IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. SUSAN DIANE EUBANKS, Defendant and Appellant.	California Supreme Court No. S082915 San Diego County Superior Court No. SCN 069937

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF SAN DIEGO COUNTY

THE HONORABLE JOAN P. WEBER

APPELLANT'S REPLY BRIEF

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Under appointment of the
California Supreme Court

DEATH PENALTY

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Introduction

The first four issues in this appeal address errors that occurred during the early parts of jury selection. They were critical mistakes that ensured an unfair trial before the parties ever met the jury.

First, the jury commissioner whose job was to identify people who were ineligible to sit on the jury, engaged instead in voir dire by excusing prospective jurors for discretionary reasons. The commissioner's wholesale excusal of

dozens or hundreds of people who were not statutorily ineligible violated several of appellant's fundamental constitutional rights. Her actions during this critical stage of the trial took place outside the presence of defense counsel (who requested to be present), the trial judge, or a court reporter.

The next critical issue involves the flawed juror summons which discouraged Hispanics from appearing for jury service. As a result, although the population of jury-eligible Hispanics in the area is approximately 24 percent, less than six percent of those who responded were Hispanic. The flawed summons which discouraged Hispanics from appearing violated appellant's Sixth Amendment right to a jury drawn from a representative cross-section of the community.

Significant errors were also committed at the guilt phase trial, including the admission of unreliable "expert testimony" minimizing the amount of drugs and alcohol in appellant's system at the time of the incident. Finally, appellant challenges several inconsistent rulings at the penalty phase excluding critical defense evidence while admitting unreliable evidence in aggravation.

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Argument

I

Allowing the jury commissioner to use her discretion in the hardship screening process to excuse inconvenienced prospective jurors from jury service violated appellant's fundamental constitutional rights.

Appellant argues the jury commissioner deprived her of several constitutional rights by excusing numerous prospective jurors for discretionary reasons outside of the commissioner's authority or no reason at all. (AOB 25.) The rights include the Sixth Amendment rights to a jury drawn from a representative cross-section of the community, to counsel, to be present at critical stages, and to a public trial, and the Eighth and Fourteenth Amendment right to heightened reliability in capital proceedings.

Respondent argues that appellant has forfeited the issue by failing to object to the use of the jury commissioner to time-qualify the jurors. (RB 56, 60, 62, 63.) Respondent further argues that San Diego jury selection procedures are constitutional, that the jury commissioner has the authority to excuse unqualified candidates and that any errors in the instant case were harmless. (RB 56-75.)

The issues were not forfeited.

Respondent seeks to dismiss appellant's arguments regarding the flawed

juror hardship or time-qualifying screening process by suggesting that the trial court informed appellant that the jury commissioner would prescreen the pool of potential jurors, and that appellant thereafter failed to object to the use of the jury commissioner for this purpose. (RB 56-61.) Respondent cites *People v. Basuta* (2001) 94 Cal.App.4th 370, 393, where defense counsel specifically objected to the use of the jury commissioner to prescreen the jurors. (RB 63.)

However, this argument misses the point. Appellant does not argue that the use of a commissioner to screen potential jurors violates the constitution. Rather, appellant's argument is that the manner in which *this* jury commissioner excused hundreds of prospective jurors in *this* case resulted in profound constitutional errors.

It is true that the trial court expressly informed the parties that it intended to use the commissioner to perform the initial screening. (6 RT 641-642; 14 RT 940.) At that time, defense counsel suggested that appellant should be present for this portion of the voir dire, especially since it was a capital case. (14 RT 940.) But the trial court informed counsel that appellant's presence was unnecessary at that stage, and that the parties would all be present and introduced to the prospective jurors following the initial screening once the venire was assembled. (14 RT 940.)

The trial court's message to counsel was clear — there was no need for

the parties to be present at the initial stage because the jury commissioner's function was simply to identify statutorily ineligible jurors. The court indicated that the commissioner would rely on the limited exclusions authorized by Code of Civil Procedure section 203. In addition, the trial court and commissioner had agreed in a private meeting that the commissioner would inquire into four additional areas — a prepaid vacation, full time school enrollment, a medical procedure that could not be canceled, and financial hardship, where the people would not be paid by their employers. (60 CT 13070.)

Regarding financial hardship, the prospective jurors were also asked to write the number of days their employers would pay for jury service. (60 CT 13070.) In addition, the affidavit the affected jurors were required to complete and sign provided that they were to attach proof of this fact from their employer along with a statement indicating whether, despite the lack of pay, jury service would constitute an undue financial burden. (55 CT 12020.)

The commissioner would inform the members of the pool that any other reasons to excuse jury service "must be taken up with the court." (60 CT 13070.)

So the trial court informed defense counsel that the parties would not have to be present for the pre-screening of the venire because the jury commissioner would only be engaging in the ministerial function of identifying those people

who would be ineligible for service based upon a showing of the required documentation. Presumably, counsel was also aware of Code of Civil Procedure section 196, subd.(a) which describes the role of the jury commissioner as to "inquire as to the qualifications of persons on the master list or source list who are or may be summoned for jury service."

So the judge and all counsel likely handled the matter under the assumption that the commissioner would properly perform her function. The law also states a presumption that an official duty has been regularly performed. (Evidence Code section 664.) This presumption applies to court employees such as clerks and bailiffs. (See *In re Estate of Crabtree* (1992) 4 Cal.App.4th 1119, 1126, and *People v. Hawthorne* (1992) 4 Cal.4th 43, 67.) And there can be little doubt that it applies to the jury commissioner as well.

However, the commissioner in the present case greatly exceeded her official function by using her discretion to excuse potential jurors.

Respondent claims only that the present issues are forfeited by the lack of an objection to the use of the commissioner. Respondent does not and cannot credibly claim that trial counsel had a duty to anticipate that the commissioner would exceed her statutory responsibilities to excuse ineligible pool members, and instead engage in the kind of jury selection that is to be conducted by the trial court in the presence of all parties. This is appellant's present legal claim.

It is not addressed by respondent. The argument should be reviewed by this court for all of the reasons stated in appellant's opening brief. Counsel's statement was sufficient to preserve the issue for review. (See *People v. Briggs* (1962) 58 Cal.2d 385, 410.) Moreover, the question involves an issue of law. (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

Forfeiture assumes defense counsel knew enough to make an objection but chose not to make it. But where the trial court effectively prevented counsel from learning enough to make an objection, it is unfair to blame the defense, which is what forfeiture does. The court should not allow an expansion of the forfeiture doctrine to cover the present argument which shows a clear breakdown of the system that was enacted to safeguard a defendant's constitutional rights.

The various constitutional violations

Appellant argues that the jury commissioner's flawed prescreening process resulted in the violation of appellant's Sixth Amendment rights to a jury drawn from a proper cross-section of the community, to counsel, to be present at critical stages to a public trial, and the Eighth and Fourteenth Amendment right to enhanced reliability in the procedures governing a capital case.

Respondent addresses only two of these claimed violations, the fair cross-section denial and appellant's right to be present during critical portions of her trial. (RB 74-75.) Respondent dismisses, without discussion, the denial of the

right to a public trial. (RB 75.) However, respondent fails to respond in any fashion to two key constitutional arguments — appellant's Sixth Amendment right to counsel during the flawed hardship screening process, and the need for procedures to ensure increased reliability in death penalty cases. Appellant assumes that respondent's failure to respond to the right to counsel argument was an oversight, and that if properly addressed, respondent would repeat the claim raised in the other arguments that appellant had no right to counsel because the hardship screening has been determined to be a non-critical stage of the trial. However, the same assumption cannot be made regarding the Attorney General's failure to respond to the violation of the Eighth and Fourteenth Amendment right to heightened reliability. Respondent acknowledges throughout its response that the hardship screening process was infected with carelessness resulting in mistakes, but suggests the mistakes did not likely affect the results of the trial.

While "heightened reliability" is not a well-defined standard, the gross carelessness exhibited by the commissioner demonstrates the violation and respondent should have addressed the issue.

While appellant will address each of respondent's arguments, it seems that the analysis requires the resolution of a primary issue. That is, whether the commissioner's procedure evolved from its intended function of screening for ineligibility into voir dire where it exercised discretion to excuse jurors whose

claimed hardships did not meet the requirements of ineligibility. Once it is determined that the commissioner was engaged in early jury selection rather than eligibility screening, then the Sixth Amendment violations will be established. And again, respondent has tacitly admitted the violation of the heightened reliability requirement — not by failing to brief the issue, but by emphasizing the commissioner's carelessness when responding to the other claims.

The representative cross-section violation

Respondent argues appellant's claim based on the Sixth Amendment right to a jury that represents the community "lacks merit because San Diego County draws its jury pools from a representative cross-section of the community." (RB 65, citing *People v. Burgener* (2005) 29 Cal.4th 833, 857, and *Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115.) This is an interesting claim because *Burgener* addressed the procedure Riverside County uses to assemble its master list, and *Roddy* did not address the constitutionality of San Diego's jury selection procedure, focusing instead on the narrow claim of whether the defendants in a capital case made the requisite showing for discovery from the Department of Motor Vehicles as to the manner in which it prepares the names used in assembling its master jury list. Moreover, *Roddy* rested on the assumption that the defendants were entitled to some discovery to facilitate the claim that the jury selection procedure in San Diego was not constitutional.

