentioned he had been taking, can sometimes worsen whatever it was prescribed to alleviate. With this statement Dr. Patterson affirmed appellant's understanding that the doctor was there to treat him, and that Dr. Patterson believed appellant had suffered from a real medical condition and that the drugs he had taken could cause him detriment. (2 C.T. 284.) Dr. Patterson thus encouraged appellant to continue with his story by affirming that the facts he was relaying had validity.

Importantly, the following statements from appellant's conversation with Dr. Patterson are some of those that were not admitted during the guilt phase of the trial. Appellant told Dr. Patterson, "You don't realize you have emotions, then you feel that controls your actions." (2 C.T. 294.) But then, a few minutes later, appellant told Dr. Patterson, "It's like I'm emotionally shut down. It's a normal thing for me, a normal function of the mind." (*Ibid.*) These two statements are contrary to each other, and further, reveal appellant's inability to identify and understand his own thought processes. Appellant explained to Dr. Patterson that he doesn't see his 22-year old son anymore because it can be pretty emotional, and the emotions amplify appellant's delusional thinking, and he becomes disoriented and

confused. (2 C.T. 315.) This description of appellant's prior behavior and thought processes are consistent with his behavior and thought process on July 17, 1996 due to the intense emotions he experienced as a result of the emotional and physical intimacy he had with his wife.

These are simply a few excerpts from an entire dialogue that is critical to understanding the context within which appellant made the statements that respondent relied upon to assert appellant's "cold" and "matter-of-fact" demeanor during its Opening Statement during the guilt phase of trial to the jury. (32 R.T.6059.) These excerpts would have provided the jury with a more complete understanding of appellant's state of mind, and therefore, were highly relevant and should not have been excluded.

The trial court's position was in stark contrast to its promise that, "[T]he defense is going to be able to argue state of mind based upon the evidence presented. There is no way I can perceive that they cannot stand in front of the jury and say he either lacked malice or lacked premeditation or willful premeditation. To foreclose that I think would be a denial of due process." (29 R.T. 5743.) The Court promised that defense counsel could argue "Mr. Johnson's statements, his condition, the dynamics of what unfolded within the house on that tragic day. [The defense] can argue that till the cows come home and all the inferences to be drawn from that. ...I don't know how I stop an argument, nor do I want to stop an argument that

sets and paints the picture from the defense standpoint because his actual state of mind is clearly the issue that's before the Court." (29 R.T. 5743-5744.)

Defense counsel argued that if the jury had the entire conversation between Mr. Johnson and Dr. Patterson, they would draw a contrary conclusion to the one that they might draw from the limited excerpts that the Court permitted. (39 R.T. 7124.) However, the Court concluded that to admit this conversation in its entirety would be to permit Mr. Johnson to "become his own expert." (39 R.T. 7125.) The court was prescient in its earlier view that by excluding portions of appellant's conversation with Dr. Patterson, appellant was denied due process.

B. The Parsing Of Appellant's Statements To Dr. Patterson Violated Appellant's Due Process Rights By Forcing The Jury To Consider Only One Motive Theory--Premeditation And Deliberation—Eliminating The Relevant Evidence To Support Appellant's True Motive.

1. Appellant's Statements To Dr. Patterson Revealed His Then-Existing State Of Mind And Were Therefore Critical And Relevant.

Respondent states that the trial court's decision to parse appellant's words to Dr. Patterson did not constitute a due process violation "because the trial court complied with the rules of evidence regarding relevance, hearsay and section 28" (Resp.Brief, p.137), but provides insufficient

support from the record to affirm this statement.[7] Respondent relies upon *People v. Prince* (2007) 40 Cal.4th 1179 to provide support for this argument. However, in *Prince* the Court deemed the witness statements offered by the defendant inadmissible hearsay, not subject to any exception, since they did not provide evidence of culpability and merely demonstrated motive. (*Id.* at p.1242.) The *Prince* defendant failed to make an offer of proof in support of the admission of evidence demonstrating third party culpability, despite several invitations from the court to do so. (*Id.* at pp.1241-1242.) The Court observed, "[T]hird party culpability evidence is admissible if it is capable of raising a reasonable doubt of defendant's guilt .... *[T]here must be direct and circumstantial evidence linking the third person to the actual perpetration of the crime.*'" (*Id.* at p.1242, quoting *People v. Robinson* (2005) 37 Cal.4th 592, 625 (citations omitted, emphasis in original).) The Court noted that defense counsel himself seemed to realize the statements were insufficient evidence to prove third party culpability. (*People v. Prince*, *supra*, 40 Cal.4th at p.1243.) The *Prince* court determined that the statements proffered by defendant did not directly or circumstantially connect the third party to the actual commission of the times, and the potential for delay and confusion outweighed the probative

[7] It is unclear what "section 28" is. [But I'd hazard a guess that it is Penal Code section 28, referenced on 8 CT 1984, in the DA's motion to admit limited portions of the Patterson interview. It would not do to look obdurate on this very limited point.]

value of the evidence; the trial court did not err in excluding the evidence. (*Id.* at p.1242.)

In the instant matter, appellant's statements to Dr. Patterson, excluded by the trial court, are his *own* statements, not those of a third party. (29 R.T. 5723.) Likewise, appellant's redacted statements (those portions of appellant's conversations with Dr. Patterson that the prosecutor sought to exclude and the trial court excluded) are admissible as a demonstration of his then-existing state of mind. Appellant only discussed matters with Dr. Patterson that revealed his state of mind before, during, and following the incident, thus the entire conversation is relevant.

Respondent also relies upon *People v. Williams* (2008) 43 Cal.4th 584. The *Williams*' court relied upon *People v. Prince*, *supra*, 40 Cal. 4th at p.1243 to affirm that the "ordinary rules of evidence do not impermissibly infringe on the accused's [state or constitutional] right to present a defense," (*People v. Williams*, *supra*, 43 Cal.4th at p.630, fn.27.)

The "statements" that the *Williams*' defendant claimed the trial court erroneously excluded are distinguishable from the instant matter in two ways. First, the statements at issue in *Williams* were not made by the *Williams* defendant. The statements were an invocation of the privilege against self-incrimination by a third party. Second, the issue was not whether the invocation should be redacted or whether redacted portions of the invocation were admissible. Rather, the issue was whether the third

party's invocation of his Fifth Amendment privilege outside the presence of the jury violated the defendant's due process rights. The *Williams* court held that an in-court third-party invocation of the right to remain silent has a potentially prejudicial impact on the jury, and also gives rise to unanswerable and misleading speculation by the jury. (*People v. Williams*, *supra*, 43 Cal.4th at p.628.) The Court [or is this a reference to the trial court?] determined that a defendant's right to due process does not include the right to create a speculative inference of a third-party's culpability on the basis of an invocation of the Fifth Amendment. Furthermore, the importance of an in-court invocation was rendered moot by offering the third party's preliminary hearing testimony, read into the record at trial. Finally, the court noted that defendant forfeited this claim altogether by withdrawing its request for an in-court invocation of the privilege, thus regardless of the outcome of the trial court's analysis, this claim was procedurally barred. (*Id.* at p.629.)

In the instant matter, appellant's statements bear no resemblance to the contested testimony in *Williams*. Appellant's remarks are his own, not those of a third party, and were not offered to prove the culpability of a third party, but rather, to contextualize appellant's actions. At trial, defense counsel presented a compelling argument as to why appellant's entire conversation with Dr. Patterson should be admitted into evidence:

"There was no real question as to the fact that [defendant] shot the sheriff. And I would suggest to the Court that the – the information that the People are submitting go to the question of why he shot the deputy sheriff. ... [I]t's our contention that we should be allowed to present the whole of the statement. Not only, as we've argued in the moving papers, to present the context, but it's our contention that the entire statement is really an explanation by the defendant, Mr. Johnson as to why the shooting occurred. And it's his belief that the shooting occurs and he's describing his emotional state – then existing emotional state in the context of a mental illness that he believes he has suffered under for some time." (30 R.T. 5726-5727)

2. The Misuse Of The Parsed Statements Was Prejudicial, Permitting The Prosecution To Inject An Innuendo As To Appellant's State Of Mind And Demeanor, Rather Than Requiring The Prosecution To Prove Its Argument Based On Fact.

Respondent misunderstands appellant's argument regarding the admission of appellant's conversation with Dr. Patterson, suggesting that appellant's proposition is that "the jury is not allowed to consider the manner that a defendant makes statements in assessing his credibility or culpability, or that a prosecutor may not argue this to a jury." (Resp.Brief, p.137.) Appellant is not arguing that "a jury is not allowed to consider the manner that a defendant makes statements in assessing his credibility." Nor is appellant arguing "that a prosecutor may not argue this to a jury."

Rather, a jury should not only consider the manner in which a defendant makes selected, isolated statements in assessing his credibility, but should also be allowed to consider all of the contextual evidence demonstrating the manner in which the statements are made. The prosecutor used appellant's edited statements to convince the jury that appellant's actions were premeditated and deliberate. He was successful because the edited statements, taken out of context, portrayed appellant as a cold-blooded killer.

The jury should have been provided the entire remainder of the statements to provide appropriate context. Whether appellant's statements regarding his mental health were "sophisticated" or had a "self-serving nature" as respondent asserts (Resp.Brief, p.138), was for the prosecution to argue and the jury to consider. However, the exclusion of these statements allowed the prosecutor to create for the jury an incomplete and misleading picture of appellant. This misleading view was not harmless beyond a reasonable doubt. Appellant's statements, taken in context, contradict the prosecution's basis for first-degree murder and the special circumstances charged. Taken in context, appellant's statements provide an understanding of his motive, clearly demonstrating that it was never his intent to kidnap his wife. Appellant's statements also clearly reveal that he was unaware of the so-called "three strikes law" at the time of the incident. By excluding critical elements of appellant's conversation with Dr. Patterson, the trial

court allowed the prosecutor to use some of appellant's words as a sword, and denied appellant the right to use the remainder of his statements as a shield. Consequently, the trial court's error was prejudicial under both state law and federal constitutional law.

Respondent argues that a prosecutor may "permissibly comment on the manner or demeanor of a witness in making his argument for guilt." (Resp.Brief, p.137.) However, should a prosecutor choose to comment upon a witness's demeanor, the prosecutor must maintain the integrity of the whole of appellant's relevant statements, or else the prosecutor risks effectively testifying himself.

In *People v. Ochoa* (1991) 26 Cal.4th 398, relied upon by respondent, the defendant objected on appeal to the prosecution's rehabilitation of a witness during trial to improve his credibility. The statements that defense counsel objected to on appeal were statements made by the prosecution about the witness, and the statements reflected facts already in the record. However, the defense did not make this objection at trial, and therefore waived the claim. The facts in the instant matter are distinguishable. Appellant's redacted statements to Dr. Patterson are not reflected elsewhere in the record, they are statements that were made by the appellant himself, and defense counsel repeatedly objected to their omission at trial. The absence of these statements inhibited the jury's analysis and conclusion as to appellant's state of mind.

Respondent also relies upon *People v. Gates* (1987) 43 Cal.3d 1168. In *Gates*, defense counsel alleged that the prosecution's argument, based on testimony in the record, was improper. This Court found that the prosecutor was "properly analyzing why he thought the jury should believe [the witness's] testimony. ... His argument was based on the evidence presented." (*Id.* at p.1187.) Thus, the *Gates* defendant did not object to the testimony, but to the prosecution's inference from the testimony. In the instant matter, appellant argues that the testimony, devoid of his redacted statements, is incomplete and therefore insufficient for the jury to make a determination as to whether the prosecution's inference from the limited admitted testimony is credible.

During its Closing Argument, the prosecution told the jury that appellant "[had] been to prison before. ...Prison is not a place he wanted to go back to." (44 R.T. 8143.) The prosecutor later stated that appellant mad a "cold, calculated judgment in a short amount of time where he weighed and considered the reasons for killing which was escape, measured against going back to prison." (44 R.T. 8155) The prosecutor also told the jury, "That is as cold as it gets, absolutely as cold as it gets, and there's only one purpose for it, ladies and gentlemen, and that was to escape." (44 R.T. 8156.) Thus, not once, but multiple times, the prosecution argued to the jury that appellant premeditated and deliberated his actions because he wanted to escape going to prison again. If the trial court had permitted the

inclusion of appellant's entire conversation with Dr. Patterson, the jury would have clearly understood that appellant's motive for shooting Deputy Aguirre sprang from a deep-seated, long-standing mental incapacity—not a calculated "need to escape" to avoid returning to prison.

Taken as a whole, appellant's statements to Dr. Patterson reveal that the motive for his behavior was not to "escape going back to prison". Importantly, the prosecutor pointed out during his Closing Argument that "mere unconsidered, rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree." (44 R.T. 8142.) The prosecutor also quoted from appellant's conversation with Dr. Patterson: "I just jumped out and shot him. I was in a situation and I just reacted. That was my reaction to that situation." (44 R.T. 8152.) A "reaction" is not a premeditated act. Further, as the prosecutor himself pointed out, appellant told Dr. Patterson, "I think possibly this afternoon was a passive suicide attempt 'cause I don't think I could kill myself but I was hoping that the officers would kill me." (44 R.T. 8152.) A person who is of sound mind does not engage in a "passive suicide attempt." Rather, appellant acted within the context of his disturbed mental state, one that he had lived with for most of his life, one that was exacerbated when he experienced periods of intense emotions of obsession, jealousy and the fear of separation from his wife like those he experienced on July 17, 1996. (2 C.T.316-317, 319-321.)

Whether or not the transcript revealed appellant's demeanor to be cold-blooded, and verdict was appropriate in response to such a demeanor can only be determined by the jury, and only if the evidence put before the jury is complete. Here, it is clear that the record is lacking. The trial court's decision to exclude appellant's redacted statements to Dr. Patterson during the guilt phase was arbitrary and capricious and resulted in a miscarriage of justice which requires reversal. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING APPELLANT'S PRIOR CONVICTIONS DURING THE GUILT PHASE, AND IN ALLOWING THE PROSECUTOR TO ARGUE THAT APPELLANT'S INTENT AND/OR MOTIVE TO KILL WAS TO AVOID RETURNING TO PRISON FOR A TERM OF TWENTY-FIVE YEARS TO LIFE.

A. Background.

Evidence of appellant's prior convictions was inadmissible for any purpose, whether as to motive, intent or premeditation. Appellant's prior convictions did not occur in close proximity to the incident at issue in the instant litigation; the interview he had with parole agent Humphrey took place five years before the current crimes.[8] The trial court permitted the prosecutor's unsupported inferences regarding a potential "three strikes"

[8] Appellant's interview with parole agent Humphrey is a linchpin of the prosecution's case since the only evidence the prosecution offered to demonstrate appellant's awareness of his status as a "three strikes" offender is the parole form from this interview and Humphrey's testimony regarding the same.

sentence but improperly refused to permit defense counsel to explain to the jury the manner in which these assertions were, in fact, unsubstantiated and conclusory. It is reasonably probable that, if evidence of prior convictions had been excluded, the prosecutor would have lacked the evidence necessary for the jury to return a guilt verdict of murder in the first degree and a penalty of death. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal.Const., art.VI §13.) The prosecution's argument at trial lacked foundation and relied upon an unreasonable inference as to appellant's motive. Prior convictions are inadmissible unless they are "logically, naturally or by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity." (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Therefore, the trial court's error in admitting this evidence was not harmless, and appellant's judgment of conviction and penalty of death must be reversed.

B. The Prior Conviction Evidence Was Not Probative To Show That Appellant's Motive Was To Avoid Going Back To Prison.

Respondent relies on *People v. Sanders* (1995) 11 Cal.4th 475 for its broad proposition that the trial court is "vested with wide discretion in determining relevance." (*People v. Sanders* (1995) 11 Cal.4th 475, 512, citing *People v. Green* (1980) 27 Cal.3d 1, 19). The proposition is true; but relevance must still exist, and on this point *Sanders* is distinguishable. The

evidence in *Sanders* corroborated the existing relevant testimony of a trial witness. In *Sanders*, excerpts of a Bob's Big Boy Manager's Manual were admitted to corroborate a manager's testimony that the techniques employed by the victims and the manager during the crime – that the victims did not offer resistance and the manager advised a logical pattern of conduct and observation with regard to the defendant — were behaviors learned from this manual. (*Ibid.*) Thus, the *Sanders*' court determined that the manual excerpts were relevant. In the instant matter, appellant's prior convictions were not offered by the prosecution to demonstrate a learned behavior of the appellant. Indeed, the prior convictions do not corroborate any fact or testimony otherwise presented by the prosecution to prove appellant's motive for his actions on July 17, 1996. Since the admitted evidence in *Sanders* is inapposite to the evidence at issue here, it is incorrect to suggest, as respondent does, that the trial court should have arrived at the same conclusion as the *Sanders*' court in determining the relevance of appellant's prior convictions. (Resp.Brief, p.141.)

