SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL NATHAN HENDERSON Defendant and Appellant.	No. S098318 (Riverside Superior Court No. INF027515)

APPELLANT'S REPLY BRIEF

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Riverside

Hon. Thomas N. Douglass, Judge

DEATH PENALTY

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Appellant Paul Nathan Henderson ("Mr. Henderson") submits this Reply Brief in support of his automatic appeal from a conviction of first degree murder with two special circumstances found true and a sentence of death.

ARGUMENT

I. MR. HENDERSON MADE A SUFFICIENTLY PARTICULARIZED SHOWING TO SUPPORT A REASONABLE BELIEF THAT AFRICAN-AMERICANS WERE UNDERREPRESENTED IN JURIES AT THE INDIO COURTHOUSE AND SHOULD HAVE BEEN PERMITTED DISCOVERY TO TEST WHETHER SUCH UNDERREPRESENTATION WAS IN FACT OCCURRING.

Mr. Henderson argued in his opening brief ("AOB") that the trial court erred when it denied his request to submit a questionnaire to five groups of 100 jurors summoned to the Indio courthouse to determine if African-Americans were underrepresented. (AOB, pp. 65-73.) In arguing that the ruling was correct, Respondent relies on the trial court's statement that Mr. Henderson's request put the "cart before the horse." (Respondent's Brief ["RB"], pp. 26-27.) In effect, Respondent contends that since Mr. Henderson had not yet established underrepresentation he had no right to information to determine if underrepresentation was occurring. The law does not ensnare defendants in such a Catch-22.

A defendant may seek to show that the jury does not reflect a representative cross-section of the community. To do so, the defendant must show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

(*Duren v. Missouri* (1979) 439 U.S. 357, 364 ["*Duren*"].) In California, the defendant must also show "the disparity is the result of an improper feature of the jury selection process." (*People v. Burgener* (2003) 29 Cal.4th 833, 857.) To make such a showing, the defendant must have the necessary information to do so. At this stage of the proceedings, Mr. Henderson was required to make only "a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or venire exists as a result of practices of systematic exclusion." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) Mr. Henderson met these requirements.

He produced evidence – that the trial court disregarded and Respondent ignores – showing that: (1) the jury eligible population in the Indio judicial district as a whole was less than 2% African-

American; (2) the city of Blythe, which is in the Indio district, had a larger percentage of African-Americans than the district as a whole; (3) jurors from Blythe were excused from service in Indio because Blythe is more than 75 miles from Indio, even though felonies occurring in Blythe were tried in Indio; and (4) the cities of Banning and Beaumont, which also had significant African-American populations and were well within the radius for jury service in Indio, were nevertheless assigned to another judicial district. (1 RT 218-219, 232-234, 237-240; 2 Supp. CT 3-5.)

To test the proposition that systematic exclusion was occurring, Mr. Henderson requested that five 100-person venires be given a questionnaire to determine whether the percentage of African-Americans in those venires was significantly lower than in the district generally. As the defense expert stated, if "5 random 100-member venires were to include no more than 1 African-American member each, this would provide strong evidence of a biased selection process. The probability of selecting 5 100-member venires and none of them having more than 1 African-American member . . . is approximately 0.02, which is a very small probability. . . . [I]f the process is fair, we should rarely see 5 such venires." (2 Supp. CT 7.) Such a disparity

would suggest "that the cause of the underrepresentation was systematic – that is, inherent in the particular jury selection process utilized." (*Duren, supra,* 439 U.S. at 366.) If such a disparity had been shown, Mr. Henderson intended to show that it was the application of Riverside County's juror exclusion policy, together with how the district lines were drawn, that artificially reduced the number of African-Americans available to serve in Indio.

The evidence pertaining to the city of Blythe is particularly telling. Riverside County permitted jurors living more than 75 miles from a courthouse to be excused from service and Blythe is more than 75 miles from Indio. (1 RT 209, 219.) Since Blythe's population – which included a larger percentage of African-Americans than the district as a whole – was included in calculating the African-American population of the entire district, it stands to reason that the blanket exclusion of Blythe jurors from service in Indio likely resulted in "a constitutionally significant difference between the number of [African-Americans] appearing for jury duty and the number in the relevant community." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1155; cf. *Duren, supra*, 439 U.S. at 366 [statute permitting women to be excused from jury service upon request together with consistent

statistical showing of underrepresentation sufficient to violate fair cross-section requirement].)[1]

How judicial district lines were drawn in Riverside County also contributed to the potential for systematic exclusion of African-American jurors from the Indio court. The cities of Banning and Beaumont each had significantly greater percentages of African-Americans than the Indio judicial district and were only about 45 miles from Indio, *i.e.,* comfortably within the geographic radius otherwise served by the Indio court. (1 RT 232-234.) But each of those cities, as a matter of Riverside County policy, had been allocated to a neighboring judicial district. (1RT 232.) African-Americans were essentially being gerrymandered out of jury service in Indio at the time of Mr. Henderson's trial. This policy-based exclusion of African-Americans from serving on Indio juries exacerbated the problem created by the exclusion of Blythe jurors from service in Indio.

Mr. Henderson's showing was sufficient to support a "reasonable belief" that systematic exclusion of African-Americans

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[1]The potential impact was all the more insidious since felony defendants from Blythe could be tried in Indio by juries from which Blythe residents had been systematically excluded. (1 RT 208-209, 240, 254-255.)

from Indio juries had occurred. One way to test the accuracy of that belief was to do just what Mr. Henderson proposed: sample a large number of jurors appearing at the court to determine what percentage was African-American. The burden on court staff and jurors was minimal, or even nonexistent, since the potential jurors to be sampled had already been called in for service. It was error for the trial court to deny Mr. Henderson the opportunity to determine whether the reasonable belief that systematic underrepresentation was occurring could be substantiated.[2]

II. MR. HENDERSON MADE A SHOWING SUFFICIENT TO JUSTIFY DISCOVERY INTO WHETHER THE RIVERSIDE DISTRICT ATTORNEY EXHIBITED RACIAL BIAS IN CHARGING DECISIONS IN CAPITAL CASES.

Mr. Henderson argued that the trial court erred in refusing him discovery into the Riverside County district attorney's charging

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[2]Respondent makes repeated reference to the statement by the defense expert, Steven Day, that there was "a real possibility" the sampling he proposed "would prove to be inconclusive." (1 RT 256-257; RB, pp. 26, 27, 28.) Respondent jumps on Mr. Day's forthrightness as if it were an admission that the data – which had yet to be collected – would in fact fail to demonstrate a disparity. It is frequently, perhaps always, the case that data collected to test a hypothesis could "prove to be inconclusive." If it were known in advance what the data would show there would be no need to collect it. Respondent's argument serves only to highlight that Respondent, not Mr. Henderson, has put the cart before the horse.

practices in death penalty cases. (AOB, pp. 75-83.) Respondent's opposition to this argument concludes with a startling statement: "[B]ecause the information Henderson sought *would not have* aided his defense or otherwise shown that racial discrimination played any role in the decision to charge him with the death penalty, the trial court did not abuse its discretion in denying his discovery request." (RB, p. 33 [emphasis added].) If, before obtaining discovery, a defendant had to prove that the evidence to be discovered would have aided his defense in fact or that racial discrimination actually played a role in the charging decision, no defendant could ever successfully obtain such discovery. The very purpose of such discovery is to ferret out the evidence. Moreover, if the defendant could already make such a showing, discovery would be unnecessary.

Appellant did not have to meet his ultimate burden to show disparity in charging practices in order to obtain discovery into that subject. Under federal law, he was required only to show "some evidence that similarly situated defendants of other races could have been prosecuted, but were not." (*United States v. Armstrong* (1996) 517 U.S. 456, 469.) Under state law, he was required to establish a "plausible justification" for the discovery. (See *People v. McPeters*

(1992) 2 Cal.4th 1148, 1171; see also *In re Seaton* (2004) 34 Cal.4th 193, 202-203 [to obtain discovery into charging practices in capital cases, defendant must analyze facts and circumstances of particular cases as to which discovery sought].) Mr. Henderson met his burden under state and federal law.[3]

Mr. Henderson took into consideration the characteristics the cases he sought for comparison. He did not seek discovery into the charging practices in all capital cases in Riverside County, but only in robbery murder or multiple murder cases in eastern Riverside County, *i.e.*, those with fact patterns similar to, and in the same general geographic area as, this case. From this category of cases, he was interested in the race of the defendant and whether the district attorney

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[3]Respondent argues at length that the "some evidence" standard under *Armstrong* is higher than the "plausible justification" standard set forth by this Court in *People v. McPeters, supra,* 2 Cal.4th 1148. It is by no means clear that "plausible justification" is less onerous than "some evidence" and no case of which Mr. Henderson is aware so holds. Contrary to the implication in Respondent's brief, the court in *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177 did not hold that *Armstrong* was the more exacting standard. The court in that case merely stated that *Armstrong* was the standard to be met and the trial court there had applied it. (*Id.* at 1190-1191.) Moreover, this Court has recently declined to hold that the only relevant standard is that expressed in *Armstrong*. (See *People v Montes* (2014) 58 Cal.4th 809, 824; see also *In re Seaton, supra,* 34 Cal.4th at 203 [citing *McPeters* favorably and no suggestion it had been supplanted by *Armstrong*].) The issue is largely academic, however, since Mr. Henderson satisfied his burden under both *Armstrong* and *McPeters*.

sought the death penalty, a critical distinction between this case and others in which discovery has been denied. (Compare *People v. Montes, supra*, 58 Cal.4th at 828-831 [defendant sought discovery into charging decisions in all cases in Riverside County since 1978 based on race of victim]; *In re Seaton, supra*, 34 Cal.4th at 202 [petitioner's showing of discrimination in charging practices insufficient because he offered no evidence of "the percentage of African-Americans among the cases in which the prosecutor *sought* the death penalty"] and *People v. McPeters, supra*, 2 Cal.4th at 1170 [defendant sought discovery only in cases where death sentence issued].)

In the cases within this narrowly circumscribed group of which defense counsel was aware, African-Americans comprised 81% of the defendants but 100% of those as to whom the death penalty was actually sought. The remaining defendants, as to whom the death penalty was not pursued, were white. (3 CT 685.) For the reasons discussed in the AOB, this showing was sufficient to suggest both the discriminatory effect and the discriminatory intent necessary to meet Mr. Henderson's burden under *Armstrong*. (AOB, pp. 78-83; see *People v. Montes, supra*, 58 Cal.4th at 831.) And the cases as to

which he sought discovery were sufficiently similar to this case to establish a plausible justification under state law. (AOB, pp. 81-82.)

That this is a capital case should also weigh in the balance as to whether Mr. Henderson's showing was sufficient to obtain the discovery. In *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, for example, the court of appeal enforced a Public Records Act request made by a habeas petitioner requesting nearly 16 years of records in capital cases "to assist in investigating whether the [San Diego County] District Attorney impermissibly sought the death penalty based on the race of the defendant, the victim, or both." (*Id.* at 748.) The court rejected the various arguments advanced by the District Attorney to avoid the discovery, stating that the "public's interest in the fair administration of the death penalty is a longstanding concern in California, and it is inconceivable to us that any countervailing interest that the District Attorney could assert outweighs the magnitude of the public's interest." (*Id.* at 752.)

In view of the very modest number of records which Mr. Henderson sought, the minimal burden on the district attorney and the very serious issues at stake, the Court should conclude that Mr. Henderson's showing under both state and federal law was sufficient

to justify the discovery. Whether Mr. Henderson could satisfy his ultimate burden of showing discrimination in charging practices remained to be seen. But he had done enough to justify discovery into the issue. The trial court's failure to permit the discovery was an abuse of discretion, requiring reversal of the special circumstances findings and the sentence of death.

III. THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION WHEN IT DENIED MR. HENDERSON'S REQUEST FOR DISCOVERY INTO SIMILAR CRIMES COMMITTED IN THE SAME GEOGRAPHIC AREA JUST BEFORE AND AFTER THE CRIME IN THIS CASE.

Respondent argues that the trial court did not abuse its discretion in denying Mr. Henderson's request for discovery into similar crimes in Cathedral City. (RB, pp. 34-41.) Respondent is incorrect.

Even the cases cited by Respondent acknowledge that courts may not refuse to grant discovery unless "'the burdens placed on government and third parties *substantially* outweigh the demonstrated need for the discovery.'" (*People v. Littleton* (1992) 7 Cal.App.4th 906, 910 ["*Littleton*"], quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 686 [emphasis in original].) The prosecution below did not demonstrate that any such burdens substantially outweighed Mr.

Henderson's need for the discovery, the cases cited by Respondent are distinguishable in significant respects and, in any event, the trial court could easily have tailored a discovery order consistent with applicable law.

A. Mr. Henderson's Showing Was Sufficient To Overcome Any Burden On Police Or The Privacy Interests Of Third Parties.

1. Mr. Henderson's request was adequately described and narrowly tailored.

Mr. Henderson sought discovery into nighttime home invasion robberies and car thefts at mobile home parks in Cathedral City and Palm Springs during the year before and the year after the crime at issue. (1 CT 158, 165.) He supported his showing with a declaration from counsel that such crimes had occurred and had been extensively reported and that Mr. Henderson had been in prison for the entire time for which the discovery was sought, with the exception of the few weeks before and after the crime. If there had been a crime spree of similar home invasion robberies in the area, Mr. Henderson could not have been the perpetrator of many or most of them. (1 CT 164-165.)

Mr. Henderson was not seeking evidence regarding all robberies or burglaries in the area, without any effort to narrow the discovery to cases with fact patterns similar to this case. (Compare

People v. Suff (2014) 58 Cal.4th 1013 [no effort by defendant to narrow discovery to cases with similar characteristics].) Instead, like the request in *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, Mr. Henderson sought discovery into a tightly circumscribed group of cases which bore "some similarities to the crimes with which the defendant was charged." (*Id.* at 1136.)

Respondent argues, as did the prosecutor, that this information was too burdensome for the police to ferret out. (RB, p. 39.) But even the prosecutor's evidence showed there had been a total of only 178 nighttime burglaries of all types in Cathedral City during the period of time at issue. (1 CT 221.)[4] Mr. Henderson sought discovery into only a narrow subset of these cases. The prosecution did not suggest and offered no evidence that providing information with respect to this small subset of cases was too burdensome.

2. The prosecution speculated, and did not show, that the discovery would interfere with ongoing investigations or the privacy interests of third parties.

Respondent argues that this case should be controlled by *Littleton, supra,* in which the court denied the requested discovery.

[4]Mr. Henderson limits his argument here to Cathedral City since Palm Springs was not the investigating authority and thus was a third party to the proceeding. (1 CT 274-275.)

(RB, p. 40.) But the showing by the prosecution in *Littleton* was far more compelling than the prosecutor's showing below. In *Littleton*,

> the prosecutor indicated that the reports defendant sought involved ongoing police investigations in which no arrests have been made or charges brought, that release of the reports would violate privacy interests of the victims and witnesses in those cases and that the information is privileged as official governmental information under Evidence Code section 1040, subdivision (b)(2).

(7 Cal.App.4th at 910; see also *People v. Jackson* (2003) 110 Cal.App.4th 280, 288-289.) Since the defendant sought discovery into cases in which no arrests had been made or charges brought, the investigative and privacy interests outweighed the defendant's need for the discovery. Information about those ongoing cases could prove useful to the defendant in the face of these countervailing considerations only if the defendant "was able to *solve* the other crimes and identify the perpetrator." (*Littleton, supra,* 7 Cal.App.4th at 911 [emphasis in original].)

Unlike the showing made by the prosecutors in *Littleton* and in *People v. Jackson, supra*, the prosecutor below offered no *evidence* that the requested discovery actually involved open investigations or cases in which no arrests had been made or charges brought. Instead, the prosecutor speculated that "many" of the cases "*may* be unsolved,

and disclosure *may* compromise on-going police investigations." (1 CT 219 [emphasis added].) The prosecutor then simply asserted that victims, witnesses and suspects in this speculative and unspecified number of cases "have a right to privacy and confidentiality." (*Id.*) In short, unlike *Littleton* and *People v. Jackson*, the prosecutor below offered nothing other than speculation that there was some unknown number of cases which might be the subject of ongoing investigations. The trial court accepted the prosecutor's unsubstantiated musings as fact. On the record actually before the court, the prosecution failed to show that the countervailing interests "substantially outweighed" Mr. Henderson's right to discovery.

3. Mr. Henderson offered a plausible justification for the discovery.

On its face, Mr. Henderson's discovery request made intuitive sense. There was some evidence before the court that a "string" of crimes very similar to this one had taken place in the Cathedral City area while Mr. Henderson was in prison. (1 CT 164, 278.) At the time of the discovery motion, as at trial, no physical evidence or eyewitness testimony could place him at the scene. His defense was that someone else invaded the Bakers' home. The purpose of the information sought, therefore, was "to allow a comparison to be made

between the facts of the defendant's case and the different cases." (*City of Alhambra v. Superior Court, supra*, 205 Cal.App.3d at 1136.)

It also stands to reason that, if there were similar cases in which arrests had been made or charges brought, further inquiry into them could have opened up fruitful areas of inquiry, investigation and cross-examination in this case. The discovery could have provided "direct or circumstantial evidence which *link[ed]* a third person to the actual crime." (*Id.* at 1134 [emphasis in original].) Whatever minimal burden may have been imposed on the police to provide such evidence did not substantially outweigh Mr. Henderson's need for the discovery.

4. To the extent the prosecution's speculative concerns may have had merit, they could easily have been addressed by an appropriately tailored order.

Respondent has ignored Mr. Henderson's argument that the trial court could have entered an order which adequately addressed the concerns of both the defense and the prosecutor. (AOB, p. 93; RB, pp. 34-41.) The trial court could have simply ordered that Mr. Henderson was entitled to discovery only of the described cases as to which an arrest had been made, charges brought or a conviction obtained. That would have been a simple order to craft and to

implement. It would have addressed all of the prosecutor's objections and provided Mr. Henderson with discovery he could have used and to which he was entitled. Instead, the trial court simply credited the prosecution's speculative and unsubstantiated statements pertaining to the alleged burden, privilege and privacy without further inquiry or consideration. That was an abuse of discretion.

B. The Denial Of Mr. Henderson's Motion Was Prejudicial.

Respondent's argument that the denial of the discovery motion did not prejudice Mr. Henderson is among the most perfunctory it has presented. (RB, p. 41.) Respondent contends there was no prejudice for no reason other than "there is no indication that similar crimes did in fact take place in the Cathedral City area during the relevant period." (*Id.*) This is just incorrect. Defense counsel submitted a declaration in which he said – under oath – that during the relevant time period similar crimes, some involving homicides, had been committed, and that these crimes had been "highly publicized" in the local press. (1 CT 164-165.) He also represented at the hearing that the investigating officer had stated that similar crimes had been committed in the area during the time frame at issue. (1 CT 278.) Significantly, despite Respondent's efforts now to question counsel's

representation, the prosecution did not dispute the truth of counsel's statements in the trial court. (See generally 1 CT 277-278.) To the contrary, the prosecution argued that there had been *too many* generally similar crimes during the requested time frame for the police to be able to provide the discovery. (1 CT 221.) For the reasons already discussed, that was an insufficient basis upon which to deny the motion.

Since Respondent has not otherwise addressed Mr. Henderson's lengthy argument about why the denial of the motion caused him prejudice, he simply refers the Court to that argument and incorporates it by reference. (See AOB, pp. 93-98.)

IV. THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JUROR N.

During the death qualification process, and at the prosecutor's request, the trial judge excused for cause Juror N., who made her living as a "psychic." (7 RT 1689-1691.) The practical effect of the ruling was that the prosecution was granted the windfall of a *Witherspoon/Witt*[5] challenge it did not, and could not, make. This was error, requiring reversal of the death sentence.

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[5] *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.

A trial court may excuse prospective jurors for cause if the jurors' views on the death penalty would prevent or substantially impair the performance of their duties. (*People v. Duenas* (2012) 55 Cal.4th 1, 10.) "The court may excuse prospective jurors for other reasons if their state of mind will prevent them from acting impartially and without prejudice to any party." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 627, citing *People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) The trial court's ruling will be upheld if it is "fairly supported by the record." (*People v. Jenkins* (2000) 22 Cal.4th 900, 988 ["*Jenkins*"].)

In arguing there was no error, Respondent insists that the excusal below was similar in kind and character to the excusal in *Jenkins*. (RB, pp. 46-47.) Far from assisting Respondent, *Jenkins* underscores the error here. In that case,

> Prospective Juror St. was excused for cause not because of his views regarding the death penalty, but because the trial court concluded he was *mentally incompetent* to perform the duties of a juror. The court stated: "I think he just is not competent to serve as a juror based on his answers to the questions, his answers in his questionnaire. And I'm going to exercise my discretion and excuse him . . . . I think *he's crazy*. I hate to be so blunt. I think he is mentally disturbed or mentally off and I am not going to have a mentally off juror . . . . This man is substantially impaired, mentally impaired serving as a juror . . . . My judgment is *in viewing him and listening to*

> *him and observing him,* there is something mentally wrong with him and I'm going to exercise my discretion and I'm going to excuse him." The indications on the face of the record that seem to have formed the basis for this conclusion are that the prospective juror believed that the most effective protection against crime was to rely upon an aura of light he believed surrounds each person. The prospective juror stated: "It's like it's their life energy. And this bubble of white light is like a healing light that helps to protect them." In addition, *the trial court apparently was disturbed by the prospective juror's repeated reference to following the dictates of his "inner voice." The juror could not predict the influence of this voice or intuition upon his deliberations as a juror.*

(*Id.* at 987-988 [emphasis added].) Unlike *Jenkins*, nothing in the record "fairly support[s]" the excusal here.

