IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. SOCORRO SUSAN CARO, Defendant-Appellant.	Crim. No. S106274 Ventura County Superior Court Case Number: CR 47813

AUTOMATIC APPEAL

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

THE HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

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Plaintiff-Respondent,	)	Ventura County Superior Court Case Number: CR 47813
v.	)	
SOCORRO SUSAN CARO,	)	
Defendant-Appellant.	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

Almost four years have passed since the briefing in this case was completed.[1] Appellant submits this Supplemental Opening Brief to provide the Court with new authorities and analysis supporting two arguments previously raised and discussed in appellant's opening and reply briefs (Arguments III and XIII) and to raise two new arguments based largely on case law decided after the reply briefing in this case (new Arguments XVIII and XIX).[2] In addition, appellant respectfully ***withdraws*** from this Court's consideration Argument II that was raised and discussed in appellant's opening and reply briefs.

[1] Appellant's Opening Brief was filed on December 4, 2012. Respondent's Brief was filed on May 15, 2014. Appellant's Reply Brief was filed on May 14, 2015.

[2] Appellant raised 17 arguments in her initial briefing. The two new arguments are numbered to follow the numbering system used in the initial briefing.

Argument III in appellant's initial briefing addressed the erroneous exclusion for cause under *Witherspoon/Witt*[3] of two prospective jurors --J.W. and D.S.-- during jury selection. Appellant now supplements this argument to incorporate several new cases decided by this Court since the filing of the reply brief which bolster the conclusion that the trial court erred in excusing these two prospective jurors.

Argument XIII in the initial briefing discussed the wrongful dismissal of Juror #9 during guilt phase deliberations and, relatedly, the failure to excuse Juror #11 if the dismissal of Juror #9 is found to be proper. Appellant supplements this argument with a number of new authorities that underscore the need for this Court to reach the merits of these important constitutional violations.

New argument XVIII addresses the trial court's failure to discuss, evaluate, voir dire, or make any determination with respect to dozens of prospective jurors whose names were submitted to the court by the parties via email for a ruling on cause based solely upon their questionnaire responses. Argument XVIII explains that, as this Court has made clear in a number of recent cases, including the recent opinion in *People v. Buenrostro* (2018) 6 Cal.5th 367 [240 Cal.Rptr.3d 704], the trial

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

court's failure to address, in any substantive manner, the submitted list of prospective jurors is also erroneous. The trial court violated its legal obligations in the proper selection of a capital jury resulting in at least nine prospective jurors being erroneously removed from the jury pool based solely on their questionnaire responses even though their responses did not meet the *Witherspoon/Witt* standard.

New argument XIX is related to appellant's Argument XVI in the initial briefing which asserted various grounds for finding California's death penalty scheme unconstitutional on its face and as applied. New argument XIX argues that the United States Supreme Court's decision in *Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616], provides yet another reason why California's death penalty scheme fails to pass constitutional muster.

ARGUMENT

II.

APPELLANT RESPECTFULLY WITHDRAWS HER PREVIOUSLY BRIEFED ARGUMENT II FROM THIS COURT'S CONSIDERATION

Upon further review of the record and this Court's recent case law, appellant respectfully withdraws Argument II in both appellant's opening and reply briefs from this Court's consideration.

III.

SEVERAL DECISIONS ISSUED BY THIS COURT SINCE THE CONCLUSION OF BRIEFING IN THIS CASE FURTHER SUPPORT THAT THE TRIAL COURT ERRED IN DISMISSING TWO JURORS FOR CAUSE OVER DEFENSE OBJECTION WHEN BOTH JURORS SAID THEY COULD BE FAIR, OPEN-MINDED, AND IMPOSE EITHER PUNISHMENT

Appellant has argued in Argument III of her initial briefing that the trial court erred in dismissing two prospective jurors --J.W. and D.S.- for cause, over defense objection, when both men said they could be fair and could impose death depending on what they learned at trial, and neither one espoused a view of the death penalty that would prevent or substantially impair the performance of his duties as a juror.[4] (AOB 137-151; Reply 14-125.) Since the filing of the briefs in this case, this Court has addressed the issue of excusals for cause related to a prospective juror's views of the death penalty in a number of cases which are relevant to assessing what took place in appellant's case.

[4] Appellant incorporates by reference the entirety of her earlier briefing of this claim. This is a supplement to that briefing and does not replace that briefing.

A. Numerous Cases Decided By This Court in the Past Four Years Further Support That the Trial Court Erred in Excusing Prospective Jurors J.W. and D.S. For Cause

This Court has stressed that a prospective juror can personally oppose the death penalty and still sit as a juror on a capital case provided that juror can conscientiously consider all sentencing options, including death. (*People v. Leon* (2015) 61 Cal.4th 569, 591; *People v. Covarrubias* (2016) 1 Cal.5th 838, 863.) Indeed, this Court has stated that a juror who would find it "very difficult" to "ever impose the death penalty" is not substantially impaired in performing his duties as a juror. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 39 [discussing *People v. Stewart* (2004) 33 Cal.4th 425, 447]; *see also Leon*, *supra*, 61 Cal.4th at p. 593 ["regardless of the jurors' personal views or inclinations, they were not disqualified from service unless they were incapable of setting aside these feelings and following the law"].)

Thus, jury selection in a death penalty case requires a two-part inquiry looking both at whether the prospective juror has strong feelings for or against the death penalty that would lead him to automatically vote one way or the other and whether the juror could, nevertheless, put aside those feelings and fairly consider both sentencing alternatives. (*Leon*, *supra*, 61 Cal.4th at p. 592.)

For this reason, follow-up questioning of jurors is

typically necessary after the jurors complete a questionnaire because a juror who indicates in his questionnaire that he would find it very difficult to impose death might, upon voir dire, "demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence." (*People v. Woodruff* (2018) 5 Cal.5th 697, 743 [quoting *People v. Stewart* (2004) 33 Cal.4th 425, 447].)

In accordance with these cases, both prospective juror J.W. and prospective juror D.S. expressed some difficulty in their questionnaires about imposing death in this case, but they both repeatedly stated in voir dire that they could and would consider the aggravating and mitigating factors and would consider both penalties. Substantial evidence did not support a finding that either juror was substantially impaired in his ability to perform the duties of a juror in this case.

Neither juror was excludable under the proper *Witherspoon/Witt*[5] standard. Here, the trial court excused both prospective jurors using the ***wrong*** standard. With respect to

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[5] *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 ["[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'"] [quoting *Adams v. Texas* (1980) 448 U.S. 38, 42].)

J.W., the court used the following standard:

> Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability ***to be neutral on the question*** of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose. (10RT 1631, emphasis added.)

As to D.S., the court stated:

> I think that does substantially impair ***his ability to be neutral*** and give serious consideration to both potential punishments in the penalty phase. (10RT 1702, emphasis added.)

The court's standard was incorrect and substantially lower than what is actually required for an excusal for cause. *Witherspoon/Witt* do not require a juror in a capital case to hold neutral views about the death penalty. The very premise of these cases is that jurors may well have strong views on the death penalty, and may even be personally opposed to it, yet still be qualified to serve as a capital juror. A juror who personally opposes the death penalty is still considered impartial for capital jury selection purposes if he can temporarily set aside his own beliefs in order to follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *see also Zaragoza*, *supra*, 1 Cal.5th at p. 37.) "The critical issue is whether a life-leaning prospective juror —that is, one generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment— can set aside his or her personal views about capital

punishment and follow the law as the trial judge instructs." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1065.)

Generally, when a prospective juror is excused for cause after voir dire, this Court defers to the trial court's determination of the juror's state of mind. (*Leon*, *sup*, 61 Cal.4th at p. 593.) However, this Court cannot defer to the trial court's decision if the court has applied an erroneous legal standard in making its determination. (*See e.g. Gray v. Mississippi* (1987) 481 U.S. 648, 661 n.10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law ...."]; *People v. Cunningham* (2015) 61 Cal.4th 609, 664 [this Court independently reviewed the record to resolve the legal question of whether a prosecutor excused a juror for racial reasons when the trial court used an incorrect standard to find "no systematic pattern of discrimination" rather than "no inference of discriminatory purpose"].)

B. The Excusal for Cause of Prospective Juror D.S. was not Supported by Substantial Evidence

D.S. described himself as between "somewhat opposed" and "strongly opposed" to the death penalty, and he believed it should be used only in the "most extreme cases." (15JQCT 4490-4491.) He wrote, "I do not believe that killing the defendant is a solution for the first killing, so I would strongly object to

the death penalty unless overwhelmingly convinced of intent free of mental impairments." (15JQCT 4490.) He supported life without the possibility of parole over the death penalty. (15JQCT 4490.) D.S. did not believe the death penalty served any purpose, did not believe it should be imposed automatically for killing a child, and had no particular feeling about its application to a woman. (15JQCT 4491.) He wrote that it was not for him to decide which was the worst punishment although he, personally, did not think he would want to live. (15JQCT 4492.)

D.S. put a "?" in the "No" answer to whether he would always vote against the death penalty no matter the evidence, and wrote in "But almost always." (15JQCT 4492.) D.S. also put a "?" in the "Yes" answer to whether he would refuse to find the defendant legally sane because of his views against the death penalty. (15JQCT 4493.) He put a "?" in the "No" answer to whether he could be open minded about the penalty and wrote: "I would require sufficient evidence to convince me that the death penalty will serve a purpose beyond retribution." He also wrote in answer to whether he could honestly consider both penalties: "I would begin from the position that life without parole is enough punishment and no more is needed." (15JQCT 4493.)

