IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ROBERT BOYD RHOADES,

Defendant and Appellant./

CAPITAL CASE

No. S082101

Sacramento County
Superior Court #
98F00230

On Appeal From Judgment Of The Superior Court Of California

Sacramento County

Honorable Loyd H. Mulkey, Jr., Trial and Sentencing Judge
Honorable Kenneth L. Hake, Record Correction Judge
Honorable Maryanne G. Gilliard, Record Correction Judge

APPELLANT'S REPLY BRIEF

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Supreme Court

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INTRODUCTION TO APPELLANT'S REPLY BRIEF

In this brief, Mr. Rhoades will address specific contentions made by the state that necessitate an answer in order to present the issues fully to this Court. This brief will focus on the substantive and procedural issues the state raises that need further argument or explanation, and will reply only to those arguments by the state which require a special reply. Mr. Rhoades will not reply to the state's contentions which are adequately addressed in his opening brief. The absence of a reply by Mr. Rhoades to any particular contention or allegation made by the state, or to reassert any particular point made in his opening brief, does not constitute a concession, abandonment or waiver of the point by Mr. Rhoades, but rather reflects his view that the issue has been adequately presented and the positions of the parties fully joined. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.) The arguments in this reply are numbered to correspond to the argument numbers in his opening brief.

The state's fallback position throughout its brief is that, despite admitted or possible errors, the evidence of guilt was overwhelming. (See RB at 99-100.) Mr. Rhoades disagrees. This Court should not rely on the state's summary of the "overwhelming evidence," for at least two reasons. First, the state does not

provide citations to support its claims. (See RB at 99-100.) Second, the state's claims do not stand up to scrutiny.

The state first claims: "The evidence showed appellant took Michael Lyons down to the river bottoms, a place with which he was intimately familiar and where he often went to do drugs." (RB at 99-100.) While there is evidence to support the second clause of this statement– Mr. Rhoades concedes he often went to the river bottoms to fish and do drugs -- the evidence that he kidnapped Michael was so weak that the first jury could not reach a unanimous verdict on the kidnapping charge and the prosecutor dismissed it. (9-CT 2543-2546.)

The state also claims that there were "several key pieces of evidence" that supported the jury verdicts. (RB at 100.) First, the state alleges: "Appellant's clothes, including his underwear, jeans and shirt, had blood on them. There was blood on the left arm and down the back of the shirt from carrying Michael's body to the bushes by the river." (RB at 100.) This is a gross exaggeration of the evidence. The faint reddish haze stains on Mr. Rhoades' shirt were the same blood type as Mr. Rhoades', but excluded Michael. (15-RT 4623-4624, 4629.) The stains on Mr. Rhoades' shirt were positive for blood and human DNA, but were so diluted that the prosecution expert could not tell if the DNA was from blood or sweat or skin. (15-RT 4623-4624, 4627.) Blood may have gotten on Mr. Rhoades' clothes when he was scratched and cut trying to extricate his truck from the mud and water, which also explained why his shirt was wet. (17-RT 5357-5358, 5377-5382.) Thus, neither the fact there was a heavy accumulation of human blood on the left shoulder and lower right-hand side of the rinsed-out shirt found in Mr. Rhoades' vehicle, nor any other evidence, suggested that Mr. Rhoades ever carried Michael's body anywhere. (15-RT 4507-4512.)

The state further alleges without citation: "Footprints matching appellant's were found between Michael's body and the river where appellant tried unsuccessfully to rinse clean the murder weapon and his clothes." (RB at 100.) Not so. The prosecution expert opined only that Mr. Rhoades' feet could have made the footprints found at the scene, because they were consistent in dimension of the overall foot and the shape of the toes, and where the pads of the toes fell. (15-RT 4545-4554; Exhibits 56, 57.) Thus, Mr. Bentley could testify only that he could not exclude Mr. Rhoades' feet as making the foot impressions that were photographed and cast at the scene. (15-RT 4557, 4594.) There was no evidence that Mr. Rhoades tried to "rinse clean" anything.

The state further alleges: "The knife with Michael Lyons' blood covered by river silt was found on the truck's tailgate. Michael Lyons' footprints were on the windshield." (RB at 100.) The evidence of Michael's blood on the knife found in Mr. Rhoades' truck and Michael's footprint on the windshield evidence was equally consistent with Mr. Rhoades' defense that, when he left to obtain a come-along to extricate his truck from the mud, someone else murdered Michael, using Mr. Rhoades' truck in the course of the crime. Michael must have struggled while in the truck. (14-RT 4416, 4425-4435; 15-RT 4504-4505, 4597, 4616-4618.) Moreover, according to the prosecution expert, the pattern of serrations on Michael was not consistent with Mr. Rhoades' knife, because Mr. Rhoades' knife had serrations in groups of three, while the serrations found on Michael's body were in groups of two. (14-RT 4300-4303.)

The state further alleges without citation: "Michael's shirt and sweatshirt had five pubic hairs on them which matched appellant's pubic hairs. A green fiber matching Michael's sweater was found in appellant's pubic region." (RB at 100.) Not so. There were no definitive matches. The prosecution expert testified

that the four pubic hairs on Michael's sweater and one pubic hair on Michael's Batman t-shirt could have come from Mr. Rhoades -- he was not excluded. (15-RT 4517, 4527-4531, 4584.) The expert testified that the most that could be said about the pubic hairs was that they were consistent in color, shape and internal structure, but he could not match them to anyone and he did not make any other comparisons with other pubic hairs from any other source. (15-RT 4530-4531, 4585.) He also testified that the fiber found on Mr. Rhoades "could have come from" Michael's sweater, because the sweater had the same type of polyester fibers in terms of color, shape, internal structure and fiber type and diameter, such that they were indistinguishable from each other. (15-RT 4534; Exhibits 20, 38.) A fiber is so small, however, that wind can carry it. (15-RT 4560.)

Contrary to the state's claim of overwhelming evidence, both juries had trouble with this case. The first jury could not reach a unanimous verdict on penalty nor on several charges, including kidnapping and forcible oral copulation (which were dismissed), and the second penalty jury deliberated more than five hours over two days, and requested a readback of the testimony of Ray Clark [truck picking up boy did not resemble Mr. Rhoades' truck], and Ms. Duda-Shea [Blood DNA on Mr. Rhoades' knife was not consistent with Mr. Rhoades' DNA, but was consistent with Michael's DNA profile], before returning a verdict of death. (15-CT 4431-4433, 4437-4440; 41-RT 12541-42, 12553; see AOB at 75-76; *People v. Sturm* (2005) 37 Cal.4th 1218, 1243 [hung jury]; *People v. Little* (1956) 142 Cal.App.2d 513, 518 [acquittal on some counts suggests close case]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 ["penalty jury deliberated for more than 10 hours over three days"]; *In re Martin* (1987) 44 Cal.3d 1, 51 [lengthy deliberations]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests for rereading of testimony indicated close case].)

ARGUMENT

SECTION 1 –PRETRIAL AND GUILT PHASE ISSUES

I. THE COURT DENIED MR. RHOADES HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY NOT RELEASING MICHAEL AND SANDRA LYONS' MEDICAL AND PSYCHOLOGICAL RECORDS

Under *People v. Gurule* (2002) 28 Cal.4th 557, 595, the state concedes that this Court should review the confidential documents examined by the trial court under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to determine whether the trial court erred in refusing to disclose them, and whether this denied Mr. Rhoades his federal due process and confrontation rights. (RB at 85.)

Mr. Rhoades concedes that under *People v. Gaines* (2009) 46 Cal.4th 172, 178-185, a remand for a showing of prejudice is the appropriate remedy for a trial court's erroneous denial of a *Pitchess* motion. (RB at 85, & fn. 31.) On remand, Mr. Rhoades would have an opportunity to demonstrate prejudice from the trial court's earlier failure to disclose relevant, confidential documents, by demonstrating a reasonable probability the outcome would have been different had the relevant information been disclosed. (*Id.* at 180-185.) Reversal would be required if "the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (*Id.* at 185.)

II. THE COURT VIOLATED MR. RHOADES' SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING HEARSAY OF MR. RHOADES' WIFE AS A SPONTANEOUS STATEMENT AND STATEMENT AGAINST SOCIAL INTEREST

A. The State Concedes That the Admission Of Mrs. Rhoades' Statements Violated The Confrontation Clause

In *People v. Livingston* (2012) 53 Cal.4th 1145, 1159, this Court reached the confrontation issue under *Crawford,* which made "it unnecessary to consider defendant's additional argument that the statement was not admissible under Evidence Code section 1370." Mr. Rhoades believes that *Livingston* provides the easiest approach in his case, because it is undisputed that the police questioning of Mrs. Rhoades occurred during a police investigation into Michael's murder. (RB at 97-98; 5-RT 1686-1692.) The state concedes that Mrs. Rhoades' statements identifying the bracelet and blanket were testimonial in nature and violative of *Crawford v. Washington* (2004) 541 U.S. 36, 68. (RB at 98; see *Davis v. Washington* (2006) 547 U.S. 813, 822.) The state also concedes that *Crawford* applies retroactively to Mr. Rhoades' case on direct appeal. (RB at 96, fn. 35; *People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4.)

Crawford prohibits the admission of out-of-court *testimonial* statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. (*People v. Livingston, supra,* 53 Cal.4th at 1158, citing *Davis v. Washington* (2006) 547 U.S. 813, 821; *People v. Cage* (2007) 40 Cal.4th 965, 969.) In Mr. Rhoades' case, the admission of Mrs. Rhoades' statements violated Mr. Rhoades' right to confrontation under the state and federal Constitutions,

because he was unable to cross-examine Mrs. Rhoades, who asserted her marital privilege not to testify. (5 RT 1684.)

The state half-heartedly argues that "appellant's hearsay objection at trial is insufficient to preserve a claim of violating the Confrontation Clause of the Sixth Amendment." (RB at 95-96.) Not so. As in *People v. Gutierrez* (2009) 45 Cal.4th 789, 809, the *Crawford* claim was not forfeited either because "(1) the appellate claim is the kind that required no trial court action to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for the reasons actually presented to that court, had the legal consequence of violating the Constitution." (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1289, fn.15; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.) This Court also has the discretion to consider constitutional claims without an objection below. (See *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

Moreover, it would have been futile for Mr. Rhoades to object under the reasoning of *Crawford,* because that case had not been decided at the time of trial, and it is irrelevant that defense counsel did not believe an objection under *Ohio v. Roberts* (1980) 448 U.S. 56, unlike a *Crawford* objection, would have been successful. (See *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].) Recently, in *People v. Livingston, supra,* 53 Cal.4th at 1158-1159, this Court considered a *Crawford* claim, even though there

is no indication that the defendant at trial had presciently objected under the reasoning of *Crawford*, years before the Supreme Court issued its decision.

B. Mrs. Rhoades' Hearsay Statements Were Not Admissible As A Spontaneous Statement Under Evidence Code Section 1240

In *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 5, this Court stated that "in any *Crawford* analysis, the first question for the trial court is whether proffered hearsay would fall under a recognized state law hearsay exception. If it does not, the matter is resolved, and no further *Crawford* analysis is required." In case this Court decides this approach is better than the *Livingston* approach, Mr. Rhoades will address the two hearsay exceptions the state claims justified the admission of Mrs. Rhoades' hearsay statements.

The state first argues that the hearsay statements of Mrs. Rhoades were admissible as a spontaneous statement under Evidence Code section 1240 and *People v. Poggi* (1988) 45 Cal.3d 306. (RB at 88-92.) Mr. Rhoades disagrees. The state concedes that Mrs. Rhoades' statements identifying the bracelet and blanket were testimonial in nature and violative of *Crawford v. Washington* (2004) 541 U.S. 36, 68. (RB at 98.) Given that genuine spontaneous statements are not testimonial under *Crawford v. Washington* (2004) 541 U.S. 36, 60, these two positions cannot be reconciled.

Moreover, the admission of Mrs. Rhoades' testimonial statements violated the Confrontation Clause because the circumstances surrounding her statements do not fit the Supreme Court's descriptions of the excited utterance or spontaneous declaration exception to hearsay. (*Idaho v. Wright* (1990) 497 U.S. 805, 820; *White v. Illinois* (1992) 502 U.S. 346, 355-356, & fn. 8.) The mere fact that Mrs. Rhoades was upset as she spoke did not make her utterance reliable. As the Supreme Court has recognized, a spontaneous statement is reliable

because it is offered "without the opportunity to reflect on the consequences of one's exclamation." (*White v. Illinois*, *supra,* 502 U.S. at 356.) Just because someone appears to be upset offers no guarantee that he or she has not taken time to consider the matter. (*Winzer v. Hall* (9th Cir. 2007) 494 F.3d 1192, 1199.) Here, Mrs. Rhoades did not perceive any disturbing or startling events; she simply was disturbed by the officers' accusation that her husband had committed a terrible crime. That does not mean that whatever she said was admissible, reliable, hearsay. (See *People v. Farmer* (1989) 47 Cal.3d 888, 904 ["an answer to a simple inquiry has been held to be spontaneous. . . . More detailed questioning, in contrast, is likely to deprive the response of the requisite spontaneity"].)

The state argues that "there was ample evidence that [Officer] Johnson's statement to [Mrs. Rhoades] was an event likely to induce stress and nervous excitement." Not so. Mrs. Rhoades negotiated with the police about whether she would speak with them, telling them she would not talk unless the police could prove to her appellant did it. (5-RT 1689-1692, 1701.) In addition, if this exception to the hearsay rule was in fact so expansive, all the police would need to do is to tell friends and family of a suspect that they had evidence the defendant "could be responsible" for a terrible crime, and then everything the friends or family said under questioning would be considered to be in response to a "startling event under Evidence Code section 1240." (RB at 90-93.)

The state claims that Mrs. Rhoades' responses were "in no way self-serving or helpful to Mr. Rhoades which further demonstrates that her identifications were not part of an attempt to contrive answers." (RB at 91.) The fact that Mrs. Rhoades decided to try to help the police after they convinced her of Mr. Rhoades' possible involvement in this terrible murder does not indicate

that her statements were reliable, but instead they could have been an angry and deliberate attempt to implicate Mr. Rhoades falsely.

C. Mrs. Rhoades' Hearsay Statements Were Not Admissible As Statements Against Her Social Interest Under Evidence Code Section 1230

The state also argues that Mrs. Rhoades' statements were admissible, because they were against her social interest under Evidence Code section 1230. (RB at 94-95.) This contention is even weaker than the first. The fact that a wife would not be thrilled to have her husband charged with or convicted of capital murder does not make everything she tells the police – even such innocuous facts as whether she had seen a blanket and a bracelet in her husband's truck – admissible under this hearsay exception.

The state argues: "Being the wife of someone who kidnaps, sodomizes, tortures, and murders a defenseless child would unarguably bring social disgrace and ridicule. No reasonable person would want to incur the shame and repugnance that such statements would naturally bring about." (RB at 95.) The state's argument, however, ignores well-settled law that it is the content of the statement that must create a risk of making the declarant an object of hatred, ridicule, or social disgrace in the community; not the collateral consequences. (*In re Weber* (1974) 11 Cal.3d 703, 721-722.)

The *Weber* court rejected the defendant's argument that any hearsay a jailhouse informant repeated was admissible because it was against his social interest under Evidence Code section 1230. (*Ibid.*) The defendant had argued that by relating what Devins had told him while they were cellmates, Anderson became a "snitch" within the prison community; that by "snitching" on Devins, "Anderson assumed the risk of the ultimate sanction." The court refused to

extend section 1230 to include the collateral consequences of being a jailhouse informant:

> Nothing in the content of Anderson's statement reflects adversely on his character in such a way as to guarantee that it is reliable. The statement reveals nothing with respect to Anderson's character. He merely related certain hearsay statements of Devins. But in order for a declaration to be against the declarant's social interest to such an extent that it becomes admissible under section 1230 of the Evidence Code, both the content of the statement and the fact that the statement was made must be against the declarant's social interest. Otherwise, each time a witness broke a confidence, he could claim that his revelations were against social interest, because by betraying the trust placed in him, he had incurred social opprobrium.
>
> The rule is stated by *Wigmore*, as follows: "It must be remembered that it is not merely the statement that must be against interest, but the fact stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question whether the statement of the fact could create a liability is beside the mark." (*In re Weber* (1974) 11 Cal.3d 703, 721-722 [citations omitted].)

Similarly, the state's argument that Mrs. Rhoades was subject to social disgrace is based solely on the collateral consequence of being the spouse of a man possibly being charged and convicted of a murder, not because there is any social disgrace associated with identifying a blanket and a bracelet. (RB at 95.) This hearsay was inadmissible under section 1230.

D. The Admission Of This Hearsay Was Not Harmless Beyond A Reasonable Doubt

The state argues that any error was harmless beyond a reasonable doubt, because the jury would have convicted Mr. Rhoades even if Mrs. Rhoades' statements had been excluded. (RB at 98-100.) The state explains that Mrs. Rhoades' "identification of the bracelet and blanket suggest that Michael Lyons was in or around Mr. Rhoades' truck near the time of his murder. But based on other evidence admitted at trial, there was no question that Michael Lyons was in

Mr. Rhoades' truck." (RB at 99.) Mr. Rhoades disagrees. Mrs. Rhoades' statements implicating him and tying his truck to Michael's murder were highly prejudicial, because the jury did not believe Mr. Rhoades' defense that someone else murdered Michael, who had been in his truck.

The state dismisses the fact that these hearsay statements also suggested that Mrs. Rhoades had turned on Mr. Rhoades and believed he was guilty, as she had told the police that she would not talk to them unless they could prove to her Mr. Rhoades did it. (RB at 100; 5-RT 1689-1692, 1701.) The fact Mrs. Rhoades did talk to the police suggested that she believed Mr. Rhoades was guilty, which was irrelevant, but prejudicial evidence. The state simply asserts that Mrs. Rhoades' "belief about her estranged husband's guilt had little impact in light of the overwhelming evidence of Mr. Rhoades' guilt as set forth above." (RB at 100.) The unavoidable inference that Mrs. Rhoades believed her husband -- whom she presumably knew very well -- was guilty, would have had a strong impact on the trier of fact. Mr. Rhoades has countered the state's "overwhelming evidence" contention in his Introduction. (ARB at 1-4.)