The trial judge below made no finding that Juror N. appeared "crazy," "mentally off," "mentally incompetent" or "mentally impaired." (*Jenkins*, 22 Cal.4th at 987.) Voir dire revealed Juror N. to be clear-headed, articulate, possessed of her faculties and plainly competent to serve. There was nothing to indicate she suffered from any "incapacity" which rendered her "incapable of performing the duties of a juror." (Cal. Civ. Proc. Code § 228(b).) She expressly denied that she would listen to or be influenced by any "inner voice." (7 RT 1624-1628.) That was, in fact, the very reason she brought up the subject of her profession: to dispel at the outset any concern that it

would interfere with her ability to hear and evaluate the evidence. (7 RT 1625.) Ironically, Juror N. thought she was being a good citizen by forthrightly seeking to address any concern that her occupation rendered her unfit to serve. Had she said nothing it is doubtful her profession would even have surfaced as an issue.[6]

She stated she received psychic information only when specifically requested to do so by a client and thus, unlike the juror in *Jenkins*, neither randomly nor unpredictably. (7 RT 1625.) She had to summon up the information consciously at the request of another, emphasizing that she was not "a mind reader." (7 RT 1625.) At trial she "wouldn't be getting any information that anybody else wouldn't be getting." (7 RT 1625.) Most importantly, she understood any "psychic information" "would not even maybe be relevant" and should be disregarded. (7 RT 1627-1628.) Her responses were dramatically different from those of the juror in *Jenkins* who saw protective bubbles of white light around people and vowed he would be guided – not by the evidence and the law – but by the "dictates of his 'inner voice.'" (22 Cal.4th at 988.)

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[6]Sadly, the excusal of Juror N. exemplifies the adage "No good deed goes unpunished."

The trial judge gave no indication his ruling was based on observations of Juror N.'s demeanor or behavior suggesting she was "crazy." Indeed, defense counsel specifically made the point that she did not exhibit conduct or behavior indicating any mental illness or defect. (7 RT 1690) No one -- neither the prosecutor nor the trial judge – disagreed with his assessment. (7 RT 1690-1691.) Nor were her responses even "conflicting or equivocal" such that the trial court's findings as to her "state of mind" would be binding on this Court. (*People v. Duenas, supra*, 55 Cal.4th at 10.) She consistently stressed that she would not receive and, in any event, would not be influenced by "psychic information." (7 RT 1624-1628.) Her responses on voir dire demonstrated she was equally as qualified to serve as any other potential juror.

It is the context in which Juror N. was excused which is of most concern, however. She had expressed doubts about the death penalty, but her answers showed, and the prosecutor acknowledged, that she could not have been challenged under *Witherspoon/Witt*. (7 RT 1619-1624, 1690.) In fact, the prosecutor's sarcastic comments reveal that she was unhappy a *Witherspoon/Witt* challenge was foreclosed. (7 RT 1689-1690 [noting Juror N. answered questions regarding the death

penalty "with the magic words"].) The purported ground for the challenge – that Juror N. admitted she made a living as a psychic – offered the prosecutor a way to get rid of a juror who might have been less willing to vote in favor of the death penalty.

Respondent urges the Court to ignore this context and consider only the stated basis for the challenge: "[E]ven if the defendant was denied a juror with scruples against the death penalty who could not have been disqualified on *Witherspoon-Witt* grounds, reversal is not required because the defendant has a right to jurors who are qualified and competent, not to any one particular juror." (RB, p. 47.) Hold on. This argument would have been foreclosed entirely had the challenge actually been based on *Witherspoon/Witt* since, if Juror N. had been challenged on that basis, the excusal would have been reversible error *per se*. (*Witherspoon, supra*, 391 U.S. at 522-523.) The result here was no different than if the prosecutor had stated her true motive for the challenge: the erroneous excusal of a juror for cause who expressed some discomfort with the death penalty that produced, in turn, "a jury uncommonly willing to condemn a man to die." (*Id.* at 521.) Mr. Henderson submits, therefore, that the standard for reversal in this case should be no different than if the prosecutor had been

forthright and actually brought the challenge under *Witherspoon/Witt*. Reversal of the penalty should be automatic.

V. THE TRIAL COURT COMMITTED *BATSON* ERROR WHEN IT EXCUSED JUROR BOWENS BECAUSE THE RECORD SUPPORTED AN INFERENCE OF DISCRIMINATION IN THE PROSECUTOR'S PEREMPTORY CHALLENGE TO HER.

A. Mr. Henderson Satisfied His Burden To Raise An Inference Of Discrimination In The Prosecutor's Peremptory Challenge To Ms. Bowens, The Only African-American Called To The Jury Box.

Respondent's opposition to Mr. Henderson's argument that the trial court erred in denying his motion based on *Batson v. Kentucky* (1986) 476 U.S. 79 ("*Batson*") and *People v. Wheeler* (1978) 22 Cal.3d 258 ("*Wheeler*") is woefully short on analysis. (See RB, pp. 47-57.) It consists largely of mere assertions that Mr. Henderson failed to establish a prima facie case of bias at the first step of the *Batson/Wheeler* framework. Saying so does not make it so.

Respondent concedes – as it must – that the trial judge applied California's prior, unconstitutional, "strong likelihood" standard for evaluating *Batson/Wheeler* claims at the first step. (RB, p. 49; see *Johnson v. California* (2005) 545 U.S. 162 ["*Johnson*"].) As a result, this Court gives no deference to the trial judge's ruling and must

review the matter *de novo*. (*People v. Edwards* (2013) 57 Cal.4th 658, 698; *People v. Avila* (2006) 38 Cal.4th 491, 553-554.)

Johnson emphasizes that the burden on Mr. Henderson at the first *Batson* step was not onerous; he was required only to point to evidence supporting an "inference of discrimination." (*Johnson, supra*, 545 U.S. at 170.) In evaluating whether Mr. Henderson met this low threshold this Court must "consider all relevant circumstances." (*Batson, supra*, 476 U.S. at 96; see also *id.* at 93-94 [whether prima facie case established is based on "totality of the relevant facts"]; *People v. Montes, supra*, 58 Cal.4th at 854.) Mr. Henderson easily satisfied his burden, the trial court erred in denying the *Batson/Wheeler* motion and this Court should reverse.

1. The undisputed facts below are alone sufficient to create an inference of discrimination in the challenge to prospective juror Bowens.

Even Respondent acknowledges that certain facts in the record support an inference of discrimination at the first *Batson* step, notably that Mr. Henderson and Ms. Bowens are both African-American and, like Mr. and Mrs. Baker, 11 of the 12 jurors and three of the five alternates were Caucasian. (RB, p. 55; see *People v. Bell* (2007) 40 Cal.4th 582, 597; *Wheeler, supra,* 22 Cal.3d at 280-281; see also

Powers v. Ohio (1990) 499 U.S. 400, 416 ["Racial identity between the defendant and the excused juror . . . may provide one of the easier cases to establish . . . a prima facie case . . . that wrongful discrimination has occurred"].)[7] Respondent cannot dispute that Ms. Bowens was the only African-American called to the jury box and that, because she was challenged, no African-Americans sat on the jury.

Nor can Respondent dispute that Ms. Bowens was well qualified to serve on the jury. She was a civic-minded juror who was active in the community, answered questions forthrightly, expressed a clear understanding of her duty to act impartially, had positive opinions of and experiences with local law enforcement and did not demonstrate strong convictions for or against the death penalty. (See generally AOB, pp.111-112.) As defense counsel indicated when making the *Batson/Wheeler* motion, had Ms. Bowens been white, it is highly unlikely that the prosecutor would have challenged her. (10 RT 2395 ["if it wasn't for the fact that she is the only black person as a potential juror, I would question whether or not she should be challenged"].) The foregoing is alone sufficient to raise an inference

[7]The remaining sitting and alternate jurors were Hispanic. (See record citations at AOB, p. 118 nn. 51, 52.)

of discrimination, but the record contains still more "relevant facts." (*Batson, supra*, 476 U.S. at 93-94.)

2. Because Ms. Bowens was the only African-American who was or could have been called to the jury box, the challenge to her raises an inference of discrimination.

The most telling evidence supporting an inference of discrimination is that the challenge to Ms. Bowens did not merely remove a single African-American juror from the panel; it insured the jury would include no African-Americans. Respondent contends that this is "pure conjecture." (RB, p. 55.) Hardly. The record is clear and undisputed on this point.

The attorneys below knew that more than 100 potential jurors were among the group being questioned, knew that only three of those prospective jurors, including Ms. Bowens, were African-American, knew the order in which the jurors would be called to the box and knew how many peremptory challenges they each had used. (10 RT 2253, 2372, 2392.) Based on that information, defense counsel stated – without contradiction by the prosecutor – that the other two African-American jurors were "back in the hundreds. . . . We all know that there is no possible way, I mean I guess it is conceivable, but it is a million to one that we would ever get to those jurors, therefore, the

only conceivably eligible juror is . . . Miss Bowens, the one who was just excused . . . ." (10 RT 2392.) The proof was in the pudding: neither of the other African-American prospective jurors had been called to the box by the time the parties exhausted their peremptory challenges. The prosecutor challenged, and knew she had challenged, the only African-American juror who had any chance of sitting on Mr. Henderson's jury. (Compare *People v. Edwards, supra*, 57 Cal.4th at 698 & n. 10 [challenge to single black juror insufficient to support prima facie case where "neither the racial composition of the jury as sworn nor the exact number of Black jurors is in the record"].)[8]

Respondent concedes that "even a single peremptory challenge because of a prospective juror's race is improper under both *Batson* and *Wheeler*" (RB, p. 55, citing *People v. Silva* (2001) 25 Cal.4th 345), but immediately reverses field, arguing that Mr. Henderson failed to establish a prima facie case because "there was no discernible pattern from which to infer discrimination." (RB, p. 55.)

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[8]This Court should not turn a blind eye to the context in which the challenge to Ms. Bowens arose. It is in part how this group of jurors was organized that reveals the prosecutor pursued the unlawful strategic goal of eliminating the only African-American who could have been selected to serve. (See *People v. Carasi, supra,* 44 Cal.4th at 1320, conc. & dis. opn. of Kennard, J.)

The law does not require the existence of a "discernible pattern" to raise an inference of discrimination.

In *Batson*, the U.S. Supreme Court "declined to require proof of a pattern or practice because '"[a] single invidiously discriminatory government act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."'" (*Johnson*, 545 U.S. at 169 n. 5.) Requiring a "discernible pattern" of unlawful challenges "would improperly sanction the use of racially motivated challenges when [as here] only one or two members of the targeted race are present in the venire." (*People v. Howard* (1992) 1 Cal.4th 1132, 1207, conc. & dis. opn. of Mosk, J.)

Numerous courts have concluded that a single challenge to a single African-American prospective juror was alone sufficient to support a prima facie case of discrimination at the first *Batson* step. (See, e.g., *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 955-956; *U.S. v. Collins* (9th Cir. 2009) 551 F.3d 914, 921-923; *Heno v. Sprint/United Management Co.* (10th Cir. 2000) 208 F.3d 847, 854; *Morse v. Hanks* (7th Cir. 1999) 172 F.3d 983, 985; *Highler v. State* (Ind. 2006) 854 N.E.2d 823, 827; *Hollamon v. State* (Ark. 1993) 846 S.W.2d 663, 666; *State v. Walker* (Wis. 1990) 453 N.W.2d 127, 135).

Furthermore, where, as here, African-Americans comprise only a tiny percentage of the community from which the jurors are selected,[9] a challenge to even one black juror is immediately suspect and may alone be sufficient to raise an inference of discrimination. (See *U.S. v. Clemons* (3d Cir. 1988) 843 F.2d 741, 748 n. 6; *State v. Walker, supra*, 453 N.W.2d at 133 n. 5.) If it were otherwise, "Black defendants would more often than not be forced to forfeit their rights under *Batson* merely because of the statistical likelihood that their jury venires would be overwhelmingly non-black." (*U.S. v. Clemons, supra*, 843 F.2d at 748 n. 6.) Similarly, where, as here, the panel from which the jury is chosen contains barely a handful of African-Americans, courts should give "close scrutiny" to a challenge to any African-American prospective juror. (*U.S. v. Collins, supra*, 551 F.3d at 921.)

The prosecutor here used a single challenge to guarantee no African-American representation on the jury which decided Mr. Henderson's fate. That may not be a "pattern," but under the circumstances it was sufficient to raise an inference of discrimination.

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[9]The record from earlier proceedings revealed that less than 2% of the jury-eligible population in the judicial district served by the trial court was African-American. (2 Supp. CT 4.)

3. This Court should not speculate regarding the prosecutor's motive for the challenge to Ms. Bowens.

It is undisputed that the prosecutor declined to offer a legitimate, non-discriminatory reason for the challenge, even when given an opportunity to do so by the trial court. (10 RT 2393-2396.) Nevertheless, Respondent asserts three times that Mr. Henderson's showing failed at the first *Batson* step because the "*trial court* noted an obvious constitutionally permissible reason for excluding Bowens." (RB, p. 56 [emphasis added]; see also *id.* at pp. 55 n. 20, 57.) That hypothetical reason was that Ms. Bowens could have been biased against law enforcement because her ex-husband had been a police officer who, decades after their marriage ended, was arrested and convicted of a crime. (10 RT 2397-2398.) The trial court's speculative reason was far from "obvious" and this Court should disregard it.

a. Speculation by trial and appellate courts at the first *Batson* step is inconsistent with settled U.S. Supreme Court precedent.

Like the court below, the trial court in *Johnson* concluded, without "an explanation from the prosecutor[,] . . . that the prosecutor's strikes could be justified by race-neutral reasons." (545

U.S. at 165.) The high court stressed that such speculation by trial courts in ruling upon a *Batson* motion at the first step is inappropriate. The *Batson* framework is intended "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Id.* [citation omitted].) Accordingly, it "'does not matter that the prosecutor might have had good reasons . . . [w]hat matters is the real reason [the jurors] were stricken.'" (*Id.* at 172, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.)

The Supreme Court pointedly noted Justice Kennard's dissent from this Court's decision in *People v. Johnson* (2003) 30 Cal.4th 1302 in which she wrote that the "proper standard for measuring a prima facie case under *Batson* is whether the defendant has identified actions by the prosecutor '*if unexplained* permit a reasonable inference of an improper purpose or motive. [Citation.] Trial judges, Justice Kennard argued, should not speculate when it is not 'apparent that the [neutral] explanation was the true reason for the challenge.'"

(545 U.S. at 168 n. 3 quoting *Johnson*, 30 Cal.4th at 1339, 1340, dis. opn. of Kennard, J. [emphasis in original].)

The same day that the Supreme Court decided *Johnson*, it also decided *Miller-El v. Dretke* (2005) 545 U.S. 231 ("*Miller-El*"). There, too, the high court emphasized that speculation by judges cannot substitute for the prosecutor's actual reasons for a challenge.

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating [the juror at issue] does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

(*Id.* at 252.)

The trial judge below can perhaps be forgiven for failing to anticipate that the Supreme Court would subsequently reject the very sort of speculation he undertook in denying Mr. Henderson's *Batson/Wheeler* motion. This Court, on the other hand, has the benefit of the high court's intervening decisions and should decline to adopt as its own the trial judge's speculation regarding the basis for the challenge to Ms. Bowens. The Court should instead heed Justice Liu's criticism of the practice of "comb[ing] the record" on appeal to "find some legitimate reason the prosecution could have had for

striking a minority juror" so as to affirm a trial court's denial of a *Batson* motion at the first step. (*People v. Harris* (2013) 57 Cal.4th 804, 872 ["*Harris*"], conc. opn. of Liu, J.)

> In such cases . . . we have [affirmed a finding of no prima facie case] by invoking possible, but not obvious, reasons that a prosecutor might have given – but did not actually give – for striking a minority juror in order to negate an inference of discrimination that would otherwise arise from the circumstances. In so doing, our *Batson* step one jurisprudence commits the very mistake that *Johnson v. California* warned against: we routinely and erroneously "rely[]on judicial speculation to resolve plausible claims of discrimination."

(*Id.* at 869, conc. opn. of Liu, J.)

Reliance upon such speculation at the first step imposes on the defendant an even greater burden of proof than the defendant bears at the third *Batson* step. At the third step, the defendant must establish that the prosecutor's "*stated* reason does not hold up." (*Miller-El*, 545 U.S. at 252 [emphasis added]; see also *Johnson*, 545 U.S. at 172.) The defendant has no obligation to show that each and every theoretical race-neutral reason is without merit. Consideration of speculative reasons at the first step not only relieves the prosecution of the obligation to offer a neutral explanation for the challenge, it effectively requires the defendant to overcome every neutral reason which can be imagined by the trial or appellate courts. It improperly

"collaps[es] a three-step analysis designed to elicit and evaluate the actual reasons for a prosecutor's strike into a one-step analysis designed to generate and validate judicially hypothesized reasons for a strike." (*Harris, supra*, 57 Cal.4th at 879, conc. opn. of Liu, J.)

b. The record demonstrates that the trial court's proposed reason for the challenge was implausible.

This Court need not conclude that a trial or appellate court may never suggest a neutral reason for a challenge in the absence of a reason proffered by the prosecution. "[T]here may be circumstances where the explanation for a prosecutor's strike of a particular juror is so obvious that there is little or no reason to think that anything else could have motivated the strike." (*Id.* at 872, conc. opn. of Liu, J.; accord: *id.* at 861, conc. opn. of Kennard, J.; *People v. Jones* (2013) 57 Cal.4th 899, 982-983, conc. opn. of Liu, J.; *see, e.g., People v. Pearson* (2013) 56 Cal.4th 393, 422 [no *Batson/Wheeler* error in peremptory challenge to African-American juror with religious scruples against the death penalty and who had made statements indicating inability to be impartial].) Contrary to Respondent's assertions (RB, pp. 56-57), this is *not* such a case.

Only the most the result-oriented analysis could conclude that the reason the trial court posited for the challenge to Ms. Bowens was "obvious." Even without reviewing the record below, it defies common sense to believe that Ms. Bowens's *former* spouse's trouble with the law 30 years after the breakup of their marriage could have caused *her* to be biased against the prosecution. That inherent implausibility is made manifest by the clear and undisputed record on voir dire.

Counsel and the trial judge thoroughly questioned Ms. Bowens about her ex-husband, and she repeatedly said that, although she was aware of his legal problems, his arrest and conviction decades after their marriage ended would have no effect on her ability to act as a juror. (7 RT 1510-1511, 1515-1518.)

> THE COURT: And I assume when it was in the papers that you read about that incident?
> ...
>
> MS. D. B.: No. I try not to read things like that. I just don't want to get involved with it, and so I tried very much to stay, keep my focus on something else, but I knew of it, yes, I did.
>
> THE COURT: Is there anything about that situation and the fact that it involved your ex-husband or anything at all that you can think of that would affect in any way any decision you might be asked to make in this case?
>
> MS. D. B.: No, it would not.

(7 RT 1516-1517.)

Her answers on voir dire and on her juror questionnaire also revealed that she counted law enforcement personnel, other than her ex-husband, among her friends and acquaintances. (7 RT 1511, 1568-1569; 27 CT 7393.) She confirmed that her relationships with law enforcement personnel would give "a law enforcement witness . . . neither a leg up nor a strike against them." (7 RT 1511.) There was nothing to the contrary in the record.

Any merit the trial court's speculation may have had in the abstract – there was none – simply evaporates in light of the record. Ms. Bowens gave no indication she would have been biased against the prosecution as a result of her ex-husband's arrest and conviction. To conclude otherwise requires an almost willful disregard of her answers on voir dire. Particularly when coupled with a comparative juror analysis, as discussed below, the conclusion becomes inescapable that the trial court's proffered explanation for the challenge was not just speculative, it was completely implausible and that Mr. Henderson established a prima facie case of discrimination.

4. Applying comparative juror analysis in this case underscores that Mr. Henderson established a prima facie case of bias in the challenge to Ms. Bowens.

Respondent urges this Court to refrain from a comparative analysis of Ms. Bowens and other jurors. (RB, p. 56, citing *People v. Carasi*, *supra*, 44 Cal.4th at 1295-1296.) The Court should undertake such an analysis because doing so demonstrates that Mr. Henderson met his burden to show an inference of discrimination.

a. Comparative juror analysis is relevant to the inquiry into whether Mr. Henderson has met his burden at the first *Batson* step.

Comparative juror analysis "flows logically from the United States Supreme Court's statements that, in determining whether a party has made a prima facie case that the opposing party has challenged a prospective juror because of race a court should consider 'all relevant circumstances.'" (*Harris, supra,* 57 Cal.4th at 862, conc. opn. of Kennard, J.) "Many courts have recognized the relevance of comparative juror analysis at *Batson's* first stage." (*Id.* at 875, conc. opn. of Liu, J. [collecting cases].)

