IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. WILLIAM ALFRED JONES, JR., *Defendant and Appellant.*	)	No. S076721 Riverside County Superior Court No. RIF73193

Automatic Appeal From the Superior Court of Riverside County
Honorable Robert G. Spitzer, Judge

APPELLANT'S REPLY BRIEF

KIMBERLY J. GROVE
Attorney at Law
CA STATE BAR NO. 095225
P.O. Box 425
Ligonier, Pennsylvania 15658
(724) 238-3497

Attorney for Appellant
WILLIAM ALFRED JONES, JR.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Evidence Code

Penal Code

United States Constitution

Jury Instructions

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S076721
Plaintiff and Respondent,	)	
	)	Riverside County
v.	)	Superior Court
	)	No. RIF73193
WILLIAM ALFRED JONES, JR.,	)	
	)	
Defendant and Appellant.	)	
	)	

Automatic Appeal From the Superior Court of Riverside County

Honorable Robert G. Spitzer, Judge

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply brief appellant addresses specific contentions made by respondent requiring additional discussion in order to present the issues fully to this court. Appellant does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims discussed. Rather, appellant focuses only on the most salient points not previously covered in the opening brief. The absence of a reply to any particular point made by respondent is not intended as a concession of any point made by respondent, or an abandonment or waiver of any argument advanced in the opening brief, but merely reflects appellant's view that the matter has been adequately addressed and that the positions of the parties have been fully presented. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

AUTHORITIES AND ARGUMENT

GUILT PHASE ISSUES

I.

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER EVIDENCE OF APPELLANT'S CRIMINAL DISPOSITION IN REACHING VERDICTS ON THE CHARGE OF FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE ALLEGATIONS.

Respondent advances several arguments with respect to appellant's first assignment of error. As discussed at length in appellant's opening brief, there are two components to the error. First, the trial court improperly admitted evidence regarding the Toni Pina incident over appellant's objection that it should be excluded as improper character evidence under Evidence Code section 1101, subdivision (b), and as more prejudicial than probative under Evidence Code section 352. (Appellant's Opening Brief at pp. 63-70.) The improper admission of this evidence was compounded by instructional error which permitted the jurors to consider evidence of additional crimes, which the trial court had admitted for purposes of impeachment but had specifically determined was not relevant on the question of intent, in determining whether appellant intended to rape and sodomize Ms. Eddings when he entered her residence. (Appellant's Opening Brief pp. 70-74.)

With respect to the evidentiary error, respondent first contends that the trial court properly admitted the evidence under Evidence Code sections 1101, subdivision (b), and 352, as evidence of the intent required for burglary. (Respondent's Brief at pp. 34-38.) Next respondent argues that, even if the evidence was not admissible under section 1101, subdivision (b), as evidence of intent, the court's ruling admitting the evidence under this section was not error because the evidence could have been admitted under Evidence Code

section 1108. (Respondent's Brief at pp. 38-39.) Similarly, respondent argues that even if the evidence was not admissible under Evidence Code section 1101, subdivision (b), as proof of intent, the trial court did not err in admitting the evidence because it would have been admissible to impeach appellant once he elected to testify. (Respondent's Brief at p. 39.) Finally, respondent argues that any error was harmless. (Respondent's Brief at pp. 40.)

With respect to the trial court's failure to inform the jury of limitations on evidence admitted for impeachment purposes only, respondent contends that any error was harmless. (Respondent's Brief at pp. 42-43.) Respondent also argues that any error was either waived or invited. (Respondent's Brief at pp. 41-42.) Finally, respondent argues that the instructions inured to appellant's benefit. (Respondent's Brief at pp. 43.)

While many of respondent's contentions are fully addressed by the authorities and arguments set forth in appellant's opening brief, some arguments raise additional points which will be discussed below.

A. Evidence Relating to the Pina Incident Was Inadmissible Under Evidence Code Section 1108 for the Same Reasons it Was Inadmissible Under Evidence Code Section 1101, Subdivision (b).

Although evidence regarding the Pina incident was admitted by the trial court under Evidence Code section 1101, subdivision (b), as proof of intent, respondent argues that the ruling may be upheld, even if the trial court erred in admitting it for this purpose, because the evidence could have been admitted under Evidence Code section 1108 as proof of appellant's propensity to commit forcible sex offenses. (Respondent's Brief at pp. 38-39.) Respondent's argument on this point suggests that the admission of evidence of uncharged sex offenses under section 1108 is subject to fewer restrictions than those imposed on other crimes evidence admitted under Evidence Code section 1101, subdivision (b). Section 1108, however, does not permit

unrestricted admission of other crimes evidence and, as discussed more fully below, evidence regarding the Pina incident would have been inadmissible under section 1108 for essentially the same reasons it was inadmissible under section 1101, subdivision (b).

Section 1108, subdivision (a), provides as follows: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." The effect of this provision is to remove the prohibition against the introduction of other crimes evidence to establish that a defendant is by propensity a probable perpetrator of the crime.[1] "By removing the traditional restriction on character evidence codified in section 1101, section 1108 now 'permit[s] the jury in sex offense cases to consider evidence of prior offenses for any relevant purpose' [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.) While section 1108 may expand the purposes for which evidence of prior sex offenses may be considered by the jury once admitted, because the section incorporates the weighing process of Evidence Code section 352, it does not authorize the admission of evidence of prior sex offenses without limitation. Further, this court has determined that the limitations imposed on other crimes evidence by section 1108 are of constitutional significance.

---

[1] Under Evidence Code section 1101, subdivision (a), "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

In *People v. Falsetta* (1999) 21 Cal.4th 903, the constitutionality of section 1108 was challenged. It was argued that the section, which represents a deviation from the long established practice of excluding propensity evidence, denied defendants due process of law. After observing that "[h]ad section 1108 allowed unrestricted admission of defendant's other 'bad acts,' character, or reputation," the due process challenge would have been stronger, the *Falsetta* court upheld the constitutionality of section 1108 because, among other things, trial courts retain discretion to exclude the evidence of propensity if its prejudicial nature outweighs its probative value, its production would consume an undue amount of time, or it would confuse the issues or mislead the jury. (*Id.* at p. 916-917) The court concluded:

> In summary, we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*, "[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (. . . § 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause." [Citation.]

(*Id.* at pp. 917-918.)

In reaching this conclusion, the court emphasized that, before admitting evidence under section 1108, trial courts "must engage in a careful weighing

process under section 352." (21 Cal.4th at p. 917.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Ibid.*) A consideration of these factors in the present case demonstrates that evidence relating to the Pina incident would have been inadmissible under section 1108 for the same reasons it was inadmissible under section 1101.

As discussed in appellant's opening brief, when the evidence being reviewed under Evidence Code section 352 is of an uncharged offense, the People must establish that the evidence has substantial probative value that clearly outweighs its inherent prejudicial effect. (*People v. Bean* (1988) 46 Cal.3d 919, 938.) In determining the probative value of other crimes, the court should consider: "'(1) the materiality of the fact sought to be proved . . .; (2) the tendency of the uncharged crime to . . . disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence.' [Citation.]" (*People v. Deeney* (1983) 145 Cal.App.3d 647, 655 [emphasis omitted]; see also *People v. Daniels* (1991) 52 Cal.3d 815, 856.)

Because identity was not in issue in the present case, the prior crimes evidence was relevant, if at all, to prove intent. When offered to prove intent, the relevancy of a prior uncharged act depends on its similarity to the charged offense. In arguing that the Pina evidence was admissible under section 1108

even if it was not admissible under section 1101, respondent contends that: "admissibility under section 1108 does not require the sex offenses be similar; 'it is enough the charged and uncharged offenses are sex offense as defined in section 1108.' (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)" (Respondent's Brief at p. 38.) Contrary to respondent's argument, in upholding the constitutionality of section 1108 the *Falsetta* court specifically recognized that "similarity to the charged offense" is a factor which must be considered in conducting the section 352 analysis required before admitting evidence of prior sex offenses under section 1108. The court elaborated on this point as follows:

> In *Balcom*, we explained that the probative value of "other crimes" evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense. ([*People v.*] *Balcom, supra*, 7 Cal.4th [414] at p. 427.)

(21 Cal.4th at p. 917.) Consequently, the factors discussed with respect to relevance on the issue of intent under section 1101, subdivision (b), also apply under Evidence Code section 352 in evaluating the probative value of the evidence.

While a lesser degree of similarity between the charged and uncharged offenses is required to prove intent than to prove identity or plan, its relevance nevertheless arises from "'the recurrence of a similar result [, which] . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the

same intent in each instance." [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, [superseded on other grounds].)

In the present case the offenses were dissimilar, and did not rationally support an inference that appellant probably harbored the same intent in each instance. Although both incidents involved alleged sexual assaults against females, that is where the parallels end. The victims were not alike since one incident involved a teenager, while the other involved a senior citizen. Further the manner in which the offenses were alleged to have been committed were not comparable in that the Pina case involved only pushing while the present case involved substantial physical violence and homicide. Even the sex offenses alleged were different, with the prior involving oral copulation and the present including rape and sodomy. Finally, the incidents were not even committed close in time since the Pina offenses were committed more than six years prior to the charged offenses. Considering the circumstances, the Pina incident and the present case were not sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance.

Respondent, however, argues that the offenses were sufficiently similar in that:

> Each involved forcible sex crime[s], against a vulnerable, solitary female, to whom Jones only had access by virtue of the victim's trusted relationship with the Jones' family. As pointed out by the trial court, the sexual assaults also occurred within moments of Jones' contact with the victims, providing further circumstantial evidence of his sexual intent in making contact with his victims. Both victims were also alive when Jones assaulted them to secure their compliance with his sexual acts.

(Respondent's Brief at p. 35.) Respondent has characterized the offenses so broadly that, with the possible exception of the factor of familiarity with the victims, the points of similarity cited are present in virtually every sex offense

case. Most forcible sex crimes are committed against a vulnerable, solitary female. Additionally, most sexual assaults occur within moments of the assailant's contact with the victims. It is also safe to assume that most victims are alive when assaulted to secure their compliance.

By classifying the offenses in such broad and general language, respondent ignores the factors required to determine probative value, namely the specific facts and nature of the involved offenses. Because the similarities between the charged and uncharged offenses are few and of little consequence, while the dissimilarities are numerous and significant, the uncharged offense does not support an inference defendant harbored the intent to commit rape or sodomy when he entered Ms. Eddings' residence. Consequently, the probative value of the Pina incident is very weak on the issue of intent.

Courts have cautioned that evidence of other acts should be scrutinized with great care in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived. (See *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917.) Here the evidence relating to the Pina incident lacked sufficient probative value to overcome its inherently prejudicial nature. The evidence, thus, was inadmissible under Evidence Code section 352, and would have been inadmissible under Evidence Code section 1108 for the same reasons it was inadmissible under Evidence Code section 1101.

B. Admission of Evidence Relating to the Pina Incident as Proof of Intent Cannot be Upheld on the Grounds that the Evidence Would Have Been Admissible to Impeach Appellant's Testimony.

Respondent argues: "In any event, evidence of Jones' sexual assault on Toni P. was also properly admitted as impeachment once Jones elected to testify . . . ." (Respondent's Brief at p. 39.) While under Evidence Code

section 788[2] the credibility of a witness may be attacked by showing that the witness has previously been convicted of a felony, section 788 is subject to the discretionary authority of trial courts to exclude evidence under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306; see also *People v. Harris* (2005) 37 Cal.4th 310, 337 ["Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352."].) Because it cannot be presumed that, if the evidence had not been admissible under section 1101, the trial court would have exercised discretion to admit the Pina conviction for purposes of impeachment, respondent's argument must fail. Additionally, respondent's argument presumes, without citation to authority, that a trial court's error in admitting evidence for one purpose can be justified on the basis that the evidence could have been admitted for a different purpose. In the absence of any authority supporting this proposition, respondent's argument must be rejected. Finally, even if the conviction had been admitted for purposes of impeachment, only the fact of the conviction and the nature of the charges would have been admissible. The details of the offense would have been inadmissible. (See *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462 [murder conviction reversed because prosecution cross examined on details of prior offense].)

---

[2] Evidence Code section 788 states: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . .."