III. THE COURT VIOLATED MR. RHOADES' FIFTH, SIXTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHT TO COUNSEL BY ADMITTING MR. RHOADES' STATEMENT HE MADE TO HIS ATTORNEYS THAT WAS OVERHEARD BY TWO BAILIFFS GUARDING HIM

The state argues that Mr. Rhoades' statement -- "I can give them a better time of death than what they have" -- was admissible because "appellant effectively waived the attorney-client privilege by making the statement where a third person was ostensibly present." (RB at 101.) Mr. Rhoades disagrees. "The fundamental purpose behind the [attorney-client] privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote

full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [fn. and citation omitted].) Here, that purpose was unreasonably subverted.

The state's heavy reliance on *People v. Urbano* (2005) 128 Cal.App.4th 396 is misplaced. (RB at 104-106.) Mr. Urbano testified at the Evidence Code section 402(b) hearing that he was talking to his attorney as he had done throughout the hearing. The trial court ruled one overheard statement inadmissible because of attorney-client privilege, explaining: "It is inherently necessary if counsel are to communicate with their clients, and vice versa, during court proceedings that they be able to do so without fear that should they raise their voice[s] unnecessarily that those statements intended to be communications from counsel could be used against them.'" (*People v. Urbano*, *supra*, 128 Cal.App.4th at 401.)

The prosecutor then proffered another communication heard by the victim while he was sitting in the back of the courtroom while the defendant was talking to his attorney in the jury box before the court was in session. Mr. Urbano, according to the victim, pointed to the area where the victim and the witness-friend were sitting and said "that guy was drunk." The defense argued that the intent to communicate confidentially with his attorney controls whether the privilege applies, citing *In re Jordan* (1972) 7 Cal.3d 930 (an in prison communication with attorney), and *City and County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227 (a physician privilege case where the attorney hired the doctor to examine his client). The court of appeal found the "comment and a gesture" not privileged, by distinguishing the defense cases saying there was no option but to disclose to a third party in those cases, but not in this case. (*People v. Urbano*, *supra*, 128 Cal.App.4th at 402-403.)

In Mr. Rhoades' case, he had no choice but to discuss his case with his lawyers in the only room provided, within earshot of the bailiffs who were just feet away. At the morning recess, Mr. Rhoades and his lawyer went to the jury room, which measured 20 feet by 30 feet, and was the only room in which a lawyer could talk to his client. (5-RT 1726, 1728.) Officer Dinwiddie was about 10 or 15 feet away, guarding one door, and the other officer was about 10 feet from Mr. Rhoades, guarding the other door, which were both open. (5-RT 1726, 1728.) It was obvious Mr. Rhoades and his lawyer were talking about the case. (5-RT 1730.) At first, Officer Dinwiddie could not hear them speak. (5-RT 1727.) Then Mr. Rhoades stood up and said, "I can give them a better time of death than what they have." (5-RT 1727.) Mr. Rhoades' lawyer told him to be quiet, that the walls and doors have ears. (5-RT 1727.) They continued to talk and Officer Dinwiddie could not hear what they were saying. (5-RT 1727.)

Simply because Mr. Rhoades did not whisper softly enough the entire time he was speaking with his lawyer is no indication that his attorney-client conversation was not intended to be confidential, nor was his statement made in a way that seemed intended to be communication to anyone but his lawyer. The surrounding circumstances clearly indicated that Mr. Rhoades was engaging in privileged communication. The unnecessary proximity of the guards to Mr. Rhoades could not forfeit his right to consult with his lawyers about his ongoing preliminary hearing or waive confidentiality. The court was correct that its ruling was unseemly and unfair; it also violated Mr. Rhoades' due process right to a fair trial and his right to counsel. (5-RT 1732.)

The state claims that the party claiming the attorney-client privilege has the burden of proof before the court as the trier of fact. (RB at 103.) Mr. Rhoades disagrees in part. The burden on the party asserting the privilege is

only to establish the preliminary facts, including that the communication was made in the course of the attorney-client relationship. (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1208.) There is then a presumption of confidentiality and the burden shifts to the party attacking the privilege. (Evid. Code § 917; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.)

The court in *Urbano* found admissibility on the factual finding that the communication was made in a way that "clearly disclose[d] it to third persons." (*People v. Urbano*, *supra*, 128 Cal.App.4th at 402.) In upholding the trial court, the appellate court deferred to the findings of the trial court and against the defendant. (*Id.* at 402-403.)

Evidence Code section 912 requires a consent to disclose as manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding. (See *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654 [Evidence Code section 912 "does not include accidental, inadvertent disclosure of privileged information by the attorney"].) "The privilege 'has been a hallmark of Anglo-American jurisprudence for almost 400 years.'" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599. "[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557).

Evidence Code section 952 states that a communication is confidential if not disclosed to third parties "so far as the client is aware," implying that the consent can only be made with a knowing waiver akin to waiving a constitutional

right, that is an intentional relinquishment of a known right. (*BP Alaska Exploration Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1252 [crime-fraud exception in the context of an attorney's work product]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [there can be no waiver of a constitutional right absent "an intentional relinquishment or abandonment of a known right or privilege"].)

The factual analysis to waive the right requires a finding by the court, by a standard of clear and convincing evidence, which is a high standard just below beyond a reasonable doubt. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 ["does not leave the matter to speculation and doubtful cases will be decided against a waiver"].) Here, the evidence of Mr. Rhoades' knowing waiver of his attorney-client privilege was not clear and convincing, and the court made no such finding.

In Mr. Rhoades' case, he had no choice but to speak to his lawyers in the only room provided, while the bailiffs were just feet away. Simply because he did not whisper softly enough the entire time is no indication that his attorney-client conversation was not intended to be confidential. In *People v. Shrier* (2010) 190 Cal.App.4th 400, 406-407, the police intentionally eavesdropped on a conversation among defendants and counsel in a large conference room, 15 feet by 30 feet which contained three long conference tables, by placing a Russian-speaking agent about five to 10 feet away from them. The *Shrier* court held: "It is reasonable to infer that [the defendants] reasonably believed these communications would be confidential and would not be overheard by the special agents, who were supposed to be present for the sole purpose of visually monitoring the inspection of the medical files." (*Id.* at 412.)

Similarly, the surrounding circumstances clearly indicated that Mr. Rhoades was engaging in privileged communication. The proximity of the

guards to Mr. Rhoades – who were supposed to be there to guard him not eavesdrop on him -- could not forfeit his right to consult with his lawyers about his ongoing preliminary hearing, or waive confidentiality. The trial court was correct that its ruling was unseemly and unfair (5-RT 1732); it also violated Mr. Rhoades' right to a fair trial and his right to counsel. (See *Medina v. California* (1992) 505 U.S. 437, 448 [a defendant who is unable to consult with his lawyer because of his incompetency violates due process]; *Escobedo v. Illinois* (1964) 378 U.S. 478, 490- 491 [right to consult lawyer].)

The state finally argues that any possible error was harmless beyond a reasonable doubt because the "jury was presented with crushing evidence proving appellant's guilt [thus]. . . [a]ppellant's announcement that he could give them a better time of death for Michael Lyons had little effect in light of this monstrous evidence." (RB at 108.) Mr. Rhoades disagrees for the reasons stated in the Introduction. (ARB at 1-4.) The court's ruling prejudiced Mr. Rhoades, as his overheard statement to his lawyers was used to suggest that he was responsible for Michael's death, simply because he speculated about his time of death. Although Mr. Rhoades' explanation for his remark was plausible -- he knew that Michael was in his truck the night of his murder, but only after Mr. Rhoades had left that night to get his come-along (17-RT 5343-5344) – the jury apparently disbelieved Mr. Rhoades with respect to this testimony, so there is no proof beyond a reasonable doubt that the bailiff's testimony about Mr. Rhoades' statement did not affect the jury's verdicts to his detriment.

IV. THE COURT VIOLATED MR. RHOADES' FIFTH, SIXTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY ADMITTING HIS PRIOR SEX AND KIDNAPPING CRIMES AND HIS CHILD MOLESTATION CONVICTION FOR PROPENSITY UNDER EVIDENCE CODE SECTIONS 1108, 352, AND 1101, PARTICULARLY BECAUSE THE EVIDENCE OF THE CHARGED CRIME OF FORCIBLE ORAL COPULATION WAS SO WEAK

A. Introduction

The state argues at length that the crimes against Sharon and Crystal were admissible under both Evidence Code section 1101(b) [hereafter section 1101(b)], to prove intent, and common scheme and plan, and Evidence Code section 1108 [hereafter section 1108] for propensity.[1] (RB at 110-140.) Mr. Rhoades disagrees.

B. The Prior Crimes Were Inadmissible Under Evidence Code Section 1108

The state first argues that the crimes against Sharon and Crystal were admissible under Evidence Code section 1108 for propensity. (RB at 110-120.)

The state claims that the evidence showed that "Michael had bruising on the inside of his lips which was consistent with a penis being forcefully pushed into his mouth," and thus this act was similar to the oral copulation with Crystal and the forcible oral copulation with Sharon. (RB at 113-114, 119.) Not so. Bruises on Michael's lips were equally consistent with a hand being forcefully placed over his mouth. (14-RT 4283.) The prosecution expert found no semen

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[1] While the court erred in instructing the jury that the prior crimes may also be considered for the purpose of determining motive, this was a mistake, as no one argued or could have argued that the prior crimes were relevant to motive. (9 CT 2402.) That is why the state does not address this issue, not because Mr. Rhoades has conceded the admissibility of this evidence as it relates to motive, but because that was never a ground for admitting this evidence. (RB at 110, fn. 38.)

or sperm on the oral swabs, which is not unusual. (15-RT 4502-4503.) This evidence hardly showed that Michael was "forced to orally copulate appellant." (RB at 113.) The evidence of forcible oral copulation was so weak that the jury could not reach a verdict and the charge was dismissed before the penalty retrial. (9-CT 2474-2475, 2526-2546.)

The state also argues that the offense against Sharon 11 years earlier was not remote. (RB at 114.) The analogous Evidence Code section 1109, however, specifically restricts admissibility of remote prior domestic violence more than 10 years before the charged offense, unless the court determines that the admission of this evidence is in the "interest of justice." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 537.) Here, the admission of these remote and dissimilar crimes against Sharon were not in the interest of justice, and should not have been admitted after a probing section 352 analysis. (See section D, *infra.*)

The state claims it is "irrelevant whether the kidnapping of Sharon was admissible under Evidence Code section 1108 because the trial court properly admitted this evidence under Evidence Code section 1101(b)." (RB at 116-117.) While it is true that the trial court also admitted the other-crime evidence under section 1101, section 1108 evidence is admitted for propensity, while evidence admitted under section 1101(b) is admitted for limited purposes. (8-CT 2262; 6-RT 2030-2032; see *People v. Loy* (2011) 52 Cal.4th 46, 60-64.) The evidence that Mr. Rhoades kidnapped Sharon after the forcible sex crime was not relevant to prove the sex crimes against Michael, but allegedly to prove his kidnapping and murder. The state, however, argues that the testimony that Mr. Rhoades "threatened to kill Sharon and in fact informed her that he was going to do just

that and that he was taking her to the river bottoms," was properly admitted under section 1108. (RB at 119.) Mr. Rhoades disagrees.

Section 1108 evidence is not admissible to prove kidnapping and murder, it is admissible to prove sex crimes only. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009 [section 1108 "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes"]; see *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Here, at a minimum, the trial court improperly allowed the prosecution to prove the kidnapping and murder of Michael by using the kidnapping of Sharon as propensity evidence under section 1108. Thus, the prosecution with the assent of the trial court, effectively and impermissibly bootstrapped otherwise inadmissible propensity evidence concerning kidnapping under Evidence Code section 1108. (See *People v. Jones* (2012) 54 Cal.4th 1, 50 ["Admissibility under Evidence Code section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute"]; *People v. Earle* (2009) 172 Cal.App.4th 372, 396-400 [commission of indecent exposure does not rationally support an inference that the perpetrator has a propensity or predisposition to commit rape as "propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a different act"].) Here, kidnapping cannot be considered to be a sex act under section 1108, and should not have been considered under a propensity theory. Thus, the court erred in admitting this other-crime evidence under section 1108 evidence for propensity, even if this Court disagrees with Mr. Rhoades's next contention that the crimes against Sharon and Crystal were not admissible under section 1101(b) to prove intent, and common scheme and plan.

C. The Prior Crimes Were Inadmissible Under Evidence Code Sections 1101

The state argues that the crimes against Sharon and Crystal were admissible under section 1101(b), to prove intent, and common scheme and plan, and the probative value of the evidence outweighed the probability that its admission would create a substantial danger of undue prejudice. (RB at 122, 120-140.) Mr. Rhoades disagrees.

The state argues that the evidence of Mr. Rhoades' intent with respect to Michael was similar with respect to Crystal and Sharon. (RB at 122-124.) Mr. Rhoades disagrees that there were distinctive elements of his conduct in committing oral copulation with his 4-year-old granddaughter and forcible oral copulation with a neighbor and acquaintance that logically and naturally tended to establish his intent to kidnap, sexually assault, and kill an eight-year-old boy who was a stranger to him. The facts of the three cases are too dissimilar to raise an inference that the commission of one crime was relevant to prove Mr. Rhoades' intent at the time of the commission of the charged crime.

It is relevant that Mr. Rhoades entered a *West* no contest plea to molesting Crystal, his four-year-old granddaughter, in his home. The state claims that Mr. Rhoades has forfeited his argument that the 1993 child molestation conviction was a convenience plea under *People v. West* (1970) 3 Cal.3d 595, in which Mr. Rhoades denied guilt, but entered the plea because it was unlikely he would have received a fair trial. (RB at 130-131.) Mr. Rhoades also argued that at the time of the plea in 1993, section 1108 was not yet enacted, so he could not weigh the potential collateral consequences of the plea when deciding to take the deal for three years at half-time.

Mr. Rhoades concedes that he did not make this precise objection about the unreliability of his prior child molestation conviction based on an induced plea of guilty until before the second-penalty phase. (30-RT 9218-9220; 9234-9235.) There is no reason to believe, however, that the trial court would have ruled differently at the guilt phase than it did at the second penalty phase when it found it irrelevant that Mr. Rhoades' *West* plea was to obtain the benefit of a "sweet" three-year deal versus going to trial and facing a much more severe sentence. (30-RT 9218-9220; 9234-9235 [court rules Mr. Rhoades' *West* plea admissible under factor (b) and *People v. Bradford* (1997) 15 Cal.4th 1229]; 37 RT 11188.)

The state also argues that the incident involving Sharon shared distinct similarities with the charged offenses. (RB at 123-124, 113-114.) Mr. Rhoades disagrees. He was convicted of forcing Sharon, an adult woman, whom he knew, to orally copulate him in her home, after which he drove her against her will towards the river bottoms, until she escaped. Nothing in the crimes committed against Sharon logically lead to an inference that Mr. Rhoades sodomized, tortured and murdered Michael.

With respect to the admission of this incident, the state also argues that "witnesses saw appellant take Michael Lyons from the street into his truck." (RB at 124.) This is a gross exaggeration of the evidence. The evidence that Mr. Rhoades had kidnapped Michael was so weak that the guilt-phase jury did not reach a verdict on this count and special allegation and they were dismissed before the penalty retrial. (9-CT 2474-2475, 2526-2546.) The truck that witnesses saw picking up a boy resembling Michael did not match Mr. Rhoades' truck, and there were sightings later that afternoon of a boy resembling Michael who was not with Mr. Rhoades. (AOB 6-8, 31-33, 38-39.) Moreover, there was uncontradicted evidence that Mr. Rhoades was playing cards and running

errands at the time the boy resembling Michael was seen getting into a truck. (AOB at 42-43.)

As explained above, the evidence of forcible oral copulation against Michael was so weak that the jury could not reach a verdict and the charge was dismissed before the penalty retrial. (9-CT 2474-2475, 2526-2546.) Bruises on Michael's lips were equally consistent with a hand being forcefully placed over his mouth. (14-RT 4283.) This evidence hardly showed that Michael was "forced to orally copulate appellant." (RB at 113.)

The state argues that "[o]bviously the trial court had no way of anticipating a hung jury on those two counts." (RB at 127.) Not so. It should have been obvious before trial that the evidence that Mr. Rhoades kidnapped and orally copulated Michael was weak. It violated Mr. Rhoades' right to due process to permit the prosecutor to use the highly prejudicial evidence of other crimes to bolster a weak case.

As in *People v. Sam* (1969) 71 Cal.2d 194, 204-205, there were no "distinctive characteristics" of Mr. Rhoades' priors or connecting links that supported the evidence against Mr. Rhoades with respect to Michael. For example the state desperately claims that another similarity between the charged crimes and the crimes against Sharon and Crystal was the fact that Mr. Rhoades was "undressed" or "naked" at the time he committed all the crimes against all three victims. (RB at 123-124.) First, the fact that Mr. Rhoades had on only pants at the time of his arrest does not prove he was "undressed" or "naked" hours earlier. Second, Mr. Rhoades gave a reasonable explanation for why he had on only pants while trying to extricate his truck from the mud: he did not want to get his socks and underpants dirty. (17-RT 5375-5376, 5378, 5399.) Finally, most sexual crimes involve some amount of getting undressed or naked.

Rather, the other crime evidence was probative only if the trier of fact drew the improper inference from the priors that it was Mr. Rhoades' inclination or nature to commit sexual crimes, and that this aspect of his character caused him to commit all the charged crimes. This is nothing but criminal propensity evidence which should have been excluded. The sexual assault of Sharon did not support a strong inference of a common design or scheme since that isolated incident many years before could not reasonably suggest a "planned course of action rather than a series of spontaneous events." (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Nor did the 1993 sexual assault of Crystal tend logically, naturally, or by reasonable inference, to prove that Mr. Rhoades intended or planned to sexually assault and murder Michael in 1996. This highly prejudicial evidence about Sharon and Crystal was irrelevant and should have been excluded.

D. The Court Abused Its Discretion In Admitting The Prior Crimes Under Evidence Code Section 352, Which Thus Precluded Their Admission Under Sections 1108 Or 1101

The state argues that the other crimes evidence was also admissible under Evidence Code section 352. (RB at 127-133.) Mr. Rhoades disagrees.

In light of the paucity of evidence the prosecution was able to present on the charged offenses, the prospect of finding Mr. Rhoades guilty beyond a reasonable doubt without the aid of the propensity evidence was low. The "safeguard" of section 352 was unrealized by a trial court that ignored section 352's primary purpose and failed to properly weigh any of the salient factors discussed in *Falsetta*, instead focusing on the relatively irrelevant factor of the similarity of offenses. Had the trial court considered the proper factors in weighing the prejudicial impact of the evidence against its probative value, it would have found that the prior crimes evidence was inadmissible because the

probative value was substantially outweighed by the probability that its admission would create a substantial danger of causing undue prejudice. (See *People v. Johnson* (2000) 81 Cal.App.4th 1301, 1314.)