Respondent also cites *People v. Kipp* (1998) 18 Cal.4th 349 and *People v. Scheer* (1998) 68 Cal.App.4th 1009 to support the decision of the trial court to admit appellant's prior convictions as evidence of his motive. However, *Kipp* is distinguishable from the instant case, and *Scheer* supports appellant's argument. (Resp.Brief, p.141.) In *People v. Kipp, supra,* this Court held that evidence of uncharged crimes is only admissible to prove a

"common design or plan, or intent" only if "the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*Id.* at p.369.) Notably, this Court made no mention of the admissibility of charged or uncharged crimes as proof of motive. In *Kipp*, the defendant was on trial for committing a rape-murder, and the prosecution sought to introduce evidence of an uncharged rape-murder that the defendant had previously committed. This Court found that "the charged and uncharged offenses displayed common features that revealed a highly distinctive pattern." (*Id.* at p.370.)

The *Kipp* facts are distinguishable from the facts here. The *Kipp* Court admitted the prior misconduct under three theories of relevance—Kipp's conduct revealed a highly distinctive pattern, evidenced a common design or plan, and established his intent in committing the same crime twice. (*People v. Kipp*, *supra*, 18 Cal.4th at pp.370-371.) In the instant case none of the *Kipp* Court's theories of relevance are present: There was no distinctive pattern of behavior, no common design or plan, and no intent to commit the same crime twice. Rather, the trial court admitted appellant's prior convictions to demonstrate an alleged motive, avoiding a return to prison.

In *People v. Scheer* (1998) 68 Cal.App.4th 1009, the Court of Appeal concluded that the trial court erred in admitting evidence of appellant's prior bad acts. The prosecution offered evidence regarding the

Scheer defendant's prior flight to show "the same intent and motive on this occasion as the last time." (*Id.* at p.1019.) The *Scheer* Court found the prior flight evidence inadmissible to establish motive. (*Ibid.*) The Court of Appeal determined that no "apparent overlapping characteristics" existed, i.e., no relationship existed between the two crimes; the individuals involved in each accident were in no way connected to each other. (*People v. Scheer*, *supra,* 68 Cal.App.4th at p.1020.) The Court explained, "[T]he existence of a motive requires a nexus between the prior crime and the current one...." (*Id.* at p.1018.) Likewise, in the instant case, there was no nexus between appellant's prior convictions and the current one and no overlapping characteristics existed. Following the logic of the Court of Appeal in *Scheer*, the trial court should not have admitted evidence of appellant's prior convictions.

Respondent relies upon multiple authorities to argue that appellant's prior convictions were relevant "to establish that ... defendant committed the present crime to avoid a return to prison or avoid apprehension." (Resp.Brief, p.141.) Notably, in every case upon which respondent relies, the defendant was on parole and had committed multiple crimes in close proximity to the murder at issue (*People v. De La Plane* (1979) 88 Cal.App.3d 223; *People v. Robillard* (1962) 55 Cal.2d 88; *People v. Powell* (1974) 40 Cal.App.3d 107; *People v. Durham* (1969) 70 Cal.2d 171), or had made an affirmative statement that he would not let anything get in his

way in his efforts to stay out of jail (*People v. Cummings* (1993) 4 Cal.4th 1233; *People v. Heishman* (1988) 45 Cal.3d 147). None of these cases rely on speculation to admit prior acts evidence, but rather rely on factual scenarios of cause, reasons or inducement linking the prior acts to the crime(s) charged. Furthermore, the Court has recognized because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." (*People v. Thompson* (1980) 27 Cal.3d 303, 316.) Here, appellant's prior convictions clearly should have been excluded.

In *People v. Daniels* (1991) 52 Cal.3d 815, this Court found that there was a direct relationship between the prior misconduct of the defendant and the current crime with which he was charged: During defendant's prior misconduct, the police rendered him a paraplegic, and the crime with which he was charged in *Daniels* was the murder of police officers in retribution for his condition as a paraplegic. [Did the defendant make any statements making clear his purpose? These might strengthen the connection.] In the instant matter, there was no direct relationship between the prior misconduct and the current crime. Moreover, there is no evidence in the record that appellant committed the current crime in retribution for his prior convictions. [Might be worth noting again how much earlier the most recent conviction/and or appellant's release was from this event, to further enhance the notion of a distance.]

In *People v. Robillard* (1962) 55 Cal.2d 88, the evidence of defendant's prior crimes was relevant to establish that the defendant killed a police officer after premeditation. In *Robillard*, as a precursor to *Daniels*, *supra*, this Court held "[A]s long as there is a direct relationship between the prior offense and an element of the charged offense, introduction of that evidence is proper." (*Id.* at p.100.) At the time that defendant murdered a police officer, he was on probation for two separate crimes, and had recently learned that an accomplice in a prior crime had likely implicated defendant in that crime. (*Id.* at p.93.) Defendant went so far as to admit that he knew he was "hot." (*Ibid.*) He understood the gravity of his offense—and the reality that, if apprehended, he would be sent to state or federal prison. (*People v. Robillard*, *supra*, 55 Cal.2d at pp.93-94.) Again here, there is no direct relationship between the prior offense and an element of the charged offense. Also, the record is silent as to appellant's knowledge whether or not he would be sent to state or federal prison if apprehended for another crime. It is also noteworthy that appellant in the current matter was not implicated in a recent crime for which police officers would be seeking to arrest him as a suspect; therefore, he did not have the same imminent apprehension at the sight of a police officer that motivated the *Robillard* defendant to perpetrate his crime.

In *People v. De La Plane* (1979) 88 Cal.App.3d 223, the evidence admitted was directly linked to defendant's perpetration of the crime --

defendant killed someone who had indicated an intent to testify against defendant regarding defendant's commission of prior robberies. (*Id.* at p.246.) Defendant's knowledge of the potential witness's intent provided defendant with a motive for killing the witness. In the instant case, appellant's prior convictions provide no such inducement to his commission of the current crime—none of the same people or facts are involved, nor are the prior acts proximate in time or circumstance.

In *People v. Powell* (1974) 40 Cal.App.3d 107, this Court opined that it was reasonable to believe that "the circumstance of Powell's parole status could reasonably tend to prove that he killed [the victim] to avoid revocation of his parole and return to prison." (*Id.* at p.155.) The Powell defendant knew that he had violated his parole by driving a stolen vehicle when he was stopped for questioning by law enforcement officers. He captured the officers, drove them to a remote location so that he could kill them, and then planned to resume his original criminal activity. Here, the prosecution presented no evidence that appellant knew he was violating his parole by carrying a firearm. Therefore, the *Powell* court's reasoning that the defendant's prior acts could be admitted to demonstrate intent based on his own knowledge of his violation of parole is inapplicable here.

In *People v. Cummings* (1993) 4 Cal.4th 1233, the defendant was on parole at the time he committed the charged murder. However, the evidence that defendant there claimed was inadmissible as a prior bad act

was not his prior conviction, but the threat he made to a friend in the days before the defendant participated in the murder of a police officer. The defendant had a handgun in his possession and, when speaking to his friend, had threatened to "kill any policeman who got in his way." (*Id.* at p.1289.) The trial court determined that this statement went directly to the defendant's motive for committing the crime for which he was then on trial – shooting an officer. The jury could reasonably infer that the defendant's intent to kill police officers, expressly stated a few days before the killing, still existed at the time of the killing. (*Ibid.*) Here, the record contains no contemporaneous statement by appellant that he would kill a police officer, for any reason. [If appellant has *never* threatened to kill a police officer, make that a little plainer, more emphatic.]

In *People v. Durham* (1969) 70 Cal.2d 171, this Court allowed evidence of prior criminal activity when such evidence provides considerable circumstantial proof of the actor's mental state at the time of the charged offense." (*Id.* at p.188.) The *Durham* defendants were both on parole under felony sentences from the State of Ohio at the time of the murder of a police officer, and had committed multiple joint criminal activities from Ohio to California in the three weeks leading up to the murder. (*Id.* at p.186.) Given the string of criminal acts perpetrated by defendants during the three weeks immediately preceding the murder of the police officer, the Court held that the admission of these criminal acts into

evidence, as well as the admission of the defendants' parole status, clearly demonstrated defendants' motive for the killing, and its probative value amply outweighed any prejudicial effect. (*Id.* at p.189.) Again, these facts are distinguishable from the instant case. The *Durham* defendants were on the run and knew they had violated their parole status and would likely be sent to jail if caught. In the instant matter, appellant was not on the run and there was no evidence his parole status was even on his mind. Furthermore, appellant's prior acts were not proximate to the current crime. In fact, appellant's most recent crime was committed almost ten years prior to the current crime.

In *People v. Heishman* (1988) 45 Cal.3d 147, the "defendant conceded that evidence of his having been in prison was relevant and admissible, but contended that disclosure that he served the prison term for attempted rape was unduly prejudicial and inadmissible." (*Id.* at p.168.) The *Heishman* defendant actually stated that "[the victim] had to be killed because he was not going back to jail again." (*Ibid.*) In the instant matter, there were no extrajudicial statements made by the appellant indicating that he killed Officer Aguirre because he was not going back to jail again. On this point, the prosecution's claim that appellant's knowledge "that he was subject to a third-strike sentence upon committing another felony", was "central to the prosecution's case," (Resp.Brief, p.143), is a house of cards. There was no evidence appellant ever knew he was subject to a third strike.

During the pre-trial hearing in which the Court ruled on motions *in limine*, the prosecution argued that the jury had "a right to know [appellant's] status because it explains his conduct not as wild and irrational but as very purposeful... [that] is what premeditation and deliberation is about. That he is not going to get taken....[I]f we're talking about a domestic violence thing or if we're talking about a simple possession of a gun, doesn't make a lot of sense for him to come out shooting like that." (18 R.T. 2985.) However, the prosecutor was required to present some foundational evidence linking appellant's status to his conduct on the date of the killing. In other words, the prosecutor was required to provide a basis for the inferential link that appellant's actions were purposeful to avoid consequences of his status. However, the only evidence which was presented explaining appellant's conduct came from the defense. Rather than concern over his status, appellant told Dr. Patterson that he was obsessed with jealously and the possibility that he might be separated from Guillermina, his wife. (2 C.T.316-317, 319-321.) He carried the guns because he wasn't going to let anyone separate the two of them. (*Ibid.*)

The prosecution also argued that the jury would have to be made aware of what "options" appellant had in life, in order for his conduct to be as extreme as it was on the day of the incident. (18 R.T. 2985.) Again, the prosecution presented no foundation that appellant knew or understood any

such options. The trial court seemingly bought into the prosecution's theory and eliminated all others, including the theory that was based on evidence -- appellant's own words — namely, that he was so jealous and obsessed with the thought of being separated from his wife, that he would do anything to prevent that from happening. When appellant saw the police officers "pulling [Guillermina] out the door [of the house]", he just "reacted". (2 C.T.320) Appellant knew that more than one police officer was with Guillermina, and this increased his anxiety that he might be separated from his wife against his own volition.

Respondent further contends that without the evidence of appellant's prior convictions the jury "would be left to wonder why appellant would have premeditated the death of Deputy Aguirre." (Resp.Brief, p.143.) This is an odd assertion, since without the evidence of appellant's prior convictions, there was no evidence beyond a reasonable doubt to support premeditation. Simply put, the prosecution offered no evidence that appellant knew he was subject to a third-strike sentence upon committing another felony. The prosecution presented appellant's prior convictions as if they were the smoking gun, definitive proof of appellant's motive and premeditation, when in fact, they were simply a foundation upon which the prosecution had no evidence to build.

Finally, contrary to respondent's assertion (Resp.Brief, p.146), the trial court's ruling to admit the prior convictions as motive evidence was a

de facto denial of appellant's motion to bifurcate. Defense counsel clearly explained that the only reason it withdrew the motion to bifurcate was due to the court's ruling, granting the prosecution's motion to admit appellant's prior convictions as evidence of motive. Defense counsel was force into this tactical decision because of the trial court's ruling. It was not a tactical decision made freely. Defense counsel's position is clearly expressed in the record:

> "And again, to – be perfectly clear, had the Court denied the People's motion to inform the jury of these unspecified priors and prior prison time, it was going to be our request to bifurcate the Bracamonte issue and keep from the jury the fact that the defendant had prior felonies that constituted Strikes 1 and 2, as well as ask the Court to not read the Information concerning the five prior felonies outlined in Count 5." (18 R.T. 3099)

The trial court effectively denied appellant's bifurcation motion by allowing the prior convictions as motive evidence. The trial court's decision to grant the prosecution's motion to admit the priors was error.

C. The Trial Court Improperly Allowed The Prosecution To Use Appellant's Prior Convictions As Evidence Of Appellant's Character And Propensity For Crime And To Argue That Appellant Killed Deputy Aguirre To Avoid Returning To Prison.

During pre-trial hearings, the prosecutor told the court: "We are introducing the evidence of the fact of his [appellant's] felony convictions leading to a 25-to-life potential sentence for the purpose of proving his motive and disposition to commit the crime of murder in this case." (18

R.T. 3068-3069) The court subsequently clarified that the felony convictions would only be admissible to prove motive. (18 R.T. 3069) This clarification was clear to both the prosecution and Defense counsel.[9] However, during its opening statement, the prosecution proceeded to use appellant's prior felonies to demonstrate to the jury appellant's alleged disposition or propensity "to react with deadly force to any situation that posed a threat to his freedom" (32 R.T. 6062) because "he is simply a self-centered, cold-blooded, rotten human being." (54 R.T. 10061.) In effect, respondent improperly used appellant's prior convictions as character evidence. Appellant objects to this use of appellant's prior convictions and appeals to this Court on this basis.

Respondent cites *People v. Clair* (1992) 2 Cal.4th 629, 662 to support the argument that appellant has lost his right to appeal this matter, since no objection was raised during trial. Notably, *Clair* cites *People v. Benson* (1990) 52 Cal.3d 754, "[I]t is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*Id.* at p.794.) However, this rule is inapplicable when the harm could not have

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[9] See Respondent's Brief, p.141: "Evidence of prior misconduct is not admissible to establish criminal disposition but may be admitted to prove, among other things, that the defendant had a motive to commit the crime." (citing Evidence Code §1101, subdivisions (a) and (b))

been cured. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1255) In the instant matter, the harm could not have been cured by an admonition from the court because the impropriety of the prosecution was pervasive. The prosecution told the jury no less than ten times during its closing argument that appellant was "cold-blooded", "arrogant", and "self-centered" (54 R.T. 10051, 10052 (in two instances), 10053, 10054, 10055, 10056, 10059, 10060, 10061), culminating in the prosecution's accusation that appellant is simply "a self-centered, cold-blooded, rotten human being." (54 R.T. 10061) Each of these statements was accompanied by a repetition of the prosecutor's assertion that there is no reasonable basis for believing appellant was having a delusion, and was also accompanied by reference to appellant's status as a felon. Thus, the prosecution's improper argument was so pervasive that an objection and admonition during trial would not have cured the harm, and appellant's right to appeal should be preserved in the instant matter.

Respondent argues that the prosecution made these statements to counteract the impact of defense counsel's argument that appellant was suffering from extreme mental or emotional disturbance. (Resp.Brief, p.147; 54 R.T. 10060-10063.) However, the prosecution pursued this theory about appellant being "cold-blooded" and "self-centered" from the commencement of trial through to the end, prior to any argument propounded by defense counsel. In common parlance, the words "cold-

blooded" are only used to describe a "killer." With the choice of these words to describe appellant, the prosecutor embarked on a calculated scheme to convince the jury that appellant's actions on July 17, 1996 were the result of his pre-existing disposition or propensity to kill, as demonstrated by his prior convictions.