C. ***The Jury Instructions Erroneously Permitted the Jurors to Consider Evidence of Other Crimes Which the Trial Court Had Determined Was Not Relevant on the Question of Intent in Resolving this Very Issue.***

Although evidence regarding the incidents involving Norma Knight, Barbara Cady, and Kathy Dunn was admitted for impeachment purposes only (24 RT 2535), the jury instructions permitted the jurors to consider the evidence for purposes of determining appellant's intent, a clearly improper purpose. After the prosecution was permitted to cross-examine appellant regarding the Pina, Cady, and Knight incidents, the court instructed the jury that instances of prior misconduct could be considered for purposes of impeachment ***and*** in determining appellant's intent as follows:

> Ladies and gentlemen, let me remind you of something that I indicated to you earlier. There was testimony early on, a couple weeks ago from Miss Pina, and then again today there has been testimony from Mr. Jones about incidents that occurred before June 19th or 18th, 1996. You may consider those incidents for a limited purpose.
>
> At this point in time, with regard to the incidents that Mr. Jones has testified to, ***you may consider those incidents insofar as they may weigh on your determination of the witness's credibility.*** The fact that an individual, for example, has been convicted of a felony offense or has committed a criminal act evidencing dishonesty or moral turpitude may be considered by you in weighing the credibility of such a witness.
>
> The fact of such a conviction or such activity does not necessarily discredit or destroy the testimony of a particular witness. However it is a factor which the law says you may take into account in weighing the credibility of such a witness.
>
> ***In addition to that, you may consider such evidence if it has a tendency to show the existence or nonexistence of the required specific intent or mental state which is an element of the crime or special circumstance which is charged in this particular***

case. At least at this point in time, and for no other purpose, you may consider such evidence.

(24 RT 2599-2600 [emphasis added].) The trial court, thus, affirmatively instructed the jurors that they could consider the Cady and Knight incidents, in addition to the Pina incident, as evidence of appellant's intent. This instruction was clearly erroneous.

Respondent argues that appellant forfeited and/or invited the error by failing to object to the instruction given by the trial court and by requesting a limiting instructing regarding other crimes evidence offered as proof of intent [CALJIC No. 2.50] without also requesting that the court inform the jurors which prior crimes the instruction applied to. (Respondent's Brief at p. 41.) In this regard, respondent argues as if the trial court had simply failed to give "clarifying" instructions on a minor point rather than actually misinstructing the jury on a critical matter. Respondent states: "A defendant 'may not . . . "complain on appeal that an instruction, correct in law and responsive to the evidence was too general or incomplete."' [Citations.]" (*Ibid.*) While this may be true, it is not what the trial court did in this case. The error was not that the instruction given by the court was correct in law and responsive to the evidence but "too general" or "incomplete." Rather, by informing the jurors that they could consider evidence of prior crimes which had been admitted for impeachment purposes only as substantive evidence of guilt, the instruction was not responsive to the evidence and was incorrect. Under these circumstances, respondent's argument must be rejected. For this reason, as well as those discussed in appellant's opening brief, the instructional error is cognizable on appeal. (See Appellant's Opening Brief at pp. 72-74.)

Respondent also claims that the instructional error was harmless because the "instructions ultimately benefitted" appellant. In this regard respondent argues that the instructions expressly precluded jurors from

considering any of the other bad acts or crimes as either propensity or bad character evidence. (Respondent's Brief at p. 43.) First, it should be noted that the erroneous instruction was given by the trial court immediately after the evidence was introduced and contained no such limitation. (24 RT 2599-2600.) The portion of the instructions referred to by respondent was given at the close of the case and read as follows: "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than those for which he is currently on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes." (26 RT 2901.) Clearly this is not the portion of the instructions appellant is challenging, nor did this single paragraph serve to negate the erroneous instruction, given immediately after the evidence was introduced and again immediately after the paragraph referred to by respondent, that the prior crimes could be considered as evidence of intent. Respondent's claim that the instructions benefitted appellant is incorrect and must be rejected.

D. ***<u>The Combined Error Was Not Harmless</u>***

Respondent argues that, for various reasons, any error was harmless. As a foundational matter, respondent contends that the applicable standard of review is that set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (Respondent's Brief at p. 39.) However, as discussed in appellant's opening brief, because the error here is of federal as well as state constitutional dimension, violating as it does appellant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, as well as his right to a reliable adjudication at all stages of a death penalty case under the Eighth Amendment, prejudice must be evaluated under the reversible error

standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (See Appellant's Opening Brief at pp. 74-77.)

Support for application of the *Chapman* standard is found in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, a California death penalty case. In *People v. Garceau* (1993) 6 Cal.4th 140, 186, in affirming the defendant's first degree murder conviction and death sentence for the killing of his girlfriend and her 14-year-old son, this court held an improper instruction permitting the jury to consider evidence the defendant had previously murdered one of his drug partners for any purpose, including his propensity to commit murder, was harmless error. In concluding the error did not prejudice the defendant, the court assumed without deciding that the *Chapman* federal harmless-error standard was applicable. Even under that more exacting standard, the court concluded, the error was harmless because of the overwhelming evidence of the defendant's guilt. (*Id.*, at p. 187.) After the court affirmed Garceau's conviction and sentence, and denied on the merits his petition for state post-conviction relief, the United States Supreme Court denied his petition for a writ of certiorari. (*Garceau v. California* (1994) 513 U.S. 848.) Thereafter, Garceau filed an application for habeas corpus relief in federal district court. The district court held Garceau was not entitled to habeas relief on the merits; but the Ninth Circuit reversed in a 2-1 decision, concluding both that the erroneous instruction permitting the jury to consider Garceau's propensity to commit murder "so offended fundamental conceptions of justice and fair play as to rise to the level of a constitutional violation" (*Garceau v. Woodford, supra*, 275 F.3d at p. 775), and that the error was not harmless beyond a reasonable doubt. (*Id.*, at p. 777.) The error here is comparable to that addressed in *Garceau*. For the same reasons, the error is of constitutional dimension, and the *Chapman* standard of review applies.

Moreover, as discussed in appellant's opening brief, under either standard of review, the combined error cannot be regarded as harmless. (See Appellant's Opening Brief at pp. 76-79.) In arguing that the trial court's error with regard to prior crimes evidence was harmless, respondent contends: "Jones' intent was amply established by his own admissions that he intended to sexually assault Eddings, and that consistent with those admissions, the evidence showed that he had raped and sodomized Eddings." (Respondent's Brief at p. 28.) Specifically, respondent argues:

> Evidence of Jones' guilt, and specifically his intent to sexually assault Eddings while she was alive was overwhelming. Jones himself admitted to going [] over to Eddings[' house] to force sex on her and he in fact did so. Clearly, she was not dead when Jones had his pants off because she managed to scratch his bare legs and abdomen while resisting his assault upon her. (Exhs. 73-D, 73-E, 73-M.) The only reasonable inference as to why Jones would be physically struggling with Eddings while his pants were off would be consistent with an intent to sexually assault her while she was alive. He then burned her home in [an] attempt to conceal his crime.

(Respondent's Brief at p. 40.) However, in making this argument, respondent overstates the evidence.

Respondent claims first that appellant admitted he intended to sexually assault Eddings when he went to her home. However, appellant testified at trial that although he killed Eddings, he did not go to her house intending to kill her, nor did he go there intending to have sexual contact with her. (24 RT 2586-2587.) During the police interrogation sessions, the detectives pressured appellant to say he had gone to Eddings' residence with the intent to sexually assault her. The closest they came to succeeding occurred during the following exchange:

> Appellant: . . . . Like I told you, you know, I don't know why it happened. I don't understand.

> Spidle: Well, it's a, it's a urge that come[s] over you right?
>
> Appellant: I don't know. I was just drinking beer then, like I said and listen[ing] to the stereo and then for some reason I went over there.
>
> Spidle: B[ut], you wanted sex, right?
>
> Appellant: Yeah, I did at the time. But, usually, I'm all right. Been wanting to be with somebody for years. Just somebody to settle down with.

(17 CT 4812.) Despite the detectives best efforts, and contrary to respondent's position, throughout the course of the questioning appellant did not state that he intended to rape and sodomize Eddings when he went to her house.

Respondent also relies on "scratches" on appellant's legs and abdomen as evidence that appellant's pants were down while he was struggling with Eddings. This conclusion is drawn exclusively from photographs taken of appellant at the time of his arrest.[3] No witness testified as to when the injuries were sustained or to the cause or nature of the injuries. In fact the prosecutor at trial did not even argue that there were scratches on appellant's legs or abdomen, much less that this proved his pants were down during the struggle with Eddings.[4] On this point, respondent reads too much into the record.

---

[3] Detective Spidel testified that the photographs were taken at the end of his June 19th interview with appellant. (17 RT 1864-1866.)

[4] The only argument made by the prosecutor with respect to scratches was as follows: "She scratched Billy Jones. This 90-pound five-foot-tall 81-year-old woman who had suffered hip surgery on both hips scratched Billy Jones on his face, on his arms, on his chest. That is the extent to which that woman was able to fight back. She fought with everything she had, and that was all Ruth Eddings could put up against Billy Jones." (26 RT 2791)

Respondent's final contention, that the arson established appellant's guilt, simply has no bearing on the issue at hand, namely appellant's intent at the time he entered Eddings' home.

Considering all of the matters mentioned by respondent, it cannot be said that the combined error was harmless. The trial court's ruling and instructions permitted the jurors to resolve one of the key issues in the case — whether appellant intended to sexually assault Eddings when he entered her residence — based upon prior unrelated misconduct involving Toni Pina, Barbara Cady and Norma Knight. The evidence had no tendency in reason to establish appellant's intent — particularly the evidence relating to the assault on Norma Knight which had no sexual component. The prosecutor exploited the error and relied heavily upon all of this evidence in urging the jurors to find criminal intent at the time of entry, a necessary element of first degree murder under a felony-murder theory and the special circumstances allegations. (See Appellant's Opening Brief at pp. 61-63.)

In closing argument, on more than one occasion, the prosecution urged the jury to consider all of the prior crimes evidence in determining appellant's intent. Initially the prosecutor argued:

> You heard a lot of testimony and you will hear arguments about what was Billy Jones' intent when he went over to that house, and that's key to this case. What was his intent? The defendant's opening statement I believe said that Bill Jones was doing the honorable thing of checking on his neighbor, and that's all he was doing. He was being a good neighbor to Ruth Eddings. And when he took the stand and testified in court, when he raised his hand and swore to tell the truth to all of you, he said no, I never intended to have sex with her. I just went over there because I was going to check on her. And what he told you in court is something you never heard him tell Detective Spidle. You have to decide whether or not Billy Jones was being truthful when he testified in court, when he gave you the new and most recent version.

In determining whether Billy Jones is truthful and credible, you can consider what he did to the teacher Norma Knight when the defendant was in high school. Walked in on a teacher, a female teacher he didn't even know, wasn't his teacher, she did nothing to him. She was simply sitting in her classroom eating her lunch, and he stabbed her in the back.

In determining whether or not the defendant was truthful when he said "I only went over to check on Ruth Eddings like a good neighbor," you can consider what he did to Barbara Cady. That was his girlfriend's mother — when he went over to her house and there was no one else home, and he entered her house and found her asleep and attempted to rape her.

When you consider what the defendant's intent was when he went over to Ruth Eddings' house, you can consider what he did to Toni Pina and appreciate the parallels between what happened to Toni Pina and what happened to Ruth Eddings. Toni Pina was only 16 years old, living with the defendant's sister. She was Billy Jones' brother-in-law's niece. He had never been alone with her before that date, and he assaulted her. He waits until he is left alone with her. He prevents her from leaving the house. She had never done anything to him before.

He had no problems with Toni Pina. Takes her back into the bedroom, forces her to orally copulate him, assaults her with intent to commit rape. He then has her wipe her face, tells her don't call the police. He leaves. He goes home. He takes a shower. He washes his clothes, and he says he was with a hooker the night before, and it just so happened when he was with a hooker, she provided the same sexual activity that he forced on Toni Pina, oral copulation.

With Ruth Eddings, he had never been left alone with her in her house before, someone he knew for many years, someone who had never done anything wrong to him. He went over to her house. He waited for an opportunity when his parents were gone, the first time they had ever gone on a vacation and left him alone. He went over to Ruth Eddings' house, knocked on the door, and Ruth Eddings made the fatal mistake of simply opening the door to let in a neighbor. He brutally beats her. He

> rapes her. He sodomizes her. He strangles her to death. He burns her house, burns her body to destroy evidence. He goes home. He takes a shower, and he washes his clothes, and earlier that evening he had told his brother he was going to be with a hooker.