At the outset of voir dire, D.S. said he could be fair to both sides. (10RT 1640.) When asked about his "qualms" about the death penalty, D.S. explained that he had a problem with killing

a person as vengeance for an initial killing unless the second killing was necessary to protect society. (10RT 1644, 1690.) However, when asked if he was willing and able to follow the law regarding weighing aggravating and mitigating factors, D.S. replied, "Sure." (10RT 1647.) When asked if he could be a juror on this case, he said, "Yeah." (10RT 1648.) When asked if he could impose death in this case, D.S. appropriately responded, "I have yet to hear anything." (10RT 1691.)

D.S. astutely explained that the question of whether he could impose death really depended on what information he was provided:

> Q. Okay. In any case where you knew that the two options were life in prison without parole or the death penalty, could you ever see yourself coming down on the side of the death penalty?
>
> A. Certainly.
>
> Q. Okay.
>
> A. Because just the fact that you've proven the person guilty and that I have voted for the person guilty and guilty three times is what you're saying, certainly you've presented a tremendous amount of information that would sway me toward the death penalty.
>
> But it would be dependent on what you present. If all you present is -- is some -- is a simple set of facts that occurred and nothing beyond that, then I might not be. It depends on what you present.
>
> I don't know -- I don't know anything about the case. Of course I read it three, four months ago, but I haven't dwelt on it, so I

don't know.

Q. Okay.

A. And it's what you present. I don't know what's going to be presented here. (10RT 1691-1692.)

When pressed repeatedly by the prosecutor to answer about his punishment decision, D.S. agreed that it would be very difficult but said he couldn't "forecast what I would judge based on what you may or may not prove." (10RT 1692, 1693.) He explained that he could not decide in the absence of knowing what the evidence would be: "I would have to sit here for six weeks and listen, so it's going to be based on all of that information, and there might be stuff in there that would cause me to say yes, all right, it's -- it's -- the death penalty is there. But there -- I don't know --." (10RT 1693.) D.S. admitted he had not really had to think through these types of questions until he filled out his questionnaire. (10RT 1693-1694.)

At the end of his voir dire, D.S. repeated that he could impose death depending on the evidence even though it would cause him some hesitation:

Q. Okay. Well, as you sit here today, do you think that you could actually impose death on another human being?

A. The answer is yes. (10RT 1694.)

When asked specifically about imposing death on appellant, D.S. again pointed out that he could not answer that question

without more information: "[Y]ou're asking a hypothetical that doesn't have enough basis still for me to answer. So the answer is I can't answer that kind of question. That's too ethereal." (10RT 1694.)

The prosecutor's questioning continued:

> Q. But we just need to know if you could ever vote death on a murder case where the only option is death or life in prison without parole or if you are so in favor of life in prison without parole because it serves the purpose of protecting society to you that you just wouldn't impose death.
>
> A. I cannot say that absolutely I would never do it.
>
> Q. Okay. So it's possible?
>
> A. It's possible. But I certainly have expressed hesitation. (10RT 1695.)

Over defense objection, the court granted the prosecutor's motion to excuse D.S. for cause. The court said that D.S.'s comment that "it would be very difficult" to impose death was enough to excuse him for cause. But, the court also cited D.S.'s statement that he would only impose death if society would benefit and future dangerousness was not a factor for the jury to consider. The court ruled that mindset would substantially impair D.S.'s ability to be neutral. (10RT 1702-1703.) When the defense tried to disagree with the court's findings, the court said counsel could make a record later but it would not change its mind. (10RT 1703.)

The trial court's ruling was not supported by substantial

evidence. D.S. said he could impose death, although he would do so with much hesitancy. He, quite correctly, declared he could not prejudge whether he could sentence appellant to death because he had not yet heard the evidence. As this Court has repeatedly held, a juror can be reluctant to impose the death penalty but still be eligible to sit on a capital jury if he can fairly consider both punishments.(*Zaragoza*, supra, 1 Cal.5th at p. 39; *Leon*, *supra*, 61 Cal.4th at p. 593.) Indeed, just last month, this Court said, "Our cases make clear that 'mere difficulty in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties.'" (*People v. Buenrostro* (2018) 6 Cal.5th 367 [240 Cal.Rptr.3d 704, 744]; *see also Adams v. Texas* (1980) 448 U.S. 38, 49-50 ["neither nervousness, emotional involvement, nor inability to deny or confirm any effect [of one's views on the death penalty on the determination of penalty] whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"].)

C. The Excusal for Cause of Prospective Juror J.W. was not Supported by Substantial Evidence

J.W. expressed in his questionnaire strong support for the death penalty when it was clearly warranted. (17JQCT 5064.) He strongly favored the death penalty for its deterrent effect,

tended to favor the death penalty for the murder of a child, had a gut reaction against imposing death on a woman but could do it if was clearly warranted, and believed the death penalty was sought too infrequently and not imposed often enough. (17JQCT 5065.) J.W.'s views on the death penalty would not affect his voting at trial, and he had an open mind about the appropriate penalty. (17 JQCT 5066-5067.) Although his wife had strong anti-death penalty views and he worried about its effect on his marriage, J.W. said he could listen to the evidence and the instructions and honestly consider both punishments. (17JQCT 5067.)

During voir dire, J.W. told the court that he had been thinking more about the issue since filling out his questionnaire, and he thought it "unlikely" that he would vote for death in this case, but it was "not impossible." J.W. could not think of any reason he could not be fair and impartial to both sides. (10RT 1508.) J.W. explained that he had not changed his convictions about the death penalty but he thought that knowing what he knew about this case, it would be "difficult" for him to apply the death penalty. (10RT 1509.) On the other hand, J.W. said, "I don't have preconceived notions" about the case. (10RT 1510.) He agreed that there would be cases where he would have less hesitancy than he had about this case. (10RT 1511.) J.W. said he absolutely did not want to be a juror, but said

someone has to do it, and he could do it. (10RT 1533.)

When questioned about his wife, J.W. acknowledged having a personal concern about his wife's feelings about the death penalty.[6] (10RT 1512.) He believed he could set her views aside but could not guarantee it. (10RT 1513.) When pressed to answer whether he could forget his wife's views if he was on the jury, J.W. said he could. (10RT 1514.)

The prosecutor later posed additional questions about J.W.'s wife. J.W. said it would not be a problem in the short-term but he was not sure about the long-term effects. He said it "perhaps" might impair his ability to impose death. (10RT 1592-1593.)

J.W. reiterated that he supported the death penalty and would vote for it if it was on the ballot, but acknowledged feeling a little "old-fashioned" about imposing it on a woman and that doing that would be "an effort." (10RT 1593.) When asked if he could impose death on appellant after looking at her and hearing about her for a long time, J.W. replied, "Theoretically, yes. I said it wasn't impossible. I do think the probability is low." (10RT 1594.) When asked again if he could impose death in this case, J.W. answered, "If I heard enough factors that led me to think it was the right thing to do." He agreed that he would

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[6] J.W. talked to his wife about possibly sitting on a capital case but did not give her any details. He also said he could refrain from talking to his wife about the trial if he was selected as a juror. (10RT 1513.)

consider and balance the aggravating factors and mitigating factors and would use his judgment. (10RT 1594-1595.)

The prosecutor moved to have J.W. excused for cause because he would "be unable to impose death on a female defendant." (10RT 1630.) Defense counsel opposed the request, noting that J.W. said he could impose death. Defense counsel argued that having some hesitancy in imposing death was not disqualifying. (10RT 1631.) The court, in granting the excusal for cause, acknowledged that J.W. said he could impose death. Nevertheless, the court disregarded what J.W. actually said during voir dire and found cause to excuse him:

> He has stated that he could consider imposing the death penalty as -- but I'm not convinced that, in light of his statements in the questionnaire and one of the first statements he made while being seated, it's unlikely he will vote death penalty in this case based upon what he knows, it seems to me that his mind-set at present is one that substantially impairs his ability to reasonably consider both punishments and to reasonably consider both punishments as a reasonable possibility in this case.
>
> And he did indicate in the questionnaire that he did not believe in the death penalty for women,[7] and he reemphasized that there -- that -- he said he might be old-fashioned, so

[7] The court was factually inaccurate. J.W. wrote in his questionnaire regarding imposing death on a woman: "Can't help but have gut reaction against – unless clearly warranted." (17JQCT 5065.) Thus, J.W. acknowledged that there were cases with a female defendant where he might find that death was "clearly warranted." And making that determination --whether death is clearly warranted --is exactly the task of a capital case juror.

> I think it's good that chivalry is not dead yet in our society, but I am of the opinion that he would be unable to faithfully and impartially apply the law.[8] (10RT 1632.)

As was the case with D.S., the trial court's ruling on J.W. was not supported by substantial evidence. J.W.'s final four voir dire answers demonstrate that J.W. not only understood his obligation as a juror, but he was perfectly willing and capable of engaging in the difficult process of being a juror on this death penalty case:

> Q. And would you be able to impose death in this case?
>
> A. If I heard enough factors that led me to think it was the right thing to do.
>
> Q. Enough factors in aggravation?
>
> A. Versus mitigation, right.
>
> Q. So you're going to look to the things I just explained about how you have to balance out the aggravating and mitigating factors?
>
> A. Yes.