This Court has never held that comparative juror analysis on appeal from denial of a *Batson/Wheeler* motion at the first step is *per*

se improper and, in fact, has occasionally engaged in such analysis. (See *Harris, supra,* 58 Cal.4th at 836-837; *People v. Cornwell* (2005) 37 Cal.4th 50, 71-72.) This Court has, instead, noted that comparative juror analysis on appeal is generally *not* justified if "the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any." *(People v. Bell* (2007) 40 Cal.4th 582, 600-601; see also *People v. Lenix* (2008) 44 Cal.4th 602, 622 n. 15.) Here, of course, the trial court *did* offer the prosecutor the opportunity to give a reason for the challenge and, when the prosecutor declined, the trial court *did* "hypothesize" such a reason. Even under this Court's prior decisions, therefore, a comparative juror analysis is justified.[10]

In fact, Respondent's repeated assertion that the trial court's hypothesized explanation for the challenge is "obvious" cries out for a comparative analysis. Whether a purported neutral explanation offered by a trial court is "obvious," merely possible or entirely implausible often will not be self-evident. Context matters. A reason which may appear "obvious" in the abstract becomes far less so if that same reason could as easily have applied to jurors who were not

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[10]In addition, trial counsel effectively invited a comparison between Ms. Bowens and other jurors. (10 RT 2395.)

challenged.[11] "[T]he purpose of the *Batson* inquiry," Justice Liu has written

> is to ensure that the actual reasons for striking a minority juror are not discriminatory, not to invite courts to guess at possible reasons. Where, as here, the record discloses only possible but not obvious reasons for the strike of a minority juror, a court should not conclude on that basis – in the face of other circumstances suggestive of discrimination – that the defendant failed to establish a prima facie case. And in determining how likely or obvious it is that a hypothesized reason was the prosecutor's actual reason for the strike, a court must consider "all relevant circumstances" bearing on the prosecutor's motives, including comparative juror analysis.

(*Harris, supra,* 57 Cal.4th at 879, conc. opn. of Liu, J.) Accepting as a permissible basis for a challenge a hypothetical reason offered only by the trial court, while rejecting comparative juror analysis on appeal, "employ[s] judicial speculation in a conspicuously lopsided way" since a comparative analysis would "inform[] the explanatory power of any hypothesized reason for a strike." (*Id.* at 869, conc. opn. of Liu, J.)

Use of comparative juror analysis at the first *Batson* step is thus "dictated by logic and fairness" (*id.* at 875, conc. opn. of Liu, J.), especially where, as here, a court has hypothesized a purportedly

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[11]Conversely, a hypothetical reason that applies only to the challenged juror and to none of the other jurors may be more credibly considered a permissible basis for the challenge. (*People v. Jones*, *supra*, 57 Cal.4th at 983, conc. opn. of Liu, J.)

neutral reason for the challenge. Neither the trial court, Respondent nor this Court should, on the one hand, rely upon the allegedly "obvious" neutral reason for the challenge in assessing whether Mr. Henderson has raised an inference of discrimination and then, on the other hand, reject evidence that white jurors with similar experiences, attitudes and answers were not challenged and were permitted to sit in judgment.

b. Comparative juror analysis reveals that the trial court's proffered reason for the challenge to Ms. Bowens is implausible and demonstrates that Mr. Henderson raised an inference of discrimination.

If this Court is not yet convinced that the trial court's hypothetical reason for the challenge to Ms. Bowens was simply implausible, comparative juror analysis should dispel any lingering doubt. Such an analysis also provides persuasive evidence that raises at least an inference of bias in the challenge. The record reveals there are "fit subject[s] for comparison" (*People v. Bell, supra,* 40 Cal.4th at 601) with Ms. Bowens: sitting jurors who had prior experiences with law enforcement that could have raised questions about their willingness and ability to be impartial when listening to the testimony of law enforcement witnesses.

As shown in the AOB, jurors two and four gave answers during voir dire and on their juror questionnaires that revealed they had had more direct, more recent, more personal and substantially more negative experiences with law enforcement than had Ms. Bowens, and yet their statements that those experiences would not adversely affect their impartiality were accepted at face value without further inquiry. (See generally AOB, pp. 129-135.) Ms. Bowens, on the other hand, had had only positive personal interactions with law enforcement and she specifically stated that her former spouse's legal troubles 30 years after their marriage ended would not affect her ability to be impartial. (27 CT 7393; 7 RT 1510-1511, 1515-1518, 1546, 1568-1569.) "[N]othing she said indicated a predisposition toward the defendant or a bias against the government." (*U.S. v. Collins, supra*, 551 F.3d at 922-923.)

Nor was there anything else in the record that would have justified the challenge to Ms. Bowens when compared to other jurors. Her attitude toward the death penalty was similar to that of jurors two and four and virtually identical to that of jurors three, five, seven and eight. (AOB, p. 135.) She and jurors two and four expressed identical views with respect to the qualities and attitudes jurors should

and should not display. (5 CT 1385; 14 CT 3863; 27 CT 7392.) All three agreed that being charged with a crime did not equate to guilt and that guilt had to be determined by the evidence. Each of them stated that they could be fair and impartial in judging the defendant or witnesses, even if they "disagree[d] with the type of lifestyle" adopted by the defendant or witness. (5 CT 1396; 14 CT 3874; 27 CT 7403.) They each gave remarkably similar responses to questions regarding the continued existence of racism in American society and their own racial attitudes. (Compare responses to Question nos. 143, 144 at 5 CT 1398-1399, 14 CT 3876-3877 with 27 CT 7405-7406.) In the end, the only distinguishing characteristic between these jurors and Ms. Bowens was the one which cannot lawfully be considered: the color of their skin.

Comparative juror analysis reveals that the trial court's speculative reason for the excusal of Ms. Bowens is thus "logically implausible" (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1182) and should carry no weight in determining whether Mr. Henderson satisfied his burden at the first *Batson* step. Ms. Bowens "should have been an ideal juror in the eyes of the prosecutor seeking a death sentence, and the [trial court's hypothesized] explanations for the

strike cannot reasonably be accepted." (*Miller-El, supra*, 545 U.S. at 247.) The "totality of the relevant facts" in this record, including a comparative juror analysis, establishes that Mr. Henderson met his burden to raise an inference of discrimination. The trial court's conclusion that Mr. Henderson failed to make out a prima facie case was, therefore, error.

B. The Trial Court's Error Should Be Reversible Per Se.

Respondent contends that, even if the trial court erred, the appropriate remedy is not outright reversal, but a limited remand to permit the trial court to conduct steps two and three of the *Batson/Wheeler* framework. (RB, p. 57.) Not so fast. Respondent has glossed over – has failed even to discuss – the considerations which compel complete reversal.

While it is true, as Respondent states, that this Court ordered a limited remand as a remedy for the *Batson* error in *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104, this Court did not hold that a limited remand is mandatory in every case. Nor can such a limited remand be squared with more recent U.S. Supreme Court authority.

Faced with a *Batson* motion, a trial judge must "assess the plausibility of [the prosecutor's] reason [for the peremptory challenge]

in light of all the evidence with a bearing on it." (*Miller-El, supra,* 545 U.S. at 252; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 478 ["*Snyder*"] [court must evaluate "all of the circumstances that bear upon" the challenge].) The third *Batson* step, in particular, "involves an evaluation of the prosecutor's credibility and the 'best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.' In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance." (*Snyder, supra,* 552 U.S. at 477.) Such nuanced considerations led the high court in *Snyder* to decline to order a remand for *Batson* error because there was no "realistic possibility" that the "subtle question of causation could be profitably explored on remand at this late date, more than a decade after petitioner's trial." (*Id.* at 486; see *People v. Carasi*, *supra*, 44 Cal.4th at 1333 n. 8, conc. & dis. opn. of Werdegar, J.) What the Court said in *Snyder* is especially apt here.

Mr. Henderson's trial occurred 13 years before this Reply Brief was filed.[12] According to the State Bar website, neither the prosecutor, Dianna Carter, nor lead defense counsel, Clark Head, is now practicing law in Riverside County. (http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch.) The trial judge, the Hon. Thomas Douglass, has apparently retired.[13] There is at least a chance that the relevant participants from 2001 will not even be able to be gathered together. But even if they could make themselves available, there is no realistic possibility that the prosecutor will be able to recall whatever reason she may have had in 2001 for the challenge. Any reason she might propose at this late date would "reek[] of afterthought." (*Miller-El, supra*, 454 U.S. at 246.) The passage of time also makes it very unlikely that Mr. Henderson's trial counsel will be able to recall the facts sufficiently to "point[] out where the prosecutor's purported justifications might be pretextual or

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[12]Oral argument and decision are not likely to occur until 14 or 15 years after the trial.

[13]Judge Douglass is not listed on the Judicial Council's roster of judges nor is he listed by the Riverside County Superior Court. (http://www.courts.ca.gov/2998.htm; http://www.Riverside.courts.ca.gov/judicialassignments.pdf.) Judicial notice of the State Bar, Judicial Council and Riverside Superior Court websites is requested. (Evid. Code §§ 459, 452(c), (d), (h); *Smith v. State Bar* (1989) 212 Cal.App.3d 971, 975.)

indicate bad faith." (*Ayala v. Wong* (9th Cir., Feb. 25, 2014) 2014 U.S. App. LEXIS 3699, *53 [en banc].)

Most important of all, it is inconceivable that the trial judge could project himself backward in time a decade and a half to "evaluate not only whether the prosecutor's demeanor belie[d] a discriminatory intent, but also whether [Ms. Bowens's] demeanor [could] credibly be said to have exhibited the basis for the strike [which will be] attributed" to her. (*Snyder, supra,* 552 U.S. at 477.) And, how will the judge weigh the apparent similarities between Ms. Bowens and the jurors who were not challenged? Surely he cannot be expected to recall the answers and demeanor of those other jurors as well.

Given the high likelihood that none of the participants will recall the facts as they existed in 2001, it is not difficult to imagine how a limited remand in this case would actually play out. The prosecutor could be expected to adopt the reason for the challenge originally hypothesized by the trial judge. And the trial judge, having posited that reason in the first instance, could be counted upon to find it persuasive, notwithstanding the other facts in the record suggesting

bias. This would make a mockery of the *Batson* inquiry and the Court should not be party to it, even indirectly.

There is yet another reason why the Court should reverse without a limited remand. Trial counsel brought the motion below based on *Wheeler*. (10 RT 2392.) While that was sufficient to preserve the claim under *Batson* (*People v. Lancaster* (2007) 41 Cal.4th 50, 73), *Wheeler* is an independent state law basis for objecting to the peremptory challenge. (*People v. Johnson, supra,* 38 Cal.4th at 1105, conc. opn. of Werdegar, J.) *Wheeler* error is reversible *per se*. (*Wheeler*, 22 Cal.3d at 283 ["prejudicial per se"]; see also *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [same]; *People v. Snow* (1987) 44 Cal.3d 216, 227 [same and noting delay of six years since trial would preclude trial court from assessing basis for challenge]; *People v. Hall* (1983) 35 Cal.3d 161, 170-171 [same and noting trial three years previous].) Although *Wheeler* sets forth a more demanding standard than *Batson* (*Johnson*, 545 U.S. at 168, 173), for all the reasons discussed above, Mr. Henderson submits that he met even this higher threshold and has demonstrated that it was more likely than not the prosecutor engaged in invidious discrimination in the challenge to Ms. Bowens.

The record below demonstrates that Mr. Henderson satisfied his burden of establishing a prima facie case of discrimination and there is no basis upon which to order a limited remand. The Court can and should find that the error here was reversible per se.

VI. MR. HENDERSON UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL DURING A POLICE INTERROGATION AND THE TRIAL COURT ERRED IN FAILING TO EXCLUDE INCRIMINATING STATEMENTS HE MADE FOLLOWING THE INVOCATION.

During his custodial interrogation, Mr. Henderson exercised his right to counsel protected by *Miranda v. Arizona* (1966) 384 U.S. 436 ("*Miranda*") and *Edwards v. Arizona* (1981) 451 U.S. 477 ("*Edwards*") when, in response to a question, he said, "Uhm, there's some things that I, uhm, want uh . . . want uh, want to speak to an attorney first, because I, I take responsibility for me, but there's other people that . . . I need to find out. I need to find out." (5 CT 1177-1178; 10 RT 2292.) Officer Wolford, one of the interrogating officers, understood Mr. Henderson's statement to mean that he "wanted to talk to an attorney about something." (10 RT 2324.) All questioning should have ceased immediately; but the interrogators pressed on until Mr. Henderson incriminated himself. The trial court should have suppressed the incriminating statements; it did not.

Notwithstanding Officer Wolford's admission that he knew Mr. Henderson wanted to consult counsel, Respondent, like the trial court and the prosecutor, contends that Mr. Henderson's statements were ambiguous, that a reasonable officer would not have known Mr. Henderson was asserting his right to counsel, and thus, that the police were justified in continuing to question him until he incriminated himself. (See *Davis v. United States* (1994) 512 U.S. 452 ["*Davis*"]; RB, pp. 66-67.) Respondent, like the trial court and the prosecutor, is wrong. The trial court's error was prejudicial by any standard and requires that the conviction and sentence be reversed.

A. Mr. Henderson's Invocation Of His Right To Counsel Was Unequivocal And Unambiguous.

1. Mr. Henderson's invocation of his right to counsel was unequivocal on its face and the interrogating officers knew he wanted to speak with counsel.

In arguing that Mr. Henderson's statements were ambiguous and equivocal, Respondent ignores the principle that Mr. Henderson was required to do no more than make "'some statement that [could] reasonably be construed to be an expression of a desire for the assistance of an attorney.'" (*Davis*, 512 U.S. at 459.) If a "reasonable police officer" would have understood his statement to be a request

for counsel, then all questioning had to cease. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

That test is easily met here since the words "I want to speak to an attorney first . . . I need to find out. I need to find out" cannot reasonably be construed to mean anything other than that Mr. Henderson wanted to speak to a lawyer before continuing because there was information he needed from counsel. Although Mr. Henderson was not required to "'speak with the discrimination of an Oxford don'" (*Davis, supra*, 512 U.S. at 459), he did a pretty good job of making himself clear. Nothing about his statement would have been "unclear, ambiguous, or confusing to a reasonable police officer." (*Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 789.) Nor is it necessary for this Court to look very far to determine what a "reasonable officer" would have understood Mr. Henderson to mean; one of the interrogating officers testified he knew Mr. Henderson "wanted to talk to an attorney about something." (10 RT 2324.) "This is not a case where the officers or the court were left scratching their heads as to what [Mr. Henderson] meant." (*Anderson, supra*, 516 F.3d at 787.)

Mr. Henderson's request for counsel, and the interrogating officer's admission that the police understood he was requesting counsel, should have been dispositive in the trial court and it should be equally dispositive here. Mr. Henderson invoked his right to counsel; all questioning should have ceased; his post-invocation incriminating statements should have been suppressed.

2. A comparison of Mr. Henderson's statement to the statements of defendants in other cases demonstrates that his request for counsel was unequivocal and unambiguous.

In arguing that Mr. Henderson's invocation of the right to counsel was ambiguous, Respondent merely refers the Court to statements discussed in four other cases, as if it should be self-evident that Mr. Henderson's invocation is equivalent to the statements in those cases. (See RB, pp. 66-67 citing *People v. Crittenden* (1994) 9 Cal.4th 83 ["*Crittenden*"], *People v. Bacon* (2010) 50 Cal.4th 1082 ["*Bacon*"]; *People v. Williams* (2010) 49 Cal.4th 405 ["*Williams*"]; and *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203 ["*Sauceda-Contreras*"]). Far from assisting Respondent, those cases demonstrate that Mr. Henderson's assertion of his right to counsel was *un*ambiguous and *un*equivocal.

In *Crittenden*, the defendant asked a question of the interrogating officers: "Did you say I could have a lawyer?" (9 Cal.4th at 123.) This was not an assertion but an inquiry, and did not reveal whether defendant actually wanted a lawyer or was merely contemplating the possibility of obtaining counsel.

The defendant in *Bacon* said, "I think it'd probably be a good idea for me to get an attorney." (50 Cal.4th at 1104.) Though closer to an assertion than the statement in *Crittenden*, the defendant's statement in *Bacon* could have meant only that he was "thinking out loud" and had yet to decide he actually wanted counsel.

Respondent takes a statement in *Williams* ["I want to see my attorney 'cause you're all bullshitting now"] out of context. As this Court held, the statement in *Williams* was an "expression of frustration and . . . game playing" (49 Cal.4th at 432) that came in the midst of an increasingly agitated exchange between the defendant and the police. Furthermore, the defendant's statement was followed immediately by direct, clarifying questions from the interrogators intended to elicit from the defendant whether he wished to meet with counsel; the defendant declined and specifically agreed to continue talking without counsel. (*Id.* at 431-432, 433.)

Lastly, the defendant in *Sauceda-Contreras* stated, "If you can bring me a lawyer, that way I[,] I with who ... that way I can tell you everything I know and everything I need to tell you and someone to represent me." (55 Cal.4th at 206-207.) This Court's discussion of why the statement was not an unequivocal assertion of the right is worth quoting at some length.

> Defendant's response to Officer Trapp's question whether he wanted to speak with Detective Blazek "right now" was conditional, ambiguous, and equivocal. It was conditional in that it began with an inquiry as to whether a lawyer *could* be brought to defendant. By responding "[*i*]*f you can* bring me a lawyer ..." (italics added), defendant was expressly asking the officer whether a lawyer could be brought to him, and impliedly asking whether one could be provided *right now*, given that the officer had asked him if he would speak with Detective Blazek "right now." It was equivocal in that defendant went on to plainly state his intent and desire to waive his right to remain silent and "tell you everything that I know and everything that I need to tell you," but then ended his response ambiguously with the words "and someone to represent me." From an objective standpoint, a reasonable officer under the circumstances would not have understood defendant's response to be a clear and unequivocal request for counsel. *For that reason, the officers were justified in seeking to clarify defendant's intent.*

(*Id.* at 219 [emphasis added].)

What Mr. Henderson said during his interrogation was markedly different from any of the statements in the cases cited by Respondent. He said, "there's some things that I want . . . want to

speak to an attorney first.... I need to find out. I need to find out." (5 CT 1177-1178.) This statement was not ambiguous. Unlike any of the statements in the cases relied upon by Respondent, Mr. Henderson's statement was, on its face and objectively understood, a direct, declarative expression of Mr. Henderson's desire to speak to a lawyer before questioning continued.

The statement was not equivocal. Mr. Henderson wanted to speak with counsel "first," *i.e.*, before answering further questions, because he "need[ed] to find out" some information. Unlike the defendant in *Bacon*, he was not merely musing over whether he should speak to a lawyer. And unlike the defendants in *Sauceda-Contreras* and *Williams,* he did not state that he would continue to talk without counsel present.

The statement was not conditional. Mr. Henderson did not ask "if" he could speak to a lawyer. Nor was he merely inquiring whether and when he might speak to counsel. (Compare *Crittenden*, *supra,* 9 Cal.4th at 123; *Sauceda-Contreras, supra,* 55 Cal.4th at 206-207; see also *People v. Suff, supra*, 58 Cal.4th at 1067-1068 [invocation not unequivocal where defendant said, "If I'm being charged with this I think I need a lawyer"]; *People v. Tully* (2012) 54 Cal.4th 952, 989-

991 [context indicated defendant only wanted to speak with counsel before being given a polygraph test].)

His statement was not a sign of frustration, an angry outburst or a challenge to the interrogators. Mr. Henderson said little before his invocation and what he did say revealed that he was despondent. (5 CT 1176-1178.) As he invoked his right to counsel the interrogators twice interrupted him but, unlike in *Williams* and *Sauceda-Contreras*, they asked no clarifying or follow up questions about whether he truly wished to consult counsel or whether he was willing to talk without the presence of counsel. (5 CT 1178 *et seq.*) In fact, follow up questions were unnecessary; Mr. Henderson had made his wishes known and Wolford admitted he and the other interrogators knew full well what Mr. Henderson wanted: "to talk to an attorney about something." But they continued nonetheless, intent on pursuing the interrogation without regard to Mr. Henderson's invocation of his right to counsel.

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B. Even If Honestly Held, The Interrogating Officers' Subjective Belief About Why Mr. Henderson Wished To Speak With Counsel Was Not Relevant To The Objective Inquiry Into Whether He Had Invoked His Right To Counsel.

Respondent argues that the interrogating officers' subjective belief about *why* Mr. Henderson wanted to speak with counsel should be considered in analyzing whether a reasonable officer would have understood Mr. Henderson to be requesting the assistance of counsel. (RB, pp. 64, 66.) According to Respondent, "the officers thought Henderson did not want to get other people in trouble so he wanted to talk with an attorney on their behalf before he answered the officers' questions. This was clear based on the officer's subsequent remarks in which they told Henderson they were not interested in him getting other people in trouble." (RB, p. 64.) This argument fails.

The inquiry under *Davis* is objective and asks only *whether* a reasonable officer would have understood that the defendant had unambiguously expressed his desire to speak with counsel. "The focus of the test . . . is the clarity of the defendant's request, not the particular officer's belief . . . ." (*People v. Suff, supra*, 58 Cal.4th at 1069.) As this Court has explained:

> [T]he question of ambiguity in an asserted invocation must include a consideration of the communicative aspect of the invocation--what would a *listener* understand to be the defendant's meaning. The high court has explained--in the context of a postwaiver invocation--that this is an objective inquiry, identifying as ambiguous or equivocal those responses that "a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel."

(*Williams, supra*, 49 Cal.4th at 428 [citations omitted; emphasis in original].)

To be sure, "[i]n certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends." (*Id.* at 429 [emphasis in original].) But this principle has no application here since it was undisputed that the officers understood what Mr. Henderson meant: "he wanted to talk to an attorney about something." (10 RT 2324.) They should have ceased their questioning immediately.

Absent statements that, objectively understood, expressly limit the circumstances under which the defendant has requested counsel, the police must presume that invocation of the right to counsel applies to all subjects about which they may wish to question the defendant. Two cases in particular underscore this principle.