During the prosecutor's opening statement, he stated that "the evidence will have shown that the wrong man died on July 17th, 1996. And at the end of this case, ladies and gentlemen, you will have a chance to do something about that." (32 R.T. 6079) The Court sustained defense counsel's objection to this statement, on the grounds that the merits of the case had to be tried and the prosecutor's statement gave the jury an improper implication. (32 R.T. 6082) Following the Court's logic here, the prosecution should not have been permitted to continually argue an improper implication to the jury throughout the trial as to appellant's disposition or propensity as a "cold-blooded" killer.

To support its contention that these statements were not improper character evidence offered to prove appellant's disposition or propensity, respondent erroneously cites *People v. Avena* (1996) 13 Cal.4th 394. (Resp.Brief, p.147.) In *Avena*, this Court held that the trial court's instruction regarding the prosecution's presentation of aggravating evidence was improperly given because the trial court did not limit the jury's consideration of defendant's "character, background, history, mental

condition and physical condition" to mitigation. (*Id.* at p.439.) The *Avena* court determined that the error was harmless because it was not reasonably possible that the defendant would have enjoyed a different result if the error had not occurred. (*Ibid.*) Here, the trial court intentionally and perspicuously limited any argument or inference with regard to appellant's prior convictions only to appellant's motive—thus eliminating the propriety of any argument by the prosecution as to appellant's disposition or propensity for crime based on his prior convictions. (18 R.T. 3069; 44 R.T. 8084.) Nowhere in the record does the prosecution provide an argument linking appellant's prior convictions to appellant's actions on July 17, 1996 as evidence of appellant's motive. The prosecution continuously argued an inference that appellant did not want to return to jail, and that this was the reason for his actions on that day in July 1996. Therefore, unlike the result in *Avena*, the error is not harmless because it is reasonably possible that appellant *would have* enjoyed a different result if his prior convictions not been admitted.

Furthermore, the trial court improperly allowed the prosecution's statements, "That's how Michael Johnson...went courting to see his wife on July 17, 1996. Armed and ready. Ready, knowing the consequences of having a gun. Ready to react with deadly force to any situation that posed a threat to his freedom." (32 R.T. 6062-6063.) Respondent erroneously cites *People v. Hill* (1998) 17 Cal.4th 800 to defend the propriety of these

statements. The *Hill* court held that "[t]he argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*Id.* at p.819.) The prosecution's argument does not constitute "fair comment" on the evidence because it is not formulated simply to demonstrate appellant's motive. Rather, the prosecution made its argument to promote the innuendo that appellant has a disposition for crime, a propensity to kill. Respondent avers that the prosecution asked for "this evidence to be used for motive and intent, and not disposition to commit crimes generally." (Resp.Brief, p.148.) However, respondent cites to no instance in the record where the prosecutor stated to anyone that the evidence was "to be used for motive and intent and not disposition to commit crimes generally." Thus, respondent's conclusion that the prosecution "presumably meant disposition not as tendency but... [as] state of mind at the time of the offense," (Resp.Brief, p.148) is supported neither by evidence or argument in the record.

D. Assuming, *Arguendo*, That Appellant's Prior Acts Evidence Met The Threshold Of Being Sufficiently Probative, The Trial Court Still Erred In Admitting This Evidence, As The Probative Value Was Substantially Outweighed By Its Prejudicial Effect.

Even if the trial court considered appellant's prior acts sufficiently probative, their prejudicial effect so substantially outweighed any probative value as to render these acts inadmissible. (*People v. Ewoldt* (1994) 7

Cal.4th 380, 404; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1445; *People v. Balcom* (1994) 7 Cal.4th 414, 422; *In re Jones* (1996) 13 Cal.4th 552, 581-582.)

In its pre-trial ruling on the prosecution's motion regarding appellant's prior convictions, the trial court held that excluding appellant's prior convictions "would be to disable the People from arguing significant circumstantial evidence that runs to motive, which would otherwise be completely absent." (18 R.T.2994) To this end, the court stated that it agreed with the fact that appellant's knowledge of his status (as a three-striker) was "to some degree speculative." (18 R.T.2997) The court also stated, "I'm faced with a dilemma, and it is a dilemma where I have to weigh in the balance evidence which invokes some degree of speculation." (*Ibid.*) Contrary to respondent's argument (Resp.Brief, p.145), the court acknowledged the grave prejudice to appellant in admitting the speculative evidence: "the Court is also mindful that if it admits evidence concerning the defendant's criminal history, it's terribly prejudicial." (18 R.T. 2993.)

E. The Trial Court Improperly Limited Defense Counsel's Argument That There Was No Evidence In The Record Confirming Appellant's Knowledge That He Would Return To Prison.

The trial court erred in sustaining the prosecution's objection to defense counsel's closing argument, "Where was the evidence, I ask you, that Michael Johnson knew of that consequence of 25 to life?" (45 R.T.

8226). The prosecution lodged its objection in anticipation that defense counsel was going to mention "three strikes." However, defense counsel did not mention "three strikes", and in fact, during pretrial proceedings defense counsel had specifically requested the court rule to exclude the use of "three strikes":

> "And as I understand the case law, since sentencing is not part of this trial, the guilt phase initial trial, neither the defense nor the prosecution can refer to it as a third strike. They simply prove up the priors." (18 R.T. 3101.)

The trial court's error effectively prohibited defense counsel from arguing that there was no evidence that appellant killed Deputy Aguirre to avoid going to prison for 25 years to life. Respondent relies upon *People v. Kirkpatrick* (1994) 7 Cal.4th 988 to assert that the trial court correctly stopped defense counsel's argument. However, *Kirkpatrick* does not aid respondent's position. In *Kirkpatrick*, the court barred defendant's claim under the doctrine of invited error, "which estops a defendant from challenging a trial court ruling granting the defendant's own motion." (*Id.* at p.1011.) In the instant matter, defense counsel did challenge the trial court's exclusion of the term "three strikes." Nor did defense counsel mention "three strikes."

Respondent argues that "nothing in the trial court's ruling prohibited defense counsel from continuing to argue that the jury should not conclude that appellant committed a murder of a police officer to avoid returning to

prison for 25 years to life." (Resp.Brief, p.151.) However, the trial court's ruling contained quite the opposite instruction to defense counsel. The trial court sustained the prosecution's objection based on the prior ruling of the court prohibiting any mention of three strikes, and in so doing asked defense counsel "to move to another area on that basis." (45 R.T. 8227.) Respondent relies on *People v. Rodrigues* (1994) 8 Cal.4th 1060 to cast the trial judge's ruling as a permissible limitation on the scope of defense counsel's closing summations. This reliance is misplaced. In *Rodrigues*, the court acted to "limit the redundancy of arguments presented by [defense counsel]." (*Id.* at p.1185.) In the instant matter, defense counsel was not being redundant, and the trial court's limitation crippled defense counsel's ability to refute the core of the prosecution's case in chief—the motive of appellant for committing the crime.

At the court hearing on appellant's Motion for New Trial, appellant's counsel requested clarification as to the trial court's ruling on this matter. In particular, appellant's counsel asked the court whether the trial court's ruling was a "finding regarding [defense counsel's] argument that the People produced no evidence of the defendant's actual knowledge." (55 R.T. 10258) The court replied, "I don't think the ruling addressed the issue you are referring to. I guess the record will have to speak for itself." (*Ibid.*) Ultimately, defense counsel was silenced by the court, and was improperly told to move on to another topic—not because defense counsel

referred to "three strikes" or a "third strike", which was the subject of the defense motion that the court had granted, but rather, because the court incorrectly thought it was anticipating what defense counsel was going to say. This was improper and should be reversed.

F. The Error Was Not Harmless And Requires Reversal.

Respondent argues that there was "overwhelming evidence of premeditation regardless of what appellant's motive for the shootings was." (Resp.Brief, p.152.) Respondent explains that, the evidence presented regarding appellant's kidnapping, rape, and firearm possession, provided the jury with sufficient evidence to determine that a return to prison was appellant's motive for shooting. (*Ibid.*) Respondent also argues that the evidence of a "felony-kidnapping murder with the special circumstance of murder of a peace officer or of murder in the advancement of the kidnapping or to avoid detection" provided ample premeditation evidence that effectively rendered the evidence of appellant's prior convictions irrelevant. (*Ibid.*) Respondent's conclusions are wrong.

Respondent's sweeping statement of the alleged overwhelming evidence of appellant's premeditation relies primarily upon portions of the trial testimony of Dr. Lisa Kus, taken entirely out of context. Dr. Kus testified as a witness for the defense during the penalty phase of the trial. As a preliminary matter, respondent's reliance on the penalty phase

testimony of Dr. Kus as evidence of the harmlessness of guilt phase error is misplaced. Respondent wrongly expands the scope of its response argument here and this Court should not consider it.

In 1994, Dr. Kus was a senior psychologist with the Ventura County Mental Health Department. (48 R.T. 8902) Dr. Kus was responsible for conducting "diagnostic intake interview for the purpose of establishing a diagnosis." (*Id.* at p.8903) It was her job to "assess how a given psychiatric illness impairs an individual...." (*Ibid.*) At the conclusion of appellant's psychiatric evaluations in 1994, Dr. Kus diagnosed appellant with organic delusional disorder. (48 R.T. 8909) Respondent points out that Dr. Kus testified that on August 29, 1994 appellant told her that he did not want to go back to prison. (Resp.Brief, p.152.) Absent from respondent's brief, however, is the context in which appellant made these statements. Also absent from respondent's brief and the record, is any link between this statement and appellant's actions on July 17, 1996, two years later.

During the same meeting in 1994, appellant explained to Dr. Kus his intense feelings of paranoia and bizarre experiences. (48 R.T. 8921) Dr. Kus offered appellant the option to be seen by a psychiatrist for medicine. (48 R.T. 8923) She also "acknowledged and educated him about his emotional distress and gave education about how that especially, occurs in the first year of sobriety." (*Ibid.*) Dr. Kus informed appellant that his sobriety could produce "intense anxiety, irritability, depression...and

delusional thoughts." (48 R.T. 8925) Appellant told Dr. Kus that he felt that his sobriety at that time was his only chance to stay out of jail. (48 R.T. 8965) Respondent argues that this statement alone, without any evidence and argument of recidivism, was enough for the jury to find that appellant's motive was not to "be incarcerated again." (Resp.Brief, p.152)

Respondent's argument fails because it neglects to evaluate the context of appellant's statement, and thus, the reason why he said it. During her testimony, Dr. Kus also explained that she and appellant discussed that his prior criminal activities were all drug-related, and that appellant conveyed to her his understanding that if he relapsed into substance abuse, he would also likely relapse into criminal behavior and would go back to jail. At the conclusion of this discussion, appellant told Dr. Kus that he did not want to go back to jail, and so he wanted to remain sober. (48 R.T. 8965-8966)

Under the *Chapman* standard, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *Fahy v. Connecticut* (1963) 375 U.S. 59, and *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) On the critical issue of appellant's motive, the prosecution's case was merely speculative as to whether the murder was premeditated or deliberate. This compels reversal.

In addition, it is reasonably probable that, if appellant's prior convictions had been excluded, one or more of the jurors would have been unable to award a guilt verdict of murder in the first degree and return a penalty of death, since the prosecution lacked any other evidence to support its theory that appellant acted in premeditation and deliberation. Thus, it is reasonably probable that, but for the erroneous rulings, a result more favorable to appellant would have been reached in the guilt phase and in the penalty phase. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal.Const., Art.VI, §13.)

VII. THE PROSECUTION COMMITTED MULTIPLE ACTS OF MISCONDUCT RESULTING IN APPELLANT RECEIVING A TRIAL DEFECTIVE UNDER BOTH THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

The instances of prosecutorial misconduct cited by appellant in his opening brief are just a few of the ways in which the prosecutor violated his oath as a public servant and as an advocate of the law. The prosecutor's intemperate and intimidating behavior infected the trial with such unfairness that appellant's conviction was obtained through a denial of due process under the federal Constitution under the Fifth, Sixth, Eighth and Fourteenth amendments. (*United States v. Sanchez* (9th Cir.1999) 176 F.3d 1214, 1224; *People v. Gionis* (9th Cir.1995) 9 Cal.4th 1196, 1214) as well as Article I, Section 7 of the California Constitution. The prosecutor's misconduct cannot be found harmless beyond a reasonable doubt, and this

Court must reverse appellant's conviction and penalty and remand for a new trial. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Alternatively, but for the prosecutor's conduct, it is reasonably probable that a result more favorable to the defendant would have occurred but for the prosecutor's misconduct. (*People v. Welch* (1997) 16 Cal.4th 153, 252-253; *People v. Sanders* (1995) 11 Cal.4th 475, 526.)

A. Beginning In Pretrial Motions, And Throughout The Trial, Prosecutor Hardy Engaged In *Ad Hominem* Attacks On Defense Counsel.

Respondent argues that the *ad hominem* attacks by the prosecutor against defense counsel during the pretrial, guilt phase and penalty phase hearings did not affect the jury's verdicts because they occurred outside the presence of the jury. (Resp.Brief, p.154.) However, Respondent fails to recognize that the cumulative attacks and intimidating behavior, affected the way in which the trial court treated defense counsel and the way in which it responded to and ruled on various issues. For instance, as seen in sub-argument J, *infra*, when the prosecutor later vehemently objected to appellant's mother's testimony that she did not want appellant sentenced to death, the trial court's forcefully worded instructions to the jury were

likewise improper, conveying the judge's opinion that appellant had committed misconduct.[10]

As a preliminary matter, respondent's assertion that appellant has forfeited any claims of prosecutorial misconduct based on failure to object at trial is disingenuous. Respondent must concede that if it would be futile for defendant to object and/or request an admonition because the admonition would not have cured the misconduct, then defendant is excused from doing so and does not forfeit the issue for appeal. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) The trial court responded to each of the prosecutor's attacks by placating the prosecutor, rather than admonishing him. Thus, any objection by defense counsel would have been futile. Without repeating this doctrine with respect to each instance discussed, appellant relies on the above authority to overcome

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[10] The trial court devastated the defense with the following harsh instruction to the jury as it returned to the courtroom: "You are specifically and in the strongest possible terms admonished to disregard the question last asked by defense counsel of this witness and the reply she made to it. The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you on the issue of penalty or punishment. The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less. It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope you receive them in that way. Thank you." (50 R.T. 9322.)

each of Respondent's assertions that appellant has forfeited his claims of prosecutorial misconduct by not objecting to the misconduct below.

The first in the series of attacks occurred during the pre-trial hearing in which appellant sought an order from the trial court releasing the grand jury proceedings. (10 R.T. 1550-1556.) The prosecutor denigrated defense counsel's motion as "actually specious" (10 R.T. 1551) and denigrated defense counsel's integrity by accusing him of having "no basis for making any honest argument" (10 R.T. 1551.) Though the trial court told defense counsel that it did not "doubt your bonafides in making the motion" (10 R.T.1553), the prosecutor was not called to task for the *ad hominem* attack. Respondent argues the prosecutor was "merely disagreeing with defense counsel about the motion." (Resp.Brief, p.156). However, disagreement does not require the questioning of one's honesty in having the disagreement. By its failure to admonish the prosecutor to limit his arguments to the substance of the argument, the trial court emboldened the prosecutor to continue pushing the envelope of misconduct. (See AOB, Arg.VII, pp.242-243.)

The second attack occurred during the pretrial hearing on appellant's *Miranda* motion to exclude the statements made to Dr. Patterson. The prosecutor argued that every law enforcement officer called to testify would be subject to "cheap shots" on their integrity by defense counsel. (11 R.T. 1798.) The trial court's response was to appease the prosecutor rather than

admonish him. The trial court assured the prosecutor it would not condone cheap shots by the defense, and assured the prosecutor the court would be receptive to the prosecutor's objection if "we've hit that level." (11 R.T. 1798-1799.) By this, the trial court actually gave encouragement to the prosecutor, placating him with the assurance that the court would be receptive to the prosecutor's objection if and when defense counsel engaged in inappropriate behavior. Moreover, the trial court's lack of resistance to the prosecutor's intimidating conduct foreshadowed a pattern of encouraging the prosecutor to cross the line.