(*Roddy v. Superior Court*, *supra*, 151 Cal.App.4th at p. 1135.)

Respondent repeats that there is no fair cross-section violation because "it has already been determined that the jury-selection process in San Diego meets constitutional requirements." (RB 66.) Respondent again uses *Roddy* for support. (RB 65-67.) While *Roddy* described the process used by San Diego in 2007, merging DMV and voter registration lists, that issue is not before this court — even if the record showed that the same system was being used in 1999 when appellant's jury was selected. And *Roddy* obviously cannot be used to support respondent's claim that the jury selection procedures in San Diego have been found to be constitutional since all of the errors addressed in the present case occurred after the stage of jury selection discussed in *Roddy*.

The present claim is that by excusing jurors in the unauthorized manner described, the jury commissioner violated appellant's right to a jury drawn from a representative cross-section of the community. Respondent fails to address this question and relies instead on a case pertaining to a different issue.

The fair cross-section claim will be further discussed in the second argument regarding the flaw in the summons sent out to prospective jurors.

Appellant's right to be present

Respondent argues that there was no violation of appellant's Sixth Amendment right to be present because, "This court has already held that

hardship screening of the jury pool is not a crucial stage of the trial and a defendant therefore has no absolute right to be present." (RB 74-75; citing *People v. Ervin* (2000) 22 Cal.4th 48, 72, 74.) In *Ervin*, the court noted that defense counsel expressly stipulated to a death-qualification procedure (not at issue here) where pro-death and pro-life jurors would be excused based upon their responses in the juror questionnaires. (*Id.* at p. 73.) In that case, defense counsel at trial agreed to every juror whose excusal he challenged on appeal. (*Ibid.*) The court noted that a defendant is not entitled to be present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges. (*Id.* at p. 74.) *Ervin* is not helpful in the present case where the discretionary excusals were made outside the presence of any member of the defense team, the prosecutor or the trial court. Unlike *Ervin*, the proceedings at issue in the present case occurred during a "crucial stage" of the trial. Whether the defendant had a right to be present at the proceedings that were *supposed* to take place — routine, ministerial hardship screening — has no bearing on her clear right to be present at the substantive jury selection that did in fact take place.

Appellant's right to a public trial

Appellant argues that conducting any portion of the voir dire proceedings outside of the courtroom violates her constitutional right to a public trial. (AOB

34, citing *Waller v. Georgia* (1984) 467 US. 39, and *People v. Harris* (1993) 10 Cal.App.4th 672, 684.) Without any citation to authority, respondent mentions in passing there was no violation because "there was no evidence that the hardship screening was held in private and that the public were excluded in any way." (RB 75.) However, the proceedings were held outside the public courtroom in a room that did not include the trial judge, counsel or the defendant, and no notice to the public. The excusal of prospective jurors in this instance, like the striking of prospective jurors in chambers described in *Harris*, must be found to be a violation of the right to a public trial.

The jury commissioner's discretion

Respondent does address the premise of appellant's claim regarding the commissioner's discretion to exclude various members of the jury pool. According to respondent, "The jury commissioner had the discretion to excuse people who were not qualified to be jurors." (RB 68.)

In support of this claim, respondent cites *People v. Ramos* (1997) 15 Cal.4th 1133, 1152, where the jury commissioner in a capital case summoned a group of people from a computer-generated master list. The commissioner's staff then reviewed all responses to the summonses to determine qualifications and requests for exceptions and excusals. "All such determinations are based on written standards and policies, which are applied without regard to race or

national origin." (*Ibid.*) *Ramos* offers no support for respondent's claim because it emphasized *appellant's* position that a commissioner may review claims of ineligibility as hardship that would disqualify a potential juror from serving as long as the review for qualification is based on written standards rather than the commissioner's discretion to excuse jurors who claim inconvenience, and the *Ramos* court emphasized that defendant in that case did not "present any evidence the jury commissioner and his staff fail[ed] to apply them evenhandedly based on written implementation." (*Id.* at p. 1156.)

Respondent also cites *People v. Basuta*, *supra,* 94 Cal.App. at pp. 393-396, for the proposition that the jury commissioner may conduct the hardship screening. (RB 69.) However, respondent omits the critical portion of *Basuta* which warns of the danger of the improper use of discretion by a jury commissioner in this process and the need to keep detailed records of the excusal of each juror so that appellate courts can review the propriety of each excusal. (*Id.* at p. 396.) Again, *Basuta* supports appellant's present claim.

Respondent then concedes that three or four jurors were excused by the commissioner for no known reason (RB 71), and that the other allegedly improper excusals identified in appellant's opening brief were eligible for excusal under various policies. (RB 72.)

For instance, people with day care problems, chronic fatigue and memory

problems are eligible for hardship excusal under rule 860(d) of the California Rules of Court. (RB 72.) Appellant believes that while such jurors are subject to excusal, it must be done by the trial court following questioning by the court and counsel for both sides. The record now provides no verification regarding the severity of the listed problems, and suggests that anyone who felt inconvenienced by the prospect of jury selection could be excused without the appropriate questioning by informing a non-judicial officer that he or she had a medical problem or family issue that justified excusal. While it may well have been that a discussion regarding the family or medical problem would have led to an excusal, it was not the commissioner's function to make this judgment call, and it had the effect of opening the door for all of the disinclined to leave.

The commissioner's function was to screen for eligibility and availability using the standards set forth in Code of Civil Procedure sections 203 and 204, and the applicable rules of court. Rule 860(b) specifically provides that inconvenience is not an adequate reason to be excused. Yet, the commissioner made decisions that allowed anyone with a claimed inconvenience to leave. This was absolutely improper.

The same is true of the claimed financial hardships. The commissioner excused 193 people who claimed a financial hardship and yet only seven of these people complied with the regulation requiring a corroborative note from an

employer, and astonishingly, only one person complied with the rule 860(d)(3) requirement of a written statement that jury service would compromise the juror's ability to support his or her household.

Appellant does not doubt that 10 week jury service would create a financial burden on many of those excused by the commissioner but someone needed to draw the distinction between a financial burden and undue hardship. This was a discretionary issue that should have been resolved by the trial court and the parties.

Regarding the prospective jurors who were required to complete a questionnaire, respondent speculates, as did the trial court at record correction proceedings, that some of those people "could well" have been sent to other courtrooms. (RB 73; 45 RT 5060.)

Appellant believes the present case identifies a serious problem in the improper use of the commissioner, who was only intended to review objective facts that would result in excusal from jury service. These would include a review for citizenship, residency, age of majority, prepaid vacations, full time student status, a prearranged surgery, and financial hardship where the affidavit is signed, the person provides a detailed note from an employer and the juror swears that jury service would not only present a financial problem, but would prevent the person from meeting his or her family needs. This is the preliminary

screening that may be done by the commissioner, and a court reporter should record all oral proceedings and the excuses must otherwise be properly documented.

Once this process is complete, the remaining jurors must be sent to the court to be questioned about the discretionary claims regarding juror ineligibility. This becomes the first stage of voir dire which is a critical stage of trial implicating the constitutional rights identified in this brief.

The breakdown of the process in the present case resulted in the violation of appellant's right to counsel, to be present, to a public trial, to a jury drawn from a representative cross-section of the community, and to heightened reliability in a capital case.

The error was structural in nature and requires reversal of the entire judgment.

Appellant argues the present constitutional errors were structural in nature within the meaning of *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, and that reversal of the guilt and penalty phase verdicts is required.

Respondent suggests the errors are harmless because appellant cannot show that the flawed prescreening process resulted in the seating of an unqualified juror, or that as a result of the commissioner's actions, appellant was tried before a jury that was not fair and impartial. (RB 75, citing *People v. Holt*

(1997) 15 Cal.4th 619, 656.)

However, contrary to respondent's argument, the present situation in which the entire screening process was infected is qualitatively different from *Holt* and the other cited cases which addressed the erroneous exclusion of a specific juror for cause following questioning from the trial court and counsel.

Respondent then distinguishes *People v. Stewart* (2004) 33 Cal.4th 425, 454, *People v. Heard* (2003) 31 Cal.4th 946, and *People v. Cash* (2002) 28 Cal.4th 703, where this court reversed the penalty verdict after finding flaws in the death qualification portion of the voir dire proceedings. (RB 76-77.) According to respondent, the improper excusal of people who were reluctant to impose death was more significant than excusing jurors who may have had problems with their health, memory, ability to speak English, finances or child care. (RB 76.) "The reasons for excusal here were all authorized by statute." (RB 77, citing Code of Civil Procedure, section 203.)

However, respondent again misses the point. Appellant does not claim that none of the prospective jurors excused by the commissioner would have been excused if the commissioner had properly performed her function. That is, if these people who were eligible or qualified based on the existing criteria had proceeded to court for further hardship questioning before the court and counsel, some of the alleged problems might have resulted in excusal.

But it would be harder to exaggerate claims during the questioning process at trial, and that process is better designed to distinguish between people who would merely be inconvenienced by jury service and those who would be ineligible or suffer undue hardship.

The commissioner in this case made discretionary excusals that should have been determined by the court. In fact, little discretion was even used. Instead, the commissioner excused anyone who claimed any reason for not wanting to serve, and several prospective jurors who claimed no reason at all.

