IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVE WOODRUFF, Defendant and Appellant.	)	No. S115378 APPELLANT'S REPLY BRIEF **DEATH PENALTY CASE**

Automatic Appeal from the Superior Court of California, County of Riverside
(Case No. RIF095875)

The Honorable Christian Thierbach, Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES iii

II. INTRODUCTION 1

III. ARGUMENT 3

A. Pretrial 3

CLAIM A1: Failure to protect defendant's rights 3
CLAIM A2: No inquiry into competence to stand trial 11
CLAIM A3: Waivers of right to unconflicted counsel 15
CLAIM A4: Denial of impartial jury 21
CLAIM A5: Insisting on right to trial 36

B. Guilt phase 39

CLAIM B1: No limit on uniformed officers in courtroom 39
CLAIM B2: "Indelible picture" of defendant 42
CLAIM B3: Witness improperly referred to arrest record . 45
CLAIM B4: Questioning mother about her convictions ... 48
CLAIM B5: Highly prejudicial testimony 51
CLAIM B6: Mocking defense counsel 56
CLAIM B7: Defense counsel's misrepresentations 60
CLAIM B8: Prosecutor's "golden rule" argument 62
CLAIM B9: Insufficient evidence of lying in wait 64

C. Retardation phase 66

CLAIM C1: Arbitrary format for retardation phase 66
CLAIM C2: Prosecutor appealed to jurors' prejudices 71

D. Penalty phase 74

CLAIM D1: Improper appeal to jurors' biases 74
CLAIM D2: Confrontation Clause violation 77
CLAIM D3: Trial court's fact-finding at sentencing 80

E. Structural 83

CLAIM E: Trial record was falsified 83

F. Constitutional 86

CLAIM F1: Death-penalty statutes are unconstitutional ... 86
CLAIM F2: Cumulative effect of errors requires reversal 91

IV. CONCLUSION 93

V. CERTIFICATE OF COMPLIANCE 94

VI. CERTIFICATE OF SERVICE 95

I. TABLE OF AUTHORITIES

Federal cases

Atkins v. Virginia (2002)
536 U.S. 304 [122 S.Ct. 2242] ..... *passim*
Batson v. Kentucky (1986)
476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] 32-35
Berger v. United States (1935)
295 U.S. 78 [55 S.Ct. 629] 54
Drope v. Missouri (1975)
420 U.S. 162 [95 S.Ct. 896] 9-10
Estelle v. Williams (1976)
425 U.S. 501 [96 S.Ct. 1691, 48 L.Ed.2d 126] 43
Frazier v. United States (1948)
335 U.S. 497 [69 S. Ct. 201, 93 L. Ed. 187] 26
Godinez v. Moran (1993)
509 U.S. 389 [113 S.Ct. 2680] 19
Gray v. Mississippi (1987)
481 U.S. 648 [95 L. Ed. 2d 622, 107 S.Ct. 2045] 23
Indiana v. Edwards (2008)
554 U.S. 164 [128 S.Ct. 2379, 171 L.Ed.2d 345] 19-20
Miller-El v. Dretke (2005)
545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] 35
Morgan v. Illinois (1992)
504 U.S. 719 [112 S.Ct. 2222] 31
Neder v. United States (1999)
527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed. 2d 35] 26-27, 33-34
Patton v. Yount (1984)
467 U. S. 1025 [104 S.Ct. 2885] 26
Strickland v. Washington (1984)
466 U.S. 668 [104 S.Ct. 2052] 27, 51, 60
Trop v. Dulles (1958)
356 U.S. 86 [78 S.Ct. 590] 89
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624 F.2d 196 52
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299 U.S. 123 [57 S.Ct. 177] 26
Woodson v. North Carolina (1976)
428 U.S. 280 [96 S.Ct. 2978] 70

California state cases

Keenan v. Superior Court (1982)
31 Cal.3d 424 [180 Cal.Rptr. 489, 640 P.2d 108] 8
People v. Anderson (1972)
6 Cal.3d 628 [100 Cal.Rptr. 152, 493 P.2d 880] 86-90
People v. Avila (2006)
38 Cal.4th 491 [43 Cal.Rptr.3d 1] 23
People v. Bradford (1997)
15 Cal.4th 1229 [65 Cal.Rptr.2d 145, 939 P.2d 259] 42
People v. Cummings (1993)
4 Cal.4th 1233 [18 Cal.Rptr.2d 796, 850 P.2d 1] 40
People v. Cunningham (2001)
25 Cal.4th 926 [108 Cal.Rptr.2d 291, 25 P.3d 519] 42
People v. Doolin (2009)
45 Cal.4th 390 [87 Cal.Rptr.3d 209, 198 P.3d 11] 8
People v. Fuiava (2012)
53 Cal.4th 622 [137 Cal.Rptr.3d 147, 269 P.3d 568] 72
People v. Hill (1992)
3 Cal.4th 959 [13 Cal.Rptr.2d 475, 839 P.2d 984] 81
People v. Jackson (2009)
45 Cal.4th 662 [88 Cal.Rptr.3d 558, 199 P.3d 1098] 66-68
People v. Jennings (1988)
46 Cal.3d 963 [251 Cal.Rptr. 278; 760 P.2d 475] 81
People v. Johnson (2012)
53 Cal.4th 519 [136 Cal.Rptr.3d 54] 19-20
People v. Johnson (2006)
38 Cal.4th 1096 [645 Cal.Rptr.3d 1] 33
People v. Lewis (1990)
50 Cal.3d 262 [266 Cal.Rptr. 834, 786 P.2d 892] 82
People v. Livingston (2012)
53 Cal.4th 1145 [140 Cal.Rptr.3d 139] 64
People v. Pearson (2012)
53 Cal.4th 306 [135 Cal.Rptr.3d 262] 22-23
People v. Ramos (1997)
15 Cal.4th 1133 [64 Cal.Rptr.2d 892; 938 P.2d 950] 81
People v. Riccardi (2012)
54 Cal.4th 758 [144 Cal.Rptr.3d 84] 23, 33-34
People v. Rodrigues (1994)
8 Cal.4th 1060 [36 Cal.Rptr.2d 235, 885 P.2d 1] 23
People v. Sims (1993)
5 Cal.4th 405 [20 Cal.Rptr.2d 537, 853 P.2d 992] 64

People v. Stevens (2007)
41 Cal.4th 182 [59 Cal.Rptr.3d 196] 64
People v. Superior Court (Vidal) (2007)
40 Cal.4th 999 [56 Cal.Rptr.3d 851, 155 P.3d 259] 14, 19, 69
People v. Taylor (1982)
31 Cal.3d 488 [183 Cal.Rptr. 64, 645 P.2d 115] 43
People v. Thomas (2012)
53 Cal.4th 771 [137 Cal.Rptr.3d 533] 36
People v. Wharton (1991)
53 Cal.3d 522 [280 Cal.Rptr. 631, 809 P.2d 290] 45
People v. Young (2005)
34 Cal.4th 1149 [24 Cal.Rptr.3d 112, 105 P.3d 487] 58
Price v. Superior Court (2001)
25 Cal.4th 1046 [108 Cal.Rptr.2d 409] 81

California Statutes

Penal Code
section 190.2 ..... 64, 86
section 190.3 86
section 190.4 81
section 1270.5 13
section 1367 ..... 1, 9
section 1376 ..... 2, 66-70

California Jury Instructions

CALJIC 2.21.2 84

California Constitution

Article 1
section 7 93
section 12 13
section 15 93
section 16 93
section 17 93
section 24 93
section 29 93

United States Constitution

Amendments

Six ..... *passim*
Eight 90, 93
Fourteen 90, 93

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I. INTRODUCTION

In the opening brief for appellant Steve Woodruff, appellate counsel documented a chain of errors that began during pretrial and continued through guilt, retardation and penalty phases, repeatedly violating Mr. Woodruff's constitutional rights to a fair trial.

In respondent's brief, a chain of false logic characterized Mr. Woodruff's trial in one of the following three ways: Error-free; or, if not error-free, then all errors were harmless; or, if not harmless, any prejudicial errors that occurred were waived or forfeited when defense counsel failed to preserve them at trial. Despite this and other defense failures, respondent argued for the effectiveness of trial counsel.

In this reply brief, appellate counsel again uses facts and appropriate case citations to document the following chain of errors:

- Before trial, trial judge Christian Thierbach neglected to conduct an adequate inquiry into Mr. Woodruff's ability "to understand the nature of the criminal proceedings," as required by Penal Code section 1367. Mr. Woodruff's IQ score was measured as below the threshold for mental retardation by the defense psychologist, slightly above by the prosecution psychologist.

- During the guilt phase, the trial judge repeatedly failed to take corrective action required by the incompetence of defense counsel Mark Blankenship and misconduct by prosecutor Michael Soccio.

- During the retardation phase, the trial judge manufactured an arbitrary process during a period of judicial limbo between the United States Supreme Court's *Atkins v. Virginia*[1] decision on June 19, 2002, and the enactment more than a year later of Penal Code section 1376. Mr. Woodruff is the only California death-row inmate whose mental retardation phase occurred during this period.

- During the penalty phase, the trial judge improperly allowed additional fact-finding and permitted prosecutorial misconduct that appealed to juror bias.

This reply brief demonstrates how respondent's argument contradicts itself and parses what was said at trial to reach erroneous conclusions.

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[1] (2002) 536 U.S. 304 [122 S.Ct. 2242]

II. ARGUMENT

A. Pretrial

CLAIM A1: Failure to protect defendant's rights

In Claim A1, appellant says the trial judge denied Mr. Woodruff his rights to a fair trial, effective assistance of counsel, heightened reliability of death-penalty proceedings, and due process of law by (a) failing to intervene to protect Mr. Woodruff's rights when it became clear that defense counsel was "in over your head"; (b) misleading defense counsel concerning the threshold for obtaining co-counsel; and (c) inadequately inquiring into Mr. Woodruff's understanding of his rights.

Respondent says the trial judge understood his authority to remove counsel, adequately inquired into Mr. Woodruff's choice of counsel, took valid waivers of his right to effective assistance, properly set standards for second counsel, and concluded that defense counsel was not ineffective. (Respondent's brief[2], p. 31.)

Subclaim (a)

Contrary to respondent's assertion that the trial judge understood his authority to remove counsel, the trial judge repeatedly expressed a belief that he did not have the power to remove Mr. Woodruff's counsel. Early in the case, at a hearing on the prosecutor's "Request for Inquiry and Waiver Regarding Attorney's Qualifications," the trial judge told defense counsel,

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[2] Future citations to respondent's brief will use the abbreviation "RB."

"The law does not give me the authority to inquire into your qualifications, and I'm not gonna do so." (RT[3] A:36.) Later, at the same hearing, Mr. Woodruff asked the trial judge if "you's tellin' me that you have the power to say that this man might not be competent to represent me." (RT A:63.) The judge replied: "No, I don't have that power. Understand that. I am not going to relieve him." (*Ibid.*) At a subsequent hearing concerning defense counsel's qualifications, when it had become clear that defense counsel was far from prepared for a trial that was about to begin, the trial judge said case law instructed him that "I cannot remove counsel of a defendant's choice. And that's fine. And I don't intend to do so." (RT 1:441.)

The trial judge was saying he was powerless to remove an incompetent retained attorney against the wishes of the defendant. What he was not saying was that he considered Mr. Woodruff's counsel to be an effective advocate. In fact, the trial judge repeatedly indicated the opposite, both before and during the trial. At the pretrial hearing in which the trial judge inquired into defense counsel's qualifications, the judge said he was doing so "to protect both of you. ... I think you're well aware of the fact if a criminal conviction of any kind is overturned because of ineffectiveness of counsel, that attorney is going to lose his license to practice law in this state." (RT A:77.)

Five months later, when it became clear that defense counsel was not

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[3] "RT" citations are to Reporter's Transcript on Appeal.

prepared for trial, the trial judge told him: "I certainly don't want to [give a death sentence] to someone who went into trial inadequately prepared. I admire your zealousness and your desire to defend this man, and this is nothing personal against you, but I think you're in over your head here." (RT 1:419.)

During the guilt phase of trial, the trial judge asked Mr. Woodruff if he wanted to continue with defense counsel, implicitly offering a mistrial, after the judge concluded that "your case was prejudiced extremely" by defense counsel's cross-examination of the prosecution's investigator, in which defense counsel invited the witness to offer his opinion as to Mr. Woodruff's guilt and the basis for that opinion. (RT 16:3611.)

In support of the assertion that defense counsel was effective, respondent says, "The record indicates that [defense counsel] had already 'assembled a fairly elaborate team of investigators and assistants, as well as several lawyers, that are now working actively on behalf of Mr. Woodruff.'" (RB, p. 46.) However, the record indicates no such thing. The language quoted in respondent's brief is defense counsel's assertion to a skeptical trial court at a trial readiness conference in which defense counsel sought an additional 60 to 90 days to prepare for trial. (RT A:73.) Defense counsel declined to identify the members of the "fairly elaborate" team, and when the trial judge asked why, defense counsel replied, "Your Honor, I refuse to be on inquisition constantly on these events. ... I don't have any

obligation to share with you who those lawyers are, and I don't know why I have to be put on the spot." (RT A:74.)