The third *ad hominem* attack also occurred during the pretrial evidentiary hearing on appellant's *Miranda* motion, outside the presence of the jury. The prosecutor questioned his supervisor as to why he had not allowed an attorney from the Public Defender's Office to visit appellant while he was hospitalized. The prosecutor disingenuously asked whether the supervisor's refusal was because of concerns the attorney might engage in "witness intimidation" and "targeting" of witnesses. The supervisor followed along, relaying his experience with "appalling" behavior by Public Defender investigators that led to witnesses being intimidated and shot, and noted that one of the prosecutor's witnesses in another case "got the hell kicked out of them (sic)." (12 R.T. 2096-2100.) Defense counsel appropriately objected to these questions on relevance grounds. (12 R.T. 2096-2100.) Respondent argues the inquiry was appropriate, because it

went to the supervisor's state of mind. (Resp.Brief, p.158.) However, the purpose of this bizarre collateral attack by the prosecutor was not to prove the supervisor's state of mind, but to denigrate the defense team and imply it was not to be trusted. This prejudiced appellant by adversely influencing the trial court against defense counsel's ability as a capable attorney. Having planted the poisoned seed, the prosecutor subsequently used this testimony to argue that the Public Defender had attempted to dissuade appellant's wife from testifying and appellant's mother from speaking with the prosecutor's office. (13 C.T. 3301-3302.) Of course, a review of the record in this case shows that the prosecutor had no evidence from which to make such an outlandish argument, which the trial court subsequently recognized:

> "My review of the record satisfies me that the public defender did not ignore an obvious conflict in its representation of [appellant] by virtue of a brief, unrelated and long past representation of Miss Alonzo on totally and wholly unrelated matters; that at no time did [defense counsel] ever feign surprise or any other demeanor other than respect for the court and its process."

(55 R.T. 10250-10251.)

A fourth intimidating attack occurred during a pretrial hearing on appellant's motion that sheriff's officers observing the trial not wear their uniforms in the courtroom. During Prosecutor Hardy's argument he snidely opined that defense counsel had made some "pretty nasty attacks" against a

prior judge hearing this case. (18 R.T. 3074.) Again, rather than admonishing the prosecutor against such improper attacks, the trial court's response was that it knew "nothing about that." (*Ibid.*) The trial court subsequently acknowledged the prosecutor's attack, "was improper." (55 R.T. 10260.)

A fifth attack occurred during the penalty phase, when the prosecutor implied defense counsel was "a rat." (50 R.T. 9314-9315.) Contrary to respondent's assertion the comment was merely a "colorful expression that was not inappropriate," (Resp.Brief, p.161) the prosecutor's remarks should not be tolerated in civilized proceedings even if these remarks were made outside the presence of the jury.

Cumulatively, and in concert with the other instances of misconduct, the prosecutor's *ad hominem* attacks prejudiced appellant. Improperly attacking the integrity of defense counsel and casting aspersions on him with no justifiable reason to do so can result in prejudicial error. (*People v. Hill* (1998) 17 Cal.4th 800, 832, citing among other references, 5 Witkin & Epstein, Cal.Criminal Law (2d ed.1988) Trial, §2914, p.3570 ["An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable."].)

Respondent argues that the prosecutor's comments were nothing more than "spirited comments" and "occasional sniping remarks."

(Resp.Brief, p.162.) However, in light of the multiple instances of misconduct, the prosecutor's conduct was more sinister than sniping. Respondent argues that a prosecutor is allowed to urge that "defense witnesses are not entitled to credence, to comment on failure to produce logical evidence, to argue on the basis of inference from the evidence that a defense is fabricated, and to comment on the evidence of prior convictions attributable to defense witnesses." (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) However, the prosecutor was not commenting on witness credibility or the state of the evidence. He was directly attacking the integrity of defense counsel. In a capital criminal trial, "[t]he gravity of the human interests at stake ... demands that the proceedings by conducted in an orderly and dignified manner ...." (*People v. Hill* (1998) 17 Cal.4th 800, 833.)

B. Prosecutor Hardy Attempted To Intimidate The Trial Court By Warning That If It Granted Appellant's *Miranda* Motion To Suppress The Statements Made To Psychiatrist Patterson, The Ruling Would Perpetrate A Fraud On The Jury.

In this instance, rather than merely attack defense counsel's integrity, the prosecutor questioned the trial court's integrity, asserting that were it to grant appellant's *Miranda* motion, the jury would be misled (or some such language). The prosecutor's statement is all the more egregious because appellant's motion had merit. (*See* Arg.IV, *ante.*; AOB, Arg.IV, pp.133-183; Arg.IV, *supra* .)

Rather than arguing the merits of the motion, the prosecutor declared that the suppression of the evidence would "permit and operate a fraud upon the jury." (10 R.T. 1576.) Defense counsel objected to the comments of the prosecutor that defense counsel was making a legal motion to suppress statements, thereby attempting to perpetrate a fraud upon the jury, moving to strike the prosecutor's verbal assault. (10 R.T. 1576; AOB, Arg.VII, pp.253-255.) The trial court did not rule on appellant's objection nor did it strike the prosecutor's improper comments; rather, it simply noted for the record that the issue was the admissibility of the evidence. (*Ibid.*) However, as set forth in Arg.IV, *ante,* and AOB, Arg.IV, it was reasonably probable the prosecutor's verbal threat was successful, as the trial court improperly denied appellant's motion. Notably, during the post trial hearing on appellant's motion for new trial, the trial court thought it had actually "sustained the defense objection, I believe." (55 R.T. 10258-10259.) While the trial court may have wanted to sustain the objection, the prosecutor's erratic behavior may have intimidated the trial court into not confronting him.

The prosecutor's attack was reprehensible and improperly designed specifically to persuade the court. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) It is reasonably probable that but for the misconduct of the prosecutor, a different result would have occurred. (*People v. Watson*

(1956) 46 Cal.2d 818, 836.) The conduct also rendered the trial fundamentally unfair. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

C. In Another Attempt To Intimidate The Trial Court, Prosecutor Hardy Stated That A Significant Gallery Presence Of Uniformed Officers Was Necessary To Ensure Law Enforcement Received Justice, That The Court Needed To Make Sure Law Enforcement "Trusted" How The Trial Was Being Conducted, And That Hardy Would Keep Law Enforcement Apprised Of The Progress Of The Trial Proceedings.

The prosecution continued its intimidating conduct towards the trial court: In response to appellant's motion to limit the presence of uniformed officers, the prosecutor threatened, "[I]t is wholly appropriate for officers to be here to make sure that the atmosphere in this courtroom is such that it is conducive to the ascertainment of justice," and that "we have to make sure that the law enforcement community trusts that what happens here isn't going to exist in an atmosphere of prejudice." (R.T. 3073-3075) These remarks are chilling, disturbing and anathema to the constitutional fundamentals of due process, fair trial and an individualized sentencing decision. To declare that the presence of uniformed police is necessary to assure a trial "conducive to the ascertainment of justice[,]" is to declare that justice must be imposed on the court and jurors by the police. The prosecutor's threat is most disturbing, as this trial involved the murder of a uniformed police officer. Respondent's glib defense of the prosecutor's

remarks reveals a disturbing view of the American judicial system as defined by the federal Constitution. (Resp.Brief, pp.164-167.)

Prosecutor Hardy did not stop with threatening that police presence in the courtroom was necessary to ensure his brand of justice. He further informed the trial court that he planned to communicate regularly with various law enforcement agencies to provide them with updates as to "exactly how we think this case is going on" (18 R.T. 3078), a thinly-veiled threat to the court that if it ruled against the prosecutor, the prosecutor would inform local law enforcement.

Respondent suggests that the prosecutor was merely informing the court that the police officers "had the same interest in attending a public trial as any other person close to a victim." (Resp.Brief, p.165.) Respondent also argues Hardy was merely assuring the trial court that due to his close relationship with police officers he would be able to convey the trial court's instructions regarding symbols of mourning to them. (Resp.Brief, p.166.) However, in light of the multiple bizarre and intimidating acts by the prosecutor detailed above and below, such an innocent interpretation of the prosecutor's comments is naive and belies credulity. Prosecutor Hardy's misconduct was "'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) The misconduct requires reversal since it is again reasonably probable that, without the misconduct,

a different result would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) (See AOB, Arg.VII, pp.255-259.) Moreover, the misconduct rendered the trial fundamentally unfair, and was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

D. Prosecutor Hardy Verbally Assaulted And Physically Intimidated An Assistant County Counsel Appearing For A Hearing On The Subpoena Of Records.

The prosecutor engaged in intimidation and *ad hominem* attacks on other trial participants, including an Assistant County Counsel Patricia McCourt, who was legal advisor to an important defense witness in the case, Dr. Lisa Kus. Respondent concedes that the prosecutor accused the County Counsel of perjury, of being sleazy and unethical, and of obstructing justice, in a loud and angry tone just prior to a hearing on a defense motion. (Resp.Brief, p.168.) Respondent characterizes this behavior as "mere allegations on the prosecutor's part that [Ms. McCourt] had acted improperly." (Resp.Brief, p.169.) A more appropriate characterization is abhorrent behavior by the prosecutor. This prejudiced appellant by directly intimidating counsel for one of his witnesses.

Respondent mischaracterizes the verbal assault as a mere altercation. (Resp.Brief, p.170.) This implies there was misbehavior by neutral counsel McCourt as well as assistant prosecutor Hardy. However, as Ms. McCourt testified, she remained silent in the face of the prosecutor's barrage to avoid

escalating the situation. (55 R.T. 10219.) (See AOB, Arg.VII, pp.259-266.) She made but one remark, in a calm, even manner, following the prosecutor's final excoriating comment. This was not a mere altercation, but another example of the prosecutor's aggressive and inappropriate campaign to bully, abuse and assault anyone it viewed as favoring the defense.

"[O]ffensive personality is not appropriate from a representative of the state's interests." (*People v. Hill* (1998) 17 Cal.4th 800, 838, citing *People v. Kelley* (Cal.App.2d 1977) 75 Cal.App.3d 672, 690.) Moreover, offensive conduct which serves to intimidate a witness – or in this case legal counsel to a witness – is misconduct that violates a defendant's constitutional rights. (*People v. Hill* (1998) 17 Cal.4th 800, 835.) Ms. McCourt described the prosecutor's behavior in the case at bar as "the most outrageous conduct in a court that I've ever seen." She described the prosecutor's physical presence as "angry, intimidating, [and] imposing ...." McCourt, as a Deputy County Counsel, was legal counsel for Dr. Lisa Kus, who testified at trial on appellant's behalf. There could have been no purpose to prosecutor Hardy's behavior other than to intimidate McCourt and her client. In light of the overall campaign by the prosecutor to intimidate parties to the trial, the prosecutor's misconduct constituted a denial of due process. *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Though McCourt insisted the prosecutor's attack did not alter her advice to

Dr. Kus, it is reasonable that the prosecutor's attack intimidated McCourt, and through McCourt, Dr. Kus. This was prejudicial to appellant because it intimidated one of his key witnesses. Dr. Kus' testimony was arguably more measured as a direct result of Hardy's behavior. This intimidation cannot be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

E. Emboldened After The Court Failed To Directly Address His Conduct Against County Counsel, Prosecutor Hardy Threatened The Court That The "Case May Get Very Ugly."

Perhaps exhausted and intimidated by the prosecutor's behavior, the trial court chose not to confront the prosecutor regarding his indefensible assault on County Counsel. (18 R.T. 3022.) Rather, the court chose not to "pursue the matter any further." The court addressed to "no one in particular,' that the court is a sanctuary for all who appear before it, and that the parties should adhere to that concept. Emboldened that there was no consequence for his abusive behavior, prosecutor Hardy threatened further abuse: "I anticipate this case may get very ugly before it's over." Respondent characterizes the prosecutor's remarks as "an accurate prediction." (Resp.Brief, p.172.) This tautology ignores that it was the prosecutor who made the case ugly. Hardy, alone, engaged in misconduct. (See AOB, Arg.VII, pp.266-272.)

F. Prosecutor Hardy Committed Misconduct, In Violation Of The Trial Court's Instruction, Accusing Appellant's Police Practices Expert Of Falsifying Documents.

Initially, respondent alleges that appellant did not preserve his claim of misconduct by not objecting to the prosecutor's argument that the audit revealed nepotism and irregularities. (Resp.Brief, p.175.) However, defense counsel raised objections over and over again during Prosecutor Hardy's cross-examination of Lt. Clark, retired Los Angeles Sheriff's Lieutenant Roger A. Clark, appellant's Police Practices Expert. (41 R.T. 7587-7638.) When Prosecutor Hardy initially embarked on cross-examination on his campaign to cast Lt. Clark as an embittered retiree of the Los Angeles Sheriff's Department, defense counsel objected and, at a sidebar with the trial court, expressed his concern as to Prosecutor Hardy's motivation, tactics and strategy for cross-examination. (41 R.T. 7592.) This objection necessarily intimates that Hardy was engaging in prosecutorial misconduct by his willful and intentional disregard for fundamental rules of procedure. The trial court informed defense counsel that he was going to give the prosecutor "some latitude" in this regard since Lt. Clark's testimony "in theory offers complete compromise of one element of the crime." (41 R.T. 7592.) An objection by defense counsel as to these two claims would have been futile or not practicable, and therefore was not necessary to preserve these issues for appeal. (See AOB, Arg. VII,

pp.272-276; People *v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.)

Substantively, respondent asserts "[t]here is no indication that the prosecutor intended, or that the jury would have construed, the prosecutor's questioning or argument to be an accusation that the witness falsified documents." (Resp.Brief, p.173.) Yet, the prosecutor argued exactly that, stating of Lt.Clark: "He's too busy falsifying records." (43 R.T. 8182.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 822, citing *People v. Avena* (1996) 13 Cal.4th 394, 420.) Hardy also tried to cast Lt.Clark as unreputable due to his bitterness towards the sheriff's department. However, Lt. Clark testified multiple times that he held no bitterness towards the sheriff's department (41 R.T. 7591, 7595-96, 7599.)

In concert with his multiple other instances of misconduct, the misconduct in this instance requires reversal of the guilt phase verdict. Examining all the expert testimony in this case, it is likely that if Prosecutor Hardy had not engaged in misconduct, mischaracterizing the facts about which he questioned Lt.Clark and unfairly biasing the jury, the jury would have arrived at a different conclusion regarding whether Deputy Aguirre was acting in lawful performance of his duties on July 17, 1996. (*People v.*

Hill, supra, 17 Cal.4th at p.828; *Chapman v. California, supra,*386 U.S. at 24; *People v. Watson, supra,* 46 Cal.2d at p.836.)

G. During Penalty Phase Cross-Examination And Argument, Prosecutor Hardy Made Unsubstantiated Accusations Against The Defense's Prison Expert.

Initially, respondent's argument that appellant waived this claim is meritless. Defense counsel objected to the manner in which the prosecutor confronted Mr. Park more than 20 times during cross-examination, on grounds of relevance, the forms of the question as lacking foundation, vague, ambiguous and/or compound and California Evidence Code section 352. Despite later characterizing the prosecutor's behavior toward Park as "vitriolic," (55 R.T. 10233; 10252) the trial court overruled the vast majority of these objections, permitting prosecutor Hardy latitude in examining Mr. Park as to the path of his career, his professional expertise, and his knowledge on the topic of prison conditions in general. (51 R.T. 9529-9559.) Any additional objections by defense counsel as to the prosecutor's behavior in this instance would have been futile or not practicable, and therefore were not necessary to preserve these issues for appeal. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.)