Three separate crimes are at issue here. In one, Mr. Rhoades was convicted for the kidnapping and forcible oral copulation of an adult female. In the other, Mr. Rhoades pleaded guilty to the molestation of his very young granddaughter. There are marked differences between an acquaintance rape and kidnapping of a woman and the molestation of a young female family member, and the kidnapping, torture, rape, and murder of a male child who was a stranger to Mr. Rhoades. In neither prior case was the victim killed, sodomized or tortured, the crimes of which Mr. Rhoades had been convicted by his first jury. Mr. Rhoades was not convicted of kidnapping or forcible oral copulation of Michael, despite the introduction of the other crimes evidence. Thus the other crime evidence was an attempt to bolster a weak case against Mr. Rhoades on these counts. Given the disparate nature of the charges concerning Mr. Rhoades' choice of victims and their dissimilarity, it would be easy for the jury to combine the incidents and facts of these two priors and assume Mr. Rhoades commits indiscriminate sexual assaults against children, as well as adults.

The prosecutor argued Sharon's and Crystal's testimony extensively. (12-RT 3652-3658; 19-RT 5704-5705, 5800-5801, 5814.) The conclusion the jury was told to draw was that because of these prior offenses, Mr. Rhoades acted in conformity with his propensity to commit sexual assault. The probative value of Sharon's and Crystal's testimony was not outweighed by its tendency to mislead, confuse and distract the jury. Sharon's testimony that Mr. Rhoades forced her to orally copulate him, threatened to cut her if she resisted, and afterward kidnapped her and threatened to kill her did not have a tendency to prove that

Mr. Rhoades kidnapped, sexually assaulted, sodomized and murdered Michael 12 years later, particularly in light of the insufficient evidence presented of kidnapping and oral copulation. Whatever the minimal relevance of the crimes against Sharon, they should have been excluded under section 352. Similarly, Mr. Rhoades' conviction of oral copulation against Crystal was not relevant to prove Mr. Rhoades kidnapped, sexually assaulted, sodomized and murdered Michael several years later.

E. The Admission of This Propensity Evidence of Prior Crimes Violated Mr. Rhoades' Rights under the United States Constitution

The state argues that "the admission of the evidence of the prior uncharged acts did not violate Mr. Rhoades' due process rights." (RB at 133-134.) Mr. Rhoades disagrees. The prosecutor's argument in Mr. Rhoades' case encouraged the jury to use the prior crimes evidence –particularly kidnapping -- to show propensity to commit the charged crimes. (19-RT 5704-5705, 5800-5801.) For example, the prosecutor argued:

> Note the defendant is predisposed to commit violent sexual offenses. We know the defendant liked to take his victims, when possible, down to the river bottoms and that we know that he is willing to kill them to prevent them from testifying against him. In other words, basically he's a sexual predator. The person who killed Michael Lyons is a sexual predator. Robert Rhoades is a sexual predator.
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> We know that in 1985 in Yuba County the defendant used a knife; he forced a woman to orally copulate him. We know that he could accomplish all these sexual acts in safety and comfort in her apartment. And yet he transports her.
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> There was only one reason he would have transported her -- because he was going to kill her. . . . I want you to take a look again at the area where he was taking her in Yuba County. It's in the same Feather River bottoms. He's taking her down there. One reason he'd do that. He's gonna kill her. That's what he does to people. Because he doesn't want people testifying against him. (19-RT 5704-5705.)

> Does he take knives to people and take them down to the river bottoms or does he not? . . . And part of that circumstantial evidence is his propensity to do this to people. And this crime is very, very similar to Sharon Thorpe except for the victim that he had in that case, she was an adult, she jumped out of the car. This was a little boy. He didn't. And you saw what happened to him. But other than that, it's a very similar crime. Knife, truck, take him down to the river bottoms, orally copulate him. (19-RT 5800-5801.)

The Ninth Circuit has recognized that in federal cases, although "there is nothing fundamentally unfair about the allowance of propensity evidence . . . 'such [propensity] evidence will only sometimes violate the constitutional right to a fair trial , if it is of no relevance, or if its potential for prejudice far outweighs what little relevance it might have.'" (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1022, 1026-1028; see also *People v. Schader* (1969) 71 Cal.2d 761, 772-773, fn.6; see *People v. Walkey* (1986) 177 Cal.App.3d 268, 279-280.) This is particularly so in cases such as this one, where the balance of the prosecution's case with respect to the charged offenses is circumstantial, the uncharged offenses are similar to the charged offenses, the prosecution relies on the other crimes evidence heavily in proving his case, and the other crimes evidence was emotionally charged. (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, quoting *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381-1386.) Here, there was no DNA evidence that connected Mr. Rhoades to the crimes. There was only evidence that proved that *someone* tortured and killed Michael who was in Mr. Rhoades' truck that night. In sum, the use of evidence of prior offenses to establish Mr. Rhoades' guilt on the basis of criminal propensity and/or disposition evidence, in the absence of direct evidence, violated the constitutional guarantees of due process and a fair jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

F. The Cautionary Instruction Was Ineffective

The fact that the court instructed the jury with a modified version of CALJIC No. 2.50.01 -- which authorized the jury to use Mr. Rhoades' prior sex offenses against Crystal and Sharon as propensity evidence -- does not alter Mr. Rhoades' argument that the cautionary instructions were ineffective.[2] (19-RT 5850-5851; 9 CT 2404-2405.) Neither CALJIC No. 2.50.01, nor CALJIC No. 2.50, prevented the prejudice of admitting this other crime evidence, but only aggravated it. (19- RT 5849-5851; 9-CT 2402.)

The cautionary instruction to the jury did not prevent the jury from using this evidence as proof of Mr. Rhoades' guilt in the capital murder case, but instead encouraged it. As noted in *Old Chief v. United States* (1997) 519 U.S. 172, 181 "[a]lthough . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance." This is particularly the case with sexual offenses, which are always inflammatory, and certainly here, where the prosecutor encouraged the jury to use evidence of Mr. Rhoades' guilt with respect to Sharon and Crystal in order to convict Mr. Rhoades of all the crimes against Michael. (12-RT 3652-3658, 19-RT 5704-5705, 5800-5801, 5814.)

G. The Error Was Prejudicial

The state argues that "ordinary errors in admitting or excluding evidence do not implicate the federal constitutional right to due process and are reviewable under *Watson*," and that "it is not reasonably probable that absent admission of

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[2] The state is correct about what instructions the court gave. (RB at 136.) The court refused to instruct under CALJIC No. 2.50.1 and CALJIC No. 2.50.2, but gave CALJIC No. 2.50.01. (18-RT 5564-5565.)

the prior incidents, Mr. Rhoades would have received a more favorable result." (RB at 139-140.) Mr. Rhoades disagrees on both counts.

The Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Sharon's and Crystal's testimony resulted in prejudice to Mr. Rhoades; it created a jury predisposed to believe that he was the kind of person who would sodomize and murder Michael, despite the lack of evidence in the prior crimes to support the crimes charged against Rhoades. Without the propensity evidence, the jury would have been presented with a case involving no witnesses, little or no physical evidence, and defense evidence that Mr. Rhoades was away from his truck when Michael was murdered. (14-RT 4416, 4425-4435; 15-RT 4504-4505, 4597, 4616-4618.)

Even if the error is evaluated under the test for state evidentiary error established in *People v. Watson* (1956) 46 Cal.2d 818, 836, Mr. Rhoades has also shown a reasonable probability that the result would have been different, as the case against him was entirely circumstantial. (See ARB, Introduction at 1-4.) By allowing the jury to consider the evidence from Sharon and Crystal, an unreliable verdict was reached; the jury's verdicts reflect a finding that Mr. Rhoades was the kind of person who would do such things, and therefore, if he had sexually assaulted two female acquaintances, he necessarily must have assaulted a young boy, who was a stranger to him, but this time murdered his victim to cover up his crime. If the jury had been required to find Mr. Rhoades guilty beyond a reasonable doubt on the merits of the prosecution's case in the charged offense alone, without evidence of Mr. Rhoades' propensity to commit such acts, there is a reasonable probability the result would have been different. As noted in the introduction, the first jury could not reach a unanimous verdict on

penalty, nor on several charges, including kidnapping and forcible oral copulation (which were dismissed). Moreover, Mr. Rhoades' lingering doubt evidence and argument in the penalty phase was so strong that the prosecutor committed misconduct by specifically and repeatedly stating that "lingering doubt" was impossible for the second penalty jury to consider because it had not heard the entire case the prosecutor presented to the first jury. (See Arg. XIII, B.) The fact that the evidence showed Michael was in Mr. Rhoades' truck the night he was killed is not sufficient to show he killed Michael, as his defense that he left his truck to obtain a come-along to extricate his truck from the mud was consistent with all the other evidence in the case.

The risk of prejudice is increased when the prosecutor argues to the jury that they should use evidence of prior crimes to convict the defendant of the other crime, as the prosecutor did here, even though the prior crimes were not similar to the charged crime. (12-RT 3652-3658, 19-RT 5704-5705, 5800-5801, 5814, 40-RT 12202, 12214-18; AOB at 124-125.) The error in admitting this evidence not only contributed to his conviction of the murder, torture, and sodomy of Michael, but was its linchpin.

V. THE COURT VIOLATED MR. RHOADES' FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE BY EXCLUDING IMPEACHMENT EVIDENCE RELEVANT TO BOBBIE LEMMONS' POSSIBLE CULPABILITY

The state argues that the trial court properly excluded impeachment evidence concerning Mr. Lemmons, and evidence of third party culpability. (RB at 140-149.) The state argues:

> [Because] there was no evidence, either direct or circumstantial, linking Bobbie Lemmons to the actual perpetration of the killing of Michael Lyons, the proffered

> evidence failed to raise a reasonable doubt as to appellant's guilt. The river bottoms were full of people who lived on the fringes of society, many of whom had criminal pasts. The fact that Bobbie Lemmons was one of many sex offenders camping out by the river does nothing to present the possibility that he committed the sexual assault and murder of Michael Lyons. The trial court did not err in excluding the prior conviction and the fact that Bobbie Lemmons was a registered sex offender. (RB at 147.)
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> In this case, the trial court did not abuse its discretion in excluding the offer of third party culpability evidence. Bobbie Lemmons status as a sex offender and his misdemeanor child molest conviction were entirely irrelevant to the commission of the murder here. (RB at 148.)

Mr. Rhoades disagrees. Mr. Lemmons' conviction for misdemeanor child molestation was relevant to whether his account of that night was reliable and whether he had a motive to cover up possible involvement in the crimes against Michael. "Misconduct involving moral turpitude may suggest a willingness to lie [citations]" and, therefore, is relevant to a witness' honesty and veracity. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295; see Evid. Code § 210.) Mr. Lemmons' child molestation prior and the inconsistent testimony he gave at Mr. Rhoades' trial was anything but collateral to the issue of whether his denial of involvement in Michael Lyons' death was truthful.

It was particularly unjust for the trial court to exclude Mr. Lemmons' child molestation prior and admit Mr. Rhoades' prior sex convictions against Sharon and Crystal under Evidence Code section 1101(b), to prove intent, and common scheme and plan, and under Evidence Code section 1108 to prove propensity. (8-CT 2262; 6-RT 2030-2032.) This is another example of the court assuming Mr. Rhoades' guilt while protecting Mr. Lemmons from legitimate impeachment and character evidence suggesting intent, common scheme, and propensity. If propensity evidence was admissible against Mr. Rhoades, it violated due process to exclude the same with respect to Mr. Lemmons.

Evidence that a third person actually committed a crime for which the defendant has been charged need not show "substantial proof of a probability" that the third person committed the act; "it need only be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833; see *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754, 760-762 [exclusion of the third-party evidence stripped defendant of evidence that someone other than she had probably committed the murder of her husband, despite her confession, the truth of which she vigorously contested]; *Holmes v. South Carolina* (2006) 547 U.S. 319, 326-331 [overturning a South Carolina conviction in which a defendant was denied the opportunity to present evidence of third party culpability because of the strength of forensic evidence in that case].)

Here, there was circumstantial evidence linking Mr. Lemmons to Michael's murder, as he had not only the opportunity to kill Michael, he lied about where he was and what he was doing the night of Michael's murder, and asked a friend to provide him an alibi. The excluded evidence was relevant to those issues and admissible under *Davis v. Alaska* (1974) 415 U.S. 308, 317, because it was essential to bolster Mr. Rhoades' defense that Mr. Lemmons was not a credible witness about what he was doing that night.

Because the state does not argue that any error was harmless, Mr. Rhoades will not repeat his argument that the error was neither "harmless beyond a reasonable doubt" nor harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB at 140-149; AOB at 134.)

VI. THE PROSECUTOR'S EGREGIOUS AND PERVASIVE MISCONDUCT IN HIS CROSS-EXAMINATION OF MR. RHOADES AND IN HIS GUILT PHASE ARGUMENT VIOLATED MR. RHOADES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL AND COULD NOT HAVE BEEN CURED BY ADMONITIONS AND THUS NO OBJECTION WAS REQUIRED

The state concedes that some of the prosecutor's questions and cross-examination of Mr. Rhoades "may have been improperly argumentative," but argues that "there is no likelihood that appellant was prejudiced." (RB at 156-157.) Here, the prosecutor had the temerity to argue that because Mr. Rhoades drove on the levees, "you just don't care about other people." (17-RT 5386.) The state claims there was no harm, because the court again sustained Mr. Rhoades' objection, and he did not answer. (RB at 156-157.) Not so. The questions themselves revealed inadmissible and prejudicial information, which constituted the misconduct. (*People v. Bell* (1987) 49 Cal.3d 502, 532-534.) Mr. Rhoades disagrees that any harm was averted because he testified that "everybody" drove on the levees. (*Ibid.*, citing 17-RT 5385-5386.) The prosecutor's insinuation that Mr. Rhoades was somehow responsible for the 1996 flood was prejudicial, as Mr. Rhoades' testimony did not clearly indicate that he drove only on parts of the levee that did not fail, and the state's argument suggested Mr. Rhoades was at least in part responsible for the levee's failure. (RB at 156-157.) The state even acknowledges that the levee failure occurred on the other side of the river and thus the inference that Mr. Rhoades "was responsible" for the 1996 flood was "illogical." (RB at 156.) Yet, it was the prosecutor who brought up this "illogical" issue, and exploited the floods of 1996 by unfairly suggesting that Mr. Rhoades

did not care about other people because of the danger of weakening the levees by driving on them, not necessarily the ones that failed.

The state argues that the prosecutor was not responsible for Officer Harris' testimony that he thought Mr. Rhoades would be glad to see the police, given that his truck was stuck, and that this testimony, admittedly in violation of a court order, did not prejudice Mr. Rhoades. (RB at 157-158; 13-RT 4063.) Mr. Rhoades disagrees. The prosecutor's questioning does not indicate, as the state suggests, that he was "merely trying to rephrase the question in order to gain an admissible answer." (RB at 158.) Either the prosecutor failed adequately to admonish Officer Harris regarding the court's order, or Officer Harris deliberately violated the court order. While Mr. Rhoades objected, and the trial court struck the testimony, it was too late, and the damage was already done -- the officer had clearly indicated that he thought Mr. Rhoades should have been happy to see the police. The fact that Mr. Rhoades testified that when he first saw the police boat, he was not happy to see them because he had drugs in his truck, does not render the error harmless, as that was made in response to the inadmissible testimony. (RB at 158, citing 17 RT 5354.) Mr. Rhoades should not have been forced into a defensive posture due to inadmissible evidence.

The state contends that Mr. Rhoades forfeited his contention that part of the prosecutor's rebuttal argument was not fairly responsive to the defense's closing argument. (RB at 158-159.) Not so. Mr. Rhoades objected that the prosecutor's argument was not "proper rebuttal," because if "he wanted to argue this, he should have argued it in his initial argument." (19-RT 5811.) The court overruled the objection. (*Ibid.*) The prosecutor's argument crossed the line of permissible argument and rebuttal because it was not fairly responsive to the argument of defense counsel. (*People v. Sandoval* (1992) 4 Cal.4th 155, 193.)

The state also contends that Mr. Rhoades forfeited his contention that parts of the prosecutor's rebuttal argument stated facts not in evidence. (RB at 158-161.) Mr. Rhoades disagrees. Prior to the second penalty phase, Mr. Rhoades asked the court to issue an order preventing the prosecutor from making the argument that Mr. Rhoades' shirt had Michael's blood on it. (10-CT 2998-3002.) Mr. Rhoades renewed this argument in his motion for new trial after the second penalty phase. (15-CT 4450-4452.) There is no reason to believe that the trial court would have ruled differently earlier in the trial than it did when it overruled this objection later.

The state also argues that the prosecutor's argument about Mr. Rhoades' bloody shirt was "properly based on the reasonable inferences or deductions drawn from the evidence presented, and on matters not in evidence but of common knowledge or drawn from common experience or history." (RB at 159-161.) Mr. Rhoades disagrees. The prosecutor's argument about Mr. Rhoades' bloody shirt contradicted the evidence presented in this case, and was not fair comment. (15-RT 4470-4474.) The prosecutor's criminalist, Mr. Bentley, testified that there was a heavy accumulation of human blood on the left shoulder and lower right-hand side of the shirt found in Mr. Rhoades' vehicle, but most of the shirt was covered in blood and rinsed out. (15-RT 4507-4512.) The faint reddish haze stains on Mr. Rhoades' shirt were the same blood type as Mr. Rhoades', but excluded Michael. (15-RT 4623-4624, 4629.) The stains were positive for blood and human DNA, but were so diluted that Ms. Duda-Shea could not tell if the DNA was from blood or sweat or skin. (15-RT 4623-4624, 4627.) The state's simplistic response to Mr. Rhoades' argument, that only one person in this scenario, Michael Lyons, lost a lot of blood (RB at 161), was contrary to the blood

type and DNA evidence produced at trial, and did not support the prosecutor's argument about Mr. Rhoades' bloody shirt.