The process broke down in this case, and by the time the parties assembled to conduct the official voir dire, they had lost the services of dozens of potential jurors who should have been part of the pool.

Respondent further argues that all of the improper excusals occurred before the prospective jurors were informed that this was a capital case. (RB 77.) Assuming this matters, it is not true. There were an additional 42 potential jurors (including 29 of the original time-qualified people) who failed to submit jury questionnaires or return for questioning after being informed that this was a capital case. (See AOB 53-56.) And neither the trial court nor the commissioner took the legally required action to sanction those who failed to return. (See Code of Civil Procedure section 209.)

The result here was that appellant was tried by a skewed jury that did not

represent the community in many respects.

A significant portion of voir dire was conducted without the benefit of counsel, the defendant, the trial court, the public or a court reporter. Because discretionary excuses were involved, this portion of the voir dire was a critical stage of the proceedings.

In *People v. Marks* (2007) 152 Cal.App.4th 1325, the court found a due process violation occurred where a portion of the jury selection took place in the court's chambers, off the record, outside of his presence and without a waiver. (*Id.* at p. 1333.) The court noted that the improper proceedings involved "suitability" as opposed to "availability" of the jurors in question. (*Id.* at p. 1334.) The court concluded that because "the portion of the jury selection at issue here constituted a critical stage of his trial, we will reverse the judgment." (*Id.* at p. 1328.)

In the present case, the constitutional violations also occurred at a critical stage of trial. Once the commissioner began excusing jurors other than those whose ineligibility could be established without questioning, she began the voir dire. Not only did this occur outside of appellant's presence as in *Harris*, it took place outside of the presence of the court, the attorneys, the public and a court reporter.

This is a profound error in the framework of the trial, and automatic

reversal is required.

II

The feature in the summons that permitted self-excusal for those with imperfect English resulted in a violation of appellant's right to a representative jury.

Appellant argues the provision in the juror summons which informs prospective jurors that they may be excused if their English is imperfect or is not their primary language resulted in significant self-excusal by Hispanics and violated appellant's right to a jury drawn from a representative cross-section of the community. (AOB 61-83.)

Respondent argues that the issue was forfeited for lack of an objection in the trial court, that it is important that jurors be able to speak English, and that there is nothing wrong with requiring prospective jurors to identify their native language on the juror affidavit. (RB 77.) Respondent further claims that a county is not obligated to take measures to "attract a more even representation of groups." (RB 79.)

The issue is not forfeited.

Respondent first argues that the issue is forfeited because appellant did not object at trial "that the venire did not reflect a representative cross-section of the community, and she never asked that records be maintained of the summonses sent out and the responses thereto." (RB 81.)

However, the issue is not forfeited for all of the reasons stated in appellant's opening brief (AOB 68-72) and discussed in the previous argument. The procedure established by the trial court, due partly to a private conversation with the jury commissioner, did not allow for the presence of defense counsel or appellant until after all of the present constitutional mischief would have taken place.

If, as requested, the defense were present for the hardship screening it would have seen that the ethnic distribution of the jurors who responded bore little resemblence to the actual population of San Diego County. However, the court had decided that the defense team's presence was unnecessary at this stage.

The constitutional violation alleged in the present case is profound, and it would be unfair to allow a forfeiture of the claim where the procedure designed by the court did not allow for the presence of counsel at the time the violation would be observed. And there can be no legitimate claim that appellant waived her right to be present for the hardship screening since any such waiver must be knowing and intelligent. (See *People v. Davis* (2005) 36 Cal.4th 510, 531-532.) There was no showing here that counsel or appellant (and counsel may not waive appellant's presence for her) understood that significant events might take place at the proceedings the court suggested they need not attend. (*Ibid.*; See also *People v. Marks, supra,* 152 Cal.App.4th at p. 334, fn. 3.)

Respondent further argues that this court should deny appellant's request to take judicial notice of the census statistics which support the present claim. (RB 81; citing *People v. Ramos, supra*, 15 Cal.4th at p. 1155, fn. 2.) Respondent suggests the request should be denied because it was not made initially in the trial court. (RB 81.) This argument must be rejected for the same reason the general forfeiture claim must be rejected. That is, because it was the trial judge who discouraged appellant from attending the proceeding that could have demonstrated the constitutional violation, the state cannot later claim forfeiture when the violation was not immediately recognized. Also noteworthy is that the court in *Ramos* denied judicial notice of the census statistics because the statistics presented in that case failed to identify the number of Hispanics who were adults, and therefore eligible for jury service. (*People v. Ramos, supra,* 15 Cal.4th at p. 1155, fn. 2.) That problem does not exist here where appellant provides the number of adult Hispanics in the relevant area.

This court should also grant appellant's request for judicial notice of the census data because of its inherent reliability. And respondent cannot reasonably challenge the reliability of the data in this case where the disparity between adult Hispanics in the population (approximately 24%) and those who responded to the jury summons (less than six percent) is so overwhelming. Appellant's Opening Brief uses two methods of measuring the disparity and includes caselaw showing

Sixth Amendment cross-section violations based on far smaller percentages. In fact, the present case shows a greater disparity between a group within a population and those who report for jury service than in any reported case. Respondent does not and cannot challenge the present claim by arguing the census statistics are not reliable.

The census statistics are a proper subject of judicial notice under Evidence Code section 452, subds.(c) and (h) (which allow for judicial notice of official acts of federal agencies and facts and propositions that are not reasonably subject to dispute). This court granted a similar request for judicial notice of the census statistics in *People v. Howard* (1992) 1 Cal.4th 1132, 1160, fn.6, and it should do so in the present case.

The "sufficient English" feature of the summons

Respondent makes two arguments on the merits of the claim. It first argues that the summons did not exclude any group because "being possessed of sufficient knowledge of the English language" is race-neutral and people should understand the language in which the trial is conducted. (RB 81.) According to respondent, it is not the state's fault if someone chooses not to master sufficient English to comprehend the testimony at a trial. (RB 82.)

This response misses the point. Of course jurors should understand the testimony at a trial. Appellant does not quarrel with the requirement set forth in

Code of Civil Procedure, section 203, subd.(a)(6) that members of a jury should possess sufficient knowledge of the English language to understand the testimony.

Appellant's argument is that the determination of this language-skills requirement should not be left to the prospective jurors themselves. Some people might be insecure about their ability to perform this important civic function, and when deciding whether they have sufficient command of the language, they read the present summons which calls for them to identify their native language. This extra question reinforces any thought they might have that since English is their second language and their command of it is perhaps imperfect, they should not serve on the jury. Hispanic citizens may read this portion of the summons and feel unwelcome or inadequate. The language provision itself, along with the implication that "sufficient" English means "native" English, had the clear potential for disparate impact on Hispanics. For this reason, it was necessary that it be applied carefully.

While section 203, subd.(a)(6) identifies an important factor in determining juror eligibility, it is wholly subjective, and the determination therefore must be made by the court rather than the prospective jurors sitting at home reading the summons/affidavit.

Moreover, ensuring English comprehension for jurors is a compelling

goal, but the method used here to achieve the goal is way overbroad. If the state used the English proficiency requirement to *deliberately* reduce the representation of Hispanic jurors, then respondent could not argue that the practice is permissible merely because the requirement is race-neutral on its face. The slack enforcement had the same *effect* as overzealous enforcement — the elimination of minority jurors beyond what is necessary to achieve the permissible goal. The correlation between the language requirement and reduced Hispanic representation is certainly not obscure. Essentially, if there is a predictable effect of racial disparity from a government policy that is narrowly drawn or enforced, there is no reason to treat it as other than "systemic discrimination."

Respondent further argues that the county has no obligation to adopt additional measures to improve the representation of Hispanics in the venire. (RB 80, 82-83.) This point is once again nonresponsive. Appellant does not argue for affirmative measures such as busing Hispanic prospective jurors to the courthouse. (See *People v. Currie* (2001) 87 Cal.App.4th 225, 236.) Rather, she makes the common sense argument that this important and subjective factor should not be weighed by those who are unsure about their language skills or whose native language is not English. There is a constitutional crisis in this system where 25 percent of the applicable juror pool is Hispanic and, when

thousands are summoned for service, less than six percent appear.

Noteworthy here is that respondent makes no attempt to challenge the allegation of a constitutional violation due to the staggering percentage of Hispanics who, for some reason, fail to appear in response to the jury summons.

Respondent refuses to discuss the statistical evidence. It seems inappropriate for the Attorney General's Office, which is responsible for civil rights enforcement as well as criminal matters, to simply ignore the statistics demonstrating the stark exclusion of a minority group from jury service.

The absolute disparity (endorsed as a valid measure in *People v. Bell* (1989) 49 Cal.3d 502, 527, fn. 14) between those eligible and those who appeared was 18.9 percent.[1] There is no reported case in the literature where the disparity was greater. In this case, the expected number of Hispanics was greater than 300 percent of those who responded to the summons. The same is true under the alternative statistical test used in *Castaneda v. Partida* (1976) 430 U.S. 482, 495. (See also AOB 76.)