Substantively, the prosecutor's unsubstantiated accusations against Park, both outside the presence of the jury and before the jury, constituted

misconduct, raising inflammatory, prejudicial, irrelevant and unsubstantiated claims against a qualified defense expert. There was no evidence supporting the prosecutor's incendiary claim that Park allowed someone carrying a gun into San Quentin without searching him, and that this person gave the gun to George Jackson, who then engaged in a brutal and cold-blooded slaughter. Yet respondent, like Hardy, treats speculation and naked opinion as fact, attempting to discredit Park as an expert for his alleged involvement with the Jackson incident. Respondent erroneously cites to an internet article in support of its assertion that "Park's suspected involvement in the incident was well documented." (Resp.Brief, p.181.) Respondent's reliance on the article is misplaced for several reasons. First, respondent provides no foundation for this Court to accept the article on any salient point. Second, even if the article were accepted as proof of respondent's point, respondent's point is nonsensical. Documentation of "suspected involvement" is not documentation of *actual* involvement. Respondent offers no more than prosecutor Hardy offered: accusations and innuendo, rumor rather than fact. Third, nowhere in the article is culpability actually attributed to Mr. Park. To the contrary, the article's author places the entirety of the blame with Stephen Bingham, George Jackson's attorney. Respondent's declarations that "there [is no] support for appellant's claim that the prosecutor's questioning was "unsubstantiated", and that this Court has held repeatedly that a prosecutor's cross

examination question does not need to be substantiated is offensive. (Resp.Brief, p.181.) Both of the two cases respondent relies upon, *People v. Navarette* (2003) 30 Cal.4th 458, 512 and *People v. Steele* (2002) 27 Cal.4th 1230, 1247-1249, are inapposite. Neither case involved cross-examination as to factual matters, *per se*. *Navarette* concerned whether a witness was giving false answers, and in *Steele* the issue was whether an expert's statement that a murder had been committed in a rage could be undermined. Since neither of these cases involves matters of fact, both are clearly distinguishable from the instant matter. Prosecutor Hardy asked Dr. Park a number of inappropriate questions because they presumed facts that were wholly unsubstantiated.

The trial court justifiably maintained its refusal to let Prosecutor Hardy inquire about Dr. Park's alleged involvement in the Jackson escape attempt. But because the trial court gave him a broad brush with which to impeach (51 R.T. 9484), Hardy found other inappropriate ways to discredit Mr. Park.

During cross-examination, Prosecutor Hardy asked Mr. Park whether there were rules prohibiting taking photographs of Level 4 facilities, and Mr. Park stated that he was not aware of any rules to this effect. (51 R.T. 9549.) Respondent argues that this was a proper inquiry for the prosecutor to make because it revealed that Mr. Park was willing to "risk the safety of the prison by not following prison protocol in taking

these photographs" and that Mr. Park was therefore not well-qualified to make safety predictions about appellant. (Resp.Brief, p.180.) This argument is unpersuasive since Prosecutor Hardy did not link Mr. Park's answer to any line of inquiry about Mr. Park's safety predictions for appellant. Moreover, Prosecutor Hardy did not impeach Mr. Park by providing any California Department of Corrections manual or rule stating that Level 4 facilities cannot be photographed. As the trial court later expressed, "I thought his conduct toward Park was vitriolic, unnecessary and pointless." (55 R.T. 10233.)

Indeed, in the absence of Prosecutor Hardy's misconduct in this instance, the jury would have reasonably believed Mr. Park's testimony that appellant was the type of person who would make a positive adjustment in prison. Mr. Park presented himself as a competent and credible expert witness, testifying that he had been an expert on these topics more than 100 times, and that the Department of Corrections had even retained him as a consultant. (51 R.T. 9531-9532.) Even crediting respondent's argument that appellant's "vicious and unrepentant conduct" (Resp.Brief, p.182) would weigh against the jury sparing appellant execution, it cannot be said that the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.24.) Additionally, in the absence of this and the many other instances of prosecutor Hardy's misconduct, and the errors of the trial court in permitting the prosecution to argue the

unsupported theory that appellant acted in premeditation, see Arguments IV, V, and VI *ante*, it is reasonably probable the jury would have sentenced appellant to life in prison without the possibility of parole. (*People v. Watson, supra,* 46 Cal.2d at p.836.)

H. During Opening Statement And Closing Argument In The Guilt Phase, And During Closing Argument In The Penalty Phase, Prosecutor Hardy Argued Falsely That Appellant Had A Motive To Kill Because He Had Signed A Parole Form That Advised Him He Would Face A Sentence Of Twenty-Five Years To Life For His Next Felony.

As more fully set forth in Arg.VI, *ante*, and AOB, Arg.IV, pp.133-183, the trial court improperly permitted Prosecutor Hardy to present evidence and argue that appellant had the motive to kill Deputy Aguirre because appellant knew he was facing a prison sentence of twenty-five years to life for the felonies he had committed on July 17, 1996. The prosecutor compounded the error by arguing that appellant signed a parole form advising him he would face a sentence of twenty five years to life for his next felony.

"A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343.) Although the line between permissible and impermissible argument may sometimes appear unclear, prosecutor Hardy, as explained below, definitely crossed this line many times.

Following the trial court's initial allowance of the inference, defense counsel did not further object, but he did attempt to counter the argument and the trial court precluded defense counsel's counter-argument. (45 R.T. 8226-8227.) The rule that a defendant must object and request an admonition at trial in order to preserve the issue for appeal, "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184.) Accordingly, the rule is not applicable where any objection by defense counsel would certainly have been overruled. (*Ibid.*)

During his opening statement Hardy foreshadowed his improper argument, implying that the parole form told appellant that possession of firearms would be the felony that would result in a twenty five year to life sentence:

> "What did that mean for Michael Johnson? The next time up, the next felony, is 25 to life. On his parole he signed a piece of paper saying you can't possess firearms, because that's the next felony." (32 R.T. 6060.)

Respondent attempts to paper-over these remarks by noting that the prosecutor never stated that the parole form explicitly state that appellant would be subject to a punishment of 25 years to life for the next felony he committed. Hardy followed-up with this statement:

> The decision for Michael Johnson to possess firearms meant that if he was caught by the police, he was going back to prison, 25 to life.

(32 R.T. 6061.)

Respondent asserts that prosecutor Hardy's argument was, "fair comment based on reasonable inferences from the evidence and in no way argued facts not in evidence." (Resp.Brief, p.185.) Again, "[a]lthough prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 822, citing *People v. Avena* (1996) 13 Cal.4th 394, 420.) Notably, respondent does not refute that during his case-in-chief argument Hardy fabricated facts, averring:

> "[Appellant] signed something saying: I know I can't possess firearms. The consequence is to go back to prison, a consequence of 25 to life." (44 R.T. 8144.)

Nor does respondent refute that the prosecutor further embellished this fabrication during the penalty phase. (54 R.T. 10022-10023; 54 R.T. 10054; 54 R.T. 10061.) Finally, respondent does not dispute that during both guilt and penalty phase closing arguments, Hardy continued the false argument that appellant knew he would go back to jail for 25 to life because it was on the parole form he signed. (44 R.T. 8144; 54 R.T. 10022-10023; 54 R.T. 10054.)

Respondent's assertion that there was no prejudice fails. Irrespective of respondent's argument that there was "overwhelming evidence of felony murder," as an alternative theory (Resp.Brief, p.185), at

a minimum, it is reasonably probable a different result would have occurred without the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Moreover, in light of the multiple instances of misconduct, appellant's due process rights to a fair trial were violated. The misconduct was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

I. Prosecutor Hardy Committed Misconduct During The Penalty Phase By Asking Deputy Fryhoff How He Felt Having Not Killed Appellant, And. By Bullying The Trial Court Into Allowing Further Questioning On The Subject After The Trial Court Initially Sustained Defense Counsel's Objection.

During the prosecution's penalty phase case-in-chief, prosecutor Hardy committed misconduct by asking Deputy Fryhoff: "How do you feel about the fact you didn't kill [appellant]?" (47 R.T. 8674.) As more fully set forth in Arg.X, *infra*, this testimony, offered under the guise of "victim-impact" evidence, was irrelevant and so inflammatory as to render the trial fundamentally unfair. This testimony, and prosecutor Hardy's misconduct in forcing it upon the jury, violated appellant's rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See Arg.X, *infra*, and AOB, Arg.X.) Defense counsel objected immediately after Prosecutor Hardy posed the question, and the trial court sustained the objection. However, Prosecutor Hardy asked to approach, and proceeded to bully the court into allowing

Fryhoff to testify that he was angry and upset that he didn't kill appellant. (47 R.T. 8678-8679.) During the sidebar colloquy defense counsel specifically objected to the prosecutor's misconduct in asking Fryhoff how he felt about not killing appellant. (47 R.T. 8675-8678.) Ironically, Hardy expressed his frustration at being accused of misconduct. Tone deaf to his own improper conduct, the prosecutor implied that the trial court had been somehow complicit in covering up evidence: " I'm getting tired of having -- with the misconduct and the abuse that's gone on with the Public Defender's office and Mental Health that's been covered up in this case, to be repeatedly assigned misconduct is offensive." (47 RT 8677.)

Worn down, the trial court finally and incorrectly allowed Hardy to elicit Deptuty Fryhoff's answer that he was "very upset with [himself] that [he] didn't kill him." (47 R.T. 8678-8679.) The prosecutor's behavior and the resulting outcome reveal the impact that Prosecutor Hardy's intimidating tactics had on the trial court.[11]

Respondent disingenuously argues that Fryhoff's testimony "demonstrated the specific harm that Deputy Aguirre's killing had on Deputy Fryhoff." (Resp.Brief, p.186.) However, the testimony does not

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[11] Notably, the trial court actually had to shush Prosecutor Hardy at this point: "Hardy: One other thing. I will ask him why when he was standing over—The Court: Shh, shh...Hardy:--why when he was standing over Michael Johnson he didn't kill him. Would I be permitted to do that? The Court: No." (47 R.T. 8678.)

reflect Fryhoff's sorrow at losing Deputy Aguirre, but Fryhoff's remorse that he himself did not exact vengeance on appellant. Respondent makes the circular argument that, "there was no prejudice from the prosecutor's actions because the trial court made a correct ruling," (Resp.Brief, p.187.) Fryhoff's testimony in this regard amounted to an irrelevant and inflammatory opinion as to the appropriate sentence. (*Payne v. Tennessee* (1991) 501 U.S. 808, 831, fn.2.) Due process prohibits the introduction of victim impact evidence "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.* at p.825.) The penalty phase must be reversed because the admission of Fryhoff's testimony and Prosecutor Hardy's argument amounted to a constitutionally flawed, unreliable verdict that death was the appropriate sentence. (*Payne v. Tennessee, supra*, 501 U.S. at p.825, 831 fn.2, and Justice Souter's concurrence, at p.836 fn.1.)

J. During The Penalty Phase, Following A Question From Defense Counsel To Appellant's Mother Whether She Would Want Her Son To Receive The Death Penalty, Prosecutor Hardy Exploded Out Of His Seat And Claimed Defense Misconduct.

As explained in Argument XI, *infra*, defense counsel's question to appellant's mother regarding whether she would want to see him receive the death penalty was neither improper nor prejudicial. Despite the appropriate question, the prosecutor exploded from his seat with "rocket-like incandescence" (55 R.T. 10263) to pose an objection, implying defense counsel had done something improper. Initially, respondent's argument

that appellant forfeited the issue is meritless. Immediately upon the prosecutor's objection, the trial court cleared the jury from the courtroom and agreed with the prosecutor that the question was misconduct. In light of the trial court's response to the objection, any objection by defense counsel would have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) Moreover, trial counsel should not have to object to the manner in which the prosecutor poses an objection in order to preserve the issue for appeal. The trial court noted the misbehavior and sought to control its impact by directing the prosecutor to sit down and by clearing the courtroom. That is a sufficient record of the event, and the reasons for requiring an objection below – to give the trial court an opportunity to address the matter – do not apply. (50 R.T. 9316-9317.)

The prosecutor's improper objection did not occur in a vacuum. The prosecutor had previously asked his own witness, Fryhoff, about his remorse over not killing appellant. Defense counsel had imposed an objection, but not leaping up with rocket-like incandescence. Additionally, this event occurred shortly after the prosecutor had accused defense counsel of being a rat by allowing Mrs. Johnson to show the jury a picture of her son.

The misconduct directly led to the trial court's subsequent devastating admonition to the jury (See Arg.XI, *infra*.) The misconduct, in

combination with the instruction and other instances of misconduct, denied appellant due process and a fair trial. The prosecution's misconduct cannot be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) It is also reasonably probable a more favorable result would have been reached in the absence of the misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

K. During The Penalty Phase Testimony Of Defense Psychologist Hinkin, Prosecutor Hardy Committed Misconduct By Making Disparaging Gestures To The Jury.

Facing a situation in which the prosecutor laughed in the middle of defense counsel's examination of multiple witnesses, stood in his line of vision and made faces at him at the same time, this Court held in *People v. Hill* (1998) 17 Cal.4th 800, "It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure." (*Id.* at p.834.) Applying the *Hill* Court's reasoning, the misconduct of Prosecutor Hardy toward defense expert Dr. Charles Hinkin demands censure.

Respondent blithely argues there "was no indication that the prosecutor meant to influence the jury in an improper manner." (Resp.Brief, p.191.) However, the very purpose of rolling one's eyes and making faces is to influence observers. Respondent acknowledges that if

the prosecutor smirked and rolled his eyes, it "would not appear to be suitable conduct for a prosecutor in a capital case." (Resp.Brief, p.192, citing the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) 5.2 Courtroom Decorum.) That Prosecutor Hardy actually did behave in this unacceptable manner is clearly established in the record. (13 C.T. 3290-3291, 3308; 55 R.T. 10233-10234, 10252-10253.)

Even if Hardy did not intend for the jurors to be influenced by his behavior, "'injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (*People v. Hill* (1998) 17 Cal.4th 800, 822, citing *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) Moreover, intention is irrelevant to a demonstration that misconduct constitutes reversible error. (*Bolton, supra*, 23 Cal.3d at p.214, fn.omitted.)

It must be noted also that prosecutor Hardy committed misconduct with respect to each of the defense's expert witnesses. (See AOB, Arg.VII, pp.241-306.) The humiliating gestures against Dr. Hinkin were most critical in that Dr. Hinkin was testifying to the heart of appellant's penalty defense, that appellant suffers from paranoid schizophrenia. At a minimum, had prosecutor Hardy not humiliated Dr. Hinkin before the jury, it is reasonably probable a different result would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Moreover, even if Prosecutor Hardy's

behavior here was a "momentary and minor lapse in decorum" (Resp.Brief, p.194), it was part of the prosecutor's "pervasive campaign to mislead the jury on key legal points, as well as [his] unceasing denigration of defense counsel before the jury." (*People v. Hill, supra*, 17 Cal.4th at p.845.) In concert with the multiple other instances of misconduct, appellant's due process rights to a fair trial were violated. The misconduct was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

L. All Of These Errors Caused Harm That Must Be Remedied.

This Court has opined that lengthy criminal trials like the instant matter are rarely perfect, and the Court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844 (citing Cal.Const., art.VI, §13); *Chapman v. California* (1967) 386 U.S. 18, 24.) However, a series of trial errors, even if independently harmless, may rise by accretion to the level of reversible and prejudicial error. (*People v. Purvis* (1963) 60 Cal.2d 323, 348 and 353.) As demonstrated above, Prosecutor Hardy's instances of prosecutorial misconduct, even if not independently harmless, cumulatively constitute grounds for reversal. Taken as a whole, these instances of misconduct constitute reversible and prejudicial error. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

VIII. THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO CROSS-EXAMINE APPELLANT'S EXPERT USING AN IRRELEVANT AND HIGHLY PREJUDICIAL DEMONSTRATION.

During the guilt-phase cross-examination of defense wound ballistics expert Dr. Martin Fackler, the prosecution posed Dr. Fackler in four positions described in the testimony of the prosecution's ejection and trajectory expert James Roberts. The prosecution did not meet any of the four elements required for the trial court to admit this demonstration evidence. Namely, the prosecution did not establish that this evidence was relevant; it did not show that the conditions during the hypothetical and those present during the alleged occurrence were substantially similar; it did not demonstrate that Dr. Fackler had any qualifications with regard to ejection pattern and trajectory; and finally, rather than clarifying for the jury the sequence of events on July 17, 1996, the demonstration was designed to mislead the jury. The trial court abused its discretion in permitting the prosecution's placement of Dr. Fackler in an improper experimental demonstration during his cross-examination, and this requires reversal.

As a preliminary matter, respondent asserts that defense counsel's objections to lack of foundation did not include reference to constitutional violations, so those violations are waived. Respondent is wrong. Appellant's argument that his constitutional rights were violated is preserved on appeal because it does not invoke facts or legal standards

different from those that the trial court was asked to apply when considering defense counsel's objections at trial. (*People v. Bivert* (2011) 52 Cal.4th 96; *People v. Loy* (2011) 52 Cal.4th 46.)

