AUTOMATIC APPEAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JUAN VILLA RAMIREZ,** **Defendant and Appellant.**	**No. S099844** **(Kern Co. Super. Ct. No. SC076259A)**

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF KERN

The Honorable Kenneth C. Twisselman, Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Appellant testified on his own behalf at the trial. Among other things, he admitted to kidnaping, carjacking, and attempting to frighten Chad Yarbrough, who he believed was harassing his relatives. He testified that he wanted Yarbrough to apologize, and that when Yarbrough did not apologize, appellant wanted to scare Yarbrough to make him apologize. Appellant testified that he pushed a clip into the gun, an automatic weapon, wanting to make the noise and the gesture, not aiming the gun and without any intention to kill. But the gun went off accidentally. He was surprised when he saw Yarbrough falling over.

Appellant was entitled to have an unbiased jury hear his testimony, along with supporting evidence, and decide on the truth of what happened when Chad Yarbrough was shot. But Kern County was not the place to try the person charged with killing the well-known captain of a local high-school football team. Appellant was tried by a biased jury where 10 of the 12 sitting jurors should have been excused for cause. His jury included:

- a pro-death juror slow to reveal extensive knowledge of the case who had pending child support proceedings in Kern County (a clear conflict of interest) (Juror No. 3);

- three jurors who worked as prison guards, one of whom (Juror No. 6) admitted she could not be fair and impartial if there was any gang evidence presented; another (Juror No. 8) who was strongly pro-death, who repeatedly indicated, that based on his experience, he did not believe that LWOP was really LWOP; and a pro-death juror (Juror No. 12) who had heard at her workplace that the decedent Chad Yarbrough was killed "execution-style";
- three jurors (Jurors Nos. 2, 11, and 12) who were related (sister, mother, ex-wife) to members of the Sheriff's Department, all three of whom personally knew several of the prosecution witnesses;
- a juror who worked for the county and personally knew several of the prosecution witnesses (Juror 10);
- a juror who worked as an administrator for the school district where the deceased attended school and played football, and who participated in the handling of decisions on the extent of memorials for the deceased following his shooting death (Juror No. 4);

- a juror who was able to recount a remarkable amount of detail as to the facts of the case on voir dire and who cried when recalling that the decedent was replaced by his younger brother as Arvin High School's Homecoming King (Juror No. 7);
- a juror who owned property next to two of the crime scenes charged in this case and who expressed fear of retaliation from "these gangsters" if the verdict didn't go their way (Juror No. 1);
- a pro-death juror who was loudly assailed in a crowded restaurant and clearly shaken during the trial when her father demanded to know what was "taking so long when everyone knows he did it" (Juror No. 11).

The evidence presented in support of the motions for change of venue showed that the community's awareness of the crime at the time of trial remained almost as high as it had been at the time of the crime. Hostility to appellant in the courthouse and in the community was palpable. The trial court allowed it to flourish when it failed to properly control the proceedings:

- the chief bailiff was allowed to give heartfelt expressions of concern for members of the Yarbrough family in the presence of the jury;
- the bailiffs checked appellant's family and friends for outstanding warrants before letting them attend the trial;
- the jury complained that family members of appellant were parking near them;
- the jury requested that bailiffs protect them when they delivered the verdict despite a dearth of evidence suggesting they were in any danger;
- prosecutorial misconduct was permitted throughout the trial.

Respondent utterly fails to address key facts underlying these errors, including the substantial evidence in support of the venue motion as well as the sheer number of errors committed during jury selection. A close review of the record in this case will show that appellant is deserving of a new trial with 12 unbiased jurors who can fairly decide this case based on evidence presented in open court.

STATEMENT OF THE CASE AND FACTS

Appellant does not dispute respondent's statement of the case. (Respondent's Brief [hereinafter RB], 1–2.) Respondent's summary of facts contains notable omissions. It includes Dr. Donna Brown's direct testimony that she thought the weapon used to kill the decedent Chad Yarbrough was not fully automatic because the three bullet holes in his head were not closer together. (RB 13.) However, it omits Dr. Brown's initial statement in her autopsy report that the three wounds were instantaneous, and the bullets were likely to have been fired from a fully automatic weapon. (39 RT 9053–9057; 46 RT 10198; Def. Exh. E.)[1] In closing argument, the prosecutor disowned Dr. Brown as a witness in this regard, saying she had no expertise in the area. (53 RT 11841–11842.)

On this topic, appellant omitted in his opening brief the testimony of Ronald A. Helson, a criminalist who worked for 20 years for the city of Bakersfield and Kern County. (48 RT 10798 et seq.) After describing the investigation he performed and the materials he reviewed, he testified that the wounds were consistent with firing from an automatic weapon; if it were in the semi-automatic mode, in a pistol, firing one round after another,

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[1] The Reporter's Transcript is abbreviated as RT; the Clerk's Transcript as CT; the jury questionnaires as JQ. All statutory and section references are to the California Penal Code unless otherwise stated.

it would have been an exceptional display of marksmanship to hit a distant target with shots bunched so closely together. Mr. Helson echoed Mr. Laskowski in testifying that in the fully automatic mode, the gunshot wounds would have all occurred in less than a quarter of a second. There was also a high likelihood of the weapon jamming if it were modified to be automatic. (48 RT 10812–10814.)

ARGUMENT[2]

I. THE TRIAL COURT'S PREJUDICIAL ERROR IN REFUSING TO ORDER A CHANGE OF VENUE DEPRIVED APPELLANT OF THE FAIR TRIAL AND RELIABLE VERDICTS TO WHICH HE WAS CONSTITUTIONALLY ENTITLED.

A. Introduction

Appellant's trial venue was so hostile that he did not receive a fair trial before an unbiased jury. The extensive evidence before the trial judge presented before and during the trial, was sufficient to establish the need for a different venue as a matter of law. The trial court's formulaic dismissal of these motions on the basis that no showing had been made that the jurors could not set aside their knowledge and opinions of the case was a failure to properly exercise discretion.

The most striking feature of respondent's answer to appellant's change of venue argument (RB 35–57) is how it simply ignores key facts. Nowhere, for example, does respondent acknowledge the false rumors of sodomy and dismemberment of Chad Yarbrough's body, even though more than half of those who answered a survey in January of 2000 had heard

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[2] The argument numbering in this brief diverges from that in the opening brief, because appellant does not believe that answers are warranted to all points raised by respondent. References to appellant's opening brief will use specific page numbers; references to arguments or subsections will be internal references to this reply.

rumors of torture, and prospective jurors told of hearing "inside" information at their workplaces (which included prisons, hospitals, and schools) about the decedent's genitals being cut off and stuffed in his mouth. (Appellant's Opening Brief [hereinafter AOB], at pp. 57–127, esp. pp. 66, 68, 101–107, 142, 265, 284–285.)

Such rumors were not only poisonous to appellant, but they were confined to Kern County, and likely would not have traveled to any other county in California.

Respondent's summary of Dr. Edward Bronson's testimony is limited to isolated tidbits. (RB 35–36.) Though it rejects his conclusions, Dr. Bronson's facts were undisputed. Respondent has Dr. Bronson "admitting" that his January 2000 survey did not ask if the survey respondents could put aside their preconceptions and follow the law (RB 36), but says nothing about Dr. Bronson's testimony that such a question, however appropriate for a court, is not appropriate for a venue survey because it does not address the key venue issues of preconceived opinions on guilt or impressions of the accused; it is also a leading question that invites an affirmative answer, and the American Society of Trial Consultants recommends against it. (4 RT 936–940.)

In footnote 19, respondent argues that the motions for change of venue made during the trial were based on the same record as the first two motions. Not so. The facts that (1) one prospective juror was married to the boss of Chad Yarbrough's sister and was not dismissed for cause; (2) one of the jurors owned property adjacent to two of the crimes scenes at issue in this case and expressed fear of gangs retaliating against her if they didn't like the verdict; (3) a juror experienced a public scene in a crowded restaurant with her father demanding that the jury render a guilty verdict quickly, an experience which was allowed to taint the entire jury; and (4) a supervising county clerk who was also the decedent's aunt, who not only was present at the trial at county expense but also found her way into the courtroom where appellant's ex parte section 987.9 hearing was being held, were all additional evidence supporting renewed motions to change venue that added to that which was considered in the first two motions before the trial began.

The killing of Chad Yarbrough in October of 1997 was a concussive event in Kern County. He was a known figure in the community before he was killed. Chad was the captain of the Arvin High School football team. He had appeared on local television sportscasts, both as a performing athlete and as a spokesperson for his team. Thousands of people attended a

memorial service for him. Stories about his killing saturated local media, including accounts of his death, widespread grieving by the Kern County community, the devastating impact on his family, the "cancer" of juvenile street gangs and community meetings to stop them that featured Chad Yarbrough's face on posters, the manhunt for appellant (a Mexican National and reputed gang leader), and appellant's capture at the Mexican border nine months after the crime's commission. (AOB 58–80, 100–121.)

Media coverage of this case was inflammatory, pervasive, and sustained. It sprang back to life whenever there was any case development. A survey of the community taken in January 2000 showed that awareness of the case, including details about both Chad and appellant, remained extraordinarily high, as did opinions about what had happened, and what should be the appropriate punishment. Unchallenged expert testimony in June 2000 predicted that this widespread and detailed recognition level was "flat," and would not appreciably decline within the following year. In fact, it remained at the same high level during jury selection in December 2000 and January 2001. (AOB 71–78.) This Court cannot be confident that appellant was tried by 12 impartial jurors.

B. Appellant Could Not Have Received, and Did Not Receive, a Fair Trial in Kern County

Respondent does not acknowledge the federal constitutional aspects of appellant's claim of error, relying on California state law. (RB 45–46.) The Sixth and Fourteenth Amendments "guarantee[ ] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) When a trial court is "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere[,] . . . due process requires that the trial court grant defendant's motion for a change of venue." (*Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361, citing *Rideau v. Louisiana* (1963) 373 U.S. 723, 726.)

In California, a motion for change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§ 1033, subd. (a).)

Interference with a defendant's fair-trial right "is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." (*Harris v. Pulley*, *supra*, 885 F.2d at p. 1361.) Actual prejudice, on the other hand, exists when voir dire reveals that the jury pool harbors "actual partiality or hostility [against the defendant] that [cannot] be laid

aside." (*Id.* at p. 1363; see also *Murphy v. Florida* (1975) 421 U.S. 421 U.S. 794; *Patton v. Yount* (1984) 467 U.S. 1025.)

The United States Supreme Court applied this two-pronged analytical approach in *Skilling v. United States* (2010) 561 U.S. 358, considering first whether pretrial publicity and community hostility established a presumption of juror prejudice, and then whether actual bias infected the jury that decided the case.

Section 1033, subdivision (a), codifies the principles set forth by this Court in *Maine v. Superior Court* (1968) 68 Cal.2d 375. The trial court's initial venue determination as well as this Court's independent evaluation must consider five factors: "'(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citations.]" (*People v. Famalaro* (2011) 52 Cal.4th 1, 21; *People v. Leonard* (2007) 40 Cal.4th 1370, 1394.)

A criminal defendant is constitutionally entitled to trial before an impartial jury. (*People v. Hensley* (2014) 59 Cal.4th 788, 824.) This requires a jury wherein no single member was improperly influenced and "'every member is "'capable and willing to decide the case solely on the evidence before it'" [citations.]' [Citation]." (*Ibid.*)

On appeal, a successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that "at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 578; see also *People v. Williams* (1989) 48 Cal.3d 1112, 1126.) The trial court's determination of the relevant facts will be sustained if supported by substantial evidence, but this Court will "independently review the court's ultimate determination of the reasonable likelihood of an unfair trial." (*People v. Hart* (1999) 20 Cal.4th 546, 598.)

Respondent and appellant do not differ in the law applicable to venue motions. (See AOB 58–61; RB 45–46.) The difference in record consideration, however, is stark. In an effort to force this case into a generic appeal of the denial of a motion to change venue, respondent repeatedly omits pivotal facts. The record evidence in this case at each and every relevant juncture—from the time of the commission of the crimes, throughout pretrial proceedings, after the prospective jurors submitted their questionnaires, after they were examined during voir dire, and finally throughout the trial itself—overwhelmingly demonstrates that the trial court prejudicially erred in refusing to grant a change of venue. There is more

than a reasonable likelihood that a fair trial was not had in this case. A comparison of this case with recent cases decided by this Court is illuminating.

In *People v. Johnson* (2015) 60 Cal.4th 966, this Court wrote that the voir dire questioning

> [w]as fully adequate to explore the jurors' knowledge of the case and any impact this knowledge would have on their ability to be fair. Defendant never claimed otherwise at trial. "Defendant's failure to exhaust his peremptory challenges or renew his venue motion supports 'a reasonable inference that the defense did not believe that pretrial publicity had prejudiced the seated jurors. . . .'" (*People v. Hensley*, *supra*, 59 Cal.4th at p. 796, quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1216 [57 Cal.Rptr.3d 543, 156 P.3d 1015].)

(*People v. Johnson*, *supra*, 60 Cal.4th at p. 987.)

> Nor is this an extraordinary case in which the publicity was "so pervasive and inflammatory" that prejudice is presumed and the jurors' assurances of impartiality should not be believed. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216–1219 [57 Cal.Rptr.3d 543, 156 P.3d 1015] (*Prince*).) . . . Defendant's failure to exhaust his peremptory challenges or renew his venue motion supports "a reasonable inference that the defense did not believe that pretrial publicity had prejudiced the seated jurors. . . ." (*Prince, supra*, 40 Cal.4th at p. 1216.)

(*People v. Hensley*, *supra*, 59 Cal.4th at p. 796.)

The most heavily publicized of this Court's recent cases was *People v. Avila* (2014) 59 Cal.4th 496. In *Avila*, the victim was of the most poignant category, an eight-year-old girl, but she had no individual history

in the local press; "Samantha Runnion was just another young lady in this county until she was abducted." (*Id.* at p. 505.) Her status would have meant the same to any venire in the state.

The venue was Orange County, which had a population of over three million people, more than four times larger than Kern County. According to the *Avila* trial court, "We went through 150 prospective jurors. My recollection is that the ones who had the most recall of the events were excused for various and sundry reasons. The ones who were challenged for cause that were not granted had limited knowledge of the facts of the case." (*Avila*, *supra*, at pp. 506–507.)

No juror in that case had a personal stake comparable to Juror No. 1, who owned rental property close by or next to crime scenes and residences of codefendants, and had to return regularly to collect rent. (AOB 298–302; see also Arg. VI.B, *post.*) There was far more detailed knowledge of the case in the minds of the seated jurors in this case; see, e.g., Juror No. 12, who worked at Wasco State Prison, and who followed the case on television and in the newspapers. (14 RT 3436.) When asked what rumors she had heard, she said that "he was shot in an orchard execution-style, after his truck was stolen." She added that he was bound, and shot in the back of the head. (14 RT 3439.) She "hoped" that she could set aside those stories, and

be impartial in this case. (14 RT 3440.) An extremely high number of prospective jurors knew someone in the Yarbrough family, about 11 percent. (28 RT 6267.) There was nothing comparable in *Avila*.

A look at each of the relevant criteria for determining whether venue should be moved shows that no one can be confident that, in this case, appellant received a fair trial.

C. Application of the Criteria Considered by this Court in Assessing Whether Rulings on Venue Motions Were Correct Establishes that Appellant's Trial Should Have Been Moved From Kern County

1. Nature and Gravity of Crime

Here, respondent simply cites cases such as *People v. Williams* (1997) 16 Cal.4th 635, *People v. Ramirez* (2006) 39 Cal.4th 398, and *People v. Bonin* (1988) 46 Cal.3d 659, for the principle that even multiple murders do not require a change of venue: "the murder of Yarbrough and multiple carjackings, while serious, are not dispositive factors." (RB 46.) Respondent does not attempt to deal with the fact that the crimes in this case included an additional murder charge (of Javier Ibarra), and were actually thought by many prospective jurors to include more cruel and degrading facts than were officially charged. (See AOB 101–107.)

The nature of and gravity of the crimes alleged here were extremely serious, and weighed toward granting venue change—particularly away

from Kern County, where the nature of what crimes actually occurred was contaminated by a web of other serious charges and poisonous rumors that would not have been present in any other part of California.

2. Size of the Community

Respondent notes that Kern County ranked 14th out of 58 California counties, and cites *People v. Balderas* (1985) 41 Cal.3d 144, 178–179 for the statement that Kern County is larger than most cases in which venue changes were granted or ordered on review, and *People v. Rountree* (2013) 56 Cal.4th 823, 839: "The size of [Kern] County supported the conclusion that an unbiased jury could likely be found." (RB 51–52.)

It may have supported this conclusion on the surface, but this Court did not assume that venue could not be changed in either *Balderas* or *Rountree*, nor did the court of appeal in *People v. Martinez* (1978) 82 Cal.App.3d 1. In all these cases, courts made a careful review of each of the relevant statutory factors before ruling. (AOB 107–111.)

Respondent summarizes some of the relationships prospective jurors had with the victim and his family, and states that

> Dr. Bronson acknowledged that the "long lasting effects" of the Yarbrough murder on the town that were referenced in newspaper articles were referring to Lamont, not Kern County as a whole. (26 RT 6236–6237.) Thus, appellant's contention that Bakersfield should be treated like a small town is without merit.

(RB 53.)

Respondent not only overlooks the extensive evidence presented by Dr. Bronson showing long-lasting effects of murder of Chad Yarbrough in Arvin, Bakersfield, and on Kern County as a whole, but it inexplicably ignores the evidence that prospective jurors who lived in or had connections with Lamont or Arvin were scattered throughout the jury pool, despite the prosecutor's recommendation that they be *excluded* from the jury pool.[3]

It further ignores the fact that Juror No. 1 went to Lamont monthly to collect rent, and actually owned Lamont property right next door to the house of Efrain Garza, which was not only the residence of a codefendant but a critical staging scene where Mr. Ramirez and others were gathered just before one of the charged crimes was committed, and was fearful of retaliation from "gangsters" if she remained on the jury and the verdict wasn't to their liking. (See AOB 298–302; Arg. VI.B, *post.*)

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[3] In his opposition to appellant's motion to change venue, the prosecutor argued:

> [T]he only group that acted like a "small-county" or "shared" the experience, was the local high-school football community, and the towns of Arvin and Lamont. If the jury commissioner had heeded the suggestion made by the prosecutor to the court, they could have excluded jurors from those towns entirely, and the recognition percentage would have been much less . . . many from Bakersfield had only a passing recollection.

(13 CT 3673.)

Appellant's contention that Kern County reacted like a small town for this particular crime is abundantly supported with facts that are simply unacknowledged by respondent. Appellant has shown how beloved was the decedent; how widely known he was before he was killed; how his television appearances as the leader of the Arvin high school football team were repeated by the local media; how thousands of people appeared at memorial service for him; how his number "32" was highlighted not only on the football field by rival teams from other parts of Kern County, but all over Lamont and elsewhere in Kern County; and how appellant was portrayed as a ruthless gangster and explicitly labeled as a gangster by at least one seated juror. Appellant has further shown how rumor mills spreading "inside" information about chilling falsities operated throughout Kern County's workplaces, not just in Lamont. (AOB 101–121.) Respondent studiously ignores the particular facts of this case.

The prosecutor acknowledged that elements of Kern County acted like a "small-county" or "shared" the experience but said that such feelings were confined to "the local high-school football community and the towns of Arvin and Lamont." (13 CT 3673.) That did not really limit the pool of tainted prospective jurors. In San Diego, or Los Angeles, or San Jose, or San Francisco, high school football is not a part of the main local narratives,

but in Kern County, Chad Yarbrough had been on local television as a football player. He was a spokesperson for Arvin High's football team, on broadcasts that were seen county-wide.

Thousands of county residents attended football games each Friday night—and Chad was murdered in late October, in the high heat of the football season, just before he was due to appear as Homecoming King. (AOB 63–64.)[4] Prospective juror George Haller knew the Yarbrough family because his son also played football—for Garces High School, a school in Bakersfield. (14 RT 3426.) Juror No. 2 talked about being at a meeting of women, including a "sports mom," sympathizing with the decedent's mother. The "small-town" reaction to this case was not confined to Lamont, and the pool of prospective jurors did not exclude people connected to Lamont. This factor strongly supported a change of venue.

3. Nature and Extent of the News Converge

Respondent argues that although media coverage following the crime was extensive, the passage of time had negated its impact. (RB 47.) "Most of the seated jurors and prospective jurors heard about this case long before the jury selection began and had limited knowledge of the facts. [¶] Juror No. 1 had heard about the case 'a long time ago.'" (RB 47.)

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[4] His younger brother Brent appeared in his place. (2 CT 587–588.)

But Juror No. 1 also referred to appellant and his friends/associates as "gangsters," and asked to get off the jury because of fear of retaliation. The fact that she may have heard about it "long ago" does not preclude the obvious fact that she had formed biased opinions about the facts of this case and the character of appellant that were operative in 2001. (AOB 298-302; Arg. VI.B, *post.*)

Many of the prospective and seated jurors duly said that they had little awareness of this case, but were contradicted in these assertions by either their own questionnaires or by further questioning on voir dire. See, e.g., Juror No. 2, who minimized her awareness of the case, but turned out to know quite a bit, and to have overheard a "sports mom" expressing sympathy for those involved in the case (see AOB 216–219); and Juror No. 3, who initially wrote that he knew nothing about the case. Gradually, he disclosed on voir dire that he had seen television coverage and heard from his wife that Chad Yarbrough had been shot, that Chad's truck was stolen and then recovered (he had seen a picture of the tow truck), and that the case started with a carjacking. He knew that appellant had been picked up out of state: "It was publicized so big, you know." (AOB 196-198; 21 RT 5041–5042; see Arg. II.C, *post.*)

As Dr. Bronson testified without contradiction, the recognition rate in Kern County was "flat"—it had not declined between January 2000 and January 2001. (AOB 69.) The fact that there were fewer articles in 2000 and 2001 than the immediate wake of the crime does not mean that the community had become indifferent, or that opinions about what had happened and about appellant had not been formed.

Respondent finds comfort in the fact that stories that appeared in the Lamont and Arvin daily papers were identical. (RB 49.) But such repetition is a key element of how a narrative becomes embedded in community consciousness. It does not in any way lessen the story's impact; "continual, repetitive and at times inflammatory coverage indicates that potential jurors in Placer County may not be able to give defendant a fair trial." (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 590.)

Respondent relies extensively on the "night stalker" case (*People v. Ramirez*, *supra*, 39 Cal.4th 398, where extensive media coverage did not justify a change in venue (RB 46, 49, 50, 55), but does not look at the details of that case. The case at bench featured intense coverage in Kern County, and virtually no coverage elsewhere. Media coverage in *Ramirez* was statewide, and a change in venue from Los Angeles would not have cured any problems of juror preconceptions.

> Although defendant argues that the media coverage of this case was "extensive and inflammatory," he focuses on the extent of the coverage and offers few examples of coverage that could be described as inflammatory. With few exceptions, the media reports were accurate. Defendant's confessions were reported, but these confessions ultimately were admitted into evidence. And the voir dire confirmed that the jury ultimately selected was largely unaware of, or had forgotten, the details of the media coverage by the time of trial.

(*People v. Ramirez, supra*, 39 Cal.4th at pp. 435–436.)

> The trial court concluded: "I don't think that a reasonable likelihood has been made out that a fair trial cannot be had in this county," adding, "You know, of course, that if a panel is brought in and if you go through the panel and the voir dire experience shows that the panel is, in fact, rather than in theory, polluted, that you can make another motion for change of venue at that time."

(*People v. Ramirez, supra*, 39 Cal.4th at p. 433.)

No such motion was ever made, either after voir dire was completed or during the trial.

Respondent presents a highly sanitized version of the media coverage, and states that "most, if not all, the facts reported in the media were introduced at trial, including facts that were beneficial to appellant. . . ." (RB 50.)

Respondent says nothing at all about the use of inflammatory language in reportage of the crimes, even though this is the most important component of media coverage. (2 RT 825–835.) In *Williams v. Superior*

Court, *supra*, 34 Cal.3d 584, this Court noted that "'execution-style' killing was referred to 12 times (variations were used 3 additional times)." (*Id.* at p. 590.) In the case at bench there were 20 references to "execution-style slaying" and characterizations of the killing as "planned execution-style." (Exh. D attached to the renewed venue motion, publicity analysis, pp. 12–13; AOB 74.)

This language was echoed by at least seven prospective jurors in voir dire, and by a seated juror. (14 RT 3439 [Juror No. 12], 3505 [Ordiway]; 19 RT 4512–4513 [Hallum]; 17 RT 4293 [Pitts]; 20 RT 4643–4644 [Harrison]; 25 RT 6128–6129 [Tibbals]; 28 RT 6627 [Williams].) Prospective juror Sherry Williams, a correctional officer, testified that between her voir dire (Jan. 3, 2001) and being called for jury selection (Jan. 17, 2001), she heard fellow correctional officers at her workplace talking about how the decedent had been killed "execution-style." (28 RT 6627.) This term was part of the televison coverage of the case. (4 RT 1197.) Stories about this case were filled with strong, emotional language, such as "brutal," "horrible," "nightmarish," "heinous," "evil," "sickening," and "cowardly." (Exh. D, publicity analysis, p. 3; AOB 114.)