The state also argues that the prosecutor properly argued that Mr. Rhoades' feet would have been "chewed up real good," had he walked ten miles in wet shoes: "It can be fairly said that it is common knowledge that walking for an extended period of time in shoes which are wet can cause blistering and chafing of the skin." (RB at 160.) Mr. Rhoades disagrees. There was no testimony supporting this wild speculation, which is hardly common knowledge.

Mr. Rhoades stands by his argument that the cumulative effect of the prosecutorial misconduct in his case requires reversal because it deprived him of his due process right to a fair trial and was not harmless beyond a reasonable doubt; it is also reasonably probable the jury would have rendered a more favorable verdict in its absence. (AOB at 145-147.)

VII. MR. RHOADES' CONVICTIONS MUST BE REVERSED BECAUSE MICHAEL'S STEPFATHER YELLED AT MR. RHOADES AND HAD TO BE REMOVED FROM THE COURTROOM

The state does not dispute that it was "spectator misconduct" for Mr. Friend to yell obscenities at Mr. Rhoades in the presence of the jury during Mr. Mr. Rhoades' testimony during the penalty phase: "You're going to die you slimy piece of shit," and/or "slimy son of a bitch." (RB at 164-166.) The state, however, claims that a mistrial was not warranted under *People v. Lucero* (1988) 44 Cal.3d 1006, 1022, where the spectator outburst was made prior to the jury's determination of guilt, allowing Lucero to argue that "the outburst came at the worst possible time in terms of its prejudicial impact—just as the jury was preparing to leave the courtroom to begin deliberating on his guilt." The state

also argues that the "outburst in [Mr. Rhoades'] case was not made at such a crucial juncture in the proceedings," and "[n]o evidence was disclosed that had not already been presented at trial." (RB at 166.) Mr. Rhoades disagrees.

First, this Court rejected Lucero's argument about the "worst possible time," finding that the "isolated outburst . . . followed by a prompt admonition" was harmless. (*People v. Lucero*, *supra,* 44 Cal.3d at 1022-1024.) Second, the outburst in *Lucero* did not involve hateful invective as here. (*Id.* at 1022.) Mr. Rhoades' case is closer to *Rodriguez v. State* (Fla.App. 1983) 433 So.2d 1273, 1276, where the victim's widow shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility toward defendant, which the Florida appellate court found deprived the defendant of a fair trial. (See also *Price v. State* (1979) 149 Ga.App. 397, 254 S.E.2d 512, 513-514 [the victim's mother repeatedly disrupted the proceedings with emotional outbursts and other interruptions, unduly prejudicing defendant].) Third, this outburst during Mr. Rhoades' testimony at penalty phase was one of the "worst possible times," given that the jury was deciding whether he should live or die. Finally, the jury's decision at the penalty phase is a normative decision, not factual, so the fact that the outburst did not reveal any outside facts is not significant. (*People v. Jennings* (2010) 50 Cal.4th 616, 689.) Unlike *People v. Panah* (2005) 35 Cal.4th 395, 451, where this Court found that a mistrial was unnecessary after the victim's mother kissed the trial judge's bailiff, in part because it was unclear whether any juror witnessed the incident, all the jurors witnessed Mr. Friend's invective, which was not comparable to a kiss. The hateful outburst was prejudicial given the fact Mr. Rhoades was pleading for his life at the time. Reversal is warranted.

VIII. THE COURT VIOLATED MR. RHOADES' DUE PROCESS RIGHTS BY INSTRUCTING THE JURY IN TERMS OF GUILT AND "INNOCENCE" UNDER CALJIC NO. 2.01

The state correctly points out that CALJIC No. 1.00 did not contain the "guilt or innocence" language. (RB at 167-169; 19 RT 5837-5838; 8 CT 2380-2381.) Yet, Mr. Rhoades' argument remains the same, as the court did use the term "guilt or innocence" in CALJIC No. 2.01. (16 RT 4860-4866; AOB at 149-150.) Because it is the trial court's duty to see that the jurors are adequately informed on the law, Mr. Rhoades' failure to request a clarifying instruction or object to an erroneous and misleading instruction does not forfeit the issue. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491; Pen. Code § 1259.)

The state argues that it is "very unlikely that the jury would construe this one sentence of CALJIC No. 2.01 to mean that appellant had the burden of proving his innocence," given the other instructions and the fact that "CALJIC No. 2.01 merely provides a means of contrasting guilt with innocence in terms of how the jury may interpret circumstantial evidence." (RB at 169-170.) Mr. Rhoades begs to differ. A jury instruction which suggested that the jury must decide between "guilt" or "innocence" violated Mr. Mr. Rhoades' constitutional rights to due process and trial by jury. (AOB at 150; see Bugliosi, *Not Guilty and Innocent -- The Problem Children Of Reasonable Doubt* (1981) 4 Crim. Justice J. 349.)

SECTION 2 - PENALTY PHASE ISSUES

IX. THE COURT VIOLATED MR. RHOADES' FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHT TO AN IMPARTIAL, REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND A RELIABLE DETERMINATION OF PENALTY, BY DENYING BOTH OF MR. RHOADES' *WHEELER/BATSON* MOTIONS WITHOUT ASKING THE PROSECUTORS FOR THEIR REASONS FOR PEREMPTORILY EXCUSING ALL FOUR AFRICAN-AMERICAN WOMEN FROM THE JURY

A. Mr. Rhoades Raised An Inference Of Discrimination When The Prosecutors Peremptorily Excused All Four African-American Women From The Jury

In one of its more telling errors, the state wishfully thinks that *People v. Johnson* (2003) 30 Cal.4th 1302, 1325-1326, still stands for the proposition that "the removal of all three African-American prospective jurors did not present a prima facie case of discrimination," despite being overruled by *Johnson v. California* (2005) 545 U.S. 162, 170 [*Johnson*], allegedly on another point.[3] (RB at 188.)

On remand from the United States Supreme Court, this Court understood that the high court had concluded that the inferences "that discrimination may have occurred were sufficient to establish a prima facie case" under *Batson v. Kentucky* (1986) 476 U.S. 79 [*Batson*]. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1099; see *People v. Hoyos* (2007) 41 Cal.4th 872, 901, citing *Johnson,*

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[3] The state gratuitously notes that Mr. Rhoades used two of his peremptory challenges, out of a total of eleven, to challenge jurors who were black. (RB at 173; citing 30 RT 9040.) Under both California and federal law, the propriety of the prosecution's peremptory challenges must be determined without regard to the validity of the defendant's own challenges. (See *People v. Snow* (1987) 44 Cal.3d 216, 225; *People v. Wheeler* (1979) 22 Cal.3d 258, 283, fn. 30 [*Wheeler*]; *Brinson v. Vaughn* (3d. Cir. 2005) 398 F.3d 225, 234.)

supra, 545 U.S. at 166, 173 [the removal of all three African-American prospective jurors established a prima facie case].)

The reason for the state's misunderstanding may be because the facts of *Johnson v. California* (2005) 545 U.S. 162 are virtually indistinguishable from the facts of Mr. Rhoades' *Batson/Wheeler* motions except that Mr. Rhoades is white, while Mr. Johnson is black. The defendant, however, need not be a member of the excluded group in order to object to the prosecutor's discriminatory use of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 412-416 ["A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings"]; see also *Smith v. Texas* (1940) 311 U.S. 128, 130 ["For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government"]; *Strauder v. West Virginia* (1879) 100 U.S. 303, 312.)

While the fact that the defendant is the same race as the jurors excused by peremptory challenges is a factor supporting a claim of racial-motivation, the converse does not weaken a claim that the peremptory challenges were racially-motivated, as the prosecutor erroneously believed. (*People v. Kelly* (2007) 42 Cal.4th 763, 779-780 ["the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule]; *Powers v. Ohio*, *supra,* 499 U.S. at 416 ["But to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms"]; 30-RT 9040-9041.) As the *Johnson* court explained:

> The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, nor to those citizens who desire to participate "in the administration of the law, as jurors" . . . . Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (*Johnson, supra*, 545 U.S. at 172 [citations omitted].)

Johnson arose from the conviction of a male African-American defendant for murder and assault on a 19-month-old Caucasian child. (*Johnson, supra*, 545 U.S. at 164.) Over the defendant's *Batson-Wheeler* objections, the prosecutor used three of his 12 peremptory challenges to remove all three African-American prospective jurors from the pool of 43 eligible jurors. (*Ibid.*) "The resulting jury, including alternates, was all white." (*Ibid.*)

In Mr. Rhoades' case, the prosecutors used three of their first five peremptory challenges to excuse all three female African-American jurors from a pool of 69 eligible jurors. (30-RT 9010-9022.) After the prosecution used two more strikes against female jurors, and accepted the jury twice, the prosecution peremptorily excused a fourth African-American juror, Alicia Richard, as soon as she was seated. (30-RT 9023-9026, 9035.) Thus, the prosecutor had used four out of eight challenges to excuse all four female African-American jurors from a pool of 69 eligible jurors. (30-RT 9042, 9046, 9010-9015.) The state does not dispute that the prosecutor excused all four African-American jurors. (RB at 188, citing 30 RT 9040; see also 30-RT 9035, 9047.)

The percentage of peremptory challenges used against African-Americans – 50 percent -- is twice that than in *Johnson* – 25 percent. Moreover, about six

percent (four out of 69) of the venire were African-American, while the prosecutors used a significantly higher percentage of its peremptory challenges – 50 percent -- against African-Americans. Thus, two different statistics -- the percentage of available African-Americans challenged – 100 percent, and the percentage of peremptory challenges used against a venire only six percent African-American – 50 percent -- provide support for an inference of discrimination.[4] (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 ["Happenstance is unlikely to produce this disparity"]; *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1070 ["The fact that 'three of the prosecution's peremptory challenges were exercised against the only three African-Americans in the jury pool,' is enough to establish a prima facie case of racial discrimination"]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813 [about 30 percent of the venirepersons who appeared before the court for voir dire were African-American. Yet the government used a significantly higher percentage of its peremptory challenges - 56 percent - against African-Americans].)

This statistical evidence alone was sufficient to demand an explanation from the prosecutor, as the *Johnson* case emphasized:

> A defendant may satisfy his prima facie burden, we said, "by relying solely on the facts concerning [the selection of the venire] in his case." We declined to require proof of a pattern or practice because "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'"

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[4] According to the United States census of 2000, less than two years after the trial, the racial makeup of Sacramento County was 64% White, 10.56% African-American, 13.53% Asian, 1.09% Native American, 19% Hispanic or Latino of any race, 8.07% from other races, and 5.84% from two or more races. Mr. Rhoades requests this court to take judicial notice of the results of the 2000 federal census. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160, fn. 6.)

> Indeed, *Batson* held that because the petitioner had timely objected to the prosecutor's decision to strike "all black persons on the venire," the trial court was in error when it "flatly rejected the objection without requiring the prosecutor to give an explanation for his action." We did not hold that the petitioner had proved discrimination. Rather, we remanded the case for further proceedings because the trial court failed to demand an explanation from the prosecutor--i.e., to proceed to *Batson's* second step -- despite the fact that the petitioner's evidence supported an inference of discrimination. (*Johnson, supra*, 545 U.S. at 169-170 & fn. 5 [citations omitted].)

Second, defense counsel in *Johnson* alleged that the prosecutor "had no apparent reason to challenge this prospective juror 'other than [her] racial identity.'" (*Johnson, supra*, 545 U.S. at 165.) The trial judge in *Johnson* did not ask the prosecutor to explain the rationale for his strikes. (*Ibid.*)

In Mr. Rhoades' case, defense counsel alleged that there were no "discernible differences" between the black women and the other eight jurors in the box. (30-RT 9046.) When the prosecutor disagreed, the court asked her to explain. (30-RT 9046.) The prosecutor *refused to explain*, which in itself, could be taken as further proof she had a discriminatory intent. (30-RT 9047.)

In *Johnson*, the court stated:

> In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case. (*Johnson, supra*, 545 U.S. at 171, fn. 6.)

In *Johnson*, "the judge simply found that petitioner had failed to establish a prima facie case under the governing state precedent, reasoning 'that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis.' The judge did,

however, warn the prosecutor that "'we are very close.'" (*Id.* at 165 [citations omitted].)

In Mr. Rhoades' case, the prosecution repeatedly argued that a prima facie case required "a showing of *a strong likelihood* that [discrimination] is the reason we excused the jurors." (30-RT 9042, 9047, 9050.) The trial court found Mr. Rhoades "had failed to establish a prima facie case under the governing state precedent," while using virtually the identical language used by the trial court in *Johnson* – "I'm very close:"

> At this juncture, [I] accept the authority of this *Howard* case [strong likelihood standard]. In doing so, I need to look very carefully at the representatives of the People and say that any further matters of this kind will weigh heavily on this Court .... *I'm very close*, I'm going to go with *Howard* for the time being, but if I see very much more of this, I'm going to indicate to you, you may well have a serious problem on your hands. (30-RT 9050; 13-CT 3703-3705 [emphasis added].)

While acknowledging that the trial court used the "I'm very close" language, the state simply ignores this fact in its first-step *Batson* analysis. (RB at 174, 170-216.) The state also ignores the fact the trial court in Mr. Rhoades' case expressed the exact same kind of reservations under the now overruled "*strong likelihood*" standard that the Court in *Johnson* found significant:

> In this case, the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,'" and on review, the California Supreme Court acknowledged that "it certainly looks suspicious that all three African American prospective jurors were removed from the jury." ... Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*. [¶] The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson*. (*Johnson, supra,* 545 U.S. at 173.)

In *Johnson,* the "trial judge still did not seek an explanation from the prosecutor. Instead, he explained that his own examination of the record had

convinced him that the prosecutor's strikes could be justified by race-neutral reasons. Specifically, the judge opined that the black venire members had offered equivocal or confused answers in their written questionnaires." (*Id.* at 165-166.) The *Johnson* court rejected this attempt to circumvent *Batson*:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson v. California, supra,* 545 U.S. at 170.)

In *Johnson,* the court explained that the trial court had erred by jumping to the third step, where only then does "the persuasiveness of the justification" become relevant:

> The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. "It is not until the third step that the persuasiveness of the justification becomes relevant -- the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." ... [D]eterminations at steps one and two ... "can involve no credibility assessment" because "the burden-of-production determination necessarily precedes the credibility-assessment stage," and that the burden-shifting framework triggered by a defendant's prima face case is essentially just "a means of 'arranging the presentation of evidence'" (*Johnson, supra,* 545 U.S. at 171 & fn. 7 [citations omitted].)

The *Johnson* court explained that it is not proper to speculate about what reasons the prosecutor might have had to excuse the black jurors:

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See

> *Paulino v. Castro*, 371 F.3d 1083, 1090 (CA9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ... [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (CA3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). (*Johnson, supra,* 545 U.S. at 172.)

Thus, this Court should summarily reject the state's attempt at adducing reasons the prosecutor might have had which could be based solely on speculation. (RB at 174-194; see also *Miller-El v. Dretke*, *supra*, 545 U.S. at 251-252 ["the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."].)

As the Court in *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108, relying on the above language in *Johnson*, persuasively pointed out, a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis":

> But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

The *Williams* court further explained that, as in Mr. Rhoades' case, the trial judge's decision not to insist the prosecutor explain her reasons to excuse the black jurors limited the scope of appellate review:

> We cannot determine the reasonableness of the prosecutor's challenges, but can only review the record to determine whether "other relevant circumstances" eroded the premises of Williams' allegations of discrimination based on statistical disparity. [¶] The district court, however, as well as the California Court of Appeal, addressed a different issue: whether the record could support race-neutral grounds for the prosecutor's peremptory challenges. Although their conclusion that the record supported such

> grounds for the peremptory challenges may have been reasonable, the Supreme Court's clarification of *Batson* in *Johnson*, and its review of the record in *Miller-El*, lead to the conclusion that this approach did not adequately protect Williams' rights under the Equal Protection Clause of the Fourteenth Amendment or "'public confidence in the fairness of our system of justice.'" (*Williams v. Runnels*, *supra*, 432 F.3d at 1108, citing *Johnson* and *Miller-El.*)

The Ninth Circuit rejected the California Court of Appeal's attempt to justify the excusal of an African-American juror with this admonition:

> This speculation is not consistent with the Supreme Court's admonition in *Johnson* that the first step in the *Batson* test does not require that "a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination." (*Williams v. Runnels*, *supra*, 432 F.3d at 1109 [citations omitted].)

The Seventh Circuit in *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 517-518, also applied this analysis, requiring the prosecutor to explain his reasons:

> *Johnson* made clear that "the *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process . . . . The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." Here, the starkly disproportionate use raises suspicions of discrimination that were obvious to the trial judge, and rather than speculate as to reasons for it, as the government would have us do, *Batson* and *Johnson* require that we simply ask the prosecutor for those reasons.
>
> After *Johnson* and *Miller-El II*, however, it is clear that this is a very narrow review. The Supreme Court made clear that the persuasiveness of the constitutional challenge is to be determined at the third *Batson* stage, not the first, and has rejected efforts by the courts to supply reasons for the questionable strikes. See, e.g., *Johnson*, 125 S. Ct. at 2414-18 (finding prima facie case established even though trial judge's examination of the record convinced him that the

prosecutor's strikes could be justified by race-neutral reasons); *Miller-El II*, 125 S. Ct. at 2332 (noting that a *Batson* inquiry is not a "mere exercise in thinking up any rational basis").

That is not to imply that the government in fact lacked legitimate non-discriminatory reasons for the choices it made. Instead, the only question before us is whether the government should be required to articulate its actual reasons for the peremptory challenges. The district court would then determine whether the government's explanation for its challenges is credible. The government's detailed recitation of multiple factors and its weighing of those for each individual prospective juror is more appropriate at the next stages of review. (*United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 517-518 [most citations omitted].)

In *McGahee v. Alabama Department of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1259-1270, the court found both a prima facie case of discrimination and intentional discrimination, in part because the prosecutor struck all the blacks, an "astonishing pattern," "leaving an all-white jury in a county which was fifty-five percent African-American," and partly because the trial judge never assessed the plausibility of the prosecutor's reasons:

In discussing the sort of evidence that should be considered by a court during a *Batson* challenge, the Supreme Court stated that "[f]or example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. There can be no clearer "pattern" than the total removal of all African-American jurors from the venire by the State. As *Batson* explained: "[t]otal or seriously disproportionate exclusion of Negroes from jury venires is itself such an unequal application of the law . . . as to show intentional discrimination." *Id.* at 93 . . . (*McGahee v. Alabama Department of Corrections*, *supra,* 560 F.3d at 1265.)