(26 RT 2788-2790.) The prosecution, thus, relied heavily upon improper evidence of criminal disposition to prove appellant's intent — a matter described by the prosecutor as "key to this case."

Considering the evidence as a whole, particularly in light of the prosecution's closing argument, it is reasonably probable that in the absence of the errors the jurors would not have found, beyond a reasonable doubt, that appellant harbored the requisite intent. Consequently, under any standard of review the error cannot be regarded as harmless.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE AUTOPSY SURGEON TO RENDER HIS PERSONAL OPINION, BASED NOT UPON ANATOMIC FINDINGS BUT RATHER UPON EXTRINSIC FACTORS, THAT THE VICTIM HAD BEEN RAPED AND MURDERED, AND THAT SHE HAD BEEN RAPED AND SODOMIZED PRIOR TO DEATH.

As discussed more fully in appellant's opening brief, one of the primary issues to be resolved by the jurors in the guilt phase was whether Ms. Eddings had been sexually assaulted prior to death. (See Appellant's Opening Brief at pp. 44-47.) The autopsy revealed no evidence of trauma which would have shed any light on this question. Although the vaginal and rectal canals were removed from the body during the autopsy, and inspected visually, there were no discernable injuries. (19 RT 2009, 2011.) According to the testimony of Dr. Silverman, a defense witness and expert in anatomic and clinical pathology, in view of Ms. Eddings' advanced age and physical condition, if she had been raped or sodomized prior to death, evidence of injury would have been expected. (22 RT 2305-2307.) However, after reviewing the autopsy protocol prepared by Dr. DiTraglia, Dr. Silverman could find no evidence of antemortem penetration. (22 RT 2305-2315.)

Despite the absence of supporting medical evidence, and over a defense objection that the question called for an opinion outside the scope of the witness' expertise (18 RT 1940-1941), Dr. DiTraglia, was permitted to testify that Ms. Eddings had been raped and sodomized prior to death. Since, there were no anatomic findings to support his opinion,[5] Dr. DiTraglia based his

---

[5] When asked: What anatomical finding did you make at the time of the autopsy to base your opinion that the rectal fluid or whatever was extracted from the rectal cavity was placed there ante-mortem?" Dr. DiTraglia replied: "There's no way to answer that question simply from looking at anatomic

conclusion on information provided to him about the case. His opinion was essentially based on the same evidence the jury would ultimately be called upon to evaluate in determining the ultimate question of fact in the case. (See Appellant's Opening Brief at pp. 87-90.) Because Dr. DiTraglia's opinion was not based upon anatomic observations, laboratory testing, or medical conclusions, it exceeded the scope of his expertise as a forensic pathologist. For this reason the trial court erred in permitting the testimony. (See Appellant's Opening Brief at pp. 90-93.) Additionally, the opinion rendered was not a proper subject of expert testimony since Dr. DiTraglia was no more qualified than the jurors to examine the evidence he considered and reach a conclusion on the greater issues addressed. (See Appellant's Opening Brief at pp. 93-95.) Finally, under Evidence Code section 352 the evidence was more prejudicial than probative because it enabled the prosecution to present its version of the facts to the jurors in the form of expert testimony, and encouraged them to shift responsibility for evaluating the evidence to the prosecution's expert. (See Appellant's Opening Brief at pp. 95-97.)

Respondent's argues that Dr. DiTraglia's training and experience as a forensic pathologist qualified him to render an opinion that Ms. Eddings was sexually assaulted prior to death, despite the fact that his opinion was not based upon medical findings and he had no specialized training or experience which would qualify him to make this particular determination based upon the factors he did consider. Specifically, respondent argues that "once an expert establishes sufficient knowledge of the subject, the question of the degree of his knowledge goes to weight and not its admissibility." (Respondent's Brief at p. 49.) However, Dr. DiTraglia's experience and training was as a medical

---

findings alone. So by limiting the question, the answer is I cannot tell you." (19 RT 1995-1996.)

expert, and the opinion in question was based not on medical findings, but rather upon factors extrinsic to the autopsy he performed. The opinion was, thus, beyond the scope of his expertise and entirely inadmissible.

Although as a medical doctor and forensic pathologist Dr. DiTraglia may have been qualified to render an opinion based on anatomic findings as to the cause of death and whether a sexual assault took place, he had no specialized training, knowledge or experience qualifying him to render an opinion that a sexual assault took place prior to death in a case where there was no medical evidence to support it. Dr. DiTraglia confirmed that he had no extraordinary knowledge, experience or training which might qualify him to determine whether a sexual assault had taken place prior to or after death based upon non-medical evidence. For example, he testified he had no specific training in psychology or psychiatry, that he knew little or nothing about necrophilia, and that he had never performed an autopsy on a body that had been sexually violated after death. (18 RT 1942-1945.) Further, Dr. DiTraglia had no training in criminology and was not qualified as a criminalist. Nor had he ever received any training in crime scene reconstruction. (19 RT 2039.)

In the absence of any relevant training or experience, Dr. DiTraglia clearly was not an expert in distinguishing, based upon the factors he considered, between cases involving sexual assaults committed prior to death and those involving sexual assaults committed immediately after death. Contrary to respondent's argument, Dr. DiTraglia's lack of training and experience in the area does not go simply to the weight of his testimony. Rather, because he had no special knowledge, skill, experience, training or education in the area, he was unqualified to render an expert opinion on the question. Absent a proper foundation as Evidence Code section 720 requires,

the trial court erred in permitting Dr. DiTraglia to offer his opinion as to whether Ms. Eddings was the victim of rape and sodomy prior to death.

Respondent also argues that Dr. DiTraglia's opinion was the proper subject of expert testimony, because it was based in part on specialized knowledge concerning the manner of death in rape homicide cases, even though this knowledge did not relate to differences between cases where a sexual assault took place prior to death and those where the victim died prior to a sexual assault being committed. Specifically, respondent refers to Dr. DiTraglia's testimony about "the connection between rape and blunt force trauma and strangulation in rape murder cases," and argues that "Dr. DiTraglia's testimony helped connect the manner and cause of death to the accomplishment of rape and sodomy; two concepts which would seem to be mutually exclusive but appeared to be inextricably intertwined in this case." (Respondent's Brief at p. 51.) Even if this statement is true, it has no bearing on the issue presented. The knowledge that homicide victims who are raped are more often killed by blunt force trauma and strangulation does not assist in determining whether a homicide victim was sexually assaulted prior to or after death unless it is also true that homicide victims who are assaulted after death are not also killed in this manner. While the information regarding cause of death may have been relevant to a determination as to whether Ms. Eddings had been sexually assaulted at all, it had no relevance to the ultimate question of whether she had been sexually assaulted prior to death.

Respondent argues that the evidence was more probative than prejudicial because, "the evidence that Jones' manner of beating and killing Eddings were consistent with other rape homicides was very probative of Jones' intent in assaulting Eddings." (Respondent's Brief at pp. 51-52.) If Dr. DiTraglia's testimony had been limited to a discussion of the manner of death,

and its relationship to whether a sexual assault had occurred at all, respondent's argument might be pertinent. However, the objection below and here on appeal relates to Dr. DiTraglia's further opinion on the ultimate issue to be resolved by the jurors – whether the sexual assault occurred prior to or after death.

In rendering his opinion on this ultimate question, Dr. DiTraglia relied not upon his specialized training, knowledge and experience as a medical doctor and forensic pathologist, but rather on "everything he knew about the case." (See Appellant's Opening Brief at pp. 87-90.) In the absence of any specialized training or experience in distinguishing between cases of pre- and post-mortem sexual assault, and in the absence of any evidence of injury which would support a conclusion that a sexual assault had occurred prior to death, Dr. DiTraglia's conclusions amounted to nothing more than his personal opinion on the greater issues before the jury. Rather than providing the jury with the benefit of any specialized knowledge, Dr. DiTraglia simply reviewed the prosecution's evidence and drew the conclusion the prosecution wanted the jurors to draw from this evidence — that Ms. Eddings had been raped and sodomized prior to her death. The trial court's ruling, thus, improperly permitted the prosecution to introduce Dr. DiTraglia's personal opinion on these matters into evidence in the guise of "expert" testimony. However, he was no more qualified than the jurors to examine this evidence and draw the conclusion he did. The probative value of Dr. DiTraglia's personal opinion on the greater issue before the jury was virtually non-existent, while the potential for prejudice resulting from his testimony in this area was great.

It is well recognized that improperly admitted scientific evidence has a unique potential for prejudice. (See *People v. Kelly* (1976) 17 Cal.3d 24, 31 ["'Scientific proof may in some instances assume a posture of mystic

infallibility in the eyes of a jury.'"]; *People v. McDonald* (1984) 37 Cal.3d 351, 372 ["aura of infallibility" arising from scientific evidence is particularly difficult to refute].) The trial court's ruling, in essence, permitted the prosecutor to put the inference she wished the jurors to draw from the evidence before them in the guise of expert testimony. The prosecution relied on the testimony of Dr. DiTraglia to give an air of scientific respectability to the inference it wanted the jury to draw from the evidence. Under these circumstances, the evidence should have been excluded as more prejudicial than probative under Evidence Code section 352.

With respect to appellant's claim that the evidence should have been excluded under Evidence Code section 352, respondent also argues that: "Jones did not make this objection below and therefore has forfeited the claim." (Respondent's Brief at p. 51.) However, although defense counsel did not reference section 352 by number, in context the objection made was sufficient to preserve the issue.[6] On this point, respondent cites Evidence Code section 353 which provides: "A verdict . . . shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears on record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . .." California courts have reasoned that such an objection is necessary to "alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity

---

[6] Defense counsel objected to the prosecution's attempt to elicit Dr. DiTraglia's opinion that Ms. Eddings was sexually assaulted prior to death by stating: "based on the status of the evidence as we have it in the record, there's insufficient data for this expert to render an opinion." (18 RT 1938.)

to establish its admissibility." (*People v. Williams* (1998) 44 Cal.3d 883, 906.) Requiring a timely objection to evidence also ensures that the court has a chance to remedy the situation before any prejudice accrues. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.)

Although the requirement of a specific objection serves important purposes, "to further these purposes, the requirement must be interpreted reasonably, not formalistically. 'Evidence Code section 353 does not exalt form over substance.' [Citation.] The statute does not require any particular form of objection." (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.) It has traditionally been recognized that "[o]bjections stated orally in the heat of trial cannot be analyzed with the legal acuity reserved for the interpretation of statutes and contracts." (*People v. Williams* (19970) 9 Cal.App.3d 565, 570.) Clearly when an objection is made during trial, counsel is not afforded the luxury of providing detailed analysis and extensive citation to authority. Consequently, "the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Additionally, as this court has observed: "[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; accord, *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

Under the circumstances of the present case, an objection that the expert was unqualified to render an opinion was the equivalent of an objection that the evidence was more prejudicial than probative since a claim that the

evidence was inadmissible under Evidence Code section 720 as improper expert testimony requires a consideration of the same facts and application of the same reasoning as a claim that the evidence was inadmissible under Evidence Code section 352 as more prejudicial than probative. No amplification of the objection made by appellant would have aided the prosecution to the extent that either by reframing the question, or by laying a broader or a different foundation therefor, the ultimate fact would have been admissible under either section. The objection was sufficient to alert the trial court to the nature of the evidence and the basis on which exclusion was sought, and to afford the prosecution an opportunity to establish its admissibility. Consequently, the issue was not waived or forfeited.

Finally, respondent argues that any error was harmless "because of the overwhelming evidence Jones' murdered Eddings to accomplish rape and sodomy." (Respondent's Brief at p. 52.) In support of this argument respondent relies upon the following:

> The jury had properly before it the fact that Eddings died as a result of blunt force trauma and strangluation, Jones' penetrated her vaginally and anally, Dr. DiTraglia's opinion that blunt force trauma and strangulation are the most common methods to accomplish rape murder, Jones' statements admitting his intent to sexually assault Eddings and that he did so, Jones' prior sexual assault on a live female, his attempt to conceal the evidence of his crimes by arson and last, but not least, the fact that Eddings left scratches on Jones' abdomen and thigh while fighting to resist Jones' sexual assault.

(Respondent's Brief at p. 52.) Again respondent has overstated the evidence. As discussed above, appellant did not admit intending to assault Ms. Eddings when he went to her house, and the only evidence of injuries on appellant's abdomen and thigh was photographic and not explained by any testimony as to the source or nature of any injuries. Also as discussed above, the arson

established nothing with respect to whether Ms. Eddings was sexually assaulted prior to death. The remaining factors cited by respondent cannot be regarded as "overwhelming" evidence on the ultimate issue to be resolved by the jury.