Several stories referred to suspects as Hispanic males when references to their race was gratuitous.[5] Appellant's nickname "Loco" appeared repeatedly in the press, along with depictions of him and his brother, Cipriano, as "bad seeds" responsible for other crimes. (Exh. D, publicity analysis, pp. 13–14; 2 RT 857–866; 3 RT 1046–1047.)

Appellant was routinely referred to in media reports as a gang member. There were dozens of reference to gangs, the arrogance of gangs, the "cancer" of gang violence, the prowling of gangs like a pack of wolves—and how the community could stand up against gangs, and cause gangs to crumble, send gang-bangers crawling back under the rocks from which they came, anti-gang meeting attended by hundreds of people, and the need to "declare war on gangs." (See Exh. D, publicity analysis, pp. 7–8.)[6] There is no evidence in this record, or in the public record, that

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[5] During the course of covering this case, the local newspaper formally adopted a policy of mentioning race only when it was relevant to the story. (3 RT 1046–1047.)

[6] "The word 'gang' . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) Given its inflammatory impact, this Court has condemned the introduction of gang evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

other counties in California were then as preoccupied with "street gangs" as was Kern County.

A key issue, according to this Court, is whether community awareness of the crime remained high even after the coverage subsides. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1251; *People v. Williams*, *supra*, 48 Cal.3d at p. 1127.) Dr. Bronson testified in June 2000 that due to the nature and the extent of coverage here, that awareness remained quite high as late as January 2000, the date of his survey more than two years after the crime, and would remain high. (3 RT 998–1004.) Again, his prediction was correct. Juror questionnaires and voir dire disclosed that *community awareness was as high at the time of trial as at any previous point since the crime's commission*. The fact that there were fewer stories about this case in 2001 than in 1998 (see RB 57) by no means shows that this case had faded from local consciousness. This factor should have weighed decisively toward a change of venue.

4. Status of the Defendant

In both his argument and written opposition to the motion to change venue, the prosecutor ignored entirely the extensive discussions of how gangs were at that time plaguing Kern County. Respondent acknowledges

that there were indeed articles about appellant's gang association, and that such association did come in at trial, but asserts:

> [T]he gang in this case was from a small outlying community in Kern County. [¶] Any potential prejudice because of appellant's association with LFS would likely stem from people who knew of the gang and lived in Lamont; not those who lived in other areas of Kern County. Moreover, much like race, any element of prejudice regarding gangs would likely follow to another county. Thus, this factor did not support a change of venue.

(RB 54.)

These arguments contradict each other. Respondent says that (1) since the gang was from Lamont, appellant's association with it would not prejudice him with people living in other parts of Kern County; and (2) it would prejudice him everywhere in California equally, as would his race. The community-wide meetings held in an effort to cope with what was seen as a serious gang problem in the wake of this crime show that fear of neighborhood gangs was very real in Kern County, and gang activity was held to be directly responsible for the crimes at bench.

5. Prominence of Victim

Respondent does not discuss the victim's name, or the number "32" that he wore on his uniform, each of which were spread all over Kern County in the wake of this crime. Instead, it cites *People v. Harris* (1981) 28 Cal.3d 935, and notes that "he did not come from a prominent family."

(RB 54.) But the victims in *Harris*, ordinary teenagers liked by their friends, had never carried the hopes of a specific community, as Chad Yarbrough had done as captain of the local football team. Thousands of people did not attend memorial services for them. They had never been on local television sportscasts as a key player or representatives of anything prior to their deaths. Once again, respondent tries to turn this case into a generic venue motion with no individual qualities, and does not discuss any part of the extensive showing made by appellant of the role of Chad Yarbrough in Kern County *before* he was killed.

In a typical example of its approach, respondent writes,

> Appellant claims the elevated status given to the victim by the publicity following the murder is determinative of the issue. (AOB 120–121.) This Court, however, has found,
>
> > [a]ny uniquely heightened features of the case that gave the victim[] and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.
>
> (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214, quoting *People v. Dennis*, *supra*, 17 Cal.4th at p. 523.) It is the victim's status prior to the crime that is relevant to this particular issue (see *People v. Prince*, *supra*, 40 Cal.4th at p. 1214; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 434), and post-crime publicity is more appropriately addressed under the category of nature and extent of media coverage. Thus, the trial court did not error in denying appellant's change of venue motions.

(RB 54–55.)

Here, however, the victim was already an important figure to large swaths of the community before the crimes at bench were committed. (AOB 119–121.) Kern County experienced a loss that would not have been felt in any other venue. It was Chad Yarbrough's status as an icon, and a spokesperson, that likely fueled the subterranean rumors of defilement and degradation that coursed throughout Kern County workplaces. Respondent has again ignored the unique qualities of this case, and simply cited to unobjectionable, and inapplicable, general principles. The status of the victim cried out for a change of venue.

D. Jurors Do Not Automatically Qualify for Service If They Agree That They Can Set Aside Their Own Beliefs and Preconceptions

As respondent notes, the U.S. Supreme Court noted in *Murphy v. Florida* (1975) 421 U.S. 794, 800, that there is a "rebuttable presumption that a juror is impartial if the juror can assure the court that he can set aside his opinions and base a verdict on the evidence presented." (RB 56.) The *Murphy* court, however, also found that

> The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality. In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have

> been influenced by it. In *Irvin v. Dowd*, for example, the Court noted that 90% of those examined on the point were inclined to believe in the accused's guilt, and the court had excused for this cause 268 of the 430 veniremen. In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt.

(*Murphy*, 421 U.S. at pp. 802–803.)

Here, of the 450 people called to serve on this jury, 199 were dismissed for hardship reasons, sometimes because of their feelings about this case. See, e.g., 13 RT 2987, where prospective juror Jarvis [200308453] called the clerk and was "emotional" about the information he had provided in his questionnaire [his address, children's school]. He did not want it to be copied or provided to counsel. His questionnaire was destroyed and he was excused by stipulation. (13 RT 2989.)

Of the 251 prospective jurors remaining who filled out jury questionnaires, a substantial majority of venirepersons (166) were dismissed for cause. This case is closer to *Irvin* than to *Murphy*, where only 20 of 78 potential jurors were dismissed for cause after being questioned.[7]

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[7] In *Murphy*, the high court noted, "In the entire voir dire transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror." (*Murphy v. Florida, supra*, 421 U.S. at p. 801.)

The prosecutor argued that the remaining 85 prospective jurors should be sufficient. (27 RT 6507.) But of these 85, more than 50 were challenged for cause by appellant—always with some reason, and often for very good reasons, i.e., intimate familiarity the Yarbrough family, prejudgment of the facts of this case, belief that death should invariably be the punishment for deliberate murder, unqualified belief that appellant and his associates were "gangsters," etc. (See AOB 135–231.)

In exceptional cases, "'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed,' [citation]. . . ." (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 429; *People v. Prince* (2007) 40 Cal.4th 1179, 1216–1217.)

In *People v. Tidwell*, this Court wrote,

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

(*People v. Tidwell* (1970) 3 Cal.3d 62, 73; see also *Irvin v. Dowd*, *supra*, 366 U.S. at p. 728.)

The United States Supreme Court has held that a rebuttable presumption of impartiality normally attaches if a juror could provide

assurances that he or she could "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" (*Murphy v. Florida, supra*, 421 U.S. at p. 800.) A defendant can rebut this presumption by demonstrating that the juror actually held a biased opinion, or "where the general atmosphere in the community or courtroom is sufficiently inflammatory," or when "most veniremen will admit to a disqualifying prejudice," such that it is probable that the community harbors "sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." (*Id.* at pp. 802–803.) The present case qualifies on all these grounds.

In *People v. Farley*, this Court rejected a challenge to the trial court's failure to change venue of the trial by noting, *inter alia*, that appellant had not challenged any of the seated jurors for cause, and had eight peremptory challenges remaining. (*People v. Farley* (2009) 46 Cal.4th 1053, 1085.) In addition, none of the sitting jurors or alternates had been challenged for cause. (*Ibid.*) Similarly, in *Skilling*, only one of the 12 seated jurors had been challenged for cause. (*Skilling v. United States*, *supra*, 130 S.Ct. at p. 2903.)

In *Beck v. Washington* (1962) 369 U.S. 541, 557–558, the fact that the defendant did not challenge for cause any of the jurors selected "is

strong evidence that he was convinced the jurors were not biased." See also *People v. Panah* (2005) 35 Cal.4th 395, 448, and *People v. Zambrano* (2007) 41 Cal.4th 1082, 1127–1128, where this Court cited the circumstance that the defendant did not challenge any of the sitting jurors for cause or exhaust available peremptory challenges, in support of its conclusion that hindsight demonstrated that retention of the case did not "produce an unfair trial."

Here, there is no doubt that appellant believed the jury was biased against him. He used all his peremptory challenges, and unsuccessfully asked for more. Ten out of the 12 seated jurors had been challenged for cause. Appellant did everything in his power to object to this jury.

In *Patton v. Yount*, *supra*, the United States Supreme Court rejected defendant's presumption-of-prejudice claim despite a wave of negative publicity, because "[t]he jury selection for Yount's second trial, at issue here, did not occur until four years later, at a time when prejudicial publicity was greatly diminished and community sentiment had softened." (Accord, *Skilling v. United States*, *supra*, 130 S.Ct. at p. 2915, fn. 13.)

There was no evidence that the community's feelings had softened prior to appellant's trial. The community from which the venire was chosen had been saturated with negative publicity toward appellant, heartrending

sympathy for the decedent and his family, and poisonous rumors about the desecration of the victim that were false.

In such a climate, the fact that seated jurors agreed with the trial court, often only after lengthy and repeated instructions and directions, that they could set aside their preconceptions and follow the law, does not insulate respondent from appellant's meritorious claim that the trial court erred in not directing this case to be tried outside Kern County. (Discussion of seated jurors in Arg. II.C, *post.*)

E. Midtrial Motions to Change Venue Should Have Been Granted

1. January 17, 2001

On January 17, 2001, just after the jury was sworn and at the beginning of the selection of alternate jurors, appellant moved for a mistrial and for a change of venue after his challenge against Michele Diaz was denied; her brother was supervisor of Chad's sister at Vons grocery store. (AOB 157–160.)

Counsel summarized the number of prospective jurors who knew someone who knew family members, or who had directly interacted with family members, and argued that both the appearance of such close connections as well as their reality required that venue be changed. His motion was wrongly denied. (See AOB 158–160.) Respondent simply

writes that the challenge to Ms. Diaz was properly denied, and does not mention the motion for a mistrial or the renewed motion to change venue. (RB 70–72.)

2. January 31, 2001

On January 31, 2001, appellant moved for a mistrial because of the "circus atmosphere" that prevailed. He described 20–25 members of the Yarbrough family being present in the courtroom during testimony:

> During the morning session when Brent Yarbrough was describing his underpants, they all burst into loud and raucous laughter. This laughter was taken up by most of the jury. I have been outside of the courtroom during several of the breaks this morning and noticed that most of these people have been gathered outside the courtroom, outside the front doors, visiting in loud voices and seemingly very happy about the progress of affairs, with jurors sitting a few feet away, who could not possibly avoid hearing the Yarbroughs visiting with each other. And I have seen this twice this morning.

(36 RT 8385–8386.)

Counsel then also noted that a uniformed bailiff, identified by the trial court as Sgt. Drew Patrick, who supervised all the sheriff's deputies who work in the courthouse, was commiserating with Yarbrough family members in the hall outside the courtroom, with jurors nearby. (36 RT 8386–8387.)

After argument, the court denied the motion.

I'll specifically rule that I don't find there's been a circus atmosphere. I deny that there's been any inappropriate behavior by the jurors or people in the audience section. I don't agree with the characterization, Mr. Bryan, that people were laughing in a loud and raucous manner. Certainly, I could hear laughter. But I don't feel it was inappropriate.

(36 RT 8391.)

Later that day, the court called Sergeant Drew Patrick to the witness stand. Sgt. Patrick was in charge of all the bailiffs in the courthouse.

The Court: Sergeant, this morning did you have contact with members of the Yarbrough family?

A. Yes, sir, I did.

Q. Could you describe that contact.

A. I just briefly spoke with them, asked them how things were going, how they were doing, how they were holding up under the trial.

(36 RT 8456–8457.)

Sgt. Patrick estimated that the interaction lasted about five minutes.

(36 RT 8457.)

The trial court then addressed him:

Q: You understand my concern –

A: Certainly.

Q: -- is that we not have law enforcement hanging around with either family in the hallway in the presence of the jurors where it would appear to the jurors that

somehow one side has the support of the Sheriff's Department. Do you understand?

A: Certainly. Sorry for any misunderstanding.

THE COURT: That's fine.

(36 RT 8464.)

3. February 4, 2001

A renewed motion to change venue was made as part of the challenge to Juror No. 11 as having committed misconduct. (See AOB 88–93, 293–297; RB 42–43; Arg. IV.B., *post.*)

4. February 9, 2001

Respondent's summary of facts regarding Diana Yarbrough (RB 43-45) does not acknowledge that Ms. Yarbrough, the decedent's aunt and a supervising clerk for the Kern County Superior Court, was present at appellant's trial nearly every day, at county expense, a fact that the prosecutor thought that was none of appellant's business. (43 RT 9746; see AOB 93–97.)

Appellant first addressed Ms. Yarbrough and her presence in this case in a motion to recuse filed in June of 2000. He noted that several municipal court judges had recused themselves from this case because of their working relationship with Ms. Yarbrough. (AOB 93–94.) The prosecutor then made an offer of proof to the effect that Ms. Yarbrough had

no working relationship with the prosecutor's office, and his only interactions with her were as a family member of Chad Yarbrough and not as a county official. The motion was denied. (4 RT 1327.)

On February 9, 2001, appellant moved for a mistral, and renewed his motion for a change of venue. Ms. Yarbrough had appeared in Department 2 of the superior court, where appellant's section 987.9 motions were heard, while counsel were waiting for court to resume. She entered via Judge Westra's chambers and stayed for several moments, speaking to the courtroom clerk and the reporter before leaving.

Ms. Yarbrough was called to testify. She affirmed the facts as presented by counsel regarding her appearance in court, but she stated that she did not have a close relationship with the district attorney's office, and that she had not tried to get information related to this case. (43 RT 9733–9734.)

Ms. Yarbrough was asked by her supervisor to prepare a statement about this incident. She did so, and gave it to Pat Chandler. She printed an extra copy of her statement, and gave it to the prosecutor, but not appellant. (43 RT 9736.) Respondent does not acknowledge this or try to explain how this evidence of a practical working relationship between Ms. Yarbrough

and the prosecutor's office somehow does not matter. (See RB 43–44, 220.)[8]

Respondent also does not acknowledge, let alone try to explain, the favoritism shown to the Yarbrough family by courthouse personnel throughout the trial, from its beginnings, when family members of appellant were singled out for record checks when they came to out, while the bailiffs were particularly solicitous of the decedent's family members, in a courtroom labeled as the "Yarbrough case." (AOB 100.) This degree of overt concern for the Yarbrough family was an unmistakable message to jurors about where official sympathies lay.

No other case cited by respondent has had so many prospective jurors who knew members of the family or knew someone within their family or at their workplace who knew someone within the Yarbrough family. Here, the superior court in which appellant was being tried paid regular wages to one of its supervising employees who was a relative of the decedent to personally attend the trial, and act as a sort of "family

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[8] Ms. Yarbrough appears again in this record, near the end of trial. According to counsel, she was heard making phone calls in a crowded hallway, saying, "You better get down here. A lot of the bastard's family have shown up." (62 RT 13836.)

coordinator," and summon family members to the courthouse if the situation seemed dire.

The chief bailiff spent several minutes comforting the decedent's relatives in the hallway in front of the jury, checking to see "how they were holding up." The trial court explained to him that it was not proper for a person with his authority to favor one side or another, and he apologized for the "misunderstanding," but he should have known this elementary principle of fairness long before the trial started. The failure to grant any of appellant's motions to change venue insured that he would not receive a fair trial.

F. Conclusion

Although this Court isolated relevant factors to be considered in evaluating the merits of venue motions in *Maine* that were later codified in section 1033, the final question is simple. The U.S. Supreme Court has written that in determining on review whether or not venue should have been changed, "[T]he underlying question has always been this: Do we have confidence that the jury's verdict was 'induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print'?" (*Skilling v. United States*, *supra*, 130 S.Ct. at

p. 1848.) In this case, the Court cannot be confident that the persons chosen as jurors were truly impartial.

II. THE TRIAL COURT'S PERVASIVE ERRONEOUS RULINGS ON APPELLANT'S CHALLENGES FOR CAUSE RESULTED IN A BIASED JURY AND REQUIRE REVERSAL OF THE JUDGMENT.

A. This Claim Is Not Forfeited

Respondent first argues that appellant's claim is forfeited because he did not expressly object to the jury as it was finally constituted (RB 58.) It seems oblivious to the numerous objections made by appellant throughout the process of jury selection, including a continuing objection to the failure of the trial court to grant him more peremptory challenges, and his challenge to the jury immediately after it was sworn.

On January 7, 2001, appellant used the last of his peremptory challenges. He then moved for additional peremptory challenges, on grounds that the panel was biased. (28 RT 6697.) His motion was denied. When he renewed the motion shortly thereafter, the trial court deemed it a continuing motion. (28 RT 6699.)

Moments later, just after the jury was sworn and during the first stage of choosing alternate jurors, appellant's challenge for cause against Michelle Diaz, whose brother supervised Chad Yarbrough's sister at work, was denied. Appellant moved for a mistrial, and renewed his motion for a change of venue. In the course of argument, counsel contended,

> The defense is being penalized because we have to exercise challenges against people who have close contact with the family, who have access to the family information, who have repercussions from the family after this case is over.
>
> And is absolutely unfair and prejudicial for this defense to be put through this type of jury pool, with jurors that we know have close connections with this family, are one person away from this family, going to affect them or the rest of their lives.
>
> They should not be under this kind of pressure, the defendant should not, and I move for a mistrial, and move for the court to reconsider our venue motion.

(28 RT 6714–6715.)

After the prosecutor defended the jury as constituted and the particular juror, counsel noted other instances of prospective and seated jurors being close to the Yarbrough family or knowing people who knew and talked about the Yarbrough family:

> This jury has the appearance of impropriety, and in order to insure a fair trial for this defendant, we can't have these clothes (*sic*) family connections, because just the appearance of impropriety makes it appear to the reasonable person looking at this objectively, that this defendant will not get a fair trial with these kinds of jurors in the jury pool.

(28 RT 6718–6719.)

The trial court denied the motion for mistrial, denied the renewed motion to change venue, and denied counsel's challenge for cause against the juror. (28 RT 6719–6720.) Respondent completely fails to address the renewed motion for a change of venue or the motion for a mistrial.

There were an abundant number of concrete complaints made by appellant as to the composition of the jury, the unfairness of the process of juror selection, and the fruits of that unfairness, just before and just after the jury was actually chosen. In *People v. Bonin*, *supra*, 46 Cal.3d 659 at p. 689, this Court wrote: "'The reason for this [contemporaneous objection] rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury."' [Citation.]" There was substantial compliance where defense counsel moved for a mistrial and moved to strike evidence elicited by prosecutor that had been ruled inadmissible. Defense counsel "gave the court more than ample opportunity to 'correct the abuse.'" (*Ibid.*)

There was, and is, no surprise that appellant was unhappy with the biased jury who sat in judgment on him, and the tainted process by which those jurors were chosen. The trial court had plenty of opportunities to rule on the fairness of appellant's jury, both before and after it was sworn. This claim is not forfeited.

B. The Panel of Prospective Jurors Was Biased Against Appellant

Appellant presented several forms of juror bias in his opening brief, at AOB 128–135. Most of these types of bias were present in this case. Respondent does not acknowledge or dispute these principles. (RB 58–61.)

Respondent repeatedly insists that even if there were error, the challenges for cause were harmless because the potential jurors were removed through the exercise of defense peremptory challenges. (See, e.g., RB 113.) Respondent ignores the fact that 10 of the 12 sitting jurors had also been challenged for cause but could not be removed because the peremptory challenges had been used on these other jurors, and requests for additional peremptory challenges were denied.

Appellant recognizes that the trial court has wide discretion in the number and nature of questions it asks prospective jurors about the death penalty. (*People v. Mills* (2010) 48 Cal.4th 158, 189, cited at RB 61.) In this case, the trial court abused that discretion. Respondent discusses each of the jurors who were accepted by the trial court over appellant's challenges. Appellant will reply to some of its responses, and otherwise rest on his previous briefing. The seated jurors will be discussed in a separate section, *post*, at Arg. II.C.

1. Dennis Herbert

Respondent's indifference to what actually happened during voir dire is revealed by the first juror discussed. It says, "Mr. Herbert stated that he could set aside what he knew about the case, and that he could set aside any preconceived views on the death penalty and consider both life without possibility of parole (LWOP) or death as punishment." (RB 62.) But Mr. Herbert did not state any of this. His own contributions were limited to three words: "correct," "yes," and "yes." (See 14 RT 3328–3329; AOB 137.)

Mr. Herbert's strong preference for death and his connections to the Yarbrough family are also minimized by respondent, who relies on monosyllabic assents as justification for allowing Mr. Herbert to serve on appellant's jury. Appellant's challenge for cause should have been granted.

2. Patricia O'Neill

Ms. O'Neill was emotional about this case, the horrible things she had heard about what had happened to Chad Yarbrough, and his similarity to her brother. (14 RT 3366–3367.) Respondent notes that she said she could consider both death and LWOP as possible penalties (RB 63), but ignores her statement that the cases where death should not be imposed were circumstances in self-defense or where a person had been abused as a

child and felt it was their "only way out." (14 RT 3373; AOB 144.) Ms O'Neill was highly likely to have been biased against appellant. Appellant's challenge for cause should have been granted.

3. George Haller

Mr. Haller, an appraiser for Kern County who knew "various judges," (14 RT 3432–3433) is an example of how Chad Yarbrough's football skills made him known beyond Arvin and throughout Kern County before he was killed. Mr. Haller knew of the Yarbrough family and the decedent because his son played football for Garces High School, which is located in Bakersfield. He also had extensive law enforcement connections, including a son-in-law who was a corrections officer. (AOB 145.) Appellant's challenge for cause should have been granted.

4. Silver Ordiway

Mr. Ordiway was biased towards death in this case. Respondent says that "some of his responses were equivocal," (RB 66) but they were not. He always supported death as the appropriate punishment for murder. (AOB 146–151.)

He did say the words, "yes sir, I could" to the prosecutor after a lengthy paragraph of a question about whether he could keep an open mind regarding penalty, but not long after that, he stated again that he would have

a difficult time in voting for a sentence of less than death if the defendant was found guilty of first degree murder, because "I do believe in the death penalty." (14 RT 3516–3517.) Appellant's challenge for cause should have been granted.

5. Roger Dilbeck

Mr. Dilbeck was another prospective juror who was close to the decedent's family. (15 RT 3608–3610.) He was strongly in favor of the death penalty. Respondent ignores appellant's complaint that the trial court repeatedly sustained objections made without any grounds provided about circumstances in which Mr. Dilbeck would not believe death was the appropriate sentence. (AOB 151–152, RB 67–68.) Appellant's challenge for cause should have been granted.

6. Floyd Moore

Counsel's questioning of Mr. Moore, a strong believer in the death penalty who said that it should be imposed in cases of murder unless there were circumstances like self-defense to mitigate the crime, was also truncated by the trial court on the basis of objections without any specified basis. This happened even though he stated that he would "not really" be considering "things like the defendant's background, how he was treated as

a child." (AOB 152–156; RB 68.) Appellant's challenge for cause should have been granted.

7. Michelle Diaz

Respondent asserts that although Ms. Diaz wrote in her questionnaire that if appellant was found guilty he should be sentenced to death, she said on voir dire that "she did not have a "fixed" opinion on death, that her mind was not "set in stone," and that she would have to evaluate the penalty based on the evidence." (RB 70; 15 RT 3590–3591.) Respondent omits, however, the type of evidence that might lead her to vote for a sentence of less than death: "if everything showed that he didn't do it . . . if it was just a cold-blooded murder, he shouldn't be able to live if he committed this sort of crime." (15 RT 3590–3591.)

Respondent ignores entirely appellant's motion for a mistrial and a renewed motion for a change of venue upon learning during jury selection on January 17, 2001, that Ms. Diaz's brother supervised Melissa Yarbrough, sister of the decedent, at work. (See AOB 159–160; Arg. I.E.1, *ante*.) The motions should have been granted; as counsel noted, a large number of persons were called in this case who had relations with or knew someone who knew the decedent and/or his family. Appellant's challenge for cause should also have been granted.

8. Raymond Benson

Mr. Benson did not "waver" on his personal view as to whether childhood events should be a factor in mitigation; he was quite clear that they should not. (See RB 73; AOB 160–162; 16 RT 3832–3847.) Mr. Benson's assent to the trial court's general question should not inspire confidence, given how clear and emphatic he was when personally discussing the issue. Appellant's challenge for cause should have been granted.

9. Charles Julian

Mr. Julian believed in the death penalty for cases in which a killing was not self-defense. (See AOB 166–167.) Appellant's challenge for cause should have been granted.