Thus, Mr. Rhoades strongly urges this Court to follow the above law and abandon its occasional practice of affirming a finding of a failure to establish a prima facie case of group bias at *Batson's* step one when the record "suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (RB at 189, citing *People v. Young* (2005) 34 Cal.4th 1149, 1172-

1174; *People v. Farnam* (2002) 28 Cal.4th 107, 134-135.) *Johnson v. California, supra*, 545 U.S. at 170-172, has emphatically disapproved of the practice of post hoc reasoning that this Court has apparently adopted. (See *People v. Davis* (2009) 46 Cal.4th 539, 584; *People v. Hoyos* (2007) 41 Cal.4th 872, 900-903; *People v. Guerra* (2006) 37 Cal.4th 1067, 1101-1104.)

There are several cases where this Court has affirmed a finding of no prima facie case of group bias at *Batson's* step one when the prosecutor explained at least one of his peremptory challenges, unlike in Mr. Rhoades' case, where the prosecutors explained none of their challenges. (See *People v. Garcia* (2011) 52 Cal.4th 706, 748-750 [rejecting *Wheeler/Batson* challenge in part because the record contained gender-neutral reasons supporting each of the three peremptory challenges against women, two of which the prosecutor explained]; *People v. Bonilla* (2007) 41 Cal.4th 313, 346-349 [finding gender-neutral reasons in the record for the excusal of numerous female prospective jurors where prosecutor explained only one such strike and trial court found no prima facie *Wheeler/Batson* case]; *People v. Panah* (2005) 35 Cal.4th 395, 439-442 [same].)

The state claims that "nothing in *Wheeler* suggests that the removal of all members of a cognizable group, standing alone, is dispositive on the question of whether a defendant has established a prima facie case of discrimination." (RB at 188-189.) Not exactly. That all Black prospective jurors were struck from the jury box is a significant factor in determining the existence of a prima facie case. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698, fn. 4; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257 [a prima facie case existed where the prosecutor used four peremptory challenges to exclude all four blacks in the jury pool]; *United States v. Alcantar* (9th Cir. 1987) 832 F.2d 1175,

1177 [prima facie case existed where the prosecutor challenged all three Hispanics in the jury pool].)

A defendant can make a prima facie showing based on a statistical disparity alone, and the Ninth Circuit has found or assumed the existence of a prima facie case in a number of cases with less striking disparities. (*Williams v. Runnels supra*, 432 F.3d at 1107 [a prima facie *Batson* violation where the prosecutor used three of his first four peremptory challenges to remove African-Americans from the jury and only four of the first 49 potential jurors were African-American]; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1453-1454 [three of nine Hawaiian jurors stricken]; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 822 [two of four African-American jurors stricken].)

Other circuits have found an inference of discrimination under similar circumstances. (See *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255-256 [finding prima facie case of discrimination when prosecutor struck four of seven minority venirepersons]; *Overton v. Newton* (2d Cir. 2002) 295 F.3d 270, 279; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.3d 912, 918-919; *United States v. Johnson* (8th Cir. 1989) 873 F.2d 1137, 1140 [considering the disproportionate rate of strikes against blacks to be relevant evidence of discrimination]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-1086 [government's use of five of its six (83 percent) allowable peremptory challenges to strike five of the seven (71 percent) blacks from the jury panel sufficient to establish a prima facie case].)

Under Ninth Circuit law, a "pattern of striking panel members from a cognizable racial group is probative of discriminatory intent, but a prima facie case does not require a pattern because 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Crittenden v. Ayers* (9th

Cir. 2010) 624 F.3d 943, 954, citing *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919, quoting *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902; *see also Snyder v. Louisiana* (2008) 552 U.S. 472, 478; accord *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 904 [holding that a prima facie case was shown where prosecutor struck the only Latino prospective juror as well as the only Latino potential alternate juror].)

Obviously, the total exclusion of African-American jurors is highly relevant in establishing a prima facie case. (*People v. Kelly* (2007) 42 Cal.4th 763, 779-780 [the prosecutor used only one peremptory challenge against an African-American and one African-American became an alternate juror and was later substituted in as an actual juror and, ultimately, became the jury foreperson]; see *People v. Blacksher* (2011) 52 Cal.4th 769, 801-802 [rejecting *Batson* challenge, in part because six African-American jurors ultimately served on the jury].) Similarly, a *Wheeler* motion based only on the excusal of a single African-American prospective juror failed to establish a prima facie case, especially when "another African-American woman then was seated on the jury." (*People v. Taylor* (2010) 48 Cal.4th 574, 614-616; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70; *People v. Hamilton* (2009) 45 Cal.4th 863, 899.) "The small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*People v. Bonilla* (2007) 41 Cal.4th 313, 343; *People v. Howard* (2008) 42 Cal.4th 1000, 1018, fn. 10.)

In *People v. Hartsch* (2010) 49 Cal.4th 472, 486-488, this Court found there was no prima facie showing because "African-Americans were represented on the panel in a proportion roughly equal to their representation in the candidate pool," that is, there were two African-Americans on the panel when the defense made a *Batson* motion after the prosecutor had excused four African-Americans

called to the jury box. By contrast, in Mr. Rhoades' case, the prosecutor excused all four African-Americans -- 100 percent, leaving no blacks on the jury.

After mistakenly citing the overruled case of *People v. Johnson* (2003) 30 Cal.4th 1302, 1325-1326, for the proposition that the removal of all three African-American prospective jurors did not present a prima facie case of discrimination, the state then relies on numerous cases that predated *Johnson, supra*, 545 U.S. 162, and were either implicitly overruled by *Johnson* or do not support the state's arguments. (RB at 188.)

For example, the state relies on *People v. Crittenden* (1994) 9 Cal.4th 83, 119, where this Court held that the trial court properly found that defendant had not made a prima facie showing, "because the prosecutor excused only a single member of that group." (RB at 188.) In Mr. Rhoades' case, however, the prosecutors excused all four black prospective jurors. Moreover, the Ninth Circuit overruled this Court on this point, relying on *Johnson* in holding that the "strong likelihood" standard used by the state courts impermissibly placed on the defendant a more onerous burden of proof than is permitted by *Batson's* standard of "rais[ing] an inference" of discriminatory purpose. (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 954.) The Ninth Circuit used comparative juror analysis in making this determination, after finding that "comparative juror analysis may be employed at step one to determine whether the petitioner has established a prima facie case of discrimination." (*Ibid.,* citing *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149.)

The state also relies on *People v. Howard* (1992) 1 Cal.4th 1132, 1154–1155, which the trial court used in Mr. Rhoades' case as a basis to rule that Mr. Rhoades had not shown a "strong likelihood" of racial discrimination. (RB at 188; 30-RT 9050.) In *Howard*, the court held that the defendant's reliance "solely on

the fact that the prosecutor had challenged the only two Black prospective jurors," out of 11 challenges, was insufficient as the defendant "did not make any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." In contrast, the prosecutors in Mr. Rhoades' case excused all four African-American jurors, using fully one-half of the allowed peremptory challenges, and refused to explain their reasons, and Mr. Rhoades explicitly engaged in comparative juror analysis in attempting to meet his burden of presenting a prima facie case. The trial court, however, rejected Mr. Rhoades' request for more time to do a more complete comparative juror analysis. (30-RT 9037, 9036-9038, 9046-9048.)

The state's thoughtless reliance on *People v. Sanders* (1990) 51 Cal.3d 471, 500, for the proposition that "the removal of all members of a cognizable group is not dispositive on the question of whether a prima facie case has been shown" is revealing. (RB at 188.) That case has been overruled in two significant respects. First, the trial court used the jettisoned "strong likelihood" standard in rejecting the claim that the prosecutor's exercise of his peremptory challenges was based on group bias. (*Id.* at 500-501.) Second, the *Sanders* court used "the standard of giving considerable deference to the determination of the trial court," and held that "we see no good reason to second-guess [the trial court's] factual determination." (*Ibid.*) As the state grudgingly concedes, this is not the standard applicable to Mr. Rhoades' case:

> This Court has recognized that a different standard of appellate review is required in cases predating *Johnson* in which the trial court determined the defendant failed to make a prima facie case of group discrimination. In those cases, the Court may not accord deference to the trial court's finding that no prima facie case has been made, but must be satisfied based on an independent review of the record that the defendant has made

> an insufficient showing at the onset to permit an inference of discrimination. Thus, even if the more stringent standard is applied, "[this Court] review[s] the record independently to 'apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (RB at 186 [citations omitted] [emphasis in original].)

The Ninth Circuit explained that another reason not to accord deference is that the trial court did not make any credibility determinations in refusing to find a prima facie case:

> Although we normally give great deference to a trial court's factual findings regarding purposeful discrimination in jury selection, this deference applies to the court's assessment of the prosecutor's state of mind and credibility. Because the trial judge made no inquiry into the prosecutor's reasons for excluding the African-American venirepersons, we need not defer to the judge's conclusory determination that there was no discrimination. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814, fn. 4, citing *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 826-827.)

Finally, the state cites an old Court of Appeal case, *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536, for the unremarkable proposition that the defendant did not make a prima facie showing based solely on his statement that "'there were only two blacks on the whole panel, and they were both challenged by the district attorney." (RB at 188-189.) More interestingly, that case relied on *People v. Wheeler, supra*, 22 Cal.3d at 280, in setting out four ways by which to show a prima facie case:

> "The defendant may demonstrate systematic exclusion by showing that: (1) the prosecutor has excluded all or most of an identified group from the venire; (2) he has used a disproportionate number of peremptory challenges against members of this group; or (3) the jurors in question have only their group identification in common; or (4) apart from their group identification they are as heterogeneous as the community as a whole." (*People v. Rousseau*, *supra,* 129 Cal.App.3d at 536.)

These alternative ways of establishing a prima facie case of *Wheeler* error were all present in Mr. Rhoades' case. First, the prosecutors excluded all of an identified group from the venire. (RB at 188, citing 30 RT 9040; see also 30-RT 9035, 9047.) Second, they used a disproportionate number of peremptory challenges (50%) against members of this group. (30-RT 9042, 9046, 9010-9015.) Third, the jurors in question have only their group identification in common. (30-RT 9036-9038, 9046-9048; AOB at 162-180.) And, finally, "apart from their group identification they are as heterogeneous as the community as a whole." (*Ibid.*)

As explained above, Mr. Rhoades agrees with the state that "a comparative analysis in a first-stage *Batson/Wheeler* case has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales," and that "such an analysis is not required when the trial court denies the motion in the first stage of the *Wheeler/Batson* review." (RB at 216, 194.) Moreover, this Court has expressed distaste for juror comparison, long before *Johnson*:

> "Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1190, quoting *People v. Turner* (1994) 8 Cal.4th 137, 170.)

In light of the state's imaginative attempt to justify the unjustifiable, Mr. Rhoades believes a reviewing court should not use comparative analysis at a first-stage *Batson/Wheeler* case to *rebut* a prima facie showing. (RB at 189-216.) Moreover, the trial court thwarted Mr. Rhoades' effort to engage in comparative juror analysis – at the prosecutor's urging -- in attempting to meet his burden of presenting a prima facie case that one or more of the female black

jurors were excused based on race and/or sex discrimination. (30-RT 9037, 9036-9038, 9046-9050.) Under these circumstances, Mr. Rhoades believes comparative juror analysis may be appropriate on appeal, but only to provide additional inferences of discrimination. It flaunts the principles laid out in *Johnson* to use comparative juror analysis for the first time on appeal to confirm the trial court's finding that Mr. Rhoades failed to prove a prima facie case that one or more of the female black jurors were excused based on race and/or sex discrimination. (RB at 194-215.) Thus, Mr. Rhoades stands by his opening brief argument with respect to his comparison of the four female, African-American, prospective jurors whom the prosecutor peremptorily excused with the jurors the prosecutors allowed to sit on Mr. Rhoades' jury for his second penalty phase trial. (AOB at 165-180; 30-RT 9016-9019, 9026, 9035.) Mr. Rhoades believes, however, that for this Court to speculate about what reasons the prosecutor might have had would violate due process and well-established United States Supreme Court dictates. (*See Miller-El, supra,* 545 U.S. at 247-248, 252 [stating a court of appeals may not supply a reason for a challenge when the prosecutor's stated reason is insufficient]; *Johnson v. California, supra,* 545 U.S. at 169-173.)

In *Johnson*, the Court reiterated that, to establish an inference, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate." (*Johnson, supra,* 545 U.S. at 169.) "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." (*Ibid.*, citing *Batson*, *supra*, 476 U.S. at 96, quoting *Avery v. Georgia* (1953) 345 U.S. 559,

562.). The *Johnson* Court explained that, although the burden of persuasion remains with the defendant, it is not until the third step of the *Batson* procedure that the persuasiveness of the prosecutor's justification becomes relevant. (*Johnson, supra,* 545 U.S. at 171 & fn. 7.) The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate, and encourages "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." (*Johnson, supra,* 545 U.S. at 172, citing *Hernandez v. New York* (1991) 500 U.S. 352, 358-359 [opn. of Kennedy, J.].)

Therefore, under the above law, this Court should disregard the state's attempt to speculate about "obvious, legitimate race-neutral reasons for challenging each of the four African-American women excused by the People." (RB at 189, 216.) For example, the state essentially claims that "the four women excused by the prosecutor all expressed strong opinions against the death penalty." (RB at 198, 202, 189-193.) This is a distortion of the record, which clearly shows that all four women could impose the death penalty, and had varying opinions, some of which were strongly favorable to the prosecution. (AOB at 165-172.) The state's desperation to make up non-racial reasons is evident when it claims the fact that two of the excluded black jurors mentioned that the criminal justice system may at times have discriminated *against blacks*, as a permissible reason for the prosecutor to excuse them in this case where the defendant was a white man, for whom they believed the justice system would be fair. (RB at 192-193.) The state's claim is illogical, as the cases on which the state rely, unsurprisingly involved black defendants, not white. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, 69-70; *People v. Walker* (1988) 47 Cal.3d 605, 619, 625-626 [third-stage *Batson* review].) It may be worth repeating that a

defendant need not be a member of the excluded group in order to object to the prosecutor's discriminatory use of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 412-416.)

This is not a case which calls for this Court to evaluate the prosecutor's reasons, because the prosecutors were never required to explain their reasons for the dismissals of these black jurors, even though the court invited them to do so. (30-RT 9047.) As the state points out, the prosecutor can excuse potential jurors based on impressions, hunches, or even arbitrary reasons, so long as they are unrelated to impermissible group bias. (RB at 185, citing *People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6.)

"It is true that peremptories are often the subjects of instinct," and that "it can sometimes be hard to say what the reason is." (*Miller-El, supra,* 545 U.S. at 252.) "But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Ibid.*) "While subjective factors may play a legitimate role in the exercise of challenges, reliance on such factors alone cannot overcome strong objective indicia of discrimination." (*Burks v. Borg* (9th Cir.1994) 27 F.3d 1424, 1429.)

Yet, the trial court's ruling of no prima facie case -- at the prosecutor's urging -- precludes this Court from speculating about such reasons, or from ruling on the sincerity of the prosecutor's reasons for striking all the black jurors. (*Johnson, supra,* 545 U.S. at 172; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359 [en banc] ["Once an inference of race-based challenges has been established, the court need not accept any nonracial excuse that comes along," citing *Johnson v. Vasquez* (9th Cir.1993) 3 F.3d 1327, 1331].) Moreover, such speculation is impermissible, because the "'best evidence of the intent of the

attorney exercising a strike is often that attorney's demeanor.'" (*Snyder v. Louisiana, supra*, 552 U.S. at 477, quoting *Hernandez v. New York, supra*, 500 U.S. at 365; see *Thaler v. Haynes* (2010) 559 U.S. __, 130 S.Ct. 1171, 1175, 175 L.Ed.2d 1003.)

In several cases where the prosecutors explained their challenges, this Court "assume[d] without deciding that defendant established a prima facie case by pointing out that the prosecutor used three of the 18 peremptory challenges she exercised to strike all of the African-American prospective jurors called to the jury box, resulting in no African-Americans serving on defendant's jury." (*People v. Cowan* (2010) 50 Cal.4th 401, 447-448, citing *People v. Salcido* (2008) 44 Cal.4th 93, 136-137; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1106 [assuming prima facie case established where prosecutor used five of 15 peremptory challenges to excuse the only African-Americans called to the box]; *People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13 [the "better practice" is for the trial court to request that the prosecution offer its race-neutral explanation for any contested peremptory challenge, despite the possibility the court will not find a prima face case, in order to assist trial and appellate courts in evaluating the challenge].) This line of authority is inapplicable in Mr. Rhoades' case because the trial court refused to ask, and the prosecutors refused to explain their peremptory challenges. (30-RT 9046-9047.)