Here the danger that Dr. DiTraglia's improperly admitted "expert" testimony influenced the jury's verdict with respect to the murder charge was real and substantial. The defense theory of the case was that, in the face of what he perceived as an attack, appellant lashed out angrily at Ms. Eddings killing her, then sexually assaulted her after her death in an expression of rage. Under this theory appellant was not guilty of first degree murder under a felony-murder theory because he did not harbor the specific intent required for burglary, attempted rape or attempted sodomy and could not have committed rape or sodomy. Dr. DiTraglia's testimony that Ms. Eddings was raped and murdered, and raped and sodomized prior to death echoed the prosecution's theory of the case and negated appellant's defense. Because the trial court's ruling permitted the jury to abdicate its responsibility for determining these key issues of fact in favor of the prosecution's expert's opinion on the matter, the error cannot be regarded as harmless and reversal is required.

III.

THE TRIAL COURT ERRONEOUSLY EXCLUDED AN ENTIRE CATEGORY OF CRITICAL DEFENSE EVIDENCE, INCLUDING EXPERT TESTIMONY BY A QUALIFIED MENTAL HEALTH PROFESSIONAL AND EVIDENCE PERTAINING TO APPELLANT'S HISTORY OF MENTAL HEALTH COMMITMENTS, WHICH RELATED TO THE CENTRAL ISSUE TO BE DECIDED BY THE JURY— APPELLANT'S INTENT.

A. Introduction

In tacit recognition of the strength of appellant's argument on the merits, respondent relies extensively on the doctrines of waiver and forfeiture and related concepts in reply to appellant's third assignment of error. Respondent's primary argument is featured in the overall heading which states "The trial court properly ***declined to reopen the defense case*** to allow additional psychological evidence and struck evidence of Jones prior mental health commitments." (Respondent's Brief at p. 53 [emphasis added].) However, because the trial court's ruling excluding Dr. Kania's testimony was entered *in limine* at the outset of the defense case, the majority of respondent's argument is devoted to an attempt to recast the issue on appeal based upon a misstatement of the record. Respondent characterizes the in limine ruling as a "tentative" ruling, and claims that appellant did not attempt to introduce the testimony of Dr. Kania until after the defense had rested. However, a review of the record demonstrates that this simply was not the case. Because respondent's arguments relating to waiver and forfeiture are based upon a misstatement of the record, they must be rejected.

Respondent also argues that: "Dr. Kania's testimony concerning Jones' personality disorder was simply not relevant to the issues in this case which necessarily involved diminished actuality or mental disease or defect. A personality disorder does not have any legal relevance to either defense."

(Respondent's Brief at p. 65.) However, as discussed at length in appellant's opening brief and again below, Dr. Kania's testimony would have established that appellant's personality disorder, which was exacerbated by the consumption of alcohol, could have caused him to react impulsively and violently to even slight provocation. Consequently, his testimony was relevant to issues of intent which were central to the controversy below.

Finally respondent argues that any error in excluding the defense psychological evidence was harmless. (Respondent's Brief at pp. 70-71.) Although the defense presented evidence that appellant was intoxicated on the night in question, and the jury was instructed on intoxication as a defense to specific intent crimes, the trial court's exclusion of Dr. Kania's testimony deprived the jurors of expert testimony explaining appellant's personalty disorder, and the effect alcohol has on him, and prevented them from considering the evidence of intoxication in context with respect to elements of specific intent. As discussed more fully below, in light of the importance of the excluded evidence it is reasonably probable that, if the evidence had been presented, a reasonable doubt would have arisen in the mind of at least one juror as to the whether appellant reacted out of rage attributable to his personality disorder and intoxication, or whether he instead acted based upon a preconceived specific intent to commit a sexual assault. Under these circumstances, the error was prejudicial.

B. Before the Defense Even Began its Case, The Trial Court Ruled That Dr. Kania Would Not Be Permitted to Testify Based Upon an Erroneous Conclusion of Law, Then Reaffirmed this Ruling During the Defense Case, and Again at the Close of the Defense Case.

Respondent's primary argument that appellant's "lack of diligence and inadequate offer of proof did not justify reopening his case" (respondent's Brief at p. 64), is based on the incorrect premise that appellant did not attempt

to introduce Dr. Kania's testimony until after the defense had rested, and that the trial court "found defense counsel's request untimely and an unwarranted disruption to the proceedings" (Respondent's Brief at p. 60). The record, however, demonstrates that the ruling prohibiting the defense from calling Dr. Kania as an expert witness was made much earlier, in fact, before the defense case began. The defense subsequently, asked the trial court to reconsider the matter on other several occasions during and after the presentation of defense evidence. On each occasion the court reaffirmed its initial ruling.

The first time the issue was addressed was at the conclusion of the prosecution's case-in-chief when the trial court, sua sponte, initiated a review of defense evidence. (20 RT 2133.) After the defense listed all of its intended witnesses, the court stated: "All right. Let's go through these witnesses, first off." (20 RT 2137.) When the prosecutor inquired whether the discourse was to include discovery matters as well as the content of the witnesses testimony, the court limited the discussion to content "to see if it's even relevant." (20 RT 2138.) The parties and the court then outlined the potential testimony of each defense witness. (20 RT 2138-2145.) After hearing from counsel, the court ruled on the relevance of the proposed testimony of each potential defense witness. (20 RT 2149-2153.)

The court concluded that certain defense witnesses, including Sandra Seneff, Mina Jones and Helen Harrington, would be permitted to testify. General areas of admissible and inadmissible testimony were determined as to these witnesses. (20 RT 2149-2150.) The court concluded that additional information was required before a determination could be made as to whether the proposed testimony of defense pathologist Dr. Silverman was relevant. Rather than "simply throwing him out there and waiting for objections to be made," the court scheduled a foundation hearing. (20 RT 2152-2153.) After

finding that additional information was necessary before the relevance of Dr. Silverman's testimony could be determined, the court ruled that Dr. Kania's proposed testimony was "irrelevant" and he would "not be permitted to testify." (20 RT 2153.)

In arguing forfeiture weakly, respondent characterizes the court's ruling excluding the testimony of Dr. Kania as a "tentative ruling based on the offer of proof at that time." (Respondent's Brief at p. 56.) However, the court never labeled any of the rulings regarding the relevance of proposed defense evidence as "tentative," and there is no indication that the parties or the court considered them to be so. Instead, the court clearly held that Dr. Kania would not be permitted to testify. Unlike the offer of proof with respect to the proposed testimony of Dr. Silverman, which the court characterized as "ill-defined" and "ill-timed" (20 RT 2156), the court did not find that the offer of proof with respect to Dr. Kania's testimony was deficient. If the trial judge had felt that further information was required before a ruling could be made with regard to the relevance of Dr. Kania's testimony, he would have set the matter for a foundational hearing. Instead, based upon an incorrect interpretation of Penal Code section 29 finding that it did not permit evidence relating to diminished actuality, the court ruled that Dr. Kania's proposed testimony was irrelevant and inadmissible.

This ruling was reconfirmed by the court at the end of the day, after several defense witness had testified, when the defense again broached the subject of the admissibility of Dr. Kania's proposed testimony, and argued that "diminished actuality is not testimony that's prohibited under Penal Code section 29." (20 RT 2201.) Respondent addresses this argument by defense counsel as if it were a new theory of admissibility: "Later, defense counsel raised the possibility that Dr. Kania could testify concerning intoxication and

cited *People v. Saille* (1991) 54 Cal.3d 1103." (Respondent's Brief at p. 55.) The argument, however, was simply an elaboration on appellant's previous position concerning the admissibility of psychological evidence relating to a defense of diminished actuality. Neither the parties nor the court considered this to be a "new" argument or a different theory of admissibility, and the court reaffirmed its earlier ruling that Dr. Kania would not be permitted to testify at the guilt phase. (20 RT 2210-2212.)

The following day the issue of the admissibility of Dr. Kania's testimony was briefly mentioned in connection with discovery when the court stated: "Well, again, let me point out what the court's position is with regard to Dr. Kania. I think — I already indicated that based on the Penal Code sections that I have already cited, I do not believe that Dr. Kania's proposed testimony, at least as far as I understand it, is relevant to the issues in the guilt phase of this trial." (21 RT 2241-2242.) Respondent again characterizes the trial court's conclusion as a tentative ruling which was left open to further discussion: "The trial court reiterated its tentative ruling based on the offer of proof at that time. (21 RT 2241.) Although the trial court remained open to additional offers of proof, the trial court cautioned counsel against any more delay . . . ." (Respondent's Brief at p. 56.) However, the language used by the trial judge makes it perfectly clear that the question of the admissibility of Dr. Kania's testimony during the guilt phase had already been decided.

Respondent infers that the trial court was open to additional offers of proof from the fact that Dr. Kania's as of then unfinished report was mentioned in connection with discovery. However, the ongoing discussions relating to discovery encompassed both phases of the proceedings, and the trial court's inquiry regarding the availability of Dr. Kania's report pertained to the penalty phase. After reaffirming that Dr. Kania would not be permitted to

testify at the guilt phase, the court added: "Since I don't have a specific report, I have just counsel's representation and argument to base that on, it may be relevant and may be able to offer relevant evidence on the penalty phase of the trial." (21 RT 2242.) Thus, the "admonishment" referenced by respondent related to a delay in discovery as potentially affecting the penalty phase of the proceedings. (21 RT 2242-2243.) The fact that the trial court's comments at this juncture were not representative of a willingness to reconsider the admissibility of Dr. Kania's testimony based upon additional information is made clear when it is considered that defense counsel offered to provide additional information, in camera, relating to Dr. Kania's report but the court declined to hear anything further on the subject stating: "Okay. And I don't need to hear that at this point in time. It's not relevant to the issues that are currently before the court." (21 RT 2243.) If, as respondent contends, the trial judge had indeed been open to additional offers of proof with regard to Dr. Kania's testimony at the guilt phase, he would not have rejected counsel's request to discuss the matter further. Instead the judge indicated that he did not "want to hear an explanation" because further information on the matter was "not relevant to the issues" before the court. The entirety of the court's comments reflect that the relevance of Dr. Kania's testimony at the guilt phase had been decided earlier, and that the court's remarks regarding counsel's failure to provide a report from Dr. Kania related to his potential testimony at the penalty phase of the proceedings.

Although the trial court had twice ruled that Dr. Kania's testimony was irrelevant and inadmissible at the guilt phase, defense counsel made one final attempt to persuade the court to reverse its position when he requested permission to "reopen" to call Dr. Kania. (25 RT 2650-2654.) If there had been any question that the trial court's ruling excluding Dr. Kania's testimony

was based on appellant's failure to provide sufficient information regarding the substance and relevance of the proposed evidence, the trial court's ruling on this final request dispelled it. At this point Dr. Kania's report had been provided to the court as well as to the prosecutor, and the court referred to Dr. Kania's conclusions in, once again, finding his proposed testimony was irrelevant and inadmissible. The court also had the benefit of reconsidering the matter in light of all of the other evidence in the case, and with a thorough understanding of the parties' competing theories of the case. Nevertheless, the court reaffirmed its ruling that Dr. Kania's testimony was irrelevant and inadmissible at the guilt phase:

> THE COURT: There has been evidence concerning the state of voluntary intoxication of the defendant on the 18th and perhaps carrying over to the 19th of June, 1996, both from the defendant's testimony and from the testimony of Mr. Donald Jones. There has been further testimony admitted by the court over the objection of the People concerning the attitude of the victim in the case towards alcoholic beverages, her habits and customs relating to consumption of alcoholic beverages.
>
> During the examination of two defense witnesses, both the defendant and Miss Mina Jones, there was testimony that at some point in time during his adolescent years defendant was hospitalized implicitly but not explicitly for some mental health condition.
>
> The court has before it a report from Dr. Kania. I would note that the report itself — at least on my recollection of the report — correct me if I'm wrong here, Mr. Cabrera — does not mention anything regarding prior psychiatric treatment of the defendant nor does it indicate that Dr. Kania has reviewed documents relating to that psychiatric treatment.
>
> In the second from the penultimate paragraph, Dr. Kania writes "Mr. William Jones suffers from a severe personality disorder and a significant drinking problem that results in a sudden change in his personality. This change is primarily the result of

a weakening of his already weak controls. He lacks adequate psychological resources to deal with stressful situations, and alcohol only serves to weaken these taxed resources. Underlying this control is considerable anger and a dependency on other people. He has a feeling that his affectional needs have never been met, a profound sense of loneliness, and very low appraisal of himself and his abilities."