In *Connecticut v. Barrett* (1987) 479 U.S. 523, the defendant "told the officers that he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident." (*Id.* at 525.) Objectively understood, the defendant had made a limited request for counsel, drawing a clear distinction between oral and written statements. (*See also Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 864 [defendant unequivocally stated he did not want to speak on tape]; *People v. Tully, supra*, 54 Cal.4th at 990-991 [defendant's request for counsel applied only "if required to submit to a polygraph test"].) Subsequently, in *Arizona v. Roberson* (1988) 486 U.S. 675, the high court emphasized that *Barrett* is applicable only where the defendant has expressly limited the request for counsel and held that invocation of the right to counsel with respect to one offense applies equally to any other offense the police wished to question about if the defendant remains in custody.

> Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation; unless he otherwise states, see *Connecticut v. Barrett, supra*, there is no reason to assume that a suspect's state of mind is in any way investigation-specific.

(*Id.* at 684.)

Even if, "in context," the officers were legitimately unsure what subject matter Mr. Henderson wished to discuss with counsel, it is of no moment. The accused has a right to consult with counsel generally, not simply the right to consult with counsel on a prescribed list of topics. Unless the defendant himself expressly and objectively limits the circumstances in which he wishes to consult counsel, a suspect's right to counsel during an interrogation is presumed to apply to "any questions" the police may wish to pose. (*Id.*)[14]

If, in determining whether a defendant had unambiguously invoked the right to counsel, the court could consider the interrogators' subjective belief as to why the defendant had requested counsel, the police could easily avoid the *Miranda/Edwards* rule

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[14] Why the defendant has invoked his right to counsel is privileged and not a valid concern of police interrogators. (Cf. *Fisher v. United States* (1976) 425 U.S. 391, 403 ["Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged"]; *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751 ["[I]f an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney"].) Any inquiry into why the defendant wished to consult counsel would invariably risk invasion of the attorney-client privilege since the court would be called upon to consider whether the subject the defendant wished to discuss with counsel was or was not within the scope of the interrogators' line of questioning.

merely by asserting that they thought the defendant wanted to talk with counsel about something other than the specific subject matter at hand. This would permit the state to dictate the subjects regarding which the defendant could legitimately request counsel and would result in an endless inquiry into the interrogating officer's subjective state of mind, including the officer's veracity and whether he or she held a good faith belief that the defendant did not want to discuss the "relevant" subjects with counsel. The objective inquiry into whether the defendant had made "'some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney'" (*Davis*, 512 U.S. at 459) would be rendered a dead letter.

And even if the officers' professed belief about why Mr. Henderson requested counsel was entirely accurate that still has no bearing on whether his invocation of the right to counsel was unequivocal. There are plenty of good reasons why, before answering further questions, Mr. Henderson might have wanted guidance from counsel regarding the involvement, if any, of other people in the events leading up to, during and after the crime. (See discussion at AOB, pp. 161-162.) Advice from counsel could have provided him critical information pertinent to his defense based on third party

culpability or assured him that he could discuss others without directly involving them or offered the possibility of a plea bargain in return for information leading to the arrest of others. But the really critical point is this: why Mr. Henderson wanted to speak with counsel was *his* business. If he made his desire to speak with counsel clear – as he indisputably did – then his reasons for doing so were irrelevant insofar as the *Miranda/Edwards/Davis* inquiry is concerned.

One final point must be made regarding Respondent's argument. Respondent contends that the officers thought Mr. Henderson wanted to speak to counsel "on behalf" of third parties. (RB, p. 64.) Respondent's contention is an after the fact effort to mischaracterize what Mr. Henderson said and for which there is no support in the record. Mr. Henderson did not state he wanted speak with counsel "on behalf" of others, the officers did not testify that that is what they thought he meant, the trial court made no finding that that is what he meant and, in any event, for all the reasons discussed above, Mr. Henderson's reasons for wanting to speak with counsel was none of the interrogators' concern.

Because the officers reasonably would have understood, and in fact did understand, that Mr. Henderson had invoked his right to

counsel they were obligated to cease questioning. Because they did not cease questioning, the trial court was obligated to suppress Mr. Henderson's inculpatory statements. Because the trial court failed to suppress the statements, it erred.

C. The Trial Court's Error Was Prejudicial.

Respondent's argument that any error was not prejudicial fares no better than its argument that there was no error. Reduced to its essence, Respondent's argument is that, because other evidence of guilt existed, the unlawfully admitted statements cannot have been prejudicial. That is not the test.

Respondent has the burden of establishing that the error was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) "[E]rror in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." (*Id.*) To satisfy its burden, Respondent was required to show that the "'verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Neal* (2003) 31 Cal.4th 63, 86 quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [emphasis in original].) "To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant

in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, overruled on other grounds, *Estelle v. McGuire* (1991) 502 U.S. 62, 72 n. 4.) Respondent has not met, and cannot meet, its burden.[15]

1. This case does not fall within the narrow group of cases in which an erroneously introduced confession might constitute harmless error.

It is only in a very limited group of cases that erroneous introduction of a confession will be harmless beyond a reasonable doubt. An erroneously admitted confession might be harmless "(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which

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[15] "[T]he burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict lies with the 'beneficiary of the error,' namely the state. [Citations omitted.] Under *Chapman*, it is not the defendant's burden to show that the error *did* have adverse effects; it is the state's burden to show that the error *did not* have adverse effects. Because it may be difficult to determine whether a particular error contributed to the jury's verdict given the counterfactual nature of the inquiry, 'the allocation of the burden of proving harmlessness can be outcome determinative in some cases.' (*Gamache* [*v. California* (2010)] 562 U.S. __ at p.__ [131 S.Ct. [591] at p. 593] statement of Sotomayor, J.).)" (*People v. Jackson* (2014) 58 Cal.4th 724, 793, conc. and dis. opn. of Liu, J. [empasis in original].)

the prosecution introduced, in addition to the confession, a videotape of the commission of the crime . . . ." (*People v. Cahill* (1993) 5 Cal.4th 478, 505; accord: *People v. Neal, supra*, 31 Cal.4th at 86.) For example, in *People v. Gonzalez* (2012) 210 Cal.App.4th 875, the court concluded an erroneously admitted confession was not prejudicial where the trial court had not relied heavily on the confession in determining guilt, multiple eyewitnesses corroborated the finding of guilt and the defendant had made other incriminating statements before receiving *Miranda* warnings.

Respondent has not even tried to argue that this case falls within the narrow range of cases identified in *People v. Cahill* – and for good reason. It does not. This alone is sufficient to establish that the error was not harmless. (*People v. Neal, supra*, 31 Cal.4th at 87.)

2. The record demonstrates that the erroneous admission of Mr. Henderson's statements was otherwise not harmless beyond a reasonable doubt.

Respondent's breezy and perfunctory argument that Mr. Henderson's inculpatory statements were mere makeweights in an otherwise overwhelming case is unavailing. (See RB, pp. 67-68.) As discussed in detail in the AOB (pp. 167-175), Mr. Henderson's statements, especially as summarized by Officer Wolford, were

essential to the prosecution case. So much so, that the parties invested substantial time and expense before and during the trial in addressing the interrogation. (See discussion at AOB, pp. 8-9, 38-46.) Defense counsel moved to suppress the statements before the preliminary hearing, then renewed the motion at trial. The entire case was delayed for months while efforts were made to enhance the tape recording. (1 CT 245; 2 CT 301-303.) Multiple and competing transcripts of the interrogation were created by both sides in the case; portions of the transcript were made exhibits and provided to the jury. (5 CT 1171 *et seq.*; Court Exhs. 6, 7, 8, 9, 10 and 11; Def. Exhs. Q, R.)

The prosecutor described the alleged confession in her opening statement (11 RT 2463-2464), played the recording of the interrogation for the jury and questioned Wolford at length about it during her case-in-chief (15 RT 3363-3409; 16 RT 3590-3610; People's Exhs. 154A-C). Unlike any other testimony, the confession, as relayed to the jury by Wolford, described the crime and its aftermath in detailed fashion and as the work of Mr. Henderson and Mr. Henderson alone. The prosecutor referred to the incriminating statements repeatedly during her closing argument. (See 19 RT 4268-4270, 4280-4287, 4319.) She used Mr. Henderson's statements to

particular effect in explaining away the most important weakness in her case: Mrs. Baker's repeated failure to identify Mr. Henderson as the perpetrator. (19 RT 4319 ["[H]ere's Mrs. Baker under the kind of stress that we've talked about. . . and we're going to say because she didn't recognize . . . that he had a little mustache and she couldn't say, in fact she thought that he didn't. Well, let's just throw this case out that window and Mr. Henderson's confession out the window because, you know, clearly that tells us the defendant wasn't there"].)

Recognizing the significance of the interrogation to the prosecution's case, defense counsel questioned Detective Wolford meticulously and at length about the interrogation. (16 RT 3480 *et seq.*; 18 RT 4001-4010.) He also called an expert to testify to his efforts to enhance the audio recording of the interrogation and offered competing transcripts of versions of the recording to bolster the third party culpability defense. (18 RT 4011-4029; Def. Exhs. Q, R.; Court Exhs. 10, 11.)

Absent Mr. Henderson's incriminating statements during the interrogation the prosecutor would have had a much steeper hill to climb to obtain a conviction. There was no physical evidence which placed Mr. Henderson at the scene of the crime. (See discussion and

record citations at AOB, p. 26.) The key prosecution witness, Mrs. Baker, could not and did not identify him as the perpetrator. (2 CT 447, 453-456; 12 RT 2772-2773; 13 RT 2821-2822, 2826-2827; 16 RT 3576-3578; 3 Supp. CT 15-16.) Mrs. Baker recalled the perpetrator as being clean shaven; other witnesses said that at the time of the crime Mr. Henderson wore a mustache or goatee. (11 RT 2484, 2548-2549; 14 RT 3067, 3083; 18 RT 4103-4104.) Another eyewitness, Officer Elders, failed to identify Mr. Henderson as the driver of the Bakers' car the day after the crime. (12 RT 2706-2707.) Other witnesses from the evening of and day after the crime testified to facts that established, at best, that Mr. Henderson was involved in the crime somehow, but did not establish that he was the perpetrator. (11 RT 2541-2542, 2564-2565; 12 RT 2709-2727, 2731-2734, 2750-2757, 2787; 3 Supp. CT 25-29.)

Witnesses who testified to other incriminating statements allegedly made by Mr. Henderson lacked credibility or were subject to attack on cross-examination. Gregory Clayton, who testified that Mr. Henderson confessed to him in the week or so after the crime, was a felon and professional snitch interested only in getting a reward for turning in Mr. Henderson. He told multiple, different, and hopelessly

inconsistent versions of Mr. Henderson's "confession." (See AOB, pp. 27-34; 13 RT 2927-2928, 2963-2964, 2965; 14 RT 3046.) Officer Griffith testified that he overheard Mr. Henderson say, "I'm sorry, I didn't mean to kill him" during a conversation Mr. Henderson had with his mother and aunt. (15 RT 3318.) But the portion of the audiotape where this statement would otherwise have been found is "unintelligible." (15 RT 3324-3325; 39 CT 10546.) Mr. Henderson's aunt contradicted Officer Griffith, insisting that Mr. Henderson did not make the incriminating statement. (15 RT 3290-3295, 3302.) Without his statements during the interrogation in evidence, it is extremely unlikely Mr. Henderson would have felt compelled to testify in his own defense. (*People v. Neal, supra*, 31 Cal.4th at 87.)[16]

In the absence of his incriminating statements, the jury could more easily have believed that third parties were involved. That, in turn, would have made it more likely that the special circumstances

[16]Undoubtedly, Mr. Henderson's decision to testify in his own defense did not help his cause. But two points need to be made. First, the narrative Mr. Henderson relayed to the jury about the events that evening was consistent with his third-party culpability defense; he did not deny being present that evening, but denied both that he was alone and that he went inside the Bakers' home. (17 RT 3788-3807.) Second, his acknowledgement on cross-examination that he had said the words attributed to him in the interrogation (18 RT 3970-3976) was an admission he had made the statements, not an admission that the statements were true.

would not have been found true. (See discussion at AOB, pp. 173-174.) Mr. Henderson's statements to the police, on the other hand, pegged him as the sole perpetrator of the crimes and corroborated in detail Mrs. Baker's written narrative of the crime – despite her repeated failure to identify him as the perpetrator. His statements to the police thus served two critical purposes for the prosecution: they offered the jury a way out of the inconsistencies and holes in the prosecution case and overcame whatever merit Mr. Henderson's third party culpability defense may have had.

Significantly, even with his inculpatory statements in evidence the jury struggled in reaching a verdict. The judge made a point of noting that the jury expressed interest in the third party culpability defense. (20 RT 4426.) Before reaching a verdict, the jury deliberated for more than seven and one-half hours over two days, and asked to review Mrs. Baker's testimony. (20 RT 4401-4407; 39 CT 10723-10726A, 10818; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours of deliberations demonstrated that issue of guilt was not "open and shut" and strongly suggested that errors in admission of evidence were prejudicial]; *see also People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour jury deliberations were "graphic demonstration of

the closeness of [the] case"].) The jury's difficulties with the evidence suggest strongly that without his statements to the police in evidence the jury could easily have reached a different verdict. The prejudice from the erroneous admission of Mr. Henderson's statement to the police is therefore apparent.

VII. THE TRIAL COURT ERRED IN ADMITTING MRS. BAKER'S WRITTEN ACCOUNT OF THE CRIME AS PAST RECOLLECTION RECORDED.

A. Mr. Henderson Has Not Forfeited His Challenge To The Admissibility Of Mrs. Baker's Testimony As Past Recollection Recorded.

Citing *People v. Blacksher* (2011) 52 Cal.4th 769 and *People v. Cowan* (2010) 50 Cal.4th 401, Respondent makes the puzzling claim that, because trial counsel did not renew his objection under Evidence Code § 1237 when Mrs. Baker's preliminary hearing testimony was played for the jury, Mr. Henderson has forfeited his argument that an inadequate foundation was laid for Mrs. Baker's testimony by way of past recollection recorded. (RB, p. 70.) Respondent's argument lacks merit.

Mrs. Baker's preliminary hearing testimony was videotaped. (11 RT 2491-2492; People's Exhibit 16B.) Before she read her written account of the crime at the preliminary hearing, trial counsel

objected that her testimony "d[id]n't come within the requirements of 1237." (2 CT 441.) The trial court immediately overruled the objection because "the foundation ha[d] been laid." (2 CT 441.) Mrs. Baker subsequently died, and counsel stipulated at trial that she was unavailable. (11 RT 2492.) Her unavailability permitted the videotape of her preliminary hearing testimony to be played to the jury as her trial testimony. (11RT 2491-2493; Evid. Code §§ 1290, 1291.)

With respect to the objection based on Evidence Code § 1237, the trial court and counsel had the following exchange:

> THE COURT: . . . I may be being overly cautious, but I see from the prelim transcript that we are now coming to a discussion and objection about the testimony, and I overruled it under 1237. Ordinarily, for example, when a reporter reads back testimony, she deletes objections and discussions. I assume that this camera captured that. . . . Can we fast forward passed [sic] that, or is there no objection to the jury hearing it?
> ...
> MR. HEAD: Well, I don't think the jury needs to hear it. Can we fast forward it?. . .
>
> MS. CARTER: I don't have a problem with fast forwarding beyond it.
>
> . . . I looked at the videotape last night, and I do recall Mr. Head making his objection, stating the grounds, the Court overruling that.
>
> . . .

> THE COURT: It is not very much, and I don't believe it would be of real import if the jury were to hear it. It is just that we ordinarily don't do that.

(11 RT 2493-2495.)

It is obvious from the exchange that the trial court, the prosecutor and defense counsel all proceeded from the premise that the objection made at the preliminary hearing had been preserved. The trial court analogized the videotape to testimony which had been given before the jury and was merely being read back, a process in which intervening objections and discussions were typically redacted. (11 RT 2493.) The trial court also entertained the possibility that the objection and related discussion might be played before the jury – just as if it were occurring at the trial in real time. (11 RT 2495.) Both scenarios properly treated the videotape as if Mrs. Baker's testimony were being given for the first time during trial, and rightly so. The videotape was Mrs. Baker's trial testimony. During that testimony defense counsel objected under Evidence Code § 1237 and the trial court overruled the objection. This was sufficient to preserve the issue for appeal. (See Evid. Code § 353 [requiring objection at trial to preserve claim for review].)

Furthermore, because trial counsel objected that an inadequate foundation had been laid under Section 1237 before Mrs. Baker read the statement, the cases cited by Respondent are inapposite. In *People v. Blacksher, supra*, trial counsel had not objected to the witness's testimony at the preliminary hearing. His subsequent failure to object when the preliminary hearing testimony was offered at trial thus forfeited the issue on appeal. (52 Cal.4th at 805.) In *People v. Cowan, supra*, the defendant forfeited his challenge to the testimony on appeal because he had not objected in the trial court on the same grounds as those asserted on appeal. (50 Cal.4th at 465-466.) Neither of those cases governs the circumstances here.

Nor should trial counsel have been required to object again to the very same testimony on the very same grounds before the very same judge, as it would undoubtedly have been futile. The trial judge noted that he had overruled the objection when made and gave no indication he was inclined to change his ruling. (11 RT 2493.) No purpose would have been served by trial counsel repeating the objection before the videotape was played. (Cf. *People v. Chatman* (2006) 38 Cal.4th 344, 380 [objections to certain questions preserved

claim on appeal with respect to similar questions because further objection would have been futile].) There was no forfeiture.

B. The Prosecutor Failed To Lay A Proper Foundation For The Written Account As Past Recollection Recorded.

Respondent mischaracterizes Mr. Henderson's argument that Mrs. Baker's written account was not admissible as past recollection recorded. Mr. Henderson did not argue, as Respondent claims, that Mrs. Baker's written account was inadmissible because she had written it down too far in the past. (RB, p. 70.) Mr. Henderson argued, instead, that the prosecutor failed to demonstrate at trial that Mrs. Baker had an "insufficient present recollection" of the facts she read into the record. (AOB, pp.188-193; Evid. Code § 1237(a).)[17] The length of time between the witness's recordation of the recollection and the witness's testimony does not even become an issue unless and until the "first requirement" under Section 1237 has been met, *i.e.,* that the witness cannot remember the facts about which he/she is being questioned. (*People v. Cowan, supra*, 50 Cal.4th at 465; see also *People v. Alexander* (2010) 49 Cal.4th 846, 909-910

[17] The trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203, 207.)

[hearsay evidence inadmissible as past recollection recorded because no showing that witness "had 'insufficient present recollection to enable [her] to testify fully and accurately' about that statement"].)

And, to insure that the "first requirement" is satisfied, the witness must testify "that he is unable to refresh his memory or testify independently therefrom." (*People v. Butcher* (1959) 174 Cal.App.2d 722, 728; see also *People v. York* (1966) 242 Cal.App.2d 560, 566-567 [efforts to refresh witness's recollection failed; therefore, sufficient foundation to show lack of present recollection].)

The prosecutor below made no effort to show, and did not show, that Mrs. Baker had a complete failure of recollection of each and every fact which was recounted in her written account. At no point did Mrs. Baker say that she could not remember what had occurred or that her memory could not be refreshed. At best, the record reflects that her memory may have been fuzzy on some details. That was not a sufficient basis upon which to admit her testimony by way of past recollection recorded. (*People v. Alexander, supra*, 49 Cal.4th at 909-910.) Furthermore, even if there was an adequate showing of "insufficient present recollection" as to one or more facts – and Mr. Henderson submits there was not – it was error to admit the

written account "in its entirety" because the prosecution failed to show that Mrs. Baker had a failure of recollection "as to all matters" described in the written account. (*People v. Hefner* (1981) 127 Cal.App.3d 88, 97.)

Stated succinctly, the prosecutor did not satisfy the foundational requirements for admission of the written account as past recollection recorded and its admission into evidence was plainly error.[18]

C. Respondent's Brief Does Not Otherwise Require Any Reply Regarding The Admission Of Mrs. Baker's Diary As Past Recollection Recorded.

Respondent's contentions that admission of Mrs. Baker's written account as past recollection recorded did not violate the Confrontation Clause and that Mr. Henderson was not prejudiced by admission of the written statement into evidence require no reply. Both of those issues have been adequately addressed in the AOB and those arguments are incorporated by reference. (See pp. 193-207.)

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[18]Respondent also claims that Appellant has "concede[d]" in a footnote in the AOB that this Court previously, and adversely, decided the issues raised regarding Section 1237. (RB, p. 70.) Once again, Respondent is incorrect. The footnote (AOB, p. 193, n. 63) referred to this Court's previous decisions regarding *Confrontation Clause* challenges to the admissibility of past recollection recorded. Neither the footnote nor Mr. Henderson's alleged "concession" addressed the state law foundational requirements for admissibility of past recollection recorded under Section 1237.

VIII. MR. HENDERSON'S SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES WAS VIOLATED WHEN A PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY OF MR. BAKER TESTIFIED TO THE CONTENTS OF THE AUTOPSY REPORT.

A. Introduction.

1. Summary of argument.

Relying primarily on this Court's decision in *People v. Dungo* (2012) 55 Cal.4th 608 ("*Dungo*"), Respondent argues that Mr. Henderson's rights under the Confrontation Clause of the Sixth Amendment were not violated when Dr. Cohen – who did not perform the autopsy on Mr. Baker – testified to the findings and the conclusions in the autopsy report authored by Dr. Garber. As discussed below, even under *Dungo*, Respondent's arguments do not withstand analysis.[19]

The autopsy report was "testimonial" by any measure. The findings in the autopsy report were offered for their truth, both the findings and the conclusions in the report were conveyed to the jury, the report possessed the requisite formality and solemnity to be testimonial and its primary purpose was for a criminal investigation.