10. Donna Wilson

Ms. Wilson was clear that she would give greater weight to the testimony of a police officer, and that she was biased against street gangs. (AOB 169–172.) Respondent recognizes that she said this in her questionnaire and in her early voir dire, but adds that "she later explained on voir dire that she could follow the law and judge witnesses based on their testimony and demeanor on the stand, and she stated that she would not automatically give a law enforcement officer's testimony more weight

simply because he was an officer." (RB 81.) Ms. Wilson actually said none of this; she assented to such propositions by the trial court. (17 RT 4277–4278.) Appellant's challenge for cause should have been granted.

11. Betty Hallum

Ms. Hallum was very aware of case information; she had followed the case in the media, and via her husband's brother, who knew the decedent's family, she learned "a few details of what happened." (19 RT 4511.) She could remember that the young man was taken out of his car and then shot "execution-style." (AOB 172.) She had a bundle of preconceived notions about what had happened during the crime that she believed came from an "inside" source. Appellant's challenge for cause should have been granted.

12. Sherry Williams

As shown in appellant's opening brief, Ms. Williams was good friends with the daughter of a key prosecution witness (Glenn Johnson, who brought appellant back from Texas and testified about appellant's incriminating statements regarding the crime). She was also a corrections officer, and reported hearing repeated examples of discussion about this case by her co-workers at her workplace, who said that appellant had kidnapped Chad Yarbrough, took him to an orchard, killed him "execution-

style," and stolen his truck. (AOB 177–179.) She was one of the prospective jurors who were exposed to a version of the crime that negated appellant's defense and lessened the prosecution's burden of proof, who was also close to a key participant in the trial. Appellant's challenge for cause should have been granted.

13. Glen Kellerhals

Appellant discussed this voir dire in detail, at AOB 182–195. Respondent answers appellant's claims that the trial court was guiding the juror via suggestive, repeated, and directive questioning by simply saying that "the trial court had broad discretion in how to conduct voir dire." (RB 91.)

Appellant pointed to the trial court's failure to ever confront the first objection of trial counsel, which was to repeated and directive questioning, and the court's mistaken insistence that counsel's first objection was to its tone, that counsel had changed the basis of his objection, and its threat that it would "pursue" counsel for making an allegation without good faith basis, even as it again had a mistaken recall of what had actually happened —all of which is ignored by respondent.

For the second time,[9] the trial court threatened counsel with punishment for making his objection, wrongly remembering what had just happened, and recast entirely counsel's objection. Respondent does not defend these actions, saying only that the trial court's denial of the challenge was "supported by the record." (RB 95.) Appellant's challenge for cause should have been granted.

14. Kimberly Lindgren

Ms Lundgren was not forthcoming to court and counsel about her knowledge of the case. On voir dire, she said she knew nothing about the case, but on her questionnaire, she had referred to having seen stories and photographs about the case. (See AOB 201, fn. 76.) Appellant's challenge for cause should have been granted.

15. Robert Murphy

Mr. Murphy worked for the Department of Corrections, and his wife worked for the Kern County Sheriff's Office. He strongly supported the death penalty, and knew quite a bit about this case. Respondent says that "Mr. Murphy expressed his personal view that the death penalty was not carried out in a swift manner in this state" (RB 97.) That's not an accurate

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[9] The first was with Terry Burton, one of the first prospective jurors questioned, who was passed for cause. (See AOB 247-252; Arg. III.A.1, *post.*)

summary of Mr. Murphy's beliefs; he believed that if a death penalty were the verdict, it would *never* be carried out. For the reasons set out in appellant's opening brief (AOB 202–205), appellant's challenge for cause should have been granted.

16. Diane Krotter

Respondent cites Ms. Krotter's agreement that she could set aside her personal views of the death penalty, follow the law, and render a verdict based on the evidence and circumstances presented in court. (RB 100.) But Ms. Krotter, as appellant pointed out in his opening brief, never wavered on her belief that death should be the penalty for first degree murder. Counsel was never allowed to ask her what, if any, circumstance might lead her to vote for a sentence of less than death for one convicted of first-degree murder. (AOB 210–212.) Appellant's challenge for cause should have been granted.

C. This Court Cannot Be Confident That None of the Seated Jurors Was Biased Against Appellant

Respondent argues that even if there were problems in how the trial court conducted voir dire, and even if there were some, or many, errors in its refusal to grant challenges for cause, it was not prejudicial, because the actual seated jurors were all unbiased:

> However, these 10 jurors, as well as the 2 who were not challenged, had no bias against appellant, assured the court they could be fair and impartial, and stated they would consider LWOP or death as possible penalties if the trial reached that phase. (14 RT 3438, 3443–3444 [Juror No. 12]; 15 RT 3578, 3578–3579 [Juror No. 11]; 3633, 3635–3635 [Juror No. 9]; 16 RT 3858–3863 [Juror No. 8], 3883–3886 [Juror No. 10];17 RT 4199–4200, 4202–4204 [Juror No. 7]; 19 RT 4414–4415 [Juror No. 4]; 21 RT 5044–5045, 5048–5051 [Juror No. 3]; 22 RT 5171–5172 [Juror No. 1]; 23 RT 5552–5553, 5554–5555 [Juror No. 2]; 24 RT 5711, 5720–5721, 5724–5725 [Juror No. 6], 5742, 5756–5757 [Juror No. 5].) As a result, appellant was not denied an impartial jury.

(RB 113–114.)

Respondent cites to isolated bits of testimony from each seated jurors. But this Court is charged with "[taking account of the full record, rather than incomplete exchanges selectively culled from it." (*Skilling v. United States*, *supra*, 561 U.S. at p. 399.) A look at the questionnaires and voir dire of each seated juror, and their behavior after being chosen, shows a very high likelihood that one or more of them was biased against appellant.

1. Juror No. 1

The voir dire of Juror No. 1 indicated that she was very familiar with the case. She had learned about it from the local media, and heard other people talking about the case at work. She knew, or rather, felt, that Chad Yarbrough had been murdered. (22 RT 5167–5168.) She knew they had

caught the person who shot him, and that he was caught in another state. (22 RT 5163.) She had heard that "Chad was in high school; that he was a football player who went to Arvin High." (AOB 201; 22 RT 5167–5168.) Appellant's challenge for cause should have been granted.

Then, after the trial had begun and counsel each made opening statements, she tried very hard to talk to the trial court alone. The trial court refused. (30 RT 7063.) In open court, she then expressed deep fear of continuing on the jury.

She owned rental properties in Lamont, went there once a month to collect, maybe more often if repairs were necessary, and feared that she might be "putting myself in some sort of situation," because the case was affiliated with Lamont gangs. She was afraid that if "there an upset of this case and these gangsters are upset, they might retaliate against me, thinking I was on the jury and I had something to do with it, because they didn't like the way decisions were made." (30 RT 7063–7064.)

The court responded by telling her that in his 13 years on the bench he had never experienced the sort of retaliation of which she was afraid. (30 RT 7065.) The juror then seemed to calm down, although she still had concerns.

The parties decided to see whether her properties were close to crime scenes.[10] The prosecutor hoped to "[make] sure that her rental properties aren't like right next door, or something, so this fear is compounded because she thinks those are the areas [where] she might run across family members or associates of these individuals." (30 RT 7070–7071.)

When the juror returned and was given the addresses at issue, she asked to see a map. (30 RT 7074.) She identified the Habecker Road property (Efrain Garza's house) as being right next door to one of her properties. (30 RT 7075.) The second location, on Ruben Road, was not close, but the third location, around 210401 San Diego Street near Hall Road (where Leonel Paredes was kidnapped), was also close to one of her properties. (30 RT 7076–7077.)

After she was shown these locations, the trial court asked her if that cause her to have any different feelings about her ability to travel to Lamont occasionally. She answered, "Well, I'm going to go by what you said. And you have been a judge for 12 years, and you haven't—in your years, you haven't experienced any retaliation against jurors. So that's what I'm—that

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[10] The sites were Habecker Road (the house of Efrain Garza, where the Juan Carlos incident began), the address of Daniel Quintana, and the parking lot from which Leonel Paredes was kidnapped. (30 RT 7070.)

is making me comfortable right now." (30 RT 7077–7078.) However, she still had "concerns." (30 RT 7080.)

After she was dismissed, appellant asked that she be removed from the jury. She had close connections with Lamont near the crime scenes and was compelled to go there regularly; she believed she was in a very dangerous situation and that appellant was a very dangerous person connected to other dangerous persons, i.e., "gangsters"—all before any evidence has been presented. (30 RT 7081–7082.)

The prosecutor neither joined nor opposed the challenge. (30 RT 7085.) The trial court denied the challenge, saying that the juror was honest with her feelings, and that he saw nothing that would prevent or substantially impair her from performing her duties. (30 RT 7086–7087.)

Juror No. 1 thus classified witnesses for the defense, including appellant himself, as "gangsters." (30 RT 7064.) She thought that she was in a very dangerous situation by being made to continue serving on this jury—the danger coming from appellant and other "gangsters." This prejudgement of appellant drastically lowered the prosecutor's burden of roof in the guilt phase of appellant's trial, and made a sentence of death more likely in any ensuing penalty phase.

The trial court *did not try to correct in any way this juror's prejudgment of appellant and of this case.* The juror likely interpreted what the trial court said as meaning that in his experience, gangsters did not retaliate against jurors for their verdicts. Notably, the prosecution did not oppose the dismissal of this plainly biased juror. This prejudgement of this case, and of appellant's character, was plain to see, and was entirely ignored by the trial court.

Respondent relies on *People v. Harris* (2008) 43 Cal.4th 1269, 1300–1303, as support for the trial court's refusal to remove Juror No. 1 in this case. (RB 143–144.) *Harris* was a case of potential jury tampering; a juror's father was called, and threatened with being shot in the stomach, as was the victim in the crime at bench. The incident was thoroughly investigated by the trial court, and by the local police department. It turned out that the father had himself made a police report complaining about a parked car that blocked his driveway, and the name on the subpoena was exactly that used by the threatening caller. (43 Cal.4th at pp. 1302–1303.)

A forceful statement by the juror that he was not in any way intimidated was accepted by the trial court, and by this Court, which approved the trial court's holding a prompt hearing to thoroughly explore the circumstances of the threat and the possibility of bias, the required

procedure for handling a presumptively prejudicial incident of juror tampering. (*Smith v. Phillips* (1982) 455 U.S. 209, 215–221; see *People v. Harris, supra*, 43 Cal.4th at p. 1304.)

In *Harris*, the defendant then argued that the fact that the court told the juror that the prosecutor's office would investigate the case and protect his family created an inherent prejudice that would be too strong to overcome regardless of what the juror said. This Court replied,

> [T]he fact that the investigation quickly yielded a strong reason to believe that his family was not targeted because of his service on the jury mitigated any prejudice that might have resulted from a belief that the district attorney's office was protecting him from defendant or someone acting on defendant's behalf. Defense counsel raised no objection, so the court had no occasion to admonish the juror not to draw any untoward inferences from the prosecutor's role in the investigation.

(*People v. Harris, supra*, 43 Cal.4th at p. 1305.)

This is not a jury tampering case. The prejudice here came from the juror herself, who expressed fear of retaliation against her by gangsters if she was on the jury and it reached a verdict that they didn't like. Respondent writes, "Juror No. 1 never stated that appellant was a 'gangster.'" (RB 144.) But who does respondent think Juror No. 1 was talking about? The jury's fear of appellant and his family was palpable, and continued to the end of the trial, when the jury reported being concerned by

seeing cars parked that were driven by members of appellant's family, and by their request for protection once they had reached a death verdict. (See Jury Notes, 17 CT 5088, 5090; 62 RT 13835–13847.)[11] It is likely that Juror No. 1 was in the vanguard of these concerns.

Respondent states, "based on the totality of circumstances surrounding her potential fear, there was no substantial likelihood that Juror No. 1 was actually biased against appellant." (RB 144.) This is wishful thinking. She was predisposed to believe that he was a gangster who was connected with other gangsters who were not locked up. The trial court may have reassured her about the behavior of gangsters, but did nothing to address her assumptions about appellant and his friends that were her underlying beliefs. A plainly biased juror sat in judgment on appellant, and sentenced him to death. (See AOB 81–84, 298–302 and Arg. IV.A, *post.*)

2. Juror No. 2

Juror No. 2, whose brother worked for the sheriff's office (23 RT 5546), was close to this case, and not forthcoming about what she knew, or what she thought. She said that her only knowledge of the case came from "just the television and probably a page on the newspaper of some sort."

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[11] There is no evidence in the record of any misconduct or threats made by anyone associated with appellant.

(23 RT 5547.) In truth, she knew plenty of details about the crime. She revealed them in between repeated statements that she didn't really know anything. (AOB 216–219.)

She knew that Chad Yarbrough was murdered and there was a truck involved and his body was found somewhere near a truck and that the perpetrators were Hispanic, and there was "sort of possible gang influence or something." She described being present at conversation of women, and the sympathy the women felt for Chad Yarbrough's mother. (AOB 216–218.) She minimized that interaction, saying,

> [J]ust the case itself was mentioned, you know.
>
> Q. And how many people were talking about it, approximately?
>
> A. A couple, I think. I don't even really know exactly how it was mentioned. Just maybe a sports mom or something like that. It was so brief, I can't even imagine it being anything.

(23 RT 5547–5549.)

There is a contradiction here, between the description of a "sports mom," or a mother with a child about the age of the decedent in this case, and others expressing "the sympathy they had as a mother—for the mother of him," and her insistence that "it was so brief, I can't even imagine it being anything."

Juror No. 2 believed that the death penalty should be imposed except in rare cases if someone deliberately takes another human being's life. This juror should have been excused for cause, and would have been discharged via a peremptory challenge had appellant been able to do so.

3. Juror No. 3

Juror No. 3 was also slow to reveal his engagement with this case. He stated on his questionnaire that he had read nothing about the case, had heard nothing about this case, had seen no photographs about the case, had talked to no one about the case, and had not heard anyone saying anything at all about this case. (23 JQ 6619–6621.) A different story emerged during voir dire. (AOB 196–198; 21 RT 5041–5044, 5053–5054.)

This juror had learned quite a bit about this case from case publicity and from ongoing conversations with his wife. He thought the death penalty should imposed except in rare cases if someone deliberately takes another human being's life. (23 JQ 6631.) He also had a court date coming up where the Kern County district attorney would seek to recover unpaid child support from him. (21 RT 5060–5061.) This juror should have been excused for cause, and would have been discharged via a peremptory challenge had appellant been able to do so.

4. Juror No. 4

Juror No. 4, an administrator with the Kern County High School District, knew several leading local government officials, including the sheriff's office and the Kern High School District police. A supervising prosecutor in the District Attorney's office had come to her school to congratulate her on establishing a Crime Free Zone around East Bakersfield High School. (23 JQ 6656–6657.) She knew about this case from local televison, and from discussions at work about what the Arvin High School administration should do regarding memorials for Chad Yarbrough, given how disruptive they were for ongoing school life. She was a strong supporter of the death penalty, and thought it should be imposed whenever a killing was "premeditated and meant." (19 RT 4417.) Appellant's challenge for cause should have been granted. If he had any peremptory challenges remaining, he would have exercised one to dismiss this juror.

5. Juror No. 6

Juror No. 6 worked in Wasco State Prison for the Department of Corrections.[12] On her questionnaire, she wrote that evidence that a "street

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[12] Although the record does not show any contact, the trial court ordered that codefendant Efrain Garza, who had already been convicted by the time of appellant's trial, be housed in Wasco State Prison. (1 RT 512–513.)

gang" was involved would present her from being fair and impartial, because the are "generally crime-oriented." If anyone use or possessed a firearm, that would also keep her from being fair and impartial, if carried by anyone other than law enforcement. (23 JQ 6701.) She thought the death penalty was fair and just for intentional murderers. (23 JQ 6715.) She was familiar with the case, not only with the facts of the crime but with fundraisers held in Arvin after the crime.

Correctional facilities in Kern County were full of prejudicial talk about this case, including poisonous false rumors and prejudicial beliefs, i.e., that appellant was killed "execution-style." (See 14 RT 3439; 25 RT 6128–6129; 28 RT 6627.) Appellant's challenge for cause should have been granted. If he had any peremptory challenges remaining, he would have exercised one to dismiss this juror.

6. Juror No. 7

Juror No. 7 had an extraordinary amount of knowledge about this case. (See 17 RT 4194–4197; AOB 167–169.) She became upset on the witness stand when talking about Chad Yarbrough's brother Brent taking Chad's place as Arvin High School's Homecoming King. (17 RT 4197–4200.)

When counsel sought to question her about any predeterminations as to the proper sentence if the jury concluded that the crime was a first degree accidental murder during a carjacking, the prosecutor objected without presenting a reason for his objection. His objection was nonetheless sustained. But voir dire questions need to be specific enough about a particular case that the court and counsel can determine whether the jurors' views of the death penalty would prevent them from being fair and impartial, even if not so specific that it requires a juror to prejudge the penalty issue based on a summary of the evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990–991.) In *People v. Cash* (2002) 28 Cal.4th 703, this Court held that the trial court erred in prohibiting defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if defendant had previously committed two prior murders. (*Id.*, 28 Cal.4th at p. 714.)

This Court has endorsed particularized death-qualifying voir dire in a variety of situations. A prosecutor may properly inquire whether a prospective juror could impose the death penalty on a defendant in a felony-murder case (*People v. Pinholster* (1992) 1 Cal.4th 865, 916–917), on a defendant who did not personally kill the victim (*People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70–71), on a

young defendant or one who lacked a prior murder conviction (*People v. Livaditis* (1992) 2 Cal.4th 759, 772–773), or only in particularly extreme cases unlike the case being tried (*People v. Bradford* (1997) 15 Cal.4th 1258, 1320).[13] Here, the trial court apparently thought that the facts contained in the question (the single word "accidental") were too specific. (See AOB 168–169; 17 RT 4202–4203.) It was wrong. Appellant was entitled to see if prospective jurors would vote for death even if appellant persuaded them that the actual firing of the weapon that killed Chad Yarbrough was accidental; that was his defense against a death sentence.

Juror No. 7 was intimately involved with this case, and should not have served on appellant's jury. The trial court erred in sustaining an objection that blocked counsel from exploring an area of legitimate

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[13] Respondent cites *People v. Valdez* (2012) 55 Cal.4th 82, as supporting the trial court's refusal to allow counsel's voir dire questions in this case. (RB 131.) Valdez upheld a trial court determination that questions about the age of victims, who were children, would led to an automatic death sentence, but recognized that

> [D]efendants are entitled to "probe the prospective jurors' attitudes" as to any fact or circumstance in the case that "could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." [Citation.] They may not, however, pose questions so specific that they require prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence the parties are likely to present at trial. [Citation.]

(*People v. Valdez, supra*, 55 Cal.4th at 165.)

concern, and in not granting appellant's challenge for cause. Appellant would have exercised a peremptory challenge to remove this juror if he were able to do so.

7. Juror No. 8

Juror No. 8 worked at the North Kern State Prison as a correctional officer. He was a strong supporter of the death penalty, and thought it should be imposed whenever there was an intentional killing, or first-degree murder. (23 JQ 6771–6773; 16 RT 3863–3864.) The trial court refused to allow counsel to ask Juror No. 8 if he were open to evidence in mitigation that included circumstances of appellant's childhood: "Counsel, I will go ahead and interpose an objection. Let's stay with the general natures of the juror's duties to consider circumstances in aggravation or mitigation and adds it more generally, please." (16 RT 3862.)

The trial court thus improperly limited voir dire of a prospective juror who had repeatedly said that he thought death was the appropriate penalty for intentional murder, who offered a car accident as the only circumstance in which he would vote for a sentence of less than death, and wrongly denied a challenge for cause. Appellant would have exercised a peremptory challenge to remove this juror if he had been able to do so.

8. Juror No. 11

Juror No. 11 had a son was a deputy in the Kern County Sheriff's Office. (23 JQ 6839.) She was frightened by "street gangs." (23 JQ 6841.) She believed that the death penalty should be imposed in every case where someone deliberately takes another life; that was her considered belief. (23 JQ 6855; 15 RT 3571–3573.) As respondent writes, she gave an affirmative answer to the trial court's question, "Are you satisfied that you can set aside any personal views or opinions you have about the death penalty and follow the law and keep an open mind as to the two possible penalties that might be imposed here?" (15 RT 3578–3579.) Immediately thereafter, however, she indicated that for either an intentional killing or a killing with kidnapping or carjacking, that death was the appropriate sentence. (15 RT 3580.)

Respondent states that "Although Juror No. 11 at times gave conflicting answers regarding her views on the penalty phase of the trial, the question as to whether to excuse the juror was one for the trial court to decide." (RB 70.) But there was no real conflict in her answers. She did assent to questions about whether she could keep an open mind concerning what penalty to assess, but she stated on her questionnaire and at the start and at the finish of her voir dire that the penalty for an intentional killing or

a killing in the course of kidnapping or carjacking should be death. (RB 69–70; AOB 156–157; 15 RT 3569–3580.) Subsequent developments affirmed that the juror was biased against appellant.

As shown above (see Arg. I.E.3; AOB 86–93), this juror committed prejudicial misconduct. She had lunch with her father in a crowded restaurant near the courthouse mid-trial. At some point in the conversation, he said, in a loud voice overheard by several people in the restaurant, something like, "what's taking them so long; they know he did it." (39 RT 8979.)

She had not told her father that she wasn't supposed to discuss the case outside the courtroom. (39 RT 8994.) She appeared hostile and prejudiced to counsel for appellant when he questioned her. (39 RT 8986.) When the trial court directed her to not discuss the incident with other jurors, she said that she had already told other jurors that her father had said something. (39 RT 8995.)

The trial court's questioning of other jurors indicated that Juror No. 11 had talked with the jurors about the incident after being told by the trial court not to do so, and that she was upset about the comments made by her father, and at being called in and questioned about the incident. One of

the jurors heard her talk about her father saying the name "Yarbrough" out loud in the restaurant. (39 RT 9011–9012.)

She failed to follow court orders by discussing the case with her father and fellow jurors despite repeated, even daily, warnings by the court not to do so since the trial began. She was not candid in her disclosure to the court of what she had done. She was unlikely to follow the court's order in the future that she disclose these types of events to the court. She was subject to improper influence by her father, who expressed a forceful opinion, in public, about the guilt of the defendant, and impatience with the pace of appellant's trial. This Court cannot be confident that she was an unbiased juror.

9. Juror No. 12

This juror worked at Wasco State Prison; she was the third correctional officer to be chosen for appellant's jury. (24 JQ 6950.) She was married for 25 years to a Kern County Sheriff's Deputy, and knew several people peripherally related to this case; she had met Glen Johnson, one of the case's chief investigators. One of her five sons was also a correctional officer. (24 JQ 6951, 6953–6955.)

Like other correctional workers, she had heard that Chad Yarbrough "was shot in an orchard execution-style, after his truck was stolen." She

also had heard that the decedent was bound and shot in the back of the head. (14 RT 3439.) She favored the death penalty except in rare cases when someone has deliberately taken another's life. (24 JQ 6967; 14 RT 3441.) Appellant's challenge for cause should have been granted. Appellant would have exercised a peremptory challenge to remove this juror if he had been able to do so.

In short, appellant's jury was filled with jurors who had conflicts of interest as well as predetermined and prejudicial opinions about what had happened during the crime's commission, the repercussions of that crime for Chad Yarbrough's family, about appellant and his character, and about the appropriate penalty. No reasonable jurist can be confident that the jury's decisions to find appellant guilty and sentence him to death were induced only by evidence and argument in open court.

III. THE TRIAL COURT PREJUDICIALLY ERRED IN CONDUCTING VOIR DIRE IN SUCH A LEADING AND DIRECTIVE MANNER THAT JURORS WHO SHOULD HAVE BEEN DISMISSED FOR CAUSE WERE RETAINED IN THE JURY POOL.

Respondent contends that the trial court properly denied appellant's motions for a mistrial which was based on the trial court's manner of conducting voir dire, and thus, the trial court did not commit any misconduct. (RB 122.) Respondent reaches its conclusion ignoring the operative legal principles, and the clear record in this case.

For example, respondent cites *People v. Whalen* (2013) 56 Cal.4th 1, 34, as approving the trial court's leading questions. (RB 112.) Although this Court approved the leading questions of jurors in *Whalen*, it also wrote, "we caution against overreliance on leading questions to the exclusion of more open-ended questions because the authority of the trial judge may cause a prospective juror to give what he or she perceives to be a 'correct' answer rather than a considered statement of his or her true views." (*Ibid.*) The record in this case is a perfect illustration of why there is a need for caution. The trial court's extensive use of leading questions was an abuse of discretion which resulted in a biased jury and an unfair trial.

A. During Voir Dire the Trial Court Proved to Be Hypersensitive, Quick to Threaten Defense Counsel, and Unwilling to Acknowledge Error

1. Terry Burton

Respondent defends the trial court's questioning of Terry Burton by misreading the record, and shows the same misunderstanding of the law related to imposing a death sentence as the trial court. (RB 124–126.)

As respondent notes, the trial court asked Mr. Burton, "If the evidence and the law required it, could you return a verdict for the death penalty?" (RB 124.) Counsel objected, on grounds that the law never requires a death verdict. His objection was overruled. (17 RT 4312–4313.) After both sides passed for cause, counsel for appellant pointed out how the prosecutor had phrased a similar question correctly ("if he as the juror thought the appropriate sentence was the death penalty, could he vote for it") and said that the trial court misinformed the juror by asking if the juror could impose a death sentence if the law required it.