Dr. Kania in his report does not offer a differential diagnosis of a mental disease or disorder, some diagnosis that might be found in the Diagnostic and Statistical Manual, Fourth Edition, of the American Psychiatric Association. Therefore, in the — based on the offer of proof, the court will deny the motion on the part of the defense to reopen and call Dr. Kania.

I would note sort of collaterally in this area, when there was first an announced intent on the part of the defense to call Dr. Kania, the People presented and filed with the court on the 17th of November a motion *in limine* to exclude that psychiatric evidence, and it's in the context of those discussions, the report from Dr. Kania, People's motion which was made on the 17th, yesterday afternoon, and in the middle of the afternoon of the 18th the defense indicated to the court that they were going to rest that I don't think we can now go back and revisit all of these issues.

At this point in time it is still the court's opinion that Dr. Kania cannot testify to the ultimate facts in this case, namely, his opinion as to whether or not the defendant actually formed the required specific intent or whether or not he premeditated or deliberated the killing of Ruth Vernice Eddings, and insofar as he has no opinion, apparently, concerning the existence of any mental disease, defect, or disorder which was operating with regard to the defendant on or about the 19th of June, 1996, his testimony is irrelevant at this stage of the proceedings.

The court's ruling at this point in time in no way is to suggest that Dr. Kania's testimony would be irrelevant or inappropriate should the case proceed to a penalty phase in the trial.

(25 RT 2650-2654.) Although the interchange between the court and defense counsel at this stage of the proceedings provides additional insight into the positions of each, it contains no "new" ruling or argument.

Respondent, however, chooses to portray this exchange as if it were the first time the issue had been addressed. In this regard, respondent cites authorities relevant to a decision to allow a party to reopen to present newly discovered evidence, and argues that "a defendant's constitutional right to present evidence does not extend to a right to reopen his case to present evidence in order to do so," and that "the decision to reopen is a matter left to the discretion of the trial court." (Respondent's Brief at p. 64.) On this point respondent further contends "the psychological evidence Jones[] sought to introduce was indisputably available during the trial and defense counsel offered no excuse for failing to secure a ruling regarding its admissibility during the presentation of his case." (*Ibid.*) However, as demonstrated by the detailed discussion above, the trial court, in fact, had ruled on the admissibility of Dr. Kania's testimony before the defense case began, then reaffirmed the ruling during the defense case when counsel again broached the subject. Counsel's request to reopen was simply one final attempt to persuade the trial court to reverse its position and allow the defense to call Dr. Kania as a witness.

Contrary to respondent's position, defense counsel did not "elect" to rest without seeking to call Dr. Kania. Before the defense began its case the trial court made it clear that no witness could be called without a prior determination on the relevance of the witness' testimony.[7] In light of the trial

---

[7] The trial judge's position was expressed in connection with Dr. Silverman: "before Dr. Silverman is allowed to testify, a 402 hearing will be conducted to determine what exactly he has to say, because the conclusions

court's numerous rulings, before during and after the defense case, that Dr. Kania's testimony was irrelevant and inadmissible and that he would not be permitted to testify, it cannot be said that appellant "elected" to rest without calling Dr. Kania.

Based upon the record, respondent's claim that "[t]he trial court was entitled to rely on defendant's lack of diligence in denying the motion to reopen"(Respondent's Brief at p. 64), is a non-issue. Respondent's primary argument is dependent upon an incorrect interpretation of the record and must, therefore, be rejected.

C. The Defense Psychological Evidence Was Improperly Excluded as Irrelevant.

Respondent also argues that the trial court's ruling excluding defense psychological evidence should be upheld because the offer of proof below failed to establish the relevance of the evidence. (Respondent's Brief at p. 65.) Further, respondent contends that the argument with regard to the relevance of Dr. Kania's testimony contained in appellant's opening brief is somehow different from that made by trial counsel. (Respondent's Brief at pp. 65-66.) Finally, respondent claims: "Dr. Kania's testimony concerning Jones' personality disorder was simply not relevant to the issues in this case which necessarily involved diminished actuality or mental disease or defect. A personality disorder does not have any legal relevance to either defense." (Respondent's Brief at p. 65.) None of these arguments have merit.

---

that were read earlier from his report do not fully set forth enough information from which the court can determine if he has relevant evidence to present, and as opposed to simply throwing him out there and waiting for objections to be made, the court will conduct a 402 hearing, and for that purpose, Dr. Silverman will be ordered into this courtroom on Thursday morning at 9:00 a.m." (20 RT 2152-2153.)

Contrary to respondent's position, the trial court ruling excluding Dr. Kania's testimony was not the result of any deficiency in the offer of proof but, rather, was based on an incorrect interpretation of the law. (See Appellant's Opening Brief at pp. 109-114.) Appellant's argument regarding the admissibility of the evidence was precisely the same below as it is on appeal. Trial counsel argued that "diminished actuality is not testimony that's prohibited under Penal Code section 29," and referred the court to *People v. Saille* (1991) 54 Cal.3d 1103. (20 RT 2201-2202.) Counsel added that "Dr. Kania, I believe, can testify based upon his interviews with Mr. Jones and any other persons that he has interviewed, can formulate an opinion that intoxication in this case resulted in a diminished actuality which in turn . . . could prevent . . . Mr. Jones's ability of forming the requisite specific intent." Counsel then gave examples of required mental states that could be refuted by a defense of diminished actuality including malice aforethought, premeditation and deliberation, and the intent to commit the underlying felony in a felony murder prosecution. (20 RT 2202-2203.) On appeal the argument is understandably more detailed, however, the substance is the same.

The essence of Dr. Kania's proposed testimony was distilled in the following portion of his report read into the record by the trial court: "Mr. William Jones suffers from a severe personality disorder and a significant drinking problem that results in a sudden change in his personality. This change is primarily the result of a weakening of his already weak controls. He lacks adequate psychological resources to deal with stressful situations, and alcohol only serves to weaken these taxed resources. Underlying this control is considerable anger and a dependency on other people. He has a feeling that his affectional needs have never been met, a profound sense of loneliness, and very low appraisal of himself and his abilities." (25 RT 2652-2653.) Dr.

Kania's testimony, thus, would have explained appellant's personality disorder to the jurors and given them an understanding of the effects of alcohol on appellant's thought processes, reasoning ability, and behavior. In light of the competing defense and prosecution theories of the case, it is apparent that all of this information was relevant to issues of intent.

In ruling that Dr. Kania would not be permitted to testify, the trial court directed counsel's "attention to the provisions of Penal Code section 29, which indicates that he cannot testify about diminished actuality or intent, knowledge, malice aforethought or anything of that sort." (20 RT 2153.) However, the section referred to by the court does not so broadly prohibit expert testimony. Specifically, this provision states:

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

This statute only prohibits "expert witness from directly stating their conclusions regarding whether a defendant possessed a required mental state." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 662.) Even though the defense of diminished capacity has been eliminated, diminished actuality remains a viable concept. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253; see also *People v. Coddington* (2000) 23 Cal.4th 529, 583, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Although evidence of voluntary intoxication and/or mental disorders may no longer be used as an affirmative defense to a crime, such evidence is admissible to negate an element of the crime which must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982.) The expert testimony of

a forensic psychiatrist or psychologist which is addressed not to the defendant's mental capacity but rather to the issue of his actual intent is, therefore, relevant and admissible. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1115.) However, the trial court read the section too broadly as prohibiting all psychological testimony related to diminished actuality and intent.

Respondent argues that "an expert testifying about the defendant's voluntary intoxication 'shall not testify as to whether the defendant had or did not have the required mental states, which include[s] . . intent . . ., for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.' [Citations.]" (Respondent's Brief at pp. 69-70.) However, in the present case the court did not simply preclude the expert from offering an opinion on the ultimate question as to whether appellant harbored the requisite intent, but instead excluded the expert testimony in its entirety and prohibited appellant from even calling his witness to the stand.

Respondent also argues that the court properly excluded Dr. Kania's testimony because "as noted by the trial court, there was no diagnosis of a mental disorder or disease within the meaning of the Diagnostic and Statistical Manual, particularly one that was relevant to the issue of Jones' specific intent. (25 RT 2652-2653.)" (Respondent's Brief at p. 66.) However, for purposes of proving specific intent there is no principled distinction between a mental illness such as schizophrenia and a personality disorder such as Dr. Kania had diagnosed. Respondent states that "Dr. Kania did opine that Jones had 'weak controls' over his behavior but again this does not translate into an offer of evidence supporting the inference that Jones' did not know or intend what he was doing." (Respondent's Brief at p. 67.) However, as the trial court did, respondent applies an improper standard to admissibility of the

psychological evidence relevant to intent. While the question whether the defendant suffered from a recognized mental illness which would have precluded him from knowing what he was doing might be relevant to a defense of not guilty by reason of insanity, this is not the standard applicable to psychological evidence relating to issues of specific intent. In fact, Dr. Kania's proposed testimony describing appellant's weak controls is precisely the type of evidence which has been recognized as relevant to such issues.

In a very similar case, *People v. Nunn* (1996) 50 Cal.App.4th 1357, the court recognized that psychological evidence relating to the defendant's predisposition to overreact under stressful conditions was admissible on questions of intent. There the defendant was convicted of four counts of attempted murder and nine counts of assault with a deadly weapon based upon his shooting into a group of men. On appeal he argued that the trial court erred in excluding defense psychological testimony. The Court of Appeal summarized the evidence and rulings made by the trial court as follows:

> Before his testimony, a hearing was held concerning the permissible scope of the testimony to be offered by Dr. Lipson. The prosecutor noted that in his report, after reviewing appellant's history, Dr. Lipson stated: "[Appellant's] tendency to overreact, coupled with his level of inebriation, resulted in his impulsive firing of the weapon." The prosecutor argued such statement was inadmissible under sections 28 and 29. The trial court agreed.
>
> The court instructed Dr. Lipson his opinion that appellant had fired impulsively was inadmissible since it was a conclusion concerning appellant's intent at the time of the shooting. The court stated, however, Lipson was free to testify to his other findings and conclusions.
>
> Dr. Lipson testified extensively concerning appellant's background and mental condition. He stated appellant experienced several traumatic incidents related to his service

> with the Navy during the Vietnam War. Lipson stated such experiences can result in a person overreacting to subsequent stressful events.
>
> The prosecutor objected, arguing Dr. Lipson was testifying to appellant's state of mind in violation of the court's ruling. The court disagreed, stating it was proper for the defense to present evidence concerning appellant's mental condition and the effect such condition would have on his state of mind at the time of the shooting. What the expert could not do was give his opinion concerning whether the defendant did or did not act with a specific intent or mental state.

(50 Cal.App.4th at pp. 1362-1363.) On appeal, Nunn argued that the trial court improperly restricted the defense evidence by precluding the expert from testifying to his opinion that appellant had fired impulsively. In rejecting this argument, the Court of Appeal observed:

> We conclude based on the language of sections 28 and 29, and the discussion in *Czahara*, that the sections allow the presentation of detailed expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted. Thus, in the present case it was permissible for Dr. Lipson to opine that appellant, because of his history of psychological trauma, tended to overreact to stress and apprehension. It was permissible for him to testify such condition could result in appellant acting impulsively under certain particular circumstances. Dr. Lipson could have evaluated the psychological setting of appellant's claimed encounter with the men at the fence and could have offered an opinion concerning whether that encounter was the type that could result in an impulsive reaction from one with appellant's mental condition. What the doctor could not do, and what the defense proposed he do here, was to conclude that appellant had acted impulsively, that is, without the intent to kill, that is, without express malice aforethought. The court acted properly in excluding Dr. Lipson's opinion that appellant fired his weapon impulsively.

(50 Cal.App.4th at p. 1365.) The court, thus, recognized that psychological evidence virtually identical to that excluded in the present case was admissible under Penal Code section 28 and 29.

The trial court's contrary ruling here was erroneous, and respondent's argument that the Dr. Kania's testimony was irrelevant and inadmissible must be rejected.