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[19] Before calling Dr. Cohen to testify, the prosecutor made no showing that Dr. Garber was unavailable. (See generally 11 RT 2597-2598; 15 RT 3228.)

(*Dungo, supra*, 55 Cal.4th at 619.) As the pathologist's notes now before the Court reveal,[20] critical information existed that would have provided a basis for cross-examining *Dr. Garber* with respect to how *he* conducted the autopsy and the conclusions *he* reached – the very reasons why the Confrontation Clause requires that witnesses such as Dr. Garber be present in court to testify. In fact, the notes suggest the very disturbing possibility that they were altered to bolster the prosecution case. None of this was or could have been explored, however, because Dr. Garber was not called to testify. The error in admitting Dr. Cohen's testimony, particularly in light of the autopsy notes now before the Court, was prejudicial.

Finally, Respondent's odd argument that Mr. Henderson somehow invited error by failing to object to Dr. Cohen's testimony does not hold water and must be rejected. Trial counsel's desire to

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[20] Respondent has asked the Court to take judicial notice of that portion of the Coroner's file comprised of the autopsy report itself and Dr. Garber's related notes. (Request for Judicial Notice, dated March 20, 2013; see *Dungo, supra*, 55 Cal.4th at 615 n. 3 [judicial notice of autopsy report].) Mr. Henderson has no objection to Respondent's request for judicial notice, but has submitted herewith a request for judicial notice ("Henderson RJN") of the entire Coroner's file obtained by habeas counsel in post-conviction discovery. (See Exh. A to Henderson RJN.)

have Dr. Garber's opinion before the jury cannot be construed as inviting the error caused by Dr. *Cohen's* testimony.

2. Newly-revealed facts.

The autopsy report, attached to Respondent's Request for Judicial Notice, dated March 20, 2013, consists of the formal, typed, three-page report, entitled "Autopsy Protocol," and is accompanied by an "Autopsy Checklist," a "Body Diagram," "Autopsy Notes" and "Examination Notes," each of which is a pre-printed form containing handwritten information.

The Autopsy Protocol ("Protocol") is set out on a form bearing the seal of the Riverside County Coroner's office. It reveals that the autopsy was witnessed by Officer Wolford and "I. D. tech" Aguilar from the Cathedral City Police Department, a deputy Coroner, another Coroner employee, and two deputy district attorneys, including the lead prosecutor, Dianna Carter. (Protocol, p. 8.) The Protocol includes an "Anatomic Summary," "Conclusion: (cause of death)" and "Other Conditions." (*Id.*, p. 6.) The causes of death are listed as "Suspect cardiac arrhythmia" and "Atherosclerotic cardiovascular disease." "Incised wound to neck" is listed under "Other Conditions." Pages seven and eight of the Protocol describe the various findings in

detail, and the Protocol concludes with the following "Opinion" regarding the cause of death.

> On the basis of the autopsy findings, it is evident that this 71-year old man suffered from severe atherosclerotic cardiovascular disease which resulted in a sudden suspected cardiac arrhythmia which resulted in his demise. In addition, a contributing factor was the incised wound to the neck.

The Protocol is signed and dated by Dr. Darryl Garber, M.D., "Forensic Pathologist." (*Id.*, p. 8.) In addition, the Coroner's Investigation Report concludes that "[b]ased on autopsy findings and the results of the investigation, the death of Reginald Victor Baker was classified as the result of a homicide." (Exh. A to Henderson RJN, p. 3.)

In the Examination Notes, the "Causes of Death" are stated in unidentified handwriting as: "Suspect Cardiac Arrythmia [sic]" and "Artheroscleratic [sic] Cardiovascular Disease." Immediately beneath that section of the document is a line entitled: "OSC." On that line, in the same handwriting, the author wrote "Artheroscleratic [sic] Cardiovascular Heart Disease." Those words are crossed out and the word "NONE," in the same handwriting, has been substituted. Immediately to the right of the word "NONE" – in unidentified, but

plainly different handwriting – are the words: "Incised Wound To Neck." (Protocol, p. 13.)

3. Recent case law.

After Mr. Henderson filed the AOB, and in the wake of the U.S. Supreme Court's decisions in *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*") and its progeny, including *Davis v. Washington* (2006) 547 U.S. 813 ("*Davis*"); *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 ("*Melendez-Diaz*"); *Bullcoming v. New Mexico* (2011) 564 U.S.__, 131 S.Ct. 2705 ("*Bullcoming*"); and *Williams v. Illinois* (2012) 567 U.S.__, 132 S.Ct. 2221 ("*Williams*"), this Court decided *Dungo*, *supra; People v. Lopez* (2012) 55 Cal.4th 569 ("*Lopez*"); and *People v. Rutterschmidt* (2012) 55 Cal.4th 650, each of which addressed whether the Confrontation Clause had been violated by expert testimony in those cases. *Dungo* is most relevant on its facts.

In *Dungo*, this Court surveyed the fractured opinions in the high court's recent Confrontation Clause jurisprudence and discerned two criteria that had to be met before a hearsay statement would be considered "testimonial," thereby implicating the Confrontation Clause.

> First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution. The high court justices have not, however, agreed on what the statement's primary purpose must be.

(55 Cal.4th at 619.)

From this the starting point, this Court considered whether the autopsy report at issue in *Dungo* was testimonial and concluded that it was not for two reasons. First, the testifying pathologist did no more than relay the autopsy findings before giving his own opinion regarding the cause of death; he did not testify to the conclusions of the pathologist who performed the autopsy. The autopsy findings lacked the formality and solemnity necessary for testimonial statements because they "merely record objective facts [and] are less formal than statements setting forth a pathologist's conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature." (*Id.* at 619-620; see also *People v. Rodriguez* (2014) 58 Cal.4th 587, 644 [pathologist's observation that child decedent had two teeth prior to death not testimonial].) In a concurring opinion, which garnered the support of

a majority of this Court, Justice Werdegar stressed that "the high court has looked to the degree of formality and structure of the circumstances in which the statement was made, using this analysis to help determine whether the statement is akin to the products of ex parte examinations." (*Dungo*, 55 Cal.4th at 623, conc. opn. of Werdegar, J.)[21]

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[21]More recently still, in *People v. Edwards, supra,* 57 Cal.4th 658, this Court stated that, despite the distinction it had drawn in *Dungo* between findings and conclusions in the autopsy report, it has "never decided" whether conclusions in an autopsy are testimonial. (*Id.* at 706 & n. 12.) Although the expert in *Edwards* gave an opinion "consistent" with the non-testifying pathologist's conclusions, the Court did not reach the question of whether the expert's testimony in that respect violated the Confrontation Clause because any error was harmless. (*Id.* at 707.)

Whether this Court's distinction between findings and conclusions is consistent with the high court's recent Confrontation Clause decisions is open to question. Writing for a five-member majority in *Bullcoming, supra*, Justice Ginsberg emphasized that the Confrontation Clause does not differentiate between observable facts and scientific conclusions:

> "Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. [Citation.] Could an officer other than the one who saw the number on the house or gun present the information in court--so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'"

Second, the primary purpose of the autopsy findings in *Dungo* was not to assist in a criminal prosecution. An autopsy "serve[s] several purposes, only one of which [is] criminal investigation. The report itself [is] simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Dungo,* 55 Cal.4th at 620.) Accordingly, "criminal investigation [is] not the *primary* purpose" for an autopsy report. (*Id.* at 621 [emphasis in original]; see, e.g., *People v. Rodriguez, supra*, 58 Cal.4th at 644 [primary purpose not criminal investigation when decedent's family

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(131 S.Ct. at 2714-2715; see also *Melendez-Diaz, supra*, 557 U.S. at 315-316 [rejecting argument that lab analyst's report not testimonial because it contained "near-contemporaneous" observations of scientific fact]; *Dungo*, 55 Cal.4th at 639-640, dis. opn. of Corrigan, J.; *Edwards, supra*, 57 Cal.4th at 769-770, conc. & dis. opn. of Corrigan, J.)

Nor is there a bright line that can easily be drawn between autopsy findings and conclusions, as a single example from this case demonstrates. The "Anatomic Summary" in the Protocol states that Mr. Baker suffered from "Atherosclerosis, generalized, severe" and one of the "Conclusions" is "Atherosclerosis cardiovascular disease." (Protocol, p. 6.) So, when Dr. Cohen testified that the autopsy report reflected that the arteries of Mr. Baker's "heart were significantly narrowed or occluded with atherosclerosis" (15 RT 3237) was he testifying to the finding of atherosclerosis or to the conclusion? Surely it had elements of both, as the report itself reflects: atherosclerosis is shorthand for an observable physical condition, but it is also a medical conclusion based on that observable physical condition.

"likely" used autopsy report in wrongful death action].) Concurring, Justice Werdegar explained that

> [a] statement should also be deemed more testimonial to the extent it was produced through the agency of government officers engaged in a prosecutorial effort, and less testimonial to the extent it was produced for purposes other than prosecution or without the involvement of police or prosecutors. ...[T]estimonial character depends, to some extent, on the degree to which the statement was produced by or at the behest of government agents for use in a criminal prosecution

(*Dungo*, 55 Cal.4th at 625-626, conc. opn. of Werdegar, J.)

B. The Autopsy Report In This Case Was Testimonial.

Despite superficial similarities between this case and *Dungo*, the autopsy report here should be considered testimonial. (Compare *People v. Edwards, supra*, 57 Cal.4th at 707 [defense conceded that *Dungo* foreclosed a Confrontation Clause challenge to pathologist testimony regarding autopsy findings].) At a minimum, the conclusions in the Protocol, which were relayed to the jury by Dr. Cohen, should be considered testimonial.

Unlike in *Dungo*, the "circumstances in which" the autopsy here was conducted (*Dungo*, 55 Cal.4th at 623, conc. opn. of Werdegar, J.) supplied both the "formality and solemnity" necessary for the report, including its findings, to be considered testimonial

evidence and demonstrated that the primary purpose of this autopsy was a criminal investigation.

1. The autopsy findings were offered for their truth.

"The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford*, 541 U.S. at 60 n. 9.) A threshold question, therefore, is whether Dr. Cohen presented the autopsy findings for their truth. He undoubtedly did, as Mr. Henderson argued in the AOB. (See pp. 224-225.) Respondent does not contend otherwise – and for good reason.

A majority of the justices in *Williams, supra,* concluded that the DNA analysis underlying the opinion of the testifying expert in that case had been offered for its truth and was not merely non-hearsay "basis evidence." (132 S.Ct. at 2256-2259, conc. opn. of Thomas, J.; *id.* at 2268-2272, dis. opn. of Kagan, J. [joined by Justices Sotomayor, Ginsberg and Scalia].) And, in *Dungo*, at least six members of this Court expressly agreed that the underlying findings in the autopsy report had been offered for their truth. (55 Cal.4th at 627, conc. opn. of Werdegar, J. [joined by Cantil-Sakauye, C.J., Baxter, J. and Chin, J.]; *id.* at 635 n. 3, dis. opn. of Corrigan, J. [joined by Liu, J.]; see also

Lopez, supra, 55 Cal.4th at 584 ["undisputed" that laboratory analysis in that case offered for its truth]; *People v. Archuleta* (2014) 225 Cal.App.4th 527, 531 [noting that a majority of the U.S. Supreme Court in *Williams* and of this Court in *Dungo* concluded the underlying facts had been offered for their truth]; *People v. Mercado* (2013) 216 Cal.App.4th 67, 89 & n. 6 [same]; Mnookin, *Expert Evidence And The Confrontation Clause After Crawford v. Washington* (2007) 15 J.L. & Pol'y 791, 822-823.)[22]

So it is here. To prepare for his testimony, Dr. Cohen reviewed the Protocol, the autopsy notes, the police reports and certain photographs. (15 RT 3231-3235.)[23] He had a copy of the autopsy report with him during his testimony and described for the jury what "Dr. Garber did and what he found." (15 RT 3235, 3244.) He gave a detailed description of the various findings in the autopsy report, including the external and internal examinations of the body, testimony which not only tracked the autopsy report itself, but which

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[22]Since this case was a jury trial, even the plurality in *Williams* might conclude that the autopsy findings had been offered for their truth. (See 132 S.Ct. at 2240, 2241 & n. 11.)

[23]In *Dungo*, photographs taken at the autopsy were not admitted into evidence. Here, at least certain of the photographs taken at the autopsy were before the jury. (See 15 RT 3225-3227, 3233-3235 [discussing People's Exhs. 90, 91, 92].)

closely tracked Dr. Garber's preliminary hearing testimony covering the same subjects. (Compare 15 RT 3235-3238 with Protocol, pp. 6-8 and 2 CT 524-527.) No witness other than Dr. Cohen testified to, and no other evidence described, Mr. Baker's underlying health condition.[24]

Unless the jury believed that Mr. Baker's underlying heart condition was extremely severe, there would have been insufficient evidence to support the prosecution theory that stress, including specifically stress caused by the otherwise non-fatal knife wound, triggered Mr. Baker's heart attack. The very purpose of Dr. Cohen's description of Mr. Baker's physical condition, as revealed in the autopsy report, was to establish that Mr. Baker was "a set-up for sudden death." (15 RT 3240.) Thus, as noted in the AOB (pp. 224-225), the jury was instructed to consider whether the facts underlying the expert's opinion had been proven. (19 RT 4353-4354; 29 CT 10758 [CALJIC 2.80].)

The findings in the autopsy report which Dr. Cohen related to the jury were offered as truthful and essential factual preconditions for

[24] While certain photographs of the body from the scene and from the autopsy were in evidence, those photographs simply depicted the external injuries to Mr. Baker. (See People's Exhs. 13, 33, 34, 37, 91, 92; 15 RT 3225-3227, 3233-3235.)

the opinion regarding the cause of death. "[A]dmission of the out-of-court statement in this context ha[d] no purpose separate from its truth; the factfinder [could] do nothing with it *except* assess its truth and so the credibility of the conclusion it serve[d] to buttress." (*Williams*, 132 S.Ct. at 2269, dis. opn. of Kagan, J; see also *id.* at 2257, conc. opn. of Thomas, J.)

2. The autopsy report satisfied the requirement of formality and solemnity.

The "structure of the circumstances" in which the autopsy was performed and the Protocol was prepared satisfy the requirement of formality and solemnity. (*Dungo*, *supra*, 55 Cal.4th at 623, conc. opn. of Werdegar, J.) To begin with, the Riverside County Coroner's Office currently describes its functions in terms that emphasize the formality and solemnity of its autopsy reports, particularly in homicide investigations. The Coroner's official website states:

> Homicide autopsies are done in a special room, which is designed to limit access and protect any evidence recovered. A viewing area is provided for any law enforcement in attendance. ¶ The Forensic Pathologists do not take their position lightly. They know their reports can, in many cases, provide the evidence to lock up a suspect or set one free.

(See www.Riversidesheriff.org/Coroner/forensics.asp.)[25]

The forensic pathologists "do not take their position lightly" specifically because their reports may contribute to a criminal conviction. There is no reason to suppose that the pathologists took their role any less seriously in 1997 when the autopsy of Mr. Baker was performed.

This already heightened degree of formality and solemnity was elevated still further by the presence of the investigating police officer, a criminalist, and two representatives of the district attorney's office – including the prosecutor who tried this case – to observe the autopsy. (Compare *People v. Edwards, supra,* 57 Cal.4th at 707 [single criminalist attended autopsy]; *Dungo, supra*, 55 Cal.4th at 620 [single police officer attended autopsy].) While the attendance of law enforcement personnel is especially pertinent to whether the report was prepared as part of a criminal investigation (see *infra*), the fact that four members of the law enforcement team chose to witness this autopsy emphasized the importance and gravity attached to it.

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[25]Judicial notice of the information on the Coroner's official website is requested. (Cal. Evid. Code §§452(c), (h), 459.) Unlike the current practice in Riverside County, Mr. Baker's autopsy was performed at a mortuary under contract with the Coroner's Office. (Exh. A to Henderson RJN, p. 2.)

The format of the Protocol itself reflects its formality. It is signed, as required by law, by Dr. Garber, identifying himself as "Forensic Pathologist." The Protocol is presented under the seal of the Riverside County Coroner's Office; the seal is illustrated, *inter alia*, with the scales of justice and a law enforcement badge. The findings, as well as the Opinion, are each set forth under a heading written in bold, capital letters. Each section is plainly included as one essential part of the overall, formal report.

Although Dr. Garber did not sign the report under penalty of perjury or specifically refer to its admissibility under any rule of evidence (*Lopez*, 55 Cal.4th at 578; *Dungo*, 55 Cal.4th 623, conc. opn. of Werdegar, J.), sworn statements under oath are not required for evidence to qualify as testimonial. (See *Bullcoming, supra*, 131 S.Ct. at 2717.) Thus, the absence in the autopsy report of such express indicia of testimonial evidence ought not to be of constitutional dimension. (E.g., *Davis, supra,* 547 U.S. at 826 ["[W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition"]; *Williams*, *supra*, 132 S.Ct. at 2276, dis.

opn. of Kagan, J. [criticizing Justice Thomas's view that Confrontation Clause "'regulates only the use of statements bearing "indicia of solemnity"'" as "grant[ing] constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections"].)

In any event, the law itself cloaks the autopsy report with formality and solemnity. Pursuant to Cal. Gov't Code § 27491, the coroner has a "duty" to "inquire into and determine the circumstances, manner and cause of death" in homicide cases. (See also *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277.) California evidence law creates a presumption, *for purposes of the burden of proof*, that Dr. Garber's "official duty," *i.e.*, the conduct of the autopsy and the preparation of the autopsy report, was "regularly performed." (See Evid. Code § 664; *People v. Wader* (1993) 5 Cal.4th 610, 661.) No oath, affirmation or reference to evidentiary rules was necessary since the law presumes, in effect, that the statements made in the autopsy report were "true and correct." (*Cf.* Cal. Civ. Proc. Code § 2015.5.)

Significantly, in his testimony before the jury, Dr. Cohen stated that the purpose of the autopsy was to "*certify* the cause of death and

manner of death." (15 RT 3229 [emphasis added].) Dr. Cohen's choice of words is telling. Characterizing the autopsy as "certify[ing]" the cause and manner of death revealed not only his own view of the formality and solemnity of the process, it reflected his attempt to impress upon the jury the weightiness and significance of the autopsy generally. When Dr. Cohen relayed to the jury what "Dr. Garber did and what he found," he was telling the jury that the autopsy report, including its findings, was "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford*, 541 U.S. at 51.)

3. The primary purpose of the autopsy report was to assist the criminal investigation in this case.

The "primary purpose" of the autopsy report regarding Mr. Baker was the criminal investigation into his death. This Court's view that since an autopsy can have multiple purposes or uses none of those purposes is "primary" (*Dungo, supra,* 55 Cal.4th at 620) is too narrow a construction of the term "primary." For a statement to be testimonial under the high court's precedents, the "primary purpose" of the statement need only be to "establish or prove past events *potentially* relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at 822 [emphasis added].) Moreover, "primary" does not mean

exclusive, sole or only. "'Primary' is defined as '[f]irst or highest in rank, quality, or importance; principal.' American Heritage Dictionary 1393 (4th ed. 2000); see also Webster's Third New International Dictionary 1800 (2002) (defining 'primary' as 'first in rank or importance'); 12 Oxford English Dictionary 472 (2d ed. 1989) (defining 'primary' as '[o]f the first or highest rank or importance; that claims the first consideration; principal, chief')." (*Brown v. Plata* (2011) ___ U.S.___, 131 S.Ct. 1910, 1936.)

Autopsies may have multiple purposes, but criminal investigations are the most or at least among the most important as the Riverside County Coroner's Office website reveals.[26] The following "Frequently Asked Question" is included there:

> Q. Why are autopsies performed?
>
> A. There are a number of reasons why autopsies are performed. However, the *basic reasons* are to determine the medical cause of death and *to gather evidence for presentation in a court of law.*

(www.Riversidesheriff.org/Coroner/faqs.asp [emphasis added].) It bears mentioning in this context that in 1999, just 18 months after the

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[26] As noted above, Riverside County treats homicide autopsies differently from others. They are now performed in a "special room" to "limit access and protect any evidence recovered" and to permit law enforcement personnel to observe the conduct of the autopsy. (www.Riversidesheriff.org/Coroner/forensics.asp.)

autopsy here, and two years before this case went to trial, the Riverside County Coroner's office was merged with, and subsumed under, the Office of the Riverside County Sheriff. (See www.Riversidesheriff.org/Coroner.) This merger of functions only underscored the already close relationship between criminal law enforcement and the Coroner's office.[27]

There was substantial law enforcement involvement in the conduct of Mr. Baker's autopsy. (*Dungo*, 55 Cal.4th at 625-626, conc. opn. of Werdegar, J.) As discussed above, the autopsy here was particularly critical for the criminal investigation. A Coroner's investigator visited the crime scene and prepared a report of the investigation. (Exh. A. to Henderson RJN, pp. 1-3.) The Coroner requested that the suspected weapon be brought to the autopsy. (*Id.*, p. 17.) The Coroner's Investigation Report makes the link to this criminal investigation clear. In addition to describing the crime scene itself, the Investigation Report concludes that "[b]ased on autopsy findings and the results of the investigation, the death of Reginald Victor Baker was classified as the result of a homicide." (Exh. A to Henderson RJN, p. 3.) Most importantly, unless there was a causative

[27]Judicial notice of the referenced pages from the Coroner's official website is requested. (Cal. Evid. Code §§ 452(c), (h), 459.)

link between Mr. Baker's death and the burglary, robbery and superficial knife wound felony murder could not have been charged nor would this case have been a capital case. Little wonder then that *four* law enforcement personnel observed this autopsy: the investigating officer and a criminalist from the Cathedral City Police Department and two deputy district attorneys from the Riverside County District Attorney's Office, including the prosecutor who tried this case. (Protocol, p. 8; compare *Dungo, supra*, 55 Cal.4th at 620; *Edwards, supra*, 57 Cal.4th at 707.)