The overall trial record shows that no such "fairly elaborate" team existed. The only other attorney to appear in court during Mr. Woodruff's trial was Ellen Winterbottom, a civil lawyer who sat at counsel table during the first phase of jury selection in March 2002 and questioned some of the prospective jurors about time-qualification concerns, but never appeared in court thereafter. (See RT 1:114, 141, 197, 392, 395, 408, 409, 432.)

The trial record demonstrates that defense counsel conducted virtually no investigation into retardation-phase and penalty-phase issues. Only one witness testified for the defense at the retardation phase, a clinical psychologist who had also testified in the guilt phase. The defense case at the penalty phase consisted of four witnesses: the same clinical psychologist who testified in the other phases, a radiologist who had testified at the guilt phase, and a brother and sister-in-law of the defendant.

Defense counsel's in-court exchanges with the trial judge make clear that counsel was operating virtually alone and often uncertain how to proceed. The trial judge's earlier observation that "you're in over your head" proved to be pathetically accurate.

Respondent says in a footnote that appellant's request of this Court to take judicial notice of the State Bar discipline records of Mr. Woodruff's trial attorney should have been directed instead to the trial court. (RB, p.

32, fn 14.) During record correction proceedings, appellate counsel requested that the trial court expand the record to include trial counsel's State Bar discipline record, including his suspension from practice for incompetence in 2000 and his resignation with charges pending in 2006. Respondent's representative[4] opposed the request and the trial judge denied appellant's request to expand the record, saying he didn't think the bar record was relevant to the appeal.[5] (SRT[6] 55-56.)

Nonetheless, trial counsel Mark Blankenship's disciplinary history was discussed on the record at trial. Blankenship was on five years probation following a six-month suspension from practice for incompetence at the time he solicited Mr. Woodruff's case. Blankenship subsequently resigned from the State Bar with charges pending for unethical conduct in other cases contemporaneous to his representation of Mr. Woodruff. (*Attorney Search, Mark Irvin Blankenship -- #130506*, State Bar of California, http://members.calbar.ca.gov/fal/Member/Detail/130506 [as of Jan. 30, 2013].)

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[4] Respondent was represented in record correction by Riverside County Deputy District Attorney Ivy Fitzpatrick.

[5] In the same hearing, the trial judge said he had "received information that [defense counsel had] been suspended. I inquired whether his license had been reinstated. And then I ultimately went on the State Bar website and confirmed it had been." (SRT 56.)

[6] "SRT" citations are to the Supplemental Reporter's Transcript on Appeal of the record-correction hearing March 12, 2009.

Subclaim (b)

Contrary to what respondent says about subclaim (b), the trial judge did not properly set standards for second counsel. In fact, the trial judge discouraged defense counsel from seeking so-called "*Keenan*[7] counsel," saying such counsel was "limited to some rather narrowly defined situations" (RT A:7), when the intent of this Court in granting trial counsel the option of seeking further assistance in death-penalty cases was "to provide a capital defendant with a full and complete defense." (*People v. Doolin* (2009) 45 Cal.4th 390, 432 [87 Cal.Rptr.3d 209, 198 P.3d 11].)

Additionally, respondent asserts that "defense counsel rendered effective assistance of counsel in deciding not to request appointment of second counsel." (RB, p. 44.) However, to have any hope of providing effective assistance to Mr. Woodruff, defense counsel had to have help from an experienced death-penalty attorney, as he had no such experience himself. He was, as the trial judge cautioned him, "in over your head." (RT 1:419.)

The trial judge erred in discouraging defense counsel from requesting *Keenan* counsel. Defense counsel was prejudicially ineffective in failing to seek help and instead trying the case by himself, ignorant of the procedures and requirements of a death-penalty case.

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[7] *Keenan v. Superior Court* (1982) 31 Cal.3d 424 [180 Cal.Rptr. 489, 640 P.2d 108]

Subclaim (c)

Contrary to what respondent says about subclaim (c), the trial judge did not adequately inquire into Mr. Woodruff's understanding of his rights. Respondent argues that "both Woodruff's participation in the dialogue with the court and [defense counsel's] express respresentations [*sic*] pointed to Woodruff's competence." (RB, p. 43.) Such an argument is as unresponsive to the question presented as Mr. Woodruff's answers to the questions the trial judge addressed to him.

The question in subclaim (c) is whether the trial judge adequately inquired into Mr. Woodruff's competence, once the trial judge was presented with reasonable suspicions that Mr. Woodruff was "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner," the standard under Penal Code section 1367(a). Despite Mr. Woodruff's many statements in pretrial proceedings that he did not understand what the judge was saying, the trial judge never inquired into Mr. Woodruff's ability to understand. (RT A:57, 61-62, 64.) As the trial prosecutor observed, "Mr. Woodruff repeatedly said he doesn't understand what's going on here, which is going to read poorly in the record." (RT A:64.)

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but ... even one

of these factors standing alone may, in some circumstances, be sufficient." (*Drope v. Missouri* (1975) 420 U.S. 162, 180 [95 S.Ct. 896].) Evidence of Mr. Woodruff's demeanor at trial -- his repeated insistence that he didn't understand -- was enough for the prosecutor to note his concerns on the record. Nonetheless, the trial judge did not inquire into Mr. Woodruff's understanding of his rights.

The judge's error denied Mr. Woodruff his state and federal rights to due process. Mr. Woodruff's convictions and death sentence should be reversed.

CLAIM A2: No inquiry into competence to stand trial

In Claim A2, appellant says the trial judge's failure to declare a doubt about Mr. Woodruff's competence to stand trial and failure to conduct a hearing, despite substantial evidence, denied Mr. Woodruff his rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

Respondent argues that "there was insubstantial evidence" of Mr. Woodruff's incompetence, so the trial court "acted within its discretion" in not conducting a hearing. (RB, p. 47.)

Respondent points to the fact that "defense counsel at no time expressed any doubts about Woodruff's understanding of the proceedings or his ability to assist in his defense. [Citations omitted.] In fact, when the trial court asked defense counsel if they [*sic*] were going to pursue and [*sic*] insanity defense, defense counsel emphatically replied, 'I'm absolutely confident that Mr. Woodruff is 100 percent competent.'" (RB, p. 48.)

The context of defense counsel's emphatic pronouncement is important, though respondent leaves it out. Counsel's exchange with the trial judge occurred at a hearing that explored defense counsel's lack of qualifications to try a death-penalty case. The trial judge asked a number of questions about motions and defenses that counsel might be considering. Counsel's answer, quoted above, was non-responsive to the question about an insanity defense, so the judge tried to rephrase the question. Defense

counsel responded: "I haven't evaluated that issue, and I don't intend to." (RT A:44.) The trial judge then asked if defense counsel had consulted "mental health professionals," but counsel didn't answer directly. "[M]y response to that request is that it's visceral and that it's specious." (RT A:45.)

The honest answer to the judge's question would have been that defense counsel had not consulted any mental health professionals, even though he had already represented Mr. Woodruff for almost eight months. In fact, defense counsel did not contact a psychologist to examine Mr. Woodruff until another six months later, four days before the scheduled start of trial. Jury selection began[8] before the psychologist had examined Mr. Woodruff. (RT 1:389.)

Hence, respondent's evidence that Mr. Woodruff was competent to stand trial is that a defense counsel said so – a defense counsel who had not retained a mental health expert, who generally believed the insanity defense to be "specious," and who had been found *incompetent* to practice law the year before he solicited Mr. Woodruff to be his client. (RT A:33, 65; CT 2:351-356.)

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[8] Time-qualifying of jurors began March 18, 2002. Some 183 potential jurors were time-qualified over two days. (RT 1:374.) The judge dismissed the potential jurors and postponed the trial when he realized that defense counsel was not prepared for trial.

The evidence that should have raised doubts about Mr. Woodruff's competence to stand trial was substantial. Less than two months after Mr. Woodruff's arrest, defense counsel told the trial court that the defendant wanted him to request bail, although, counsel said, "I realize this is a no-bail case." (RT A:6.) Either defense counsel did not properly explain the constitutional and statutory restrictions on bail in a capital case (see Cal. Const. Art. I, § 12; Pen. Code § 1270.5), or, more likely, Mr. Woodruff was incapable of understanding the concept. Either way, Mr. Woodruff's request should have raised a doubt in the trial judge's mind about Mr. Woodruff's competence to understand his circumstances.

Mr. Woodruff repeatedly said he didn't understand what was going on in the courtroom. At the hearing in which defense counsel's lack of qualifications to try a death-penalty case were explored, Mr. Woodruff told the trial judge: "I don't understand nothin' you sayin', Judge." (RT A:57.) At the same hearing, Mr. Woodruff demonstrated magical thinking in telling the trial judge "there is a higher up that sent Mr. Blankenship to me, and he must be the one to represent me, you know, because there's someone over you and that you work for. So, I really don't understand what is really going on here, anyway, you know." (RT A:61-62.)

Respondent also points to Mr. Woodruff's IQ score of 78 on the prosecution's retest of the Wechsler Adult Intelligence Scale (WAIS-III) as demonstrating that the evidence of his incompetence was insubstantial.

However, Mr. Woodruff scored 66 when the defense psychologist gave the same test five months earlier. His familiarity with the test could account for the higher score on the retest, which is disfavored by the test's publisher. Also, this Court has said a defendant can be mentally retarded even with an IQ score of 78. (*People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1006, fn. 4 [56 Cal.Rptr.3d 85, 55 P3d 259].)

However, long before the competing psychologists diagnosed Mr. Woodruff as either mentally retarded with verbal cognition impairment (defense) or borderline mental functioning with a learning disability in reading (prosecution), the obvious signs should have raised a doubt about Mr. Woodruff's mental functioning. The trial judge should have asked more questions.

The result of the trial judge's failure to inquire was a trial with an intellectually incompetent client defended by a professionally incompetent attorney. Consequently, the trial was constitutionally inadequate. Mr. Woodruff was denied his rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

CLAIM A3: Waivers of right to unconflicted counsel

In Claim A3, appellant says the trial judge elicited from Mr. Woodruff three pretrial waivers of the right to unconflicted counsel without establishing that Mr. Woodruff understood what rights he was giving up or why.

Respondent says the trial judge conducted adequate inquiry into defense counsel's conflicts of interest and obtained "knowing and intelligent waivers on multiple occasions from Mr. Woodruff." (RB, p. 51.) Respondent also says that because the conflicts involved prior representation, "there were no competing loyalties." (*Ibid.*)

Defense counsel's conflicts all involved activities that occurred while he also represented Mr. Woodruff. He represented Mr. Woodruff's mother on misdemeanor charges arising out of the same incident. He purported to represent Mr. Woodruff's brother Claude Carr, and sought to consolidate all three trials. While charges were pending against Mr. Woodruff, defense counsel represented penalty-phase witness Dennis Smith on unrelated charges. The judge in Mr. Woodruff's trial ordered defense counsel not to attempt to impeach Smith with any information he learned in the course of representing Smith. Additionally, defense counsel purported to represent Mr. Woodruff's daughter during voir dire of her testimony in the middle of Mr. Woodruff's trial. To avoid having her testify at Mr. Woodruff's trial, defense counsel appeared to be willing to stipulate to the

admission of a tape recording of her police interview, which the trial judge would not allow, saying, "I guarantee if you enter into a stipulation like that, which I'm not gonna accept if you do -- that will be Issue No. 1 before the Supreme Court, if it ever gets that far." (RT 4:1234.)

The trial judge sought three waivers from Mr. Woodruff of his counsel's conflicts – one waiver involving defense counsel's representation of Mr. Woodruff's mother on charges growing out of the same incident, and two waivers involving defense counsel's representation of penalty-phase witness Smith on unrelated charges.

That Mr. Woodruff did not understand the concept of "waive" became clear as soon as the trial judge mentioned the term. When the judge told Mr. Woodruff at a pretrial hearing on May 7, 2002, that he wanted to know "whether you are willing to waive any potential conflict of interest that may exist" based on defense counsel's representation of his mother, the judge asked if Mr. Woodruff understood. Mr. Woodruff said he did not. (RT B:483.) The judge then rephrased the questions, defining "waive" as "give up," but not defining "conflict of interest" at all. The judge elicited two "yes" answers and one answer of "I'm satisfied with Blankenship," but nothing to indicate that Mr. Woodruff understood the right he was giving up. (RT B:484.)

The first of the waivers involving defense counsel's representation of Smith, the penalty-phase witness, occurred at the same hearing as the

waiver involving Mr. Woodruff's mother. The judge asked: "There may have been some issues that arose that may conflict with your best interest, and so all I need to simply ask you again as with respect to your mother: Do you waive, or give up, any right to contest an issue related to a conflict of interest based upon Mr. Blankenship's prior representation of Mr. Smith?" (RT B:486.) Mr. Woodruff's answer was nonresponsive to the question: "I am satisfied." (*Id.*) However, notwithstanding the likelihood that Mr. Woodruff's answer indicated that he still did not understand what the trial judge was talking about, the judge did not probe any deeper. He merely said: "I will take that as a 'yes.'"