D. The Constitutional Issues are Cognizable on Appeal.

In a single sentence, respondent argues that appellant's "claim that the trial court's exclusion of his psychological evidence or refusal to reopen violated his federal and state constitutional rights to present a defense is forfeited because he did not object on this ground below." (Respondent's Brief at p. 64.) In making this argument respondent again attempts to recast the issue on appeal, in this instance arguing as if the ruling excluding Dr. Kania's testimony was somehow based on a defense objection. Clearly this was not the case. As demonstrated by the foregoing detailed discussion of the proceedings, the trial court required the defense to establish the relevancy of each proposed defense witness's testimony prior to any witness being called to the stand. Appellant argued that Dr. Kania's testimony was relevant; however, the trial court rejected the argument and excluded the evidence. The issue was raised and framed by the trial court, not appellant. Consequently, this is not a situation where the defendant is required to articulate specific grounds upon which to base an objection under Evidence Code, section 353.[8]

---

[8] Respondent relies on Evidence Code section 353 which provides as follows: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the ***erroneous admission of evidence*** unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court

Further in light of the trial court's ruling that Dr. Kania's testimony was irrelevant, any additional objection that the exclusion of relevant evidence violates a defendant's constitutional right to present a defense would have added nothing to the discussion and obviously would have been futile.

E. The Error Was Prejudicial.

Respondent argues that any error in excluding the defense psychological evidence was harmless. (Respondent's Brief at pp. 70-71.) However, respondent's argument on the point is premised on a misunderstanding of the nature and relevance of Dr. Kania's proposed testimony in the context of the parties' theories of the case.

As set forth above, the defense theory of the case was that, although appellant did not intend to harm Ms. Eddings when he went to her residence, in the face of what he perceived as an attack, he lashed out angrily at Ms. Eddings killing her, then sexually assaulted her body after death in an expression of rage. This defense, which would have precluded a first degree murder conviction by negating the necessary specific intent, was based upon appellant's testimony as well the testimony of expert witnesses.

Appellant testified that he had been drinking heavily the night of the incident (23 RT 2501-2502), and that he did not go to Ms. Eddings' house intending to sexually assault her. (24 RT 2563-2564.) He explained what had happened that evening between himself and Ms. Eddings saying he had been holding an open can of beer when he knocked on Ms. Eddings' door. She let him in, then became angry he was drinking, knocked the can out of his hand,

---

which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." This section relating to the erroneous admission of evidence has no application to the issue raised on appeal which involves the exclusion of evidence.

and began swinging at him. (23 RT 2502.) Appellant grabbed Ms. Eddings by the neck and choked her; she went limp and they fell to the ground. (24 RT 2567, 2574.) Appellant had both hands on Ms. Eddings' neck when they began to fall. Although he used one hand to try to stop their momentum, he was unsuccessful, and fell on top of her. (24 RT 2597-2598.) After they fell, she was not breathing or moving when he put his penis between her legs and "had sex" with her. (24 RT 2576.)

Appellant's testimony was consistent with earlier statements he made to police. During an interview which took place shortly after the incident, appellant admitted that he and Ms. Eddings "got in a wrestling match" after she let him in. (17 CT 4807.) He said he was not sure what had happened, but he remembered Ms. Eddings threw up her arms and they fought. (17 CT 4810.) After the "fight" Ms. Eddings was motionless and appellant took her clothes off and "had sex" with her by putting his penis between her legs. He did not know whether penetration had occurred. (17 CT 4811, 4818.) Appellant repeatedly stated that he did not mean to harm Ms. Eddings, and that it would not have happened had he not been drinking. (17 RT 4808, 4817.)

The trial court's ruling excluded Dr. Kania's testimony explaining appellant's personality disorder and the effects of alcohol on him. This testimony would have provided the jury with insight into appellant's thought processes, and would have explained why appellant might have reacted violently to Ms. Eddings as the result of little or no provocation even though he did not harbor any pre-existing intent to harm her. Although the trial court admitted evidence of appellant's intoxication the night of the incident, and provided the jury with instructions relating to intoxication (6th Supp CT 26 [CALJIC No. 4.21.1]), the jury was deprived of expert testimony explaining

appellant's personalty disorder and the effect alcohol has on him. Because the psychological evidence would have provided the jury with information regarding the magnified effect alcohol has on someone with appellant's personalty disorder, and on appellant in particular, in the absence of any psychological evidence, the defense case was significantly diminished. The evidence of intoxication could not be considered in context and properly related to the element of intent, and, therefore, may not have been viewed as persuasive. As discussed at length in appellant's opening brief and above, the primary issue to be resolved by the jurors with respect to the first degree murder charge was intent. The prosecution's case against appellant was weak on this issue and encouraged jurors to speculate as to appellant's intent based upon dissimilar prior conduct. The trial court's error eliminated an entire category of defense evidence related to intent and profoundly weakened appellant's case.

In light of the importance of the excluded evidence, it is reasonably possible under *Chapman v. California* (1967) 386 U.S. 18, and reasonably probable under *People v. Watson* (1956) 46 Cal.2d 818, 836, that if the evidence had been presented a reasonable doubt would have arisen in the mind of at least one juror as to the whether appellant reacted out of rage attributable to his personality disorder and intoxication or whether he instead acted based upon a preconceived plan to commit a sexual assault. Under these circumstances the error cannot be regarded as harmless, and appellant's murder conviction must be reversed.

ERRORS UNDERLYING THE PENALTY PHASE

Jury Selection Issues

I.

THE TRIAL COURT'S EXCLUSION OF QUALIFIED JURORS, AND INCONSISTENT APPLICATION OF THE *WAINWRIGHT V. WITT* STANDARD FOR EXCLUSION WHICH UNFAIRLY FAVORED THE PROSECUTION, VIOLATED APPELLANT'S RIGHTS TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court improperly excused two prospective jurors for cause who voiced reservations about capital punishment, but who also stated they would follow the court's instructions and could impose the death penalty if they found the circumstances warranted it. Nothing in the questionnaires completed by these individuals, or in their responses during voir dire, demonstrated that their opinions regarding capital punishment would interfere with the performance of their duties as jurors. The improper exclusion of either of these prospective jurors for cause requires reversal of appellant's death sentence. Respondent contends that the jurors were properly excused. (Respondent's Brief at pp. 88-94.) However, for the reasons set forth below, respondent's argument with respect to these two potential jurors must be rejected.

The court also refused to excuse five prospective jurors who stated that they would automatically vote to impose the death penalty if the charged crimes and special circumstance allegations were proven. Considering these rulings in the context of the entire voir dire proceedings demonstrates that the trial court's application of the *Wainwright v. Witt* (1985) 469 U.S. 412 standard for exclusion was inconsistent and unfairly favored the prosecution.

As a consequence, while the defense was required to utilize peremptory challenges to remove potential jurors who would automatically vote in favor of the death penalty and should have been excused for cause, the trial court's ruling excluding otherwise qualified jurors with reservations against the death penalty afforded the prosecution the opportunity to exercise peremptory challenges to remove any remaining potential jurors with misgivings about capital punishment. As a combined consequence of the trial court's uneven application of the *Witt* standard, and the prosecutor's use of peremptory challenges, all of the prospective jurors who expressed strong opposition to, or conscientious scruples against, the death penalty were excluded from the jury. A death sentence imposed by such a jury cannot be executed without violating the United States Constitution, and the judgment must be reversed for this additional reason.

With regard to this second contention of error, respondent argues first that appellant "waived any claim he was deprived of an impartial jury." (See Respondent's Brief at pp. 73-76.) However, as discussed below, the doctrine of waiver has no application to the Constitutional error complained of by appellant. Respondent also contends that the trial court properly denied appellant's requests to dismiss certain jurors for cause and properly granted the prosecution's requests to dismiss other jurors for cause, and that the prosecutor's exercise of peremptory challenges did not deny appellant a fair and impartial jury. (Respondent's Brief at pp. 77-95.) By addressing these factors separately, respondent ignores appellant's overall contention that the actions of the trial court and the prosecutor produced a jury culled of all those who revealed during voir dire that they had conscientious scruples against or were otherwise opposed to capital punishment in violation of appellant's right

to a fair and impartial jury. Respondent's argument on this issue must also be rejected.

A. Waiver

Respondent argues that appellant "waived any claim of error with respect to the trial court's refusal to excuse for cause Elizabeth R., Patrick P., Patricia N., Beverly D. and Minne B. It is well established: ""'To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so. [Citations.]""'" (Respondent's Brief at p. 75.) Respondent additionally contends that appellant "also waived his claim the prosecutor's exercise of peremptory challenges to excuse life-inclined jurors denied him an impartial jury. In order to preserve this claim for appeal Jones was required to object at trial." (Respondent's Brief at p. 75.) In arguing waiver, respondent fragments and misinterprets appellant's argument on appeal.

As noted above, appellant's argument is that the actions of the trial court and the prosecutor combined to produce a jury culled of all those who revealed that they had conscientious scruples against, or were otherwise opposed to, capital punishment in violation of appellant's right to a fair and impartial jury. (See Appellant's Opening Brief at pp. 152-175.) The United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Such a scrubbed jury violates the Sixth, Eighth, and Fourteenth Amendments. (*Adams v. Texas* (1980) 448 U.S. 38, 43; accord *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.) Here the state excluded from the jury all of the venire persons who

had identified themselves as strongly opposed to the death penalty in principle or who otherwise expressed reservations about imposing the death penalty. Specifically, and as fully explained in appellant's opening brief, the trial court applied the *Witt* standard in an arbitrary, inconsistent, and fundamentally unfair manner to exclude "life-inclined" jurors. (See Appellant's Opening Brief at pp. 152-165.) As to the few remaining "life-inclined" jurors who escaped the court's uneven application of *Witt*, the prosecutor excluded them with peremptory challenges. (See Appellant's Opening Brief at pp. 171-175.) The joint efforts of the two state actors thus resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). (See Appellant's Opening Brief at pp. 152-177.) Under these circumstances, waiver is not indicated since counsel cannot waive a defendant's right to an unbiased jury without express consent. (See *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453.)

Respondent also contends, without substantial argument, that appellant's "failure to object to the trial court's ruling granting the prosecutor's motion to dismiss for cause prospective alternate Larry L. should also be waived." (Respondent's Brief at p. 76.) The only citation to authority by respondent is to a footnote in *People v. Lewis* (2006) 39 Cal.4th 970, 1007, fn.8. *Lewis*, however, did not hold that the defendant waived trial court error in improperly excusing a juror for cause by failing to object. In the footnote to which respondent refers the court observed: "The law is unclear as to whether a procedural bar applies to defendants' challenge to A.L's excusal for cause. (*Compare People v. Hill* (1992) 3 Cal.4th 959, 1005 [holding

defendant "waived any error" by "failing to object to the prosecutor's challenges"], with *People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4 [stating "controlling federal precedent holds that *Witherspoon* error is not waived by 'mere' failure to object"]. . . .) Although this footnote suggests there may be some dispute as to whether *Witherspoon* error in improperly excusing a prospective juror for cause may be waived by a failure to object, the court's reference to *People v. Hill* is puzzling. The ruling in *Hill*, quoted by *Lewis* in brackets, relates to the defendant's challenge to the prosecutor's exercise of ***peremptory*** challenges to six prospective jurors who held reservations as to the propriety of the death penalty, not to a trial court ruling excluding a prospective juror for cause in violation of *Witherspoon.*

Respondent cites to no authority holding that the doctrine of waiver has any application to *Witherspoon/Witt* error, and decisions of the United States Supreme Court and of the California courts have unanimously ruled that such error is not waived by mere failure to object. Shortly after *Witherspoon*, the United States Supreme Court reversed and remanded two cases in which the *Witherspoon* error was raised neither at trial nor on appeal. (*Maxwell v. Bishop* (1970) 398 U.S. 262; *Boulden v. Holman* (1969) 394 U.S. 478.) The court then granted certiorari in *State v. Wigglesworth* (1969) 248 N.E.2d 607, in which the Ohio Supreme Court had held the defendant waived *Witherspoon* error (see 248 N.E.2d at pp. 613-614), and reversed per curiam, citing *Witherspoon, Maxwell v. Bishop, supra,* and *Boulden v. Holmen, supra.* (*Wigglesworth v. Ohio* (1971) 403 U.S. 947.) *Harris v. Texas* (1971) 403 U.S. 947, also summarily reversed a lower court decision holding that failure to object waived *Witherspoon* error. California decisions similarly reject waiver of *Witherspoon* error. (See *People v. Velasquez* (1980) 26 Cal.3d 425, 443; *People v. Risenhoover* (1968) 70 Cal.2d 39, 56; *In re Anderson* (1968) 69

Cal.2d 613, 618-619.) Consequently, there is no legal authority supporting respondent's waiver argument.