The autopsy in this case occurred following the transport of Mr. Baker's body from a crime scene, resulted in a determination that the death was a homicide, was essential to whether Mr. Baker's death could be charged as felony murder, and was observed by multiple law enforcement personnel. It strains credulity to say that the autopsy of Mr. Baker did not have as its primary purpose investigation into a crime.

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4. The conclusions in the autopsy report as to which Dr. Cohen testified should be considered testimonial.

When, in *Dungo*, this Court stated that the pathologist's "expert conclusions" are more formal than the findings (55 Cal.4th at 619), it had no occasion to consider whether the conclusions in the autopsy report were testimonial since the testifying pathologist had not conveyed the report's conclusions to the jury. (*Id.*) This case squarely presents the question whether testimony regarding the conclusions in an autopsy report implicates the Confrontation Clause. The answer is yes. Even if the Protocol as a whole was not testimonial, the conclusions were.

a. Dr. Cohen repeated Dr. Garber's conclusions.

Although Dr. Cohen appeared to provide his "own" opinion regarding the cause of death, in fact he did little more than repeat, with perhaps some embellishing, the opinion expressed by Dr. Garber in the Protocol and during the preliminary hearing. Dr. Cohen opined that Mr. Baker died "primarily from heart disease" and that his fatal heart attack was brought about by the stress of the crime, including specifically the otherwise superficial "incised wound to the neck." (15 RT 3239-3242.) This opinion was entirely consistent with Dr.

Garber's Opinion expressed in the Protocol and during his preliminary hearing testimony. Dr. Garber concluded that Mr. Baker died of a heart attack caused by heart disease and that the wound to the neck was a contributing factor. At the preliminary hearing, he so testified and then agreed that "being tied up and having his throat cut" could have caused Mr. Baker to suffer a heart attack. (2 CT 528; see also 11 RT 2598 [prosecutor states Dr. Cohen's testimony would be consistent with Dr. Garber's].) In other words, although Dr. Cohen did not expressly state that he was repeating Dr. Garber's opinions, that is, in fact, what he did.

b. The conclusions were testimonial.

In addition to the reasons discussed in subsection 3, above, demonstrating the autopsy report as a whole was testimonial, there are additional reasons specifically applicable to the conclusions.

The conclusions in the autopsy report met the test of formality and solemnity because the opinion regarding the cause of death is ultimately the reason for the autopsy. As this case reveals, it is the conclusion, even more so than the findings, which "can, in many cases, provide the evidence to lock up a suspect or set one free." (www.Riversidesheriff.org/Coroner/forensics.asp.)

The pathologist's observations undoubtedly require special training and experience, but the conclusions reflect the pathologist's professional expertise and judgment. (See *U.S. v. Ignasiak* (11th Cir. 2012) 667 F.3d 1217, 1232 ["the observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy"].) The opinion regarding cause of death also comes draped in the solemnity of an official governmental pronouncement. When Dr. Cohen told the jury that the purpose of an autopsy is to "certify" the cause and manner of death, he was emphasizing that the conclusion was more than the opinion of a medical professional, it was the opinion of a medical professional cloaked with the authority and dignity of the state. This gave the conclusions the requisite formality and solemnity to be testimonial.

And, more so than most cases, the conclusions here had as their primary purpose a criminal investigation. Mr. Baker's death was not caused by an obvious outside event or agent, such as a gunshot wound or strangulation or poison – circumstances easily comprehended by a jury. The immediate cause of death was a heart attack resulting from Mr. Baker's underlying severe heart disease – a heart attack which

indisputably could have happened without the crime. (15 RT 3238, 3243.) The prosecution had to link that heart attack to the crime. The necessary link which made this both a felony murder and a capital case was provided by the pathologist's expert conclusions, originally expressed by Dr. Garber and then repeated by Dr. Cohen, that the stress Mr. Baker felt during the crime itself, caused in no small part by the incised wound to the neck, led to the heart attack. It is not too much to say that this conclusion by a governmental official *was* the prosecution's theory of the case and provided the essential testimony to convict Mr. Henderson of capital murder.

The conclusion in the autopsy report was undoubtedly testimonial within the meaning of the Confrontation Clause.

C. Mr. Henderson Was Prejudiced Because Permitting Dr. Cohen To Provide "Surrogate Testimony" For Dr. Garber Foreclosed Cross-Examination Of Dr. Garber Regarding Disturbing Discrepancies In The Autopsy Report.

Mr. Henderson was prejudiced by not having Dr. Garber available for cross-examination. The high court has emphasized that confrontation is intended to permit

> "cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the

> conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

(*Maryland v. Craig* (1990) 497 U.S. 836, 845, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243.)

Specifically as it pertains to forensic testimony, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz, supra*, 557 U.S. at 319.) This case illustrates in particularly stark fashion why permitting one pathologist to give "surrogate testimony" (*Bullcoming, supra*, 131 S.Ct. at 2710) for the pathologist who actually performed the autopsy violates the Confrontation Clause.

When the prosecutor revealed that Dr. Cohen, rather than Dr. Garber, would testify, defense counsel expressed concern because he wanted to be able to ask questions regarding the autopsy report itself and suggested he had several areas of inquiry he could have pursued if Dr. Garber had testified. (11 RT 2597, 2598.) The prosecutor sought to allay those concerns by stating that Dr. Cohen's testimony would not contradict Dr. Garber's opinions. (11 RT 2598.) The trial court told counsel that he would "certainly be permitted to cross-examine" Dr. Cohen about the report, including any inconsistency between Dr.

Cohen's testimony and the report. (11 RT 2597-2598.) All true enough; but beside the point. "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming, supra*, 131 S.Ct. at 2716.) "Defendant had the right to cross-examine [Garber] on the methods and reasoning *he* used. It is ultimately the jury's role to evaluate the credibility of the person who drew the conclusions and decide for itself whether to accept them." (*People v. Edwards, supra*, 57 Cal.4th at 771-772, conc. & dis. opn. of Corrigan, J. [emphasis in original]; compare *People v. Rodriguez, supra,* 58 Cal.4th at 634 [expert's testimony did not violate Confrontation Clause where pathologist and toxicologist who performed forensic analysis upon which expert's opinion was based were available for cross-examination].)

The record now reveals that the autopsy report – which was not originally part of the record on appeal – contains a disturbing discrepancy that would have provided fruitful grounds for cross-examination of Dr. Garber and raises the distinct possibility that the report was altered to enhance the prosecution case. As described

above, the Examination Notes show that someone wrote "NONE" in the space reserved for other conditions and then *someone else* inserted the words "incised wound to neck." (Examination Notes, p. 13.) The formal Protocol states that the wound to the neck was an "Other Condition" which, the Opinion states, was a "contributing factor" to the death.

The jury should have been given the opportunity to hear *Dr. Garber* explain this troubling evidence. Who wrote "NONE," suggesting no "other conditions," and who wrote "incised wound to neck" in the Examination Notes? When were the latter words added to the Notes? Were they contemporaneous with the autopsy or included only after someone reviewed the Notes and was unsatisfied that they did not specifically link the heart attack to the crime? Did the word "NONE" mean that Dr. Garber had doubts about the impact of the wound to the neck at the time he performed the autopsy, prompting someone else to include the reference to the neck wound?

The apparent addition of the words "incised wound to neck" in the Notes raises the specter that someone thought the evidence of Mr. Baker's heart condition was not sufficient, standing alone, to link his heart attack to the crime. After all, Mr. Baker was at risk of a deadly

heart attack at virtually any time. (15 RT 3237-3238, 3243.) Faced with this reality, did someone feel the need to alter or embellish the Examination Notes to "improve" the autopsy conclusion and ensure a link between the crime and Mr. Baker's death?

The addition of the words "incised wound to neck" to the Notes thus raises the possibility that the police or prosecution team influenced the preparation of the report. Did the presence of the police and prosecutors at the autopsy apply subtle or not so subtle pressure on Dr. Garber to go farther in the report than he felt comfortable in reaching the conclusion that the wound to the neck was a "contributing factor" to the death? Did the prosecution team insist that "incised wound to the neck" be added to the Notes to ensure a link between the crime and Mr. Baker's death? Did the prosecutor call Dr. Cohen to testify at trial, rather than Dr. Garber, because she wanted to avoid discussion of how the words "incised wound to neck" found their way into both the Notes and the "Opinion" section of the Protocol? Such questions deserved exploration and an answer. As Justice Werdegar wrote in *Dungo*:

> Even without telling a witness what to say, government agents intent on building a criminal case against a suspect may consciously or unconsciously bias a witness's responses by verbal and nonverbal cues It is the accusatory context that

> makes the production of such out-of-court testimony especially dangerous and demands the resulting statements be considered "testimonial under even a narrow standard."

(*Dungo, supra*, 55 Cal.4th at 626, conc. opn. of Werdegar, J., quoting *Crawford, supra*, 541 U.S. at 52.)

The questions and issues suggested by the words "NONE" and "incised wound to neck" written in different handwriting in the Notes could not be explored with Dr. Cohen, or at least not as fully explored, since he did not perform or even witness the autopsy and did not draft the report. It is so that questions of this sort can be explored on cross-examination that the Confrontation Clause prohibits the presentation of testimonial evidence through "surrogates." (*Bullcoming, supra,* 131 S.Ct. at 2710, 2715.)

Because Mr. Henderson could not cross-examine Dr. Garber about the performance of the autopsy or the discrepancies in the Examination Notes and their relationship to the ultimate autopsy conclusions, the jury lost the opportunity to weigh the credibility of the pathologist who performed the autopsy and authored the report. (*Maryland v. Craig, supra*, 497 U.S. at 846.) It goes without saying that if trial counsel had had the opportunity to inquire whether Dr. Garber had expressed doubts about the relationship between the crime

and Mr. Baker's death or had been coerced, even subtly, into reaching the conclusion that he did, or had had the opportunity to explore whether the prosecution had tampered with the autopsy findings and conclusions, it could have completely undermined the prosecution's case. If the pathologist who performed the autopsy doubted his own conclusion or if the evidence suggested the prosecution had influenced or tampered with the report because the prosecution itself was unsure about the link between the crime and the death, it would have been far easier for the jury to entertain a reasonable doubt about Mr. Henderson's guilt.

The prosecution's decision to put Dr. Cohen on the witness stand effectively walled off from scrutiny these potentially fruitful and damning areas of inquiry. Dr. Cohen's "surrogate testimony" laundered Dr. Garber's opinion so that it came out of the wash as Dr. Cohen's own, cleansed of the apparent discrepancy between the Examination Notes and the Opinion stated in the Protocol. This foreclosed meaningful cross-examination into Dr. Garber's "honesty, proficiency, and methodology" (*Melendez-Diaz, supra*, 129 S.Ct. at 2538) or questioning designed to "expose any lapses or lies" he may

have committed. (*Bullcoming, supra,* 131 S.Ct. at 2715.) That prejudiced Mr. Henderson, requiring a reversal of the judgment.

D. Mr. Henderson Did Not Invite Error In Connection With Dr. Cohen's Testimony.

Respondent all but concedes that defense counsel's failure to object at trial to Dr. Cohen's testimony did not forfeit his Confrontation Clause challenge on appeal. (RB, pp. 72-73; see *People v. Edwards, supra*, 57 Cal.4th at 704; *People v. Pearson, supra,* 56 Cal.4th at 461-462.) Respondent argues instead that "the defense's concern was with ensuring Dr. *Garber's* opinions regarding the neck wound and cause of death would come before the jury regardless of whether he testified," and, therefore, any error resulting from Dr. *Cohen's* testimony was invited. (RB, p. 73.)[28] This argument is belied by the record below:

> MR. HEAD: . . . Apparently Dr. Garber is not going to testify. He is the one that did the autopsy. Now does that mean that the autopsy protocol is going to come in as evidence as a business record, I mean the contents of the autopsy protocol [?] There are things in there, for example, Dr. Garber opines that the wound did not kill – itself was not fatal, but that Mr. Baker died of a heart attack. I want to get that in evidence, obviously. Dr. Garber is not here to testify to that.

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[28]Notably, Respondent's "invited error argument," though without merit, is a concession that Dr. Cohen was giving "surrogate testimony" with respect to Dr. Garber's findings and conclusions in the autopsy report.

> THE COURT: I don't have a concern, Mr. Head, that you will be able to go into that. Presumably Dr. Cohen will express an opinion as to cause of death, and if he says that it is [the] wound to the throat rather than a heart attack, you will certainly be permitted to cross-examine on doesn't Dr. Garber, who actually did the autopsy, doesn't [he] think it is heart attack and therefore isn't your opinion not good because Garber is the one who knows? I am not concerned about that. You will be permitted to do that.
>
> MR. HEAD: Okay.
>
> MS. CARTER: I can pretty much assure Mr. Head . . . that [Dr. Cohen] isn't going to opine that the neck wound was the cause of death, that it was a heart attack. I think pretty much what Garber said[,] which is that it was a heart attack facilitated by the fear and by the slicing of the neck.
>
> MR. HEAD: There may be other things in the report that I want to, you know, highlight. I don't know at this point, but there may be.
>
> THE COURT: . . . I would imagine that in coming to whatever opinion Dr. Cohen has, he relied on that report, and you will be able to cross-examine him[,] I started to say ad nauseum, forgive me.

(11 RT 2597-2598.)

Courts will find waiver based on invited error only if trial counsel "'"intentionally caused the trial court to err"'" and clearly did so for tactical reasons." (*People v. Souza* (2012) 54 Cal.4th 90, 114.) Counsel must have "expresse[d] a deliberate tactical purpose in resisting or acceding to" a trial court ruling. (*Id.*) If "counsel merely acted defensively and reasonably in direct response to the court's

earlier ruling" (*id.* at 115), the error will not be considered invited. It is this latter rule which applies here.

First and foremost, trial counsel made it clear that it was Dr. *Garber's* opinions, as expressed in the autopsy report, he wanted before the jury and inquired how the prosecution intended to present that evidence. He surely did not say that he was unconcerned with how those opinions might be presented to the jury.

Second, it is apparent from the colloquy between defense counsel and the trial court that counsel had reservations about Dr. Cohen being substituted as a trial witness for Dr. Garber. Defense counsel did not then have available to him any objection based on the Confrontation Clause. (See *People v. Pearson, supra,* 56 Cal.4th at 461-462; *People v. Beeler* (1995) 9 Cal.4th 953, 979; *People v. Clark* (1992) 3 Cal.4th 41, 158.) The law at the time permitted a pathologist to testify to and rely upon another pathologist's autopsy without running afoul of the Confrontation Clause. (*People v. Beeler, supra*, 9 Cal.4th at 979.) Given the reservations he expressed about Dr. Cohen, it seems likely that defense counsel would have raised a Confrontation Clause objection had he been able to do so. That he acquiesced when he had no meaningful alternative was not an affirmative tactical

decision to elicit Dr. Cohen's testimony as a substitute for Dr. Garber's. Nothing that he said during his colloquy with court and counsel can be construed as a desire that Dr. Garber's opinions come before the jury "regardless" of who testified.

Third, the circumstances in which the subject of Dr. Cohen's testimony arose bear on whether he invited any error. The colloquy concerning Dr. Cohen occurred at the end of the day on January 31, 2001, in the midst of trial, only a few days before Dr. Cohen testified. (11 RT 2597; 15 RT 3228 *et seq.*) In the absence of obvious grounds on which to object, trial counsel's immediate concern was undoubtedly whether another expert would testify to a different cause of death. (11 RT 2597 [inquiring whether "autopsy protocol is going to come in as a business record. . . . There are things in there, for example, Dr. Garber opines that the wound did not kill – itself was not fatal, but that Mr. Baker died of a heart attack. I want to get that in evidence, obviously. Dr. Garber is not here to testify to that"].) Presumably to avoid an argument that the surprise had prejudiced the defense, the prosecutor assured defense counsel that Dr. Cohen's opinion would track Dr. Garber's. (11 RT 2598.)

Even so, the opinion concerning cause of death was not the only reason trial counsel wanted Dr. Garber on the witness stand. (See 11 RT 2598 ["There may be other things in the report that I want to, you know, highlight"].) In any event, the trial court stated that the solution to the problem of any discrepancies between the report and the expert's opinion was permitting trial counsel to cross-examine Dr. *Cohen* "ad nauseum." (11RT 2598.)[29]

Most important of all, and related to this last point, the trial court had quite clearly made the decision to permit Dr. Cohen to testify *even if Dr. Cohen intended to express an opinion different from Dr. Garber's*. The trial court stated to defense counsel: "[I]f [Dr. Cohen] says that it is [the] wound to the throat rather than a heart attack, you will certainly be permitted to cross-examine on doesn't Dr. Garber, who actually did the autopsy, doesn't [he] think it is heart attack and therefore isn't your opinion not good because Garber is the

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[29]From the standpoint of whether Dr. Cohen's testimony violated the Confrontation Clause, the trial judge's proposed solution was no solution at all. (*Bullcoming, supra*, 131 S.Ct. at 2716 [Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination"].)

one who knows? I am not concerned about that. You will be permitted to do that." (11 RT 2597-2598.)

Defense counsel's reluctant acquiescence in the trial court's decision to permit Dr. Cohen to testify reflected nothing more than "defensive acts" designed to make the best of a *fait accompli.* (*People v. Souza, supra,* 54 Cal.4th at 115.) He made no affirmative statements suggesting he wanted Dr. Cohen to testify in Dr. Garber's stead nor did he express any "deliberate tactical purpose" in acceding to the circumstances with he was suddenly faced. He acquiesced, to be sure, but did so with reservations and because it was apparent the trial court intended to allow the testimony. He certainly did not "affirmatively join[] in the presentation of Dr. Cohen's testimony" (RB, p. 73) and no amount creative reading of the record leads to that conclusion. There was no invited error.

IX. THE TRIAL COURT ERRED IN EXCLUDING EXPERT TESTIMONY ESSENTIAL TO MR. HENDERSON'S DEFENSE.

Mr. Henderson argued in the AOB (pp. 229-254) that the trial court prejudicially erred when it excluded the proposed testimony of Dr. Scott Fraser, a psychologist whose testimony would have assisted the jury in assessing the reliability of Mrs. Baker's description of her

assailant and her corresponding failure to identify Mr. Henderson as the perpetrator. By excluding the testimony, the trial court interfered with Mr. Henderson's "opportunity to present a complete defense" under federal and state law. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *People v. McDonald* (1984) 37 Cal.3d 351, 373, 375-377.)

Respondent's substantive response to this argument consists of two paragraphs covering about a half page. (See RB, pp. 83-84.) This dismissive, "move along, nothing to see here" approach should fool no one. Respondent has said essentially nothing in its brief because nothing can be said to cure the trial court's error or the prejudice from that error.

A. Dr. Fraser's Proposed Testimony Was Admissible And Critical To The Defense.

Respondent does not dispute that Dr. Fraser's testimony met the criteria for expert testimony under Evidence Code § 801. Instead, Respondent, like the trial court before it, contends that Dr. Fraser's testimony had little or no bearing on the issues before the jury. Respondent, like the trial court before it, misunderstands the significance of the proposed testimony. Contrary to the trial court's pejorative comments, which have been repeated by Respondent, Dr. Fraser's testimony was neither "superfluous" nor "silly." (17 RT

3725; RB, p. 83.) It went straight to the heart of Mr. Henderson's defense that he was not the man who assaulted the Bakers. It may not require, as the trial court observed, "a psychologist to explain to a jury that if a witness cannot ID a suspect, perhaps the suspect is not guilty." (17 RT 3725.) But that misstated the purpose of Dr. Fraser's proposed testimony.

Dr. Fraser's proposed testimony was intended to provide the jury with a scientific basis for evaluating the reliability of Mrs. Baker's description of the perpetrator as "clean shaven" and her corresponding failure to identify Mr. Henderson as the perpetrator. He could have helped the jury understand that her description of the assailant was highly reliable evidence that Mr. Henderson was not the man she saw that night.

Dr. Fraser's testimony, if believed, would have underscored that Mrs. Baker's description of the assailant as "clean shaven" was likely correct because eyewitnesses recall visual cues such as the presence or absence of facial hair with extraordinarily high rates of accuracy – even when they are under great stress. (17 RT 3664-3668, 3702-3703.) That same research indicated that, if Mrs. Baker's assailant had had facial hair, she would have recalled it and mentioned

it. (17 RT 3665, 3700.) He would also have testified that jurors generally do not understand the distinction between recognition, which can be affected by stress, and recall of visual cues, which is virtually unaffected by stress. (17 RT 3666-3667, 3672-3673.)

Other witnesses testified that Mr. Henderson wore a mustache or goatee at the time of the crime. In particular, Latesha Wasson, who saw Mr. Henderson right after the crime, testified that he had a mustache or goatee. (11 RT 2548.) Dr. Fraser's testimony would also have aided the jurors in evaluating this discrepancy between Mrs. Baker's description of the assailant and Ms. Wasson's description of Mr. Henderson on the night of the crime. Since the scientific research suggesting the reliability of Mrs. Baker's description of the assailant would also have applied to Ms. Wasson's description of Mr. Henderson, the jury would have had to grapple with the fact that two eyewitnesses from the evening of the crime each gave highly reliable testimony that, individually and together, pointed to someone other than Mr. Henderson as the assailant.