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[1] In Appellant's Opening Brief, the absolute disparity figure is incorrectly listed as 13.2 percentage points using the census list of Hispanic surnames and 12.1 percentage points using the enhanced list which includes additional possible Hispanic people whose names did not appear on the census list. However, since 24.9 percent of the eligible voters in North County San Diego were Hispanic, and the actual Hispanic representation among the 700 who responded to the summons was 42 (using the more inclusive list), or 6 percent, the absolute disparity in those figures was 18.9 percentage points. The constitutional violation is therefore significantly greater than that described in the opening brief, and far greater than in any other reported case.

The only legitimate explanation for this enormous disparity is that bad judgment was used by whoever formulated the language question on the subpoena. To allow jurors to excuse themselves after reading the summons/affidavit, is the identical flaw noted in *Duren v. Missouri* (1979) 439 U.S. 357, where the Supreme Court found a violation of the Sixth Amendment cross-section requirement due to language in the jury summons that allowed for self-excusal by women. (*Id.* at pp. 362, 367-368.)

Respondent does not effectively challenge this profound constitutional violation, but instead asks the court to avoid the issue by finding forfeiture, or in the alternative, argues as if the language provision has no purpose or effect other than implementing the obvious principle that jurors should understand English. However, this provision in the summons has produced an enormous disparity between a eligible Hispanic jurors and those who respond for jury service.

The error was prejudicial.

Respondent finally argues that even if there was a violation of the fair cross-section requirement, appellant cannot show that an unqualified or biased juror was seated, or that appellant was tried by a biased jury. (RB 83; citing *People v. Holt* (1997) 15 Cal.4th 619, 656.) However, the cited passage from *Holt* addresses the erroneous excusal of a potential juror for cause, a trial error which does not apply here.

Contrary to respondent's claim, a violation of the Sixth Amendment cross-section requirement shows that appellant was deprived of her right to an impartial jury. In *Duren v. Missouri, supra,* 439 U.S. at p. 370, and *Taylor v. Louisiana* (1974) 419 U.S. 522, 525, the court found the violation of the right to a jury drawn from a cross-section of the community required a reversal of the conviction in those cases. (See also *In re Carpentar* (1995) 9 Cal.4th 634, 654 where this court held that a biased jury results in a structural error "no matter how convinced we might be that an unbiased jury would have reached the same verdict.")

The same is true here given that the language provision in the summons produced a profound error in the framework of the trial depriving appellant of this vital right. Reversal of the entire judgment is required.

III

The feature in the summons allowing self-excusal for Spanish speakers also violated appellant's rights to due process and equal protection.

Appellant argues that, in addition to the Sixth Amendment fair cross-section violation described in the previous argument, the provision in the summons/affidavit allowing self-excusal for those with imperfect English violated equal protection and due process principles. It violated equal protection by excluding Hispanic prospective jurors and by creating a classification which

allowed for the retention of hearing or vision-impaired jurors that it did not allow for imperfect English speakers. The due process violation was a product of the lack of guidelines available to implement Code of Civil Procedure, section 203, subd.(a)(6).

Respondent first argues the issue is forfeited for lack of an objection in the trial court. However, appellant again disputes this claim where the trial court encouraged the defense to absent itself from the proceedings where it would have discovered the violation. Moreover, this is a pure question of constitutional law which an appellate court may review for the first time on appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

Respondent fails to properly distinguish between the issues raised and makes certain general claims in response. Respondent first claims that it is proper to require that jurors speak English since the trial is conducted in that language. (RB 84-85.) Appellant agrees with this logical point. However, respondent then claims there was evidence of only one Hispanic prospective juror who excused himself based on this ground, as well as another Japanese speaker which rebuts the claim that the requirement improperly excludes Hispanics. (RB 85.)

The argument misses the point. Appellant's argument is not that the affidavit encourages those who appear in the venire to excuse themselves,

although Pedro Padillo apparently did so. The argument is that Hispanics reacted to the factor by not responding at all, thus creating the imbalance of Hispanics between eligible voters (nearly 25 percent of the district) and those who answered the summons (no more than six percent of those who appeared).

Respondent next claims the statute is constitutional on its face and as applied *because* the prospective jurors were allowed to excuse themselves. (RB 87.) "Self-selection avoids arbitrary or discriminatory exclusion by court personnel." (RB 87.) Respondent, without citing any authority, thus frames the issue for the court: Should potential jurors be able to excuse themselves from jury service by deciding the subjective issue of whether their English is sufficient to permit them to sit on a jury? Respondent's claim is unworkable as "self-selection" does not render the statute "sufficiently definite." (RB 87.) It allows 7000 individuals to make their own decisions about the level of English a juror needs. And it does not avoid "arbitrary or discriminatory exclusions by court personnel." It effectively excludes a particular ethnic group *en masse*.

While respondent argues the state has an interest in streamlining the jury selection procedures, this cannot be done where jurors fail to respond based upon self-assessment of subjective factors. It would be wrong for these determinations to be made by the commissioner, and it is worse for them to be made by the prospective jurors. Respondent suggests that "the state must, and

should, presume the good faith of persons summoned to jury service." (RB 87.) However, the law is to the contrary. It requires that other hardship claims be verified to the extent possible. Such verification is even more critical where the subjective assessment will impact the requirement that the jury represent a cross-section of the community. The trial court concluded that we live in a time where people do not follow through on their obligation for jury service. (45 RT 5062.) The meager number of jurors who responded to the summons supports this claim. Viewed in this light, we cannot accept respondent's argument that self-excusal is a proper and effective method of jury selection.

Regarding the claim that section 203, subd.(a)(6) creates a distinction between language-impaired jurors and hearing or vision-impaired jurors, respondent argues that loss of vision or hearing is generally immutable whereas imperfect ability to speak English can always be changed. (RB 86.) For this reason, respondent suggests the groups are not similarly situated for equal protection purposes, and it is "rational" for the state to distinguish between the groups. (RB 86.)

However, respondent ignores the cited authority showing the strict scrutiny standard must apply where a state-created classification impacts the representation of Hispanics on a jury. (See *Johnson v. California* (2005) 543 U.S. 499, 505; AOB 94.)

Respondent does not attempt to show that the present classification is narrowly tailored in a way that promotes a compelling governmental interest. While it is certainly laudable to find ways to assist those with hearing or vision problems, similarly assisting those who would establish a racially representative jury is equally important to the state and has greater constitutional significance.

Allowing Hispanic prospective jurors to excuse themselves resulted in a violation of appellant's rights to due process and equal protection. Denying assistance to English-challenged jurors in this largely Hispanic area, while providing assistance to vision or hearing-impaired potential jurors also violated appellant's right to equal protection.

The results speak for themselves. Hispanics were under-represented by well over 300 percent. Reversal of the judgment is required.

IV

The lack of a record of the trial court's discussion with the jury commissioner and the hardship screening process deprived appellant of her constitutional rights to due process and a jury trial as well as other statutory rights.

The discussion between the trial court and the jury commissioner regarding the hardship excusal process took place in private without the benefit of notification to trial counsel or appellant. There was no court reporter present to record these proceedings. Moreover, there was no court reporter to record

the hardship screening conducted by the commissioner, which resulted in the excusal of 471 of the 700 people who responded to the summons.

Appellant argues that the failure to report these proceedings resulted in the lack of an adequate record on appeal, and therefore violated the capital appellant's due process and jury trial rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the applicable statutes.

Respondent argues that appellant "forfeited these arguments by acquiescing in the jury selection procedures." (RB 88.) Respondent maintains that appellant was notified the jury commissioner would prescreen the prospective jurors, but never requested that a court reporter record the proceedings. (RB 89.)

However, respondent makes no mention of the original private meeting between the trial court and the jury commissioner where the hardship screening process was discussed. There obviously can be no claim that appellant acquiesced to this private conversation about which she was never notified. This was certainly an in-chambers conference in a capital case for which Penal Code section 190.9, subd.(a)(11) requires a court reporter.

Respondent's claim that appellant acquiesced to the actual hardship screening by the commissioner, and therefore forfeited the present claim, fails for two reasons. First, appellant did not acquiesce. Rather, counsel specifically

asked to be present for the hardship screening, but the trial court informed him his presence was not required. This was an obvious message from the trial court that the commissioner's actions would be limited to clerical and nondiscretionary findings for which counsel's presence was unnecessary and that the commissioner would comply with the legal requirement to keep a record of all excusals. There is no legal support for the proposition that a criminal defendant forfeits an issue on appeal by failing to anticipate that an officer of the court will overstep his or her authority in a way that results in profound violations of the defendant's constitutional rights.

It would be patently unfair to apply the forfeiture doctrine to this case where defense counsel asked to be present, and was informed that the commissioner was only performing nondiscretionary clerical acts for which a record would be kept, and then the commissioner radically overstepped her authority by excusing jurors for discretionary reasons without a proper record.

On the merits, respondent argues that there is no constitutional requirement that the commissioner's hardship screening be recorded "or that Eubanks be present." (RB 89.) This claim is flawed for several reasons. First, respondent omits any reference to the statutes and Rules of Court cited by appellant (AOB 100-101) that require the presence of a court reporter at all conferences in a capital case, and a record of all hardship excusals by the jury

commissioner.

Respondent's argument is further flawed because it mischaracterizes appellant's "lack of an adequate record" claim, as a "defendant's constitutional right to be personally present at the hardship screening" claim. By emphasizing the latter claim, respondent diverts the court's attention from the significant and narrow claims raised by appellant.