Respondent says "the record in this case shows that Woodruff knowingly and intelligently waived his right to conflict-free counsel several times," that the trial court "ensured that Woodruff understood his rights" (RB, p. 57), and that the trial judge "explained in detail" defense counsel's conflict with respect to Smith. (RB, p. 58.) Furthermore, respondent asserts that Mr. Woodruff "had the mental capacity to make a knowing and intelligent waiver." (*Id.*)

Respondent's evidence for Mr. Woodruff's intelligence was a pretrial assertion by defense counsel, "I'm absolutely confident that Mr. Woodruff is 100 percent competent," even though at the time of that assertion Mr. Woodruff had not been examined by any mental health professional and no penalty-phase investigation had been done. (RT A:44.)

The totality of the exchange between the trial judge and Mr. Woodruff regarding the waiver of conflicted counsel began with Mr. Woodruff shaking his head no, that he did not understand what the judge was saying, followed by nonresponsive answers to the judge's direct solicitations of waivers of his right to unconflicted counsel, and a series of "yes" answers to leading questions. (RT B:483-486.) The trial judge never even attempted to explain the concept of conflict of interest, a concept that may have seemed simple to the trial judge, but was likely over the head of a defendant with an IQ in the range of mildly mentally retarded to well below normal.

In support of respondent's conclusory proposition that Mr. Woodruff's three waivers were knowing, intelligent and voluntary, respondent says "the trial court explained in depth what the dangers and possible consequences of the conflicts regarding [defense counsel's] prior representations of [two prosecution witnesses] were." (RB, p. 57.)

What the record actually shows is that Mr. Woodruff answered "yes" to a series of questions he did not understand. All he knew was that "no" answers would mean he would lose his attorney, the man he thought was helping him when everyone else was trying to harm him. That the trial court explained the concept of conflict of interest in legal language is not evidence that Mr. Woodruff comprehended the explanation.

Although respondent paraphrases the prosecution psychologist's testimony as being that Mr. Woodruff's "reasoning ability was very high" (RB, p. 59), this is not what the psychologist said. According to the psychologist's testimony, Mr. Woodruff's "abstract reasoning was much too high" to qualify as mentally retarded (RT 23:4903), even though the psychologist's own testing measured Mr. Woodruff's IQ as 78, which this Court has said is consistent with mental retardation for purposes of disqualification from the death penalty under *Atkins v. Virginia*, *supra*, 536 U.S. 304. (*People v. Superior Court (Vidal)*, *supra*, 40 Cal.4th at pp. 1006-1007.)

Additionally, respondent cites two United States Supreme Court cases for the proposition that if Mr. Woodruff was competent to stand trial, he was also competent to waive counsel entirely and thus competent to waive a conflict. (RB, p. 59.) However, the cited cases, *Indiana v. Edwards* (2008) 554 U.S. 164, and *Godinez v. Moran* (1993) 509 U.S. 389, do not stand for the stated principle. In fact, *Edwards* suggests the opposite – that someone can be competent to stand trial but *not* competent to represent himself, "given the different capacities needed to proceed to trial without counsel." (*Edwards*, at p. 177.)

Respondent does not cite to this Court's decision in *People v. Johnson* (2012) 53 Cal.4th 519 [136 Cal.Rptr.3d 54], in which this Court said trial courts have the discretion to deny self-representation under *Edwards* when

"the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Id.*, at p. 530.) Clearly, Mr. Woodruff lacked the capacity to conduct his own defense and lacked the capacity to understand fully what was going on in his trial. Mr. Woodruff shook his head "no" when the judge asked if he understood what the judge meant by waiving his right to unconflicted counsel. Mr. Woodruff's subsequent waiver was not knowing; he lacked the mental capacity to make an intelligent decision; and consequently the decision was not voluntary.

CLAIM A4: Denial of impartial jury

Claim A4 alleges that Mr. Woodruff was denied an impartial jury by (a) the trial judge's improper exclusion for cause of two qualified jurors based on questionnaire answers; (b) defense counsel's incompetence and the trial judge's abuse of discretion in allowing a biased juror to be seated; and (c) the prosecutor's use of peremptory challenges to exclude black jurors.

Subclaim (a)

In subclaim (a), appellant says the trial court improperly excluded prospective jurors D.K. and W.C. for cause over defense objection based on their answers on a jury questionnaire alone, reasoning that he did not see a theoretical possibility that either juror could vote for the death penalty, in spite of the questionnaire answers by both prospective jurors that they would consider all of the evidence.

Respondent argues the trial court did not err in excusing either juror for cause, saying the "record as a whole ... clearly established that W.C. and D.K. could not fairly discharge the duties of capital jurors." (RB, p. 68.)

In fact, the record as a whole is unclear as to each juror. While both jurors rated themselves "1" on a 1 to 10 scale, meaning strongly against the death penalty, only W.C. answered "yes" to a subsequent question about whether his opposition to the death penalty would "make it difficult for you

to vote for the death penalty in this case." (CT 10:2926; CT 12:3501.) D.K., whose answer indicated it would not be difficult to vote for the death penalty, added that "I would follow the law." (CT 10:2927.) Neither juror said he would (a) "always" or (b) "never" vote for the death penalty, instead choosing (c), "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (CT 10:2928; CT 12:3503.)

Respondent points to this Court's holding in *People v. Avila* (2006) 38 Cal.4th 491 [43 Cal.Rptr.3d 1], that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (RB, p.64, quoting *Avila*, at 531.) But, such a finding cannot be made in this case because prospective juror D.K. specifically said, in his own handwriting, "I would follow the law." (CT 10:2927.)

Recently, this Court said, "To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from 'conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate,' the juror is not disqualified by his or her failure to enthusiastically support capital punishment."

(*People v. Pearson* (2012) 53 Cal.4th 306, 332 [135 Cal.Rptr.3d 262], quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 [36 Cal.Rptr.2d 235, 885 P.2d 1].)

In excusing D.K. without voir dire, in spite of such a clear statement of his willingness to follow the law, the trial judge erred. Such an error, this Court has said, "requires automatic reversal of defendant's sentence of death under existing United States Supreme Court precedent." (*People v. Riccardi* (2012) 54 Cal.4th 758, 778, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667 [107 S.Ct. 2045, 95 L.Ed.2d 622].)

Subclaim (b)

In subclaim (b), appellant says Mr. Woodruff was denied a fair trial because of the presence on the jury of a biased juror, Juror No. 3, who said on voir dire, "I'd be strongly on the side of him being guilty." (RT 3:1007.) The subclaim has three parts: (i) ineffective assistance of counsel because of the trial attorney's insistence that the biased juror be seated, despite the prosecutor's attempt to remove him for cause; (ii) abuse of discretion in the trial judge's denial of the prosecution's challenge for cause; and (iii) structural error in seating a juror who indicated on the questionnaire that he would be an automatic vote for the death penalty.

No evidence supports respondent's conclusion that "Juror No. 3 was not a biased juror." (RB, p. 75.) Respondent parses the language of the jury questionnaire and both counsels' questioning of Juror No. 3 in voir dire to

find words here and there that support the erroneous conclusion of lack of bias. For example, respondent says, "Juror No. 3 admitted it would be possible that he both could and could not be fair and impartial." (RB, p. 69.) The only word in that statement that Juror No. 3 actually uttered, in answer to a defense counsel who was trying to rehabilitate him, was "possible." The exchange began with a question about the juror's mother, a correctional officer:

Q. Now, does that involvement with your mom, does that make it so it's hard for you to be fair in a case involving the death of an officer?
A. I'm thinking how I'd be leaning towards, you know, guilt. You know, if, umm, you know, to tell you the truth, I couldn't really tell you if I could fair and impartial.
Q. You don't know?
A. I don't know.
Q. But it's possible you couldn't be?
A. Yeah.
Q. But it's possible you could be?
A. Possible.
Q. Are you a person that is willing to evaluate options before making conclusions?
A. Right.
Q. And does your duty involve being open-minded and listening to all the evidence?
A. Yeah, that's my duty.
Q. Is that duty something you can't fulfill because of your relationship with your family involving a peace officer?
A. Well, the subject of the case, you know, that's the thing that gets to me, death of a law enforcement officer.

(RT 3:989-990.)

Defense counsel asked no further questions. But the prosecutor followed up, asking, "How would strong feelings about a police officer dying impact your ability to be fair?" Juror No. 3 responded: "It would be difficult to be fair, you know what I'm saying? I'm saying to you that I would try to be fair. ... You know, but I am not sure if I could." (RT 3:1007.) No one asked him any more questions.

Respondent asserts that the trial court's "factual finding that Juror No. 3 could be fair and impartial is binding." (RB, p. 70.) The fundamental problem with that argument is that the trial judge made no such factual finding.

Respondent attributes to the trial judge the determination that "Juror No. 3 provided assurance that he could set aside his biases and be fair and impartial." (RB, p. 71.) However, as the exchanges quoted above demonstrate, Juror No. 3 made no such assurance that he could set aside his biases. Furthermore, the trial judge made no such determination. The trial judge made two statements on the subject. First, he said he was denying the challenge for cause "because I believe his responses, albeit somewhat hesitatingly, indicated that he would do his best to be fair in both the guilt and penalty phases." (RT 3:1023.) Second, the trial judge explained that he had denied the challenge for cause because Juror No. 3's "responses were such as to convince me that he could, or at least would make his best effort to be fair in all phases of the trial." (RT 3:1024.) Thus, the judge's

conclusion was not that the juror had said he *could* be fair, but that the juror said he *would try* to be fair, in spite of the caveat that the judge omitted, Juror No. 3's last words in voir dire: "... but I am not sure if I could." (RT 3:1007.)

More than "would try to be fair" is required. The appropriate question is "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence." (*Patton v. Yount* (1984) 467 U.S. 1025, 1036 [104 S.Ct. 2885].) The answer is that Juror No. 3 did not swear to any such thing.

The Sixth Amendment to the United States Constitution requires that criminal prosecutions be heard "by an impartial jury." "Impartiality is not a technical conception. It is a state of mind." (*United States v. Wood* (1936) 299 U.S. 123, 145 [57 S.Ct. 177].) It is left to the discretion of the trial court, on a case-by-case and juror-by-juror basis, to determine the impartiality of the jurors before it. (*Frazier v. United States* (1948) 335 U.S. 497, 511 [69 S. Ct. 201, 93 L. Ed. 187].)

When Juror No. 3 said on voir dire in Mr. Woodruff's trial that he was "leaning towards, you know, guilt" and "I'd be strongly on the side of him being guilty," the trial judge ignored the juror's actual state of mind and abused his discretion in finding that juror to be sufficiently impartial.

Trial by a jury that includes someone who is not impartial is among the "very limited class of cases" with structural error "subject to automatic

reversal." (*Neder v. United States* (1999) 527 U.S. 1, 8 [119 S. Ct. 1827, 144 L. Ed. 2d 35].)

As to subclaim (b)(i), respondent argues that defense counsel was not ineffective. (RB, p. 75.) "It is clear from the record that defense counsel chose not to challenge Juror No. 3 and objected to the prosecution's challenge of this juror for cause because of reasonable trial strategy." (*Id.*, p. 74.) However, defense counsel's stated strategy in picking the jury was to oppose the exclusion of *any* black juror, regardless of that juror's stated attitudes or biases. (See RT 3:828.) It is not enough for defense counsel to have a strategy. That strategy must be "within the range of professionally reasonable judgments." (*Strickland v. Washington* (1984) 466 U.S. 668, 699 [104 S.Ct. 2052].) Defense counsel's strategy was unreasonable, based on his own racial stereotype that any black juror would be a good juror – just because he was black.

Respondent also suggests that an appellate claim of ineffective assistance in jury selection is unfair second-guessing. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (RB, p. 74, quoting *Strickland, supra*, at p. 689.) To the contrary, questions about the competency of defense counsel's performance were made on the record both by the trial judge and the prosecutor throughout Mr. Woodruff's trial.

The fact that the prosecutor made the challenge for cause based on Juror No. 3's stated pro-prosecution bias speaks volumes. The prosecutor said he did so because "As a prosecutor, I don't have just an obligation to win a trial, I have an obligation to try to make sure it goes fairly." (RT 3:1024.) Clearly, the prosecutor was also motivated by a desire that any conviction would withstand appeal.

The judge also implicitly questioned defense counsel's judgment. Before ruling on the prosecutor's challenge, the judge addressed defense counsel: "If I were in your seat, Mr. Blankenship, I'd be the one who was making the challenge for cause. But I am not in your seat, and you're objecting to it." (RT 3:1023.)

Defense counsel expressed puzzlement at the judge's comments, which he interpreted as the judge opining that Juror No. 3 "is one that I should have asked to be removed for cause based on answers to the questions that were developed through voir dire." (RT 3:1023.) Defense counsel suspected "the trap has been set" by the prosecutor. (*Ibid.*) The prosecutor, denying any trap, said he often stipulated for cause to jurors who appeared to be pro-prosecution. "I assume that Mr. Blankenship did not challenge (JUROR NO.3), in part, because he is African-American, which, again, I think is impermissible to stay on a jury simply because of race. But that's his business." (RT 3:1024.)