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[8] The court also faulted J.W. for "discussing his views on capital punishment with his wife after leaving the last proceeding" in violation of the Court's admonition. (10RT 1632.) That was also factually inaccurate. J.W. said he told his wife he might be sitting on a capital case and said nothing more. (10RT 1512-1513.) There is nothing in the record to support that J.W. did anything other than acknowledge to his wife that the 16-week trial for which he was a potential juror was a capital case. That does not support cause for excusing J.W. Moreover, given the media coverage surrounding this case coupled with the 16-week trial estimate, it is reasonably likely that J.W.'s wife already knew or reasonably could have guessed that J.W. was a potential juror in this high-profile death penalty case.

Q. One of the -- one of the other things that I said in describing that is that any one of those factors can be so overwhelming to you that that alone makes the aggravating circumstances so extreme in comparison to the mitigating circumstances that you think death is appropriate.

It doesn't -- we don't have to have all of the different types of aggravating factors that are present. We can have just one that is so bad that it outweighs all the others. Do you think that you could do that?

A. Certainly. It would depend on my judgment. (10RT 1594-1595.)

J.W. understood his duty well: to consider all factors in mitigation and all factors in aggravation and then decide, using his judgment, whether the scales tipped in favor of death or life without the possibility of parole. J.W.'s unequivocal answers proved his fitness to sit as a juror notwithstanding his ambivalence about imposing death on a woman. Nevertheless, the trial court disregarded what J.W. said during voir dire and went back to J.W.'s questionnaire responses to find J.W. excusable for cause using an erroneous standard.

D. <u>This Court's Recent Jurisprudence Confirms That Neither D.S. or J.W. Qualified for an Excusal for Cause</u>

In the last four years, this Court repeatedly stressed in *Leon*, *Zaragoza*, *Covarrubias*, *Woodruff*, and *Buenrostro* that jurors who look like they might be excusable for cause based solely on their questionnaire answers might be rehabilitated through voir dire questioning. The jurors did not need to change their views

on the appropriateness of the death penalty, they needed only to be able to put their views aside to fairly consider both punishments. (*Leon*, *supra*, 61 Cal.4th at p. 592; *Zaragoza*, *supra*, 1 Cal.5th at p. 39-40; *Covarrubias*, *supra*, 1 Cal.5th at p. 864; *Woodruff*, *supra*, 5 Cal.5th at p. 6235; *Buenrostro, supra*, 240 Cal.Rptr.3d at p. 744.)

In appellant's case, although prospective jurors D.S. and J.W. were voir-dired after completing their questionnaires, the court disregarded the jurors' assurances that they could and would fairly consider both death and life without the possibility of parole and instead relied heavily on the jurors' initial concerns about the death penalty to grant the prosecutor's request to excuse the jurors for cause. That was wrong. The court failed to consider the second part of the two-part inquiry -- whether the jurors could set aside their personal views and follow the law in deciding the penalty. (*Leon*, *supra*, 61 Cal.4th at p. 592.)

Moreover, the trial court explicitly removed both jurors for cause based upon at least two incorrect legal standards. First, the court excused the jurors for not being neutral towards the death penalty, a standard that is not required under *Witt*. (*Witt, supra*, 469 U.S. at p. 424.) Second, the court disregarded that having difficulty with the concept of imposing death is not a disqualifying factor. (*See e.g. Zaragoza*, 1 Cal.5th at p. 39;

Leon, *supra*, 61 Cal.4th at p. 593.) This Court has explained that because California's capital sentencing process contemplates that a juror will take into account his own values in assessing the aggravating and mitigating factors and determining whether death is warranted, a juror's expressed difficulty in imposing death is not the equivalent of substantial impairment. (*Woodruff*, *supra*, 5 Cal.5th at p. 743.)

Whether this Court reviews this claim under a de novo standard or a more deferential standard, the court's two excusals for cause, over defense objection, were not supported by substantial evidence of the juror's impairment to serve as a juror. Accordingly, this Court must reverse appellant's death sentence. An error in excusing a juror for caused based on the juror's views about the death penalty is reversible error without the need for demonstrating prejudice. (*Leon*, *supra*, 61 Cal.4th at p. 593 [citing *Gray v. Mississippi* (1987) 481 U.S. 648, 667–668]; *Zaragoza*, *supra*, 1 Cal.5th at p. 41 [same].)

XIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WHEN IT DISMISSED ONE OF TWO JURORS WHO BRIEFLY MENTIONED THE EMOTIONALISM OF DELIBERATIONS WHILE TALKING TOGETHER IN THE COURT PARKING LOT DURING GUILT PHASE DELIBERATIONS

In her opening brief, appellant made three inter-related arguments regarding the trial court's dismissal of Juror #9 during guilt phase deliberations while retaining Juror #11 after the two jurors had a brief discussion in the court parking lot after court ended on a Friday about emotions running high in the deliberation room. (AOB 290-326; Reply 85-114.)[9]

In that initial briefing, appellant specifically argued:

(1) the court erred in dismissing Juror #9 because what transpired between the jurors was only a de minimis violation of the court's standard admonishment not to discuss the case unless all twelve jurors were together and did not reveal a demonstrable reality that Juror #9 could not perform his duties as a juror or otherwise constitute good cause for his dismissal. (AOB 290-313; Reply 94-101.);

(2) if the actions of Juror #9 constituted good cause for

[9] Appellant incorporates by reference the entirety of her earlier briefing of this claim. This is a supplement to that briefing and does not replace that briefing.

his dismissal, then the trial court erred in not also dismissing Juror #11 who was the other party to this brief discussion. There is no legally sound scenario under which two jurors engage in a brief but prohibited conversation but only one of the jurors is dismissed for cause for engaging in the conversation while the other participant is left on the jury. (AOB 313-317; Reply 101-106.); and

(3) the trial court erred in not granting a new trial when a post-trial declaration by Juror #11 offered additional evidence supporting that the trial court improperly dismissed Juror #9 and that any conversation between the two jurors about the case was brief and insignificant and did not rise to the level of unlawful juror misconduct. In addition, contrary to her answers to the trial court's questioning, Juror #11 admitted in her declaration to conversing with Juror #9 about emotions related to this case thus supporting that if Juror #9 was rightfully excused, then Juror #11 also should have been removed; therefore, the new trial motion should have been granted. (AOB 320-326; Reply 106-114).

A. Cases Decided Since the Reply Brief Was Filed Provide Additional Support for this Court to Exercise its Discretion to Decide this Issue Solely on the Merits Because it Involves Constitutional Error and Affects the Substantial Rights of Appellant

Respondent has argued that the first two parts of this claim were forfeited because counsel for appellant moved for the dismissal of Juror #9 and did not request the dismissal of Juror

#11. Appellant has explained why this Court should not find either aspect of this claim forfeited because the trial court had the opportunity to decide whether good cause existed for the removal of Juror #9 and Juror #11.[10] (AOB 317-323; Reply 86-94.) Specifically, appellant raised the issue of Juror #9's misconduct in the trial court and provided the trial court an opportunity to determine if the misconduct rendered Juror #9 unable to perform his duties as a juror. Because the trial court placed its reasons for dismissing Juror #9 and not dismissing Juror #11 on the record, this Court has all the information it needs to evaluate whether the trial court's reasons constituted a demonstrable reality of Juror #9's unfitness to serve as a juror.

Nevertheless, if this Court believes appellant has forfeited this claim, appellant asks this Court to exercise its discretion to decide the merits of this claim notwithstanding the forfeiture. The fact that a party did not do enough to prevent or correct an error does not deprive a reviewing court of the

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[10] In addition to the reasons discussed in appellant's opening and reply briefs, appellant further notes that the trial court had a duty to inquire further into Juror #11's inability to serve after ruling that Juror #9 had to be dismissed even if appellant did not desire Juror #11's dismissal. (*People v. Cowan* (2010) 50 Cal.4th 401, 506 ["The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry."].)

authority to reach a question that has not been preserved for review. (*People v. Williams* (1998) 17 Cal.4th 148, 161 n.6.) Appellate courts typically engage in the discretionary review of forfeited claims when the claims involve important issues of constitutional law or a substantial right of the defendant. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887 n.7.) This case presents such a situation, and this Court has the authority to review this claim.

Since the filing of the reply brief in this case, numerous courts have exercised their discretion to address the merits of a claim that could have been deemed forfeited:

- *People v. Young* (2017) 17 Cal.App.5th 451, 463 ["[T]he fact that a party may forfeit a right to present a claim of error to the appellate court if he or she did not raise the issue in the trial court does not mean the appellate court is deprived of authority to reach the merits of the issue"--citing *People v. Williams, supra*, 17 Cal.4th at p. 161 n.6] [reviewing the dismissal of a juror outside of the presence of the defendant and counsel with no objection when trial resumed; case reversed];
- *In re T.F.* (2017) 16 Cal.App.5th 202, 213 ["[I]t is well established that even when a party has forfeited a right to appellate review by failing to preserve a

claim in the trial court, an appellate court may still review the claim as an exercise of its discretion" citing *People v. Williams, supra*, 17 Cal.4th at p. 161 n.6] [exercising discretion to determine whether a confession was involuntary even though no challenge was made on that ground in the trial court; confession found involuntary and judgment reversed];

- *People v. Malago* (2017) 8 Cal.App.5th 1301, 1304 [reviewing a challenge to a supervision condition even though counsel failed to secure a ruling after raising an objection --citing *People v. Williams, supra*, 17 Cal.4th at p. 161 n.6; condition upheld];
- *People v. Brown* (2016) 247 Cal.App.4th 211, 233 [an issue should be reviewed despite the lack of an objection when "the issue is an important one affecting defendant's substantial rights" ---citing *People v. Williams, supra*, 17 Cal.4th at p. 161 n.6] [considering the ramifications of the jury having returned two signed verdict forms --one guilty & one not guilty– for the same count even though counsel did not object after learning of this after the jury was dismissed; conviction reversed];
- *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020 ["[A]n appellate court may exercise its discretion to

review a claim affecting the substantial rights of the defendant despite forfeiture for failure to raise the issue below"--citing *In re Sheena K.*, supra, 40 Cal.4th at p. 887 n.7] [reviewing a claim of *Griffin* error despite no objection to the prosecutor's argument at trial; *Griffin* error occurred but harmless];

- *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1310 [electing to review a forfeited claim that a sentence constituted cruel and unusual punishment to avoid a subsequent claim of ineffective assistance of counsel citing *In re Sheena K.*, supra, 40 Cal.4th at p. 887 n.7; sentence was constitutional].