Respondent relies heavily on *People v. Rogers* (2006) 39 Cal.4th 826. Respondent claims that in *People v. Rogers*, as here, the defendant asserted constitutional and statutory error because he was excluded from preliminary hardship screening of prospective jurors. (RB 89.)

However, *Rogers* is easily distinguishable. In *Rogers*, the defendant complained of his personal absence from an otherwise proper proceeding which was transcribed by a reporter and at which he was represented by counsel. Here, the proceeding took place without the defendant or his counsel, and there is no record.

Respondent also cites *People v. Ervin* (2000) 22 Cal.4th 48, 72-74, for the proposition that appellant has no right to be personally present for the hardship screening. However, in *Ervin,* as in *Rogers,* defense counsel was present and agreed to excuse every juror that defendant would later claim was improperly excused. (*People v. Ervin, supra*, 22 Cal.4th at p. 74.)

While this analysis is interesting, and helps show the importance of having the hardship screening conducted by the trial judge and attorneys, it does not address appellant's argument.

Respondent eventually addresses the present claim but argues a defendant is only entitled to a record sufficient to permit adequate and effective appellate review. (RB 91, citing *People v. Rogers, supra*, 39 Cal.4th at p. 857, and *Griffin v. Illinois* (1956) 351 U.S. 12, 16-20.) Appellant does not quarrel with the cited standard, but instead claims the record was not adequate to permit effective review.

Rogers does address the adequacy of the appellate record after ruling that the defendant did not have the right to be personally present. (*People v. Rogers, supra*, 39 Cal.4th at pp. 856-861.) Again, *Rogers* is curious support for respondent's argument in light of the detailed record presented in that case. In *Rogers,* the appellate record included the detailed juror questionnaires, the court minutes, and the on-the-record excusals summarizing the off-the-record discussion among the court and attorneys, who thereafter stipulated to all but one of the 133 excusals.[2]

The present case is qualitatively different where the hardship excusals

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[2] The court found there was no constitutional violation as to the single juror to which defense counsel did not stipulate because the erroneous exclusion of one juror could not establish a fair cross-section violation for purposes of the Sixth Amendment.

were made by a non-judicial court employee who ignored the nondiscretionary criteria that had been established, and the process took place outside the presence of defense counsel, the prosecutor or the judge. There was, therefore, no discussion among the parties as to the propriety of the various excusals and no written record. The record shows the jury commissioner opened the gate for all who wished to avoid service, including those who fell outside of the four nondiscretionary categories. Many who claimed financial hardship failed to provide the required documentation, many were unsigned or listed no reason at all.

The record in the present case is woefully inadequate and certainly substantially less than the record before the court in *Rogers*. The flawed process resulted in a jury that did not fairly represent the community under the Sixth Amendment and, amounted to an arbitrary process that resulted in a death verdict in violation of the Eighth Amendment. The process also violated the multiple statutes and court rules designed to protect a capital defendant's rights in the hardship screening process.

There can be no claim of harmless error since the appellate record is the tool used to review the impact of a constitutional violation.

Respondent claims that any error was harmless because it did not show that if appellant had been personally present (again misrepresenting the present

issue) that "the jury would have found she did not kill her four children or would have voted to sentence her to life imprisonment without the possibility of parole rather than death." (RB 91.) It should go without saying that there were many possible results between acquittal and a death verdict. This is a complicated case involving a mentally disturbed mother whose combination of desperation and intoxication led her to kill her sons whom she loved dearly and represented her greatest joy and sense of pride.

Respondent's claim that appellant cannot show the present violation could have resulted in an acquittal is an oversimplification which exposes the weakness of its position.

Respondent cites two other cases in support of the harmless error claim — *Thomas v. Borg* (9th Cir. 1998) 159 F.3d 1147, 1152, and *People v. Freeman* (1994) 8 Cal.4th 450, 487. (RB 92.) However, both cases deal with the prejudice prong of a claim of ineffective assistance of trial counsel which was not raised in this appeal.

Conclusion

The record on appeal does not permit effective review of the many prospective jurors improperly excused by the jury commissioner. The issue was not forfeited where the defense was not informed of the trial court's private conversation with the commissioner until after it had taken place, and counsel

(after asking to be present) could not have anticipated that the commissioner would ignore her script and allow unfettered self-excusal. The juror summonses provided some insight into the commissioner's actions but she did not require signatures, supporting documentation or detailed reasons.

Any jurors who did not meet the defined criteria, including the required documentation for financial hardship, should have been subjected to questioning by the attorneys and trial judge. The failure to comply with this framework allowed the nonjudicial court employee to act in an arbitrary way that shaped a pro-death jury or did not represent a cross-section of the community.

The lack of an adequate appellate record requires reversal of the convictions and death verdict.

V

The two searches of appellant's home were based on invalid warrants seeking unnecessary "dominion and control" evidence when police knew appellant lived in the house and omitted material facts from the affidavit.

Appellant will submit this issue on the briefing presented in the Appellant's Opening Brief at pages 107-136.

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VI

The trial court erred by allowing the medical examiner to rely on her own informal experiments to support her conclusion regarding appellant's blood alcohol content and drug levels.

The sole defense presented by appellant at the guilt phase of her trial was that she was not able to form either "intent to kill" or "premeditation to commit to first degree murder" — negating the charges of first degree murder and the potential capital sentence — due to her intoxication from alcohol and prescription drugs.

The defense presented the testimony of Dr. Clark Smith. to establish that the massive infusion of fluids into appellant's body by medical personnel would have significantly decreased her blood alcohol content and drugs levels from the time she committed the murders and attempted to kill herself. The BAC level of .07 percent, determined from blood taken at the hospital long after the infusion of the fluids, did not accurately reflect appellant's intoxication level earlier in the evening. The level of drugs and alcohol in appellant's body, determined by the prosecution's expert, Dr. Vina Spiehler, failed to account for dilution and time factors.

After an Evidence Code section 402 hearing, the court ruled that it would allow the prosecution to call Dr. Spieler as a rebuttal witness.

She testified that her personal experiences in the field are consistent with

her opinion, and discussed "experiments" she conducted (presumably on cadavers) while at the Orange County Coroner's office.

Appellant challenges the admission of the testimony on three grounds. First, it should have been subjected to the requirements of *People v. Kelly* (1976) 17 Cal.2d 24, but was not. Next, the evidence should have been excluded under Evidence Code section 801 subd. (b) as it lacked a sufficient foundation. And, finally, it lacked the "heightened reliability" required for such evidence by the Eighth Amendment.

Respondent contends that appellant has presented an "inaccurate portrayal of the record and also lacks merit." (RB 108.) Respondent is incorrect on both points.

As a threshold matter, appellant repeats her contention that the medical literature relied upon by Dr. Spiehler was outdated. (See AOB 144.) The witness relied upon Garriott's Medical / Legal Aspects of Alcohol Determination and Biological Specimens published in 1988. (28 RT 3213-3214.) Defense counsel observed that this work had been replaced by a later edition, which omitted the sections relied upon by Dr. Spiehler. (28 RT 3218-3219.) Respondent counters that, in her section 402 testimony, Dr. Spiehler claimed this was because the editor could no longer locate the doctor who wrote that chapter, not because the material was outdated. (RB 111, fn. 24.) There are

two problems with this argument.

First, Dr. Spiehler's claim as to why the basis for her opinion was no longer found in professional literature is basic hearsay and therefore inadmissible. (*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Ca.2d 33, 43. See also, *Frampton v. Hartzell* (1960) 179 Cal.App.2d 771, 773.) Moreover, her explanation defies common sense. First, it is unlikely that a well-known medical professional would suddenly disappear. Even if this were true, and the medical data remained valid, why not simply publish it in the subsequent edition, rather than omit it?

Respondent argues that "Dr. Spiehler's testimony was not subject to the test of admissibility set forth in [*Kelly*] and reiterated in *People v. Leahy* (1994) 8 Cal.4th 587, because Dr. Spiehler did not use a novel technique or new method." (RB 113.) Rather, Dr. Spiehler "simply observed and relied upon comparative alcohol values in a series of cases where samples were available both before and after blood transfusions. She made no new calculations or measurements and did not use any new scientific technique." (RB 114.)

In fact, Dr. Spiehler described the "ten to fifteen experiments" she had conducted at the coroner's office and claimed these supported her opinion. However, she could not supply any material documenting these experiments. (28 RT 3171.) Her opinion, disagreeing with that of defense expert Dr. Clark, was

based in significant part on these "informal comparisons". (28 RT 3213.)

Dr. Spiehler's methods of conducting these "experiments" are not mentioned or approved anywhere in published medical literature. She made calculations and measurements based on these experiments. With no case data or documentation, they hardly qualify as generally accepted in the scientific community. (*People v. Kelly, supra,* 17 Cal.3d 24.) Such opinions must be based on *reliable* factors, utilizing sound reasoning. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1153, 1157.) Given Dr. Spiehler's complete lack of written data, her failure to follow any acceptable protocol, and reliance on outdated professional literature, her opinions should have been found to be inadmissible. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1195.)