Defense counsel's decision to oppose the removal of biased Juror No. 3, as unwise and indefensible as it was, was not strictly "his business." The decision impacted whether Mr. Woodruff would receive a fair trial before an impartial jury, as the Sixth Amendment requires. Mr. Woodruff did not receive a fair trial, in large part because of the ineffectiveness and utter incompetence of defense counsel. Mr. Woodruff's convictions and death sentence should be reversed.

Respondent does not appear to directly address subclaim (b)(ii), that the judge abused his discretion in allowing a biased juror to be seated, other than to argue, "Juror No. 3 was not a biased juror." (RB, p. 75.) The flaws in that argument are addressed above.

As to subclaim (b)(iii), respondent argues that appellant's characterization of Juror No. 3 as an "automatic vote for death" is "not supported by the record." (RB, p. 75.) No one on voir dire addressed Juror No. 3's statement on the jury questionnaire, "If the defendant is guilty of murder he/she should get the death penalty." (CT 6: 1754.) Nevertheless, respondent says a follow-up question on the questionnaire clarified that "he would not always vote for the death penalty, but rather would consider all the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (RB, at p. 75, citing CT 6:1756.) Additionally, respondent says Juror No. 3 said on voir dire that

"he would be willing to evaluate all options before making conclusions and he would be open-minded." (RB, p. 75, citing RT 3:990.)

In fact, Juror No. 3 made no such unambiguous statements of openness to a penalty other than death. Contrary to respondent's assertion, Juror No. 3 did not say on voir dire that he would be "willing to evaluate all options" and "would be open-minded." (RB, p. 75.) The language respondent attributes to Juror No. 3 was actually taken from questions formulated by defense counsel. Counsel asked whether "your duty involve[s] being open-minded and listening to all the evidence" and whether "that duty [is] something you can't fulfill." (RT 3:990.) Juror No. 3 did not directly answer whether he could fulfill that duty. His response was that "the subject of the case, you know, that's the thing that gets to me, death of a law enforcement officer." (*Id.*)

Additionally, the respondent's suggestion that Juror No. 3 said he would "impose the penalty I personally feel is appropriate" ascribes to the juror the language of the questionnaire's authors, to which Juror No. 3 merely marked an "X" in the appropriate box. (CT 6:1756.) However, when asked to describe "your general feeling about the death penalty," Juror No. 3 wrote in his own handwriting: "If the defendant is guilty of murder he/she should get the death penalty." (CT 6:1754.) Hence, his own words suggest a misunderstanding of California law, a misunderstanding that neither counsel nor the trial judge addressed on voir dire. If, as

respondent suggests, Juror No. 3 were to "impose the penalty I personally feel is appropriate," that penalty would be death for murder.

A juror such as Juror No. 3 "who will automatically vote for the death penalty in every case" must be excluded. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222].)

By allowing Juror No. 3 to sit on the jury, the trial judge committed structural error. Mr. Woodruff's convictions and death sentence should be reversed.

Subclaim (c)

Subclaim (c) involves allegations of racial discrimination in the prosecutor's exclusion of two black jurors.

In subclaim (c)(i), appellant says the trial judge erred in denying defense counsel's first motion alleging racial discrimination in jury selection, finding a lack of a prima facie case of systematic exclusion because the judge was confused about the identity of juror S.J. The judge did not even ask the prosecutor to explain his reasons for the peremptory challenge, as required by *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. Instead, the trial judge said juror S.J. had compared jury duty with a root canal and had said he did not want to be in court. (RT 3:1035.) Instead, the "root canal" comparison had been made by a white juror, D.B. (RT 3:932; CT 8:236), who had already been excluded by a defense peremptory challenge. (RT 3:1029.)

Respondent concedes that the judge was mistaken about S.J.'s identity (RB, p. 80, fn. 26), that "no obvious reason appears why the prosecutor would have chosen to strike S.J." (*Id.*, at p. 82), and that "it is not clear whether the trial court applied the proper standard." (*Id.*, at p. 78.) Nonetheless, respondent says the trial court "did not err in finding that Woodruff failed to make out a prima facie showing of an inference of discriminatory purpose," but if the trial court did err, "the matter should be remanded to the trial court and not reversed." (*Id.*, at p. 84.)

Respondent points out that the prosecutor accepted the jury with an African-American juror, Juror No. 3 (see subclaim (b)), and that defense counsel's motion alleging racial bias in the prosecutor's jury selection involved the prosecutor's first peremptory challenges to African-American jurors.[9] (RB, p. 79.) Respondent fails to mention that the prosecutor attempted to exclude the first eight black jurors to appear in the jury box, either by challenge for cause or peremptory challenge, and characterized jury selection in Mr. Woodruff's trial as a "race battle." (RT 3:830.)

If this Court finds that the trial judge erred in failing to find a prima facie case of racial discrimination in the exclusion of juror S.J., respondent suggests that the proper remedy is remand to the trial court for the second and third steps of *Batson* analysis, where the burden is on the prosecution to show non-racial reasons for the juror's dismissal. Indeed, this Court has said remand is the proper remedy, and if the prosecution cannot meet its burden, a new trial should be ordered. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103 [645 Cal.Rptr.3d 1].)

However, the failure to find a prima facie case of racial discrimination was not the trial judge's only error on voir dire. Three other errors were structural, requiring a reversal of Mr. Woodruff's conviction:

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[9] The defense motion involved two prosecution peremptory challenges – to jurors L.T., for whom the judge found appropriate, and accurate, non-racial reasons for exclusion, and S.J., whose exclusion is the subject of this appellate claim.

the trial judge's failure to require voir dire of two jurors who expressed ambivalence about the death penalty (*People v. Riccardi, supra,* 54 Cal.4th at p. 778); the trial judge's failure to exclude Juror No. 3 for cause, in spite of his admitted pro-prosecution bias (*Neder v. United States, supra,* 527 U.S. at p. 8); and the trial judge's failure to exclude Juror No. 3 based on his unchallenged statement in the juror questionnaire that he would be an automatic vote for the death penalty. (CT 6:1754.)

In subclaim (c)(ii), appellant says the trial judge erred in accepting the prosecutor's pretextual reason for excluding black juror M.M.

Respondent argues that the prosecutor "offered a reasonable, race-neutral explanation" and the trial judge's decision that defense counsel had not proved purposeful racial discrimination "is supported by substantial evidence in the record." (RB, pp. 84-85.) Respondent also says "statistics do not show purposeful racial discrimination by the prosecutor," in that "African-Americans were represented by eight point three percent of the selected jury" – meaning one juror, Juror No. 3. Finally, respondent says "comparative juror analysis does not reveal purposeful discrimination," because the similarly educated Juror No. 2, a science researcher, and Juror No. 11, a kindergarten teacher, were not social workers. Both were white.

The appropriate question in *Batson* analysis is not whether the prosecutor offered a race-neutral reason for excusing juror M.M. The appropriate question is whether the reason given was pretextual. "If a

prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

Juror M.M.'s self-ranking on the death penalty (7 out of 10) on the juror questionnaire was the same as Juror No. 1 and Juror No. 5 and higher than Juror No. 7 and Juror No. 12. On voir dire, M.M. said he would be capable of voting for the death penalty after hearing the facts. (RT 4:1108, 1128.) Though he was highly educated, so were Juror No. 2 and Juror No. 11. He worked in social service, but so did Juror No. 11. The real difference was that he was black.

The prosecutor had characterized voir dire as a "race battle" (RT 3:830), and indeed it was. Defense counsel wrongly believed that any black juror would be sympathetic to a black defendant, and so he opposed the removal of any juror with dark skin, even one who readily admitted pro-prosecution bias. For his part, the prosecutor systematically tried to eliminate blacks from the jury.

The result of all of these errors was that black jurors were systematically excluded from the jury, except for one who believed "strongly" in the defendant's guilt before hearing any testimony, a juror

who believed all murderers should be executed. To allow a trial with such a jury is structural error, requiring reversal.

CLAIM A5: Insisting on right to trial

In Claim A5, appellant says the prosecutor committed misconduct in insinuating during jury voir dire that the defendant had asked for a trial; and the trial judge erred in mischaracterizing the prosecutor's conduct and denying a defense objection to the prosecutor's attempt to prejudice the jury.

Respondent argues the prosecutor committed no misconduct and there was no prejudice from what he told the jury. (RB, pp. 89-91.)

Respondent concedes that "the trial court set forth the wrong factual scenario" (RB, p. 90) in rejecting defense counsel's objection while characterizing the prosecutor's question on voir dire of juror D.M. as having been "to the effect, Hey, even if the guy is caught on tape, a presumption of innocence applies." (RT 4:1094.)

Respondent cites to a footnote in this Court's opinion in *People v. Thomas* (2012) 53 Cal.4th 771, 791 fn. 7 [137 Cal.Rptr.3d 533], which noted that "a prosecutor made a comparable comment" that "even Jack Ruby (whose killing of Lee Harvey Oswald was broadcast on national television) had the right to a jury trial." (RB, p. 90.) However, the comment in the Ruby case, if comparable to this case at all, is comparable only to the trial judge's improper recollection of what the prosecutor said

and not to what the prosecutor actually said to prospective juror D.M., which was that Mr. Woodruff "had a right to *ask for* a trial."

In this case, the prosecutor asked the juror if he understood "that even somebody who did it can ask for a trial? Do you understand that? ... That it's a constitutional right for everybody, even if they did it, to ask for a trial? Will you not hold it against the defendant?" (RT 3:1073.)

Defense counsel objected. The trial judge overruled the objection. (*Ibid.*)

Defense counsel revisited the issue the following day outside the presence of the jurors, saying the prosecutor's comments were "a little over the top," in that the prosecutor implied that a plea bargain had been offered, though none had been. Defense counsel said the comments were "very misleading and prejudicial to Mr. Woodruff." (RT 4:1092.)

The judge said the prosecutor's comments were in the context of "the juror ... saying that a videotape will be nice. And Mr. Soccio's comments to the effect, Hey, even if the guy is caught on tape, a presumption of innocence applies, and you have to follow the law. You are not gonna hold it against the defendant because we're having a trial." (RT 4:1094.)

That, of course, is not what had happened. The prosecutor's comments had nothing to with a defendant "caught on tape" and holding it against a defendant "because we're having a trial." The offending language

was that "even somebody who did it can ask for a trial" and "it's a constitutional right for everybody, even if they did it, to ask for a trial." (RT 3:1073.) Those comments by the prosecutor implied that Mr. Woodruff had been offered a plea bargain, but had rejected it and *asked* for a trial. But, as defense counsel pointed out, no plea bargain had been offered and no trial had been requested. (RT 4:1092.)

This is another example of the trial judge's faulty memory informing his ruling on a defense motion. As with the prospective juror who did not compare jury duty to a root canal (see Claim A4(c)(i)), the trial judge again used a false scenario as his justification for denying defense counsel's motion concerning prejudicial comments by the prosecutor to one prospective juror on voir dire tainting the entire jury because every juror heard the prejudicial comments.

The prejudice to Mr. Woodruff is that the prosecutor planted in the jurors' minds before they had heard any evidence that Mr. Woodruff had been offered a plea bargain, which he had rejected. Those false assumptions would color every piece of evidence and every witness's testimony. The jurors would logically conclude, from the outset, that even though Mr. Woodruff was guilty he had asked for a trial.

Such comments, and the trial judge's refusal to correct the damage done by them, denied Mr. Woodruff his state and federal constitutional

rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

Mr. Woodruff's convictions should be overturned.

B. Guilt phase

CLAIM B1: No limit on uniformed officers in courtroom

In Claim B1, appellant cites the trial judge's refusal to prevent an intimidating atmosphere at trial, allowing the courtroom to be packed by uniformed Riverside police officers wearing blue wristbands in memory of the slain officer. This prejudicial atmosphere denied Mr. Woodruff his rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

Respondent argues the trial court acted within its discretion in denying a defense request "to exclude all uniformed officers from the courtroom, as their presence was not inherently prejudicial." (RB, pp. 91-92.)

Defense counsel's initial request was for an order "limiting or prohibiting the presence of uniformed peace officers in the trial" (RT 4:1256), although he revised his request for "an order barring all uniformed personnel in the courtroom, other than the individuals -- hopefully a limited number of officers in the courtroom itself." (RT 4:1256-1257.)

The trial judge said he was sympathetic with defense counsel's concerns about uniformed officers. "I can't say that I am not without the

same concern to some extent myself, but here's the problem: I have no right to tell them how to dress when they come in here." (RT 4:1257.) "[F]or me to issue an order excluding uniformed officers from attending would be illegal. I don't have authority to do that, so I'm not gonna issue such an order." (RT 4:1258.)

Respondent cites *People v. Cummings* (1993) 4 Cal.4th 1233 [18 Cal.Rptr.2d 796, 850 P.2d 1], another case involving the shooting of a police officer, in which this Court spoke with approval of the trial court's decision to place some limits on the number of uniformed officers present at any given time in an effort "to balance the rights of those officers whose duty assignments precluded attendance in civilian clothes against the possibility that seeing large numbers of uniformed officers among the spectators would somehow influence the jury." (*Cummings*, at p. 1299.)