According to respondent,

> The court noted that was not how the court phrased the question, and explained that its question was "if the evidence and law required it" and that was terminology he used frequently with jurors. (17 RT 4318–4319.) The court explained that what it meant was that the court instructs the

jury on the law and the jury must follow the law. (17 RT 4319.)

(RB 125.)

The fact that the trial court "used that terminology frequently with jurors" illustrates its dearth of experience in death penalty cases (it had never before presided over a capital trial). Counsel for appellant, as the prosecutor noted, was correct. The law never requires a death sentence, regardless of the evidence. (AOB 249–252.)

The trial court berated trial counsel for saying that it had phrased the issue in this way, and accused counsel of misquoting it. (AOB 248–249.) It was wrong. After the court discovered it was wrong, it retreated to an insistence that the language at issue was "standard language," and said, "we use that terminology with jurors all the time." (17 RT 4317–4321.)

Counsel did not misquote the court. The court's response was not only defensive, but it shows that it was relying on its extensive experience with non-capital criminal cases, and misapplying it to the penalty phase of a capital case in a voir dire process that looks at prospective jurors' views on imposing death as a primary focus.

Respondent makes the conclusory and incorrect assertion that "the record does not reveal that defense counsel was 'right' about what the trial court said, or that the trial court misunderstood the law." (RB 126.) But it

does not take issue with appellant's discussion of the supreme court precedent and jury instructions that make it clear that a death penalty is never required by the law. Respondent does not deny that the trial court asked the prospective juror if he could impose the death penalty if the law required it. The "standard language" used by the trial court is by no means standard in a death penalty case.

For the trial court to not realize that the language at issue was mistaken in its first capital case is understandable, even inevitable. Its unwillingness to acknowledge error, however, and its threatening trial counsel for raising this important point, is inexcusable.

2. James Davis

Respondent then defends the voir dire of prospective juror James Davis, and states that "Mr. Davis was equivocal in his responses, and the court's questions were aimed at clarifying those responses to determine whether he could be fair and impartial." (RB 127.) That may have been true for the first few pages of voir dire, after Mr. Davis said, "I don't know how fair I could be," because of his 16 years as a corrections officer. (16 RT 3789.)

Mr. Davis repeatedly said that he had doubts about his ability to be fair, but he also expressed desire to try hard, and eventually said that he

could perform his duties. (AOB 257–258.) He went back and forth, and back and forth, and back and forth through very extensive voir dire, until finally he told the court and counsel that he had a traumatic situation at work; he "ended up having to shoot three inmates a couple of days ago." (6 RT 3789–3797.) The trial court then felt obliged to "take the next step" with jurors who express a bias, and "explain what their duties are." It did so. (16 RT 3802.) Eventually, it became clear to the court that Mr. Davis had to be dismissed. (See AOB 260.)

Explaining a prospective juror's duties to set aside his or her personal convictions and follow the law is a reasonable approach, but it does not justify repeating with very slight variations over and over a depiction of the juror's duties, and to view each expression of doubt as something to "clarify," until the prospective juror finally assents to the direction the trial court clearly wanted him or her to go. (See, e.g., the voir dire of Glen Kellerhals, AOB 182–195.)

3. Five Admittedly Biased Jurors Who Were Qualified by the Trial Court as Potential Jurors

Appellant gave as examples of the trial court's overbearing voir dire five prospective jurors who returned to court after having been led by the trial court to say they could be fair during voir dire, to say that actually, they could not be fair. (AOB 262–288.) Respondent makes a conclusory

summary of each juror's voir dire and return to court, and states, "There is no correlation between the court's voir dire and the jurors' later request to be excused." (RB 131.) Appellant disagrees.

a. Mark Torres

Mr. Torres expressed strong support for the death penalty. After he said that persons convicted of murder should be put to death, and the death penalty should be used more often, the trial court instructed him repeatedly on his basic duties as a juror, after which Mr. Torres said he would have no problem keeping an open mind. Three weeks later, however, it was clear to Mr. Torres that, due to his place of employment (the Department of Corrections), he could not be fair. (AOB 262-264.)

b. Kyle Dock

Mr. Dock was the father of teenaged boys who played football in Kern County. He was raised to believe that "an eye for an eye" was the proper way to approach punishment for a crime, and he did not believe that a person's background had any relevance to what penalty should be imposed. Appellant's challenge for cause was denied.

Mr. Dock was questioned on December 21, 2000. When he was called to serve as a juror on January 17, 2001, and he was asked if there was any reason why he should not be on the jury, he answered "yes." (28 RT

6665.) He proceeded to tell about hearing from several workmates who lived in Arvin and they were talking about having heard Chad's father being really upset about what had happened to his son, and how he wanted to hurt the person who did it. He said it was impossible to avoid such talk. The trial court persisted in questioning Mr. Dock and probed his financial situation before finally dismissing him. (28 RT 6665–6670; see AOB 264–271.)

c. Edward Wright

Mr. Wright's son's girlfriend was friendly with the Yarbrough family. His son went with her to the Yarbrough house after Chad Yarbrough's death. (17 RT 4100.) She had dated Chad, and her parents were friends with Chad's parents. (17 RT 4101.) When his son returned from the visit, he said that Chad Yarbrough's bedroom "was like a shrine." (17 RT 4101.) The court questioned him at length,[14] and instructed him repeatedly on what the duties of a juror were, and finally obtained agreements from him that he could follow the law, and that he would not automatically favor law enforcement, even though he worked with them, and he would go into a penalty phase with an open mind, even though he

[14] When questioning Mr. Wright about the impact of his family's connections to the Yarbrough family, the trial court stated, "we are not concerned about appearances. We are concerned about reality." (AOB 272.)

thought that if the killing was intentional, the punishment should be "murder or death." (17 RT 4118; see AOB 278.)

Mr. Wright was called back to serve on the jury on January 17, 2001. When asked if there was any reason why he should not serve on the jury, he answered, "No," but when asked if there was any reason why he could not be fair to both sides, he answered, "yes." (28 RT 6650.) His honest belief was that he was "leaning way too far towards guilty." Mr. Wright was then excused. (28 RT 6651.)

d. Charlene Hicks

Ms. Hicks was very close to people in Arvin, where she worked, who knew the decedent's family well. She had heard specific details about how hard the crime had affected Chad's mother. She also heard detailed depictions about how Chad was killed (it was "terrible, horrible"), along with rumors about "the manner in which it was done, they were kind of mocking him or something and making crude remarks."

The trial court questioned and instructed her at length. (17 RT 4232–4251.) After she told counsel that she knew that Chad's death was an intentional first degree murder and that there was nothing he could do to change that opinion, the prosecutor questioned her, and obtained a statement that she could be fair and open-minded; the trial court resumed its

voir dire. After she told the court, "I think he was intentionally killed," the court persisted with instructions on her duties. (17 RT 4260–4261.) She was questioned for more than 30 pages. Appellant's challenge for cause was denied.

Ms. Hicks was called to serve as an alternate juror on January 17, 2001. She informed the court and counsel that she had developed concerns about her ability to perform her duties as a juror—concerns not related to hardship. Both parties stipulated that she be excused, and the court accepted their stipulation. (28 RT 6721–6722.)

e. Sam Lozano

Mr. Lozano was plainly biased. The process of voir dire did indeed lead him to say that he could remain open-minded at the penalty phase. On January 10, 2001, he came to court and talked about financial issues and telephone calls, and ultimately agreed that he could not be fair; only then was he dismissed. (25 RT 6115–6120, esp. 6119; AOB 283–288.)

It is exceedingly rare for any prospective juror to report that he or she could not be fair after having survived voir dire and a challenge for cause. Here, it happened five times. It is very likely that the trial court's natural authority together with its repetitive and directive questioning led these five prospective jurors to make statements, or agreements, about how

open they could be that, once removed from the courtroom, they realized were false.

B. The Presence of Pro-Death Prospective Jurors Who Were Quickly Excused Does Not Somehow Justify the Overbearing Voir Dire Techniques Exercised by the Trial Judge

Respondent points to four other pro-death prospective jurors who were excused relatively quickly by the trial court in order to show that the trial court did not always attempt to salvage pro-death jurors. (RB 128.) There were dozens of prospective jurors whose bias was so obvious that they were quickly dismissed, usually by stipulation. (28 RT 6510–6511.) This put additional pressure on the trial court to reject challenges for cause so that a jury pool could be assembled, and does not in any way undercut appellant's demonstration of suggestive, leading, and overbearing voir dire questioning by the trial court.

C. Assuming Arguendo That the Trial Court's Questioning of Prospective Jurors Was Evenhanded, That Does Not Excuse Its Overbearing, Leading and Directive Nature

Respondent also states, "The record establishes that the court did not use a different standard in questioning jurors based on their attitude towards to death penalty (citation.)" (RB 131.) Whether or not the trial court used a different standard in its approach to pro-life prospective jurors is not

relevant to the problems with an overbearing voir dire illustrated here.[15] Given the fact that a majority of prospective jurors were dismissed for cause, it is likely that the trial court was very concerned about ever being able to select a jury in this case.

Respondent then states that the trial court questioned jurors who appeared favorable to the defense in the same manner as it questioned jurors who appeared favorable to the prosecution, and cites to the voir dire of seven prospective jurors. (RB 128–129.) It is not clear why respondent cited to Joyce Baretto, who was passed for cause by both sides. (15 RT 3903.) Douglas Harlan was dismissed for cause because of an inability to impose the death penalty, as was prospective juror Mandelyn Hobbs. (See 23 RT 5503.)

Assuming arguendo that the remaining four jurors were mirror images of the 48 jurors challenged for cause by appellant, this is not relevant to the propriety of the trial court's voir dire. Appellant's complaint is not about uneven voir dire. It is about overbearing, leading, and directive voir dire, and refusal to remove biased jurors. Practically speaking, the prosecutor had no trouble dismissing each of the jurors who he believed had

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[15] It is worth noting that pro-life juror Katy Gonzalez was subjected to questions not asked any other prospective jurors, i.e., if she could look appellant in the eye and sentence him to death. (See AOB 232–242.)

been wrongly allowed to be part of the jury pool, whereas appellant was overwhelmed by the number of jurors he believed were biased against him. His repeated efforts to get more peremptory challenges were rebuffed. (28 RT 6880, 6993, 6997.)

These four jurors are the only jurors who survived voir dire and challenges who could be considered pro-life jurors. The prosecutor could, and did, exercise a peremptory challenge to remove the only one who was called (28 RT 6699 [Mr. Golich].) Appellant, on the other had, had nowhere near enough peremptory challenges to excuse all jurors who were likely to have been biased against him.

Given the climate of prejudice and biased created by the media coverage of this case, the trial court faced a substantial challenge in obtaining unbiased pool of prospective jurors. The slant of the community against appellant meant that most jurors were biased against him. Therefore, even if the trial court was evenhanded in its questioning, the number of pro-life jurors was a tiny fraction of those biased in favor of death for appellant. Assuming arguendo that the trial court treated pro-life and pro-death jurors alike, that does not excuse its conduct in any particular case of voir dire.

D. Appellant's January 8, 2001, Mistrial Motion Should Have Been Granted

Appellant agrees with respondent that a trial court's denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Ca1.4th 916, 953; RB 135.) Here, appellant's motion should have been granted. Respondent states that there were no severe limits on voir dire imposed by the trial court, and cites to a mistake by defense counsel in his questioning of Mr. Moreno. (See RB 135.) The severe limits trial counsel were pointing to occurred at the end of the voir dire of Ms. Krotter.

She initially thought that death was the appropriate penalty for all premeditated murders. Eventually, she agreed that she could keep an open mind as to penalty. Counsel then sought to explore what kinds of evidence might lead her to vote for a sentence of less than death, particularly in light of her statement that evidence of a difficult childhood would not mean anything to her:[16]

> Q. What evidence, ma'am, would you be interested in, in determining whether or not what the penalty should be?
>
> MR. BARTON: Objection. Irrelevant for voir dire.

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[16] Mrs. Krotter would not listen to evidence about a bad childhood because she had one herself, and would not expect anyone to rule in her favor for that reason. (23 RT 5475–5477.)

> THE COURT: Sustained. Any new areas, Mr. Bryan? I think we have covered this.
>
> MR. BRYAN: This is a new area, your Honor. She's now talking about some sort of evidence, and I don't think that we know exactly what she's talking about.
>
> THE COURT: I think we have exhausted this area. Unless you have something new, I am going to go ahead and rule on the challenge. We've made an adequate record. Submit it?
>
> MR. BARTON: People submit it.
>
> MR. BRYAN: No, your honor. I'm asking for more questions.
>
> THE COURT: I'm going to deny that based on the record that the Court finds you have had adequate of opportunity to conduct supplemental voir dire. I'm going to deny the challenge for cause, and I'm going to base that not only on the juror's responses but also on her demeanor and my observations of her.

(23 RT 5490–5491.)

For the reasons set out in appellant's opening brief, where he summarized the questioning of Mr. Moreno, a strong death penalty supporter who knew several members of the prosecution team, and Ms. Krotter, appellant's motion for a mistrial should have been granted. Not only did the trial court not grant the motion, however, but it threatened the livelihoods of both counsel:

> THE COURT: I'm going to deny the motion for mistrial. I don't find there's been any denial of a fair trial. I again have denied for the record that I'm engaging in any kind of

> conscious or unconscious attempt to pick jurors that are biased or prejudiced in favor of either side, or that I have any quota system for picking jurors, et cetera. I appreciate counsel are going to be aggressive advocates for your sides. But once again, I caution counsel that to the extent that you make representations about what the record is, if you feel that this Court is engaging in some activity which is to be construed as unfair, then I ask you to please be careful and have a good faith basis for making those types of challenges. Because, again, they can be certainly proper, if you think there's a good faith basis for it. But if you don't have a good faith basis for it, there can be subsequent proceedings, including State Bar proceedings, if counsel are engaging in tactics that are not good faith. I'm not suggesting that's happened. It's just that we don't lightly accuse either counsel or courts of being biased or unfair without good faith. If there is lack of good faith, there can be implications.

(23 RT 5487–5488.)

Whether or not this mistral motion should have been granted, there is not a shred of evidence that counsel was not proceeding in good faith. They had a well-founded belief that the court's methods of voir dire were improperly overbearing and directive. The trial court repeatedly misunderstood their objections, resisting them so deeply as to not understand them at all, i.e., taking an objection of leading and directive questioning to be a complaint about his volume, or denying that it said what it had just finished saying (AOB 136–142, 182–196.) The trial court repeatedly threatened both counsel. These threats were real; the trial court secretly reported counsel to the state bar mid-trial. (AOB 466 et seq.) For

the reasons set forth in appellant's opening brief, this motion for mistrial should have been granted.

IV. THE TRIAL COURT'S REFUSAL TO DISMISS EITHER JUROR NO. 1 OR JUROR NO. 11 REQUIRES THAT APPELLANT'S CONVICTIONS AND DEATH SENTENCE BE SET ASIDE.

A. Juror No. 1

Juror No. 1 was a biased juror. Respondent states that Juror No. 1 "explained that she was not familiar with Lamont or the people who lived there." (RB 144.) This is false. Not only did she own property in Lamont, but she had lived there in the past for many years. (30 RT 7079.)[17] For the reasons set forth previously (Arg. II.C.1, *ante*; AOB 299–302), her presence on the jury that convicted appellant and sentenced him to death requires that the verdicts against him be set aside.

B. Juror No. 11

In discussing whether Juror No. 11 committed misconduct (RB 136–140,144–145), respondent simply ignores the hearing, and the testimony of other jurors, and cites the trial court's conclusion. For the reasons set forth previously (Arg. II.C.8, *ante*; AOB 293–298, 302), this biased juror committed misconduct.

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[17] Respondent is probably extrapolating from her reaction to the court's telling her that it was going to show her "three specific parts of Lamont that are going to be the subject of some evidence in this case." (30 RT 7073.) She answered, "Are there named streets? I'm not very familiar with the area. Is there a possible ability to have a map?" (30 RT 7074.)

Respondent relies on *People v. Danks* (2004) 32 Cal.4th 269, 280 et seq., where a juror discussed feelings of stress with her husband. (RB 144.) This Court held that there was no misconduct because the juror "did not discuss the case or deliberations with her husband, but only the stress she was feeling in making the decision." (*Id.*, 32 Cal.4th at p. 304.) However, in this case, the events at issue involved a father raising his voice to his daughter in a public place because she could not explain to him what was taking so long to obtain a guilty verdict. It seems clear that evidence was being discussed and pressure was being brought to bear. This juror promptly told other jurors and the trial court, and was visibly upset about the encounter. There is nothing in these facts which make it comparable to the juror in *Danks*.

V. THE TRIAL COURT ERRED IN NOT DISMISSING ALL CORRECTIONAL OFFICERS FROM APPELLANT'S JURY POOL.

Respondent cites this Court's opinion in *People v. Ledesma* (2006) 39 Cal.4th 641, 668, where the trial court refused to dismiss for cause a juror on the sole grounds that he worked at the jail and knew that the accused was incarcerated. (RB 146.)

In *Ledesma*, this Court summarized the law regarding actual and implicit bias. One of the bases for finding an implicit bias is "(e) Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them." (Cal. Code Civ. Proc., § 229.)

It was clear from the testimony of the numerous correctional officers called as prospective jurors that the local correctional facilities were centers of interest and concern about this case; that it was a major topic of discussion during the process of jury selection; and that many correctional officers held opinions or expressed notions that were premature, unfounded, and false. (See voir dire of prospective jurors Torres, Williams, Lozano, Tibbals, and Juror No. 12.)

Respondent dismisses the statements regarding the atmosphere and publically expressed beliefs at the workplaces of correctional officers

Lozano, Williams, and Torres because they did not serve on the jury. (RB 149.) But this does not lessen the impact of the poisonous rumors heard at work by Lozano that he labeled as "inside" information, or the discussions and expressions in workplace group conversations that appellant was killed "execution-style" reported by Sherry Williams[18]—and by seated Juror No. 12.

Respondent wrongly states that two correctional officers served on appellant's jury, Jurors No. 6 and No. 8, and discusses the voir dire of only those two jurors. (RB 147–148.) Appellant made the same mistake; see AOB 303. There were actually three; Juror No. 12, originally Alt. Juror No. 3, who replaced the original Juror No. 3, worked at Wasco State Prison. (24 JQ 6950.) Like other correctional workers, Juror No. 12 had heard that Chad Yarbrough "was shot in an orchard execution-style, after his truck was stolen." (14 RT 3439.)

Respondent writes, "appellant fails to establish that correctional officers, as a class, are incapable of serving as fair and impartial jurors."

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[18] Prospective juror Sherry Williams, a correctional officer, testified that while on the job at the prison she heard fellow correctional officers say that the appellant had kidnapped Chad Yarbrough, stolen the vehicle, taken him to an orchard, and killed him "execution-style." (28 RT 6627.) The term was also remembered from media coverage by correctional officer and prospective juror Tibbals. (See 25 RT 6128–6129.)

(RB 148.) Appellant made no such effort. There is no doubt that correctional workers are as eligible as any other occupation to serve on juries. In the particular circumstances of this case, however, where the case was a chief subject of concern and speculation in the numerous correctional institutions of Kern County, and where falsities, presumptions of guilt, and poisonous rumors were part of daily talk in public areas of these institutions (see AOB 303–308), the trial court abused its discretion in not granting appellant's motion.

VI. RACIAL BIAS ANIMATED THE PROSECUTOR'S PEREMPTORY DISMISSAL OF BLACK AND HISPANIC PROSPECTIVE JURORS; THE TRIAL COURT'S FAILURE TO FIND A PRIMA FACIE CASE PER *BATSON/WHEELER*[19] REQUIRES REVERSAL.

A. The Trial Court's Procedure Was Improper, and Should Not Be Salvaged by Respondent's Review of this Record

The trial court's ill-considered, precipitous denial of appellant's four *Wheeler* motions meant that it failed to exercise any discretion. It indicated that reasons would come at a later time, but when "later" came, the trial court articulated no specific reasons, and offered only a conclusory and perfunctory denial. The prosecutor was never asked to explain any of the peremptory challenges, and never did. He was told by the court it would not be necessary. (28 RT 6621.)

Respondent now provides reasons for the dismissal of each juror that were never provided below. (RB 155–161.) As respondent observes, this Court has previously held that an examination for the first time on appeal of whether a defendant as made out a prima facie case of a *Wheeler* violation is "unreliable." (*People v. Cornwall* (2005) 37 Cal.4th 50, 71; RB 154.) There is no logical reason for allowing respondent, but not appellant, to point to various parts of voir dire to support its position. For the reasons set

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[19] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277.

forth in his opening brief, appellant's state and federal rights to equal protection and to a trial by a representative cross-section of the community were violated.

B. Prejudice

Regarding prejudice, the only prospective juror who was identified as African-American in the jury pool was improperly dismissed. Appellant acknowledges that four of the 12 jurors who rendered the verdicts against him were Hispanic. (RB 152.)

VII. APPELLANT WAS PREJUDICED BY THE WRONGFUL ADMISSION OF INFLAMMATORY AND IRRELEVANT GANG EVIDENCE.

Appellant argues that the gang evidence admitted at trial was irrelevant and inflammatory and thus more prejudicial than probative. It was an abuse of discretion to allow such evidence before the jury. Respondent argues that the gang evidence was admissible to prove appellant's motive and intent for the murder of Chad Yarbrough. (RB 162–170.) It quotes fragments of appellant's description of what he had been told about what had happened to his aunt's house, and what he said to Chad Yarbrough in Chad's truck, in order to prove the prosecution's theory of the case, which was that "appellant and Garza murdered Yarbrough because they believed Yarbrough was 'banging with Arvin,' the rival gang of Lamont 13." (RB 166.)

As respondent notes, gang evidence is admissible when the very reason for the crime is gang related. (*People v. Champion* (1995) 9 Cal.4th 879, 922; RB 166.) In *Champion*, the defendant denied membership in a gang and presented an alibi defense, denying any participation in the multiple murders charged. The initial statements to the police by appellant were a description of what Chad Yarbrough and his associates had done to

his aunt's house. The prosecutor's theory of the case omits this obvious motive for what happened:

> RAMIREZ: And all the guys in (inaudible) had left girls and baby and they went and they were knocking on the windows and hitting the walls and stuff and telling CARLOS come out, he's a punk it's about Arvina and all this shit and my aunt kept on telling them you guys better leave or I'll call the cops. They didn't leave.

(14 CT 4148.)

Respondent claims that the gang evidence was relevant to show that "appellant harbored the necessary intent, that is, malice aforethought and that he acted with premeditation and deliberation, negating appellant's defense that he accidently shot Yarbrough." (RB 166–167.) But that issue hinges on the credibility of appellant's testimony in light of forensic evidence, i.e., distance of weapon from decedent when fired, likelihood of a burst of bullets vs. separate shots fired by moving appellant, interrelationship of three bullets, etc. There is nothing in any gang evidence that makes it more or less likely that appellant's actual shooting of Chad was premeditated.

This case is nothing like the cases relied on by respondent, who cites *People v. Williams* (1997) 16 Cal.4th 153, 193 (gang evidence was only proof in support of prosecution theory of gang warfare in a case involving an alibi defense); *People v. Olguin* (1994) 31 Cal.App. 4th 1355,

1369–1370 (gang evidence was highly relevant to show how decedent was killed); *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516–1519 (evidence supported charges under § 186.22). Here, the evidence of motive was already before the jury. Unlike *Olguin* and *Funes*, there were no section 186.22 charges in this case. And unlike *Williams*, appellant had already admitted he had kidnapped and car-jacked for revenge, and he already admitted he held the gun that killed Chad Yarbrough.

Respondent also does not show how gang evidence "reinforced the testimony of Leonel Paredes and Juan Carlos Ramirez." (RB 167.) Such evidence does not make it more likely that appellant was correctly identified by Leonel Paredes, nor does it strengthen the prosecution's case against appellant for the robbery of Juan Carlos—other than to make appellant seem generally like a criminal.

Appellant does not dispute the law regarding prejudice as set out by respondent; it echoes that which he set out in his opening brief. (AOB 324; RB 168.) The use of gang evidence prejudiced appellant. Respondent argues that "the evidence in this case consisted of far more than evidence of appellant's gang membership and affiliation with his coconspirators." Then, respondent cites only Leonel Paredes's eyewitness identification of

appellant, but does not show how gang evidence made that identification more or less reliable.

Respondent then summarizes the facts supporting appellant's convictions for the crimes against Juan Carlos Ramirez and Chad Yarbrough, but says nothing about how gang evidence fills in gaps or adds to the weight of this evidence against appellant. It concludes that "even without the gang evidence the jury would have convicted appellant of the charged crimes because the evidence was overwhelming." (RB 171.) Respondent does not show how the gang evidence affected the jury's deliberations in any regard. In truth, its sole effect was to lower the prosecutors's burden of proof and "create a risk the jury will improperly infer the defendant has a criminal disposition." (*People v. Williams*, *supra*, 16 Cal.4th at p. 193.) For the reasons set out in appellant's opening brief, the use of gang evidence in this case was prejudicial. (AOB 321–324.)

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING INTO EVIDENCE APPELLANT'S STATEMENT OF JULY 24, 1998.

A. Appellant Did Not Make a Valid Waiver of His Miranda Rights

In his opening brief, appellant argued that appellant never made a valid waiver of his *Miranda*[20] rights. (AOB 325–334.) He showed how the prosecutor asked the trial court to make a factual finding regarding when a waiver might have occurred, and to determine whether the waiver was express or implied, but the trial court refused to do so, saying, "the evidence in the record is the basis for my ruling." (5 RT 1500.)