A. Background.

Appellant called Dr. Martin Fackler as an expert witness in wound ballistics. (40 R.T. 7287.) During direct examination, Dr. Fackler testified to the effects that three gunshot wounds would have had on Deputy Aguirre (40 R.T. 7295-7298, 7308). He testified to the inability to determine Deputy Aguirre's position at the time of the wounds and whether Deputy Aguirre was in motion or not (40 R.T. 7299-7300, 7308-7310), the inability to determine the sequence of shots (40 R.T. 7298, 7302-7305, 7306, 7309, 7312), and stippling (40 R.T. 7301-7302, 7305, 7309, 7312).

Contrary to respondent's assertion, the prosecutor did not ask Dr. Fackler to passively participate in a demonstration. Rather, the prosecutor used Dr. Fackler as a marionette, and, under the guise of simply "posing" the unwitting Dr. Fackler, instead caused the jury to attribute the opinions expressed by the prosecution's expert James Roberts to Dr. Fackler. The conscription of an expert to offer testimony on a subject outside his area of special knowledge, skill, experience, training or education, over his own objection and defense counsel's objection, is error. Cal.Evid.Code §720(a).

B. Analysis.

The court, in its discretion, must rely on proof of the following four foundational elements to determine the admissibility of an experimental demonstration: "(1) the experiment must be relevant; (2) it must have been conducted under at least substantially similar, although not absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury." *People v. Turner* (1994) 8 Cal.4th 137, 198. The prosecution did not meet any of these four foundational elements at trial, and the experimental demonstration should not have been admitted.

First, respondent relies upon *People v. Bonin* (1989) 47 Cal.3d 808 to assert that its experiment with Dr. Fackler constituted relevant evidence. In *Bonin*, this Court stated that, "in the case of experimental evidence, the preliminary fact [citation] necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the [event in question] took place." *Bonin, supra*, 47 Cal.3d at p.847. Here, the experimental demonstration in which the prosecution employed Dr. Fackler bore no resemblance to the conditions that existed on July 17, 1996. The prosecutor failed to establish which hand appellant allegedly used to make the final shot, and therefore also failed to establish

that Dr. Fackler was demonstrating the shot by using the same hand that appellant would have used. The prosecutor failed to account for the comparative heights of Dr. Fackler and appellant. Dr. Fackler testified that he is 5'9" tall. (40 R.T. 7352.) It was stipulated that appellant is 6'1". (40 R.T. 7399.) Based on the trajectory patterns determined by Mr. Roberts, a firearm is fired at different heights, depending on the height of the individual using the gun. (36 R.T. 6679.) The prosecutor failed to lay a foundation as to whether this difference in height was insignificant. Furthermore, the prosecutor failed to establish whether the angle at which Dr. Fackler held the gun was similar to the angle at which the appellant held the gun. (36 R.T. 6668, 6689.) Critically, Dr. Fackler expressed concern that the angle he would be demonstrating to the jury might not be similar due to his height. (40 R.T. 7352.) Therefore, under *Bonin*, the preliminary facts necessary to support the relevancy of the experimental demonstration are absent.

Second, the trial scenario and the reality of the scene on July 17, 1996 were not substantially similar. Respondent argues that the circumstances of the demonstration of Dr. Fackler and the events of July 17, 1996 were substantially similar. However, respondent fails to state the elements that make the circumstances similar in any manner. In all three authorities that respondent relies upon, *People v. Bradford* (1997) 15 Cal.4th 1229, *People v. Turner* (1994) 8 Cal.4th 137, 198 and *People v.*

Bonin (1989) 47 Cal.3d 808, 847, this Court specifically articulated a number of factors which constitute the substantial similarity of circumstances: the experiment was performed at the same location as the alleged crime; at approximately the same time of day; and using the same caliber gun and similar ammunition. None of these factors are present in the instant matter, and therefore the admission of the prosecution's demonstrations using Dr. Fackler was error. In fact, the *Bonin* court determined that the lower court's ruling admitting the experiment constituted reversible error because the prosecution failed to carry its burden as to foundation. Specifically, the *Bonin* court stated that the prosecution did not "produce any evidence to show the experiment was conducted under conditions similar to those of the [event in question]." *Bonin, supra*, 47 Cal.3d at p.847. Nor did the prosecution in the case at bar: the prosecution presented no evidence that (1) the difference in height between Fackler and appellant was insignificant; (2) the mannequin used in the experiment was the same size and in the same position as Deputy Aguirre; (3) the ejection pattern of the weapon was the same; or (4) that the casings did not move around. It was virtually impossible for the prosecution to lay an adequate foundation of "similar circumstances" for this experiment. The trial court should have disallowed it.

Third, Dr. Fackler's qualifications to participate in the experimental hypothetical were not demonstrated with particularity by the prosecution.

Indeed, on cross-examination Dr. Fackler cautioned the prosecution not to ask him to engage in the experiment because he had no qualifications to do so. Dr. Fackler reluctantly submitted to the prosecutor's continued questioning, stating, "Yes, I can try and give what I think is—knowing that this is not field of expertise, and I'll give it a try." (40 R.T.7346.) During this time defense counsel objected seven times based on the lack of foundation. (40 R.T. 7342-7347.) The *Bonin* Court considered the fact that the expert who was asked to participate in the experiment conceded that he was unqualified to conduct the experiment. The Court relied upon this fact to determine that the lower court erred, stating "we are compelled to set that finding [of the admissibility of the experiment] aside and to hold that the ruling predicated on it was erroneous." *People v. Bonin* (1989) 47 Cal.3d 808, 848. Similarly, here, appellant called Dr. Fackler as an expert witness in wound ballistics. (40 R.T. 7287.) Dr. Fackler described wound ballistics as the science of a projectile's effect on a human body. (40 R.T. 7355.) Dr. Fackler had not done any testing and was not qualified to render an opinion based on ejection patterns or trajectory. (40 R.T. 7287-7293.) Yet, the prosecution told the trial court that it wanted Dr. Fackler to engage in an experiment based on these two factors, and to assume that previous testimony given by the prosecution's expert was correct. (40 R.T. 7344.) Because he was not an expert in this area, Dr. Fackler was not in a position to challenge the outcome of the prosecutor's experiment. He was, in effect,

a dupe for the prosecution. Pursuant to *Bonin*, this Court should reverse the lower court's finding on the admissibility of the experimental demonstration because Dr. Fackler was unqualified to participate in the demonstration. (*Bonin*, *supra*, 47 Cal.3d at p.848.)

Fourth, the prosecution's request to have Dr. Fackler act out prosecution expert James Roberts' testimony was designed to mislead the jury. In a brief colloquy with counsel, the trial court told the prosecutor,"[Y]ou're asking him what any juror could answer, any person could answer. I'm not sure what the question is. I apologize, but I don't understand it." (40 R.T. 7344-7345.) If the court was confused, it is probable the jury was as well. The prosecutor responded, "I want him to—two factors here, ejection pattern and the trajectory." (40 R.T. 7344-45.) Clearly, the prosecution presented Dr. Fackler in this experimental demonstration to convey to the jury that Dr. Fackler implicitly agreed with the prosecution's own witness' testimony. The prosecution's posing of Dr. Fackler provided a patina of concurrence with Mr. Robert's testimony. This did not aid the jury in any manner, but rather served only to confuse.

Respondent further contends that Dr. Fackler made conclusions that were consistent with the prosecution theory that the murder committed execution style, to demonstrate premeditation. (Resp.Brief, pp.200-201.) In so doing, respondent implies that additional information and hypothetical facts rooted in evidence given to Dr. Fackler during cross-examination

somehow altered his prior opinions and testimony. However, Dr. Fackler's conclusion that the three east to west trajectories were fired before the fourth one (40 R.T. 7331), and his conclusion that the head shot with stippling [gunshot wound No.2] was the last shot (40 R.T. 7334) remained constant throughout his testimony. Dr. Fackler's opinion that the head shot with stippling was the last shot is contained within his expert report, completed and submitted long before he rendered any trial testimony. (40 R.T. 7334.) Dr. Fackler also testified during direct examination that gunshot wound No.2 was the last wound inflicted on Deputy Aguirre. (40 R.T. 7302.) During his direct examination, Dr. Fackler testified that it was not possible to determine which shot occurred first to Deputy Aguirre. (40 R.T. 7298-7299.) Dr. Fackler highlighted the fact that the physical evidence in the instant matter can support multiple actual circumstances. In other words, his explanation that gunshot No.2 was the last shot received by Deputy Aguirre is consistent with the physical evidence, but there are other sequences in which the gunshots could have been fired that would also be consistent with the physical evidence. (40 R.T. 7302-7303.) Thus, respondent's assertion that Dr. Fackler modified his testimony, and that this modification would cause the jury not to believe his earlier testimony, is clearly erroneous. (Resp.Brief, p.201.) However, if true, respondent's assertion assists in establishing prejudice against appellant from the erroneous experiment.

Finally, respondent argues that any error regarding the admission of Dr. Fackler's demonstrations was harmless because "other prosecution evidence of appellant's premeditation was overwhelming, and the defense evidence was weak." (Resp.Brief, p.201.) The testimony of James Roberts, prosecution expert in ejection and trajectory, had already been heard by the jury. The direct testimony of Dr. Fackler had also been heard. The "posing" of Dr. Fackler by the prosecution had no other purpose than for the prosecution to convey to the jury by innuendo that Dr. Fackler agreed with the prosecution's argument that Deputy Aguirre was not moving and was lying on the ground when appellant fired the third shot. The prosecution argues that its other evidence of premeditation was overwhelming, but this argument has no merit. As appellant has demonstrated in Arguments IV, V, and VI, *ante*, the prosecution proffered no direct evidence at trial that appellant acted in premeditation. The prosecution relied almost exclusively on Dr. Fackler's demonstration to advance its premeditation argument. By using Dr. Fackler to pose its theory, the prosecution was able to give the appearance that a defense expert supported its argument. Even if this evidence had a scintilla of probative value, this value is substantially outweighed by the probability that its admission created a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury and therefore should have been excluded. Cal.Code of Evid. §352. It is reasonably probable that, but

for the admission of the demonstrations the jury would have reached a different verdict. Therefore, appellant's convictions must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

IX. THE TRIAL COURT IMPROPERLY PERMITTED EXPERT TESTIMONY ON APPELLANT'S PRIOR CONVICTIONS.

As appellant argued in Section VI *ante*, evidence of appellant's prior convictions was improperly admitted during the guilt phase to prove motive and intent. The trial court furthered this error by improperly allowing a Ventura County Senior Deputy District Attorney to provide expert opinion that appellant suffered prior convictions, of which four were serious felonies, and that if appellant were convicted of another felony he faced a prison sentence of 25 years to life. (36 R.T. 6731-6736, 6742-6743, Resp.Brief, p.201.) This expert testimony was inadmissible because it was a legal opinion, usurping both the trial court's and the jury's roles in determining the veracity of the convictions; moreover, the information was improperly used by the prosecution to prove that appellant had a propensity to commit the crimes of which he was charged. The prosecution improperly used this evidence in this manner because it lacked any other evidence upon which to prove appellant's propensity for criminal behavior.

Expert testimony on matters of law and legal conclusions are inadmissible. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 689. As this Court has made clear, "[i]t is thoroughly

established that experts may not give opinions on matters which are essentially within the province of the court to decide." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884, citations omitted). Indeed, opining on the law falls squarely within the province of the trial judge and his duty to instruct jurors on the general principles of law pertinent to the case. (*People v. Daniels* (1991) 52 Cal.3d 815, 885.) Ironically, respondent agrees that this legal principle applies here: "[T]he principle found in the above cases is that an expert may not attempt to define a statutory term when its definition is a matter of law on which the court should instruct." (Resp.Brief, p.206, citing *People v. Clay* (1964) 227 Cal.App.2d 87, 98.) Respondent attempts to distinguish Kilbride's testimony, asserting that it merely assisted the jury in determining whether appellant had prior convictions by interpreting court and department of Corrections documents. (Resp.Brief, p.205.) However, this is precisely the kind of testimony that the *Clay* court contemplates is reserved solely for the court's instruction. *Id.* at p.98.

Contrary to respondent's assertion, Mr. Kilbride did not simply embrace an ultimate issue of fact. (Resp.Brief, p.203.) The expert testimony of a Ventura County Senior Deputy District Attorney bore the imprimatur of the state's legal authority, thus infringing on the trial court's province to instruct on the law as it relates to the ultimate issues of fact. As

set forth by the Court of Appeal in *Downer v. Bramet* (1984) 152 Cal.App.3d 837,842:

> While in many cases expert opinions that are genuinely needed may happen to embrace the ultimate issue of fact (*e.g.*, a medical opinion whether a physician's actions constitute professional negligence), the calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins.

The reasoning of the *Downer* Court of Appeal applies here. Kilbride's "trial by oath" testimony was not "genuinely needed," nor did it "happen" to overlap the ultimate issue. The jury did not need Kilbride's testimony to assess the prior conviction package and documents, and comport them with the trial court's instructions. Thus, Kilbride's testimony was of no assistance to the jury. As this Court held in *People v. Coffman* (1994) 34 Cal.4th 1, 77, "the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (citing *People v. Torres* (1995) 33 Cal.App.4th 37, 47.) Moreover, the ultimate issue in this case was not whether appellant had suffered the priors, but whether he was guilty of the current crimes, the prior convictions being a foundational piece of the prosecution's motive and intent theory.

Citing *People v. Wiley* (1995) 9 Cal.4th 580, respondent argues that there was no constitutional error in allowing Kilbride to opine on the law,

because there was no constitutional right to a jury trial on whether he suffered the prior convictions. [12] However, *Wiley* is distinguishable. The purpose of the proof of prior convictions in *Wiley* was to determine an aspect of a sentence enhancement to a defendant's sentence; specifically, it was to determine whether the multiple priors were brought and tried separately. In the instant case, the proof of the prior convictions was used to determine appellant's motive or intent, aspects related to guilt or innocence of the crimes charged. Thus, the issue for which the evidence was relevant in the case at bar -- guilt or innocence-- was one in which there was a federal constitutional right to a jury trial. (U.S. Const., 6th, 8th and 14th Amends; *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Duncan v. Louisiana* (1970) 391 U.S. 145.))

Allowing an officer of the state to offer testimony as to the law of prior convictions and its applications to the facts in appellant's case was tantamount to directing a conclusive presumption shifting the burden of persuasion to appellant to disprove the element of intent. (*Sandstrom v. Montana* (1979), 442 U.S. 510, 517.). In this regard, the prosecution assured the jury it need do nothing other than rely on Kilbride in its determination:

"But I submit to you if you listen to Mr. Kilbride's testimony,

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[12] Respondent doesn't dispute the statutory right to have the jury determine the veracity of appellant's prior convictions. (Cal. Pen. Code §1025.)

> which is uncontested in the case, you will find that every one of these priors and all the appropriate findings are laid out very, very well in that testimony." (44 R.T. 8137.)

To appellant's further prejudice, the prosecution used Kilbride's expert testimony to argue that the prior convictions prove appellant's predisposition and propensity to commit the instant crimes charged:

> "You know, in the beginning of this case I told you that the reason we were all here was because that man made a decision. That decision was to kill Pete Aguirre. In fact, as we've seen over these weeks, he made a lifetime worth of decisions that culminated in the decision to kill Peter Aguirre and to avoid responsibility for all those other decisions." (44 R.T. 8195-8196.)