This juror misconduct claim, whether treated as the erroneous dismissal of a juror for misconduct or the failure to remove a juror who committed misconduct, involves important constitutional rights. Removing a juror is a serious matter that implicates a criminal defendant's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Appellant is sentenced to death. This claim affects her substantial rights and involves vital constitutional concerns. (*See e.g. Beck v. Alabama* (1980) 447 U.S. 625, 638 [the Eighth Amendment requires heightened reliability at both the guilty and penalty phases of a capital trial].) For these reasons, this Court should exercise its

discretion and decide this claim solely on the merits.

B. The Record Upon Which the Trial Court Relied To Excuse Juror #9 Does Not Support a Demonstrable Reality that Juror #9 was Unable to Perform His Duties as a Juror

Two cases decided since the filing of the reply brief further support that the trial court erred in dismissing Juror #9. In *People v. Armstrong* (2016) 1 Cal.5th 432, 450-454, this Court reiterated the heightened standard of review that attaches to the review of the discharge of a sitting juror: the juror's inability to perform his duty as a juror must appear in the record as a demonstrable reality. In conducting this review, this Court is not "simply determining whether any substantial evidence in the record supports the trial court's decision." (*Armstrong*, *supra*, 1 Cal.5th at p. 450 [quoting *People v. Lomax* (2010) 49 Cal.4th 530, 589].) Rather, the reviewing court must independently look at the evidence upon which the trial court actually relied and determine whether the trial court's conclusion that good cause existed to dismiss the juror was "manifestly supported." (*Id.* at p. 450-451.)

In *Armstrong*, the trial court dismissed Juror 5 during the third day of deliberations following a 9-day guilt phase trial. (*Id.* at p. 444.) At the end of the second day of deliberations, the jury indicated it was deadlocked. After the court instructed the jury to continue deliberations, the court received two notes stating that Juror 5 was not objectively considering the evidence

and was refusing to listen to other jurors. The court also received a note from Juror 5 saying that Juror 12 was biased. After questioning the foreperson, Juror 5, Juror 12, and two other jurors, the court excused Juror 5 and Juror 12. (*Id.*)

The defense objected to the dismissal of Juror 5. The trial court, however, concluded based on the juror interviews that Juror 5 had a fixed opinion, was no longer deliberating, and was taking time outs with her cell phone and a book. (*Id.* at p. 449.) Juror 5 had denied these allegations but the court found her not credible. (*Id.* at p. 451.)

On review, this Court found that the trial court's determination that Juror 5 was refusing to deliberate was not "manifestly supported" by the evidence upon which the court relied. (*Id.*) In reaching this conclusion, this Court closely examined what each juror actually said and found the trial court's reasons for dismissing Juror 5 were not borne out by the juror interviews. (*Id.* at p. 452-453.) The evidence, therefore, did not support as a demonstrable reality that Juror 5 was refusing to deliberate. Accordingly, this Court found Juror 5's dismissal to be an abuse of discretion, and the judgment was reversed. (*Id.* at p. 453-454.)

The same reasoning applies in this case. As appellant explained in her earlier briefing, a review of the trial court's brief questioning of Jurors #9 and #11 did not support a

demonstrable reality that good cause existed to dismiss Juror #9. (AOB 306-313; Reply 94-101.) The only "misconduct" was that the two jurors violated the admonition not to talk about the case unless all 12 jurors were together. The interviews showed only that the two jurors had a very brief --one or two line-- discussion about the emotionalism in the deliberation room. Juror #9 reported that the only comment about the case was that emotions had been "very highly charged." Juror #9 explained that someone had said appellant had to have been emotional that night, and Juror #9 had agreed. Juror #9 could not remember who brought up the case but said it could have been him. He acknowledged being aware of the admonition not to discuss the case without all 12 jurors being present in the jury room, and he apologized deeply for what he had done. (58RT 11268-11271.)

Juror #11 admitted talking to another juror in the parking lot but said they didn't specifically talk about the case but "sort of" talked about deliberations. When asked to explain "sort of," Juror #11 said the other juror thanked her for taking the time to listen and understand his perspective. She didn't believe she made any further response to that. When asked if that was all of the conversation about the case, Juror #11 replied, "Yes." (58RT 11268-11272.)

The court found good cause for excusing Juror #9 based on his "flagrant violation" of the court's order not to discuss the

case outside the jury room. (58RT 11275.) The court never explained how this demonstrated that Juror #9 could not perform his duties as a juror. Nor did the court explain how this very brief exchange on the fourth day of deliberations after a 56-day trial was a "flagrant" violation as opposed to a minor violation of the court's order. As this Court did in *Armstrong*, this Court must again find that the record does not support a demonstrable reality that the excused juror could not perform his duties as a juror and must reverse the judgment.

This Court also discussed the contours of the demonstrable reality standard in *People v. Williams* (2015) 61 Cal.4th 1244, 1262. In that case, this court upheld the dismissal of Juror 12 for multiple violations of the court's admonition not to discuss the case. Juror 12 admitted that she made a comment to other jurors that the only reason an in-custody prosecution witness was handcuffed was because he was African-American. The trial court talked with Juror 12 who acknowledged her mistake in giving that opinion. After the court explained why the witness was handcuffed and admonished the juror again about not discussing the case before deliberations, the court denied a prosecution request to excuse Juror 12. (*Williams*, *supra*, 61 Cal.4th at p. 1260.)

Nine days later, a different juror reported that Juror 12 had made comments about the case in front of other jurors. This time Juror 12 denied making the comments attributed to her, but

offered that she had heard someone else say something similar. (*Id.* at p. 1261.) The other jurors were questioned but no one else heard Juror 12 make the comments attributed to her. This time the court granted the prosecution's request to dismiss Juror 12, over defense objection. (*Id.*) The court did so after finding that Juror 12 had violated the court's admonition a second time after being specifically warned not to do so and then lied to the court when she denied making the second set of comments. (*Id.*)

This Court's analysis of the dismissal in *Williams* is informative. The Court acknowledged, as appellant did in his briefing, that the failure to follow a court's admonition is misconduct. (*Id.* at p. 1262.) But, not all misconduct constitutes good cause to dismiss a sitting juror. In the *Williams* case, the trial court had not found good cause to dismiss Juror 12 after just one violation. It was the juror's second violation of the court's admonition coupled with her dishonest denial of having made the second comments that formed the basis for the trial court's finding of good cause. This Court agreed that Juror 12's ***multiple*** lapses supported her dismissal as a demonstrable reality. (*Id.* at p. 1262-1263; *compare with People v. Linton* (2013) 56 Cal.4th 1146, 1191-1196 [no error in court's refusal to dismiss a juror during the second day of guilt phase deliberations even though the juror had "vented" to her husband about one aspect of the case].)

In stark contrast to *Williams*, in appellant's case, Juror #9 violated the trial court's admonition one time by engaging in a very brief conversation with another juror after 59 days of trial and four days of jury deliberations. The trial court did not find that Juror #9 had committed any previous violations nor did the court find Juror #9 to be dishonest in his reporting of the incident. Indeed, rather than lying to the court as Juror 12 did in *Williams*, Juror #9 was open, forthright, and deeply apologetic. Further, the record is devoid of any evidence that anything Juror #9 said in the parking lot was in any way prejudicial to appellant. In short, the dismissal of Juror #9 as unable to carry out his duties as a juror was not supported as a demonstrable reality.

Moreover, even if, for the sake of argument, Juror #9's actions warranted his dismissal, then certainly by the time of the new trial motion, Juror #11's disqualification was also warranted. Juror #11 not only violated the court's admonition by talking to Juror #9 about deliberations, but, as evidenced by her post-trial declaration, she did not respond candidly or accurately when she answered the court's questions about what transpired. Like Juror 12 in *Williams*, and unlike Juror #9 in this case, Juror #11 possibly had multiple infractions in connection with the fleeting parking lot conversation and her responses to the court.

As one court recently observed, "[T]he defendant is entitled to proceed with the sitting juror on the panel unless and until good cause for removal is shown to be a demonstrable reality." (*People v. Young* (2017) 17 Cal.App.5th 451, 468.) The inability of Juror #9 to serve on appellant's deliberating jury was not shown to be a demonstrable reality. If, for the sake of argument, the actions of Juror #9 did constitute demonstrable evidence of his inability to continue serving as a juror, then Juror #11 was at least equally unable to continue serving as a juror. Under either finding, this Court must reverse the judgment and afford appellant a new trial.

XVIII.