However in Mr. Woodruff's case, which went to trial more than nine years after the *Cummings* decision, the trial judge not only made no attempt to limit the potential intimidating atmosphere of a courtroom packed with uniformed Riverside police officers, he said he was powerless to do anything about it. The lesson of *Cummings* is that the trial judge had the power to place reasonable limits on the presence of uniformed officers in the courtroom. The trial judge in Mr. Woodruff's trial abused his discretion in refusing to exercise his authority when defense counsel requested it.

Consequently, Mr. Woodruff went to trial in a courtroom with "a number of uniformed officers" present (RT 5:1447), and in their midst a retired officer and brother of one of the victims who added to the intensity by gesturing at the defendant as though he were pointing a gun at him. (RT 7:1732.)

Such an atmosphere was reasonably likely to affect the jurors, who had to know subconsciously that if they did not find Mr. Woodruff guilty they would face the wrath of the Riverside police.

CLAIM B2: "Indelible picture" of defendant

In Claim B2, appellant says the trial judge allowed the jurors to view two color photographs of the defendant in an orange jail jumpsuit, one in court and both during deliberations, which denied Mr. Woodruff his rights to the presumption of innocence, a fair trial, the heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

Respondent says the two photographs did not raise the inference that Mr. Woodruff was in custody and their admission into evidence could not have prejudiced him. (RB, p. 96.)

In an attempt to make the photographs appear benign, respondent mentions a "brief reference to how Woodruff appeared at the time of his arrest" (*Ibid*), and cites to cases discounting the prejudicial effect of "an isolated comment that a defendant is in custody" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336 [65 Cal.Rptr.2d 145, 939 P.2d 259]), and "[b]rief glimpses of a defendant in restraints" (*People v. Cunningham* (2001) 25 Cal.4th 926, 928 [108 Cal.Rptr.2d 291, 25 P.3d 519]). (RB, p. 98.) Additionally, respondent says "there was nothing prejudicial about the photographs. In fact, one photograph was a close up of Woodruff's face and neck; therefore the jail jumpsuit was only minimally visible, if at all." (RB, p. 97.)

Respondent's inaccurate description of the jumpsuit as "minimally visible, if at all" refers to Exhibit 28, which is a head-and-shoulders

photograph in which the orange of the jumpsuit is the dominant color. The other photograph, Exhibit 27, shows Mr. Woodruff literally from head to toes, as he was barefoot. The indelible image from each photograph is of a black man in a bright orange jumpsuit holding a booking card.

As this Court has observed in *People v. Taylor* (1982) 31 Cal.3d 488, 494 [183 Cal.Rptr. 64, 645 P.2d 115], citing *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [96 S.Ct. 1691, 48 L.Ed.2d 126]:

> [T]he defendant's jail clothing is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. [Citation omitted.] The clothing inexorably leads to speculation about the reason for defendant's custody status, which distracts the jury from attention to permissible factors relating to guilt. In most instances, parading the defendant before the jury in prison garb only serves to brand the defendant as someone less worthy of respect and credibility than others in the courtroom.

In this case, the image that the jury had of Mr. Woodruff in an orange jumpsuit holding a booking card was not a brief glimpse of something minimally visible. The presence of Exhibits 27 and 28 in the jury room (RT 18:3943-3944) allowed jurors to dwell on that image as long as they chose. That was the indelible image the trial judge chose to give to the jurors. It served no purpose other than to prejudice Mr. Woodruff.

During the testimony of Officer Lavall Nelson, who transported Mr. Woodruff from the shooting scene, the prosecutor asked if Exhibit 28 showed how Mr. Woodruff looked "at the time, or about the time, of his

arrest." Nelson confirmed that it was, "[w]ith the *exception* of the jumpsuit." (RT 10:2236.) The exception makes all the difference. Clearly, the prosecutor wanted the jurors to see the jumpsuit for the purpose of planting the indelible image in their minds. There was no legitimate reason for doing so – no testimony to police brutality to rebut, no testimony to maltreatment or coercion.

The indelible image of a prisoner in an orange jumpsuit prejudiced the jurors against Mr. Woodruff, denying him a fair trial, reliable guilt and penalty verdicts, and due process of law.

Mr. Woodruff's convictions and death sentence should be reversed.

CLAIM B3: Witness improperly referred to arrest record

In Claim B3, appellant says a prosecution witness's gratuitous comment about the defendant's "previous arrest record" violated Mr. Woodruff's rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case and due process of law.

Respondent argues that the claim is waived because defense counsel failed to object or seek an admonition. (RB, p. 98.) Furthermore, respondent says the "inadvertent remark by the detective did not prejudice Woodruff." (*Ibid.*)

As respondent correctly notes (RB, p. 99), this Court has said "a witness's volunteered statement can ... provide the basis for a finding of incurable prejudice." (*People v. Wharton* (1991) 53 Cal.3d 522, 565 [280 Cal.Rptr. 631, 809 P.2d 290].)

In this case, the volunteered statement was made by the lead homicide investigator on the case. Respondent characterizes the comment as "inadvertent," meaning unintentional. (RB, p. 100; see Merriam-Webster's Collegiate Dictionary (11th ed. 2004) p. 627; Roget's Super Thesaurus (3d ed., 2003) p. 303.) Respondent also says the comment was "very brief, rather vague" and the remark "was an insignificant part of the case." (RB, p. 100.)

But there was nothing unintentional about the detective's mention of Mr. Woodruff's "previous arrest record." The question that defense counsel

asked the detective on cross-examination concerned why the detective didn't question Mr. Woodruff's brother Claude Carr further after Carr told the detective Mr. Woodruff "is a family man." (RT 13:2949-2950.) The detective's answer was non-responsive: "He simply states he's a family man. He hasn't done anything wrong. Are we talking about what he was like in the past and his previous arrest record?" (RT 13:2950.)

There is no way to cure the detective's insinuation about Mr. Woodruff's prior criminal history. The detective intended the jury to get the message that Mr. Woodruff was not the family man he purported to be, but instead was someone with an extensive criminal record.

In fact, Mr. Woodruff had no felony convictions before the current case. He was, as he portrayed himself to be, a family man, taking care of his daughter when the first police officer arrived at his door while Mr. Woodruff's common-law wife was out. (RT 20:4169.) Mr. Woodruff and his family lived in the downstairs apartment so that he could keep an eye on his mentally disabled mother, who lived upstairs. (RT 27:5656.)

A competent defense attorney would have objected to the detective's comment and asked the trial judge to instruct the jurors to disregard it. Instead, defense counsel said, "You crossed the line here a little bit," prompting the prosecutor to object to defense counsel's commentary, and the trial judge to sustain the prosecutor's objection to defense counsel's inappropriate comment. (RT 13:2950.)

Defense counsel's failure to object was yet another example of his incompetence, of his failure to provide constitutionally effective assistance to his mentally impaired client. However, even if he had objected, no judicial admonishment would have cured the harm of the jurors having learned that Mr. Woodruff had an arrest record, albeit by the detective's insinuation. Such a comment by the lead homicide detective on the case was neither "insignificant" nor "inadvertent"; it was a prejudicial comment intended to paint the defendant in the worst possible light.

Because the comment denied Mr. Woodruff a fair trial, as it was intended to do, his conviction and death sentence should be reversed.

CLAIM B4: Questioning mother about her convictions

In Claim B4, appellant says the prosecutor committed misconduct when he asked Mr. Woodruff's mother, over defense objection, about her misdemeanor convictions resulting from the same incident. The trial judge sustained the defense objection, but declined to admonish the prosecutor. The harm was exacerbated when the trial judge allowed the prosecutor, again over defense objection, to ask Mr. Woodruff's mother whether she had a trial and whether she testified. Mr. Woodruff was harmed further by defense counsel's ineffective assistance in failing to seek a mistrial.

Respondent says the prosecutor's questioning of Mr. Woodruff's mother was not prejudicial. Furthermore, respondent says the claim is forfeited because defense counsel "did not request an admonition." (RB, p. 102.)

In fact, defense counsel had objected to the question, and had used the word "admonished," although in the gratuitous context of chastising the prosecutor rather than cautioning the jurors. (RT 10:2252.) It is a theme seen throughout the trial in which defense counsel was more interested in embarrassing the prosecution and its witnesses than in protecting his client's rights. (See, e.g., Claim B7.)

After the jury was excused for the lunch recess, defense counsel sought the trial court's guidance. (RT 10:2284.) Defense counsel referred to the prosecutor's comment about Mrs. Carr's convictions as "a bell that

we have to unring." (RT 10:2284.) Counsel said "there's a side of me that wants to ask for a mistrial, but I really don't want to because I think we're doing great here." (RT 10:2285.)

Counsel was correct about his assessment of the bell that had to be unrung. Even though the trial judge had sustained defense counsel's objection, the damage was done by the leading question, which provided all of the information about the charges and convictions and suggested its own answer. (RT 10:2252.) The harm didn't go away just because the trial judge sustained the objection. The trial jurors could infer the prosecutor's message – Mr. Woodruff's mother was guilty and so was Mr. Woodruff.

Defense counsel properly objected to the question and sought an admonition, which the trial judge declined to give, then objected again to a follow-up question, which the trial judge also denied. But, in deciding not to seek a mistrial under the delusional conclusion that "we're doing great," defense counsel was constitutionally ineffective.

This incident highlights the chain of errors that marked the Woodruff trial from start to finish. The prosecutor asked an inappropriate question, the judge erred in failing to admonish the jury to ignore it, and defense counsel provided ineffective assistance in improperly asking for an admonition and in failing to ask for a mistrial. Those actions and failures to act prejudiced Mr. Woodruff, making it more probable that the jurors

would vote to convict him based on extraneous factors that they should not have heard. Mr. Woodruff's convictions should be overturned.

CLAIM B5: Highly prejudicial testimony

In Claim B5, appellant says the trial process broke down when defense counsel solicited inadmissible and prejudicial testimony of the prosecution's chief investigator that he believed Mr. Woodruff was guilty of murder and the reasons for that belief.

Respondent argues that defense counsel was not ineffective, the prosecutor did not commit prejudicial misconduct, and the trial judge properly instructed the jury to ignore the opinion testimony. (RB, pp 105-106.)

Respondent cites *Strickland v. Washington*, *supra*, 466 U.S. at p. 688, 694, for the principle that appellant must show defense counsel's conduct fell below an objective standard of reasonableness and must demonstrate prejudice. (RB, pp. 111-113.)

Appellant's argument is not just that defense counsel was ineffective, but that defense counsel abandoned his client by failing to provide the "meaningful adversarial testing" required by *Strickland*'s companion case, *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 2044, 80 L.Ed.2d 657]. In *Cronic*, the Supreme Court wrote that the Sixth Amendment "requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' ... If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." (*Cronic*, at p. 654.) In a

footnote, the Court added, "'In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to "have Assistance of Counsel" is denied.'" (*Cronic*, at p. 654, fn. 11, quoting *United States v. Decoster* (D.C. Cir. 1976) 624 F.2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U.S. 944 [100 S.Ct. 302, 62 L.Ed.2d 311] (1979).)

Mr. Woodruff's defense counsel, in cross-examining the prosecution's lead investigator, solicited the witness's opinion that the defendant was guilty of murder and the reasons for that opinion. It was not a brief exchange, but in the trial judge's estimation consumed a half-hour of cross-examination, redirect and recross. (RT 16:3610.) Soon after the exchange ended, the judge dismissed the jury for the weekend. Speaking directly to Mr. Woodruff, the judge said he was "deeply, deeply troubled by what occurred here" and said he believed "your case was prejudiced extremely by Mr. Silva being asked by your counsel and allowed to answer without objection as to his opinion as to your guilt." (RT 16:3610-3611.)

In effect, the trial judge offered a mistrial based on defense counsel's prejudicial ineffective assistance. The trial judge asked Mr. Woodruff if based on the judge's opinion that the testimony "prejudiced your case, do you still wish to continue with this trial with Mr. Blankenship representing you." (RT 16:3613.) Mr. Woodruff responded that he wanted "to get this

over with, man. I been through enough." (*Ibid.*) When the trial judge repeated the question, Mr. Woodruff answered "yes." (RT 16:3614.) The judge considered that answer "an appropriate waiver" of ineffective assistance. (RT 16:3618.)

(The inadequacy of the trial judge's several attempts to have Mr. Woodruff waive ineffective assistance and conflicts is discussed in Claims A1 and A3.)

In support of the argument that defense counsel was effective in his cross-examination of prosecution investigator Silva, respondent says, "These decisions must be viewed through counsel's perspective at the time they were made and will not ordinarily be second-guessed." (RB, p. 112.)