Lastly, Dr. Fraser would have testified that Mrs. Baker's failure to select Mr. Henderson from a photo lineup was as reliable as any selection she may have made. (17 RT 3675, 3678-3680, 3697-3698.)

He also would have explained that jurors erroneously believe that a selection of a suspect from a lineup is more reliable than a rejection. (17 RT 3680, 3697-3698.)

The trial court failed to grasp that this was not a "typical" eyewitness identification case. In a "typical" case involving eyewitness identification expert testimony, "[e]xclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112 citing *People v. McDonald* (1984) 37 Cal.3d 351, 376.) Here, while the *absence* of physical evidence linking Mr. Henderson to the crime corroborated Mrs. Baker's failure to identify him, there was no other evidence to corroborate Mrs. Baker's description of the *perpetrator* and to give it independent reliability. Dr. Fraser's testimony was intended to provide that independent reliability.

The "proffered expert testimony would have had significant probative value" (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 725) and excluding it stripped Mr. Henderson of his "'right to put before the jury evidence that might [have] influence[d] the

determination of guilt.'" (*Taylor v. Illinois* (1988) 484 U.S. 400, 408.) That was error.

B. The Error Was Prejudicial.

The discussion of why Dr. Fraser's testimony should have been admitted reveals why its exclusion was prejudicial. The prosecutor made the very arguments to the jury that Dr. Fraser's testimony was offered to rebut. (AOB, pp. 236-238.) She exploited the common misconception that the stress of the crime, including so-called "weapons focus," interfered with Mrs. Baker's ability to recall "details," including Mr. Henderson's "little mustache." (19 RT 4315-4319.) Dr. Fraser's testimony was intended to refute that misconception. He would have specifically testified that stress, even weapons focus, does not interfere with the accuracy of eyewitness recall of visual cues such as facial hair. (17 RT 3664-3665, 3667-3668, 3702-3703.) The psychological research to which he intended to testify would have suggested to the jury that, given the length of time Mrs. Baker said she observed the assailant, her description of him as "clean shaven" was likely accurate to a very high degree of probability and, further, that if the assailant had had facial hair she would have recalled and reported it. (17 RT 3665, 3670, 3674-3675,

3694, 3700.) His testimony could have highlighted the significance and probable accuracy of Ms. Wasson's testimony that Mr. Henderson had facial hair when she saw him immediately after the crime. Together, Mrs. Baker's and Ms. Wasson's highly reliable testimony strongly suggested someone other than Mr. Henderson was the assailant.

The prosecutor also argued that Mrs. Baker selected from a photo lineup someone who arguably looked like Mr. Henderson and, thus, she had for all practical purposes "selected" him. (19 RT 4320-4321.) Dr. Fraser's testimony was intended to show that the selection of someone else was actually a rejection of Mr. Henderson as the assailant and that the rejection was equally as reliable as a selection. (17 RT 3677-3680, 3697-3698.)[30]

There is no doubt the jury was troubled by Mrs. Baker's testimony, since the jurors asked to view the videotape of her testimony during deliberations. (20 RT 4401-4407.) In the absence of Dr. Fraser's proposed testimony, the jurors had no framework for considering the reliability of Mrs. Baker's description of the assailant

[30] Since the prosecutor made the very arguments to the jury which Dr. Fraser's testimony was intended to rebut, Respondent's failure even to mention the prosecutor's argument in its brief is especially noteworthy. (See generally RB, pp. 80-84.)

and her corresponding failure to identify Mr. Henderson other than the one the prosecutor gave them: *i.e.*, that stress and weapons focus caused her to miss Mr. Henderson's facial hair and her memory to fail when trying to identify him as her assailant. But that was the very framework Dr. Fraser's testimony was intended to rebut.

Dr. Fraser's testimony would have made it more likely the jury would have concluded that, even if Mr. Henderson was present at the scene that evening, he was not the man inside the Bakers' home. That, in turn, would have assured the robbery-murder and burglary-murder special circumstances could not have been found true since there was no evidence that, as an aider and abetter to the crime, Mr. Henderson had the intent to kill Mr. Baker or exhibited a "reckless indifference to human life." (AOB, pp. 252-254; 39 CT 10777-10778.)

In sum, Mr. Henderson's defense was severely hampered when the trial court excluded Dr. Fraser's testimony. The deadly nature of that error manifested itself during the prosecutor's closing argument. The trial court's error was plainly prejudicial under any standard and the conviction must be overturned.

X. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE CALJIC 2.92 TO THE JURY.

A. CALJIC 2.92 Was Plainly Applicable To This Case And Should Have Been Read To The Jury.

Respondent does not dispute that "'it is error to refuse to give an instruction requested by a defendant . . . which deals with identification in the context of reasonable doubt.'" (*People v. Wright* (1988) 45 Cal.3d 1126, 1140; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [error not to give requested instruction on eyewitness identification].) Seeking to dodge the import of this settled principle, Respondent, like the trial court, contends it was unnecessary for the jury to be given CALJIC 2.92 because "this was not a case in which identification was a crucial issue." (RB, p. 86.) This contention is simply incorrect.

Mrs. Baker's eyewitness testimony and its reliability were at the core of Mr. Henderson's defense. She saw the perpetrator for what seemed like "forever," described him immediately after the crime as "clean shaven," and then repeatedly failed to identify Mr. Henderson as the perpetrator. (2 CT 447, 449-450, 453-456, 457; 11 RT 2484-2485; 12 RT 2771-2773; 13 RT 2821-2822, 2826-2827; 16 RT 3577-3578.) The defense offered evidence that Mr. Henderson

was not clean shaven that evening, including the testimony of Ms. Wasson who saw Mr. Henderson immediately after the events. The composite drawing of the perpetrator which Mrs. Baker assisted does not resemble Mr. Henderson. (Compare People's Exhs.131, 132 with People's Exh. 114 [Photo #5] and Def. Exh. E.) Mrs. Baker did not pick Mr. Henderson out of a photo lineup or identify him in open court. (2 CT 447, 453-456.) While the prosecution undoubtedly wanted to downplay the significance of Mrs. Baker's failure, even refusal, to identify Mr. Henderson as the perpetrator, her failure to identify him was surely "crucial" to Mr. Henderson's defense.

Respondent also contends that CALJIC 2.92 is inapplicable where, as here, "there is no evidence the perpetrator was identified by an eyewitness." (RB, p. 86.) Respondent cites no authority for this proposition; none exists. While CALJIC 2.92 may most commonly be used when a witness has identified the defendant, the instruction does not state that its use is exclusively limited to such cases. By its terms, CALJIC 2.92 is potentially applicable in any case in which the jury must evaluate the testimony of an eyewitness. (See AOB, pp. 258-263.) The purpose of the CALJIC 2.92 factors is to guide the jury in assessing the reliability of eyewitness testimony. And the reliability

of Mrs. Baker's description of the perpetrator, in particular, was of great significance to Mr. Henderson. The trial court's refusal to give the instruction was therefore erroneous. (*People v. Wright, supra*, 45 Cal.3d at 1140.)

B. The Error Was Prejudicial.

The prejudice from the trial court's refusal to give CALJIC 2.92 is discussed in detail in the AOB and need not be repeated here. (See pp. 263-268.) Mr. Henderson responds instead first to Respondent's misleading contention that because defense counsel mentioned Mrs. Baker's failure to identify Mr. Henderson during his closing argument, "the jury did not need any further assistance in understanding the significance of this fact." (RB, p. 86.) Respondent has got it wrong again.

This case is significantly different from those cases in which a failure to instruct on identification factors has been found to be harmless error. Defense counsel here did not discuss most of the factors listed in CALJIC 2.92 during his closing argument, and to the extent that he did, it was not in any sustained or systematic fashion. (See 19 RT 4292-4293, 4295, 4296, 4307; compare *People v. Fudge, supra*, 7 Cal.4th at 1111; *People v. Wright, supra*, 45 Cal.3d at 1148.)

Then, during deliberations, the jury asked to view the videotape of Mrs. Baker's testimony and took more than seven and-a-half hours to reach a verdict – both sure signs that the jurors were struggling with evaluating her testimony. (Compare *People v. Wright, supra*, 45 Cal.3d at 1150; *People v. Coates* (1984) 152 Cal.App.3d 665, 671-672.)

The failure to instruct must also be considered in light of the trial court's related error in excluding the testimony of Dr. Fraser. This Court held in *People v. Wright* that CALJIC 2.92 "will sufficiently bring to the jury's attention the appropriate factors, and that an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (45 Cal.3d at 1143 [emphasis in original].) Not only was the jury here not fully apprised of the various factors to be considered because it was not given the instruction, the jury had to grapple with Mrs. Baker's testimony without any assistance from Dr. Fraser's proposed expert testimony. Virtually all of the factors from CALJIC 2.92 pertinent to Mrs. Baker's testimony would have dovetailed directly with Dr. Fraser's proposed testimony:

- The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act.

Mrs. Baker observed the perpetrator throughout the crime, for what seemed like "forever." (2 CT 449-450, 457.) Dr. Fraser would have testified that the length of time a witness observes another increases the reliability of the recall of distinctive cues such as facial hair and would have testified that witnesses are highly likely to mention the presence or absence of facial hair. (17 RT 3674-3675, 3700, 3702-3703.)

- The stress, if any, to which the witness was subjected at the time of the observation;

Mrs. Baker was undoubtedly stressed. The prosecutor sought to use that stress to explain away Mrs. Baker's failure to identify Mr. Henderson and that it was why she might have failed to recall a "little mustache." (19 RT 4315-4319.) Dr. Fraser would have debunked the notion that stress has any particular effect on an eyewitness's recall of distinctive cues, such as facial hair. (17 RT 3364, 3667-3668, 3670, 3694).

- The witness' ability, following the observation, to provide a description of the perpetrator of the act.

Mrs. Baker was able to and did give a description immediately after the crime and described the perpetrator as "clean shaven." (2 CT 455-

456.) Dr. Fraser would have testified that the initial description given by eyewitnesses, particularly if soon after the events, is the most reliable. (17 RT 3664.)

- The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness.

Mr. Henderson did not and does not fit Mrs. Baker's description of the perpetrator.

- The cross-racial [or ethnic] nature of the identification.

Mr. Henderson is African-American. Mrs. Baker was white. Dr. Fraser would have testified that cross-racial identification often produces false positives and that, therefore, a failure to select a member of another race from a lineup increases the chance that the rejection is reliable. (17 RT 3683-3686.)

- Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup.

Mrs. Baker failed to select Mr. Henderson from a photo lineup. (2 CT 453-456; People's Exhs. 114, 130.) Dr. Fraser would have testified that the failure to select a suspect from a lineup is a rejection of that suspect and is as reliable as a selection. (17 RT 3679-3680.)

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- The period of time between the alleged criminal act and the witness' identification.

Mrs. Baker saw the photo lineup with Mr. Henderson within a few days after the crime and failed to identify him. Dr. Fraser would have testified that eyewitness testimony is at its most reliable soon after the crime and before other information has begun to distort the witness's recollection. (17 RT 3664.)

- The extent to which the witness is either certain or uncertain of the identification.

Mrs. Baker appeared certain that Mr. Henderson was not the perpetrator, having failed to select him from a photo lineup and in court. Dr. Fraser's testimony was intended to underscore the reliability of Mrs. Baker's failure to identify Mr. Henderson.

- Whether the witness' identification is in fact the product of [his] [her] own recollection.

Mrs. Baker failed to select Mr. Henderson soon after the crime and when he was in court. This indicated that she was relying on her own recollection.

The trial court's failure to instruct the jury in the language of CALJIC 2.92 together with the exclusion of Dr. Fraser's testimony was a one-two punch that brought Mr. Henderson's defense to its knees, crippling his ability to focus the jury on the reliability of Mrs.

Baker's failure to identify him as the perpetrator. If the jury had had the benefit of either the instruction or Dr. Fraser's testimony, Mr. Henderson's defense would have been significantly strengthened. Had the jury had the benefit of both the instruction and Dr. Fraser's testimony, the chances that the jury would have reached a different verdict would have increased substantially. The trial court's error was prejudicial and the conviction should be reversed.

XI. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED MR. HENDERSON TO WEAR A STUN BELT DURING THE PENALTY TRIAL.

A. There Was No Showing Or Finding Of A Manifest Need For Imposition Of The Stun Belt.

Respondent concedes that, in ordering Mr. Henderson to be restrained by a stun belt during the penalty trial, the trial court placed principal reliance upon *People v. Garcia* (1997) 56 Cal.App.4th 1349, a case overruled in *People v. Mar* (2002) 28 Cal.4th 1201 ("*Mar*"). (See 20 RT 4483.) In addition to its reliance on repudiated authority, the trial court neither created a record establishing a "manifest need" for the restraint nor made the required finding of manifest need. This was error. (*Mar, supra,* 28 Cal.4th at 1220.)

Respondent half-heartedly recites the "evidence" upon which the trial court purportedly relied and argues that it was sufficient to

show a manifest need for the stun belt. (RB, p. 103.) Respondent's argument does not withstand scrutiny in light of the record and the principles articulated in *Mar* and this Court's earlier decision, *People v. Duran* (1976) 16 Cal.3d 282 ("*Duran*").

To establish a manifest need for a restraint where, as here, the defendant has not engaged in "threatening or violent conduct in the presence of jurors" (*Duran, supra*, 16 Cal.3d at 291-292), the "nonconforming behavior . . . must appear as a matter of record." (*Id.*) The trial court must base its determination on "'*facts*, not rumor and innuendo even if supplied by the defendant's own attorney'" (*Mar, supra*, 28 Cal.4th at 1218 [emphasis in original]; *People v. Stevens* (2009) 47 Cal.4th 625, 633.) The court may not rely only "upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others." (*Mar, supra,* 28 Cal.4th at 1221.) The "record must demonstrate that the trial court independently determined on the basis of an on-the-record showing of defendant's nonconforming conduct that 'there existed a manifest need to place defendant in restraints.'" (*Id.*)

In *People v. Virgil* (2011) 51 Cal.4th 1210, for example, a case cited by Respondent, the trial court took testimony from two deputies

which "established that defendant was a genuine flight risk." (*Id.* at 1271.)

> He was seen using a makeshift key to unlock another inmate's handcuffs. Defendant lied to Deputy Norris and then tried to hide and dispose of the "key." It was reasonable for the court to conclude from this evidence that defendant had been caught attempting to help another inmate escape, and possibly attempting to escape himself. This conduct was sufficient to warrant increased security.

(*Id.*; see also *People v. Montes*, *supra*, 58 Cal.4th at 839-841 [testimony from deputies regarding need for stun belt as restraint].)

The record below does not approach even the minimally sufficient showing in *People v. Virgil*. First, as the trial court repeatedly acknowledged, Mr. Henderson had never exhibited any disruptive or threatening behavior in the courtroom. (20 RT 4413, 4426, 4445.) Second, the trial court improperly relied upon unsubstantiated hearsay in Mr. Henderson's custody file regarding two alleged incidents that occurred weeks or months before the stun belt motion. (20 RT 4442, 4448.) Unlike the record created in *Virgil*, the trial court below took no testimony from any witness to support or verify the hearsay allegations. (See also *People v. Montes, supra*, 58 Cal.4th at 839 [testimony from courtroom deputy regarding defendant's in-court and out-of-court conduct].) The trial court was

not permitted, therefore, to credit that hearsay as a basis for its ruling. (*Mar, supra*, 28 Cal.4th at 1221.)

Third, to the extent the trial court took testimony, the witnesses all discussed the alleged "threat" made by Mr. Henderson. But the evidence revealed there was no threat. As originally – and incorrectly – reported to the judge, Mr. Henderson said: "Well, there are worse ways to commit suicide than by attacking a D.A." (19 RT 4311.) Mr. Henderson told the court that he was not making a threat and had actually said, "[T]here are some *better* ways to commit suicide than jumping on a D.A., you know" (20 RT 4449 [emphasis added]), a non-threatening statement with precisely the opposite meaning from what the judge originally understood. The defense investigator who reported the statement said that she did not consider it to be a threat when made. (20 RT 4433-4434.) Even the trial judge acknowledged Mr. Henderson may have been "blowing off steam." (19 RT 4314.) Defense counsel repeatedly stressed to the trial judge that, in his opinion, whatever anger or frustration Mr. Henderson may have felt when he made the statement had dissipated. (20 RT 4424.) There was nothing in the record to suggest otherwise.

Fourth, the trial court ordered the stun belt without any inquiry into how it operated, the protocols for its use or for treating someone who had been shocked, what experience law enforcement personnel had with the device or what safeguards existed to protect against accidental discharge. (Compare *People v. Montes, supra*, 58 Cal.4th at 840; *People v. Virgil, supra,* 51 Cal.4th at 1271.)

Finally, the record revealed Mr. Henderson had twice attempted suicide, and defense counsel, the only person in the courtroom with any experience with a case in which a stun belt had been ordered during a trial, repeatedly warned the trial judge that the stun belt would be psychologically damaging to Mr. Henderson. (20 RT 4414, 4418, 4425; compare *People v. Montes, supra*, 58 Cal.4th at 842-843 [defense "never stated or suggested that the threat of electric shock affected the defendant's mental state" and evidence showed defendant showed emotion at trial]; *People v. Jackson, supra,* 58 Cal.4th at 745 [defense counsel never suggested that threat of electric shock "affected defendant's mental state"].) He also stressed that the belt would likely be visible to the jury. (20 RT 4412-4413, 4427, 4447.) Relying on *People v. Garcia* alone, and without an evidentiary basis or further inquiry, the trial judge concluded that the stun belt would

have little or no negative psychological impact on Mr. Henderson and would not be visible. (20 RT 4443, 4446, 4483.)

In sum, the trial judge made no record of any behavior which would have justified the stun belt, disregarded the evidence that belied any need for a restraint, relied upon unsubstantiated hearsay, failed to make any inquiry into the use of the stun belt and then, in an unwitting acknowledgement that no manifest need had been show, ordered the stun belt imposed merely because he felt it necessary to "err . . . on the side of caution." (20 RT 4426.) This was plainly insufficient to justify the restraint. Since this record does not reveal any "showing of violence or threat of violence or other nonconforming conduct," the order imposing the stun belt was "an abuse of discretion." (*Duran, supra*, 16 Cal.3d at 291-292.)

B. Mr. Henderson Suffered Prejudice From Imposition Of The Stun Belt.

This Court has emphasized that stun belts are "inherently prejudicial" and that is why a showing of manifest need for the restraint is required. (*People v. Stevens, supra*, 47 Cal.4th at 643-644.) Nevertheless, Respondent argues there was no prejudice from imposition of the stun belt here because there was "no indication" that the belt affected either Mr. Henderson's demeanor or his decision not

to testify at the penalty trial and "no evidence" that the jury saw the stun belt. (RB, p. 104.) But it is Respondent's burden to show no prejudice beyond a reasonable doubt, not Mr. Henderson's burden to prove prejudice. (*People v. Jackson, supra*, 58 Cal.4th at 775, 778, 779, conc. and dis. opn. of Liu, J., citing *Gamache v. California* (2010) 562 U.S. __, 131 S.Ct. 591, 592, 593 [statement of Sotomayor, J.].)

In fact, neither side dared mention the stun belt once it was in place: Mr. Henderson, out of concern that calling attention to it would surely prejudice him in the jury's eyes; the prosecutor, out of concern that calling attention to it would be direct evidence of such prejudice. The pernicious and deleterious effects of the stun belt are such that it is highly unlikely the sort of evidence which Respondent seems to think should be required will ever be present. The evidence will inevitably be much subtler and more indirect.

There may be no express statements of record at the penalty trial to demonstrate prejudice, but there assuredly were indications that the stun belt would and did have a powerfully negative effect on Mr. Henderson; Respondent has simply chosen to ignore them. This is what we know: Mr. Henderson had twice attempted suicide before

the penalty phase – a sure sign of psychological fragility. (20 RT 4408-4409.) The very statement by Mr. Henderson which the trial court believed justified the stun belt mentioned suicide. (19 RT 4311.) Trial counsel repeatedly warned the court of the severe, negative impact the stun belt would have on Mr. Henderson. (20 RT 4414, 4418, 4425.) Immediately after the stun belt ruling and the jury verdict, Mr. Henderson fired his trial counsel because he wanted to "get this over with." (20 RT 4473.) And then, at the penalty trial, Mr. Henderson sat passively and did nothing in his own defense.

Even if Mr. Henderson's obvious despair and passivity were not caused solely by the stun belt, the trial judge should have recognized that someone so psychologically fragile should never have been required to labor under the threat that 50,000 volts of electricity would be administered to him without warning. "The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly,

concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*Mar, supra*, 28 Cal.4th at 1226.) "[F]ear" that the stun belt will discharge "may eviscerate the defendant's ability to take an active role in his own defense." (*United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1306 n. 7; see also *People v. Jackson, supra*, 58 Cal.4th at 796, conc. and dis. opn. of Liu, J.)

Moreover, contrary to the suggestion in Respondent's brief, prejudice from the imposition of a stun belt does not require a showing that the jury has seen the belt. The principles governing imposition of a stun belt apply "even if the device is not visible to the jury." (*People v. Virgil, supra*, 51 Cal.4th at 1270.) In any event, there is indirect evidence that the jury could and did see the stun belt. Defense counsel spoke from prior experience that jurors could see the stun belt.

> I had a trial where the person had that stun belt, and I don't care. I think the jury can see it. I mean it is a big old box, you know, and if he gets up in any way, you can see it . . . . If the jury gets any wind of that at all, that is going to have a terribly prejudicial affect [sic] on the penalty trial.