Moreover, even if the doctrine of waiver applied to *Witherspoon* error, it would not be applicable under the facts of this case. Respondent argues that "as with other timely objection requirements an objection requirement here would have given the trial court the opportunity to consider the defendant's objection and either reconsider its ruling or fully explain the basis for the ruling on the record." (Respondent's Brief at p. 76.) Generally, the requirement of a timely objection ensures that the court has a chance to remedy the situation before any prejudice occurs. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Respondent argues that appellant waived the error by failing to "object" to the trial court's granting of the prosecution's motion to exclude prospective juror Lee for cause. Although defense counsel did not utter the words "I object," he also did not stipulate or otherwise agree that Mr. Lee should be excused for cause; rather counsel "submitted" the matter without further argument. (14 RT 1545.) Under these circumstances the trial judge was alerted to the possibility of *Witherspoon* error when appellant did not consent to the dismissal of Mr Lee. Additionally, contrary to respondent's claim, the trial court did in fact explain the basis for it's ruling excusing Mr. Lee in substantial detail. (14 RT 1545; see also Appellant's Opening Brief at pp. 138-139.) Thus, the function of an objection — to alert the court to the risk of error and permit it to avoid that error — was essentially fulfilled, and the issue cannot be deemed waived.

B. The Exclusion of Prospective Jurors Brown and Lee for Cause Was Unsupported by Substantial Evidence and Requires Reversal of the Death Sentence.

The trial court excused for cause prospective jurors Brown and Lee, both of whom voiced reservations about capital punishment, but also stated

that they would follow the court's instructions and could impose the death penalty if they found the circumstances warranted it. Respondent argues that these prospective jurors were properly excused for cause. However, as discussed at length in appellant's opening brief, and further below, nothing in the questionnaires completed by these individuals, or in their responses during voir dire, demonstrated that their opinions regarding capital punishment would interfere with the performance of their duties as jurors. (See Appellant's Opening Brief at pp. 129-151.)

1. Prospective Juror Brown

Respondent argues that the trial court properly excused prospective juror Brown because "her views on the death penalty would prevent or substantially impair her ability to be a fair juror." (Respondent's Brief at p. 88.) However, Ms. Brown's responses on the questionnaire revealed that she would not automatically vote for a life sentence, and that she would not prejudge the appropriate punishment in the absence of facts. (8 CT 2053.) Her responses during voir dire demonstrated that she could put her personal feelings about the death penalty aside and follow the court's instructions. She said she would be fair, would not automatically vote in favor of life without the possibility of parole, and would respect the law. Nothing in her responses indicated she was unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death was the appropriate penalty under the law, and in fact she said she could and would do so.

When initially questioned by the court as to whether she would be able to consider the death penalty in this case, Ms. Brown indicated she was unsure. The court asked whether she would "automatically vote for life imprisonment regardless of the evidence" and she replied that it was "hard to

say." (11 RT 974-975.) However, after several other prospective jurors were questioned by the court and counsel, during which time the duties and obligations of jurors in determining penalty were explained to the panel in some detail, Ms. Brown stated: "Now I've heard the judge speak, I have a better understanding of it now. I would be fair. I would keep my own beliefs to myself." (11 RT 1059-1060.) Respondent concedes that Ms. Brown "denied that she would automatically vote against the death penalty" and that she stated "that while she was uncomfortable with imposing the death penalty she would respect the law." (Respondent's Brief at p. 89.) However, respondent claims that "when probed a little bit more by the prosecutor, Cynthia B. candidly concluded, 'Personally, I don't think I could do it just because of my beliefs.' (11 RT 1063.)" Respondent, unfortunately, quotes Ms. Brown out of context on this point.

Ms. Brown was not asked whether she could impose the death penalty but, rather, whether she could "come back, look the defendant in the face, and say 'I sentence you to death.'" (11 RT 1063.) Respondent also claims that Ms. Brown "admitted she was 'not sure' she could impose death even where the aggravating circumstances outweighed the mitigating circumstances." Again the question posed to Ms. Brown was not whether she could impose the death penalty but whether she could: "come into court, look at the defendant, Mr. Jones, and say 'I sentence you to death'?" (11 RT 1068.) In light of the questions posed, Ms. Brown's responses did not justify an order excusing her for cause.

As both parties agree, the applicable standard permits a trial court to excuse a juror for cause "if the juror's answers convey a 'definite impression' that his views 'would "prevent or substantially impair" the performance of his duties as a juror in accordance with his instructions and his oath.'"

(*Wainwright v. Witt* (1985) 469 U.S. 412, 426.) Such was not the case with Ms. Brown since marching into court, looking the defendant straight in the eye, and telling him: "I sentence you to death" is not a duty imposed on any juror. Rather than indicating that she would have been unable to perform her duties as a juror, Ms. Brown's responses were simply an honest reflection of the emotional impact such a decision would have on her. However, the pain or extreme difficulty that otherwise inheres in the decision to execute another human being simply does *not* establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties. (*People v Stewart* (2004) 33 Cal.4th 425, 446-449.)

"[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever [of the possibility of the death penalty] is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Adams v. Texas* (1980) 448 U.S. 38, 50.) "[T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Ibid.*) As this court has explained: "In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. . . . [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled — indeed, duty-bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. . . . ." (*People v Stewart, supra*, 33 Cal.4th at p. 446.)

Respondent argues that "contrary to Jones' contention (AOB 135), the trial court appropriately relied upon its observations of Cynthia B.'s body language in deciding that her views on the death penalty substantially impaired or prevented her from fulfilling her obligation to consider both penalties." (Respondent's Brief at p. 90.) Appellant, however, has not argued that the trial court improperly considered Ms. Brown's body language in ruling on the matter. Instead appellant argues that the trial court applied an improper standard in excluding her.

The trial court excluded Ms. Brown on the following basis: "The Court's evaluation of her responses is that although saying ultimately at the end she didn't know what she would do, everything else about her answers and her body language made it unmistakably clear that she had a position in this case with regard to the ultimate punishment. And she did not appear to the court to be open to the possibility of considering equally, based on the evidence, the two possible alternative punishments in this matter." (12 RT 1080-1081.) Contrary to the trial court's conclusion, however, there is no requirement that a juror view the two penalties "equally." In fact the two penalties are not equal since a juror cannot vote for death without finding that the aggravating circumstances substantially outweigh the mitigating circumstances. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Hence, this court has explicitly held that "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror to ever impose the death penalty." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) The court has also held that "[a] juror whose personal opposition toward the death penalty may predispose him to assign

greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

The trial court apparently concluded that because Ms. Brown expressed strong opposition to the death penalty in general, she would be unable to set aside her personal beliefs and follow the court's instructions. However, "to presume that personal beliefs automatically render one unable to act as a juror is improper." (*United States v. Padilla-Mendoza* (9th Cir. 1998) 157 F.3d 730, 733; see also *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fn. 9 ["it cannot be assumed that a juror who describes himself as having . . . religious scruples against the infliction of the death penalty . . . thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him."].) Contrary to the trial court's presumption, Ms. Brown expressly confirmed that she "would be fair," and "would keep [her] own beliefs to [herself]," and that she "would respect the law." (11 RT 1060-1061.) Respondent argues that Ms. Brown's responses were similar to those of a prospective juror held to have been properly excused in *People v. Roldan* (2005) 35 Cal.4th 646. However, as respondent notes, the prospective juror in that case stated: "I don't think I could ever vote for death." (*Id.* at p. 698.) Ms. Brown made no such statement. Although her initial responses during voir dire were somewhat equivocal, after she understood the duties and obligations of a juror, she indicated that she could be fair. Consequently, the record does not support the trial court's excusal of prospective juror Brown for cause under the applicable legal standard.

2. *Prospective Juror Lee*

Respondent argues that the trial court properly excused prospective juror Lee for cause, because his responses during voir dire "evidenced an inability to follow the law." (Respondent's Brief at p. 93.) In arguing that Mr. Lee was properly excused, respondent relies on statements he made during questioning by the prosecution and the court which essentially asked Mr. Lee what decision he would reach on penalty in light of particular evidence. (Respondent's Brief at pp. 91-93.) During this portion of voir dire Mr. Lee indicated that, based upon his life experiences with his son's mental illness, he might or might not have difficulty with the issue of punishment depending on the evidence presented. (14 RT 1506-1508.) However, he stated that he would not automatically find the special circumstances allegations not true in order to avoid the issue of punishment; he would not ignore the court's instructions (14 RT 1509-1510); and he would put aside his independent knowledge of mental illness and treatment options and decide the case based upon the evidence (14 RT 1508).

Nothing in Mr. Lee's responses indicated that any preconceptions he might have about the appropriateness of capital punishment in the case of a defendant with mental health problems who had not been afforded the opportunity for treatment, would interfere with his ability to follow the court's instructions and conscientiously weigh relevant mitigating and aggravating factors in reaching an ultimate decision at the penalty phase. Furthermore, unlike other cases where prospective jurors have been properly excluded because their preconceptions were at odds with the law regarding capital punishment, Mr. Lee's views were not in conflict with his responsibilities as a juror in the penalty phase.

In *People v. Pinholster* (1992) 1 Cal.4th 865, this court held that prospective jurors who indicated they would automatically vote against the death penalty in the case before them, regardless of their willingness to consider the death penalty in other cases, were properly excused for cause. Specifically the court held that a juror who stated he would automatically reject the death penalty in a case involving felony-murder was properly excused. In this regard the court observed: "The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. (§ 190.2, subd. (a)(17)(vii).) This prospective juror unequivocally stated his inability to follow the law in this respect." (1 Cal.4th 865, 917.) The prospective juror was properly excused because his opinions regarding the death penalty were in conflict with state law. Such was not the case with respect to Mr. Lee.

The trial court's concern with Mr. Lee was that he would vote against the death penalty if the evidence showed appellant suffered from mental problems for which he had not received treatment. Unlike the jurors in *Pinholster*, Mr. Lee's preconception was not contrary to the law, and his views would have been an entirely appropriate basis for rejecting the death penalty. Whereas the prospective jurors in *Pinholster* indicated they would automatically reject the death penalty in any case involving felony-murder without regard to relevant aggravating and mitigating circumstances, Mr. Lee indicated only that he might reject the death penalty based upon what would be relevant and proper mitigating circumstances depending on the evidence presented. (See Pen. Code, § 190.3.)

As this court has observed, the Eighth Amendment teaches "with respect to the process of selecting . . . those defendants who will actually be

sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." [Citation.] It is not simply a finding of facts which resolves the penalty decision, "'but . . the jury's moral assessment of those facts as they reflect on whether [a] defendant should be put to death . . . .'" [Citation.] The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540.) Consequently, "[e]ach juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider," and to vote against death "unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*Id.* at p. 541.)

Given these principles it becomes clear that the State may not exclude a prospective juror from a capital trial because he frankly concedes his view that under a particular description of the evidence to be presented, death is not an appropriate penalty. In rendering such a judgment, a juror is doing only what the Constitution requires — making his own moral assessment of the evidence as it relates to penalty. Whether one would agree or disagree with the assessment, it cannot be said that a prospective juror who undertakes this process and concludes that death would be an inappropriate sentence is, or would be, untrue either to his oath as a juror or to the mandate of any constitutional instruction. (*Adams v. Texas*, *supra*, 488 U.S. at 46.) Mr. Lee's responses did not demonstrate a refusal to consider relevant aggravating and mitigating circumstances but, rather, demonstrated a consideration of just such factors. Consequently, contrary to respondent's argument, there is no basis in the record for concluding that Mr. Lee held views on capital punishment which

would have prevented or substantially impaired the performance of his duties as a juror in accordance with the instructions and his oath.

Respondent also argues that: "Any error in excusing Larry L. is not reversible, because reversal is not required for an error in excusing a juror for reasons unrelated to the death penalty." (Respondent's Brief at p.94.) The prosecutor's challenge to Mr. Lee and the trial court's ruling excluding him for cause, demonstrate that this statement is incorrect. The prosecution challenged prospective juror Lee for cause arguing as follows: "Mr. Lee, who indicated that if evidence was presented that the defendant had some sort of mental illness or mental condition — and I believe it's fair to say that that evidence will in fact be presented, based on the defendant's witness list — and if he found that the defendant had not been receiving medication or counseling — and it's my belief that he will hear that evidence as well — Mr. Lee indicated that with that assumption he could not sentence Mr. Jones to death." (14 RT 1544.) The trial court granted the challenge reasoning as follows: "And although he responded affirmatively with regard to what would happen in the guilt phase of the proceedings, and that his concern over possible penalty would not interfere with his decision in the guilt phase, he indicated a profound inability or concern about his ability to make a decision in the penalty phase. I don't think he has made up his mind necessarily. But the challenge for cause at this point in time will be granted." (14 RT 1545.) The record simply does not support respondent's contention that Mr. Lee was excluded for reasons unrelated to the imposition of penalty.