To the contrary, defense counsel's decisions were second-guessed by the trial judge at the time. The trial judge implicitly offered Mr. Woodruff a mistrial and a new trial with different counsel because of the trial judge's conclusion that "your case was prejudiced extremely" by defense counsel's cross-examination of the investigator as well as the unchallenged redirect. (RT 13:3611.) Respondent even concedes that the investigator's "testimony about his opinion that Woodruff was guilty and the basis for his opinion was harmful to Woodruff," although respondent adds, implausibly, that "it was not prejudicial." (RB, p. 114.)

Respondent says the claim "is waived because Woodruff failed to object or request an admonition." (RB, p. 115.) However, by definition, a

Cronic claim such as this involves the failure of defense counsel to act to protect his client's rights. Mr. Woodruff's trial counsel did not recognize the magnitude of his error – he argued that he had been "very cunning and brilliant" (RT 16:3616) and compared his performance with "scoring a touchdown after an interception." (RT 16:3620.)

Furthermore, defense counsel was not the only participant with a responsibility to ensure the trial was fair. The prosecutor had an obligation, which he violated, not to take advantage of defense counsel's incompetence. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629].)

The trial judge alone seemed to perceive the egregious nature of what had transpired. The judge acknowledged his own role as "ineffective performance of judge. ... I should have cut it off and I didn't. But it may well be that some higher court will review this some day. But it's an issue that came up. It concerns me." (RT 13:3620-3621.)

Nonetheless, respondent says "any error by the trial court is harmless." (RB, p. 117.) To the contrary, the judge's failure to intervene could hardly have been more harmful. The judge's error allowed the trial to break down, allowing Mr. Woodruff's trial to proceed without an actual

defense because of the incompetent counsel's delusions about scoring a touchdown.

Mr. Woodruff's convictions and death sentence should be reversed.

CLAIM B6: Mocking defense counsel

In Claim B6, appellant says the prosecutor and trial judge repeatedly mocked defense counsel in front of the jury, which undermined defense counsel's credibility with the jury and denied Mr. Woodruff his rights to a fair trial, effective assistance of counsel, heightened reliability of guilt and penalty verdicts, and due process of law.

Respondent argues that neither the prosecutor nor the trial judge committed prejudicial misconduct. (RB, p. 117.) Nonetheless, respondent concedes the prosecutor "should not have commented on defense counsel's ponytail." (*Id.*, p. 119.) Respondent also concedes the prosecutor made an "inappropriate comment" in requesting sanctions against defense counsel. (*Id.*, p. 122.) Still, respondent argues any errors were not prejudicial and says other examples cited by appellant were fair comment on the evidence. And, respondent says the claims are forfeited because defense counsel failed "to object and request an admonition that could have cured the harm." (*Id.*, p. 118.)

As for what respondent characterizes as the trial judge's "alleged intemperance," respondent argues that defense counsel failed to object to 11 of the 12 cited examples of judicial mocking, failed to request an admonition to the jury after any of them and raised no objection at trial on the grounds now raised on appeal. Hence, respondent says these claims also are forfeited. (*Id.*, p. 128.)

Defense counsel repeatedly objected, outside the presence of the jury, to the disparaging comments by the judge and prosecutor. (RT 5:1427-1428; RT 10:2241; RT 14:3263.) If defense counsel did not raise his objections sufficiently to preserve these issues for appeal, it is yet another example of the ineffective assistance defense counsel provided to Mr. Woodruff.

Respondent says the prosecutor's comment about defense counsel's ponytail "did not constitute prejudicial misconduct." (RB, p. 119.) To the contrary, the prosecutor was deliberately attempting to prejudice Mr. Woodruff in the minds of the jurors, before they had even been sworn, by portraying defense counsel as a weird guy with a weird haircut – an insidious message that counsel is not one of us and neither is his client, which was one of several continuing themes of the trial. (See, e.g., Claim D1.)

In an attempt to say Mr. Woodruff was not prejudiced by the disparaging comments, respondent argues "[t]here was no evidence that race played any part" in the death of Officer Jacobs "or the officers' response to the radio call; or that Woodruff is mentally retarded." (RB, p. 126.) To the contrary, there was compelling evidence of all of those things, even if not presented effectively by defense counsel. Testimony at trial showed that Mr. Woodruff's family previously had filed a formal complaint of police harassment (RT 19:4025, 4040-4042); that Mr. Woodruff viewed

the police officers' arrival at his front door in response to the neighbor's loud-radio complaint as another incident of police harassment (RT 19:4024, 4029; RT 20:4171); that Mr. Woodruff felt the Riverside police treated his family differently from other people (RT 20:4147-4148); that Mr. Woodruff felt Riverside police had no respect for black people (RT 20:4174); that Mr. Woodruff viewed the officers confronting his mother as "crooked police" who were prejudiced (RT 20:4181); and that Mr. Woodruff met the criteria for a diagnosis as mildly mentally retarded. (RT 26:5298-5309.)

Respondent cites this Court's opinion in *People v. Young* (2005) 34 Cal.4th 1149 [24 Cal.Rptr.3d 112, 105 P.3d 487], for the proposition that describing a defense counsel's closing argument as "idiocy" is fair comment. (RB, p. 126.) However, even if effectively calling a defense counsel stupid may be fair comment, calling the counsel's trial strategy "shameful" and "despicable" is not. Those characterizations of defense counsel by the trial prosecutor in this case are more analogous to comments this Court disfavored in *Young*, in which this Court said prosecutorial comments that "characterized defense counsel as 'liars' or accused counsel of lying to the jury ... constituted misconduct." (*Young*, at p. 1193.)

Respondent argues that the prosecutor's comments were "isolated" or "fleeting" (RB, p. 120), or "brief" (RB, p. 122), that they were "fair comment" (RB, p. 126), or that they were not prejudicial. (RB, p. 127.)

But, even if no individual comment was prejudicial, the continuing barrage of disparaging comments – from opposing counsel and, worse, from the bench – infected the atmosphere of the courtroom, allowing the jurors to infer that counsel was weird, dishonest and incompetent. Even if some of those inferences regarding defense counsel were accurate, they were nonetheless unfair to Mr. Woodruff. The overall effect of the disparaging comments was that Mr. Woodruff did not receive a fair trial in any of the three phases.

Mr. Woodruff should get a new trial with competent counsel before an impartial judge.

CLAIM B7: Defense counsel's misrepresentations

In Claim B7, appellant says defense counsel made numerous false or misleading statements, which diminished the defense's credibility with the trial court and jury and denied Mr. Woodruff a fair trial, effective assistance of counsel, heightened reliability of death-penalty proceedings, and due process of law.

Respondent argues that defense counsel was effective (RB, p. 131), and "not 'outside the wide range of professionally competent assistance.'" (RB, p. 134, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 690.) Respondent also argues that appellant's references to attorney discipline cases are "inapposite," as the "standard for disbarment or suspension does not apply to an ineffective assistance claim." (RB, p. 136.)

However, respondent's arguments are contradictory. If defense counsel's dishonesty was so egregious as to be comparable to other attorneys who were suspended or disbarred, how could it not be outside the range of professionally competent assistance?

Respondent's estimation of defense counsel's performance is counter to those of the trial judge and the trial prosecutor, as well as the trial record. In the previously discussed Claim B6, appellant objects to the trial prosecutor's characterizations of defense counsel as dishonest, shameful and despicable – even though there was basis for such comments

-- because such descriptions poisoned the trial atmosphere and biased the jury.

In Claim B7, appellant identifies seven occasions in which defense counsel misrepresented facts – about when he received discovery, about when he learned of potential guilt-phase testimony, about what a key witness had previously said (on two separate occasions), about the sequence of events on the day of the shooting, about the existence of copies of Polaroid photographs, and about the delivery of discovery to the prosecution.

Many descriptions of defense counsel's performance at trial are appropriate. "Effective" is not one of them.

Because counsel was prejudicially ineffective, Mr. Woodruff's convictions and death sentence should be reversed.

CLAIM B8: Prosecutor's "golden rule" argument

In Claim B8, appellant says the prosecutor committed prejudicial misconduct in his guilt-phase closing argument by urging the jurors to place themselves in the shoes of the victims and others, what is known as the "golden rule" argument.

Respondent argues that the prosecutor did not improperly appeal to the jurors' emotions "and any error was not prejudicial." (RB, p. 136.)

Respondent says appellant "takes the prosecutor's argument out of context when he argues that the prosecutor asked the jury to imagine the gun pointed at them." (RB, p. 142.)

Regardless of the point the prosecutor was trying to make, he made it by asking the jurors to place themselves in the victim's situation: "He may have been about as far as I am from you when he shot and killed Doug Jacobs. Is that very far to take a gun and point it at you and shoot?"(RT 25:5239.)

Point it at *you*, the jurors. To ask the jurors to imagine a gun pointed at them is to place them in the most prejudicial situation the prosecutor could, in the place of the victim the instant before he was killed.

The prosecutor committed misconduct. It was not harmless.

Respondent also points out that defense counsel did not object and hence the claim is forfeited. (RB, p. 138.) Appellant argues that an objection would have been futile because the damage done by the

prosecutor's argument could not be undone. Nevertheless, defense counsel was prejudicially ineffective in failing to object.

The result of the prosecutor's misconduct and defense counsel's ineffectiveness was that Mr. Woodruff did not receive a fair trial. Consequently, his convictions and death sentence should be reversed.

CLAIM B9: Insufficient evidence of lying in wait

In Claim B9, appellant says the evidence was insufficient to support the special circumstance of lying in wait.

Respondent argues the jury's true finding was supported by substantial evidence. (RB, p. 145.)

Respondent quotes *People v. Livingston* (2012) 53 Cal.4th 1145 [140 Cal.Rptr.3d 139], for the proposition that a reviewing court "neither reweighs evidence nor reevaluates a witness's credibility." (RB, p. 144.)

Appellant is not asking this Court either to reweigh evidence or re-evaluate a witness's credibility. Appellant merely argues that the evidence presented did not meet the requirements of lying in wait under Penal Code section 190.2(a)(15), as described by this Court in numerous cases. (See, e.g., *People v. Sims* (1993) 5 Cal.4th 405, 432 [20 Cal.Rptr.2d 537, 853 P.2d 992].)

Respondent says the element of concealment is satisfied by "a showing that a defendant's true intent and purpose were concealed by his actions or conduct." (RB, p. 145, quoting *People v. Stevens* (2007) 41 Cal.4th 182, 202 [59 Cal.Rptr.3d 196].) However, Mr. Woodruff's actions in advance of the shooting did not conceal his purpose – they *announced* his purpose. Officer Baker, the first officer on the scene, *was* aware that Woodruff represented a threat. Baker testified that he "felt unsafe" when he heard Mr. Woodruff at the bottom of the stairs say, "You better not

touch my momma." (RT 6:1559.) Defense counsel asked why. "Because I took it as a threat." (*Ibid.*) Baker said that's when he placed an 11-11 call – officer needs assistance. (RT 6:1560, 1562.) Baker testified that when Officer Jacobs arrived, "I made him aware of the situation, made him aware that there was somebody downstairs who stuck his head out, said, You better not touch his mom." (RT 6:1603.)

Consequently, the elements of "lying in wait" – concealment of purpose, substantial period of watching and waiting, and surprise attack – are not all present in this case. The jury's true finding of the special circumstance of lying in wait should be reversed.

C. Retardation phase

CLAIM C1: Arbitrary format for retardation phase

In Claim C1, appellant says he was denied his rights to due process and equal protection when the trial court, without guidance from the higher courts or legislature, arbitrarily established its own format for the mental retardation phase of Mr. Woodruff's trial.

Respondent argues the trial court's procedure was proper (RB, p. 148), and the trial court "did not violate the holding in *Atkins* by proceeding to trial in the absence of guidance from the Legislature on how to implement the holding in that case." (RB, p. 56.)

Respondent cites this Court's opinion in *People v. Jackson* (2009) 45 Cal.4th 662 [88 Cal.Rptr.3d 558, 199 P.3d 1098], for the proposition that "*Atkins* does not give a capital defendant a right to have a jury determine whether he or she is mentally retarded." (RB, p. 153.) However, that is not the issue in Claim C1.

In *Atkins*, it should be noted, the Supreme Court deferred "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (*Atkins*, at p. 317.)

Mr. Woodruff is uniquely situated among California's death-row inmates in that he alone had a mental retardation phase during the limbo period between the *Atkins* decision on June 19, 2002, and the enactment

more than a year later of Penal Code section 1376, which was intended to define "mental retardation" for purposes of death-penalty prosecutions and establish procedures for determining whether an individual defendant is mentally retarded.

Senate Bill 3, introduced in the California Senate on December 2, 2002, in response to *Atkins*, was intended to "define the term 'mentally retarded' and ... provide that a defendant in any case in which the prosecution seeks the death penalty may apply for an order directing that a mental retardation hearing be held." (Senate Bill No. 3, Legislative Counsel's Digest (Dec. 2, 2002), http://legix.info/us-ca/measures;2003-04;sb0003/doc@99 [as of Jan. 30, 2013].)

Although S.B. 3 was introduced the day before guilt-phase testimony began in Mr. Woodruff's trial, it was not signed into law as Penal Code section 1376 until October 8, 2003, too late to benefit Mr. Woodruff and too late to assist the trial judge who desperately sought guidance from the higher courts or legislature. (See RT 2:618; RT 19:4064, 4070; RT 25:5284-5285.)