Here, the process of obtaining a statement from appellant took place over several days, with thousands of miles between interrogations. In El Paso, appellant told his questioners on July 19, 1998, that "I don't have anything else to say to you guys." (5 RT 1374, 1386–1388.) Sgt. Glen Johnson, and respondent, do not consider this statement to be an invocation of Miranda rights, but appellant has shown how different this unequivocal language is from other similar statements discussed in case law, such as "I don't have anything to say to you guys *right now*." (See AOB 332.)

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

Respondent argues that it was not a true invocation (see RB 175–176) but even if it were, "it does not invalidate appellant's statement of July 24, 1998, because appellant expressly waived those rights after he was re-advised." (RB 176.) The express waiver of his *Miranda* rights was: "Appellant's response 'yeah' after he was re-advised of his Miranda rights and asked whether he wished to speak to the detectives about the crime was an express waiver of those rights." (RB 178.)

But respondent promptly adds, "Even if this was not deemed an express waiver, appellant's subsequent actions of answering the detective's open-ended questions was an implied waiver. (*Berghuis v. Thompkins*, 560 U.S. at pp. 387–388; *People v. Whitson*, *supra*, 17 Cal.4th at p. 250." (RB 178.)

Respondent relies heavily on *Berghuis*, which held that "a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 388–389; see RB 174, 175, 177, 178, 179.)

But in *Berghuis*, the entire process of questioning the defendant took place in one interrogation spread over three hours, in one afternoon. The issue was the impact of the failure of the defendant to sign a statement that

his *Miranda* rights were read to him, or to formally waive his *Miranda* rights, in light of his continuing participation in the interrogation.

> About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" *Id.*, at 11a, 153a. Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." *Id.*, at 11a. Helgert asked, "Do you pray to God?" Thompkins said "Yes." *Id.*, at 11a, 153a. Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" *Id.*, at 153a. Thompkins answered "Yes" and looked away. *Ibid.* Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later. *Id.*, at 11a.

(*Berghuis v. Thompkins*, 560 U.S. at p. 376.)

On appeal, defendant argued that his failure to make an explicit waiver should preclude the use of his implicit admission. The high court looked closely at what had taken place during that interrogation, and concluded that by his conduct of continuing to participate in the interrogation, he had implicitly waived his rights to remain silent and to have access to counsel. (*Id.*, 560 U.S. at 388.)

Here, there was no clear ruling by the trial court, likely because there was no actual waiver of his *Miranda* rights by appellant. For the reasons set forth in his opening brief, the use of appellant's confession notwithstanding the lack of a waiver of his rights to remain silent and have counsel present when questioned by the authorities was prejudicial error. (AOB 336–337.)

B. Appellant's Confession Was Involuntary

Respondent first claims that "appellant has failed to cite to the record on appeal to support this argument, and thus, the argument should be deemed forfeited. (Cal. Rules of Court, rule 8.204 (a)(1)(C); *Sky River LLC v. County of Kern* (2013) 214 Cal.App.4th 720, 741.)" (RB 180.)

Appellant made a detailed presentation of the factual basis for his argument in the first section of Argument X, entitled "Factual and Legal Background." (AOB 325–328.) That section contains extensive citations to exact page numbers where testimony was proffered, and where legal rulings were made. There is no forfeiture. The extended period in which appellant was subject to the deputies' control (see AOB 325–328), together with their insistence that he cooperate and their suggestions of benefits that might flow from his cooperation (see transcript of confession, 14 CT 4135 et seq.), show that appellant's confession was not made of his own free will.

IX. THE WRONGFUL ADMISSION OF A LENGTHY RECORDED STATEMENT OF CARLOS ROSALES REQUIRES REVERSAL

A. Factual and Legal Background

Carlos Rosales, appellant's cousin, was arrested on October 14, 1997, at his house on 9920 Stobaugh Street. He was 17 years old at the time. (33 RT 7888.) He testified against appellant, describing the carjacking of Juan Carlos Ramirez and placing appellant at the scene of that crime, and also setting the stage for the carjacking of Chad Yarbrough and his truck; he was at Daniel Quintana's house when the decedent's white truck came into view. He also provided exculpatory testimony for appellant when he testified that appellant was with him and his girlfriend Ashley Medina on the night that Leonel Paredes was kidnapped. (33 RT 7881.)

On cross-examination, Carlos Rosales testified that he was beaten by the cops and thrown against a wall on October 14, 1997, the night he was arrested (33 RT 7891), and beaten by the cops again on October 22, 1987, when he gave his first taped statement. He testified that they frequently hit him, and threw him against the wall. (33 RT 7898.)

He gave a second taped statement in January 1998, after he had been charged with and pled guilty to the robbery of Juan Carlos. He had agreed to testify, and in return for his testimony, he would plead guilty to a robbery

charge and maybe a strike on his juvenile record and four years confinement time. He said that his testimony at appellant's trial was truthful. (33 RT 7882.)

During appellant's cross-examination, the prosecutor stated that he wanted to play the tape-recorded statement of the January 1998 interview in its entirety. Counsel for appellant replied,

> We object to the playing of the tape in its entirety, in that there's a lot of information therein which the police are guessing or speculating as to facts, as to what happened or what didn't happen. By playing the tape, I think it is highly prejudicial to this defendant, in that these police officers, their assertions as to what they think the facts are, what other people have told them, and what they heard from third parties are, obviously, hearsay.

(34 RT 8037.)

After further argument, the trial court found that:

> [T]he evidence of the tape recording, itself, is admissible, under 352, the prejudicial effect does not substantially outweigh the probative value, to the extent that many of the questions and answers have already been read to the jury that relate to allegations made by the officers, that may or may not be true, and the Court has admonished the jury that the questions were being admitted for the limited purpose of explaining the witness's state of mind or to explain subsequent conduct.

(34 RT 8041.)

B. The January 2,1998, Recording Was Unsworn Testimony Which Was Irrelevant Except in an Extenuated Collateral Way, Confusing, and Prejudicial; It Was Error for the Trial Court to Admit it into Evidence

Respondent now argues,

> [T]he taped interview of Rosales on January 2, 1998, was highly probative to show that he was not pressured or coerced into making the statement. At trial, appellant placed Rosales's state of mind at issue by eliciting from him an assertion that his testimony and statements implicating appellant were the products of coercion and thus, implicitly, not credible. (33 RT 7911.) As the trial court correctly noted, Rosales's tone of voice, the officers tone of voice, and the manner in which Rosales and the officers were speaking was relevant to both Rosales's credibility and to prove that he was not pressured or coerced when making the statement or when entering into his agreement with the District Attorney's Office. (34 RT 8045–8046.) . . . *Without the tape, the prosecutor would have been unable to adequately rebut Rosales's claim that the officers were pressuring him into entering the plea agreement and making the recorded statement on January 2, 1998.*

(RB 187–188, emphasis added.)

As illustrated by respondent's argument (in italics), the trial court's ruling had the effect of distracting the jury from its assessment of Mr. Rosales' testimony. Instead, their focus was directed to an assessment of whether one tape recorded interview ruled out the possibility of physical coercion having been applied during a *different* interview conducted four months earlier. The probative value of a tape made four months after the abuse was nonexistent, either to establish the coercion or to rule it out. The

playing of the plea negotiations to prove the absence of abuse four months earlier was an abuse of discretion because there was so little probative value. It introduced collateral issues; and it injected prejudicial considerations which together and in combination with other errors raised in this appeal, undermined the reliability of the guilt and penalty phase verdicts.

Respondent cites *People v. Ledesma*, *supra*, 39 Cal.4th at pp. 711–712, as authority for allowing the recording into evidence. (RB 191.) In *Ledesma*, the witness testified under oath at a preliminary hearing that her boyfriend had confessed to her. But at trial she denied that the defendant had confessed to her and claimed she did not remember what she had testified at the preliminary hearing. (*Id.*, 39 Cal.4th at pp. 710–712.)

Reading the preliminary hearing transcript to the jury in those circumstances is not comparable to the plea negotiations which were played to the jury in this case. Unlike the preliminary hearing testimony in *Ledesma*, the recorded interview at issue was not under oath and there was no opportunity for the defense to cross examine Mr. Rosales in that interview where the factual basis of the plea agreement was established.

Respondent cites examples of Carlos Rosales's testimony being "impeached and clarified"by the tape (RB 191), but does not show how these bits of clarification justify admission of the entire tape.

None of the cases cited by Respondent support its argument that the tape was admissible to prove Mr. Rosales' state of mind. (RB 189.) The tape of the interview where Mr. Rosales was abused might have been relevant for that purpose, but the negotiations over the factual basis of the plea were not. (See *People v. Harris* (2013) 57 Cal.4th 804, 843 [rape victim's expressions of love for another relevant to show she did not consent to having sex with defendant]; *People v. Riccardi* (2012) 54 Cal.4th 758, 823 [stalking case where victim's prior statements of fear were admitted to show she did not consent to defendant's entry into her apartment]; see *People v. Gurule* (2002) 28 Ca1.4th 557, 621 [prior statement to prison guard admissible where prisoner voluntarily sought out guard to make confession prior to the initiation of plea negotiations where suggestion on cross-examination that prisoner lied during plea negotiations].)

In *Gurule*, a confession which preceded any plea negotiations was admitted to establish credibility of the plea agreement. In this case, it is the plea negotiations themselves that are being used to bolster the plea

agreement. A prior consistent statement used to rebut a claim of recent fabrication would need to have been made *prior to the coercion*. Anything else is no more than hearsay, without any probative value.

Respondent does not claim that Carlos Rosales was lying about official misbehavior in October of 1997. Mr. Rosales had reason to think that if he were not cooperative, he would be beaten again. Rather than showing that his statements were not coerced, the January 2, 1998, tape suggests that he had been beaten into submission.

Respondent points to the trial court's limiting instruction, which told the jury that it should not consider the questions asked by the deputies for the truth of matters stated. (34 RT 8083–8084; RB 189.) But this did not address the problems created by the admission of this entire tape.

Respondent cites Evidence Code section 356[21] as authority for admitting the entire tape since appellant "called into question the veracity of portions of Rosales's statement made on January 2 to law enforcement." (RB 192.) Its cite to 34 RT 8001 ["prosecutor argues Rosales's statement as

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

taken out of context]" actually referred to Carlos's testimony at a prior judicial proceeding, on January 24, 1999. (34 RT 8000.) The taped statement was brought to the jury's attention by the prosecutor during direct examination (33 RT 7881.) When appellant sought to impeach a specific statement by Carlos on cross-examination, the prosecutor made an objection, citing Evidence Code section 356; that objection was overruled.

Finally, respondent cites *People v. Brown* (1994) 8 Cal.4th 746, 757, as justifying the use of the entire tape. (RB 189.) *Brown* concerned one accusation of child sex abuse allegedly made by a victim a month after being molested that was admitted not to show that the molest had happened, but to show that a complaint was made. (*Ibid.*) It's not clear how this case supports the admission of an audiotape over an hour long that addressed numerous topics, including both charged and uncharged crimes.

Respondent then "submits that appellant has waived his constitutional claims by failing to raise these objections in the trial court. (*People v. Burgener* (2003) 29 Ca1.4th 833, 869; *People v. Partida* (2005) 189 37 Ca1.4th 428, 433–434.)" (RB 189–190.) It overlooks appellant's motion for mistrial based in part on the admission of this tape. (14 CT 4019 et seq.)

That motion, under the section called "CARLOS ROSALES TAPE RECORDING," asserted that "defendant was denied his right to confrontation and cross-examination of out of court hearsay declarants wh (sic) statements were reported on the tape. [U.S. Constitution, 6th Amendment and Cal. Constitution, art. I, section 15.]" (14 CT 4022.) The minute order for January 31, 2001, the day after the motion was filed, states that "THE ISSUE REGARDING PLAYING OF THE TAPES IS PRESERVED. THE DEFENSE OBJECTION TO THE USE OF THE CONTENTS OF THE TAPES IN ANY FORM IS OVERRULED." (14 CT 4027.)

In short, the January 2, 1998, tape was irrelevant to issues of Carlos Rosales's demeanor and reliability. It simply did not address the coercive effects of repeated beatings of the witness by the law enforcement officers investigating this case three months earlier, prior to the taped interview. Respondent asserts that "the People had a right to introduce the whole statement to put it in context and dispel appellant's theory that the statement was made under pressure and coercion from the police," (RB 192), but does not explain how any recording made in January 1998 is relevant to dispel charges of coercion that took place in mid-October 1997.

Any probative value in this regard that it may have had was swamped by the prejudicial admission of this lengthy interrogation, during which the police emphasized their strong feelings about the general culpability of appellant. It was prejudicial error for the trial court to have allowed this lengthy and confusing tape to be played for the jury. It cannot be said beyond a reasonable doubt that this error had no effect on the verdicts reached by appellant's jury. (*Chapman v. California* (1967) 386 U.S. 18, 23.)

X. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR CRIMES AGAINST LEONEL PAREDES AND JUAN CARLOS RAMIREZ, AND THE ENTIRE JUDGMENT MUST ACCORDINGLY BE REVERSED.

A. Leonel Paredes

At the close of the prosecution's case, appellant made a motion pursuant to section 1181.1 to dismiss counts 7, 8, and 9 (crimes against Leonel Paredes), and counts 4, 5 and 6 (crimes against Juan Carlos Ramirez). (42 RT 9450 et seq.) After argument, the trial court denied the motions. (42 RT 9467.)

Appellant agrees with respondent that the testimony of a single witness is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181; RB 194.) Respondent selects from the record those bits of evidence supporting the verdicts on crimes charged against Leonel Paredes. (RB 194–195.) However, this Court does not limit its review to the evidence favorable to respondent.

> As *People v. Bassett*, *supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of

evidence remains substantial in light of other facts.'"
(69 Cal.2d at page 138.) (Fn. omitted.)

(*People v. Johnson* (1980) 26 Cal.3d 557, 576–577, emphasis in original. See also *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

Respondent does not challenge any of the summary of evidence presented by appellant. (AOB 20–25, 344–345; RB 194–195.) That evidence shows that Leonel was not familiar with his assailants, and did not name appellant or identify him as a perpetrator until after (1) a very suggestive photo lineup by Deputy Robert Contreras in which he gave Leonel appellant's name (37 RT 8599–8600), (2) receiving direction from his cousin Rosalio, and (3) seeing appellant's face on television. Under these circumstances it was error for the trial court to allow Leonel to identify appellant in court. Without that identification testimony, there was insufficient evidence to support the verdict.

Appellant had an alibi for that night; he was at the Kern County Fair, and presented a picture of himself and his cousin and his cousin's then-girlfriend taken that night at the fair, along with their testimony. He also presented an unchallenged expert on eyewitness testimony on the circumstances of the crime showing how high were the chances of error. (AOB 343–346.) Given the unreliability of the identification, no reasonable jurist would have admitted it into evidence.

As respondent notes, appellant had a chance to present this expert testimony, and cross-examine Leonel. (RB 194–195.) But jurors have difficulty in distinguishing between accurate and inaccurate eyewitnesses.[22] Mistaken eyewitnesses no less than accurate eyewitnesses are telling what they believe to be the truth, and thus the cognitive faculties jurors usually deploy in making credibility judgments about lying witnesses do not work well in this context.[23]

Here, the identification of appellant by Leonel Paredes was the core piece of evidence relied on by the prosecution, and it was generated by others who fed information to Leonel. Looking at the entire record of what

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[22] See Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony* in The Handbook of Eyewitness Psychology: Memory for People (Lindsay et al. eds., 2007), pp. 453, 475–487.

[23] This also explains why cross-examination—the great engine for uncovering truth—often sputters in the face of an honest but mistaken eyewitness; appellant has no reason to doubt Leonel's sincerity. As both the DNA exonerations and empirical study show, cross-examination cannot protect against wrongful identifications. (See Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination* (2007) 36 Stetson L.Rev. 727; Wells, *Eyewitness Identification: Systemic Reforms* (2006) Wis. L.Rev. 615 ["Cross-examination, a marvelous tool for helping jurors discriminate between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken."]; *State v. Clopten* (Utah 2009) 223 P.3d 1103, 1110 [because eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered].)

he first said when interviewed, and how the identification of appellant came to pass, his identification of appellant was unreliable, and the evidence supporting the verdict was insufficient.

B. Juan Carlos Ramirez

Regarding the crimes against Juan Carlos, respondent recognizes that intent of the kidnapping during the commission of a carjacking must be present when the kidnapping commenced. (See *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1365, citing *People v. Laursen* (1972) 8 Ca1.3d 192, 198 ["specific intention" to commit target offense must be present at the time of the original asportation]; RB 196.) There was no evidence presented showing that appellant had any idea that Juan Carlos was kidnapped when he first jumped into the victim's truck.

Regarding the robbery count, the evidence showed that appellant assaulted the victim, and also that he had been told that the victim had assaulted Freddie de la Rosa's sister. There was no evidence that he was involved in planning or carrying out any robbery. (See AOB 345–346.) For the reasons set forth in appellant's opening brief, his convictions for counts 4 and 6 must be set aside.

XI. THE TRIAL COURT PREJUDICIALLY ERRED BY PREVENTING APPELLANT FROM CONTEMPORANEOUSLY SPECIFYING THE BASIS FOR HIS OBJECTIONS TO PROSECUTORIAL MISCONDUCT, AND BY DELAYING ITS RULINGS UNTIL ANY REMEDY WOULD BE INEFFECTIVE.

At the outset, one consequence of the trial court's decision was that in the course of trying to comply with the court's directive, it may have fallen afoul of the longstanding obligations of counsel in regard to making objections to prosecutorial misconduct. (See AOB 349–354; *People v. Stanley* (2006) 39 Cal.4th 913, 952.) Counsel's efforts to reserve a motion, in compliance with the trial court's directives, had led to repeated claims by respondent that he has forfeited his claims, notwithstanding his efforts to present, and preserve them. (RB 217, 219.)

In response to appellant's argument, respondent writes,

> The trial court did not abuse its discretion in adopting a procedure for the presentation of mistrial motions based on prosecutorial misconduct. The court has a duty to see that both the prosecution and the defense receive a fair trial, and the trial court has the power to make such orders. (See *People v. Bowman* (1966) 240 Cal.App.2d 358, 382; Cal. Code Civ. Proc., § 128, subds. (a)(3), (5).)

(RB 203.)

The pages cited in *Bowman*, however, dealt with the trial court's intrusion into the process of cross-examination of a particular witness. After reviewing the applicable law in this regard, the *Bowman* court concluded,

> Despite freedom from the obligation so to do, in view of the serious charges made against the trial judge, the record has been examined with a particularity to determine the extent and manner in which he participated in the case, both in ruling on the legal questions presented to him, and in the presentation of evidence to the jury. It is concluded that the zeal which was exhibited by what might be considered more than ordinary participation for a judge in a jury trial, was not only inspired by desire to see that justice was done, both to the accused and to the People, but, also, objectively, could leave no other impression with the jury.

(*People v. Bowman* (1966) 240 Cal.App.2d 358, 382–383.)

Appellant does not see how the *Bowman* case has anything to do with the trial court's limitations and directions placed on trial counsel that are the subject of this argument. For the reasons set forth in his opening brief, this method of proceeding violated appellant's state and federal constitutional rights to due process of law and the effective assistance of counsel.

XII. REPEATED INSTANCES OF PREJUDICIAL MISCONDUCT BY THE PROSECUTOR VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY CONTAMINATING THE TRIAL WITH UNFAIRNESS, AND REQUIRE THAT THE JUDGMENT BE REVERSED.

Appellant's trial was fundamentally unfair because of pervasive prosecutorial misconduct. Throughout this case, the prosecutor posed testimonial questions that he knew to be improper, that he crafted to cause maximum prejudice.

Appellant does not disagree with the general legal principles governing such claims set out by respondent. (RB 205–206.) It is in the application of these principles that our differences lie.

A. The Prosecutor Improperly Attempted to Argue His Theory of the Case to the Jury by Inflammatory Questioning of Daniel Quintana.

On redirect examination of Daniel Quintana, the prosecutor asked him,

> Q. So you had problems with Arvina guys and you were real close to Carlos' mom, and you were aware of this incident, correct?
>
> A. Yes.
>
> Q. Did you take a Tec-9 and ever shoot anybody from Arvin three times in the back of the head because of that?

(32 RT 7661.)

Counsel promptly objected on grounds of prosecutorial misconduct, moved to strike the question, and moved for a mistrial. (32 RT 7661.) Respondent argues that there was no misconduct because the jury later heard the prosecutor's theory of the case, which was precisely this—appellant deliberately shot the victim because there were three bullets fired—so the question could not have harmed appellant; and that in any event, the trial court sustained appellant's objection and admonished the jury to disregard the question. (RB 206–207.)

But such a question was asked without a shred of good faith. The prosecutor well knew that Daniel Quintana had done no such thing. His "explanation"[24] (RB 206) is worse than disingenuous. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 621.) In *Wagner*, this Court reversed defendant's convictions on this ground despite the fact that the trial court

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[24] "The prosecutor explained that he asked the question, 'because the defense is putting forth the theory, though this witness, that a justifiable explanation for the defendant's actions is because he's from Lamont, and he had had hard times with Arvina kids and he was somehow upset about what happened at the aunt's house.'" (RB 206.)

admonished the jury in a manner similar to the trial court in the present case.

B. The Prosecutor Repeatedly Violated the Trial Court's Order Prohibiting Reference to or Evidence of Appellant's Alleged Possession of and Alleged Attempts to Purchase Other Guns and Ammunition.

Respondent first argues this error has been waived because trial counsel objected only on the basis of relevancy. (RB 208). The case relied on by respondent, *People v. Cole* (2004) 33 Cal.4th 1158, 1201, concerned appellant claims of prosecutorial misconduct where there was no objection made whatsoever. The misconduct at issue occurred during cross-examination of appellant, which respondent recognizes at RB 209.

Respondent acknowledges, as did the trial court, that it was error to admit evidence of the "Chinese ammunition," since it could not have been used in the commission of the crimes at bench. However, it argued that it was not prejudicial, in light of evidence from appellant himself testifying that he possessed a Tec-9 automatic weapon and shot the decedent. (RB 209.)

The effect of this evidence, i.e., the 32″ color screen with a picture of the Chinese ammunition and the prosecutor's nod towards the screen, was that it portrayed appellant as having a criminal disposition because he was surrounded by weapons, and more likely, therefore, to have deliberately

shot Chad Yarbrough. (*People v. Lo Cigno* (1961) 193 Cal.App.2d 360.) This effect was compounded when the prosecutor cross-examined appellant, and asked him if he was "using marijuana and buying *guns*" (47 RT 10458; RB 209.) Respondent's assertion that "the prosecutor's question did not insinuate that appellant had purchased a gun other than the Tec-9" (RB 211) is wrong—that's precisely what the question asked.

Respondent is also wrong when it states that "appellant's assertion that the prosecutor gestured his head in the direction of the television to reference to other ammunition is unsupported by the record." (RB 211–212.) Counsel recognized that the television was off at the time of the gesture. (47 RT 10574–10575.) In response, the prosecutor stated, "I know I never nodded my head on page 10458 when I used that question. On page 10468 when I said the boxes that we saw I may have looked towards the television screen." (47 RT 10578.)

C. The Prosecutor's Accusations of Dishonesty Leveled At Defense Investigator Mosley During Cross-Examination Were Baseless, Impugned the Integrity of the Defense Team, and Constituted Misconduct.

Respondent argues that "the prosecutor's brief, unanswered question did not result in prejudice to appellant." (RB 212.) It points out that "the evidence adduced by Investigator Mosley did not relate to the Yarbrough murder. . . . The purpose of Mosley's testimony was to establish that Juan

Carlos Ramirez had driven to the location where the carjacking occurred in order to participate in a narcotics transaction." (RB 213.)

It is true that Mosley's testimony was confined to the assault and robbery of Juan Carlos Ramirez, but the question ("Mr. Mosley, you left the BPD [Bakersfield Police Department] under accusation of dishonesty, correct?") impugned the integrity of appellant's defense team. Counsel argued that the prosecutor knew that such allegations had been barred from admission in other cases involving Mr. Mosley's expert testimony; neither the prosecutor nor respondent denies this evidence of bad faith.

Respondent cites two cases (RB 213) to show lack of prejudice: *People v. Pinholster* (1992) 1 Cal 4th 865, 943 [prosecutor asks witness to name head of Aryan Brotherhood to rebut inference that witness was a professional snitch]; *People v. Crew* (2003) 31 Cal.4th 822, 839 [witness provides non-responsive answer concerning victim's fear of defendant that violates court order, but not attributable to prosecutor]. Neither of the cases cited involve the disparagement of the honesty of the defense team. Neither *Pinholster* nor *Crew* involved the intentional use of inadmissible evidence, much less inadmissible evidence that relates personally to the defense team. The prejudicial effect of such misconduct struck at the core of the right to effective assistance of counsel and appellant's defense to all charges.

Counsel noted without contradiction that no formal accusations had ever been made against Mr. Mosley, nor any criminal charges ever filed, and that his resignation occurred some 10 years prior. (43 RT 9566–9567.) It was deliberate misconduct to have asked the question, and when considered with the other instances of prosecutorial questions that were really assertions, was prejudicial.