For the above reasons, the voir dire record in this case was sufficient to permit an *inference* that the prosecutors excused at least one of the challenged jurors on the basis of race, establishing a prima facie case that required them to explain their reasons for the challenges. (See *Snyder v. Louisiana, supra,* 552 U.S. at 478.) Mr. Rhoades urges this Court to reconsider its apparent policy of routinely rejecting every claim of discriminatory jury selection that has come

before it in more than 50 opinions since the June, 2005, ruling in *Johnson v. California*, whether involving claims of error at the first step or at the third step of the *Batson* process.[5]

It is hard to imagine a case that would present a stronger prima facie showing at the first step of the *Batson* analysis than Mr. Rhoades' case. This Court's rulings in the opinions cited seemingly ignore the Supreme Court's admonition in *Johnson* that the burden of establishing a prima facie case at the

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[5] *People v. McKinzie*, 54 Cal.4th ___, 2012 Cal. LEXIS 7248 (Aug. 2, 2012); *People v. Riccardi*, 54 Cal. 4th 758 (2012); *People v. Streeter*, 54 Cal. 4th 205 (2012); *People v. Thomas*, 53 Cal.4th 771 (2012); *People v. Elliott*, 53 Cal.4th 535 (2012); *People v. Dement*, 53 Cal.4th 1 (2011); *People v. Clark*, 52 Cal.4th 856 (2011); *People v. Blacksher*, 52 Cal.4th 769 (2011); *People v. Garcia*, 52 Cal.4th 706 (2011); *People v. Vines*, 51 Cal.4th 830 (2011); *People v. Jones*, 51 Cal.4th 346 (2011); *People v. Thomas*, 51 Cal.4th 449 (2011); *People v. Booker*, 51 Cal.4th 141 (2011); *People v. Cowan*, 50 Cal.4th 401 (2010); *People v. Hartsch*, 49 Cal.4th 472 (2010); *People v. Lomax*, 49 Cal.4th 530 (2010); *People v. Thompson*, 49 Cal.4th 79 (2010); *People v. Taylor*, 48 Cal.4th 574 (2010); *People v. Mills*, 48 Cal.4th 158 (2010); *People v. Taylor*, 47 Cal.4th 850 (2009); *People v. Davis*, 46 Cal.4th 539 (2009); *People v. Hawthorne*, 46 Cal.4th 67 (2009); *People v. Hamilton*, 45 Cal.4th 863 (2009); *People v. Carasi*, 44 Cal.4th 1263 (2008); *People v. Cruz*, 44 Cal.4th 636 (2008); *People v. Lenix*, 44 Cal.4th 602 (2008) (non-capital); *People v. Salcido*, 44 Cal.4th 93 (2008); *People v. Watson*, 43 Cal.4th 652 (2008); *People v. Lewis*, 43 Cal.4th 415 (2008); *People v. Howard*, 42 Cal.4th 1000 (2008); *People v. Kelly*, 42 Cal.4th 763 (2007); *People v. Zambrano*, 41 Cal.4th 1082 (2007); *People v. Hoyos*, 41 Cal.4th 872 (2007); *People v. Thornton*, 41 Cal.4th 391 (2007); *People v. Bonilla*, 41 Cal.4th 313 (2007); *People v. Stevens*, 41 Cal.4th 182 (2007); *People v. Lancaster*, 41 Cal.4th 50 (2007); *People v. Bell*, 40 Cal.4th 582 (2007); *People v. Williams*, 40 Cal.4th 287 (2006); *People v. Lewis*, 39 Cal.4th 970 (2006); *People v. Stanley*, 39 Cal.4th 913 (2006); *People v. Ledesma*, 39 Cal.4th 641 (2006); *People v. Johnson*, 38 Cal.4th 1096 (2006) (non-capital); *In re Freeman*, 38 Cal.4th 630 (2006) (habeas corpus proceeding); *People v. Avila*, 38 Cal.4th 491 (2006); *People v. Huggins*, 38 Cal.4th 175 (2006); *People v. Jurado*, 38 Cal.4th 72 (2006); *People v. Guerra*, 37 Cal.4th 1067 (2006); *People v. Partida*, 37 Cal.4th 428 (2005) (non-capital); *People v. Schmeck*, 37 Cal.4th 240 (2005); *People v. Gray*, 37 Cal.4th 168 (2005); *People v. Cornwell*, 37 Cal.4th 50 (2005); *People v. Ward*, 36 Cal.4th 186 (2005).

first step of the *Batson* process is not an onerous one. (*Johnson v. California, supra,* 545 U.S. at 170.) This Court's reasoning and conclusions in the other first-step cases it has decided since *Johnson*, continue to frustrate the purpose behind the *Batson* three-step process by preventing defendants from obtaining access to the totality of relevant evidence, by circumventing the three-step process, by weighing conflicting evidence and inferences and drawing ultimate conclusions at the first step of the process rather than at the third step, by ignoring relevant evidence supportive of an inference of discrimination, by considering evidence and inferences irrelevant to the question to be decided, and by misconstruing or mischaracterizing evidence in the record relevant to the establishment of a prima facie case. While not overtly employing a higher burden of proof as it did before *Johnson*, the ultimate effect of this Court's analysis of first-step cases is the same. Mr. Rhoades simply requests this Court to honor the law as explicated in *Johnson* and *Batson,* and refuse to speculate about what explanations the prosecutors may or may not have had for excusing all the African-Americans from his jury. (*Williams v. Runnels*, *supra*, 432 F.3d at 1108 ["But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis"].)

B. The Prosecutors' Discriminatory Exclusion Of All Four African-American Female Jurors Is Reversible Per Se, Because A Remand To Permit The Prosecutor To Explain Would Be Futile In Light Of The Trial Judge's Death And The Delay Of More Than A Decade

The state does not challenge Mr. Rhoades' argument that if the trial court committed *Wheeler/Batson* error, reversal of the judgment of death is required.

(RB 216.) Therefore, Mr. Rhoades stands by his opening brief. (AOB at 197-198.)

This Court and the Ninth Circuit have held that a remand for a further hearing may be the appropriate remedy for a *Batson* error with respect to a first-stage prima facie showing. (AOB at 197-198; see *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 923 [remanding for completion of the *Batson* steps]; *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 906 [same].)

This Court in *People v. Johnson*, *supra,* 38 Cal.4th at 1103-1104, stated that upon remand, the trial court:

> should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenges. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment.

Justice Werdegar, however, explained that "the trial court may well decide that neither it nor the parties can reliably reconstruct events from so long ago, notwithstanding the existence of the jury questionnaires and verbatim transcript of the jury selection proceeding." (*Id.* at 1106 [conc. opn. of Werdegar, J.].)

In Mr. Rhoades' case, it would be futile to remand because the death of the trial judge will make it difficult for the state to carry its burden of proof, such that there is no "realistic possibility" that their reasons for exercising these four strikes "could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Snyder v. Louisiana, supra,* 552 U.S. at 485-486.) Here, it will be difficult for a new judge to reliably determine whether

the prosecutors exercised any of these four peremptory challenges against the black jurors in a discriminatory manner. (*Thaler v. Haynes, supra,* 130 S.Ct. at 1175 [judge may rule on sincerity of prosecutor's reasons without having presided over the voir dire; the "'best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor'"].)

For all these reasons, Mr. Rhoades believes that automatic reversal of the death sentence for this error is required. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1105 [conc. opn. of Werdegar J.] [because "*Wheeler* was based on state law, nothing we decide today implicates the rule of automatic reversal this court has applied for state constitutional *Wheeler* error"].)

X. THE COURT VIOLATED MR. RHOADES' FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY DENYING MR. RHOADES' CHALLENGE TO EXCUSE A JUROR FOR CAUSE WHO SERVED ON THE JURY

The state contends that the trial court properly denied Mr. Rhoades' challenge to Juror # 88. (RB at 217-223.) First, the state contends that Mr. Rhoades failed to preserve this claim for appeal because he did not exhaust his peremptory challenges or express dissatisfaction with the jury ultimately selected, as required under *People v. Bonilla* (2007) 41 Cal.4th 313, 339. (RB at 217.) Mr. Rhoades concedes that he did not exercise a peremptory challenge against Juror No. 88 (10) and exercised only 16 of his 20 peremptory challenges leaving him with 4 remaining peremptory challenges when he accepted the jury. (29 RT 8935; 30 RT 9015-9063.) The state, however, is mistaken that "there is no indication in the record that he notified the trial court that he was dissatisfied with the jury that was selected to determine his penalty." (RB at 217, citing 30 RT 9058, 9063.) Mr. Rhoades moved to excuse Juror # 88 for cause. (28-RT

8446-8451.) Mr. Rhoades also made two *Batson/Wheeler* motions. (30-RT 9016-9020, 9026-9027.) To require more "indication" that Mr. Rhoades was dissatisfied with the jury would be to exalt form over substance. Moreover, as Justice Werdegar explained, "the issue may be deemed preserved for appellate review if an adequate justification for the failure to satisfy these rules is provided." (*People v. Mills* (2010) 48 Cal.4th 158, 186, fn. 8, citing *People v. Wilson* (2008) 43 Cal.4th 1, 34 [conc. opn. of Werdegar, J.].)

The United States Supreme Court has held that a trial court's erroneous refusal to strike a juror for cause does not violate a defendant's Fifth Amendment right to due process by impairing his right to the full complement of peremptory challenges to which state law entitled him, because a defendant is not "forced" to use a challenge. (*United States v. Martinez-Salazar* (2000) 528 U.S. 304, 314-317.) Instead, the defendant may choose "the option" of letting the juror sit on the jury and pursue a Sixth Amendment challenge on appeal. (*Id.* at 315.) Here, Mr. Rhoades took this risky approach and left this biased juror on the jury, apparently in the hope and expectation that the courts would uphold his Sixth Amendment challenge on appeal. Mr. Rhoades contends that this tactic is an adequate justification for the failure to use one of his peremptory challenges to excuse Juror # 88 whose rabid pro-death penalty views would "prevent or substantially impair" her ability to be fair to Mr. Rhoades.

The state next claims that "while this juror tended to lean toward the death penalty based on the early information provided to her, voir dire clarified that she would listen and consider all the evidence in aggravation and mitigation and not predispose herself to voting for the death penalty." (RB at 223, 221-223.) Mr. Rhoades disagrees.

Nothing Juror # 88 said during the court's attempted rehabilitation contradicted her previous statements. In her jury questionnaire she agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts. (21-CT 6075.) In voir dire, she reiterated that "because a child was involved," it would be difficult for her *honestly* to consider life without possibility of parole. (28-RT 8339-8440.) If Mr. Rhoades did not prove to her that LWOPP was an appropriate sentence, she would "have to" vote for death. (28-RT 8440.) She also reaffirmed she was leaning towards the death penalty based on the crimes Mr. Rhoades had been convicted of, though she said she "would have to listen to everything first before I could definitely say for sure." (28-RT 8442, 8446, 8450; see also RB at 208-212.) The state does not dispute the factual record of this juror's bias, but simply argues some of her answers were "equivocal." (RB at 218-223; 28-RT 8446-8449.) Mr. Rhoades disagrees. The overall record clearly indicates that Juror # 88 was disingenuous when she said she would consider all of the evidence; she had already committed herself to the proposition that a child sex/murder would automatically cause her to vote for the death penalty. (21-CT 6075; 28-RT 8339-8440.)

The state claims that *People v. Boyette* (2002) 29 Cal.4th 381, 416-418, is distinguishable. (RB at 221-222.) Not so. In *Boyette*, this Court reasoned that the biased juror was strongly in favor of the death penalty, indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and felt that an offender (such as the defendant in that case) who killed more than one victim should automatically receive the death penalty. (*Boyette*, *supra*, 29 Cal.4th at 418; RB at 221-222.)

Similarly, juror # 88 clarified on voir dire that if Mr. Rhoades did not prove to her that LWOPP was an appropriate sentence, she would "have to" vote for death, which was consistent with her jury questionnaire where she agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts. (21-CT 6075; 28-RT 8440.)

Death is not the default option unless Mr. Rhoades could prove to this biased juror that LWOPP was the appropriate sentence. The biased attitudes in both cases are virtually the same. Unlike *Boyette, supra*, 29 Cal.4th at 416-419, where this Court found the error in failing to excuse the objectionable juror was harmless because the juror did not sit on the jury, Juror # 88 sat on Mr. Rhoades' jury.

The state claims that Mr. Rhoades is complaining about the deprivation of a peremptory challenge, but Mr. Rhoades did not use a peremptory challenge to excuse this biased juror. (RB at 223; AOB at 202-203.) Mr. Rhoades has always relied on *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315, which ruled:

> After objecting to the District Court's denial of his for cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice. (*Ibid.*)

Unlike *Martinez-Salazar*, Mr. Rhoades made the choice to pursue a Sixth Amendment challenge on appeal, rather than using a peremptory challenge at trial. The jury selection process used at Mr. Rhoades' trial resulted in a denial of his state and federal constitutional rights not only to an impartial jury, but also the denial of a jury that was drawn from a representative cross-section of the

community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528, 530.) In "the special context of capital sentencing" (*Lockhart v. McCree* (1986) 476 U.S. 162, 182), the court's refusal to grant Mr. Rhoades' challenge for cause to Juror # 88, who sat on Mr. Rhoades' jury, skewed the sentencing process and rendered it unfair, unreliable, unrepresentative, and unconstitutional.[6] A defendant who is convicted of a crime by a jury including even one biased member is entitled to a new trial. (*United States v. Martinez-Salazar, supra,* 528 U.S. at 316.)

XI. THE FEDERAL AND STATE CONSTITUTIONS BAR THE RE-TRIAL OF THE PENALTY PHASE OF A CAPITAL CASE AFTER THE JURY IN THE FIRST PENALTY TRIAL WAS UNABLE TO REACH A UNANIMOUS VERDICT

The state correctly notes that after Mr. Rhoades filed his opening brief, this Court rejected the argument that retrial of the penalty phase following a deadlock by the first jury offends the constitutional proscription against cruel and unusual punishment. (RB at 224-226; *People v. Taylor* (2010) 48 Cal.4th 574, 633-634.) The *Taylor* Court, citing *Trop v. Dulles* (1958) 356 U.S. 86, 101, held that "California's asserted status as being in the minority of jurisdictions worldwide that impose capital punishment' does not establish that our death penalty scheme per se violates the Eighth Amendment .... Likewise here, that California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.'"

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[6] Mr. Rhoades inadvertently stated once that the court refused to "permit appellant's peremptory challenge to Juror # 88," when, in context, it is clear that Mr. Rhoades is contesting the court's refusal to permit Mr. Rhoades' challenge for cause to Juror # 88. (AOB at 203.)

The *Taylor* court, however, failed to engage in an "evolving standards of decency" analysis under the Eighth Amendment. Even if *Europe's* universal abandonment of the death penalty is not controlling or even relevant in identifying the "evolving standards" in this country – but see *Roper v. Simmons* (2005) 543 U.S. 551, 575 ["the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"] – that is hardly grounds for concluding that being one of the handful of *American* death penalty jurisdictions to permit penalty retrials is "likewise" irrelevant. (See, e.g. *Kennedy v. Louisiana* (2008) 554 U.S. 407, 419-421 [that 44 states do not authorize the death penalty for rape of a minor is the *sine qua non* of the evolving standards inquiry that leads the Court to declare death unconstitutional in that instance] *Roper v. Simmons*, *supra,* 543 U.S. at 567-568 ["A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment"].)

Under the Eighth Amendment's "evolving standards of decency" approach, this Court should reconsider and find that the Eighth Amendment bars the retrial of a penalty phase after the jury is deadlocked. The clearest objective evidence of contemporary values and evolving standards of decency is the legislation enacted by the various state legislatures. The overwhelming majority of the states with death penalty laws prohibit such retrials and this Court should adopt that view as an appropriate interpretation of the Eighth Amendment's applicability to the retrial issue.

While *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 rejected the argument that the double jeopardy clause or the due process clause barred the State from retrying a penalty phase after the first jury was unable to reach a unanimous verdict, it did not address the Eighth Amendment issue Mr. Rhoades

now raises. The Eighth Amendment's evolving standards of decency require that the state be limited to one opportunity to present its case for death to a jury. If the original jury cannot reach a unanimous verdict of death, twenty seven states and the federal government have stated that the death penalty should not be imposed upon the defendant. The jury should be discharged and the defendant should be given a sentence of life imprisonment without parole.

To paraphrase the language in *Green v. United States* (1957) 355 U.S. 184, 188, repeated attempts to convince a jury to return a death verdict, enhances the possibility that even though the defendant's crime warrants a life sentence, he may be sentenced to death. Therefore, Mr. Rhoades urges this Court to reverse his death sentence by finding that retrial of the penalty phase after a hung jury violates the Eighth and Fourteenth Amendments.

XII. THE TRIAL COURT'S DENIAL OF FUNDING TO DO MITOCHONDRIAL DNA TESTING ON THE BLOOD ON MR. RHOADES' SHIRT AND THE FINGERNAIL SCRAPINGS UNDER MICHAEL'S FINGERNAILS, AND THE COURT'S REFUSAL TO PERMIT MR. RHOADES TO SHOW THAT MITOCHONDRIAL DNA TESTING WAS ACCEPTABLE IN THE SCIENTIFIC COMMUNITY, AND THE COURT'S REFUSAL TO ALLOW COMMENT ON THIS LACK OF EVIDENCE, VIOLATED MR. RHOADES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION

A. The Court's Denial Of Funding To Do Mitochondrial DNA (mtDNA) Testing Deprived Mr. Rhoades of Due Process

The state argues that Mr. Rhoades was never "precluded from making the required showing concerning mtDNA testing," and the trial court "repeatedly informed appellant that the trial court was open to hearing and accepting evidence in support of appellant's motions concerning DNA." (RB at 232-233,

citing 30 RT 9247, 9258-9259; 31 RT 9405-9406; 39 RT 11740.) To say that Mr. Rhoades was not denied funding to do mitochondrial DNA testing is a curious interpretation of the record, if not an outright distortion.

The state inconsistently argues that, under Penal Code section 987.9, only another judge ruled on the funding requests, as if Mr. Rhoades had not challenged that ruling, or as if that fact absolves the trial judge of its failure to act. (RB at 237.) Mr. Rhoades, however, did not limit his argument to the trial court, but to the denial of his request for funding by both judges. (AOB at 223.) Mr. Rhoades argued that "the court" erred in "refusing to fund mtDNA testing of the hairs and fingernail scrapings in this case," and that the erroneous denial of his request for funds for expert or investigative assistance violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment." (AOB at 223.)

Here is the factual basis for Mr. Rhoades' argument: On October 5, 1998, in an in camera hearing, Mr. Rhoades complained to the trial court that the funding court had denied funds for a DNA expert, so he could do mtDNA testing on pubic hair and fingernail scrapings and testing on fibers. (22-RT 6711-6719.) On December 23, 1998, the 987.9 court denied funding for serology and pubic hair testing for Gary Harmor to do PCR-DNA testing on fingernail scrapings, and denied funding to do mtDNA testing on pubic hair, four on Michael's sweatshirt and one under his t-shirt. (43-RT 12780-86, 12797; 10-CT 2863-64; Exhibits 34, 41.) On February 8, 1999, the trial court denied funding for mtDNA testing, particularly because the funding judge denied it and the Third District had denied a writ. (31-RT 9368; 14-CT 4049-4053.)

On February 10, 1999, Mr. Rhoades requested funding to fly his DNA expert, Mr. Beaver, to Sacramento for a 402 hearing on mtDNA, as the prosecutor objected to his telephone testimony. (42-RT 12798-99.) Mr. Beaver

was expected to testify that mtDNA testing had been around since about 1991 and existed in 1995 or 1996, and was reliable to a 99.5% certainty. (42-RT 12800-04.) Mr. Rhoades wanted to argue that the state refused to do mtDNA testing to avoid discovering the true identity of Michael's killer. (42-RT 12804.) Mr. Rhoades wanted to cross-examine prosecution expert witnesses, Bentley and Duda, about why they did not consider or do mtDNA testing of evidence. (42-RT 12805.)