Respondent attempts to avoid the substance of appellant's argument by asserting that appellant forfeited his claim that the expert testimony was improper. Respondent cites *People v. Lindberg* (2008) 45 Cal.4th 1 and *People v. Roberts* (1992) 2 Cal.4th 271, 298. In *Lindberg*, this court held that the defendant forfeited his claim because he did not object to the expert's testimony specifically on the ground he advanced during his appeal, thereby depriving the trial court of an opportunity to make a fully informed ruling on the issue. *Id.* at pp.47-48. In *Roberts*, the defendant raised a challenge to the expert qualifications of multiple expert witnesses for the first time on appeal. This Court found the issue forfeited because it was not raised at trial. The facts in the instant matter are distinguishable from both *Lindberg* and *Roberts*. By respondent's own reckoning,

appellant argued at trial that the admission of Kilbride's testimony violated Evidence Code section 352. (Resp.Brief, p.204, citing 7 C.T. 1792-1815; 18 R.T. 2991.) This was sufficient to preserve the objection to Kilbride testifying as to the law. Evidence Code section 352 provides in pertinent part that the trial court, "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice...." The limited probative value of Kilbride's testimony was substantially outweighed by the probability that its admission created undue prejudice. Moreover, Kilbride's testimony rendered the trial fundamentally unfair, raising a due process violation preserved by trial counsel's relevance objection. *Lindberg,* 2 Cal.4th at p.442.

The trial court abused its discretion, resulting in reversible error. Relying on *People v. Prieto* (2003) 30 Cal.4th 226, 247, respondent argues that the admission of Mr. Kilbride's testimony was harmless under the *Watson* standard. However, Kilbride's testimony was not rendered in the sanitized vacuum of determining whether enhancements to a sentence should be imposed. Rather, Kilbride's opinions were used to bootstrap the prosecution's untenable argument that appellant knew he was facing a 25 year to life sentence and thus had motive and intent to kill Deputy Aguirre to avoid going back to prison for life. The prosecution used the imprimatur of the State of California to leap frog its lack of evidence that appellant had

any knowledge he was facing a 25-year-to-life sentence, and jump straight to first-degree murder. Thus, the admission of this evidence violated appellant's rights to due process and a fair trial under the state and federal constitutions. (U.S. Const. 5th, 6th, and 14th Amends.) Appellant's conviction for first-degree murder and the true findings of the prior conviction enhancements must be reversed.

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DEPUTY FRYHOFF TO TESTIFY THAT HE WAS ANGRY HE DID NOT KILL APPELLANT.

During the penalty phase, the trial court erred by permitting the introduction of Deputy Fryhoff's testimony that he was angry he did not kill appellant. Notably, respondent does not address appellant's argument that the prosecution failed to give adequate notice of the content of Deputy Fryhoff's testimony. (AOB, Arg.IX.) Respondent thus concedes that the prosecution failed to give defense counsel notice as to the nature of Deputy Fryhoff's testimony. Respondent argues that Deputy Fryhoff's testimony was relevant victim impact evidence and did not state an opinion as to what the jury's verdict should be. Respondent is wrong.

A. Background.

The trial court permitted Fryhoff to testify at trial on two limited aspects of victim impact: 1) the impact that Deputy Aguirre's killing had on Fryhoff, as he was present and participated in the events at the crime scene, and 2) the impact that Deputy Aguirre's killing had on Fryhoff due to his

special relationship with Deputy Aguirre as his training officer. (46 R.T. 8405.) The prosecution introduced Fryhoff's testimony for neither of these aspects. Rather, the prosecution sought from Fryhoff inflammatory testimony as to his remorse at not exacting the ultimate punishment from appellant.

The second question posed by the prosecutor to Fryhoff was, "How do you feel about the fact you didn't kill [appellant]?" (47 R.T. 8674.) Though defense counsel immediately objected, and the trial court sustained this objection, the bell had been rung. After the trial court sustained defense counsel's objection, the prosecution asked to approach, and a sidebar conversation between counsel and the trial court ensued. The prosecutor justified his question by arguing that Deputy Fryhoff would carry an overwhelming sense of guilt for the rest of his life that he didn't kill appellant. (47 R.T. 8675-8676.) The trial court responded by reiterating that Deputy Fryhoff would be permitted to provide testimony only about the impact that the events of July 17th had on him, and that the prosecutor should ask Deputy Fryhoff, "What are your emotions that have resulted from the events of that day?" (47 R.T. 8677.) The court further explained to the prosecutor, "You are allowed to get into the victim impact and what emotions he feels and why he feels them. He's going to be allowed to state that and I will permit it." Adding a final set of suspenders to the belt, the trial court also instructed the prosecutor that the question "Do you wish

you'd killed him?" would not be admissible, but "what emotions he has, why he's feeling what he's feeling, he'll be allowed to say that..." (47 R.T. 8677-8678.) Notably, the trial court's initial reaction was that Deputy Fryhoff's feelings about not having killed appellant were irrelevant. The trial court's initial ruling regarding this testimony was correct, and the change was incorrect and prejudicial to appellant.

Ignoring the instruction of the trial court, the prosecutor led Fryhoff to again repeat his regret at not killing appellant, by asking about Fryhoff's emotions in shooting appellant:

> "The Prosecutor: Describe your emotions for us regarding that part of the incident, the fact that you shot Michael Johnson.
>
> Deputy Fryhoff: Um, I'm very upset with myself that I didn't kill him.
>
> The Prosecutor: Is that something that you think about often?
>
> Deputy Fryhoff: That's something I have to live with every day.
>
> The Prosecutor: Does it make you feel that somehow you were a failure as an officer?
>
> Deputy Fryhoff: Yeah, it makes me very hostile that I wasn't able to do it."
>
> (47 R.T. 8678-8679.)

With this colloquy, the inflammatory bell that already had been rung, rang twice again.

B. Respondent's Reliance On *Payne V. Tennessee* Is Misplaced, In That Fryhoff's Testimony Was Not Relevant To An Assessment Of Appellant's Moral Culpability.

Respondent relies upon *Payne v. Tennessee* (1991) 501 U.S. 808 to persuade this Court that Deputy Fryhoff's testimony was properly admitted to assess appellant's moral culpability. Respondent's reliance is misplaced.

In *Payne*, the United States Supreme Court held that the Eighth Amendment to the federal Constitution does not prohibit a capital sentencing jury from considering victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family. (*Payne*, *supra*, 501 U.S. at p.817.)

The *Payne* Court undertook an in-depth analysis and explanation of the origin and development of victim impact evidence. Of note, the *Payne* Court indicated that the significance of assessing the harm caused by the accused in Anglo-American jurisprudence is two-fold. First, it is a prerequisite to a criminal sanction. Second, it provides a standard for determining the severity of the sentence that will be meted out. (*Id.* at p.820, citing S.Wheeler, K.Mann, & A.Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 56 (1988).)

Victim impact evidence is "designed to portray for the sentencing authority the actual harm caused by a particular crime..." (*Id.* at p.821.) It is designed to show "each victim's 'uniqueness as an individual human being ...'" (*Payne*, *supra*, 501 U.S. at p.823 (internal citations omitted).)

Victim impact evidence is meant to be another form or method of informing the sentencing authority about the specific harm caused by the crime in question. (*Id.* at p.825.) The *Payne* Court held that in order for the jury to meaningfully assess a defendant's moral culpability and blameworthiness, it should consider evidence of the specific harm caused by the defendant. (*Ibid*; *People v. Salcido* (2008) 44 Cal. 4th 93, 151.)

What respondent misses in its review of *Payne's* mandate, is that Fryhoff's testimony that he regretted not killing appellant does not evidence "specific harm" caused by the appellant. Instead, it evinces Fryhoff's specific guilt in not exacting a form of biblical justice, Fryhoff's remorse that he did not exact an eye-for-an-eye on the spot. Fryhoff's regret is not "victim impact" evidence, but rather "third party actor" evidence, a demonstration of unrequited remorse in failing to mete out ultimate justice. The *Payne* Court presciently warned against the wrongful inclusion of this type of evidence, stating: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee*, *supra*, 501 U.S. at p.825, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 179–183.)

Respondent relies upon *People v. Kelly* (2007) 42 Cal.4th 763 and *People v. Edwards* (1991) 54 Cal.3d 787 to assert that evidence that defendant's acts caused specific harm to others should be considered a

circumstance of the crime and is therefore admissible. (Resp.Brief, p.209). However, as explained, *infra*, the testimony proffered by Deputy Fryhoff to which appellant objects is his explanation of remorse and grief that are the impact of his own acts measured by his own moral compass, not due to the acts of appellant. Importantly, this Court in *People v. Kelly* (2007) 42 Cal.4th 763 echoed *Payne,* stating, "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair'. (*Id.* at p.793, citing *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) Deputy Fryhoff's testimony that he regretted not killing appellant invites an irrational response from the jury, and is therefore so unduly prejudicial that it should not have been admitted.

This Court in *Edwards* likewise mirrored the United States Supreme Court in *Payne*, focusing on the impact of the defendant's actions on others. This Court held that "factor (a) of section 190.3 of the California Criminal Code allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra,* 54 Cal.3d at p.835.) Again, Deputy Fryhoff's testimony that he regretted not killing appellant does not reveal a specific harm that appellant inflicted upon Fryhoff. (Resp.Brief, p.209.) Rather, this testimony reveals the impact that Fryhoff's own behavior had on Fryhoff.

Respondent acknowledges that a prosecution witness may not testify as to his or her opinion on the appropriate punishment for the capital defendant. (Resp.Brief, p.209). Here, respondent draws the court's attention to *People v. [Gregory Calvin] Smith* (2003) 30 Cal.4th 581, 622-623, 631-632 and *People v. Lancaster* (2007) 41 Cal.4th 50, 97, which relies on *Smith*. Indeed, the *Smith* court clearly stated "that the prosecution may not elicit the views of a victim or victim's family as to the proper punishment." (*Smith*, *supra*, at p.622.) By providing his opinion, three times, that he wished he had killed appellant, Fryhoff, a state officer, told the jury that appellant should have been killed, and Fryhoff wished he were the one to do it. Regret from a fellow officer that vengeance was not carried out could not have assisted the jury in arriving at a conclusion based on logic and sound reasoning.

In an attempt to avoid the substance of appellant's argument, respondent asserts that appellant has forfeited this claim on appeal by his submission to an admonition by the court to the jury. However, defense counsel made clear he objected to the question and answer, and the trial court made clear the boundaries. Subsequently, at sidebar, defense counsel expressed concern to the trial court that the prosecutor was intentionally delving into improper areas of testimony. Counsel foreshadowed: "I'm concerned, your Honor. The district attorney just said himself he knows he's not supposed to ask information of this kind." (47 R.T. 8666). That

the trial court allowed the prosecutor to elicit the very subject matter it had just prohibited, as "opinion," would have rendered futile any objections to the admonition. Defense counsel's objection and subsequent expression of concern to the court more than adequately constitute an objection to the substance of the court's subsequent admonition to the jury. (See AOB 342, fn.58).

In any event, contrary to respondent's assertions, the trial court's admonitions and instructions to the jury regarding the purpose of Deputy Fryhoff's testimony did not remediate the harm of Fryhoff's testimony, but rather increased the inflammatory impact. After the court made it clear that it would overrule any additional objection from defense counsel the defense submitted as to the following jury admonition proposed by the court as to Deputy Fryhoff's testimony:

> "But I will tell the jury in substance that the opinion received from Deputy Fryhoff of what he thought ought to have occurred is just that: his opinion. The decision concerning punishment is yours and exclusively yours, to be measured by the criteria upon which you have been and again will be instructed." (47 R.T. 8681).

However, this was not the admonition actually given by the trial court. Instead, the trial court instructed the jury:

> "You have heard an opinion by a witness concerning very strong feelings that he feels about what should happen to the defendant. That is not received as an opinion of what he feels ought to be done in this case. That is offered as what you have heard referred to as victim impact evidence as his

subjective feelings." (47 R.T. 8690).

The instruction simply made no sense. On one hand, the court instructed the jury that Fryhoff's "strong feelings" were proper victim impact evidence about what he thought should be done with appellant, while on the other hand instructing them Fryhoff's testimony was not received as to what Fryhoff thought should be done with appellant. (47 R.T. 8690.) Rather than assisting the jury by providing clarity in the framework of thought they were to engage in, the admonition added to the confusion already created by the court's admission of Fryhoff's testimony.

Finally, the court's error was not harmless. Contrary to respondent's assertion (Resp.Brief, p.213), at a minimum, it is reasonably possible, i.e. extremely realistic, that appellant would have obtained a better result at the penalty phase if the trial court had excluded Fryhoff's testimony. Given the extreme and uniquely inflammatory nature of this testimony and argument, it is reasonably possible the jury would have spared appellant's life. Alternatively, the prosecution cannot prove beyond a reasonable doubt that the testimony and argument did not contribute to the verdict of death. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) An error of state law bearing on the penalty in a capital case is reviewed under the reasonable possibility standard. (*People v. Mickey* (1991) 54 Cal.3d 612, 682, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) "[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we

will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) This Court must reverse the judgment of death and order new penalty phase proceedings.

XI. THE TRIAL COURT ERRED IN SUSTAINING THE PROSECUTOR'S OBJECTION TO TESTIMONY FROM APPELLANT'S MOTHER THAT SHE DID NOT WANT HIM SENTENCED TO DEATH, AND IN FURTHER INSTRUCTING THE JURY "IN THE STRONGEST POSSIBLE TERMS" THAT IT SHOULD DISREGARD HER TESTIMONY.

The trial court committed error in sustaining the prosecutor's objection to appellant's mother's testimony that she did not want him sentenced to death. The court furthered its error in instructing the jury "in the strongest possible terms" to disregard the testimony. The hypocrisy of respondent's positions in Argument X, *supra*, and this argument should be noted. In Argument X, respondent argues the testimony of Deputy Fryhoff – that he wished he had killed appellant at the scene of the crime – is appropriate; yet here, respondent argues that the testimony of Mrs. Johnson – that her son should not be executed – is inappropriate. These positions are inconsistent and require a reversal of appellant's sentence. (See generally AOB, Arg.X and Arg.XI.)

A. Relevant Facts.

Pursuant to Cal.Pen.Code §190.3(k)[13], defense counsel began direct examination of Mrs. Johnson at the penalty phase by eliciting details regarding appellant's background and good character. (50 R.T. 9309-9310.) Defense counsel then asked Mrs. Johnson whether she wanted her son to receive the death penalty. (50 R.T. 9316.) The prosecutor immediately exploded from his chair with an objection. The trial court responded by asking the prosecutor at sidebar what remedy he "wished before the jury." (50 R.T. 9318.) The prosecutor responded, "I believe what they need to be told is that no witness essentially can talk about – can testify to this because this is specifically for them to decide." (50 R.T. 9319.)

Following its rush to judgment that the question and answer were improper, and receiving the prosecutor's input, the trial court proposed the following admonition:

> "The decision concerning the result of this case is exclusively that of the jury. You are specifically instructed to disregard the question and its answer. The law of this state is clear that the expressed feelings of family of the defendant is not to be considered by you. The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less."

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[13] Cal. Pen. Code §190.3(k) states in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: ... Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

(50 R.T. 9321.) Both prosecution and defense counsel submitted on the admonition. (50 R.T. 9321.) However, when the jurors returned to the courtroom, the court proceeded to administer a different, harsher admonition than the one originally read and accepted by counsel:

> "Ladies and gentlemen of the jury, you are admonished that the decision concerning the result of this case is exclusively yours, that is, of the jury. You are specifically and in the strongest possible terms admonished to disregard the question last asked by defense counsel of this witness and the reply made to it. The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you on the issue of penalty or punishment. The family of Deputy Aguirre did not and could not express its desires and respected the rule of law. You can do no less. It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope that you receive them that way. Thank you."

(50 R.T. 9322.) This impromptu admonition was highly inflammatory, and carried with it the implication that defense counsel and appellant's mother had not respected the law, in contrast to the respect for the law of the victim's family. (50 R.T. 9322.) The court told the jury that, though it normally would not alter its neutral demeanor, the admonition was to be understood "in the strongest possible terms." (50 R.T. 9322.) Thus, the court conveyed significant gravity to the alleged improper conduct of defense counsel and Mrs. Johnson. This constituted prejudice to appellant, who is entitled to a fair and impartial trial by a neutral arbiter.

B. No Forfeiture.

Respondent asserts that under California Evidence Code section 354, appellant has forfeited his claim on appeal. (Resp.Brief, p.215.) Section 354, *inter alia*, prohibits the setting aside of a verdict or finding due to the erroneous exclusion of evidence unless the record reveals that the "(a) substance, purpose, and relevance of the excluded evidence was known to the court by the questions asked, an offer of proof, or by any other means; or (b) The rulings of the court made compliance with subdivision (a) futile...."