D. The Prosecutor's Questioning of Appellant Portraying Him as a Danger to "Arvinas," Despite the Prosecutor's Admission That He Had No Factual Basis for Such Questioning, Constituted Misconduct.

Respondent does not deny that the prosecutor had no evidence suggesting that appellant had ever attacked an "Arvina" outside the charges in this case. (See AOB 363–365.) It justifies these questions, which were not really questions, by saying, "Clearly, the prosecutor's point in asking these questions was to demonstrate that there was animosity between the two gangs and to refute appellant's contention that he was not involved in gangs at the time of the murder." (RB 214.) The prosecutor was entitled to present evidence to the jury on these points, but was not entitled to ask rhetorical "questions" in order to lead the jury to believe that he had evidence that he did not have.

In order to show how the questions were not prejudicial, respondent refers to unnamed witnesses who testified that appellant was a "member" of

Lamont 13, and to appellant's own interview in which he had described mistreating Chad Yarbrough before killing him. (RB 214.) This evidence was not determinative of disputed issues in this case, i.e., did appellant deliberately kill Chad Yarbrough, or was the burst of gunfire an accident? The nonexistent evidence induced by the prosecutor's question sought to establish a criminal disposition by suggesting a history of prior violence between appellant and "Arvinas," even though appellant was several years older than his codefendants in the charged crimes, and had been out of town for an extended period just prior his arrest in August of 1997.

This questioning constituted deliberate misconduct. It was plainly intended to convey to the jury that the prosecutor possessed information about appellant's gang activity and dangerousness. This is another instance of the prosecutor "testifying" in the guise of a question in order to support his theory of the case, to wit: that Chad Yarbrough was a hapless victim of irrational gang violence.

E. The Prosecutor's Series of Questions Insinuating That Appellant Furnished Drugs, Stole Money, and Sold Drugs, Asked Without a Good-Faith Belief That the Underlying Facts Could Be Proven, and Without Any Intent of Proving Such Facts, Constituted Misconduct.

The series of questions on cross-examination of appellant were a thinly veiled effort by the prosecutor to denigrate appellant's character. The

prosecutor's questions effectively "charged" appellant with purveying drugs to young women, making bail with drug money, and being fired due to drug use. At no time did the prosecutor make an effort to prove these matters, nor did he have reason to believe they could be proved.

Respondent seeks to justify these questions by saying that appellant "opened the door" when he addressed his drug use and August 1997 arrest on direct examination. It states that "Contrary to appellant's assertion, the prosecutor had a basis for asking this question: Specifically, he relied on the police reports which indicated that appellant had been furnishing the drugs to the girls in the apartment. (47 RT 10537.)" (RB 214–215.)

But that's not what the prosecutor asked. The prosecutor asked him if he was not also arrested for furnishing drugs to girls in the apartment.

Early in the case, two charges alleging possession of methamphetamine during this incident, counts 10 and 11, had been bifurcated because of "the entire separate fact scenario" and, in the words of the prosecutor, the lack of "cross-admissibility." (6 RT 1761.)

There was no evidence at all that appellant had furnished these drugs. On December 1, 2000, in argument prior to trial as to how this incident could be used by the prosecution, it was clear that there was no evidence whatsoever that the small amount of drugs found a the scene had

been supplied to the girls who were there, one of whom had called the police. (See 9 RT 2397.) The prosecutor sought to do by a question what he could never have proved with evidence, which was to portray appellant as a purveyor of drugs to young women. Such a picture, and the methods used to present it, could not have been more prejudicial.

Regarding appellant's objection to the question, "who paid your bail to get you out of jail?" (41 RT 10473), respondent acknowledges that appellant objected as irrelevant, and asked to reserve a motion based on prosecutorial misconduct. (RB 217.) This question was not discussed in the lengthy (47 RT 10535–10636) and confusing effort to sort out and rule on the various objections that had been "reserved," as well as other points presented in appellant's motion or mistrial filed on February 20, 2001. (15 CT 4252.) However, the trial court did deny that any of the questioning of appellant by the prosecutor constituted misconduct (47 RT 10635–10636), and the day's minute order stated, "MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S CROSS-EXAMINATION OF THE DEFENDANT IS DULY ARGUED AND DENIED." (15 CT 4266.)

Appellant made every reasonable effort to make objections to prosecutorial misconduct throughout the prosecutor's cross-examination of

appellant, in difficult circumstances (see Arg. XIII), and is entitled to a ruling on the merits.

F. The Prosecutor's Request in Front of the Jury that Efrain Garza's Mother Be Subject To Recall at the Penalty Phase Was a Deceit Intended to Convey the Inevitability of a Penalty Phase.

Respondent initially seeks to profit by the trial court's refusal to allow objections to prosecutorial misconduct on the record by saying that the claim is forfeited. (RB 219.) Appellant attempted to comply with the trial court's directions by reserving a motion, rather than directly make the motion respondent apparently thinks it should have made. The trial court eventually considered it as a mistrial motion, and denied it on the merits. (36 RT 7710.)

This remark was made in bad faith. Respondent argues that the jury probably did not assume from this remark that a penalty phase was inevitable, and that appellant was not prejudiced by the remark, but does not deny that the prosecutor never intended to call Ms. Garza during penalty phase. (RB 219–220.) When considered with the other questions and remarks of the prosecutor that were designed to improperly influence the jury rather than gain information or respond to other concerns, this remark helped prejudice appellant.

XIII. THE PROSECUTOR'S OFFICE SHOULD HAVE BEEN RECUSED; FAILURE TO ORDER RECUSAL REQUIRES REVERSAL IN THE UNUSUAL CIRCUMSTANCES OF THIS CASE.

Appellant filed the motion on two grounds: (1) the prosecutor's use of evidence it had previously said was false (testimony of Cipriano Ramirez) to argue that appellant personally shot and killed Javier Ibarra, after arguing twice that Gabriel Flores shot Ibarra; and (2) the decedent's aunt, Diana Yarbrough, worked as supervising clerk for the municipal court, in the same building as the prosecutor's office; municipal court judges had recused themselves because of their close relationship with Ms. Yarbrough. (AOB 370–374.)

A. Javier Ibarra

Regarding the first grounds respondent points out that the prosecutor chose not to present Cipriano's prior testimony, and that it was legitimate for the prosecutor to switch theories: "The evidence presented in appellant's trial, as well as the trial in Flores's and Cipriano Ramirez's trials, was consistent with either Flores or appellant having been the shooter." (RB 223.)

This is misleading. The evidence may be have been consistent with either being the shooter, but the basis upon which a death sentence was sought was one which had previously been denounced by the prosecutor as

false. The prosecutor presented different evidence in each case with an eye, not to doing justice, but to obtaining the harshest sentence possible in both cases by pointing to each being the shooter even though only one could have been the shooter. (See AOB 375 et seq.; Arg. XIV, *post.*) In *In re Sakarias* (2005) 35 Cal.4th 140, this Court held that a prosecutor is not free to selectively present evidence in separate trials to support a theory of enhanced culpability in each trial when the theories themselves are irreconcilable. "[C]ases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations. . . ." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 162.) That is precisely what the prosecutor did here in order to obtain a sentence of death against appellant.

Respondent argues that there was no prejudice caused by the prosecutor's change in theories as to who shot Javier Ibarra, and recites facts showing how brutally Chad Yarbrough was treated before his death as being instrumental in the jury's death verdict. (RB 224–225.) The whole point of the Ibarra evidence, however, was to show that appellant was not just overcome by anger at how his aunt and the children in her house were frightened, but that he was a calculating killer who had killed before. The prosecutor's closing argument referred extensively to the prior killing as a

revelatory moment that showed what kind of person appellant was. (62 RT 13746, 13749, 13756, 13758.) This was done in order to increase the chances that appellant would receive a death penalty. Given how close was the penalty phase verdict (see Arg. XXI, *post*), it was error for the prosecutor's office not to have recused itself.

B. Diana Yarbrough

Respondent cites three cases for the proposition that no prejudice resulted from Ms. Yarbrough's role in the courthouse: *People v. Gamache* (2010) 48 Cal.4th 347, 363–365 [surviving victim had been typist for 10 years for the DA's office, case was reassigned to a different office away from where she worked]; *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 107–108) [even if employment advice was given to former police chief's replacement, not sufficient conflict to justify recusal of entire LA district attorney's office prosecuting former police chief for fraud]; and *People v. Parmar* (2001) 86 Cal.App.4th 781, 800 [partial funding of post in Sacramento DA's office for position to prosecute public nuisances by the SHRA (an executive agency) was not a conflict of interest justifying recusal in noise abatement proceedings].

People v. Gamache, supra, is the only comparable case. The conflict in *Spaccia* was so attenuated it was not even deemed a prima facie case, and

in *Parmar* the conflict was not a conflict at all, but executive branch funding for a properly legislated executive power. In *Gamache*, as in this case, the parties all recognized the conflict. But in *Gamache*, unlike this case, the work on the case was transferred away from the place of work of the conflicted employee. This was done, even where the employee/ surviving victim was a low level typist, unlike the high-level supervisor in this case.

Diana Yarbrough was active in obtaining a guilt verdict and death sentence against appellant. Her closeness to the prosecutor's office was shown by her preparing a written report of her appearance in appellant's section 987.9 hearing for her supervisor, and giving a copy of that report to the prosecutor, without the knowledge of either appellant or her supervisor. She attended trial every day, notwithstanding her full-time job as a supervising clerk in the same courthouse where appellant was being tried, and coordinated attendance by Chad Yarbrough's family at the trial. (See Arg. I.E.3., *ante*.)

The municipal court judges with whom she worked recused themselves, for good reason. It was unfortunate that the prosecutor's office did not take the same precautionary measures. Precisely because she was free to go anywhere in the courthouse, it cannot now be known by appellant

how far her reach extended. He does know, however, that she was actively engaged, and keenly interested in the outcome of this trial. It was prejudicial error for Kern County to try prosecute this case at all (see Arg. I, *ante*), and it was also prejudicial error for the local prosecutors to try this case.

PENALTY PHASE

XIV. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE OF THE FUNDAMENTALLY UNFAIR PROSECUTORIAL TACTIC, APPROVED BY THE TRIAL COURT, OF PRESENTING EVIDENCE AND ARGUMENT TO THE JURY THAT APPELLANT WAS THE SHOOTER OF JAVIER IBARRA, AFTER HAVING SUCCESSFULLY ARGUED TO TWO OTHER JURIES THAT GABRIEL FLORES WAS THE ACTUAL SHOOTER.

A. Introduction

The key evidence presented against appellant in aggravation during the penalty phase purported to show that appellant personally shot and killed Javier Ibarra. Unbeknownst to the jury, however, the prosecution had twice before presented different evidence along with forceful argument to two juries that Gabriel Flores, not appellant, had shot Ibarra.

The new evidence[25] presented at appellant's trial consisted of:

(1) Sheriff's Deputy Allan Hall testified that appellant told him two days after the shooting that he was wearing a white cap on the night of the shooting for the entire evening, and that neither Gabriel Flores nor Cipriano Flores wore any cap at all, thus implicitly admitting that he was the

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[25] In his opening brief, appellant stated on page 399 that there was no new evidence presented against appellant regarding the Javier Ibarra shooting. He was wrong, and corrects that error in this section of his reply brief.

shooter.[26] (58 RT 12933.) This would have been valuable evidence for both Gabriel Flores and Cipriano Ramirez. The opinion affirming Gabriel Flores's convictions, however, in its summary of the facts, does not include any such admissions by appellant to Deputy Hall, who simply testified about finding a white cap with "Lamont" written on it when arresting appellant. See *People v. Flores* (2000), No. F031754, attached hereto as Appendix A, p. 5.

(2) Jesse Ibarra testified that Alma Mosqueda told him on the morning after his brother Javier was shot and killed that appellant was wearing a white hat the night his brother was killed. (58 RT 12977.)

When Jesse Ibarra testified at Flores' trial in 1998, he could not remember telling the police that Mosqueda said that appellant had been the one wearing the white hat, because he was "too upset." Appendix A, at 5. Alma had no memory of ever saying such a thing to Jesse. (57 RT 12802.)

(3) Gerardo Soto, the common-law husband of appellant's aunt, testified that he was interviewed by the police on the night the murder was committed. Appellant and Cipriano had been by earlier that night for 30 minutes or so. He told the interviewer that appellant was wearing dark

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[26] According to eyewitness Ysela Nunez, the shooter wore a white cap, and was the only one of the three wearing any hat. (AOB 387–388.)

clothing (a blue Pendleton), and a matching blue cap. (58 RT 12941, 12954–12955.)

Witness Jesse Ibarra tailored his testimony to comply with the prosecutor's different theories at different trials, in order to obtain the maximum penalty for each of the three men charged with killing his brother. Deputy Hall likewise conducted himself in a way that is anathema to a system of justice. Although it is not clear from the record whether or not Mr. Soto was disclosed as a potential exculpatory witness to Flores or Cipriano Ramirez, it is clear that he was never called by the prosecution at either previous trial. A sentence based on these witnesses' testimony, and the completely different closing argument is unreliable and the product of prejudicial prosecutorial misconduct.[27]

B. *In re Sakarias* Cannot Be Distinguished from this Case

In *In re Sakarias*, this Court held that it was a Due Process violation of the California and federal constitutions when the prosecution presents

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[27] Respondent cites *People v. Watts* (1999) 76 Cal.App.4th 1250, in support of the prosecutor's inconsistent theories and arguments (RB 221, 223, 236), but *Watts* provides it no support. In *Watts*, "There [was] no indication that the prosecution caused the witnesses to change their testimony from that given during the prosecution of Shaw, or that the prosecutor otherwise acted improperly in securing appellant's conviction." *Id.*, 76 Cal.App.4th at p. 1265.)

inconsistent and irreconcilable theories in separate trials in the absence of a good faith justification.

> Because it undermines the reliability of the convictions or sentences, the prosecution's use of inconsistent and irreconcilable theories has also been criticized as inconsistent with the principles of public prosecution and the integrity of the criminal trial system. A criminal prosecutor's function '"is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial." (*United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.)

(*In re Sakarias*, *supra*, 35 Cal.4th at p. 159.)

Respondent concedes that "the Kern County District Attorney's Office attributed the act of shooting Ibarra, which could have been committed by only one defendant, to both Flores and appellant in separate trials." (RB 233.) Respondent then attempts to distinguish *Sakarias* by fitting it into one of the three exceptions identified in *Sakarias* where inconsistent prosecutions might proceed without offending due process. But none of the three exceptions applies.

1. The Prosecutor Manipulated the Evidence to Unduly Increase the Aggravating Effect of the Ibarra Shooting and Thus Increase the Likelihood of a Death Sentence

First, respondent entirely misunderstands *Bradshaw v. Stumpf* (2005) 545 U.S. 175. It correctly notes that the United States Supreme Court found no due process violation regarding Stumpf's guilty plea because the "the

precise identity of the triggerman was immaterial to Stumpf's conviction for the aggravated murder." (*Bradshaw v. Stumpf, supra*, 545 U.S. at p. 187.) (RB 234.) Appellant discussed *Stumpf*, however, for a different reason: its recognition that the identity of the triggerman could be highly relevant for sentencing purposes in a capital trial, and its remand to the Sixth Circuit to determine if the prosecution's inconsistent arguments required reversal of the death penalty. (545 U.S. at pp. 187–188.) Respondent ignores this part of *Stumpf*, the only part discussed by appellant (see AOB 395–399) and does not even note that the case was in pertinent part reversed.

In this case, the prosecution's effort at trial was to increase the likelihood of a death sentence by showing the prior use of a firearm to kill someone, which is always a powerful statutory aggravator and particularly so here. Without the alleged prior use of a firearm, appellant would have appeared less culpable and less blameworthy. The similar circumstances of the two shootings would also tend to eliminate any residual doubts as to whether the gun that killed Chad Yarbrough at night from a distance of about 10 feet went off accidentally. The aggravating effect of the evidence is clear.

The evidence was not just theoretically aggravating. The prosecutor actually based much of his penalty phase closing argument on the new

"fact" that appellant was the shooter. (See AOB 390–391; 62 RT 13740, 13746, 13749, 13756.) He argued that "the defendant personally chose to kill Chad, just like he chose to kill Javier Ibarra." This contention was the heart of the prosecutor's argument that appellant would be a danger to everyone around him in prison if he were not executed. (62 RT 13758.)

Respondent is flat wrong when it argues that "the prosecutor's variation in argument did not concern a fact used to convict appellant *or increase his punishment*." (RB 233, emphasis added.) That was the whole purpose of the new evidence, and different argument—to increase the chances that appellant's jury would vote for death.

2. The Prosecutor Unambiguously Manipulated the Testimony of Two Witnesses, and Added a Third, to Obtain a Death Sentence

Respondent's second point in support of their position that the inconsistent prosecutions did not violate due process was that the evidence was ambiguous and therefore the prosecutor was allowed to rely on "the uncertainty of the evidence" to justify the prosecutor's use of "alternate theories" in separate cases. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 164, fn. 8.) (RB 234.)

The different evidence presented at the Flores trial and at the trial *sub judice* had nothing to do with ambiguity. At the Flores trial,

> [T]he parties stipulated: "the day after the murder Jesse Ibarra, the victim's brother, went to the police and told them he had gone to Mosqueda's apartment and she told him the shooter was the man wearing the white cap and the Pendleton, and that person was Juan [appellant].' On cross-examination, Jesse Ibarra stated that he remembered going to speak to Mosqueda the day after his brother was killed, but he did not remember telling the police that appellant was the shooter.

(Appendix A, p. 5.)

As for the "new evidence" consisting of Deputy Hall's testimony that appellant in effect confessed shortly after his arrest by saying that he had worn a white hat the night of the shooting, there was again no ambiguity. The officer's alleged knowledge of such a statement, knowledge which should be imputed to the prosecution, was *Brady*[28] evidence which had to be disclosed to Flores and Cipriano, because it was hearsay that should have been memorialized in some manner at the time the statement was made. However, the officer, and the prosecutor, said nothing about appellant's "admission" until his own trial. Jesse Ibarra said nothing at appellant's trial of any memory loss, and Soto was not called by either Flores or Cipriano. There are no ambiguities here.

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[28] *Brady v. Maryland* (1963) 373 U.S. 83.

3. The Prosecutor's Manipulation of Testimony Was Aimed at Obtaining a Death Sentence

Respondent's third attempt to distinguish *Sakarias* begins:

> Third, there was no claim in this case that the prosecutor intentionally manipulated the evidence in either trial to the detriment of appellant in order to secure a death judgment. Rather, based on what was before the trial court, the evidence adduced at both trials was substantially the same, and the prosecutor simply argued different inferences from that evidence. In *Sakarias*, it was not simply the prosecutor's act of arguing inconsistent theories based on the same evidence, but rather his decision to present different evidence in the separate trials in a manner designed to deceive the jury that constituted misconduct. (*In re Sakarias*, *supra*, 35 Cal.4th at pp. 155–156.)

(RB 235.)

The prosecutor did not "simply argue different inferences" from the evidence previously presented. He manipulated the testimony of Jesse Ibarra and Deputy Hall and Mr. Soto and produced evidence which he should have disclosed years earlier. Appellant has continuously protested this misuse of the prosecutorial authority from the moment months before trial that he was informed about the prosecutor's intentions to show that he was the triggerman, contrary to the theory presented at two previous trials. (See AOB 370–393.)

In its analysis finding lack of a good faith justification in *Sakarias*, this Court noted that a prosecutor is not free to selectively present evidence

in separate trials to support a theory of enhanced culpability in each trial when the theories themselves are irreconcilable. "[C]ases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations. . . ." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 162.)

That is precisely what the prosecutor did here in order to obtain a sentence of death against appellant. He presented different evidence—evidence that would have been useful to both Gabriel Flores and Cipriano Ramirez had they known about it.

In *Sakarias*, this Court cited *United States v. Kattar*, *supra*, several times and relied upon it to state: "A criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.'" (*In re Sakarias*, *supra*, 35 Cal.4th at p. 161.) The decision in *Sakarias* also quoted from *Kattar* concerning the disturbing notion of a prosecution "changing its stripes" depending on the "strategic necessities of the separate litigations." (*Id.* at p. 159.)

Inconsistencies, such as inconsistent verdicts, are often the necessary byproduct of other rights and principles deemed necessary to a just system as a whole. But just because inconsistency is tolerated in some

circumstances as a necessary by-product of a just system does not mitigate its universally understood corrosive effect on justice when it is not justified. Inconsistency based on blatant manipulation of evidence and uncoupled from rational justification is the essence of arbitrariness, which has long been held to be inconsistent with the fundamental notions of fairness and reliability guaranteed by the Due Process Clause and in capital cases, the Eighth Amendment to the United States Constitution.

C. Refusal to Allow Appellant to Inform the Jury About the Prosecutor's Previous Contradictory Arguments Prejudicially Violated Appellant's Right to Present a Defense and to Due Process of Law

Respondent argues that the closing arguments are not evidence, and cites Evidence Code section 140 and *People v. Watts* (1999) 76 Cal.App.4th 1250, 1263, in support; therefore, it argues that appellant was not entitled to present them to his jury. (RB 236–237.)

But in demonstrating, as appellant is entitled to do, an inconsistent position, there is no better evidence than the prosecutor's argument, because that's where their positions were laid out most fully. The purpose of closing argument is "to assist the jury in analyzing the evidence." (*United States v. Hasner* (11th Cir. 2003) 340 F.3d 1261, 1270; see also *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993, 1013 ["The government's closing argument is that moment in the trial when a prosecutor is compelled to reveal her own

understanding of the case as part of her effort to guide the jury's comprehension."].) There is no better place to find the prosecutor's theory of the case than in his or her closing argument. (See also *People v. Carr* (1958) 163 Cal.App.2d 568, 576–577; *People v. Eggers* (1947) 30 Cal.2d 676; *People v. Hill* (1998) 17 Cal.4th 800, 819–820.)

The closing arguments at issue are not hearsay because they are not proffered for the truth of any of the matters stated. (Evid. Code, § 1200.) The prosecutor stipulated that the arguments were admissible in these proceedings for other motions as well. (4 RT 1297.) Since this stipulation was made in the context of an effort by trial counsel to recuse the prosecutor's office for its change in theories as to who shot Javier Ibarra, respondent cannot complain of the stipulation being used for some illegitimate or unexpected purpose.

Respondent's assertion that these arguments are "irrelevant" (RB 237) is nonsensical. This issue in contention is the inconsistency of prosecutorial positions in separate trials. How could closing arguments not be relevant to establishing exactly what the prosecutor's positions were, and how they changed from one trial to the next? The fact that the prosecutor's office had previously ridiculed a theory that it now embraces is evidence

that could not be improved upon in establishing appellant's claim. It is the power of this evidence that troubles respondent, not its inadmissability.

D. This Evidence Was Prejudicial

Respondent argues that even if it was error to allow the evidence and argument pointing to appellant as the man who personally shot Javier Ibarra, it was harmless, and cites other parts of the prosecutor's closing argument pointing to the brutality of the killing of Chad Yarbrough, and the other crimes of which appellant was convicted. (RB 239–241.)

Appellant and respondent both recognized that the applicable standard of prejudice is that set out by this Court in *In re Sakarias*, *supra*, 35 Cal.4th at p. 165:

> [P]rejudice should be tested on the "reasonable likelihood" standard applicable to the knowing presentation of false evidence, which is equivalent to the "harmless beyond a reasonable doubt" test of *Chapman v. California* (1967) 386 U.S. 18. . . . Because the prosecutor intentionally used an inconsistent and probably false theory to obtain a death sentence against Sakarias, we agree with the parties that Sakarias is entitled to relief if he can show a reasonable likelihood the prosecutor's use of the tainted factual theory affected the penalty verdict. (*Accord*, *United States v. Kattar*, *supra*, 840 F.2d at p. 128; Prosecutorial Inconsistency, *supra*, 89 Cal. L.Rev. at p. 1471.)

(*In re Sakarias*, *supra*, 35 Cal.4th at p. 165.)

In *Sakarias*, the prosecutor, like respondent, pointed to other evidence that the defendant was heavily involved with the killing:

> Sakarias undisputedly played a direct role in the brutal, unprovoked killing of Viivi Piirisild. The uncontroverted evidence showed that Sakarias stabbed Viivi four times in the chest, including two potentially fatal wounds passing through vital organs, and that he later took the hatchet, went to the bedroom, and struck her at least twice in the head with the hatchet blade. Sakarias had a loaded handgun when arrested and later was found in [166] possession of shanks in the county jail (for use, he said, against gang members who had robbed him). He also made statements during trial indicating a lack of remorse for killing Viivi and suggesting that he and Waidla had intended to kill Avo Piirisild as well. (*Sakarias*, *supra*, 22 Cal.4th at pp. 614–616.)
>
> Other considerations, however, make it impossible for us to conclude *beyond a reasonable doubt* that the prosecutorial argument that Sakarias struck all the hatchet-blade blows, including the first, antemortem one, played no role in the penalty decision.

(*In re Sakarias*, *supra*, 35 Cal.4th at pp. 165–166, emphasis in original.)

The Court reviewed mitigating evidence, noted the import of the evidence showing how powerful was the first blow which the prosecutor said was delivered by Sakarias, and the fact that the jury deliberated 10 hours before reaching its verdict, and set aside Mr. Sakarias's death penalty. (35 Cal.4th at pp. 166–167.)