The court ruled that it would not take telephone testimony and denied Mr. Rhoades' request to permit him to argue about the lack of mtDNA testing of the evidence. (31-RT 9404, 9406.) The court said its ruling was without prejudice to renewing if Mr. Rhoades wanted to provide the court more information. (31-RT 9405.) The court reiterated that it would not order funding for mtDNA testing, but would not rule on whether Mr. Rhoades could do it. (31-RT 9413-14.) On March 2, 1999, Mr. Rhoades told the court that the funding judge had denied Mr. Rhoades' request for funds to do DNA testing on the fingernail scrapings. (36-RT 10821-24.) The court stated it did not need to make a ruling on the DNA issue yet. (38-RT 11663.)

On March 10, 1999, the court ruled that Mr. Rhoades was entitled to comment that there was no DNA evidence, but the prosecutor was entitled to comment that he had delivered the physical evidence to the defense. (39-RT 11755.) Mr. Rhoades agreed, but argued that he should be entitled to "present our minute order that says that I requested funding to do DNA testing of fingernail scrapings. And . . . that funding was denied." (39-RT 11758-59, 11762.) Mr. Rhoades explained that the 987.9 funding judge denied him funds in November and December "on that specific issue of trying to get the mitochondrial testing for the fingernail [scrapings] and for the pubic hair." (39-RT 11767.) In short, both

the funding and trial courts erred in repeatedly refusing Mr. Rhoades' requests for funding to do mtDNA testing on hairs and fingernail scrapings.

B. Recent Scientific Developments Established That mtDNA Analysis Was Scientifically Accepted At The Time Of Retrial

The state also argues Mr. Rhoades failed to present sufficient, competent evidence to show that mtDNA testing was reliable and accepted in the scientific community, and asserts without citation to authority, that the prosecution "should not be held responsible for conducting a method of DNA testing which was virtually unheard of and was certainly not a generally accepted means of testing." (RB at 233-237.) Mr. Rhoades disagrees. Mitochondrial DNA analysis had been established as reliable in 1996, three years before the time of the second penalty trial. Later appellate cases affirmed that mitochondrial DNA analysis was scientifically accepted as of 1996. (*State v. Council* (S.C. 1999) 515 S.E.2d 508, 516-517; *State v. Pappas* (2001) 256 Conn. 854, 875-890, 776 A.2d 1091; *State v. Scott* (Tenn. 2000) 33 S.W.3d 746, 758-761; *People v. Klinger* (N.Y.Co.Ct. 2000) 713 N.Y.S.2d 823, 823-828.) In 1996, the FBI started using mitochondrial DNA analysis. (*FBI Clarifies Reporting on Microscopic Hair Comparisons Conducted by the Laboratory*, News Release, July 13, 2012.)

Moreover, a defense expert witness, Lisa Calandro, a supervisor of the DNA Analysis Section of Forensic Analytical, testified that mtDNA analysis had been going on since before 1994, and she did not know of any controversy regarding the scientific acceptance of mtDNA testing. (31 RT 9371-9377.) In addition, Mr. Rhoades made an offer of proof that a second expert, Mr. Beaver, would testify that mtDNA testing had been used since about 1991 and existed in 1995 or 1996, and was reliable to a 99.5% certainty, but the court prevented Mr. Beaver from testifying. (42-RT 12798-12804.)

The state claims that the trial court did not err in ruling that Mr. Beaver could not testify at an Evidence Code section 402 hearing by telephone, even though the courts refused to pay to fly Mr. Beaver to Sacramento for a 402 hearing on mtDNA analysis. (RB at 233-234; 42-RT 12798-99.) The state is in error. Under these circumstances, Mr. Rhoades' argument was certainly not "patently false," as the state alleges, that Mr. Rhoades was precluded from presenting Mr. Beaver as an expert witness about mtDNA, and he was precluded from making the required showing concerning mtDNA testing. (RB at 232-233.) Either the court erred in denying the request for Mr. Beaver to testify by telephone or erred by denying Mr. Rhoades' request to fly Mr. Beaver to Sacramento. Either way, Mr. Rhoades was denied an opportunity to present evidence about the reliability of mtDNA testing.

The state's claim that Evidence Code section 711 justified the court's refusal to take a witness's testimony over the telephone for no good reason (as well as its refusal to pay for the witness' travel) is disingenuous. (RB at 230.) Evidence Code section 711 provides that "[a]t the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine." Evidence Code section 780 directs the trier of fact to evaluate witness credibility by, among other methods, observing the witness's demeanor "while testifying" as well as his or her "attitude toward the action in which he testifies or toward the giving of testimony." (*Elkins v. Superior Court (Elkins)* (2007) 41 Cal.4th 1337, 1358-1359.) Neither of these statutes prohibits live testimony over the phone – particularly in a pretrial hearing -- where the witness can be cross-examined and his or her speech can be heard.

In conclusion, Mr. Rhoades was entitled to an analysis of the fingernail scrapings, pubic hairs, and blood on his shirt, or at least to comment on the

prosecution's failure to conduct such testing. In light of the prosecutor's misuse of the blood, hair, and fingernail evidence, the requested mtDNA testing would have raised a reasonable probability that the verdicts or sentence would have been more favorable if the results of DNA testing had been favorable and available before his second penalty phase.

C. The Court Erred In Refusing To Permit Mr. Rhoades To Comment On The Prosecutor's Failure To Subject Certain Critical Evidence To DNA Testing

The state also supports the trial court's restriction on defense counsel's closing argument concerning the prosecution's failure to conduct mtDNA testing:

> Because the fact of mtDNA testing was inadmissible, the trial court properly ordered appellant not to comment on DNA testing or the prosecution's "failure" to conduct such testing during closing argument. Logically, the prosecution should not be held responsible for conducting a method of DNA testing which was virtually unheard of and was certainly not a generally accepted means of testing. (RB at 236-237.)

Mr. Rhoades disagrees for the reasons explained above and because he was prevented from proving the scientific validity of mtDNA testing of biological evidence by the court's refusal to provide money to permit him to conduct such testing. Therefore, defense counsel had a right to comment on the fact that the prosecution had not done such testing that might have led to highly reliable evidence either exonerating or inculpating Mr. Rhoades. (See AOB, Arg. XIII, D.; *People v. Ford* (1988) 45 Cal.3d 431, 442-447.) Moreover, the prosecutor committed egregious misconduct by misleading the jury that appellant could have subjected the bloody shirt, the fingernail scrapings taken from Michael, and the pubic hairs found on the blanket to DNA testing, when in fact the prosecutor knew the court had denied appellant the funds to conduct such DNA testing of the evidence in this case. (See 41-RT 12389, 12402-03; AOB, Arg. XIII, D.) The

prosecutor also told the jury that the fingernail scrapings and other evidence was released to the defense, which would have raised the inference that the defense did not reveal the test results of their testing because they were unhelpful. (*Ibid.*)

XIII. THE PROSECUTORS' EGREGIOUS AND PERVASIVE MISCONDUCT IN THEIR PENALTY PHASE ARGUMENTS VIOLATED MR. RHOADES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION AND WAS NOT CURED BY THE COURT SUSTAINING OBJECTIONS, WHICH THE PROSECUTOR IGNORED

A. The Prosecutor's Use Of Mr. Rhoades' "Normal Childhood," As A Factor In Aggravation Was Unconstitutional

The state initially argues that Mr. Rhoades failed to object, and therefore forfeited this argument for consideration on appeal. (RB at 239.) Mr. Rhoades disagrees. (See AOB at 251-252.) The state also argues the "prosecutor never argued that appellant's background and childhood should be considered as factors in aggravation ... [but simply] urged the jury to find the evidence of appellant's childhood lacked weight as a mitigating factor." (RB at 241-242.)

Mr. Rhoades believes the prosecutor stepped over the line of lawful advocacy when he told the jury that Mr. Rhoades had a "normal childhood," was simply a "rotten egg," and thus deserved death. (40-RT 12225, 12356; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033 [character evidence of the defendant's background and history -- evidence that did not relate to the circumstances of the crime -- cannot be used affirmatively as a circumstance in aggravation].) The court's refusal to instruct the jury that Mr. Rhoades' background could only be considered as mitigating evidence compounded the error. (See AOB, Arg. XVI, B. at 263-265; 15-CT 4402; 40-RT 12048-50.)

B. The Prosecutor's Argument That The Jury Could Not Consider Or Find "Lingering Doubt" Because Mr. Rhoades Did Not Call Every Prosecution Witness, And The Trial Court's Terse Instruction, Rather Than Mr. Rhoades' Proposed Instruction, Deprived Him Of His Due Process Right To A Fair Trial

The state argues that the "prosecutor did not argue that the jurors were prohibited from considering appellant's theory of lingering doubt. Rather, he argued that the defense failed to demonstrate lingering doubt with the evidence it presented." (RB at 247.) In other words, the state protests that the prosecutor's argument "cannot be interpreted" as arguing that lingering doubt was impossible to find unless the second penalty jury had heard the entire case the prosecutor presented to the first jury, "and even if it could, appellant suffered no prejudice." (RB at 243-248.) Mr. Rhoades disagrees, and the basis is made patently evident by the prosecutor's arguments specifically and repeatedly stating that "lingering doubt" was impossible for the second penalty jury to consider because it had not heard the entire case the prosecutor presented to the first jury. These arguments are reiterated below.

In its initial closing, the prosecutor argued: "It's not your function to redetermine the guilt." (40-RT 12226.) The prosecutor argued that lingering doubt means you have to "set aside the conviction" and ignore the evidence. (40-RT 12227.) In final closing argument the prosecutor argued:

> He presented little bits and pieces, and there are huge gaps. And you can tell there's huge gaps just by listening to the way he presented it and what he presented.
>
> *Now for you to have a lingering doubt, you have to hear the entire case I put on last year.* (41-RT 12358 [emphasis added].)

The court sustained Mr. Rhoades' objection and ambiguously admonished the jury to "disregard that statement." (41-RT 12358-59.) Yet, the prosecutor persisted with this theme:

> I'm going to read to you from counsel's opening statement. And remember, this is his opening statement.
>
> "So we're going to do -- what we're going to do is we're going to present the prosecution's case to you. They're going to present some, we're going to present the rest."
>
> *So he's admitting that he has to put on the entire case.* (41-RT 12359 [emphasis added].)

The court sustained Mr. Rhoades' objection, but denied his motion for mistrial and denied Mr. Rhoades' request for another admonition. (41-RT 12359-12360.) Yet, the prosecutor persisted:

> I'll give you an example of what the defense did in this case when they tried to put on my case for me. They called Ray Clark. But they didn't put on Charlie Wilber. Okay. Why not? *They're going to put on the whole case, counsel, right? Apparently not. They did not over and over and over again.* (41-RT 12360 [emphasis added].)

The prosecutor's argument about the need for the defense to put on Mr. Wilber borders on the ludicrous, as Mr. Wilber was a tangential witness who was simply with Ray Clark on a balcony about 3:30 to 4:00 p.m. when Mr. Clark said there was a kid that was grabbed and put into a vehicle. Mr. Wilber, however, did not see the child enter the vehicle. He saw a dingy white-looking or a creamy color Toyota four-wheel-drive, which either had a camper shell or was a 4-runner, speeding off on C Street going eastbound. (39-RT 11871-73, 11888-92.) Mr. Wilber said that all he saw was a truck when Mr. Clark pointed it out, but that he had not seen the child so he did not think what he saw was important. (39-RT 11903, 11932.)

After the court denied Mr. Rhoades' request for a mistrial based on the prosecutorial misconduct (41-RT 12362-65), the prosecutor persisted:

> I think if you go back, think of all the people who are logical witnesses the defense didn't present, it's a lot of people. . . .
>
> Okay. I just want you to count up the number of people mentioned in the evidence here who didn't testify. *If you doesn't*

[sic] hear my whole case, how can you have a lingering doubt? (41-RT 12365 [emphasis added].)

The court again sustained Mr. Rhoades' objection and ambiguously admonished the jury to "disregard the last sentence of the argument." (41-RT 12365-12366.) After the court denied another mistrial motion and refused to sanction the prosecutor (41-RT 12370-73), the prosecutor continued to argue that the defense could not prove lingering doubt without calling every witness from the guilt phase. (41-RT 12403-04.)

The record clearly supports Mr. Rhoades' factual basis for his argument: the prosecutor argued that the jury could not consider Mr. Rhoades' theory of lingering doubt because it had not heard the entire case the prosecutor presented to the first jury.

In light of the fact that the state does not challenge the copious law indicating that evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial as a factor in mitigation under Penal Code section 190.3, Mr. Rhoades will not repeat his argument. (AOB, Arg. XIII, B., at 233-244; *People v. Gay* (2008) 42 Cal.4th 1195, 1218-1220, 1226 ["The combination of the evidentiary and instructional errors present[ed] an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt"]; *People v. Slaughter* (2002) 27 Cal.3d 1187, 1219; *People v. Terry* (1964) 61 Cal.2d 137, 146).

The state finally argues:

> Even assuming the prosecutor committed misconduct by arguing that lingering doubt could only be found if the jury was presented with the entire body of evidence admitted during the guilt trial, appellant cannot show he was prejudiced. Defense counsel argued at length there remained "lingering doubt" about defendant's guilt and that this was a factor in mitigation. (40 RT

> 12269-12295; 41 RT 12312-12343.) The instructions given reinforced these concepts. (15 CT 4352, 4356.) Additionally, the trial court sustained the objections by the defense and admonished the jury regarding the prosecutor's argument. (RB at 247-248.)

Mr. Rhoades disagrees. In Mr. Rhoades' case, the prosecutor's argument denigrating lingering doubt, along with the court's terse instruction, failed to permit the jury to give full effect to the lingering doubt mitigation in this case. By permitting the prosecutor to tell the jury it could not find a lingering doubt without hearing the entire guilt phase evidence, the court left the jury with no guidance on this important factor in mitigation. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 189, 206-207.)

Lingering doubt was the most important mitigating factor in Mr. Rhoades' case. It was a mitigating factor based upon the circumstances of the offenses. Mr. Rhoades' death sentence should be reversed, because the prosecutor's argument subverted the lingering doubt theory. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 326-328.) Here, despite the fact Mr. Rhoades presented some guilt-phase evidence, the prosecutors refused to accede to the court's repeated rulings that they should not argue that it was impossible for the jury to have a lingering doubt without hearing every witness that had testified at Mr. Rhoades' first trial. (41-RT 12358-12404.)

Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917; *People v. Lancaster* (2007) 41 Cal.4th 50, 94.) The court's inadequate, cursory instruction on the issue – which did not contradict the prosecutor's argument that it was impossible for the jury to have a lingering doubt -- while refusing Mr. Rhoades' requested instruction, did not cure the error. (AOB at 233, fn. 41; 15-CT 4356; 41-RT 12495, 12059-62.)

In *People v. Gonzales* (2011) 52 Cal.4th 254, 325-326, and *People v. DeSantis* (1992) 2 Cal.4th 1198, 1239-1240, a lingering doubt instruction was not required where the defendants were "able virtually to retry the guilt phase case under the guise of introducing evidence of the circumstances of the crime to the penalty jury [and the] jury was steeped in the nuances of the case, much as if the same jury had decided guilt and penalty." In contrast, the need for a lingering doubt instruction was much greater in Mr. Rhoades' case, because Mr. Rhoades did not retry the entire guilt phase, as the prosecutor repeatedly pointed out.

By divorcing the penalty phase from the guilt phase and presenting Mr. Rhoades' guilt of Michael's murder as a given, Mr. Rhoades was deprived of the possible benefit of whatever lingering doubts the first jury may have possessed as to whether he was the one who murdered Michael. This "impossibility" for the second jury to have a lingering doubt without hearing the entire trial, as the prosecutor repeatedly argued, allowed the second penalty phase jury to do what the first jury was unable to do: unanimously agree on a sentence of death. (See *Smith v. Balkcom* (5th Cir. 1981) 660 F.2d 573, 579-582 [empanelling a second jury for a penalty trial would deprive the accused of the benefits of whatever "whimsical doubt" as to guilt the jury might carry over into its penalty deliberations].)

C. The Prosecutor's Argument That Mr. Rhoades Kidnapped Michael And Failed To Call Logical Witnesses Concerning Michael's Kidnapping Was Prejudicially Erroneous Because That Charge Was Dismissed After The Jury Failed To Convict Mr. Rhoades Of Kidnapping And Kidnapping Special Circumstances

Mr. Rhoades had argued at the penalty retrial that the prosecutor went too far in arguing that Mr. Rhoades failed to call logical witnesses concerning Michael's kidnapping, even though the prosecutor had dismissed the kidnapping and kidnapping special circumstances charges after the first jury could not agree

on a verdict. (AOB at 244-245.) The state claims Mr. Rhoades has forfeited this argument on appeal. (RB at 248.) Mr. Rhoades sufficiently objected. Mr. Rhoades objected and the court sustained objections to the prosecutor's baseless arguments. For example, the prosecutor argued:

> I'll give you an example of what the defense did in this case when they tried to put on my case for me. They called Ray Clark. But they didn't put on Charlie Wilber. Okay. Why not? They're going to put on the whole case, counsel, right? Apparently not. They did not over and over and over again. (41-RT 12360.)

The prosecutor persisted with this line of attack:

> Again, as I said before, they failed to call Charlie Wilber. He gives a little texture to Ray Clark's testimony, doesn't he? Because he placed it at 3:30 to 4 o'clock. Now counsel didn't bring that out. But that was part of the evidence I put on in front of the guilt jury -- (41-RT 12370.)

The court overruled Mr. Rhoades' objection to this argument. (41-RT 12372.) The basis of Mr. Rhoades' objection was obvious to everyone. Any further objection would have been futile, as the prosecutor ignored the court's rulings sustaining Mr. Rhoades' repeated objections. (AOB 251-252; see *People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutor's continual misconduct, coupled with the trial court's failure to rein in her excesses, excused the defendant from continually objecting because any additional attempts on his part to do so would have been futile and counterproductive to his client]; *People v. Friend* (2009) 47 Cal.4th 1, 37 [defense counsel made several unsuccessful objections to other statements made by the prosecutor in closing argument, and the state conceded that any further objections would have been futile].)

The state then argues that "the prosecutor's remarks were fairly responsive to appellant's counsel's closing arguments to the jury regarding Michael Lyons' kidnapping." (RB at 248-250.) Mr. Rhoades disagrees.