(20 RT 4427; see also see also 20 RT 4412-4413 [the stun belt "is pretty obtrusive, I think. . . you can see it"]; 20 RT 4447 ["I think [the

jury] can see it"].) There was no contrary statement or evidence presented. In fact, since Mr. Henderson represented himself at the penalty phase, there was increased likelihood that when he stood up or moved about, such as during his brief statement to the jury, the jurors could see the stun belt.

It is because the risk of prejudice is so great that the law requires a showing of manifest need before physical restraints, including a stun belt, are permitted. If demonstrable prejudice from an erroneous imposition of a stun belt is required in every instance before a reversal will follow, then the manifest need standard will become little more than empty words. As the U.S. Supreme Court said regarding the administration of medication to a defendant in a capital trial:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. [Citation.] Like the consequences of compelling a defendant to wear prison clothing, [citation], or of binding and gagging an accused during trial, [citation], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. . . .

(*Riggins* v. *Nevada* (1992) 504 U.S. 127, 137 ["*Riggins*"]; see also *Mar, supra*, 28 Cal.4th at 1227-1228 [relying upon *Riggins*].)

Concurring in *Riggins*, Justice Kennedy emphasized the subtle, but undeniably negative, consequences from any restraint which impacts the defendant's demeanor before the sentencing jury.

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

(504 U.S. at 143-144, conc. opn. of Kennedy, J.)

In asking for the ultimate penalty, the prosecutor here emphasized Mr. Henderson's passivity and apparently emotionless demeanor. She argued that the "kitty cat" the jurors saw before them was not his true nature. Instead, in his "natural habitat" he was a predatory "Bengal tiger." (21 RT 4876-4877.) She also argued that his flat affect revealed that he had no remorse. (21 RT 4876.) In each instance, she portrayed Mr. Henderson's muted demeanor as entirely inappropriate, and therefore grounds for imposition of a death sentence. Teasing out the extent to which his passivity reflected

psychological numbness caused by the terrifying prospects he faced, on the one hand, and fear of a debilitating electrical shock, on the other, is fruitless. Suffice it to say that any contribution his fear of the stun belt made to his subdued behavior played directly into the prosecutor's hands. (Compare *People v. Jackson, supra*, 58 Cal.4th at 748 [no prejudice from stun belt when defense counsel argued defendant's courtroom demeanor was positive attribute]; see *id.* at 801, conc. and dis. opn of Liu, J.). The "precise consequences" of requiring Mr. Henderson to wear the stun belt "cannot be shown from a trial transcript." (*Riggins, supra*, 504 U.S. at 137.) That does not make them any less real. The Court should conclude that under the circumstances the imposition of the stun belt was prejudicial error and reverse the death sentence.

XII. THE TRIAL COURT ERRED BY FAILING TO APPOINT SPECIAL COUNSEL TO PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY TRIAL WHEN IT BECAME APPARENT THAT MR. HENDERSON INTENDED TO FOREGO PRESENTING A CASE IN MITIGATION.

Mr. Henderson has argued that to ensure reliability of the sentence under the Eighth Amendment the trial court had a *sua sponte* duty to appoint special counsel to present mitigating evidence when it became apparent that Mr. Henderson, acting as his own attorney,

would decline to present a case in mitigation. (AOB, pp. 325-352.) Particularly where, as here, substantial mitigating evidence had been developed, and witnesses were available and willing to testify,[31] the trial court should not have permitted the jury to remain uninformed as it made its sentencing determination. Had the jury heard the available mitigating evidence there is a substantial probability that it would have chosen a sentence of life without possibility of parole ("LWOP").

Respondent does not dispute that mitigating evidence had been developed, was available and could have resulted in a different penalty verdict. Respondent argues instead that the issue is whether "'the Eighth Amendment interest in a reliable penalty determination overcomes the defendant's Sixth Amendment interest in self-representation.'" (RB, p. 107-108.) Respondent has taken its cue from statements made by this Court in other cases. For example, in *People v. Taylor* (2009) 47 Cal.4th 850, this Court stated:

> Defendant contends that in capital cases the Sixth Amendment right to represent oneself, recognized in *Faretta v. California* (1975) 422 U.S. 806 [45 L. Ed. 2d 562, 95 S.Ct. 2525] (*Faretta*), must give way to the requirements of the Fifth and

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[31]See the evidence summarized at AOB, pp. 327-332.

> Eighth Amendments to the federal Constitution that the death penalty be imposed through a fair and reliable procedure. . . .
>
> We addressed and rejected much the same set of claims in *People v. Blair* (2005) 36 Cal.4th 686, 736-740 [31 Cal. Rptr. 3d 485, 115 P.3d 1145], and other cases. We have explained that the autonomy interest motivating the decision in *Faretta*--the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the individual which is the lifeblood of the law'" (*Faretta, supra,* 422 U.S. at p. 834)--applies at a capital penalty trial as well as in a trial of guilt. (*Blair,* at pp. 738-740.) This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. (*Id.* at p. 737; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074 [119 Cal. Rptr. 2d 859, 46 P.3d 335]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365 [65 Cal. Rptr. 2d 145, 939 P.2d 259].) A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223 [259 Cal. Rptr. 669, 774 P.2d 698].) Moreover, a rule requiring reversal when a capital defendant chooses self-representation and presents no mitigating evidence could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error. (*Id.* at pp. 1227-1228.)

(*Id.* at 865 [footnote omitted].)

Mr. Henderson specifically argued that casting the issue as whether the Eighth Amendment reliability requirement trumped his interest under the Sixth Amendment in controlling his own defense is a "false dichotomy." (AOB, p. 342.) The state's interest in a reliable penalty verdict need not be inversely proportional to the defendant's

autonomy interest in self-representation, such that as one increases, the other decreases. The appointment of special mitigation counsel can further the state's Eighth Amendment interest in a reliable penalty determination without interfering with the defendant's Sixth Amendment interests.

A. Appointment Of Special Counsel To Present A Case In Mitigation When The Defendant Refuses To Do So Furthers The State Interest In A Reliable Penalty Determination And Does Not Interfere With The Defendant's Interest In Self-Representation.

1. Appointment of special mitigation counsel is intended to further the state's interest in a reliable penalty determination.

As a result of defense counsel's offer of proof, the trial court knew that substantial mitigating evidence had been developed and was available. (See 20 RT 4539-4540, 4548-4558.) When it became apparent that Mr. Henderson intended to forego presenting any mitigating evidence, the trial court could have and should have appointed special mitigation counsel to present a mitigation case to ensure a reliable penalty verdict under the Eighth Amendment.

A core principle animating the U.S. Supreme Court's "narrowing jurisprudence" in capital cases is that the "severity of the appropriate punishment necessarily depends on the culpability of the

offender." (*Atkins v. Virginia* (2002) 536 U.S. 304, 319.) This is intended to ensure "that only the most deserving of execution are put to death." (*Id.*) The Eighth Amendment imposes on the state an obligation to avoid "arbitrary and capricious sentencing and [to] ensur[e] an assessment based on the characteristics of the individual defendant as to whether death is the necessary punishment." (Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate To Require Presentation Of Mitigation Evidence, Even When The Sentencing Trial Defendant Wishes To Die* (2011) 21 Temp. Pol. & Civ. Rts. L. Rev. 1, 2 ["*Mandatory Mitigation*"].) As a result, the state has a "significant interest" (*People v. Clark* (1990) 50 Cal.3d 583, 617-618 ["*Clark*"]) in making sure that "'death is the appropriate punishment in a specific case.'" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 327-328.)

'[A] reliable penalty determination" is a decision "made by a fully informed sentencer." (*Clark, supra*, 50 Cal.3d at 617-618.) "[A] capital jury is required to do more than simply find facts that determine the penalty decision. The jury must make a moral assessment of those facts as they relate to whether death is appropriate for the individual defendant, and must be free to reject death on the

basis of any constitutionally relevant evidence. The jurors must, therefore, weigh the aggravating and mitigating factors, assigning whatever moral or sympathetic value each juror deems appropriate to each, and upon completion of the weighing process must decide if death is the appropriate penalty." (*Id.* at 631.) In order for the jury reliably to fulfill its solemn role the "record on which the verdict is based [must be] 'complete,' i.e., [] it does not lack 'any significant portion of the evidence of the appropriateness of the penalty.'" (*People v. Deere* (1991) 53 Cal.3d 705, 729 ["*Deere II*"], conc. opn. of Mosk, J.)

A sentencing jury cannot have been "fully informed" in any sense of the term if it had no opportunity to hear and consider available mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 544, conc. opn. of O'Connor, J. ["a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense"].)

> [I]f the Eighth Amendment requires that an individual capital defendant's dignity be respected through consideration of the defendant's individual character and the unique circumstances of his crime, that requirement cannot be satisfied where the important evidence is omitted from the sentencing phase. . . . "[W]here society's interest in the reliability of the decision

> making process in death penalty cases is manifested in an individualized determination based on aggravating and mitigating circumstances, a waiver of one part of this structure invalidates the delicately balanced protection for safeguarding against arbitrary imposition of the death penalty."

(Ho, *Silent At Sentencing: Waiver Doctrine And A Capital Defendant's Right To Present Mitigating Evidence After Schriro v. Landrigan* (2010) 62 Fla. L. Rev. 721, 741 ["*Silent At Sentencing*"].)

Even if a defendant may "rationally" choose to seek the death penalty rather than LWOP (*People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223), it does not follow that the state must, or lawfully even can, simply accede to that choice. (Carter, *Maintaining Systematic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death* (1987) 55 Tenn. L. Rev. 95, 144-145 ["*Maintaining Systematic Integrity*"].) The state cannot comply with a defendant's request to impose a punishment the Eighth Amendment would otherwise prohibit. (See *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 680 [en banc]; *Dear Wing Jung v. United States* (9th Cir. 1962) 312 F.2d 73, 75-76; see also *Whitmore v. Arkansas* (1990) 495 U.S. 149, 173, dis. opn. of Marshall, J. ["Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to

exact such punishments"]; *State v. Moore* (Neb. 2007) 730 N.W.2d 563, 566 [stay of execution issued even though defendant did not request it; "We must adhere to our heightened obligation to ensure the lawful and constitutional administration of the death penalty, regardless of the wishes of the defendant in any one case"].)

When "a defendant refuses to present mitigating evidence, the critical safeguard of individual case-by-case determination of the appropriate penalty is lost. . . . The integrity of the criminal justice system in the non-capricious imposition of the death penalty is subverted if a defendant can choose the penalty regardless of the merits." (*Maintaining Systematic Integrity, supra,* 55 Tenn. L. Rev. at 144.) If a defendant would not have been found to deserve death had the sentencing jury considered relevant and available mitigating evidence, imposing the death sentence on such a defendant would violate the Eighth Amendment even if it is the defendant himself who has prevented the introduction of mitigating evidence. (*Silent At Sentencing, supra*, 62 Fla. L. Rev. at 745.) Since "consideration of the character and record of the individual offender and circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death" (*Woodson v. North*

Carolina (1976) 428 U.S. 280, 304), before the state may execute such a defendant, it should ensure that no one – the defendant included – has prevented the jury from considering "factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) An incomplete record is equally unreliable whether it is the state, defense counsel or the defendant himself who prevents the introduction of relevant mitigating evidence.

Mr. Henderson's refusal to present a case in mitigation plainly deprived the sentencing jury of the necessary tools to do its job. For Respondent to suggest that the penalty verdict below was nonetheless "reliable" is to ignore what the record reveals: substantial mitigating evidence existed, it could have been presented and it could have made a difference. But the jury heard none of it. (See 20 RT 4539-4540, 4548-4558; AOB, pp. 327-332.) The jurors were not "fully informed" – far from it. They were dangerously uninformed.

From the very beginning of the trial, the trial judge had prepared the jurors for the weighing that they would undertake at the penalty trial:

> The defense may, *if any such evidence exists*, put on mitigating evidence . . . ¶ The prosecution may, if any such evidence exists, put on aggravating evidence . . . .¶ You can only vote for the death penalty when the aggravating evidence is so

> substantial compared to the mitigating evidence, that the bad is so substantial compared to the good[,] that the death penalty is warranted.

(4 RT 824-826 [emphasis added].)

When the time came for decision making, the jury had nothing mitigating to compare to the prosecution's case in aggravation. Despite the existence and availability of mitigating evidence, so far as the jurors were aware, no "such evidence exist[ed]." (4 RT 824.) Since only aggravating evidence weighed in the balance and the jurors understood that the death penalty could be imposed "[o]nly if the aggravating or bad evidence is greater than the mitigating" (*id.*), a death sentence was a foregone conclusion. (*Silent at Sentencing, supra*, 62 Fla L. Rev. at 741 [When "the defense does not respond with a case of its own, the prosecution's case goes uncontested and a death sentence is the unavoidable result"].)

Even if the judge did not err under the Sixth Amendment in permitting Mr. Henderson to represent himself, it does not follow that nothing further could or should have been done to ensure the reliability of the penalty determination in the face of Mr. Henderson's refusal to present a case in mitigation. (But cf. *People v. Bloom, supra,* 48 Cal.3d at 1228 n. 9 [defendant's decision to represent

himself at penalty phase did not "in and of itself" result in an unreliable penalty verdict].) Indeed, the state's duty under the Eighth Amendment to ensure reliability in the penalty determination arguably ought to be at its highest when, as here, a self-represented defendant prevents the sentencing jury from hearing evidence that will permit it to be "fully informed."

The trial court could and should have appointed special counsel to assist the state in complying with *its* obligation to ensure that the punishment meted out was proportional to and commensurate with both the severity of the crime *and* the individual "human attributes" of the defendant. (See *Graham v. Florida* (2009) 560 U.S. 48, 59; *Mandatory Mitigation, supra*, 21 Temp. Pol. & Civ. Rts. L. Rev. at 18-19; *Maintaining Systematic Integrity, supra*, 55 Tenn. L. Rev. at 145].) The state's Eighth Amendment interest in a reliable penalty determination demands no less. (Cf. *Sell v. United States* (2003) 539 U.S. 166, 180 ["[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one"].) Any minimal burden or delay that might be occasioned by appointment of special counsel is a small price to pay to ensure the reliability of the penalty determination. Had the trial court appointed

special counsel to present a case in mitigation, the result below could more confidently be considered "reliable." (See *Deere II, supra*, 53 Cal.3d at 729, conc. opn. of Mosk, J.)

2. Appointment of special mitigation counsel does not interfere with the self-represented defendant's Sixth Amendment right to control the defense.

Even as it would have furthered the state's interest in a reliable penalty determination, appointment of special counsel to present the case in mitigation would have respected Mr. Henderson's decision to act as his own attorney.

At the outset, it is undisputed that the defendant's right to self-representation, as strong as it may be, nevertheless may be required to yield to the state's interest in ensuring a fair trial. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 171; *Faretta v. California, supra*, 422 U.S. at 835; *People v. Bloom, supra,* 48 Cal.3d at 1220.) Similarly, a capital defendant cannot waive appellate review of his sentence since the "state, too, has an indisputable interest" in whether the defendant received a fair trial. (*People v. Stanworth* (1969) 71 Cal.2d 820, 834.)[32]

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[32]Moreover, there is no right to self-representation under state law. (*People v. Johnson* (2012) 53 Cal.4th 519, 526.)

There is little doubt the trial court could have appointed special counsel. A trial court may appoint "amicus counsel" to participate at trial even over the *pro se* defendant's objection, and such participation does not, of itself, violate the defendant's rights under the Sixth Amendment. (*Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 162-163; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 n. 7.) Nor is appointment of special mitigation counsel a radical or novel idea. Courts, judges and commentators have urged it as a solution to the problem posed by self-represented defendants who refuse to present a mitigation case. (See, e.g., *Barnes v. State* (Fla. 2010) 29 So.3d 1010, 1025, 1026; *State v. Reddish* (N.J. 2004) 859 A.2d 1173, 1200-1204; see also *United States v. Davis* (E.D. La. 2001) 180 F.Supp.2d 797, 798 n. 2, rev'd (5th Cir. 2002) 285 F.3d 378; *United States v. Davis* (5th Cir. 2002) 285 F.3d 378, 393, dis. opn. of Dennis, J.; *Muhammad v. State* (Fla. 2001) 782 So.2d 343, 370, conc. opn. of Pariente, J.; *Deere II, supra*, 53 Cal.3d at 712 [noting that trial court appointed mitigation counsel where defendant instructed his attorneys not to present mitigation]; *People v. Deere* (1985) 41 Cal.3d 353, 369, conc. opn. of Broussard, J.; *Mandatory Mitigation, supra*, 21 Temp. Pol. & Civ. Rts. L. Rev. at 35-39;

Maintaining Systematic Integrity, supra, 55 Tenn. L. Rev. at 149-152.)

Most importantly, appointment of special mitigation counsel to assist the trial court avoids the problems this Court has emphasized could arise if mitigation counsel were appointed for the *defendant* over the defendant's objections. Since special counsel will not "represent" the defendant as such, no lawyer will have been "forced" on the accused. (See *Barnes v. State, supra,* 29 So.3d at 1025, 1026 [appointment of mitigation counsel "to assist the court" did not interfere with defendant's right to self-representation].) Nor would mitigation counsel be presented with the potential ethical concerns or conflicts of interest that would face counsel appointed to represent a defendant who refuses to present a case in mitigation. (*Maintaining Systematic Integrity, supra*, 55 Tenn. L. Rev. at 146-147, 149.) And the defendant would be precluded from claiming ineffective assistance of counsel if special counsel's performance fell below professional standards.

Perhaps most important, so long as it is clear that special counsel is not representing the accused, the defendant's autonomy interest in controlling the defense will be respected. The self-

represented defendant should not be required either to present mitigation or to cooperate with special counsel.[33] And even if the defendant encourages the jury to disregard the mitigating evidence presented by special counsel, "the resulting determination of whether death is appropriate must be more reliable than a proceeding with no mitigation at all." (*Mandatory Mitigation, supra*, 21 Temp. Pol. & Civ. Rts. L. Rev. at 39.) Finally, appointing special mitigation counsel to assist the trial court and sentencing jury would avoid altogether this Court's concern that a rule requiring reversal "when a capital defendant chooses self-representation and presents no mitigating evidence could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error." (*People v. Taylor, supra*, 47 Cal.4th at 865.)[34] Nothing prevented the

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[33] A potentially more troublesome scenario would arise if the self-represented defendant undertook to put on some mitigating evidence and the trial court appointed special counsel to present a "better" or more complete mitigation case. That arguably would impermissibly interfere with the defendant's Sixth Amendment right to control the defense. (See *State v. Arguelles* (Utah 2003) 63 P.3d 731, 754; see also *McKaskle v. Wiggins, supra,* 465 U.S. at 178-179.)

[34] Nothing that Mr. Henderson has argued is intended to diminish or interfere with the trial court's ability to ensure that the defendant does not seek to use the appointment of special counsel as a vehicle for obstructionist or disruptive behavior. (See *Faretta, supra,* 422 U.S. at 834-835 n. 46 [emphasizing trial courts' authority to prevent self-

trial court from appointing special counsel and its failure to do so was error.

B. The Trial Court's Failure To Appoint Special Mitigation Counsel Prejudiced Mr. Henderson.

Since Respondent argued that the trial court was not obligated to appoint special mitigation counsel, Respondent did not address the prejudice to Mr. Henderson from the trial court's failure to do so. Mr. Henderson will not repeat the arguments he made in the AOB that demonstrate prejudice. (AOB, p. 352.) Suffice it to say that had the jury heard the evidence defense counsel had developed, it would have been better prepared to undertake the task for which it had been enpaneled: weighing aggravating evidence *and* mitigating evidence before deciding whether death was the appropriate punishment. Since the jury heard only half the story, it was ill-prepared to reach a reliable conclusion. There is a "reasonable possibility" (*People v. Brown* (1988) 46 Cal.3d 432, 448) that if the jury had heard the mitigating evidence, it would have returned a different penalty verdict.

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represented defendants from disrupting proceedings or refusing to follow proper procedures].)

XIII. MR. HENDERSON DOES NOT CONCEDE THE MERITS OF ANY ARGUMENT MADE BY RESPONDENT NOT SPECIFICALLY ADDRESSED IN THIS REPLY BRIEF.

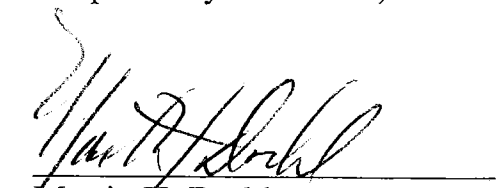
Mr. Henderson does not concede the merits of any argument made by Respondent to which Mr. Henderson has not specifically responded in this Reply Brief. If Mr. Henderson has not replied to an argument it is because he believes that no reply is necessary and that the arguments made in the AOB adequately address the issues. Mr. Henderson did not wish to burden the Court with a mere repetition of arguments made in the AOB.

CONCLUSION

Mr. Henderson submits that, for the reasons discussed in the AOB and in this Reply Brief, the conviction of murder with special circumstances found true and/or the sentence of death must be reversed.

Dated: July 1, 2014

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Case No. S098318

I certify that this brief complies with the type-volume limitation set forth in Rule 8.630(b)(1)(C) of the California Rules of Court. This brief uses a proportional typeface and 14-point font, and contains 33,180 words.

Dated: July 1, 2014

Martin H. Dodd

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman Dupree Dodd Croley Maier LLP, 180 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman Dupree Dodd Croley Maier LLP for the collection and processing of correspondence.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 1, 2014, at San Francisco, California.

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