Respondent also contends that "there is no possibility of prejudice as a result of excusing Larry L. since he was questioned as an alternate and would not have served on Jones' jury in any case." (Respondent's Brief at p. 94.) However, the exclusion of a prospective juror in violation of *Witherspoon*

and *Witt* requires automatic reversal without regard to prejudice. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; *Gray v. Mississippi* (1987) 481 U.S. 648, 666-667 (opn. of the court); *id.* at pp. 667-668 (plur. opn.); *id.* at p. 672 (conc. opn. of Powell, J.); see *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523 [antedating *Witt*].) On this point the court in *Gray* held:

> Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, *Wainwright v. Witt*, 469 U.S., at 416 , and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have 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*, 386 U.S., at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.*, at 23, n. 8, citing, among other cases, *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge). As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" 391 U.S., at 521, quoting *Fay v. New York*, 332 U.S. 261, 294 (1947).

(*Gray v. Mississippi* (1987) 481 U.S. 648, 667.) Respondent's argument must, therefore, be rejected.

C. <u>The Actions of the Trial Court and the Prosecutor Produced a Jury Culled of All Those Who Revealed During Voir Dire That They Had Conscientious Scruples Against or Were Otherwise Opposed to Capital Punishment, Which Violated Appellant's Right to a Fair and Impartial Jury.</u>

In addition to the trial court's error in excluding prospective jurors Brown and Lee for cause, appellant has demonstrated that the actions of the trial court and the prosecutor produced a jury culled of all those who revealed during voir dire that they had conscientious scruples against or were otherwise opposed to capital punishment, in violation of appellant's right to a fair and

impartial jury. (See Appellant's Opening Brief at pp. 151-175.) The United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Such a scrubbed jury violates the Sixth, Eighth, and Fourteenth Amendments. (*Adams v. Texas*, *supra*, 448 U.S. at p. 43; accord *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521.) The voir dire process in the present case produced just such a jury. Asked to rate their feelings on the death penalty on a scale of 1 to 10 — with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against — three of the deliberating jurors rated themselves at 10, five rated themselves at 8, two at 7, one at 5, and one at 3. (6 CT 1594,1616; 7 CT 1639, 1662, 1685, 1708, 1730, 1753; 13 CT 3444, 3466; 16 CT 4383.) The state excluded from the jury all of the venirepersons who had identified themselves as strongly opposed to the death penalty in principle or who otherwise expressed reservations about imposing the death penalty. Specifically, the trial court applied the *Witt* standard in an arbitrary, inconsistent, and fundamentally unfair manner to exclude "life-inclined" jurors. As to the few remaining "life-inclined" jurors who escaped the court's uneven application of *Witt*, the prosecutor excluded them with peremptory challenges. The joint efforts of the two state actors thus resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521).

Rather than address the issue raised by appellant, respondent chooses to discuss the individual prospective jurors who were excused for cause, and argue that each was properly excused. (Respondent's Opening Brief at pp. 77-94.) Respondent's argument, therefore, ignores the fact that the trial court applied the *Witt* standard in an arbitrary and capricious manner, and the fact that the prosecutor's exercise of peremptory challenges to excuse the remaining life-inclined jurors produced a jury from which all such jurors were excluded in violation of appellant's right to a fair and impartial jury. Because respondent offers no argument with regard to the overriding issue, appellant relies upon the lengthy discussion contained his opening brief. (Appellant's Opening Brief at pp. 152-175.)

With respect to that portion of the issue relating to the prosecution's exercise of peremptory challenges, respondent argues: "even assuming the prosecutor did exercise peremptory challenges in the manner argued by Jones, systematic exclusion by [the] prosecution [by] peremptory challenges of potential jurors who merely have reservations about the death penalty does not deprive the defendant of a representative jury at the guilt phase." (Respondent's Brief at pp. 94-95.) In his opening brief appellant acknowledges this court has repeatedly held that a prosecutor's exercise of peremptory challenges to exclude life-inclined jurors, or "death-penalty skeptics," does not offend the federal constitution. (See, e.g., *People v. Ochoa*, *supra*, 26 Cal.4th at p. 432 [and authorities cited therein]; Appellant's Opening Brief at pp. 173.) However, where as here, state action — whether on the part of the trial court, the prosecutor, or a combination of the two — results in a jury purged of all those with any scruples against imposing the death penalty, it would be illogical to allow the prosecution to accomplish indirectly that which it may not do directly in light of clearly established

United States Supreme Court precedent. (*Adams v. Texas*, *supra*, 448 U.S. at p. 43; *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521.)

In the past, the rationale underlying this court's conclusion that the prosecution's use of peremptory challenges to exclude life-inclined jurors does not offend the constitution has been that the defense is granted an equal number of peremptory challenges with which it is free to exclude death-inclined jurors. (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 432 ["Because both parties may exercise peremptory challenges to remove jurors with unfavorable attitudes, the practice does not produce a jury biased toward death."].) However, even assuming the correctness of this rationale and its application to some cases — indeed, to most cases — it does not apply to this case. This is so because the defense and the prosecution were *not* on equal footing when they exercised their peremptory challenges after the trial court's rulings on challenges for cause.

As discussed at length in appellant's opening brief, the trial court refused to exclude death-inclined jurors who were disqualified, excused life-inclined jurors who were not disqualified, and otherwise applied the *Witt* standard inconsistently and unfairly in a manner that benefitted the prosecution and resulted in the unjustified exclusion of a disproportionate number of life-inclined jurors. (See Appellant's Opening Brief at pp. 151-171.) Unlike the prosecution, many of the defense peremptory challenges had to be directed toward damage control against those jurors whom the court should have excused for cause. Clearly, the prosecution and the defense did not exercise their peremptory challenges on a level playing field. The pool of remaining jurors was already unfairly skewed toward death due to improper state action. Under these circumstances the rationale supporting the rule that the prosecution's use of peremptory challenges to exclude life-inclined jurors does

not offend the constitution ceases to exist. Regardless of the vehicle by which the state achieves the result, it is settled that when the state has excluded all life-inclined citizens from a capital jury, the "State crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments because "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-522 and fn. 20.) Respondent's argument must, therefore, be rejected.

Finally, respondent attempts to argue that any error was harmless. In this regard respondent contends that "the appropriate inquiry under *Witherspoon* and *Witt* is whether the jury that was actually empaneled was impartial. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86 . . ..) Jones makes no attempt to show, nor could he demonstrate, that his particular jury was not impartial." (Respondent's Brief at p. 95.) There is, however, no requirement that appellant show prejudice or establish that the jury was in fact biased in favor of death, and *Witherspoon/Witt* error is reversible per se. (See *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi*, *supra*, 481 U.S. 648, 659-667 (opn. of the court); *id.*, at pp. 667-668 (plur. opn.); *id.*, at p. 672 (conc. opn. of Powell, J.); *People v. Ashmus* (1991) 54 Cal.3d 932, 962; accord, *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237, 1272-1273, 1275.)

For purposes of the federal constitution, an error in the trial process itself is subject to a harmless error analysis as set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 503.) However, the error here falls within the limited category of "structural errors"

that require automatic reversal. (*Ibid.*) In this regard the United States Supreme Court has observed:

> Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. [*Chapman v. California* (1967)] 386 U.S. at p. 23, fn. 8, citing *Payne v. Arkansas*, 356 U.S. 560, 568-569 (1958) (introduction of coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 342-345 (1963) (complete denial of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 522-535 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, *Tumey v. Ohio*, *supra*, with counsel to help the accused defend against the State's charge, *Gideon v. Wainwright*, *supra*. Compare *Holloway v. Arkansas*, 435 U.S. 475, 488-490 (1978) with *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980). Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, see *Powell v. Alabama*, 287 U.S. 45, 57-73 (1932), and no criminal punishment may be regarded as fundamentally fair.

(*Rose v. Clark* (1986) 478 U.S. 570, 577-578, fn. omitted.) Thus, structural error is a defect affecting the framework within which the trial proceeds. Such defects include a deprivation of the right to counsel, the lack of an impartial trial judge, the unlawful exclusion of jurors of the defendant's race, the denial of the right to self-representation at trial, and the denial of the right to a public trial. (*People v. Flood, supra*, 18 Cal.4th at p. 500.)

As discussed above, the United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Such a scrubbed jury violates the Sixth, Eighth, and Fourteenth Amendments. (*Adams v. Texas*, *supra*, 448 U.S. at p.

43; accord *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521.) Consequently, as noted above, the exclusion of a prospective juror in violation of *Witherspoon* and *Witt* is structural error which requires automatic reversal. (*People v. Ashmus, supra,* 54 Cal.3d at p. 962; *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-667 (opn. of the court); *id.* at pp. 667-668 (plur. opn.); *id.* at p. 672 (conc. opn. of Powell, J.); see *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523 [20 L.Ed.2d at pp. 784-786] [antedating *Witt*].) Respondent's argument must, therefore, be rejected.

Overall Challenges

II.

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

As discussed at length in appellant's opening brief, many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, the opening brief presents these arguments in an abbreviated fashion sufficient to alert the court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the court's reconsideration of each claim in the context of California's entire death penalty system. Respondent does not address these claims on the merits, but rather lists cases in which this court has rejected the arguments. (See Respondent's Brief at pp. 95-99.) Appellant's position is fully set forth in the opening brief with respect to most aspects of the issue. However, recent United States Supreme Court precedent impacts one area.

Appellant has argued that California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing, and deprives defendants of the right to a jury trial on each factual determination prerequisite to a sentence of death in violation of the Sixth, Eighth, And Fourteenth Amendments to The United States Constitution. (See Appellant's Opening Brief at pp. 189-235.) As part of this argument appellant contends that, based upon United States Supreme Court precedent, any jury finding necessary to the imposition of the death penalty must be found true beyond a reasonable doubt. (Appellant's Opening Brief at pp. 190-207.)

In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court found that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this interpretation has been squarely rejected by decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531] [hereinafter *Blakely*]; and most recently *Cunningham v. California* (2007) 549 U.S. U.S. __ [127 S.Ct. 856,166 L.Ed.2d 856] [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 478.) In *Ring*, the court acknowledged that in a prior case reviewing Arizona's capital sentencing law, *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

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

of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances. One of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.) In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 2537, italics in original.)

This court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases. In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a

statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.) The Supreme Court has now explicitly rejected this reasoning in *Cunningham*.[9]

In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (127 S.Ct. at pp. 861-863.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (127 S.Ct. at p. 869.)

Cunningham then examined this court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (127 S.Ct. at p. 870.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to

---

[9] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black*: "Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra*, 35 Cal.4th at p. 1253; *Cunningham, supra*, 127 S.Ct at p. 868.)

> punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(127 S.Ct. at p. 869.) In the wake of *Cunningham*, it is crystal-clear that in determining whether *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

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

This holding is simply wrong. As section 190, subdivision (a)[10] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules

---

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

governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham*, *supra*, 127 S.Ct. at p. 862.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it this argument:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at p. 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance. (Pen. Code, § 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances

exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88 (7th ed., 2003).)

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, 124 S.Ct. at 2551; [emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

CONCLUSION

In light of the foregoing discussion, as well as that contained in appellant's opening brief, appellant requests that the judgment of the trial court be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Kimberly J. Grove, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 23,025 words, excluding the tables and this certificate. This document was prepared in WordPerfect, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November ___, 2007, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, PA 15658. I served the Appellant's Reply Brief by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

William Alfred Jones, Jr.
P.O. Box P-29500
San Quentin, CA 94974

The Honorable Robert J. Spitzer, Judge
Superior Court
P.O. Box 431
Riverside, CA 92502

Natasha Cortina
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Michael Lasher, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

District Attorney
4075 Main Street
Riverside, CA 92501

Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Ligonier, Pennsylvania, on November 5, 2007.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 5, 2007, at Ligonier, Pennsylvania.

_____

Kimberly J. Grove