THE TRIAL COURT ABDICATED ITS LEGAL AND STATUTORY DUTIES WHEN, AFTER THE PARTIES SUBMITTED AN EMAIL TO THE COURT LISTING 48 JURORS THEY AGREED COULD BE EXCUSED FOR CAUSE, THE COURT EXCUSED THOSE JURORS WITHOUT ANY DISCUSSION ABOUT WHETHER THE JURORS WERE ACTUALLY EXCUSABLE FOR CAUSE, WITHOUT CONDUCTING ANY VOIR DIRE OF THOSE JURORS, AND WITHOUT MAKING AN ACTUAL FINDING THAT THE JURORS MET THE CRITERIA FOR EXCUSAL FOR CAUSE RESULTING IN A NUMBER OF JURORS BEING EXCUSED WHEN A CAUSE FINDING WAS NOT WARRANTED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

A. At the Court's Suggestion, the Parties Submitted a List of Jurors They Agreed The Court Could Excuse for Cause Based Solely on the Questionnaire Responses

Prior to jury selection, the court and the parties discussed logistics and scheduling. They decided the jurors would start filling out questionnaires on July 17, 2001. The court contemplated that after reviewing the juror questionnaires but before the jurors came back for voir dire, the parties might stipulate "regarding those prospective jurors based solely on their questionnaire responses." (4RT 525.) The court explained:

"I'd plan to meet with counsel on the 23rd and go over stipulations the parties might have regarding answers on those questionnaires, ***make those rulings*** and then bring the panel back in the 24th." (4RT 527, emphasis added.)

The process of jury selection began on July 17 with three panels of 80-85 prospective jurors brought into the courtroom for hardship screening. (5RT 765.) Jurors not excused for hardship completed a 23-page juror questionnaire. (6RT 771, 839, 898.) Jury selection continued on July 18 with three more panels processed. (7RT 967, 1028, 1089.)

At one point on July 18, the court asked the parties:

> Is there any idea as to a percentage of completed questionnaires that you have observed that would be excludeable for cause based on the answers in the questionnaire? (7RT 1085.)

The prosecutor responded:

> I can't give a percentage, but there are a number of jurors who have said they would not find somebody guilty just so they could avoid the -- the penalty phase. And I think that's the type of answer that the Court is talking about, 'cause --. (7RT 1085.)

Defense counsel responded:

> And there are likewise a number of people who believe that a person who is convicted of killing a child ... should receive the death penalty. However, they do answer question 89 that they know of no reason why they could not sit as a juror in this case. So --. (7RT 1085.)

The court commented:

> Well, I've only looked at one in detail and that one was one I'm sure the parties will agree can be stipulated off because she had things to say in there that were not complimentary to either side in terms of the opinions expressed, and she did express in rather unequivocal fashion that she would never support the death penalty. But the person also expressed in rather unequivocal language that she already had an opinion about the case and the outcome. (7RT 1085.)

Based on this initial review of questionnaires, the parties agreed they would need more prospective jurors than was initially expected. (7RT 1087-1088.)

On July 19, two more panels were processed. (8RT 1142, 1198.) On July 20, after another two panels were processed, the court and the parties agreed that they still did not have enough questionnaires and opted to have more panels brought in. (8RT 1236, 1285, 1324-1325.)

On Monday, July 23, a final two panels were processed.[11] (9RT 1336, 1373.) That same day, the prosecution, with the agreement of the defense, requested that the jurors be brought back on August 2 for general voir dire rather than the previously agreed upon date of July 31 with voir dire finishing by August 10 and opening statements starting on August 20. The court expressed concern that the change would start them off already behind

[11] The second panel was added at the request of the parties who estimated that 50% of the jurors who completed questionnaires likely would be successfully challenged for cause. (9RT 1332.)

schedule.

The court posed the following question:

> If I grant your request, can you assure me as you sit there now that by close of business on Friday, August 10th, we will have a jury and we will have four or six alternates so that you can start -- start opening statements on Monday, August 20th? Can you give me your heartfelt commitments we'll have a jury picked by August 10th? (9RT 1426.)

The prosecutor said that he thought that was a reasonable expectation but he could not agree with absolute certainty that the jury would be picked by then because he did not know what the jurors would say. He added that based on his review of the questionnaires so far, he expected they would eliminate a lot of jurors "right off the bat." Defense counsel agreed. (9RT 1427.)

The court asked the parties to commit to "do[ing] everything reasonably possible, without affecting the interest of your client, to have a jury picked and impaneled on or before close of business on August 10th?" Both parties agreed. (9RT 1427.)

The court next asked about both exclusions for cause and stipulations. Specifically, the court wanted to know when they could meet "to deal with any stipulations the parties have in terms of excluding people who have completed the questionnaire for cause -- or any stipulations?" The parties conferred and agreed upon July 30. (9RT 1427.) The court, noting that the prosecutor had thought they had a 50% "kick-out rate" for cause,

stated:

> I take it from that there won't be a lot of disagreement amongst the parties as to some challenges for cause based on the answers in the questionnaire. ... Although theoretically you have a chance to rehab them. Some of the ones I've seen I think would be just a waste of time, but I can't tell you how to do your job. (9RT 1427.)

Defense counsel responded:

> I have no intention of wasting someone's time. I never do that in jury selection. I don't intend to start now. ... I have spent no time this weekend doing anything other than going over the juror questionnaires. And I believe there's at least 39 to 40 people on the list. I have not provided my list to the People. I am waiting until they're prepared to provide me a list.
>
> And I would fully expect given my experience with the people involved that we're going to have a lot of duplicate names. How many duplicate names -- I would think it would be considerable. But that is the exhausted list as far as I'm concerned of all of the questionnaires up until the ones we receive today. (9RT 1428.)

The court proposed meeting on Friday (July 27) to allow time for the clerk to contact the excused jurors and time for the jury commissioner to rearrange the remaining jurors. (9RT 1428.) Ultimately, the court granted the proposed change in schedule based on counsels' "assurances you'll do everything possible within the realm of your control, anyway, without running the risk of harming your client's interest, to have a jury picked on or before August 10." (9RT 1429.)

On July 26, defense counsel sent an email to the court's staff that said, in relevant part:

> Below is a list of Jurors that both the prosection [sic] and defense agree can be ***excused due to either hardship or cause***. We all agreed to ***submit*** this list now with the hope it will help Judge Coleman and his staff to know this as soon as possible. Additionally, due to the selfless industry of both sides, we no longer need the continuance he granted from 7/31 to 8/2. We are ready, unless he has detrimentally relied on our continuance motion, to have the jurors back on 7/31 as previously planned. I hope Judge Coleman accepts our group apology for any inconvenience we have caused. [The email then listed 62 names with 14 names containing the notation "(hardship)" after them.] (3rd Supp CT 114-115, emphasis added.)

On July 27, the court began the hearing by stating:

> I probably should put on the record for the benefit of the record that yesterday afternoon the Court received an e-mail actually -- technology is wonderful -- from [defense counsel] indicating there had been agreement reached that a certain number of jurors ***could be excused***, some for the hardship reasons that I had specified to the parties in an e-mail I had sent to them, and I've had those e-mails entered in the file by the clerk ...
>
> This list includes ... ***a number of other jurors where the parties were in agreement that they could be excused for cause reasons***. I believe that should be entered into the record as well and made a permanent part of the file. (9RT 1431-1432, emphasis added.)

Defense counsel clarified that although she transmitted the list, it was a joint list. The parties agreed that without the 62 jurors in the email, they had 175 remaining jurors. They further

agreed that there were no more jurors for whom they could reach agreement. (9RT 1432.) The court and the parties went on to discuss the logistics of bringing in the remaining 175 jurors for voir dire. (9RT 1433-1436.)

Despite the court's previous indications that any jurors the parties agreed upon would be discussed and ruled upon, the court neither discussed nor ruled upon any of the 48 jurors submitted by the parties. Indeed, the court never formally excused any of the jurors; the court simply treated them as if they had been excused. As discussed further, below, at least 11 of the jurors on the email list were not excusable for cause.

B. Appellant's Submission to the Court of the Agreed Upon List of Jurors Who Could Be Excused for Cause Does Not Preclude Appellant From Challenging on Appeal the Excusal for Cause Of Some of the Jurors on the List

Appellant acknowledges that defense counsel never objected when the court treated the entire list of 62 jurors as excused. At the time this case was tried in 2001, a challenge to the court's excusal for cause was not waived by a failure to object. This Court explained in *People v. McKinnon* (2011) 52 Cal.4th 610, 636, that it had adhered to that no-objection-needed rule since its decision in *People v. Velasquez* (1980) 26 Cal.3d 425. This Court "abandoned" that rule in *McKinnon* in 2011 and announced that, prospectively, the defense would need to object or make the functional equivalent of an objection to preserve a claim of

Witherspoon/Witt[12] error for appeal. (*McKinnon*, 52 Cal.4th at p. 636, 638-644.) Because appellant's case was tried before *McKinnon*, counsel's failure to object to any of the excusals for cause does not forfeit her ability to challenge these excusals on appeal. (*See also Uttecht v. Brown* (2007) 551 U.S. 1, 18 ["In order to preserve a *Witherspoon* claim for federal habeas review there is no independent federal requirement that a defendant in state court object to the prosecution's challenge; state procedural rules govern"].)