Both subdivisions (a) and (b) are met. First, the substance, purpose and relevance of the excluded testimony were patently obvious: appellant had some good elements of character, his life had meaning and purpose and he brought love and joy to his mother. (*People v. [Gregory Calvin] Smith* (2003) 30 Cal.4th 581.) To this end, at the close of evidence, the trial court attempted to soften and mitigate its erroneous admonition to the jury. (See AOB, Arg.XI, pp.357-359; 53 R.T. 9907-9908; 54 R.T. 9970-98971.) Second, in light of the prosecutor's hyperbolic objection and the trial court's rush to judgment that defense counsel had committed grievous error, any further objection by defense counsel to the trial court's instruction would have been futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Riel* (2000) 22 Cal.4th 1153, 1213.) For this reason, respondent's reliance on *People v. Price* (1991) 1 Cal.4th 324 and *People v.*

Davis (1995) 10 Cal.4th 463, 502, fn.1, 534, fn.31, to assert that appellant's claim is waived, is misplaced. Moreover, neither *Price* nor *Davis* involved the issue of whether an objection and request for admonition would have been futile in light of a trial court's foundational assumption that defense counsel had committed an act of misconduct. *Price* involved the preservation for appeal of a claim of prosecutorial misconduct. (*Id.* at p.447.) By contrast, in the case at bar, outside the presence of the jury the trial court immediately conveyed that defense counsel had committed misconduct by asking the prosecutor what remedy he sought. (50 R.T. 9317-9318.) The trial court's demeanor made clear any further objections to the trial court's admonition would be futile. In *Davis,* the issue was a defense attempt to assert federal constitutional violations for the first time on appeal. (*People v. Davis, supra,* 10 Cal.4th at p.534, fn.31.) The trial court did not have before it facts similar to those in the case at bar: in this case the trial court immediately presumed that defense counsel committed misconduct, and the trial court presented its perceived mitigating instruction in the form of its strongly-worded admonition to the jury. In the instant matter, defense counsel did not waive the issue but rather submitted to a proposed admonition, that was subsequently unfairly altered by the trial court, in the event that the testimony he had elicited might have been improper. Defense counsel admitted that he didn't know whether Ms. Johnson's response was improper or not. (50 R.T. 9317-9320.)

C. The Trial Court's Exclusion Of, And Instruction To The Jury Not To Consider, Appellant's Mother's Testimony That He Should Not Receive The Death Penalty Was Error.

This Court has consistently maintained that witness testimony expressing that a defendant should not be subject to a penalty of death may be admissible if it constitutes evidence of a defendant's character. (*People v. Smith* (2005) 35 Cal.4th 334, 367.) Indeed, this Court has held:

> "[T]estimony that defendant deserves to live, provided by someone who had a significant relationship with him, is admissible, not because that opinion is itself important but because the testimony provides indirect evidence of the defendant's character."

(*People v. [Gregory Calvin] Smith, supra,* 30 Cal.4th at p.631.) Thus, respondent swims against the tide in arguing that Ms. Johnson's excluded testimony would not have provided insight into appellant's character. Respondent notes that in *People v. [Gregory Calvin] Smith* this Court questioned whether defendant's former attorney should be allowed to offer testimony on the appropriateness of the death penalty. (Resp.Brief, p.216.) However, while affirming that someone who had a significant relationship with a defendant could testify to whether that defendant deserves to live, in dicta, this Court questioned whether the defendant's former attorney had such a relationship. *People v. [Gregory Calvin] Smith, supra,* 30 Cal.4th at pp.631-632. The Court also noted that "the penalty decision ... is not the

proper subject of expert testimony." (*People v. [Gregory Calvin] Smith, supra,* 30 Cal.4th at p.632.)

The case at bar is in stark contrast to the facts in *Smith.* Mrs. Johnson is appellant's mother. She is thus someone who has "a significant relationship with him." She is not an attorney/expert. She was not offering a legal or expert opinion; her testimony was admissible because it "provides indirect evidence of the defendant's character." (*People v. [Gregory Calvin] Smith, supra,* 30 Cal.4th at p.631.)

In *People v. Sanders* (1995) 11 Cal.4th 475, also relied upon by respondent, this Court affirmed the trial court's ruling allowing defendant's sister to testify that she wanted her brother to continue to live and that she loved him. (*Sanders*, *supra*, 11 Cal.4th at p.544.) This Court also permitted defendant's brother to testify that he had come to court to plead for the defendant's life. (*Id.* at p.545, fn.30.) Respondent states that the *Sanders*' Court excluded the defendant's sister's testimony expressing her desire that defendant would not be executed because this testimony was not "strictly relevant to the defendant's character, record, or individual personality." (Resp.Brief, p.216, citing *Sanders*, *supra*, 11 Cal.4th at p.546.) However, respondent provides an incorrect and overly broad summary of the *Sanders*' Court's reasoning. The *Sanders*' Court provided this explanation: "The trial court did not bar the evidence on the basis that it was irrelevant, but as duplicative and unduly prejudicial." (*Sanders*, *supra*, 11 Cal.4th at p.545.)

The *Sanders*' defendant's sister had already testified that it was "a pleasure to know that I can go and see him and know that he's alive and he's there." (*Id.* at p.544.) The *Sanders'* court permitted defense counsel to argue social stigma from the defendant's sister testimony, and did not permit further inquiry that might constitute an opinion as to the appropriate penalty for the defendant. (*Ibid.*) Here, Ms. Johnson's excluded testimony is not duplicative. It is equivalent to the Sanders' defendant's sister's testimony. By testifying that she did not want to see her son receive the death penalty, Ms. Johnson effectively told the jury that it was a pleasure to know that she could go and see him and know that he's alive and know that he is there. (50 R.T. 9316.) Under the *Sanders*' Court's logic, Ms. Johnson's testimony should not have been excluded.

Contrary to respondent's characterizations, Ms. Johnson did not provide testimony as to the impact that appellant's potential execution would have on her. (Resp.Brief, p.216.) Nor did Ms. Johnson provide an improper recommendation to the jury. (Resp.Brief, p.216.) Defense counsel and appellant's mother did respect the law. In line with this Court's jurisprudence in *People v. Ervin* (2000) 22 Cal.4th 48, 102, *People v. Mickle* (1991) 54 Cal.3d 140, 194, *People v. Heishman* (1988) 45 Cal.3d 147, 194, *People v. Ochoa* (1998) 19 Cal.4th 353, 456, *People v. Kraft* (2000) 23 Cal.4th 978, 1072 and *People v. [Gregory Calvin] Smith* (2003) 30 Cal.4th 581, 622-623, affirming that family and friends with whom

appellant has a significant relationship can and should testify to the feelings they hold toward appellant, defense counsel and Mrs. Johnson respected and complied with the law. In light of this, the court committed grave error in instructing the jury that the testimony was improper and that, while the victim's family respected the rule of law, defense counsel and Mrs. Johnson did not. In doing so, the court invaded the province of the jury and, in the guise of comment on the evidence, improperly directed the jury toward a particular verdict. (*People v. Brock* (1967) 66 Cal.2d 645, 654-655.) The very strong language used by the court had the double-edged effect of disparaging defense counsel *and* potentially causing the jury to disregard the other unquestionably proper testimony given by appellant's mother.

Finally, contrary to respondent's assertion appellant has not waived this claim. Taken within the context of the direct examination of Mrs. Johnson, defense counsel made clear that he did not think he was not allowed to ask appellant's mother the question "Would you or do you want to see [appellant] receive the death penalty?" (50 R.T. 9316.) Furthermore, defense counsel did not agree with the trial court's instruction as-read. Additionally, instructional errors can't be waived by failure to object. (See *People v. Moore* (2011) 51 Cal.4th 386; *People v. Butler* (2009) 46 Cal.4th 847.)

D. The Trial Court's Error Is Clearly Harmful.

After the close of evidence, in its balancing of mitigating and aggravating factors, the jury should have considered exactly the type of evidence that Ms. Johnson's testimony provided. (*Payne v. Tennessee* (1991) 501 U.S. 808, 821 ["We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death.'"].) The trial court's initial condemning instruction precluded the jury from this consideration. Moreover, the trial court's attempt to clarify the initial instruction at the close of evidence (53 R.T. 9907-9908; 54 R.T. 9970-9971.), over defense objection, only served to compound its error by reminding the jury to preclude from consideration Mrs. Johnson's testimony that she wanted her son to live.[14]

Since the prosecution case during the penalty phase was not compelling (*see* Arg. IV.D., *ante,* and AOB, Arg. IV.D.), the court's error in excluding Mrs. Johnson's testimony is significant. The State cannot prove beyond a reasonable doubt that the exclusion of the testimony, compounded by the behavior of the prosecutor and trial court, and the trial court's instructions, did not contribute to the verdict of death. (*Chapman v.*

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[14] The trial court admonished the jury, inter alia, "You are specifically and *in the strongest possible terms admonished* to disregard the question last asked by defense counsel of this witness and the reply she made to it." (50 R.T. 9322; emphasis added.)

California (1967) 386 U.S. 18, 24.) This Court must reverse the judgment of death and order new penalty phase proceedings.

XII. THE CALIFORNIA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant reiterates the following arguments in reply to respondent's terse arguments regarding the constitutionality of the California death penalty statute. (See also AOB, Arg.XII.) Appellant recognizes that this Court has previously found California's death penalty sentencing scheme does not violate the federal constitution. Appellant requests this Court reconsider its previous rulings with respect to whether the following are required to assure constitutionality of California's sentencing scheme: proof beyond a reasonable doubt of aggravating factors; jury unanimity as to each aggravating factor; explicit findings by the jury of the factors found in aggravation; inter-case proportionality review; meaningful narrowing of the class of offenders eligible for the death penalty; minimizing the risk of wholly arbitrary and capricious action; and equal protection provided to capital defendants.

Under the Sixth and Fourteenth Amendments to the Constitution of the United States, beyond-a-reasonable-doubt is the appropriate burden of proof for proving aggravating factors. The United States Supreme Court has clearly articulated the rule governing this issue, stating, "If a State makes an increase in a defendant's authorized punishment contingent on a

finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona* (2002) 536 U.S. 584, 589, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494.)

Additionally, the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States mandate a unanimous jury agreement on aggravating factors. The U.S. Supreme Court has noted that unanimity is one of the bedrock requirements underlying the rights guaranteed by the Sixth Amendment. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p.477, citing 4 W. Blackstone, Commentaries on the Law of England 343 (1769).) Pursuant to California Penal Code section 190.4, if a jury cannot "reach a unanimous verdict that one or more of the special circumstances are true, the court shall dismiss the jury and shall order a new jury to try the issues" as they relate to the special circumstances. Section 190.4 thus embraces the Sixth Amendment requirement of juror unanimity regarding the veracity of one or more special circumstances. In the case at bar, since the jury was not required to provide the court with its written findings regarding the aggravating factors, this Court does not know whether the jury reached a unanimous verdict on a single aggravating factor. For this reason, the due process, equal protection, jury, and cruel and unusual clauses of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution necessitate the jury base its death sentence on written findings regarding aggravating factors. Oddly, California law comports with this requirement

in non-capital cases: The court is required to state on the record the reasons for the choice of sentence. (*See e.g. People v. Martin* (1986) 42 Cal.3d 437, 449; Cal.Pen.Code §1170(c).) No less should be required in capital cases where defendants are entitled to more rigorous protections. (*Ring v. Arizona* (2002) 536 U.S. 584, 589; *Harmelin v. Michigan* (1991) 501 U.S. 957.)

California's prohibition on inter-case proportionality review increases the likelihood of arbitrary, discriminatory, or disproportionate impositions of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. The United States Supreme Court has repeatedly approved proportionality review as a safeguard against arbitrary impositions of the death penalty. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 259; *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.) This Court should follow suit to assure death penalty judgments are free from arbitrary imposition.

Under the Eighth Amendment to the federal Constitution, California's capital sentencing scheme does not meaningfully narrow the class of persons who are death eligible. As it existed on July 17, 1996, the sentencing scheme is impermissibly broad. In *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244, the Court found that California Penal Code section 190.2 failed to "genuinely narrow the class of persons eligible for the death penalty" and thus failed "[t]o pass constitutional muster. Additionally,

Penal Code section 190.3 factor (a) allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. While facially constitutional, *Tuilaepa v. California* (1994) 512 U.S. 967,987-988, factor (a) is such a broad catch-all category, that in practice it allows indiscriminate imposition of death.

Finally, the California death penalty scheme violates equal protection principles by providing different, and arguably fewer, procedural protections to non-capital defendants than to capital defendants.

"The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*In re Gary W.* (1971) 5 Cal.3d 296, 303, quoting *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578.) This Court has held that "[P]ersons convicted under the death penalty law are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause." (*People v. Carey* (2007) 41 Cal.4th 109, 136, citing *People v. Williams* (1988) 45 Cal.3d 1268, 1330.) However, analysis of the source of this doctrine, *Tigner v. Texas* (1940) 310 U.S. 141, reveals that its basis is inapposite to the situation at bar. Justice Frankfurter, writing for the majority in *Tigner v. Texas* (1940) 310 U.S. 141, 147, stated

simply that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The issue before the Court was whether Texas could apply its criminal law to various forms of industrial combination and monopoly but exclude the application of that law to corresponding activities of agriculture. (*Id.* at p.147.) The *Tigner* Court determined that there was "general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy." (*Id.* at p.146.) The Court reasoned that "the equality at which the 'equal protection' clause aims is not a disembodied equality." (*Id.* at p.147.) Thus, the Court concluded that the Texas legislature was within its power to write into its criminal law differences between agriculture and other economic pursuits. (*Ibid.*)

The facts in the instant matter are readily distinguishable from the facts in *Tigner*. Industry and agriculture have different impacts on society and thus are inherently differently situated. However, a person who commits a capital crime is inherently similarly situated to a person who commits a non-capital crime. The similar purpose of both the California death penalty statute (Cal. Pen. Code §190 *et al.*) and the Uniform Determinate Sentencing Act (Cal. Pen. Code §1170), is to evaluate whether a person has committed a crime, and if found guilty to mete out the same punishment, proportionate to the crime, to every person convicted of that

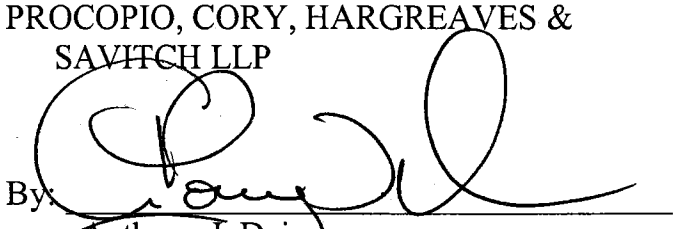
crime. The severity of the crime committed does not alter the reality that both persons are subject to judgment and an assessment of punishment pursuant to the California penal code. As the United States Supreme Court has analogously reasoned, "[c]apital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.) To find that capital and non-capital defendants are not similarly situated would incarnate the very notion of a "disembodied equality," that Justice Frankfurter argued was not the intent of the equal protection clause.

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court reverse his conviction and sentence of death.

DATED: January 3, 2012

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: 

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CERTIFICATE OF WORD COUNT

(Cal.Rules of Court, Rule 8.630(b)(1)(A))

The text of appellant's Reply Brief consists of 46,619 words as counted by the Word 2007 word-processing program used to generate this brief.

DATED: January 3, 2012

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People v. Johnson, Michael

Supreme Court No.:
S070250

Superior Court No.: 39376

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, and not a party to the within action. My business address is 525 B Street, Suite 2200, San Diego, California 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business. On January 3, 2012, I caused to be served the following document(s):

1. APPELLANT'S REPLY BRIEF

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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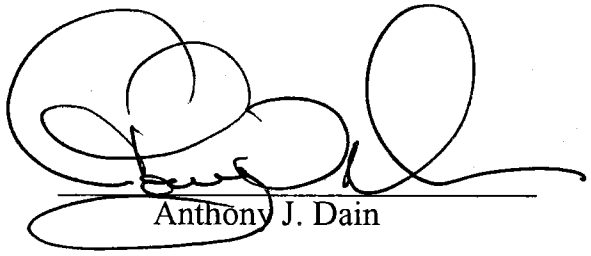
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on January 3, 2012, at San Diego, California.



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