This opinion evidence was also inadmissible under Evidence Code section 801 subd.(b). (AOB 146-147.) That provision requires that opinion evidence be based on "reliable matter". While a medical expert may rely on *published* medical works, this material must itself be reliable. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 639, 644; *Pacific Gas & Electric v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136.) As this court has stated, "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 [citation omitted].)

Dr. Spiehler's opinion testimony was based on medical literature no

longer in print, and on "experiments" or "informal comparisons" that would have been rejected at a high school science fair. It was inherently unreliable. Respondent has failed to show why this evidence should not have been excluded under Evidence Code section 801 subd. (b).

Finally, the evidence should have been excluded under the "heightened reliability" requirement of the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Riggins v. Nevada* (1992) 504 U.S. 127, 133.)

Respondent argues there is no requirement for the courts to modify their long-standing state-law based rules governing the admissibility of evidence in a capital case. (RB 114, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1229, *People v. Kraft* (2000) 23 Cal.4th 978, 1035, and *People v. Weaver* (2001) 26 Cal.4th 876, 930.)

This is true, as long as those rules do not permit the admission of evidence which is so unreliable as to violate due process and the Eighth Amendment to the United States Constitution. Assuming, *arguendo,* that Dr. Spiehler's opinion evidence was proper under state-based evidentiary statutes, the Eighth Amendment violations certainly trump the state statutes. (*Stogner v. California* (2003) 539 U.S. 607; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1972) 410 U.S. 284.)

In the present case, there was no dispute as to appellant's acts, and the only defense contention was that her mental state was not that required for first degree murder. This question turned *entirely* upon the evidence concerning the level of appellant's intoxication at the time of the shootings. Dr. Smith's testimony was coherent, thoughtful, reasonable and based on widely-accepted scientific principles set forth in established medical and legal publications. The trial court permitted the prosecution to rebut Dr. Smith's opinions conclusions through the testimony of Dr. Spiehler. Dr. Spiehler's contrary conclusions were based on specious personal "experiments," and her reliance upon outdated medical literature.

This court should not endorse convictions for four counts of first-degree murder and a judgment of death based largely on the junk science presented by the prosecution.

VII

The trial court erred by allowing penalty phase testimony that appellant smeared feces on her nephew's face.

Appellant argues that the trial court erred in admitting evidence of an alleged statement she made to her sister suggesting that she had rubbed a soiled diaper in her nephew's face when she found it hidden in a bedroom.

This evidence was originally excluded in the guilt phase when the trial

court found it more prejudicial than probative under Evidence Code section 352. (25 RT 2737.)

In response to appellant's evidence at the penalty phase that she was a loving and dutiful mother to her children before the night of the shootings, the court reversed its ruling and found the evidence was admissible to impeach that claim. (27 RT 2996.)

The admission of this evidence was more prejudicial than probative within the meaning of Evidence Code section 352, deprived appellant of due process of law, and failed to meet the Eighth Amendment requirement of "heightened reliability".

Respondent argues that the admission of this evidence at the penalty phase was proper to impeach appellant's evidence that she had previously been a good mother to her children, citing *People v. Gates* (1987) 43 Cal.3d 1168, 1211, and *People v. Ramos* (1997) 15 Cal.4th 1133, 1173. (RB at p. 117.) However, neither case applies to the present issue since those cases refer to the prosecutor's ability to cross-examine a defense witness and Linda Smith was the prosecutor's witness.

Initially, there is a substantial doubt about whether the incident ever occurred. The sole source of this allegation was appellant's sister, Linda Smith. She testified that she had a telephone conversation with appellant in which

appellant said she had found a pair of soiled training pants that Aaron had hidden in a bedroom. (36 RT 4533.) Smith testified that appellant, who kept an immaculate house, became upset and held the pants up to Aaron's face, forcing him to smell them, and then rubbed them in his face. (36 RT 4534.) When Smith expressed concern, appellant told her that she had only held the pants up to the boy's nose, and did not actually rub them in his face. (36 RT 4535.) No one witnessed the incident, and appellant denied to Smith that she had actually smeared the training pants on the child's face. The defense also presented telephone records to show the conversation never took place. (36 RT 4546.)

This was hearsay evidence which should have been excluded, absent a substantial showing of reliability. (*People v. Phillips* (2000) 22 Cal.4th 226, 238; *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.) And, again, in a capital case the Eighth Amendment requires that the state's evidence be subjected to a standard of "heightened reliability". (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) This evidence meets neither test.

The next problem relates to the lack of probative value of the evidence. In fact, the evidence concerning Aaron was irrelevant to the question of whether appellant was a good mother to her children. Aaron was appellant's nephew, not her son. She traveled to Texas and took custody of the boy when his father

died. (23 RT 2317.) While Aaron initially got along well in the family, that eventually changed. He began to have behavioral and disciplinary problems which bothered appellant. (23 RT 2352.) He was viewed like a stepchild, "the last in the pecking order". (23 RT 2352.) By early 1997, Linda Smith became concerned over this and appellant informed her that she wanted to return Aaron to relatives in Texas. (23 RT 2353.)

That appellant viewed Aaron differently from her own sons is easily seen by the fact that while she shot and killed her own children, Aaron was found in another bedroom, unharmed, with the blankets pulled up under his chin. (23 RT 2422.)

So appellant's treatment of Aaron had little to do with the mothering of her own children. It had virtually no probative value as to any disputed issue. Evidence Code section 1044 limits the admission of evidence to that which is relevant and material. The evidence lacked any probative value and should have been excluded under section 352.

Assuming the evidence had any probative value, it would be far outweighed by the prejudicial impact.

When excluding the evidence under section 352 at the guilt phase, the trial court characterized it as "very disturbing testimony, obviously, that a woman would spread feces on a child." (25 RT 2737.)

In such an emotionally-charged trial, the jury was faced with the difficult task of rendering decisions based on competent, relevant evidence without being tainted by emotion and prejudice. The evidence was shocking and highly prejudicial, with virtually no probative value. It would almost certainly prejudice the jury against appellant and improperly contribute to the jury's decision that she should be put to death. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.) The trial court abused its discretion by admitting the evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Moreover, the admission of this evidence was so inflammatory that it violated appellant's Fourteenth Amendment right to a fair penalty trial. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463.) This court has held that in a capital trial, "[e]vidence that serves primarily to inflame the passions of jurors must . . . be excluded . . ." (*People v. Love* (1960) 63 Cal.2d 843, 856.)

The Constitution does not permit evidence "aimed at inflaming the jury's passions" and designed to "goad . . . it into an emotional state more receptive to a call for imposition of death . . ." (*Tucker v. Zant* (11th Cir. 1984) 724 F.2d 882, 888.) The admission of such evidence "so infect[s] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty

a denial of due process." (*Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1226, quoting and applying the standard enunciated in *Romano v. Oklahoma* (1994) 512 U.S. 1, 12.)

And this evidence was certainly not "harmless" as respondent contends. It was inflammatory in the extreme and improperly undermined appellant's claim that she had been a good and caring mother to her own children. Its prejudicial impact cannot be overstated, especially when viewed with the other evidentiary errors occurring at the penalty phase. The judgment of death must be reversed.

VIII

The trial court erred in allowing the crime scene reconstructionist at the penalty phase to describe the horror the children experienced before the killings.

Rod Englert, a crime scene reconstructionist, testified for the prosecution at the penalty phase. Defense counsel objected, noting that the prosecution originally indicated Englert would be testifying at the guilt phase to establish appellant's intent to kill, which was no longer in issue.

The prosecutor argued, and the trial court agreed, that Englert's testimony would show the "circumstances of the crime" under Penal Code section 190.3, factor (a). Englert outlined his testimony at an Evidence Code section 402 hearing.

Defense counsel objected to Englert's proposed testimony, arguing that he

would be making conclusions that are properly left to a jury. Counsel also argued that the jury would be "double counting" the evidence in aggravation and the special circumstance based on the number of bodies. Defense counsel finally claimed that the testimony would be vague and overly broad in violation of the Fifth, Eighth and Fourteenth Amendments.

While the court agreed that Englert's testimony was "somewhat cumulative" with the medical examiner's, it found he was nevertheless "well-qualified" to provide "some helpful information" regarding the bullets that were fired in the bedroom. In support of its ruling that the evidence was admissible as a circumstance of the crime, the trial court cited *People v. Hovey* (1988) 44 Cal.3d 543, 576, where the court upheld the admission of a pornographic magazine found in the defendant's bedroom, and evidence concerning the surgical and autopsy protocols used on one of the victims.

On appeal, appellant contends this highly inflammatory evidence was not admissible under Penal Code section 190.3, factor (a), violated the heightened reliability requirement of the Eighth Amendment, and was more prejudicial than probative within the meaning of Evidence Code section 352 and the due process clause of the Fourteenth Amendment.

Respondent ignores much of appellant's argument, and claims instead that the evidence was properly admitted under *People v. Robinson* (2005) 37 Cal.4th

592, also cited in appellant's opening brief. (AOB 166, 168, 223.)

Evidence depicting "circumstances of the crime" is generally admissible at the penalty phase. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1163; *People v. Medina* (1995) 11 Cal.4th 694, 776.) And, as respondent asserts, the the trial court's discretion to exclude such evidence is more circumscribed than in the guilt phase. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) However, that discretion is not eliminated and the cases apply particularly to a trial court excluding *all* such evidence. (*Ibid.*; *People v. Davenport* (1995) 11 Cal.4th 1171, 1206, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555 fn. 5; *People v. Karis* (1988) 46 Cal.3d 612, 641-642 fn. 21.)