As noted above, the prosecutor repeatedly faulted Mr. Rhoades for not presenting "a lot" of logical witnesses and asked the jury "to count up the number of people mentioned in the evidence here who didn't testify." (41-RT 12365.) Among the witnesses the prosecutor faulted Mr. Rhoades for not calling to testify were witnesses who testified about Mr. Rhoades' possible kidnapping of Michael, a theory that Mr. Rhoades' first jury did not accept. Included among these irrelevant witnesses was Charlie Wilber, who "placed [the kidnapping] at 3:30 to 4 o'clock," which allegedly "was part of the evidence [the prosecutor] put on in front of the guilt jury." (41-RT 12370.)

The prosecutor also complained about Mr. Rhoades' failure to depose the ill Dixie Bell "who could theoretically corroborates [sic] that he did all these stops:"

> He could have presented evidence and he had the ability to put on the evidence. You can hold that against him. You can hold that against him. He failed to call logical witnesses. (41-RT 12378.)

The prosecutor's desperate argument was unfounded as it was improper to hold "against him" the fact that Mr. Rhoades did not *again* raise a reasonable doubt about his guilt of the crime of kidnapping and kidnapping special circumstances when those charges were dismissed after the jury could not agree on a verdict.

Here, all the witnesses who could have testified about Mr. Rhoades' alibi that he could not have kidnapped Michael could not reasonably be considered "logical witnesses" that Mr. Rhoades could be faulted for failing to call at the second penalty phase. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1167.) The prosecutors had dismissed the kidnapping charges against him after the first jury

could not reach a unanimous verdict. Mr. Rhoades was not required to demonstrate a lingering doubt as to these dismissed charges.

D. The Prosecutor's Misleading Argument That The Defense Had Not Subjected The Fingernail Scrapings Under Michael's Fingernails To DNA Testing, Even Though The Court Had Denied Mr. Rhoades Funds To Do Such Testing, Deprived Him Of His Due Process Right To A Fair Trial

The state claims that the prosecutor's comments during summation were not "reprehensible lying" by misleading the jury into believing Mr. Rhoades could have conducted DNA testing on his shirt, the fingernail scrapings of Michael Lyons, and the pubic hair found on Michael Lyons' sweatshirt and shirt, all the while knowing that the court denied Mr. Rhoades funding to conduct such tests. The state asserts these were "fair comments on the evidence." (RB at 250-256.) The state also claims that the prosecutor made no mention of the pubic hairs on the blanket and this evidence was not the subject of earlier defense motions regarding DNA testing. (RB at 250, fn. 54.) Mr. Rhoades disagrees.

The prosecutor objected to Mr. Rhoades telling the jury that "there is no evidence before you of DNA testing of the biological evidence in this case." (39-RT 11779, 11775.) The court ruled that it would not permit any evidence on the failure to produce evidence – including DNA testing of the biological evidence -- even in the penalty phase in this death penalty case. (39-RT 11781-82, 11779.)

Mr. Rhoades contended that he should be able to argue "there was no [DNA] testing done that points to my client." (39-RT 11951-53.)

The court refused: "No, you're not going to argue it, sir. I'm going to order you at this time you will not mention that. And you have your remedy of appeal, but you will not mention that, sir, for reasons I've just indicated. Now that's my order." (39-RT 11951-53.)

Mr. Rhoades then offered to stipulate that the prosecutor "turned over the fingernail scrapings to me for examination and that neither side conducted DNA testing." (39-RT 11956-57.) The court thought that was "a very fair offer." (39-RT 11957.)

While preserving his prior objections, the parties agreed to the following stipulation read to the jury:

> "It's hereby stipulated to and agreed to by the parties that the fingernail scrapings taken from the body of Michael Lyons were appropriately transported to Forensic Analytical, DNA laboratory for the defense. The defense had the possession of the scrapings from January 19, 1998 until April 1998, after which time they were returned to the People. The defense did not test the fingernail scrapings." (40-RT 12200-01.)

In closing argument, Mr. Rhoades was able to argue that no one did DNA testing on the fingernail scrapings, but not the failure of anyone to test the hairs by mtDNA testing. (41-RT 12331-32.)

Yet, despite defense objections, the prosecutor did not refrain from his argument that without redoing the entire guilt phase, the jury could not have a lingering doubt of Mr. Rhoades' guilt:

> Okay, counsel makes a big deal about the fingernail scrapings, and he's the one who brought this whole idea up.
>
> Note what counsel did in this regard.
>
> We only know that Bentley had those fingernail scrapings, I believe from Duda, because she said she got it for him. There's no other evidence I believe that it got from Michael's body to Bentley.
>
> It's one of those holes in the cases I was talking about when counsel left.
>
> Duda says she got it from Bentley. And she says,
>
> "Can that sometimes be -- can that be of evidentiary value?"
>
> She said, "Well, sometimes."
>
> Okay. At that point, counsel stops asking questions. He doesn't ask her, Well, why didn't you do it in this case?

> Why didn't he ask that question, okay?
>
> Defense's own expert had it for almost three months. They didn't examine it either. Why didn't he present their expert to tell you why that wasn't done? (41-RT 12389.)

Mr. Rhoades objected, stating the prosecutor knew that he asked for money to get this done. (41-RT 12390.)

The court admonished the jury again:

> I think I should do this, without getting this -- again, ladies and gentlemen, any comment that counsel make is pursuant to the stipulation that the Court read to you during the course of the trial. It's not to go beyond that. And all the remarks by either counsel for the People or the defendant regarding testing prior to the resumption of the argument after this recess are stricken and you're admonished to disregard them. (41-RT 12403.)

The prosecutor committed egregious misconduct by misleading the jury that Mr. Rhoades could have subjected the bloody shirt, the fingernail scrapings taken from Michael, and the pubic hairs found on the blanket to DNA testing, when in fact the prosecutor knew the court had denied Mr. Rhoades the funds to conduct such DNA testing of the evidence in this case and he was not allowed to inform the jury that the court had denied him funding to do such testing. (41-RT 12389.)

Mr. Rhoades' conviction should be reversed, because of the prosecutor's knowing introduction and reliance on the false theory that Mr. Rhoades could have tested the evidence when the court had denied funding. (*People v. Hill* (1998) 17 Cal.4th 800, 823.) The prosecutor's knowing misstatements cannot be deemed harmless beyond a reasonable doubt because the evidence against Mr. Rhoades was entirely circumstantial and there is no way to determine whether any of the jurors were influenced by the prosecutor's mischaracterization of Mr. Rhoades' role in not subjecting critical evidence to DNA testing. The standard of prejudice applicable to the knowing use of perjured testimony is equivalent to the

Chapman v. California (1967) 386 U. S. 18, 24, harmless beyond a reasonable doubt standard. (*United States v. Bagley* (1985) 473 U.S. 667, 679-680 & fn. 9; see *People v. Ruthford* (1975) 14 Cal.3d 399, 408-409.) Under *United States v. Agurs* (1976) 427 U.S. 97, 104, the *Chapman* standard is justified because the knowing use of perjured testimony involves prosecutorial misconduct, and, more importantly, involves "a corruption of the truth-seeking function of the trial process."

Under the *Chapman* standard, the prosecutor's inexcusable lying was not harmless beyond a reasonable doubt. The evidence of Mr. Rhoades' guilt was entirely circumstantial and quite weak. The prosecutor obviously felt the case was weak enough against Mr. Rhoades that he had to resort to deliberately trying to mislead the jury about Mr. Rhoades failing to subject critical evidence to DNA testing, rather than being precluded from doing so. It is nothing if not a "corruption of the truth-seeking function of the trial process" for the prosecutor to try to convince a jury to give Mr. Rhoades the death penalty because there was no DNA testing when the state and the court had refused to fund DNA testing. This reprehensible prosecutorial misconduct deprived Mr. Rhoades of his due process right to a fair trial. (See *Estes v. Texas* (1965) 381 U.S. 532, 540; *Berger v. United States* (1935) 295 U.S. 78, 88 ["The interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done"].)

Here, the prosecutor succeeding in prejudicing the jury by deliberately misleading them about Mr. Rhoades' inability, for lack of funding, to do DNA testing of critical evidence.

E. The Prosecutor's Argument That The Jury Should Conduct Their Own Comparison Of Knife Wounds With A Microscope Was Unconstitutional

The state argues that the prosecutor properly told the jury to get a magnifying glass and make their own comparison of the knife wounds to conclude that the prosecution's own expert, Dr. Dibdin, who conducted the autopsy on Michael, was wrong. (RB at 256-258; 41-RT 12387-88.) Mr. Rhoades disagrees.

The prosecutor improperly asked the jury to second-guess its own expert by acting as experts themselves, inviting the jurors to compare the photographs "under a magnifying glass" to decide for themselves whether they matched, even though the prosecutor did not present another expert to contradict Dr. Dibdin's opinion. (See *People v. Hogan* (1982) 31 Cal.3d 815, 852-853 & fn. 21.)

It is misconduct for jurors to conduct experiments or investigations that enable one or more jurors to receive evidence outside the presence and knowledge of the defendant going to a crucial element in the prosecution or defense case. (*People v. Castro* (1986) 184 Cal.App.3d 849, 853-854 [juror's use of binoculars not in evidence to determine if police officer's testimony was credible was reversible misconduct].)

If the jurors were qualified to draw a conclusion from the photographs of the knife marks as intelligently as an expert -- which of course they were not -- then the opinion testimony of the expert would not have been admissible. (See *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 124.)

The state's reliance on *People v. Turner* (1971) 22 Cal.App.3d 174, 182-183, is misplaced. Mr. Rhoades believes *Turner* was wrongly decided and, in addition, the *Turner* jury simply examined more closely a photograph by use of a magnifying glass. In Mr. Rhoades' case, the prosecutor asked the jurors to

second-guess the autopsy doctor who found that the pattern of serrations on Michael was not consistent with Mr. Rhoades' knife. (14-RT 4258, 4300-4303.) This was not within the realm of the jurors' competence.

F. This Court Should Review The Misconduct Because An Admonition Would Not Have Cured The Harm, Any Further Objections Would Have Been Futile, And It Violated Federal Due Process

The state argues that Mr. Rhoades' claims are forfeited because he "neither objected (or objected on the same grounds) nor requested an admonition," and "presented no evidence that an objection on the grounds challenged on appeal would have been futile." (RB at 258-259.) Not so.

Here, Mr. Rhoades objected numerous times. Any further objections would have been futile and thus the error is not waived. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.) Since the judge sanctioned the most egregious forms of prosecutorial misconduct, any further objection would have been a fruitless gesture, which is not required to preserve an issue for appeal. (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *Douglas v. Alabama* (1965) 380 U.S. 415, 422; *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Moreover, even if that were not the case, the facts are not in dispute and the federal constitutional legal principles are essentially the same as the trial court was asked to apply. Therefore, Mr. Rhoades' constitutional claims are preserved even if presented for the first time on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1288, fn. 15.) Finally, an appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; see also *People v. Smith* (2003) 31 Cal.4th 1207, 1215; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Moreover, the errors

in Mr. Rhoades' case were egregious because, despite any court admonition, the jury could not help but be influenced by the prosecutorial misconduct, as demonstrated above.

G. The Cumulative Effect Of The Prosecutor's Misconduct During Closing Argument Denied Mr. Rhoades His Due Process Right To A Fair Trial, Thus Requiring Reversal

The state argues that there were no errors based on the prosecutor's closing argument, and any possible error was necessarily harmless. Therefore, there was no cumulative effect of penalty phase errors for consideration in this case. (RB at 259.) Mr. Rhoades disagrees.

The prosecutor's repeated instances of improper argument materially damaged Mr. Rhoades' defense and likely poisoned the jury. Prosecutorial misconduct in closing argument can render a trial so fundamentally unfair as to deny defendant due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-645.) The penalty phase is not supposed to be a lynching party; it is supposed to control and direct the base emotions, such as vengeance and hatred, which an ugly crime can induce.

This Court recently condemned the prosecutor's "purely emotional appeals," and "extended and melodramatic oration couched as a letter to the victim" because the "irrelevant information or inflammatory rhetoric . . . divert[ed] the jury's attention from its proper role [of rational deliberation on the statutory factors governing the penalty determination] or invite[d] an irrational, purely subjective response." (*People v. Gonzales* (2011) 51 Cal.4th 894, 952.) It was improper for a prosecutor to ignore the court's rulings, and it was prosecutorial misconduct because the conduct was deceptive and reprehensible. (*Id.* at 920 ["while it was improper for the prosecutor to persist with his line of questioning after the court sustained an objection, this conduct did not amount to the kind of

'deceptive or reprehensible' tactic that rises to the level of prosecutorial misconduct"].)

In *Gonzales*, the prosecutor's improper remarks were not central to the case he presented in closing argument. They were rhetorical flourishes following the prosecutor's initial comments on the defense penalty phase witnesses. (*Id.* at 953.) In Mr. Rhoades' case, the DNA issue, the magnifying glass, and the kidnapping/logical witnesses argument, were central to the prosecution's argument, and cumulatively prejudicial. Second, the evidence of the defendant's involvement in *Gonzales* was quite overwhelming and not circumstantial, unlike in Mr. Rhoades' case. (*Id.* at 953-954.) Finally, defense witnesses in *Gonzales* were themselves implicated in the crime by having failed to take steps to prevent the abuse. (*Id.* at 954.) Nothing like that happened in Mr. Rhoades' case.

The state concedes that the proper standard of prejudice is whether there is a reasonable possibility that the jury would have returned a different penalty verdict absent the prosecutor's statements. (RB at 255-256; AOB at 252-255; see *People v. Gonzales*, *supra*, 51 Cal.4th at 953.) "In evaluating the effects of improper argument at the penalty phase, this Court applies the reasonable possibility standard of prejudice . . . which . . . is the 'same in substance and effect' as the beyond-a-reasonable-doubt test for prejudice." (*Id.* at 953, citing *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The constitutional dimension of the prosecutorial misconduct requires reversal in Mr. Rhoades' case because it clearly was not harmless beyond a reasonable doubt under *Chapman* v. *California*, *supra,* 386 U.S. at 25-26. This is particularly true in this close case, where the first jury could not reach a verdict on penalty, and the second jury deliberated more than five hours over two days. (See ARB, Introduction at 1-4.)

XIV. THE COURT VIOLATED MR. RHOADES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION WHEN IT DENIED MR. RHOADES' REQUEST FOR A CONTINUANCE TO INVESTIGATE NEWLY DISCOVERED EXONERATING EVIDENCE

The state contends that the trial court properly denied Mr. Rhoades' motion to continue, 15 months after the guilty verdict. (RB at 260-261.) The state argues "there was very little likelihood that appellant would be able to obtain meaningful evidence" as a result of the baseless and speculative letter from Raymond on Walton Avenue, or that it could be obtained in a reasonable time. (*Ibid.*) Mr. Rhoades disagrees.

Unlike *People v. Snow* (2003) 30 Cal.4th 43, 76-77, in Mr. Rhoades' case there was no dispute that the letter from Raymond regarding the defendant being set up by Timothy Clark was newly-discovered evidence. Mr. Rhoades was entitled to a reasonable continuance to investigate the matter and to prepare a new trial motion based on the allegations in the letter. This refusal violated Mr. Rhoades' due process right to a fair trial. (See *Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [denial of a continuance may be so arbitrary as to violate due process].)

XV. THE USE OF IDENTICAL FACTS TO CONVICT MR. RHOADES OF SEPARATE CRIMES AND TO IMPOSE A DEATH SENTENCE VIOLATED THE FIFTH AND EIGHTH AMENDMENTS

Mr. Rhoades agrees with the state that he overlooked the fact that the court stayed the concurrent sentences on counts 4, 5, 6, and 7, and stayed the consecutive sentence on count 9. (RB at 261-262; 16-CT 4654-4659; 42-RT 12689-12692.) Mr. Rhoades apologizes for this error. Yet, Mr. Rhoades stands by the remainder of his argument urging this Court to reconsider the *Pearson*

ruling, because having a sentence stayed under Penal Code section 654 is not sufficient to protect a defendant in a capital case. It is simply unfair and unconstitutional under the Fifth and Eighth Amendments to permit a jury in a death penalty case to use identical facts to convict Mr. Rhoades of separate crimes, which they then are permitted to consider in deciding whether he should live or die.

At trial, the prosecution presented no substantial evidence of a lewd act apart from the evidence of a forcible lewd act and sodomy for which Mr. Rhoades was charged and convicted. The prosecution also presented no substantial evidence of a forcible lewd act, apart from the sodomy. In closing argument, the prosecutor argued that one "can't commit sodomy without committing a lewd act." (18-RT 5690.) And in closing argument, the prosecutor also equated sodomy with torture: "Sodomy is a form of torture in and of itself." (18-RT 5695.)

Thus, these four counts -- torture, a lewd and lascivious act upon a child under 14, a forcible lewd act upon a child under 14, and forcible sodomy on a child under 14 years old -- were not understood at trial to be distinct and separate crimes, and thus should not have merely been stayed, but all but one should have been excluded from consideration by the penalty jury.

XIX. THE COURT DENIED MR. RHOADES HIS DUE PROCESS RIGHT TO COMPLETE TRANSCRIPTS

The state concedes that there are missing transcripts and that the parties tried but failed to obtain a settled statement of all the proceedings. (RB at 272-273.) The state argues that Mr. Rhoades has failed to meet "his burden of demonstrating prejudice with regard to his ability to prosecute his appeal." (RB at 272-273.) Mr. Rhoades disagrees. It is impossible to make a compelling argument about prejudice when Mr. Rhoades does not know what the missing

records would have revealed. Without a transcript of everything that counsel and the court talked about, Mr. Rhoades cannot assess the propriety of Mr. Rhoades' conviction. (See *People v. Gaston* (1978) 20 Cal.3d 476, 482-484.) The state's denial of transcripts to an indigent defendant violates due process. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227, 229.)

CONCLUSION

For the reasons stated in this reply brief and his opening brief, Mr. Rhoades respectfully requests this Court to reverse the judgment below and grant him a new trial, or reverse the judgment of death, or, at a minimum, remand for a *Wheeler/Batson* hearing.

Dated: September 9, 2012

Respectfully submitted,

RICHARD JAY MOLLER
Attorney for Mr. Rhoades
By Appointment Of
The Supreme Court

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT'S REPLY BRIEF on September 11, 2012, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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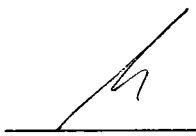
I declare under penalty of perjury that according to Microsoft Word the word count on this brief is 28,990 words and that this declaration was executed on September 11, 2012, at Redway, California.



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