In *McKinnon*, this Court also addressed the difference between a stipulation and a submission. In *McKinnon*, the court read each of the 111 completed questionnaires and then addressed with counsel, one by one, each prospective juror which the court had identified as "questionable" based on its review. (*Id.* at p. 637.) During this discussion with the parties, defense counsel "expressly stipulated" to the excusal of several jurors based on their questionnaire responses. The prosecutor stipulated to the excusal for cause of five additional jurors. Defense counsel "submitted" the issue of the prosecutor's stipulated excusals and declined the court's offer to voir dire two of the five jurors. The court then excused all five jurors. (*Id.*)

On appeal, McKinnon challenged those five excusals for

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

cause. (*Id.* at p. 635.) The State argued that McKinnon forfeited the claim because he failed to object to the excusal at the time. (*Id.* at p. 637.) This Court ruled that submitting a matter to the court is not the equivalent of stipulating to it; therefore, McKinnon did not forfeit his challenge to the trial court's ruling. (*Id.*)

This Court recently confronted another situation distinguishing submission from stipulation in *People v. Buenrostro* (2018) 6 Cal.5th 367 [240 Cal.Rptr.3d 704], and made the same ruling. In *Buenrostro*, after 122 potential jurors completed questionnaires, the trial court identified 29 potential jurors which it believed it would excuse for cause if the jurors' answers during voir dire were consistent with their answers on their questionnaire. (*Buenrostro*, 240 Cal.Rptr.3d at p. 741.) The court expressed to the parties its hope that they could work through the obvious ones to stipulate for cause. The court and the parties then discussed the 29 prospective jurors. After discussing prospective juror B.R., the defense said, "[W]e'll submit it. We can't stipulate to them obviously, Your Honor, but we know what the Court's concerns are." (*Id.*) The court excused B.R. for cause based on her questionnaire answers that she would not vote for death. (*Id.*)

Buenrostro argued on appeal that the trial court erred in excusing B.R. for cause. As in *McKinnon*, the State argued that

Buenrostro forfeited her claim by not objecting when B.R. was dismissed. (*Id.* at p. 742.) This Court, citing *McKinnon*, stated that at the time of Buenrostro's trial (in 1998) no objection was required to preserve a *Witherspoon/Witt* error on appeal. (*Id.*) Further, again citing *McKinnon*, this Court ruled that submitting a question to the court does not forfeit a claim. (*Id.*)

What took place in appellant's case was analogous to the submission process in *McKinnon* and *Buenrostro*. During discussions about jury selection and before the email was sent, the trial court made several allusions to itself and the parties discussing jurors who might be excusable for cause based on their questionnaire answers:

- "I'd plan to meet with counsel on the 23rd and go over stipulations the parties might have regarding answers on those questionnaires, **make those rulings** and then bring the panel back in the 24th." (4RT 527, emphasis added.)
- "I'm going to tell them [their phone number is] only for court personnel, that's not going to the parties, that's just for court personnel so as to contact them in the event we're not going to be in session on a given day and ***to contact those who the parties have stipulated off <u>after</u> our -- our discussion*** with those once you have the completed questionnaire and indicate

they need not return to court on the given date --" (5RT 762, emphasis added.)

- "When can we meet to deal with any stipulations the parties have in terms of ***excluding people who have completed the questionnaire for cause -- or any stipulations***?" (9RT 1427, emphasis added.)
- "I take it from [the prosecutor's belief that there was a 50% kick-out rate for cause] there won't be a lot of disagreement amongst the parties as to some challenges for cause based on the answers in the questionnaire. ... Although ***theoretically you have a chance to rehab them.*** Some of the ones I've seen I think would be just a waste of time, but I can't tell you how to do your job." (9RT 1427, emphasis added.)

Outside of these four brief comments from the court, no discussion of the court's procedure for ruling on any submissions for cause took place. But certainly the court's comments implied the parties would provide the names of jurors that either side or both sides thought could be excusable for cause, the court and the parties would discuss the jurors, and the court would then rule on whether the jurors met the criteria for excusal for cause or whether they should be questioned further on voir dire.

In actuality, none of that happened. Defense counsel sent a

member of the court's staff an email[13] listing 62 jurors that the parties had agreed could be excused for hardship or cause.[14] (3rd Supp. CT 114-115.) Unlike *McKinnon* and *Buenrostro*, when the court and the parties met the next day, they never discussed any of the jurors listed in the email ***at all***. The court never indicated, at least by name, that it had read the questionnaires of any of the 48 non-hardship prospective jurors listed in the email, never offered its opinion on whether those jurors met the standard for excusal for cause, and never made any finding that any of the jurors should be excused for cause. Instead, the trial court simply made counsel's email a part of the court file and treated its work as done. Both the court and the parties moved on to other topics without further mention of the jurors listed in the email. Significantly, on the day the email was made part of the record, no one used the word "stipulation," and the parties were never asked to stipulate to any excusals for cause.

In stunning contrast, the court and the parties discussed each request for dismissal based on ***hardship***, and the parties affirmatively stipulated to each hardship dismissal. (*See e.g.*

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[13] The prosecutor was not copied on the email.

[14] Fourteen of the 62 jurors had the notation "(hardship)" listed after their name thus implying that the remaining 48 jurors were excusable for cause. (3rd Supp CT 114-115.) In the absence of any other indication in the record for the excusal, the reviewing court must assume the excusal was for cause. (*People v. Leon* (2015) 61 Cal.4th 569, 593.)

4RT 524 [discussing that the court would go through each hardship request "with the assistance of counsel"]; 5RT 764 ["Once the bailiff has collected all those [hardship request forms], I'll invite counsel to come to the bench and read along with me or show you the shared hardship request and ask you your opinions"]; 6RT 798 ["What I'm going to do now is go back into a conference room with the attorneys and the court reporter and discuss these requests for hardship excuse or exclusion from the jury"]; 6RT 800 ["If counsel wishes to approach, I'd invite their approaching the bench and I'll read these [hardship request forms] and give them to counsel. And unless I -- unless I indicate to you I'm questioning the hardship, assume if I'm giving it to you I tend to agree with the hardship and soliciting your opinion if you wish to disagree"]; 6RT 801-819 [showing how each hardship request was handled with the court and the parties discussing and agreeing or disagreeing or stipulating].)[15]

Surely, possible excusals for cause of prospective jurors who have passed the hardship screening and filled out an

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[15] The court also devoted more time to the 14 jurors referenced in the email as excusals for hardship than it did with the other 48 jurors listed in the email. (*See* S.B. [6RT 939, 952, 954; 8RT 1327-1328; 3rd Supp CT 110]; J.H. [3rd Supp CT 110]; E.G. [8RT 1329]; G.F.M. [8RT 1369]; C.H. [9RT 1399, 1412; 3rd Supp CT 111]; T.I. [9RT 1400, 1415; 3rd Supp CT 111]; J.L. [8RT 1325; 9RT 1370]; E.M. [8RT 1329-1330]; V.M. [3rd Supp CT 110]; D.R. [9RT 1379]; L.S. [7RT 1123, 1128-1130; 3rd Supp CT 111]; C.W. [9RT 1371]; A.W. [3rd Supp CT 110]; Z.Z. [9RT 1395, 1420-1421; 3rd Supp CT 111].

extensive questionnaire were deserving of at least as much discussion between the court and the parties as those prospective jurors dismissed for hardship. Given the court's earlier indication that agreed upon excusals for cause would be discussed and ruled upon, there was no good reason for the court not to have done so.

Defense counsel's acquiescence when the trial court treated the emailed list of jurors as excused is much more akin to a submission to the court than a stipulation, especially when the court never asked the parties to stipulate to their excusal and the parties never used the term "stipulate" with respect to excusing any of the prospective jurors for cause. As noted, the court and the parties knew how to stipulate. (*See e.g.* 9RT 1369 [defense counsel "stipulates" and the prosecutor agrees to excuse G.F.W. listed on the email with a hardship notation]; 9RT 1370 [defense counsel says the prosecutor "agreed to stipulate" and they agreed to excuse J.L. listed in the email as a hardship]; 9RT 1371 [The parties both affirmatively say "stipulate" on the record to the excusal of both A.W. and D.R. who are listed in the email with a hardship notation].)

In *McKinnon* and *Buenrostro*, the defense "submitted" after the court and the parties discussed the jurors before the court excused them. In appellant's case, defense counsel, in her email to the court's staff, wrote that the parties "agreed to ***submit***

this list now with the hope it will help Judge Coleman and his staff to know this as soon as possible" implying they expected the court to take some action based on the list. (3rd Supp CT 114.) The next day, the defense said nothing when the trial court, without any discussion, treated the submitted email list as established excusals for cause. Notably, there was not a single mention of the word "stipulation" in the email to the court or in the hearing the next day. Defense counsel could have objected when the court took no action and treated the list of jurors as excused without discussion. Under *McKinnon*, however, counsel's lack of objection to the excusals after her submission is not a bar to this Court's review. Appellant no more forfeited her right to appeal the trial court's removal of those jurors from the prospective jury pool than the defendants did in *McKinnon* and *Buenrostro*.

Appellant's situation is markedly different than the cases involving stipulations to juror excusals.[16] For example, in

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[16] Appellant acknowledges that in her initial briefing, she referred to the excusals in this case as "stipulated" excusals in Arguments I and II. Appellant used the term stipulated as a synonym for agreed. In the years since that briefing, appellant has recognized that the use of the word "stipulated" possibly carried with it a legal context that was not intended.

As discussed elsewhere in this claim, the parties never used the word "stipulate" and, on the day the court excused the jurors, the court never referred to a "stipulation." Accordingly, appellant now clarifies for purposes of Argument I, as well as this argument, that counsel did not "stipulate" to the excusal of jurors but rather submitted to the court a list of jurors which

(continued...)