Here, the prosecutor used the "fact" that appellant personally shot Javier Ibarra repeatedly to show not only that appellant deserved the death sentence, but that he would pose a future danger in prison if he were given a sentence of less than death, because he was a calculated killer. (AOB 406–408.)

The jury did not come quickly to its penalty verdict. They deliberated approximately 20 hours over four days before reaching a death sentence. It cannot be said beyond a reasonable about that appellant's death sentence was unaffected by the evidence at issue.

XV. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT APPELLANT PERSONALLY SHOT JAVIER IBARRA.

Respondent recognizes that "Before a juror can consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (*People v. Foster* (2010) 50 Cal.4th 1301, 1364.)" (RB 241.) No reasonable juror could find beyond a reasonable doubt that appellant personally shot Javier Ibarra based on the evidence presented to his jury.

The evidence pointed to by respondent as constituting sufficient evidence is evidence formerly used to convict Gabriel Flores and Cipriano Ramirez, two trials in which the prosecution argued that Gabriel Flores was the triggerman (RB 242), plus new evidence: "Mosqueda gave conflicting statements regarding who was wearing the white hat on the night of the murder." (RB 243.)

Before this trial, there were no conflicting accounts from Alma about what she had seen. In four separate proceedings, she testified that Gabriel Flores wore a white hat. Together with Ysela Nunez's testimony that the shooter was wearing a white hat, and the two others wore no hat, that was enough to convict Gabriel Flores.

The conflict comes from the victim's brother, Jesse Ibarra: "The day after Ibarra's murder, Mosqueda told Ibarra's brother, Jesse, that appellant

was the one with the white hat and that appellant had shot Ibarra." (RB 243.) Finally, respondent points to the testimony of Gerardo Soto that he saw appellant and his brother Cipriano the night of the murder, and that appellant was wearing a dark Pendleton and a hat that was not white." (RB 243.) What Soto said to Deputy Contreras was that appellant was wearing a dark Pendleton and a matching blue hat; he always wore "something that matches." (See 58 RT 12938–12954.) This evidence simply does not point to appellant as the shooter.

The evidence supporting the prosecutor's argument that appellant personally shot Javier Ibarra is thus a "conflict" generated by the prosecution that had not existed before this trial—a statement essentially accusing appellant of being the shooter from Alma Mosqueda that contradicts her sworn testimony on four different proceedings, a hearsay statement denied by the declarant, plus appellant's uncle saying that he wore a hat of a significantly different color (dark, and blue, rather than white) at some time later on the evening that Javier Ibarra was murdered.

> As *People v. Bassett*, *supra*, 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence

> supporting the finding, for 'Not every surface conflict of evidence remains substantial in light of other facts.'" (69 Cal.2d at p. 138.) (Fn. omitted.)

(*People v. Johnson*, *supra*, 26 Cal.3d at pp. 576–577, emphasis in original. See also *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

This Court underscored the significance of the word "substantial" in developing a standard of review in *People v. Bassett* (1968) 69 Cal.2d 122, 138 (*Bassett*). Justice Mosk's unanimous opinion quoted from one of the court's earlier cases:

> [W]e emphasized in *Estate of Bristol* (1943) 23 Cal.2d 221, 223 [143 P.2d 689, 690], that "The critical word in the definition is 'substantial'; it is a door which can lead as readily to abuse as to practical or enlightened justice." Seeking to determine the meaning of "substantial" in this connection, the court in *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54], canvassed dictionary and judicial definitions and concluded that the term "clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case."

(*Bassett*, *supra*, 69 Cal.2d at p. 138.)

This standard has been repeated in thousands of appellate decisions ever since. (See, e.g., *Meyers v. Board of Administration etc.* (2014) 224 Cal.App.4th 250, 260.)

Bassett also relied on *People v. Holt* (1944) 25 Cal.2d 59, 70, and described the appellate task thus:

> As the emphasized language indicates, our task in this regard is twofold. First, we must resolve the issue in the light of the whole record—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." (*People v. Holt*, *supra*, at p. 70 of 25 Cal.2d.)

(*Bassett*, *supra*, 69 Cal.2d at p. 137.)

Recently, this Court added another test to its standards of review: "some evidence." This standard was first adopted in *In re Rosenkrantz* (2002) 29 Cal.4th 616, 625–626 for the review of a governor's decision to grant or deny parole, and it remains the standard of review only for cases involving review of a decision to deny or overturn a grant of parole. "The 'some evidence' standard is *more deferential* than substantial evidence review, and may be satisfied by a lesser evidentiary showing. . . . [U]nder the 'some evidence' standard, '[o]nly a modicum of evidence is required.'" (*In re Shaputis* (2011) 53 Cal.4th 192, 210.)

There may be "some evidence" that appellant personally shot Javier Ibarra, but there is nothing that is ponderable, reasonable in nature, credible,

or of solid value. Respondent states that there is a conflict in the evidence between Alma Mosqueda, who denied telling Jesse Ibarra that appellant was the one wearing a white hat, and Jesse Ibarra, and that "The weight to be given to Mosqueda's and Jesse Ibarra testimony and their credibility were matters exclusively within the province of the jurors. [Citation.]" (RB 243.)

True enough; this is "some evidence." But this isolates bits of testimony and removes it from its full context. The larger story is that Alma swore under oath four times that Gabriel Flores wore the white hat—and had no recollection of ever saying anything to the contrary to Jesse Ibarra.

Even when viewing this evidence in the light most favorable to the government, this whole record does not contain evidence that any reasonable juror could find that shows appellant to have been the shooter of Javier Ibarra beyond a reasonable doubt. Appellant's death sentence was therefore obtained in violation of the state and federal constitutional guarantees of due process of law and a sentence based on reliable evidence. Appellant's death sentence must be set aside.

XVI. APPELLANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE THE PROSECUTION'S WITNESSES AGAINST HIM, AND TO DUE PROCESS OF LAW, WAS VIOLATED BY INTRODUCTION OF HEARSAY STATEMENTS ALLEGEDLY MADE BY CIPRIANO RAMIREZ.

Respondent argues that Cipriano's statements satisfy the requirements for hearsay exceptions set out in Evidence Code sections 1223 and 1230, and states that there is no Sixth Amendment violation under *Aranda/Bruton*[29] because the statements were non-testimonial and thus not subject to the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36, 53–54. (RB 245–251.) Respondent is wrong; the admission of Cipriano's hearsay statements at appellant's trial resulted in unreliable and unfair guilt and penalty phase verdicts. The statements should not have been admitted.

In *Crawford*, the U.S. Supreme Court abandoned the *Ohio v. Roberts* (1980) 448 U.S. 56 "reliability" standard of analyzing a hearsay statement proposed for admission against a defendant, and held that the Confrontation Clause bars the state from introducing into evidence any out-of-court statements which are "testimonial" in nature unless the witness is

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[29] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington*, supra, 541 U.S. at pp. 53–54.)

Crawford expanded the reach of the confrontation clause in some ways and narrowed it in other ways. In any event, *Crawford* should not be read to allow the introduction of unreliable statements, thereby violating the constitutional guarantees of due process of law. The high court's characterization of extrajudicial statements of a codefendant or accomplice that implicates a defendant in the commission of a crime remains true: "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged 'accomplice,' as here, does not testify and cannot be tested on cross-examination." (*Bruton v. United States*, *supra*, 391 U.S. at p. 136.)

Here, the prosecution's theory was that appellant "probably" over-heard Cipriano's alleged statements on the telephone. Yet appellant had no opportunity to cross examine Cipriano as to either the accuracy of the hearsay statements, the circumstances under which the statements were made, or what he meant when and if he made the ambiguous statements. Cipriano's reliability was attacked by the prosecution at his own trial. (See AOB 377–380.) It was a denial of due process for the trial court to allow

Cipriano's statements to be presented to appellant's jury. For the reasons set forth in his opening brief, appellant's death sentence should be set aside.

XVII. APPELLANT WAS PREJUDICED BY THE INTRODUCTION OF UNADJUDICATED CRIMINAL ACTIVITY AGAINST HIM.

On February 23, 2001, the prosecutor filed a motion to include the August 1997 "dope/gun case" (counts 10 and 11) as an aggravation under section 190.3, factor (b). (15 CT 4307 et seq.) The trial court found that the evidence showed appellant was present with both drugs and a firearm, and the firearm was available for defendant to put to immediate use to aid in the drug possession, and the presence of the gun and drugs was not accidental or coincidental. The trial court ruled the evidence showing appellant's presence near both the drugs and the weapon was admissible pursuant to section 190.3, factor (b), because it involved the express or implied threat to use force or violence. (54 RT 12025–12026.)

Appellant showed in his opening brief that the trial court erred. (AOB 418–423.) Appellant was "present" in that he was hiding when the deputy entered the room. The gun was legal. The facts do not establish a threat within either the ordinary or the legal sense of the word. Respondent does not dispute appellant's depiction of the facts, but cites without comment cases distinguished by appellant, or cases that are inapposite, to support the trial court's exercise of discretion. (RB 252–255.)

Respondent minimizes the fact that the weapon in this case was legal, and cites *People v. Dykes* (2009) 46 Cal.4th 731, in support. (RB 253–254.) In *Dykes*, however, this Court found it significant that defendant had just been arrested before the weapon was found. "Evidence establishing that a defendant knowingly possessed a potentially dangerous weapon *while in custody* is admissible under section 190.3, factor (b), even when the defendant has not used the weapon or displayed it with overt threats. (Citation omitted)." (*People v. Dykes, supra*, 46 Cal.4th at pp. 776–777, emphasis in original.)

In *Dykes*, this Court also wrote, "the illegality of the weapon possessed by the defendant while he was in custody was a factor . . . the jury legitimately could infer an implied threat of violence from all the circumstances, including the 'criminal character of defendant's possession' (citation omitted)." (46 Cal.4th at p. 777.)

Appellant has distinguished the two cases cited by the trial court in allowing the use of this evidence: *People v. Bland* (1995) 10 Cal.4th 991 and *People v. Garceau* (1993) 6 Cal.4th 140, 198–200. (AOB 422–423.) Respondent does not mention the *Bland* case, and simply cites *Garceau*, where the defendant had a machine gun, a silencer, handguns, and an

explosive device, none of which were legal, which this Court referred to as an "arsenal," (*Id.* at pp. 203–204) as authority. (RB 253.)

Respondent also cites *People v. Quartermain* (1997) 16 Cal.4th 600, 631, where the defendant's house yielded numerous firearms, including several sawed-off rifles, silencers, and material and instructions for making silencers. Neither of these cases is comparable to this case, where there is one legal handgun at issue that was not on appellant's person at the time he was arrested.

The trial court reasoned that the gun's proximity to drugs and to appellant was sufficient to create an implied threat to use force or violence. No case so holds. It was error for the trial court to have allowed this evidence. For the reasons set forth in his opening brief, appellant's death sentence must be set aside.

XVIII. THE TRIAL COURT PREJUDICIALLY ERRED AND THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN APPELLANT WAS IMPEACHED WITH ASSERTIONS BY THE PROSECUTOR ABOUT CONDUCT UNDERLYING A 1994 MISDEMEANOR NO CONTEST PLEA WHICH INVOLVED NO MORAL TURPITUDE.

On November 28, 2000, appellant filed a motion in limine to limit prior conduct used for impeachment if appellant elected to testify. (11 CT 3250.) Appellant argued that a 1994 misdemeanor "joyriding" no contest plea this prior incident should not be used to impeach him. He cited several reasons, including the fact that the elements of an auto theft were so close to carjacking charges that it would be the sort of propensity evidence forbidden by Evidence Code sections 1101 and 1101, subdivision (a), and that appellant did not actually steal the car. The motion was argued on December 1, 2000. (9 RT 2332 et seq.)

Police reports were given to the court for review, and they showed that appellant was not present when the car was stolen. He pled no contest to a "joyriding" charge that did not involve any moral turpitude. There was no evidence of an intent to steal. (9 RT 2372.)

The prosecutor did not disagree with the legal principles set forth by counsel for appellant, but contended that an intent to steal may have arisen at the point where appellant fled from the police. (9 RT 2374.)

The trial court relied on *People v. Wheeler* (1992) 4 Cal.4th 284, and quoted the following language to direct its exercise of Evidence Code section 352:

> [A]dditional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor or any other conduct not amounting to a felony is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, moral turpitude evaluation, which felony convictions don't present. Hence, courts may and should consider with particular care, whether the admission of such evidence might involve undue time, confusion or prejudice which outweighs its probative value.

(*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 296–297; 9 RT 2382.)

The trial court then applied the standard of beyond a reasonable doubt to the question of whether or not the prior conduct under the prosecutor's offer of proof (the police report) evidenced moral turpitude such that it could be used to impeach appellant, and found that it did not. (9 RT 2382–2383.)

As shown in the opening brief, however, the trial court forgot its ruling by March of 2001, and allowed the prosecutor to begin its cross-examination of appellant by asking him about his misdemeanor pleas to "joyriding": "That's when you were in a stolen car fleeing from the police

that flipped and ejected people, right?" The trial court overruled appellant's objection. (AOB 429–430.)

Respondent argues that there could be no prosecutorial misconduct because all parties had forgotten by March what had happened in December. "[F]rom the record it appears that everyone, including the prosecutor, defense counsel, and the court, was under the misapprehension that the court had earlier stated it would allow evidence of the vehicle theft." (RB 260.)

The fact that both the trial court and counsel for appellant accepted the prosecutor's false version of events ("As I recall, I get to impeach him with the fact that he had the misdemeanor conduct, not a conviction but misdemeanor conduct of auto theft" [47 RT 10370; see also 47 RT 10375–10377]) does not somehow cleanse the prosecutor's deception. Such misrepresentation should not be excused because it worked.

Counsel recovered enough of an understanding to object when the prosecutor questioned appellant (47 RT 10447–10448), but when the "reserved" objections were later discussed, the trial court mistakenly recalled what it had earlier ruled, and denied appellant's motion for prosecutorial misconduct in bringing up facts behind the misdemeanor plea. (47 RT 10551–10552.)

Respondent also contends that in any event, it was perfectly legal for appellant to have been impeached with this prior misbehavior. (RB 260–263.) In order to buttress this assertion it states that appellant was the actual operator of the car (RB 261), but there is no such evidence in the record. Respondent cites *People v. Lang* (1989) 49 Cal.3d 991, 1011, as establishing the moral turpitude is involved when anyone takes a vehicle from another (Veh. Code, § 10851), but that's not what happened here. The prosecutor argued that an intent to steal was formed once appellant sought to avoid the police, after the car had been taken by others, but that view was, and is, unprecedented. It was properly rejected by the trial court in December of 2000 when it considered the only evidence proffered by the prosecutor (a police report) as not constituting sufficiently reliable evidence of moral turpitude to be used to impeach appellant.

Finally, respondent summarizes all the evidence in this case against appellant in a misleading manner ("Yarbrough was shot three times in the head, leading to the undeniable conclusion that appellant did not accidentally fire the gun."[30] [RB 264]), and argues in essence that there was so much evidence of other bad behavior that whatever may have happened

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[30] Both prosecution and defense experts testified that the Tec-9 as an automatic weapon would fire three shots in less than a quarter of a second. See 40 RT 9167; 48 RT 10812–10813.)

regarding this incident could not have made any difference. For the reasons set forth in appellant's opening brief (AOB 432), it cannot be said beyond a reasonable doubt that the error did not affect the jury's consideration of the charges against appellant, or his sentence of death. (See also discussion of jury deliberations at Arg. XXI, *post.*)

XIX. THE EVIDENCE PROFFERED BY THE PROSECUTION AS REBUTTAL EVIDENCE WAS TOO SPECULATIVE AND AMBIGUOUS TO BE USED FOR ANY PURPOSE.

At the outset, respondent argues that any errors made by the trial court regarding penalty phase rebuttal evidence could not have been prejudicial, because the evidence was not presented to the jury. (RB 264–265.) True enough, but the threat of this evidence kept appellant from presenting evidence of his behavior during his only prior incarceration, which earned the appreciation and praise of his counselors. (AOB 433–441, 49 RT 12350.)

The "evidence" in its entirety consisted of hearsay testimony about obscenities and hatred aimed at jail staff by other prisoners after staff confiscated a "shank" and other contraband, and appellant twice saying "count me in," when other inmates said, "it was going to be on," or "it's fucking on." (AOB 432–436; RB 265–266.)

The other incident would have been presented by Deputy Chavez. He would have told the jury that several years before, appellant was one of the persons found in three carloads of juveniles suspected of a drive-by shooting. (61 RT 13485–13486.)

This evidence was speculative, inconclusive, and without value. Just because it is to be used in rebuttal does not mean that it can be less reliable

that any other evidence submitted against a defendant. (*People v. Martinez* (2003) 31 Cal.4th 673, 694–695; *Burger v. Kemp* (1987) 483 U.S. 776, 789, fn. 7.)

Respondent argues that there was no due process violation as there was in *People v. Gonzalez* (2006) 38 Cal.4th 932 (RB 270–271). That issue is close, given that appellant was given the Chavez police reports on the same day Chavez would have testified, (AOB 436), but neither *Gonzalez* nor respondent addressed appellant's chief contention, which is that the evidence was inflammatory, without probative value, and unreliable. (AOB 439–441.)

Evidence of good institutional behavior by appellant on his only prior incarceration could have made a difference in the jury's deliberations, which lasted 20 hours. (See Arg. XXI, *post.*) The evidence precluded by the trial court's rulings was highly relevant to appellant's future behavior in institutional settings, a substantial topic in most penalty phase deliberations. The trial court's rulings violated appellant's Sixth, Eighth, and Fourteenth Amendment rights to reliable and accurate sentence, and require that his death sentence be set aside.

XX. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PROHIBITING APPELLANT FROM PRESENTING MITIGATING EVIDENCE OF ANY EVENTS THAT TOOK PLACE BEFORE THE MOMENT OF HIS BIRTH.

The trial court refused to allow any evidence at all concerning events that took place before the moment of appellant's birth. Appellant tried to present evidence from Esperanza Villa, appellant's maternal grandmother; Maria Villa, appellant's aunt; and Angelita Ramirez, appellant's mother; about life inside the home in which appellant was born, and particularly about how his father mistreated appellant's mother and his older brother Lorenzo, who became a significant care giver for appellant.

Respondent recognizes that "appellant wanted to introduce evidence that appellant's father beat his mother prior to his birth to demonstrate that appellant's older brother witnessed the violence and then beat appellant." (RB 280.) Such evidence would help to explain that the abuse of appellant was not provoked by his own misconduct, but was a result of the dysfunctional and violent circumstances in which he grew up.

Respondent argues that it was within the trial court's discretion to exclude such evidence, citing *People v. McDowell* (2012) 54 Cal.4th 395, 404 [hearsay evidence of father's abuse of animals excluded as redundant of a great deal of other evidence of his violent tendencies], quoting *People v. Rowland* (1992) 4 Cal.4th 238 [evidence was admitted at trial of family

background before appellant was born, and no error for prosecutor to argue that evidence was irrelevant as it did not relate to the defendant's personal circumstances]; *In re Crew* (2011) 52 Cal.4th 126, 152 [hearsay evidence of family circumstances presented to establish ineffective assistance of counsel lacked a nexus to the crime and therefore had no mitigating effect); *People v. Thorton* (2007) 41 Cal.4th 391, 454 [father's testimony about occasion when he beat wife but son/appellant was not present was excluded where defendant presented no "independent authority" at trial to establish the effect of domestic violence on children, even when they do not directly witness the violence]; *People v. Souza* (2012) 54 Cal.4th 90, 137 [proper for prosecution to argue in closing that evidence of family circumstances admitted at trial was not mitigating where it did not directly involve the defendant]; and *Lockett v. Ohio* (1978) 438 U.S. 586, 604, n.12 [says nothing about limiting mitigating evidence; "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."].) (RB 279–280.)

Lockett simply does not support respondent's argument. The other cases cited by respondent, such as *Rowland* and *Crew*, involved hearsay evidence that was cumulative, or as in *McDowell* (quoting *Rowland*) and *Souza*, the evidence was admitted and the prosecution argued it was not mitigating.

Respondent concedes the mitigating nexus of the evidence excluded in this case: to explain why appellant was abused by his brother and to exclude any blame on appellant for causing the abuse. The evidence was not hearsay evidence and it was not cumulative. The question of whether it was mitigating in fact should have been left to the jury and not the judge. *Lockett v. Ohio, supra.*

Respondent recognizes that the United States Supreme Court and this Court have determined that family history and circumstances can be relevant, but argued that such cases as *In re Gay* (1998) 19 Cal.4th 771, and *Hernandez v. Martel* (C.D. Cal. 2011) 824 F.Supp.2d 1028, do not require a different result because "each of these cases dealt with the genetic component of psychological disorders, such as drug and alcohol abuse or schizophrenia." (RB 280.)

In *Gay* and *Hernandez*, the courts were describing why the evidence was relevant—a requirement of all evidence. Neither case said anything that

would support an exclusion of all evidence depicting what took place before the moment of a defendant's birth.

In this case, appellant wanted to introduce evidence that appellant's father beat his mother prior to his birth, inter alia, to demonstrate that appellant's older brother witnessed the violence and then beat appellant. As noted in appellant's opening brief, the prosecutor challenged appellant's depiction of Lorenzo and his behavior towards appellant as untrue, and inconsistent with an assertion of appellant's aunt Olivia in a taped interview provided to the prosecution. (AOB 451–452; 60 RT 13303.)

The arbitrary cut-off date enforced by the trial court prevented appellant from developing a fuller picture of Lorenzo in context, and how the lives of his parents and older brother, were developing up to the moment of his birth. It made a convincing narrative impossible. There was no indication that appellant sought to present "generations" of witnesses (60 RT 13211–13212), or otherwise abuse the trial court's time. It was error for the trial court to restrict mitigating evidence in this manner.

Respondent argues that no prejudice could have resulted because all the evidence about Lorenzo that was necessary to establish appellant's points was presented to the jury (RB 280), but that evidence was challenged by the prosecutor at trial. The excluded evidence was a key part of

appellant's story of how he grew up. It made more plausible and coherent his social history, and would have cost very little time.

As set forth below, the decision to impose a death sentence was not easy or quick. (See Arg. XXI, *post.*) The trial court's arbitrary limit on appellant's presentation of mitigating evidence denied him a fair and reliable sentencing trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and thus requires that his death sentence be set aside.

XXI. WHERE THE STATE RELIES ON THE IMPACT OF A MURDER IN ASKING FOR DEATH, THE DEFENDANT SHOULD BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION ON HIS FAMILY IN ASKING FOR LIFE.

Appellant argued that the interests of reciprocity and the low threshold for relevance required for mitigating evidence in a capital case meant that he should have been allowed to present evidence showing the impact of his execution on his family. (AOB 453–465.) In support of his contention, he cited *Smith v. Texas* (2004) 543 U.S. 37, 43, and *Tennard v. Dretke* (2004) 542 U.S. 274, 285. As these cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Smith v. Texas*, *supra*, 543 U.S. at p. 43.) So long as a "fact-finder could reasonably deem" the evidence to have mitigating value, a state may not preclude the defendant from presenting that evidence. (*Id.* at p. 44.; see also Arg. XXII, *ante*.)

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. As the United States Supreme Court has concluded, victim impact evidence is relevant because it shows the "uniqueness" of the victim. For the very same reasons, execution impact evidence is relevant because it shows the uniqueness of the defendant.

In *Payne v. Tennessee* (1991) 501 U.S. 808, the Supreme Court recognized that "evidence about . . . the impact of [a] murder on the

victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 826.) A major premise of *Payne*'s rationale was that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (*Id.* at pp. 820–826.)

Relearnt state statutes and rules governing sentencing also allow the impact of criminal sentence of those close to the defendant as mitigating evidence to be considered at the time sentence lengths or probation are determined. Section 190.3 permits defendants to introduce "any matter relevant to . . . mitigation. . . ." At the time the 1978 law was enacted, the term "mitigation" had been used in previous sentencing statutes and was recognized to include the impact of sentence on a defendant's family. Under well accepted principles of statutory construction,[31] the electorate is deemed to have intended "mitigation" as used in section 190.3 to have the same meaning as it had in these other statutes.

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[31] Where the language of a statute includes terms that already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms have been used in the same way. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216. See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.) This principle too applies to legislation adopted through the initiative process. (*In re Jeanice D., supra*, 28 Cal.3d at p. 216.)

Prior to the 1978 law, the same term had been used repeatedly in sentencing statutes and court rules governing sentencing. For example, at the time the electorate voted on the 1978 law, Penal Code section 1203, subdivision (b) provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (c)(3) of that section went on to provide that a grant of probation was appropriate if the trial court found "circumstances in mitigation."

At the time the electorate enacted section 190.3 in 1978, both section 1203 and 1170, subdivision (b) had court rules drafted to implement them. California Rules of Court, rule 414 set forth "criteria affecting probation," designed to implement the inquiry into aggravation and mitigation mandated by section 1203. Rule 414 provided that in deciding if there was mitigation for purposes of whether to grant probation, the court was required to consider a number of factors, including the impact of the sentence "on the defendant and his or her dependents." Courts have long relied on this mitigating factor in determining an appropriate sentence. (See, e.g., *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 834 and n.15.) There is no rational reason why capital defendants should not be able

to parent the same unmistakably mitigating evidence as person facing far less severe consequences for their actions.