Responding to the claim that the evidence is unduly inflammatory, respondent provides a sanitized version of Englert's testimony: "Englert provided information about bullet trajectories, stippling [sic], and other information that related to a subject, multiple shootings 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact'. . . Englert explained that Eubanks shot at Austin three times as Austin cowered back on the top bunk . . ." (RB 121-122.)

However, a closer look at the testimony illustrates the problem. The improper details included Englert's opinion that appellant first shot 14 year-old Brandon in his left temple, and then again in the back of the neck as he lay

slumped over on his side. (31 RT 3672.) He then speculated that appellant went into the younger boys' bedroom where she shot at seven year-old Austin three times, missing him twice, then firing a shot into his left eye as he raised his knee in an attempt to fend off his mother's deadly attack. (31 RT 3676.) Englert speculated that at this point appellant paused to reload her gun as the remaining two boys cowered on the lower bunk. (31 RT 3677.) She then shot six year-old Brigham in the head as he huddled next to Matthew. (31 RT 3678, 3684.) Finally, appellant fired a shot which missed four year-old Matthew but he scrambled to the other end of the bed, where appellant shot him in his head. (31 RT 3681, 3687.)

This evidence is in stark contrast to that presented in *People v. Robinson, supra,* 37 Cal.4th 592, upon which respondent relies. In *Robinson*, a medical examiner viewed the victim's wounds and concluded that the victim was likely shot "execution style while kneeling in front of the shooter". (*Id.* at p. 643.) The testimony was brief, straightforward, clinical and objective. The witness did not speculate on the victim's fear as Englert did here. *Robinson* does not support the present ruling.

Had Englert's testimony been confined to bullet trajectories, etc., it may have been marginally relevant and therefore admissible. But his editorializing about appellant pausing to reload the gun while the boys cowered in fear, and his

speculative comments about the sequence of the shootings and the boys' state of mind had no probative value but was extremely inflammatory.

Admission of the evidence also violated Evidence Code section 352. (*People v. Edwards* (1991) 54 Cal.3d 787, 831; *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Moreover, it deprived appellant of a fundamentally fair penalty trial which is guaranteed by the Fourteenth Amendment. (*People v. Falsetta* (1991) 21 Cal.4th 903, 913; *Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

The evidence was also woefully inadequate to meet the "heightened reliability" required for capital cases by the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) In fact, the trial court, in refusing to continue the guilt phase based on Englert's unavailability, stated:

> The Court: This is an expert witness that's going to propound theories on the evidence taking a look at things and making a reconstruction based on his evaluation of the crime scene.
>
> * * *
>
> And . . under no circumstances could I find that this is an essential witness based upon the state of the evidence at this time.

(RT 2975.)

Moreover, Englert conceded at the section 402 hearing that he did not have a "solid opinion" on the sequence of the shootings. This was in stark

contrast to his testimony at trial. His opinion testimony was unreliable and bordered on "junk science".

This shocking, unsupported, inflammatory and unreliable evidence may well have tipped the scale at the penalty phase trial resulting in appellant's death sentence. That judgment must be reversed.

IX

The trial court erred at the penalty phase by excluding evidence of the living conditions for a life without parole inmate.

At the penalty phase, appellant sought to introduce the testimony of James Esten, a former longtime administrator with the California Department of Corrections. Mr. Esten's proposed testimony and exhibits would have detailed the living conditions in the administrative segregation section of the women's prison at Chowchilla, which serves as California's female prisoner death row. The court ruled this testimony was inadmissible under *People v. Fudge* (1994) 7 Cal.4th 1075, and *People v. Quartermain* (1997) 16 Cal.4th 600.

Esten's testimony was thereafter limited to his review of appellant's jail records, some background information and an interview with appellant. Evaluating this information in the context of his training and extensive experience within the Department of Corrections, he concluded that appellant would pose no significant danger if sentenced to prison for life. He reached this

conclusion using the criteria set forth in the applicable Department of Corrections guidelines and regulations.

Appellant argues that *Fudge, Quartermain*, and the court's former decisions on which they are based[3], must be re-examined for several reasons.

First, the plain language of Penal Code section 190.3 supports admission of this evidence. That statute holds in pertinent part that evidence may be presented "as to any matter relevant to aggravation, mitigation, and sentence . . ." Appellant challenges the interpretation given this statute in *People v. Thompson, supra,* 45 Cal.3d at p. 139, and claims that the rule of lenity supports her position. (AOB 177-180.) Appellant further argues that the language of Penal Code section 190.3 factor (k), provides for admission of "a day in the life of a prisoner serving life-without-parole" evidence, citing *Boyde v. California* (1990) 494 U.S. 370, 372, 377-378.) (AOB 180.)

Respondent fails to address this contention, but merely cites to *Jones, Fudge* and *Quatermain*, with no analysis of the present argument. (RB 123-124.)

Appellant offers a critical analysis of the basis for the decisions in *Grant* and *Thompson*, specifically challenging the court's conclusions that this evidence

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[3] See *People v. Thompson* (1988) 45 Cal.3d 86, 139; *People v. Grant* (1988) 45 Cal.3d 829, 860; *People v. Daniels* (1991) 52 Cal.3d 815, 877-878; *People v. Majors* (1998) 18 Cal.4th 385, 416; *People v. Ervin* (2000) 22 Cal.4th 48, 98; and, *People v. Jones* (2003) 29 Cal.4th 1229, 1261-1262.

would be "irrelevant and speculative". This analysis includes decisions of this court and the United States Supreme Court. (AOB 182-187.)

Respondent likewise fails to address this portion of the argument, merely asserting that a jury's decision to impose either death or life imprisonment is limited to the circumstances of the crime, and the defendant's individual background and character. (RB 124.) This claim is contrary to holdings cited in the opening brief including, *Jurek v. Texas* (1976) 428 U.S. 262, 274; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 876-878; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5; *Hitchcock v. Dugger* (1987) 393, 398; and *Simmons v. South Carolina* (1994) 512 U.S. 154, 163.) (AOB 188 - 192.)

> [S]tates cannot limit the sentencer's consideration of *any* relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider *any* relevant information offered by the defendant.

(*McClesky v. Zant* (1987) 481 U.S. 279, 306 [emphasis added].)

Appellant urges the court to reevaluate the reasoning and authorities used to reach its prior conclusion that evidence of the conditions under which a life prisoner would be confined is "too speculative and irrelevant" to assist a jury in determining a defendant's future dangerousness.

And this is especially important in this case where the prosecutor emphasized to the jury that, as a life prisoner, appellant would enjoy three meals

a day, perhaps have loving relationships, enjoy sunrises and sunsets, watch television and "have hope". (37 RT 4698.) The prohibition against a prosecutor's specific reference to conditions of life in prison is one of the reasons used to exclude a defense showing these conditions. (See *People v. Lucas* 12 Cal.4th 415, 499.)

The judgment of death must be reversed.

X

The trial court erred at the penalty phase by admitting unreliable hearsay evidence in aggravation and excluding powerful mitigating evidence.

Appellant sought to introduce mitigating evidence at the penalty trial concerning an event at the jail where she sought and ultimately obtained medical attention for another inmate. The evidence was excluded as being "hearsay". Appellant also sought to introduce evidence that she was sexually molested as an adolescent by her cousin. This too was excluded. Finally, appellant unsuccessfully attempted to introduce evidence that, as a child, she had been molested by her father.

In contrast, the court admitted evidence of an alleged incident at the jail where appellant supposedly became angry during an organized game, and walked out after making threats. The court's rulings lacked balance, allowing inflammatory hearsay in aggravation and denying, as unreliable, important

mitigating evidence.

Respondent contends the mitigating evidence offered by the defense was properly excluded as it was not only hearsay, but unreliable hearsay. Respondent further argues that the admission of aggravating hearsay evidence presented by the prosecution was proper impeachment evidence, and any error was harmless.

The defendant has a right to present mitigating evidence at a penalty trial. (*Green v. Georgia* (1979) 442 U.S. 95, 96-97; *People v. Phillips* (2000) 22 Cal.4th 226, 238.) Respondent does not dispute this, but rather emphasizes that such evidence must nonetheless be reliable. (*People v. Phillips, supra,* 22 Cal.4th 226, 238; *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.) Respondent argues that none of appellant's proffered mitigating evidence was sufficiently reliable and none came under any recognized exception to the hearsay rule. (RB 126.) Respondent is incorrect on both counts.

The medical treatment incident

Appellant attempted to introduce the testimony and written report of Dr. Bart Jarvis, who worked at the county jail where appellant was confined after her arrest and release from the hospital. (32 RT 3903.) The report detailed an incident where another inmate was refused medical treatment by a nurse. Appellant intervened and helped get the inmate the necessary medical attention.

The nurse who had denied the inmate medical attention was then discharged from her duties at the jail. (32 RT 3901.) The court recognized the relevance of the evidence, yet, excluded it finding, "it just would be too many levels of hearsay." (32 RT 3907-3908.)