People v. Duff (2014) 58 Cal.4th 527, 539, the trial court explicitly permitted the parties to prescreen the juror questionnaires to "arrive at stipulations as to particular jurors they mutually agreed were unsuitable." In finding that the stipulations in that case constituted a forfeiture of the claim that any of the stipulated jurors were wrongfully excused under *Witherspoon-Witt*, this Court focused on the fact that the reasons for the stipulated dismissals were never established:

> The trial court did not dismiss these prospective jurors on *Witherspoon-Witt* grounds; it did not dismiss them on any particular ground or make findings as to the basis for their dismissal, but instead accepted the parties' stipulation that the jurors be dismissed. Nothing in the record suggests these jurors' views of the death penalty played any role in their dismissal. Indeed, the court anticipated there would be stipulations wholly unrelated to *Witherspoon-Witt* concerns .... (*Duff*, 58 Cal.4th at p. 540.)

This Court further explained, "When prospective jurors are formally dismissed pursuant to stipulation rather than cause, the trial court makes no findings, and we have nothing we can review." (*Id.*)

This Court ruled similarly in *People v. Booker* (2011) 51

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[16](...continued)
she indicated the parties had agreed could be excused due to either hardship or cause.

And, as appellant stated in the introduction to this brief, she is now withdrawing Argument II from consideration by this Court.

Cal.4th 141. There, after the parties had reviewed the completed questionnaires but before voir dire, the defendant agreed to stipulate to excusing some jurors who opposed the death penalty and the prosecutor agreed to excuse some jurors who supported the death penalty. (*Booker*, 51 Cal.4th at p. 159.) In this manner, the parties stipulated to the excusal of 33 jurors. In excusing these jurors, the trial court explicitly stated that it was excusing the jurors pursuant to stipulation and not excusing them for cause. (*Id.*) In addition, after the stipulated excusals, defense counsel explained her reasoning:

> Your Honor, for the record, [the prosecutor] and I have both reviewed all of the questionnaires.... [¶] And as a matter of trial tactics, we had agreed to enter into stipulations regarding excusing by my count, 33 of the venire members, as we believe it's to the benefit of our client to do that. (*Id.*)

Appellant's situation was quite different than either *Duff* or *Booker*. In appellant's case, cause was the ***only*** reason provided in the record for excusing the 48 non-hardship prospective jurors listed in the email. Not only did counsel explicitly state this in her email ["Below is a list of Jurors that both the prosection [sic] and defense agree can be ***excused due to either hardship or cause***"], but, as discussed above, it was also the only basis for possible excusal that the court mentioned in its few comments about reviewing the questionnaires.

The record is silent as to defense counsel's motivation because the genesis of the email took place outside the record and outside the presence of appellant. Moreover, although the trial court never formally excused any of the jurors listed in the email on the record, the court never cited "stipulation" as the basis for the excusals or disavowed cause as the basis for excusing those jurors. So, unlike in *Duff* or *Booker*, this Court can review whether those 48 jurors were properly excused for cause under the *Witherspoon-Witt* standard because the record amply supports that they were excused for cause.

The *Buenrostro* case also discussed a related issue: If the challenge to the excused juror is not forfeited, does the defense submission on the issue nevertheless lend support to the trial court's assessment that the juror was excusable for cause? (*Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 744-745.) This Court concluded that because Buenrostro's challenge on appeal had merit, the fact that her attorney had "submitted" on whether the juror should have been excused, had no effect on this Court's finding that the excusal of the juror was improper.[17] (*Id.* at p. 745.)

Similarly, in appellant's case, defense counsel's submission of an emailed list of jurors who she thought could be excused for

[17] This Court also took into account that in *Buenrostro*, the trial court never permitted the parties to attempt to rehabilitate any of the prospective jurors. (*Id.*)

cause does not lend support to the trial court's excusals because, as explained in subsection (c)(2), below, appellant's challenge to the excusal of at least nine of the excused jurors is meritorious. Appellant establishes below that the evidence was insufficient to establish that the death penalty views of any of those nine prospective jurors would impair or substantially impair their performance as a juror at appellant's trial. Defense counsel's view that these jurors could be excused for cause does not alter the fact that those jurors should not have been excused based on their questionnaire responses without conducting further inquiry.

C. The Trial Court's Abdication of its Duty to Determine Whether Prospective Jurors Were Excusable for Cause Based Solely on Their Questionnaire Responses Led to the Excusal of Numerous Jurors Who Should Not Have Been Excused for Cause

By allowing the parties to decide which prospective jurors could be excused for cause and taking no further action, the trial court abdicated to the attorneys its legal duty to preside over jury selection. "[A] trial judge must at all times maintain control of the process of jury selection ...." (*Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 512.) "[T]hose accused of capital crimes have an important interest at stake, and because their right to a fair and impartial jury is a vital constitutional concern, trial courts should err on the side of caution when questionable or

marginal cases arise" during jury selection. (*People v. Wilson* (2008) 44 Cal.4th 758, 790.)

"Recent decisions of this court have emphasized the importance of meaningful death-qualifying voir dire. We have reminded trial courts of their duty to know and follow proper procedure, and to devote sufficient time and effort to the process." (*People v. Stitely* (2005) 35 Cal.4th 514, 539.) The trial court must make "a conscientious attempt" to determine the views of prospective jurors regarding capital punishment so that any jurors excused for cause meet the constitutional standard. (*People v. Leon* (2015) 61 Cal.4th 569, 592-593; *see also People v. Salazar* (2016) 63 Cal.4th 214, 235 [The important part of jury selection in a capital case "is a process that allows the court and counsel to ascertain the panelists' honest views about the death penalty and their ability to perform a juror's duty"]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 866 [the trial court has an obligation to resolve uncertainties in a juror's questionnaire responses and to orally examine that juror to determine if he is excusable under *Witt*].)

Follow-up questioning is necessary because a juror who indicates in his questionnaire that he would find it very difficult to impose death might "demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult

determination concerning the appropriateness of a death sentence." (*People v. Woodruff* (2018) 5 Cal.5th 697 743 [quoting *People v. Stewart* (2004) 33 Cal.4th 425, 447].)

In appellant's case, the trial court was aware of the need to voir dire prospective jurors whose questionnaire responses raised a question of potential impairment. During the week that prospective jurors were filling out the questionnaire, the prosecutor opined there was going to be a 50% "kick-out rate" for cause based on the questionnaires he had reviewed. (9RT 1332.) In response to that estimate, the court stated:

> I take it from that there won't be a lot of disagreement amongst the parties as to some challenges for cause based on the answers in the questionnaire. ... Although theoretically you have a chance to rehab them. Some of the ones I've seen I think would be just a waste of time, but I can't tell you how to do your job. (9RT 1427.)

That was not the first time the trial court had telegraphed its belief that it was the attorneys' responsibility to select the jury with minimal input from the court. Earlier, the court and the parties had discussed how long they anticipated the jury selection process to take with estimates ranging from two to four weeks. (4RT 456-458.) The court stated, "Well, three to four weeks is a little long to me. But it's your jury. You folks select it. Not me." (4RT 458.)

Later, during another jury selection scheduling discussion, the prosecutor requested more time to review the questionnaires:

"I know some of them you can dispense with quickly. You go to the death penalty questions and you find out right away whether or not you need to read the rest of the questionnaire. But most of them, I think, we're going to have to go through." (4RT 527.) The court urged the parties to talk about that and said it was "more than willing to be flexible because the burden is really on you folks, not on me." (4RT 527.)

After abdicating its responsibility to the attorneys, the trial court removed dozens of jurors from the jury pool based solely on their questionnaire responses because the parties indicated those jurors could be excused for cause. That, however, is not how jury selection operates. The trial court's desire to use the jury questionnaires to speed up the jury selection process does not excuse its failure to take the steps necessary to make sure that prospective jurors were not unconstitutionally excluded from serving on the jury. By failing to determine whether cause actually existed, the trial court allowed jurors to be dismissed when a review of their questionnaire would have revealed that the jurors were not substantially impaired.

1. In Recent Years, This Court Has Critically Examined Whether Prospective Jurors Have Been Wrongly Excused for Cause Based Solely on Their Questionnaire Responses

This Court has stated clearly and unequivocally that jurors cannot be dismissed solely on the basis of their questionnaire

responses unless those responses "leave no doubt that their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the court's instructions and the jurors' oath." (*Woodruff*, *supra*, 5 Cal.5th at p. 743 [quoting *Covarrubias*, 1 Cal.5th at p. 863].) If the juror's responses are "inconsistent and do not clearly reveal an inability to serve, the court may not grant a cause challenge without further questioning to clarify the juror's views." (*Id; see also People v. Zaragoza* (2016) 1 Cal.5th 21, 39 ["Where a prospective juror's written responses are ambiguous with respect to the individual's willingness or ability to follow the court's instructions in a potential penalty phase, the record does not support a challenge for cause"]; *Leon*, *supra*, 61 Cal.4th at p. 592 [a prospective juror whose questionnaire reveals that he would vote automatically based on his views of the death penalty but who also indicates he could consider aggravating and mitigating factors and change his views cannot be excused for cause without undergoing additional questioning].)