Respondent cites the *Jackson* opinion for a cribbed version of Penal Code section 1376. (*Id.*, at p. 152.) The Court's selective editing of Penal Code section 1376(b)(1) -- quoting the first 11 words and last 15 words, while leaving out 129 words in the middle -- was relevant to the facts in the

Jackson case[10], but not to the facts in this case. However, the omitted words contained the language that would have helped Mr. Woodruff if S.B. 3 had been enacted in time for him to have the pretrial determination of mental retardation that the legislature intended.

The day after the *Atkins* decision was announced, Mr. Woodruff's trial counsel requested a pretrial determination of his mental retardation. The trial judge denied the request as premature, saying he felt such a hearing would be more appropriate after a jury convicted the defendant, found special circumstances to be true, and recommended the death penalty. (RT B:511.)

Defense counsel revisited the issue on the first day of jury selection, November 7, 2002, in an attempt to halt the selection of a death-qualified jury until the issue of Mr. Woodruff's mental retardation had been determined. (CT 17:4819-4833.) The trial judge denied the motion. (RT 2:617.)

If the trial had been held a year later, Mr. Woodruff would have been entitled to the pretrial determination of the mental retardation question that

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[10] The defendant's counsel in *Jackson* was denied a continuance of his penalty phase retrial in the immediate aftermath of the *Atkins* decision. On appeal, he sought "a new penalty phase trial at which jurors have the opportunity to decide whether he is mentally retarded." (*Jackson*, at p. 679.)

the trial judge twice denied. The prosecution expert's testimony in the guilt phase about what Mr. Woodruff told him during his psychological examination would have been inadmissible. (RT 23:4864-4868; Pen. Code § 1376(b)(2).) The trial court and defense counsel would have had guidance about what California's standard was, what the burden of proof was, what evidence was admissible and when, and what the appropriate procedures were. Instead, neither trial court nor counsel had such guidance.

Respondent asserts that appellant "does not state with any specificity what exactly was wrong with the procedure used in his trial." (RB, p. 154.) To the contrary, appellant says in Claim C1 that the problem with the procedures was they were arbitrary, unspecified and unclear even while the trial was in progress. The result was a mental retardation phase in which the trial judge made up the procedures as he went along. The evidence was largely introduced in the guilt phase, where it didn't belong. Such procedural protections as later defendants would have under Penal Code section 1376 were denied to Mr. Woodruff.

Given that the defense psychologist rated Mr. Woodruff's IQ as 66, well below the standard score of 70 for mental retardation in *Atkins*, and that the prosecution psychologist rated Mr. Woodruff's IQ as 78, which this Court in *People v. Superior Court* (*Vidal*), *supra*, 40 Cal.4th 999, rated as consistent with mild mental retardation, the ad hoc procedures and denial of procedural protections prejudiced Mr. Woodruff.

Because of the gravity of the potential punishment in a death-penalty case, determinations of guilt and appropriate punishment require heightened reliability relative to other criminal cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 944].) Instead of heightened reliability, Mr. Woodruff's trial afforded no reliability at all. The standardless proceedings violated his rights to due process and equal protection and against arbitrary and capricious punishment. Because Mr. Woodruff was denied a pretrial determination of his retardation status, which would have altered the course of the trial significantly, both the guilt and penalty verdicts should be overturned. The case should be returned to the trial court for a pretrial determination of the issue of mental retardation in accordance with Penal Code section 1376.

CLAIM C2: Prosecutor appealed to jurors' prejudices

In Claim C2, appellant says prosecutorial misconduct in closing argument in the mental retardation phase and defense counsel's ineffectiveness in failing to object to that misconduct resulted in a jury verdict that was contrary to the evidence presented.

Respondent says the issue was waived for failure to object at trial, but the prosecutor did not commit misconduct anyway so defense counsel was not ineffective in failing to object. (RB, pp. 156-157.)

Respondent tries to minimize the damage of the prosecutor's comment by describing it as "alluding to the old saying, 'if it looks like a duck and quacks like a duck, it's a duck.'" (RB, p. 158.) However, the "old saying" is itself an invitation to prejudice, to judge based on appearances rather than on substance. (See *Brain Training Games*, debate.org, http://www.debate.org/debates/If-it-looks-like-a-duck-quacks-like-a-duck-and-walks-like-a-duck-its-a-duck/1/ [as of Jan. 30, 2013].)

People who are mildly mentally retarded do not *look* mentally retarded. In *Atkins*, the Supreme Court cited clinical definitions that

> require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage

> in logical reasoning, to control impulses, and to understand the reactions of others.

(*Atkins*, *supra*, 536 U.S. at p. 318.)

Nothing in the description of mental retardation in *Atkins* involves how a person looks, only how such a person thinks, functions and processes information. Mr. Woodruff repeatedly told the trial court that he didn't understand what was going on in his case. (RT A:57, 61-62, 64.) His reading level, at the age of 39, was that of a third-grader (RT 26:5304), he needed the help of his brother to fill out forms (RT 27:5645-5646), and the help of other jail inmates with his correspondence. (RT 20:4221.) Yet, the prosecutor urged the jurors to conclude that Mr. Woodruff was not mentally retarded because he *looked* normal. That was an improper appeal to the jurors' prejudices, a jury predisposed to rule against Mr. Woodruff, having already found him guilty of first-degree murder with special circumstances.

Respondent suggests the prosecutor's comments, even if "worthy of condemnation," do not represent constitutional violations "unless the challenged action 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (RB, pp. 157-158, quoting *People v. Fuiava* (2012) 53 Cal.4th 622, 679 [137 Cal.Rptr.3d 147, 203, 269 P.3d 568, 615], *reh'g denied (Apr. 18, 2012), cert. denied*, (U.S., Dec. 10, 2012, 12-5700).)

The prosecutor's comments to the jury encouraged jurors to follow

their prejudices rather than the evidence and the law. By so doing, the prosecutor did so infect the trial with unfairness as to make the resulting jury decision that Mr. Woodruff was not mentally retarded, despite the evidence, a denial of due process.

If this claim is forfeited because of defense counsel's failure to preserve it, that is only because of defense counsel's ineffective assistance, which denied Mr. Woodruff his Sixth Amendment right to the effective assistance of counsel.

The jury's verdict in the mental retardation phase should be reversed.

D. Penalty phase

CLAIM D1: Improper appeal to jurors' biases

In Claim D1, appellant says the prosecutor committed prejudicial misconduct in his penalty-phase opening statement by suggesting the jurors could consider their religious values in determining the proper penalty and could properly make up their minds without hearing any penalty-phase evidence.

Respondent says the issue is forfeited because trial counsel did not object or request a curative instruction. (RB, p. 161.) If this is so, it is yet another instance of ineffective assistance of counsel denying Mr. Woodruff his right to a fair trial.

Additionally, respondent says the prosecutor did not commit misconduct in his opening statement and Mr. Woodruff was not prejudiced by what the prosecutor said. (*Ibid.*) And, even if the prosecutor erred, respondent says it was "not reasonably possible that a result more favorable" to Mr. Woodruff would have resulted because of "the overwhelming nature of the factors in aggravation, including the facts underlying both the charged crime and the prior acts of violence." (RB, p. 164.)

However, as will be discussed in more detail regarding Claims D2 and D3, Mr. Woodruff was never convicted of any crime regarding the alleged prior acts of violence, the trial judge discounted two of them as not

aggravating, and another alleged act depended on unconstitutional law-enforcement hearsay testimony that violated Mr. Woodruff's right to confront witnesses against him.

Respondent accuses appellant of "[s]plicing together various phrases from the prosecutor's argument" in an effort to show that the prosecutor argued that various things didn't matter in the penalty phase. (RB, p. 163.) In fact, the essence of Claim D1 is that while the prosecutor ostensibly was arguing that Mr. Woodruff's history and religion didn't matter, he was using the rhetorical device of paraleipsis to suggest that they should consider those things.

When the prosecutor said, "Those things are for you to take and to weigh for yourselves," what were the jurors to think he meant by "those things"? The things that immediately preceded "those things" were whether Mr. Woodruff "had a bad history" or was "a bad man" or was "a Christian or non-Christian." (RT 26:5378.) To suggest otherwise requires a logical leap, ignoring a succession of characteristics that Mr. Woodruff may or may not have had and jumping back to "the circumstances and the facts surrounding this killing." (*Ibid.*) That is not what the context of the prosecutor's opening statement suggested. What the prosecutor did suggest was that even though it didn't matter whether Mr. Woodruff had a bad childhood, was a bad man or was a Christian or non-Christian, *those things* "are for you to take and to weigh for yourselves." It's acceptable to

consider those things, the prosecutor was telling the jurors. But it isn't acceptable – and if they took into account whether they thought Mr. Woodruff acted like a Christian, they were deciding his penalty on an inappropriate consideration.

CLAIM D2: Confrontation Clause violation

In Claim D2, appellant claims the trial judge violated Mr. Woodruff's Sixth Amendment right to confront witnesses against him when the trial judge allowed two law-enforcement witnesses to testify about what an absent witness had told them about a prior violent incident.

Respondent concedes that in admitting Pomona police officer Richard Machado's hearsay testimony over defense counsel's objection, the trial judge "violated [Mr. Woodruff's] federal constitutional right to confront witnesses." (RB, p. 169.) However, respondent insists the constitutional violation was "harmless beyond a reasonable doubt" because it was "mostly cumulative" of the testimony of another witness, Freddy Williamson (*Id.*, p. 170), and because "the overall strength of [the] prosecution's case was substantial." (*Id.*, p. 171.)

However, Williamson's testimony never implicated Woodruff as doing anything during the Pomona incident. When the prosecutor asked if Woodruff was present, Williamson testified: "I am not positive. He might have been there, but I can't swear I seen him." (RT 26:5527.) On cross-examination, defense counsel asked Williamson if Mr. Woodruff had been in the vicinity of the Pomona incident. Williamson replied: "I can't swear on it. I never actually seen him. I assume he may be -- might have been, but I never actually seen him." (RT 26:5533.) Williamson's testimony does

not even conclusively place Woodruff at the scene of the Pomona incident, let alone describe him as engaging in an act of violence.

The overall strength of the prosecution's penalty-phase case depended in large part on Officer Machado's testimony. Mr. Woodruff had never been convicted of any crime regarding any of the alleged acts mentioned by the prosecution's penalty-phase witnesses. At sentencing, the trial judge discounted two of the alleged events in aggravation. (RT 28:5849-5850.) But the trial judge gave great weight to the Pomona incident, saying it "demonstrates a history [of] violent criminal conduct by the defendant." (RT 28:5848.) The trial judge said the evidence was uncontradicted that on the day of the Pomona incident, Mr. Woodruff had tried to hit the victim with a bottle or some glass device. (RT 28:5848-5849.)

However, not only was that evidence uncontradicted, it was uncorroborated. The only testimony to that detail was by Officer Machado, which respondent concedes. (RB, p. 170.) Furthermore, the testimony of the law enforcement officer likely bore substantially more credibility with the jury than that of Williamson, who testified that he was currently serving a Nevada prison term for "[p]impin' and pandering." (RT 26:5519-5520.) Williamson's only testimony about Mr. Woodruff's involvement in the Pomona incident was that Mr. Woodruff "might have been" there. (RT 26:5527, 5533.)

Hence, the Confrontation Clause violation was neither harmless nor cumulative. It involved uncorroborated testimony to a key detail of an incident that the trial judge relied on in his sentencing decision. Aside from the Pomona incident, the evidence of prior acts of violence by Mr. Woodruff was mostly minor, vague or ambiguous. None of it involved a conviction. But for the Confrontation Clause violation and the admission of what the trial judge characterized as "very highly prejudicial hearsay" (RT 27:5552), there is a reasonable likelihood that the jury's verdict at the penalty phase would have been different.

Mr. Woodruff's death sentence should be reversed.

CLAIM D3: Trial court's fact-finding at sentencing

In Claim D3, appellant says the trial court improperly admitted and considered highly inflammatory and prejudicial unsworn testimony and improperly considered the probation report before denying defendant's automatic motion to modify the death penalty.

Respondent argues that the claim was waived by defense counsel's failure to object in the trial court and that any error was harmless. (RB, p. 171.)

Defense counsel was silent when the trial court, after denying his motion for new trial, said: "Now we proceed to the Automatic Motion To Reduce The Jury's Recommendation Of The Death Penalty. And I understand, at least, Mr. Soccio, you have some individuals you'd like to have address the Court?" (RT 28:5816.)

This is yet another example of defense counsel's ineffective assistance. As has been mentioned repeatedly in appellant's opening brief, as well as in this brief, defense counsel had never tried a murder case, let alone a death-penalty case, and therefore had no experience with an automatic motion to reduce the jury's recommendation of the death penalty. Defense counsel was on probation with the State Bar at the time of his representation of Mr. Woodruff following a suspension from practice for incompetence. (RT A:33, 65; RT 14:3264; CT 2:355-356.)