This evidence should have been admitted under the official records exception to the hearsay rule. (AOB 209-210.) Dr. Jarvis' testimony at the section 402 hearing demonstrates that in spite of his inability to recall details of the incident, he could have provided a foundation for admission of the report he authored. (AOB 209-210.) Respondent does not address this aspect of the argument.

The exclusion of this evidence violated the Due Process Clause. (*Green v. Georgia* (1979) 442 U.S. 95, 96-97; *People v. Phillips* (2000) 22 Cal.4th 226, 238.) Respondent's claim that the Supreme Court subsequently "limited" *Green* in *Oregon v. Guzek* (2006) 546 U.S. 517 (1 RB 130), misinterprets *Guzek* which actually *supports* appellant's position as evidenced by the quotation found in Respondent's Brief, at p. 130:

> The Eight Amendment insists upon "reliability in the determination that death is the appropriate punishment in a specific case." [Citations.] The Eighth Amendment also insists that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." [Citation.]

(*Oregon v. Guzek, supra,* 546 U.S. 517, at pp. 525-526, quoting *Penry v.*

Lynaugh (1989) 492 U.S. 302, 327-328.)

Moreover, improperly excluding evidence of good behavior by a capital defendant while in custody violates both the Eighth and Fourteenth Amendments. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5; *People v. Fudge* (1994) 7 Cal.4th 1075, 1116.)

Evidence that appellant was molested by her cousin

Appellant's uncle, Don Smith, was asked during direct examination, whether his son, Greg, had an "inappropriate relationship" with appellant when she was living with the Smith family as a young teenager. (RT 4074.) The prosecutor objected based on the lack of foundation, and the objection was sustained for a lack of reliability. (34 RT 4074 - 4075.)

This evidence could have been admitted under the family history exception to the hearsay rule, set forth in Evidence Code section 1310, *et seq.* (AOB 211.) Appellant's uncle was a qualified declarant related by blood or marriage, and was additionally "intimately related" to the family. (Evidence Code section 1311.)

The evidence was reliable since the statements had been made to appellant's uncle, an attorney in Texas, by his own son, his wife, and appellant years before the shootings in this case. All three declarants were "unavailable". (AOB 211.)

Evidence that appellant was molested by her father

The defense called Debbie Burdette, a career counselor at Maric College at the time of appellant's enrollment at the school. (34 RT 4388, 4390.) Appellant and Ms. Burdette often discussed appellant's "bad background". (34 RT 4391.)

During Ms. Burdette's testimony, the prosecutor made a "preemptive objection" and asked for a sidebar conference. (34 RT 4393.) The prosecutor stated that she was aware that appellant had told Ms. Burdette that she and her sister had been molested by their father. (34 RT 4394.) Defense counsel intended to solicit the testimony that appellant had been molested by her father. (34 RT 4394.) The prosecutor complained that appellant had never mentioned this to other mental health professionals and stated that she may have to bring in other witnesses to rebut the claim. (RT 4304.) After verifying with defense counsel that appellant had not mentioned this to "other mental health care professionals," the court found this to be "inadmissible hearsay," and excluded the testimony. (34 RT 4394.)

This testimony could have been admitted under the family history exception as set forth above, as Ms. Burdette had become "intimately familiar" with appellant's family background. (AOB 211-212.)

It also met the criteria for admission of "reliable hearsay" as appellant's

statements to Ms. Burdette had been made, in confidence, years before the shootings. The testimony by appellant's half-sister, Brenda Idol, that her father, Bill Stanley, had sex with her the day of appellant's mother's funeral certainly adds to the reliability of appellant's claim that Stanley had molested her as well.

The molestations of appellant by her cousin and her father were relevant and powerful mitigating evidence that would have given the jury a better understanding of appellant's bitterness towards the men who had betrayed her.

Each of these incidents was "highly relevant to a critical issue in the punishment phase of the trial" and each had indications of substantial reliability. (*Green v. Georgia, supra,* 422 U.S. at p. 97; *People v. Phillips, supra,* 22 Cal.4th at p. 238; *People v. Weaver, supra,* 26 Cal.4th at pp. 980-981.)

The prosecution's evidence of incidents at the jail and hospital

Appellant was confined in the county jail during trial. During cross-examination of defense expert James Esten, the prosecutor referred to a note by a nurse and asked if Esten had read the report. (34 RT 4361.) There was also a report regarding aggressive statements attributed to appellant. The defense objected and the lengthy discussion at the sidebar conference is set forth in the opening brief. (AOB 200-207.)

The prosecution was permitted to use these notes to impeach Esten. (35 RT 4366.)

However, there was no foundation for these notes to be used as impeachment evidence and no indicia of reliability. The prosecution could not establish the authors or whether the notes had been written by jail or hospital staff, whether appellant was medicated at the time of the statements attributed to her, and much of the writing was illegible. The cases on which respondent relies for support are unavailing.

People v. Ramos (1997) 15 Cal.4th 1133, was a capital case in which a defense witness was impeached at the penalty trial with evidence that the defendant had been "cited" five times in prison disciplinary hearings for possession of a weapon. (*Id.* at p. 1173.) There was no issue regarding the reliability of the evidentiary basis for this impeachment evidence. In fact, the defendant testified as to the reasons he needed to possess weapons. (*Id.* at p. 1174.)

There was no supporting evidence in this case as to the vague notations made by unknown persons.

> As we explained in *People v. Eli* (1967) 66 Cal.2d 63, 79, "Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box' [citation] . . . There is also a responsibility on trial courts to scrupulously prevent cross-examination based on mere fantasy. One of the dangers sought to be minimized by *Eli* was that of the question, based on a paucity or total lack of factual support which is asked with little or no hope of affirmative response and with the basic purpose of creating through innuendo that which cannot be

established by proof. [Citations]."

(*Id.* at p. 1173.)

People v. Gates (1987) 43 Cal.3d 1168, is equally unavailing. In *Gates*, the court merely held that if the issue of future dangerousness in prison is first raised by the defendant, the prosecution may cross-examine pertinent witnesses on the issue. (*Id.* at p. 1211.)

The alleged reports did not meet the requirements of the official records exception, and there is no exception that would allow their admission as impeachment evidence. They do not meet the Eighth Amendment's "heightened reliability" requirement for capital cases.

Given the one-sided evidentiary rulings by the trial court at the penalty phase, all tilting in favor of the prosecution, it cannot be said that these errors did not affect the outcome of that critical stage. The judgment of death must be reversed for having been obtained in violation of state law (*People v. Watson, supra,* 46 Cal.2d 818), and in violation of appellant's constitutional rights. *Chapman v. California* (1967) 386 U.S. 18, 24.)

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XI

The cumulative impact of the errors deprived appellant of her right to a fair trial and requires reversal of her convictions and death sentence.

Appellant argues that the errors described in the opening brief had a cumulative effect that denied her right to a fair trial. (AOB 216-217.)

Respondent argues that there were no errors during appellant's trial, and any errors that might have been committed do not entitle her to any relief. (RB 131.)

However, errors did occur. And they were significant.

The jury commissioner conducted voir dire and released several hundred potential jurors without questioning or requiring documentation. The jury summons sent to 7,000 citizens included a message suggesting Hispanics might not be fit to serve as jurors. As a result of this message, most of the Hispanics contacted decided not to appear. And while the problems associated with the early jury selection were numerous and obvious, there was no record kept of the proceedings that resulted in the mass excusal of prospective jurors.

The primary guilt phase error occurred when the trial court admitted unreliable expert testimony that diminished the sole defense relating to appellant's intoxication.

At the penalty phase, the trial court repeatedly allowed unreliable

evidence in aggravation while excluding relevant mitigating evidence.

The errors affected every aspect of this capital case. The United States Supreme Court requires heightened reliability in procedures involved in both phases of a capital trial. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Respondent ignores this fundamental premise of capital litigation and asks this court to sanction unreliable procedures which impacted jury selection and both phases of this trial. By simply suggesting that this may not have been a "perfect trial", respondent shows no respect for the additional due process required in cases seeking a death judgment.

The errors in this case were profound and collectively rendered the trial unfair.

Reversal of the judgment is required.

XII

California's death penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution.

Pursuant to this court's directive in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant maintains that the issues raised in this argument have been fairly presented in the Appellants Opening Brief at pages 217-259.

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Conclusion

The errors noted in this appeal impacted the jury selection, guilt and penalty phases of this trial. Perhaps the greatest errors occurred before formal jury selection began. By the time the regular voir dire began, the court employee tasked with excusing ineligible jurors had exercised her discretion to release many eligible jurors without any questions, supporting documentation or a record that would permit review.

Prospective jurors from San Diego's largest minority community were encouraged to stay home, which they did.

Appellant's primary guilt phase defense was attacked by unreliable testimony relating to informal, undocumented experiments conducted by a forensic toxicologist. And the penalty phase included the admission of substantial unreliable aggravating evidence and the exclusion of reliable evidence in mitigation.

The justice system has failed in the present case and the judgment must be reversed.

Dated: 6/15/09

Respectfully submitted,

Patrick Morgan Ford

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Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 14,844 words, as determined by the word count feature of the program used to produce the brief.

Dated: 6/15/09

Patrick Morgan Ford

PATRICK MORGAN FORD

DECLARATION OF SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Reply Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on June 16, 2009, at San Diego, California.

Esther F. Rowe