Appellant also cited cases from around the country recognizing the admissibility of such evidence. (AOB 456–457.) Not only does the Eighth Amendment guarantee appellant the right to place any mitigating evidence before the jury, but in the context of this case, where the victim's mother, brother, and girlfriend described for the jury the impact of his loss on them,[32] principles of equal protection and fundamental fairness also require that appellant be afforded the same opportunity to present evidence of the pain and loss his execution would cause members of his family. (*Wardius v. Oregon* (1973) 412 U.S. 470.) Failure to allow appellant to also put forward such evidence trivializes the impact his loss would have on his own family, and skews the moral and normative decision the jury was asked to make toward the imposition of death.

Respondent concedes two points: (1) that evidence of impact on a decedent's family arising from the decedent's death is relevant to show that the decedent is a unique individual, and (2) the trial court "limited how the jury could consider the evidence" relating to the impact of a death sentence

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[32] According to counsel for appellant, the foreperson of the jury was openly sobbing during Ms. Castro's testimony. (58 RT 12988.)

on appellant's family. (RB 285.) Respondent cites several cases decided by this Court restricting the admissibility of such evidence and quotes *People v. Ochoa* (1998) 19 Cal.4th 353, at p. 456: "the jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (RB 283.) It also relies on *People v. Bennett* (2009) 45 Cal.4th 577, where this Court rejected the contention that because the prosecution could present victim impact evidence, appellant should be permitted to introduce execution impact evidence. It did not directly address the issue of parity, but simply stated that the only permissible mitigation evidence is that which deals with the defendant's own circumstances, not those of his family. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 602.) (RB 283.)

This distinction between the impact of death on different families is arbitrary and artificial. The impact of the death on family members is relevant to show the unique individuality of both the victim and the person who is to be executed. The impact of a defendant's execution on his family is an individualized sentencing consideration which reflects the individuality of the person being sentenced. By excluding this evidence, the trial court denied appellant a full and fair opportunity to present evidence of his individuality to the jury. This lack of individualized consideration of

appellant's role in his family and the impact of his death on his family members, all a reflection of his character and individual worth, resulted in an arbitrary and unreliable sentencing determination.

Respondent also states that execution-impact evidence "is not relevant because it does not address the defendant's character, record, or individual personality. (See *People v. Smithey*, *supra*, 20 Cal.4th at p. 1000.)" (RB 285.) But that is precisely was appellant's family members would be deprived of if he were executed: His "character, record, and individual personality."

Respondent cites the correct standard for evaluating the impact of a penalty phase error[33] and argues that even if there had been error it could not have mattered, because appellant was allowed to present a wide array of mitigating evidence. (RB 285–286.) But the jury was not allowed to give full mitigating effect to the evidence presented, and there was substantial evidence that was excluded, not because it was cumulative, but because of the trial court's misapprehension about the individualized nature of

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[33] "We use the *Chapman* test in evaluating the effect of erroneously excluding mitigating evidence; reversal is required 'unless the state proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' (*People v. Lucero* (1988) 44 Cal.3d 1006, 1032 [245 Cal.Rptr. 185, 750 P.2d 1342], quoting *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Smith* (2005) 35 Cal.4th 334, 368.) (RB 181.)

sentencing determination. Appellant's family members were not allowed to described how they would feel, or react, if respondent were to kill him. Testimony to the effect that they cared for him, and that he had had a hard life as a child, is qualitatively different.

In arguing that this testimony would not have made a difference, respondent also cites to the various factors in aggravation presented at trial. (RB 286.) Respondent says nothing, though, here or anywhere else, about the length of time spent by the jury in deliberations over what penalty to impose—20 hours spread over four days. The length of the deliberations may not always be significant when considered out of context. (See, e.g., *People v. Taylor* (1990) 52 Cal.3d 719, 732 [10 hours deliberation to determine the issue of guilt on four charges and the truth of three special circumstances did not indicate a close case].) In the present case, the length of the deliberations was significant. (See *Woodford v. Visciotti* (2002) 537 U.S. 19, 26–27 [assuming that aggravating factors in death penalty trial were not overwhelming where jury deliberated for a full day and requested additional instructional guidance].) It cannot be said beyond a reasonable doubt that the error at issue would not have made a difference in the jury's penalty assessment.

XXII. THE TRIAL COURT'S CONDUCT THROUGHOUT THE TRIAL DEMONSTRATED ACTUAL BIAS, THEREBY VIOLATING APPELLANT'S DUE PROCESS RIGHT TO AN IMPARTIAL TRIAL JUDGE; AUTOMATIC REVERSAL IS REQUIRED

The legal principles applicable to this claim set out by respondent are generally unobjectionable. (RB 286–288.) Respondent's factual errors, however, continue.

Appellant initially set out two interactions during voir dire in which the trial court misunderstood counsel's point. (AOB 468–471.) Respondent answers by saying, "Neither example demonstrates that the judge misunderstood or misperceived defense counsel's objections or statements to the court. The judge, instead, disagreed with defense counsel's objections regarding the manner in which the judge was conducting voir dire." (RB 289.)

The first incident occurred early in the process of jury selection. The prospective juror was Terri Burton. After an essentially accurate summary of what happened, respondent states, "Mr. Burton's voir dire does not reflect that the judge was incorrect when it told defense counsel that he had misquoted the court. In fact, defense counsel had misquoted the court." (RB 290.)

Respondent does not specify what this misquote might have been. The relevant transcript reads:

THE COURT: *If the evidence and law required it, could you return a verdict for the death penalty?*

A. (Affirmative nod.)

Q. Yes or no?

A. Yes.

(17 RT 4312, emphasis added.)

Counsel then objected: "Your Honor, I object to the last form of questioning, because the law never requires death." (17 RT 4312.)

The objection was overruled. After the juror was passed for cause, appellant explained his objection:

MR. BRYAN: Yes, your Honor. You know, Mr. Barton just asked this juror if upon deliberations if he thought the—if he as the juror thought the appropriate sentence was the death penalty, could he vote for it. He said yes. And I must say, that is the right way to put it. *The Court, however, asked this juror if he could find the death penalty, if the law required it.* And that is the most important—

THE COURT: Mr. Bryan, be very careful when you state things to state them accurately. And that's not the way I phrased it.

(17 RT 4318, emphasis added.)

But it is exactly how the court phrased it. There was no misquote of the court by counsel,

Respondent then denies that the prosecutor agreed with defense counsel:

> Moreover, there is no indication that the prosecutor "endorsed defense counsel's position as being legally correct," and that the judge then accepted defense counsel's position. (AOB 469.) What the prosecutor indicated was that he thought the disagreement between defense counsel and the court was one of semantics, which it appeared to be. (17 RT 4321.)

(RB 290.)

What the prosecutor said was,

> And I think I hear both court and counsel, seems like what counsel is saying is because you asked that in the singular as opposed to putting it together, *it sounds like this juror might be thinking that the law would require one or the other, given a set of circumstances. But the law will never require one or the other, it will always require him to be open to either.*

(17 RT 4320, emphasis added.)

Thus, defense counsel made an objection to the trial court's misstatement of the law regarding the jury's discretion to impose the death penalty. The trial court denied that it had said what it said, and warned counsel to "be very careful when you state things to state them accurately." When it reviewed the transcript and discovered that counsel had quoted the court accurately, the court insisted that it had used "standard language,"

never recognizing that such language is not only not "standard" in a death penalty case, but is an important misstatement of the law. Respondent never addresses appellant's demonstration of how contrary to well-established precedent was the trial court's language at issue. (AOB 251–252.)

The second incident occurred on January 3, 2001, deeper into the process of jury selection. Respondent writes,

> The same is true of Juror Kellerhals. The court was not biased against defense counsel, nor were the court's perceptions "distorted." (AOB 470–471.) Instead, the court appeared to react to defense counsel's serious accusations that the court was intimidating a juror into giving a desired answer, an accusation that any judge would take seriously. The court responded to that accusation by stating he did not believe he had intimidated the juror, an observation echoed by the prosecutor. The judge then considered appellant's challenge for cause and denied it based on the juror's responses and demeanor. (20 RT 4867–4868.)
>
> Nothing in the record indicates that the judge misperceived defense counsel's comments or objection.

(RB 290.)

The record, however, shows that appellant first objected to the leading and insistent nature of the trial court's voir dire. Counsel argued that the trial court had repeated its instructions and questions over and over in order to drill into the juror the message that he should say he could be fair, even when he repeatedly said that it was be difficult for him to do. (20 RT 4860.) The court said that the record would reflect what had

happened, and asked counsel if there was anything else. Counsel added that the believed the witness was intimidated by the court into saying that what the court wanted to hear by an increase in voice volume. (20 RT 4860–4861.)

The trial court was sensitive about the volume of its voice. It was the one part of his voir dire that had been criticized by the prosecutor. (16 RT 3968–3969.) It immediately threatened defense counsel for proceeding in bad faith, saying that it may have to "pursue" that behavior, and redefined the sequence of events:

> THE COURT: The record reflects the words I used. Do you specifically—*you specifically were stating your belief that the Court was intimidating in the range and the rank of voice volume that the Court used. So now you've changed the basis for your concern to the words that were used.*

(20 RT 4862, emphasis added.)

Respondent argues that "the record reflects that the judge responded to defense counsel's accusation of judicial misconduct and ruled on defense counsel's objections. Appellant fails to establish that judicial bias affected the court's voir dire." (RB 290.)

This summary misses both the spirit and the letter of what took place. Appellant objected to repetitive, leading and directive voir dire

during the lengthy questioning of Mr. Kellerhals, not judicial misconduct. There is a difference. Respondent here echoes the trial court's belief that questioning or objecting to its voir dire is somehow questioning its essence —something so egregious that it warrants being reported to the State Bar. Not so. As respondent recognizes elsewhere, even erroneous rulings do not establish bias. (RB 287-288.)

Respondent denies that the trial court harassed defense counsel by threatening to pursue formal sanctions from the state bar. (RB 290–292.) It discusses the trial court's threats to defense counsel made during its response to appellant's motion for a mistrial on January 8, 2001, after voir dire of Gary Moreno and Diane Krotter. (RB 291.) It quotes all the trial court's language denying that its discussion of reporting counsel to the State Bar if objections were not made in good faith was not a threat (RB 291), and asserts that it was aimed at "both sides," but of course it was a threat. There was no other reason to bring up the topic.

Not only was it a threat, but it was a repeated threat. Respondent overlooks the previous time when the trial court threatened to "pursue" counsel for objecting to its voir dire; see AOB 190. Respondent may have overlooked it, but it's doubtful that trial counsel ever forgot the trial court's statement that it may have to "pursue" him. (See 65 RT 14373–14375.)

Respondent argues that this Court cannot consider the referral of both trial counsel to the State Bar, because it's not part of the appellate record:

> "'Appellate jurisdiction is limited to the four corners of the record on appeal. . . .'" (*People v. Waidla*, *supra*, 22 Ca1.4th at pp. 743–744, citing *In re Carpenter*, *supra*, 9 Ca1.4th at p. 646.) Since the letters from the California State Bar are not part of the record, they can not be considered on appeal.

(RB 294–295.)

Evidence Code section 452, however, allows judicial notice to be taken of: "c. Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Appellant is not asking this Court to necessarily consider the results reached by the State Bar, or the reasoning behind those results, but rather the fact that the documents exist at all, and why they exist—the fact that Judge Twisselman asked that both counsel be investigated during this trial, as respondent notes, without telling either of them,. (RB 295.)

State bar records reflecting disciplinary proceedings against counsel are appropriate facts for judicial notice. (*White v. Martel* (9th Cir. 2010) 601 F.3d 882, 885; *People v. Vigil* (2008) 169 Cal.App.4th 8, 12, fn. 2 [judicial notice taken of attorney's disciplinary record].) Appellant asks that

judicial notice be taken, if not for the facts contained in the attachments, then for the fact that they exist, at the behest of Judge Twisselman.

Respondent argues that Judge Quashnick's denial of the motion to disqualify Judge Twisselman is not cognizable by this Court (RB 293), nor are the arguments that the trial court was deceptive and committed misconduct to argue during the penalty phase that appellant was the person who shot Javier Ibarra (RB 293), and the contention that the trial court's ruling directing prosecutorial misconduct motions to be asked at sidebar so that the jury would never hear such a motion. (RB 294.) Each of these points is made in support of appellant's overall claim that Judge Twisselman was biased against him, and therefore violated due process of law. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904; *People v. Brown* (1993) 6 Cal.4th 322, 333.) Appellant has shown a probability of bias, not just the appearance, and is therefore entitled to a new trial before an impartial tribunal.

XXIII. THE RACIAL DISCRIMINATION PERMEATING CAPITAL SENTENCING THAT IS ACCEPTED BY DOMESTIC LAW VIOLATES BINDING INTERNATIONAL LAW, AND REQUIRES THAT APPELLANT'S DEATH PENALTY BE SET ASIDE.

Appellant contends his trial and sentence of death are in violation of the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCP), American Declaration of the Rights and Duties of Man, and International Convention Against All Forms of Racial Discrimination. (AOB 482–506.)

Respondent cites to this Court's frequent rejections of these claims, e.g., *People v. Mungia* (2008) 44 Ca1.4th 1101, 1143. (RB 295.) With one exception, appellant has nothing to add to his opening brief.

Regarding appellant's separate claim of an impermissibly racist system of administering the death penalty that is accepted as part of domestic law even though rejected by international law, respondent ignores appellant's showing at AOB 495–506, and simply cites to *McCleskey v. Kemp* and its successors:

> Moreover, appellant's citation to statistical studies showing that race correlates to the imposition of the death penalty does not demonstrate that California's death penalty scheme violates international law.
>
> > The Constitution does not require that a state eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in

> order to operate as a criminal justice system that includes capital punishment.
>
> (*McCleskey v. Kemp* (1987) 481 U.S. 279, 319.) A defendant does not have to look to international law for protection against racial discrimination because both under the state and federal Constitutions, racial discrimination by the state is prohibited. (*People v. Hillhouse*, *supra*, 27 Ca1.4th at p. 511.)

(RB 296.)

But the correlation of statistical data with racial discrimination, which was accepted by *McCleskey* as an inevitable byproduct of discretions, can make a difference in international law. The covenants against racism to which the United States subscribes do not tolerate acceptance of racial discrimination, even when cloaked in the name of "discretion," or when racism is an acceptable motive if combined with more legitimate bases for decision making. (AOB 498–503.)

This Court's fullest discussion of this question appears to have been in *People v. Jenkins* (2000) 22 Cal.4th 900, where it wrote,

> Although he contends that international law on the issue of racial discrimination would differ from our equal protection and Eighth Amendment jurisprudence, in that international law would permit the use of the kind of statistical evidence rejected by the United States Supreme Court in *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262] to demonstrate that the death penalty is imposed in a racially discriminatory manner, he provides no authority in support of this proposition.

(*Jenkins*, 22 Cal.4th at p. 1055.)

Article 1 of the International Convention on the Elimination of Forms of Racial Discrimination defines "racial discrimination" as:

> [a]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

(General Recommendation No. 14: Definition of discrimination (Art. 1, par.1) 03/22/1993, emphasis added.)

The United States responded to this definition with a question about the terms "descent" and "ethnic origin"[34] but did not otherwise object to or qualify this definition. The European court of Human rights, the Court overseeing implementation of the U.N. Treaties, recognizes the use of

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[34] "Although the definition included in Article 1(1) contains two specific terms ('descent' and 'ethnic origin') not typically used in federal civil rights legislation and practice, there is no indication in the negotiating history of the Convention or in the Committee's subsequent interpretation that those terms encompass characteristics which are not already subsumed in the terms 'race,' 'color,' and 'national origin' as these terms are used in existing U.S. law. See, e.g., *Saint Frances College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Roach v. Dresser Industrial Valve*, 494 F. Supp. 215 (W.D. La. 1980). The United States thus interprets its undertakings, and intends to carry out its obligations, under the Convention on that basis."
(*The Convention on the Elimination of All Forms of Racial Discrimination: Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, September 2000* (U.S. State Department <http://www.state.gov/www/global/human_rights/cerd_report/cerd_part2b.html> [as of June 10, 2015].)

statistics to show racial discrimination. See *D.H. and Others v. The Czech Republic* App. No. 57325/00 (ECtHR 13 Nov. 2007) (en banc), a case concerning discrimination against the Roma population by the Czech Republic. In the course of hiding discrimination, the court recognized the propriety of using statistics:

> [T]he aim of Council Directives 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to prohibit in their respective spheres all direct or indirect discrimination based on race, ethnic origin, religion or belief, disability, age or sexual orientation. The preambles to these Directives state as follows: "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence" and "*The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.*"

(*D.H. and Others*, at p. 31.)

The court cited the Race Convention, and specifically Article 1, as authority. (*D.H. and Others*, at p. 35.) Another authority it cited was a U.S. Supreme Court case, *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, which held that the relevant legislation aimed at discrimination in

employment "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (*D.H. and Others*, *supra*, at p. 43.)

In sum, *McCleskey* states that racism violates the constitution only if it is the *purpose* of a challenged act or omission, but specifically forbids the establishment of racism by showing the *effects* of a challenged practice or system independent of anyone's express intentions. (AOB 489–505.) In so holding, it violated the International Convention Against All Forms of Racial Discrimination to which the United States has specifically subscribed.

XXIV. THIS COURT SHOULD DEFER ANY FINDINGS ON THE VIENNA CONVENTION CLAIM UNTIL APPELLANT HAS BEEN AFFORDED AN OPPORTUNITY TO INVESTIGATE AND PRESENT THE CLAIM ON HABEAS CORPUS.

Respondent argues that there is a sufficient record on appeal for this Court to address and reject appellant's claim under Article 36 of the Vienna Convention on Consular Relations. (RB 296–304.) It cites to the December 2000 hearing in which appellant sought to suppress his confession and cited the VCCR as authority, along with the federal and state constitutions. (See Supplemental Motion to Suppress, 12 CT 3324–3334, Opposition to Motion, 12 CT 3363–3393.) It also cites to the letter from the Mexican Consulate filed as part of appellant's motion for a new trial filed after he was sentenced to death. (19 CT 5442–5453.)

Respondent does not dispute that counsel for appellant did not become aware of the possibilities of consular assistance until December of 2000, two years and five months after appellant's arrest. It also does not discuss this Court's prior decisions on Vienna Convention claims, which treat the issue as a matter that is properly addressed in state post-conviction proceedings. (*People v. Mendoza* (2007) 42 Cal.4th 686, 711 [where Article 36 violation was introduced at formal sentencing and raised on appeal, claim is instead "appropriately raised" in a habeas petition]; *In re Martinez* (2009) 46 Cal.4th 945, 957.)

It is clear that the question of prejudice arising from a VCCR violation depends on "facts outside of the record. . . ." (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 711.) Post-conviction habeas corpus review is the necessary venue for the resolution of appellant's argument that he was prejudiced by the article 36 violation. The fact that he cited the VCCR as authority for his challenge of appellant's confession, and had the Mexican Consulate send a letter for the trial court to consider after he was sentenced to death does not somehow override these precedents, or the logic underlying them.

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

A. This Court Has Misunderstood and Misapplied Two U.S. Supreme Court Cases in Ruling That the California Death Penalty Scheme Sufficiently Narrows the Pool of Murderers Eligible for a Death Sentence.

Appellant argued that California's death penalty scheme is a "wanton and freakish" system that randomly chooses among thousands of murderers a few victims of the ultimate sanction. (AOB 516–543.) He presented his arguments in an abbreviated fashion, seeking to alert the court to his claims and their federal bases, with one exception—the issue of whether this scheme meaningfully narrows the pool of persons eligible for death. (AOB 519–526.)

Respondent lumped together all of appellant's separate claims, and said for each one that appellant has presented to compelling reasons for this Court to reconsider its past decisions. Appellant will rest on the contentions made in his opening brief, with the exception of his failure-to-narrow argument.

1. *Pulley v. Harris* Approved the 1977 Statute on its Face, and Not the 1978 Statute in Effect When Appellant Was Sentenced to Death, Which "Greatly Expanded" the Number Of Persons Eligible for Death.

This Court's belief that the United States Supreme Court resolved the constitutionality of the 1978 death penalty statute in *Pulley v. Harris* (1984) 465 U.S. 37, represents a fundamental misunderstanding of that decision. In *Harris*, the issue before the Supreme Court was "whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." (*Harris*, 465 U.S. at pp. 43–44.) The issue in *Harris* was plainly different from the question of whether the 1978 version of the statute sufficiently narrows the pool of death-eligible murderers.

It is true that *Harris* contains the statement that the California statute, "[b]y requiring the jury to find at least one special circumstance beyond a reasonable doubt, . . . limits the death sentence to a small sub-class of capital murders." (465 U.S. at p. 53.) *Harris*, however, involved California's *1977* death penalty statute (see *Harris*, 465 U.S. at pp. 38–39, fn. 1), while the whole point of the Briggs initiative in 1978 was to substantially expand the reach of that statute to include "All murderers."

(AOB 520–521.) Appellant challenged the 1978 statute, which the *Harris* case did not consider at all.

Furthermore, *Harris* concluded only that the 1977 California statute was constitutional "[o]n its face." (See 465 U.S. at p. 53.) The high court in *Harris* explicitly distinguished the two laws, noting that the special circumstances in the 1978 California death penalty law are "*greatly expanded*" from those in the limited in 1977 law. (465 U.S. at p. 53 fn. 13, emphasis added.) *Harris* did not in any way address, let alone resolve, the issue of whether or not the 1978 statute fails to meet the Eighth Amendment's requirement that a death penalty scheme meaningfully narrow those eligible for a death sentence.

2. *Tuilaepa v. California* Dealt with Section 190.3, and Had Nothing at All to Say about Section 190.2, and Whether or Not California's Statute Sufficiently Narrows the Pool of Persons Eligible for Death.

This Court has also erroneously relied upon *Tuilaepa v. California* [(1994) 512 U.S. 967] in rejecting narrowing claims. In *People v. Sanchez* (1995) 12 Cal.4th 1, 60, this Court rejected the claim that "the 1978 death penalty law is unconstitutional . . . because it fails to narrow the class of death-eligible murderers and thus renders 'the overwhelming majority of intentional first degree murderers' death eligible," in reliance on a

misunderstanding that the United States Supreme Court in *Tuilaepa* resolved this claim:

> [I]n *Tuilaepa v. California*, *supra*, and in a number of previous cases, the high court has recognized that 'the proper degree of definition' of death-eligibility factors 'is not susceptible of mathematical precision'; *the court has confirmed* that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, *it suitably narrows the class of death-eligible persons*, and provides for an individualized penalty determination.

(*Sanchez*, 12 Cal.4th at pp. 60–61, emphasis added. See also *People v. Arias* (1996) 13 Cal.4th 92, 187 [rejecting narrowing claim by stating "[i]dentical claims have previously been rejected with respect to the death penalty scheme applicable in this case and to its closely related predecessor, the 1977 law" and citing to *Tuilaepa*]; see also *People v. Beames* (2007) 40 Cal.4th 907, 933–934 [rejecting the defendant's narrowing claim by citing to *Tuilaepa*, 512 U.S. at pp. 971–972, for the proposition that "the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers . . . [thus] there is no merit to defendant's contention . . . that our death penalty law is impermissibly broad."].)

The issue that the United States Supreme Court resolved in *Tuilaepa* was whether the aggravating factors in section 190.3—which in California pertain only to the death selection determination, and not the death eligibility determination—are constitutional. (*Tuilaepa v. California*, *supra*,

512 U.S. at p. 969.) The Supreme Court in *Tuilaepa* explicitly said that it was *not* addressing any issue concerning the eligibility stage of the California scheme in section 190.2. (*Id.* at p. 975.)

Respondent simply referred to previous rejections by this Court of the points made here, and did not deny or discuss these contentions. (RB 305.) Appellant is entitled to a consideration of these points, which strike at the core of this Court's articulated rationale for not finding that the statute fails to meaningfully narrow the population of those eligible for the death penalty. For the reasons set forth in his opening brief, California's death penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Appellant submits that, for the reasons discussed in the AOB and in this Reply Brief, his convictions and his sentence of death must be reversed.

Dated: July 23, 2015

Respectfully submitted,

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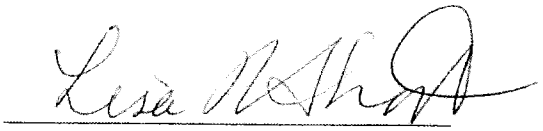
CERTIFICATE OF WORD COUNT

I performed a word count of this Appellant's Opening Brief, and I certify that it contains a total of 44,541 words.

DATED: July 23, 2015

Respectfully submitted,



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DECLARATION OF SERVICE BY MAIL

Re: *People v. Juan Villa Ramirez*, Cal. Supreme Court No. S099844; Kern Co. Super Ct. No. SC076259A

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is PMB 422, 4110 SE Hawthorne Blvd., Portland, Oregon 97214. I served a true copy of the attached

APPELLANT'S OPENING BRIEF

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

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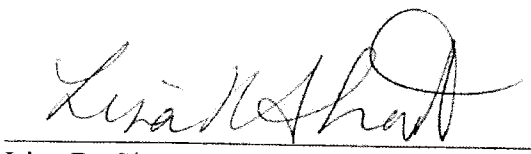
Each said envelope was then, on July 23, 2015, sealed and deposited in United States mail at Portland, Oregon, Multnomah County, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 23, 2015, in Portland, Oregon.



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