Given defense counsel's lack of experience with death-penalty procedures, as well as his general incompetence as a lawyer, it is not surprising that he would fail to object to the trial judge's failure to follow accepted procedures regarding the automatic motion for modification of sentence under Penal Code section 190.4(e). But such failure to object is yet another example of the prejudicial ineffective assistance that defense counsel provided to Mr. Woodruff, in that he failed to perform as any reasonably competent attorney would have done under the circumstances. Such incompetence should not be held against his client.

Case law was clear, long before Mr. Woodruff's trial, that in ruling on a modification motion under Penal Code section 190.4(e), a trial court "can consider 'only that which was before the jury.'" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1183 [64 Cal.Rptr.2d 892; 938 P.2d 950], quoting *People v. Jennings* (1988) 46 Cal.3d 963, 995 [251 Cal.Rptr. 278; 760 P.2d 475].) It was also clear, as respondent points out, that if a defendant failed to object at the time of the modification to the judge's erroneous consideration of information, a subsequent claim to that effect was forfeited. (*People v. Hill* (1992) 3 Cal.4th 959, 1013 [13 Cal.Rptr.2d 475, 839 P.2d 984], overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046 [108 Cal.Rptr.2d 409].)

Despite defense counsel's failure to object, it is clear that the trial judge erred in considering the probation report and the unsworn testimony

of seven witnesses – five of them highly emotional victim-impact witnesses – before making his ruling on the automatic modification motion.

The remedy for these errors is remand for reconsideration of the automatic modification motion. (*People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892].)

E. Structural

CLAIM E: Trial record was falsified

In Claim E, appellant says the court reporter had a pattern and practice of falsifying the reporter's transcript, which is demonstrated in numerous places during jury selection in three separate days. Appellant says the falsified transcript made a reliable appellate process impossible.

Respondent acknowledges that it "appears the court reporter did cut and paste," but says the errors were not intentional and were harmless because appellant fails to demonstrate prejudice. (RB, pp. 176, 179, 180.)

The trial judge also acknowledged, during a March 2009 hearing on appellant's motion for new trial, that "there are undoubtedly example of cut-and-paste and so on." (SRT 4.)

Appellant's counsel had filed the motion for new trial in the trial court on November 21, 2008, in conjunction with an alternative motion to correct, augment and settle the record. The trial judge denied the motion for new trial, saying "there is no showing of deliberate falsification of anything in any of the transcripts." (*Ibid.*)

Despite the attempts of respondent to portray "cut and paste" as benign, not "deliberate falsification" and "not intentional" (RB, p. 176), the court reporter's methods were both intentional and dishonest. The very act of copying text from one section of transcript and pasting it in several others, purporting that the words spoken in one place were spoken in the

others, is a deliberate fraud. In multiple sections of transcript covering three days of jury selection, the words in the transcript are not the words that were actually spoken.

The harm of the court reporter's dishonesty is not just that appellate counsel cannot be sure what actually transpired during jury selection. The greater harm is that appellate counsel cannot trust the written record of any part of the trial at all.

The family atmosphere of this particular Riverside County courtroom is documented on the record. The trial judge performed the court reporter's wedding ceremony. The court reporter's spouse was a Riverside County deputy district attorney. (SRT 5-6.) The trial judge was himself a former Riverside County deputy district attorney. (RT A:41-42; RT 4:1139; RT 20:4224.)

In such an atmosphere, it is not surprising that the trial judge found the court reporter's "cut and paste" to be harmless. To rule otherwise would be to find his own longtime court reporter to be dishonest, though dishonest she was.

California jury instruction CALJIC 2.21.2 says that if a witness is shown to be untruthful in one statement, then any other statement by that witness can be disbelieved. That cautionary instruction should apply to the court reporter too: She has been shown to be dishonest repeatedly in

preparing the transcript. What else she excluded – what prejudicial slip of the tongue by the trial judge or prosecutor – no one can ever know.

The fundamental question before this Court is whether Mr. Woodruff received a fair trial. When the transcript of that trial cannot be trusted, the answer to that question must be no – Mr. Woodruff did not receive a fair trial.

F. Constitutional

CLAIM F1: Death-penalty statutes are unconstitutional

In Claim F1, appellant says California's death-penalty statutes are unconstitutional in four regards: (a) Penal Code section 190.2 is impermissibly broad; (b) Penal Code section 190.3 allows arbitrary and capricious imposition of death; (c) the statutes contain no safeguards to avoid arbitrary and capricious sentencing, and deprive defendants of jury determinations of each factual prerequisite to a death sentence; and (d) California's use of the death penalty violates international norms of humanity and decency, as well as constitutional protections of due process of law and against arbitrary and capricious punishments.

Respondent argues the California death-penalty law does not violate the federal Constitution, appellant's arguments "have been repeatedly rejected by this Court," and appellant "provides no basis" for this Court to revisit the issue of the death penalty's constitutionality. (RB, p. 182.)

This Court once observed, "The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment. Judged by contemporary standards of decency, capital punishment is impermissibly cruel." (*People v. Anderson* (1972) 6 Cal.3d 628, 650 [100 Cal.Rptr. 152, 493 P.2d 880].) Among the Court's concerns was "an awesome problem involving the lives of 104 persons under

sentence of death in California, some for as long as 8 years." (*Id.*, at p. 640.)

As events would show, the Court in *Anderson* misread "contemporary standards," at least as reflected in the will of the contemporary electorate. Proposition 17, billed as an attempt to overturn the *Anderson* decision, was approved by more than two-thirds of the voters in the November 1972 ballot. (*History of California Initiatives*, California Secretary of State, Elections Division (2002) p. 6 http://www.sos.ca.gov/elections/init_history.pdf [as of Jan. 30, 2013].)

Six years later, the electorate enacted a new death-penalty initiative by an even wider margin, with 71.1 percent in favor. (*California Proposition 7, the Death Penalty Act (1978),* Ballotpedia, http://ballotpedia.org/wiki/index.php/California_Proposition_7,_the_Death_Penalty_Act_(1978) [as of Jan. 30, 2013].)

But, the *Anderson* Court had been prescient in its observation that the authors of the California Constitution "anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted." (*Anderson, supra*, at p. 648.)

The current chief justice has been quoted as saying California's death penalty requires "structural change, and we don't have the money to

create the kind of change that is needed." (Dolan, *California chief justice urges reevaluating death penalty*, Los Angeles Times (Dec. 24, 2011).) Her predecessor, Ronald George, has called the state's death penalty "basically dysfunctional." He was quoted as saying, "Any time these cases go on for two decades, the system is not working right. It's not right for the victims' families, it's not right for the perception of the courts." (McCarthy, *Chief Justice George steps down*, California Bar Journal (August 2010).)

While this Court in 1972 was concerned about condemned inmates waiting "for as long as 8 years" to learn their fates, today's death-row population contains more than 240 inmates whose cases have gone on for more than two decades, to use Chief Justice George's benchmark, and more than 40 whose cases have been on appeal for more than three decades. (*Condemned Inmate List*, California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf [as of Jan. 3, 2013].)

Furthermore, "contemporary standards" have changed since the voters decided Proposition 17 in 1972 and Proposition 7 in 1978. While more than two-thirds of voters supported those two death-penalty initiatives, last year's Proposition 34, a measure that would have abolished California's death penalty, attracted nearly half of the vote, 48 percent. In raw numbers, more voters supported abolition of the death penalty in 2012

(5,974,243) than supported the initiative that created the current death-penalty law (4,480,275). (*Statement of Vote, November 6, 2012, General Election*, California Secretary of State (Dec. 14, 2012) p. 13, http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf; *California Proposition 7, the Death Penalty Act (1978), supra.*)

Thus, not only "contemporary standards" but "evolving standards of decency" (*Trop v. Dulles* (1957) 356 U.S. 86, 101 [2 L.Ed.2d 630]) suggest that the trend is away from support for the death penalty. (See, e.g., Editorial, *America's retreat from the death penalty*, New York Times (Jan. 2, 2013).) In 1972, 41 states had statutes that allowed a death penalty in criminal cases. (*Anderson, supra*, at p. 648.) Today, only 33 states have laws allowing the death penalty and some of them are actively considering abolition. (*States With and Without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty [as of Jan. 30, 2013]; see, e.g., Wagner, *O'Malley to announce sponsorship of death penalty repeal bill in Maryland*, Washington Post (Jan. 14, 2013); Fender, *Death penalty foes may try to repeal Colorado's ultimate punishment*, Denver Post (Dec. 26, 2012); Jung, *Oregon legislator prepares death-penalty repeal bill, as anniversary of execution moratorium approaches*, [Portland] Oregonian (Nov. 20, 2012).)

When two California chief justices reach the same conclusion – that the death penalty is "basically dysfunctional" and in need of "structural

change" that it will not get, when more than 240 condemned inmates have waited more than 20 years for a resolution of their cases, when nearly half the voters want to scrap the current system and replace the death penalty with life without parole, it is indeed time for this Court to revisit the issue. This Court got it right in *Anderson* in 1972: the death penalty is both cruel and unusual. It doesn't work.

Mr. Woodruff, who approaches his tenth anniversary on death row with no end in sight, urges this Court to repeal the death penalty. It is dysfunctional and serves no purpose. As it exists in California, and as it is applied to Mr. Woodruff, it violates the Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM F2: Cumulative effect of errors requires reversal

In Claim F2, appellant says the cumulative effect of errors before Mr. Woodruff's trial and during the guilt, mental retardation and penalty phases deprived him of a fair trial, the right to confront the evidence against him, a fair and impartial jury, effective assistance of counsel, fair and reliable guilt and penalty determinations, and due process of law.

Respondent argues "there are no errors to cumulate," and "the record contains no errors and no prejudicial error has been shown." (RB, p. 188.) Respondent concludes that Mr. Woodruff "received a fair and untainted trial." (*Ibid.*)

Not only is the suggestion that Mr. Woodruff had an error-free trial implausible on its face, respondent's assertions regarding Claim F2 contradict concessions of error throughout respondent's brief. Regarding Claim A4, subclaim (c), respondent concedes that the trial judge was mistaken about a prospective juror's identity (RB, p. 80, fn. 26), that "no obvious reason appears why the prosecutor would have chosen to strike" the juror (*Id.*, at p. 82), and that "it is not clear whether the trial court applied the proper standard." (*Id.*, at p. 78.) Regarding Claim B6, respondent concedes the trial prosecutor "should not have commented on defense counsel's ponytail" (RB, p. 117), and made an "inappropriate comment" in requesting sanctions against defense counsel. (*Id.*, p. 122.) Regarding Claim D2, respondent concedes that the trial judge "violated

[Mr. Woodruff's] federal constitutional right to confront witnesses." (RB, p. 169.) Regarding Claim E, respondent acknowledges that it "appears the court reporter did cut and paste." (RB, pp. 176.)

In each case, respondent argues the error was harmless or forfeited or both.

However, at some point the combination of even arguably harmless errors becomes harmful, denying the defendant a fair trial. At Mr. Woodruff's trial, virtually every link contributed to a prejudicial chain of errors: from a court reporter falsifying the transcript; to a trial judge confusing the identities of challenged jurors; to a defense counsel so incompetent that he fought to keep one juror for the sole reason that the juror was black even though the juror had made up his mind that the defendant was guilty before hearing any evidence; to a prosecutor who took advantage of the defense counsel's incompetence to elicit, without objection, inadmissible opinion testimony regarding the defendant's guilt.

Any of those errors, standing alone, should be enough to require reversal. Collectively, they made a mockery of the American ideal of equal justice under the law.

Mr. Woodruff's convictions and death sentence should be overturned. He is entitled to a new trial, a fair trial with effective assistance of counsel before an impartial judge and jury. He has not had such a trial.

III. CONCLUSION

For all of the reasons stated above, as well as all of the reasons stated in appellant's opening brief, appellant Steve Woodruff, by and through counsel, respectfully requests that this Court reverse his convictions on all counts, the trial court's findings of special circumstances and the finding that he is not mentally retarded, and all sentences, including the sentence of death.

At all phases of the trial proceedings, Mr. Woodruff was denied his rights to a fair trial, assistance of counsel, heightened reliability of guilt and penalty determinations, due process of law and equal protection of the laws under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 16, 17, 24 and 29 of the California Constitution.

This case should be remanded to the trial court for a new trial with competent counsel and an unbiased judge and jury.

January 30, 2013

Respectfully submitted,

DENNIS C. CUSICK
Attorney for Appellant

IV. CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Reply Brief in *People v. Woodruff*, S115378, is printed on recycled paper using 13-point Times New Roman type. It is 18,251 words in length.

January 30, 2013

Respectfully submitted,

DENNIS C. CUSICK
Attorney for Appellant

V. CERTIFICATE OF SERVICE

I, the undersigned, hereby declare:

I am over the age of eighteen years and am not a party to the within-entitled action. On January 30, 2013, I served the attached Appellant's Reply Brief in *People v. Woodruff*, S115378, by placing copies of the brief in postage-paid envelopes addressed to the persons listed below and by depositing those envelopes in the United States mail.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of January, 2013, at Sacramento, California.

Dennis C. Cusick