This Court has emphasized repeatedly the need for trial courts to proceed with special care before excusing jurors based solely on their questionnaire responses. In conformity with this view, in the past four years, this Court has reversed five death judgments when prospective jurors were excused for cause based solely on their ambiguous or inconsistent responses on jury

questionnaires without the trial court engaging in any voir dire with the jurors to resolve the ambiguities or inconsistencies. (*See Leon*, *supra*, 61 Cal.4th at p. 590-593; *Zaragoza*, *supra*, 1 Cal.5th at p. 36-40; *Covarrubias*, *supra*, 1 Cal.5th at p. 860-866; *Woodruff*, *supra*, 5 Cal.5th at p. 623-625; *Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 744-746.)

In *Leon*, three dismissed prospective jurors expressed general opposition to the death penalty in their questionnaires and indicated that they would automatically vote for life without the possibility of parole. (*Leon*, 61 Cal.4th at p. 590.) However, all three prospective jurors also said they would not vote automatically for life without the possibility of parole if they were instructed to set aside their personal feelings and weigh aggravating and mitigating evidence before deciding on punishment. (*Id.* at p. 591.) After a short voir dire during which the court repeated the *Witherspoon/Witt* questions, one juror said he would vote for life without the possibility of parole "regardless of the evidence" and the other two repeated that they would always vote for life without the possibility of parole and would never vote for death. (*Id.*) This Court found the dismissal of all three jurors to be reversible error because the court never asked the jurors about whether they could set aside their views and follow the law in deciding on punishment. (*Id.*)

In *Zaragoza*, a prospective juror revealed in her

questionnaire that her religious/moral beliefs led her to believe she had no right to decide if someone should die. (*Zaragoza*, 1 Cal.5th at p. 37-38.) Nevertheless, the prospective juror wrote that she would not automatically vote for life without the possibility of parole because of her views and that she could set aside her personal feelings and follow the law as instructed. (*Id.* at p. 38.) This Court found the juror's excusal for cause to be reversible error because ambiguous jury questionnaire answers about following the law do not support a challenge for cause. (*Id.* at p. 39.) The fact that a juror has conscientious opinions or beliefs about the death penalty does not mandate a finding that the juror would be substantially impaired in her duties as a juror. (*Id.*) A court must consider both the juror's views and the juror's willingness to put those views aside. (*Id.*) Only upon further questioning could the court determine if one aspect of the inquiry resolved the issue of the juror's ability to sit as a juror in the penalty phase. (*Id.* at p. 40.)

In *Covarrubias*, a prospective juror, a correctional officer, indicated in his questionnaire that he was strongly opposed to the death penalty, he believed it should be abolished, and he did not believe the state had a right to take a life. (*Covarrubias*, 1 Cal.5th at p. 864.) In addition, the juror stated he would probably refuse to vote for a death sentence regardless of the evidence, but he might possibly change that answer if he was

instructed and ordered to consider the aggravating and mitigating evidence before voting on the appropriate punishment. (*Id.* at p. 864-865.) The juror also answered "Yes--most probably" when asked if he could set aside his personal feelings and follow the court's instructions on the law. (*Id.* at p. 865.) This Court found the excusal of the prospective juror for cause to be reversible error because the juror's answers to the *Witt* inquiries were ambiguous, and the trial court was obligated to resolve those ambiguities through voir dire before determining whether the juror was disqualified. (*Id.*)

In *Woodruff*, although the prospective juror wrote in his questionnaire that he did not believe in the death penalty and was strongly against it, he also stated he would follow the law and consider all of the evidence and instructions before imposing the sentence he personally felt to be appropriate. (*Woodruff*, 5 Cal.5th at p. 623.) This Court found his excusal for cause was not supported by the record because his responses did not demonstrate his inability to "put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence." (*Id.* at p. 625 [quoting *People v. Stewart* (2004) 33 Cal.4th 425, 447].)

In *Buenrostro*, the prospective juror, a 70-year-old retired payroll clerk, identified herself as strongly against the death

penalty, wrote, "I wouldn't want to make that decision," and marked that her opinion about the death penalty would make it difficult for her to vote for death in that case. (*Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 742-743.) This Court found the trial court erred in dismissing the prospective juror solely on the basis of her questionnaire when the juror had not answered 36 of the 81 questionnaire questions, including questions about whether she would consider all of the evidence or would always vote for life without the possibility of parole. (*Id.* at p. 744.) The prospective juror's unanswered questions "provided a reason for the trial court to voir dire [the juror], but not justification to excuse her for cause." (*Id.* at p. 746.) In addition, this Court clarified that a prospective juror's feeling of not wanting to make a decision is different than a prospective juror not being able to consider both penalties because of her views of the death penalty. (*Id.* at p. 744.)

2. At Least Nine of The Prospective Jurors Excused for Cause in This Case Based Solely on Their Questionnaire Responses Should Not Have Been Excused

Against the backdrop of these five recent reversals, an examination of the questionnaires of at least nine of the 48 prospective jurors who were excused for cause in appellant's case reveals ambiguities or inconsistencies that the trial court should have resolved through voir dire and which did not clearly

meet the *Witherspoon/Witt* standard for excusal for cause.[18] When

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[18] The critical questionnaire questions for this analysis are:

Question 87: If you are chosen as a juror, will you follow the law and the instructions given to you by the judge, even if you disagree with a particular aspect of the law or a particular instruction that conflicts with your personal ideas?

Question 89: Do you know any reason why you could not or would not be a completely fair and impartial juror in this particular case?

Question 90: What are your general feelings regarding the death penalty?

Question 91: What are your general feelings about life imprisonment without the possibility of parole?

Question 92: Which would you say most accurately states your position on the death penalty? [Options: strongly in favor, somewhat in favor, neutral, somewhat opposed, strongly opposed.]

There are also questions regarding whether the death penalty serves any purpose (93), whether it should be imposed automatically for the murder of a child (94), whether the juror has any feelings about its application to a woman (95), whether the juror's views have changed over time (96), whether it is sought too often, too seldom, or randomly (97), whether it is imposed too often, about right, or not often enough (98), and whether death or life without the possibility of parole is a worse punishment (99).

Question 101: Do you feel so strongly **against** the death penalty that you would refuse to find the defendant guilty of first degree murder, no matter what the evidence shows, in order to end the case before it ever gets to the penalty phase?

Question 102: Do you feel so strongly **against** the death penalty that you would refuse to find any special circumstance to be true, no matter what the evidence shows, in order to end the case before it ever gets to the penalty phase?

Question 103: Do you have feelings **against** the death penalty, which are so strong that you would **always** vote **against** the death penalty, no matter what evidence was presented?

(continued...)

a trial court's excusal ruling is made solely on the questionnaire responses without assessing the actual juror, then the court's ruling is reviewed de novo and not for an abuse of discretion. (*Woodruff*, *supra*, 5 Cal.5th at p. 743 [citing *Zaragoza*, 1 Cal.5th at p. 37].)

When viewed in the contexts of those five cases, the following prospective jurors should not have been excused for cause on the basis of their questionnaire responses in appellant's case

(1) Potential juror R.E. did not want to be on a capital case jury but his inconsistent questionnaire responses did not establish cause to excuse him; they indicated a need for further questioning. R.E., a 20-year-old part-time college student and full-time stockroom clerk born in Mexico, believed "nobody has the right to end another's life." He strongly opposed the death penalty and thought it was not a "good example" to "correct a death with another death." He did not really hear about the death

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[18](...continued)
Question 105: Do you have feelings **in favor of** the death penalty which are so strong that you would **always** vote **for** the death penalty, no matter what evidence was presented?

Question 106: At this point, before you have heard any evidence, do you believe you are open minded about what the penalty should be?

Question 107: If you were a juror at a penalty phase, would you be able to listen to all the evidence, as well as the judge's instructions on the law, and give honest consideration to both death and life without parole before reaching a decision?

penalty being imposed but felt it was imposed too often. He believed life without the possibility of parole was the worse punishment because "time will punish the defendant." R.E. checked that he would always vote against the death penalty and wrote, "I feel I am not the person to decide whether someone should live or die." Despite these sentiments, R.E. also checked that he was open minded about what the penalty should be, that he could be a fair and impartial juror, and that he would be able to listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. (5JQCT 1251-1268.)

(2) The responses of potential juror E.D. typified an ambiguous questionnaire requiring follow-up questioning. E.D., a 73-year-old retiree, both noted her strong opposition to the death penalty and embraced being a fair and impartial juror who could consider both penalties. E.D. did not believe in the death penalty and wrote that multiple times in her questionnaire; she believed it served no purpose; and she felt it was sought and imposed too often. Although E.D. would not refuse to find guilt or special circumstances because of her opposition to the death penalty, she indicated she would always vote against the death penalty. On the other hand, E.D. checked that she was open minded about what the penalty should be, could be a fair and impartial juror, would follow the law as instructed even if she disagreed with it, and marked yes that she would be able to listen to all

the evidence and instructions at the penalty phase and give honest consideration to both penalties. (4JQCT 976-993.)

(3) C.T. had mixed views about the death penalty. C.T. was a 34-year-old married construction worker who was born in Cambodia and who lived with extended family including his mother and two school-age relatives. C.T. wrote that he did not believe in the death penalty; it served no purpose. He believed that people should be held accountable for their behavior but also believed that we are more civilized than having a death penalty. For this reason, he supported life without the possibility of parole. Yet, when asked to rate his view of the death penalty, he selected "somewhat opposed" rather than "strongly opposed." He did not think the death penalty should be automatic for killing a child: "Not all cases are the same." He thought death was a worse punishment and believed appellant should get life without the possibility of parole. Nevertheless, C.T. would not refuse to find guilt or sanity to avoid the death penalty. Twice he wrote in: "I will follow the law." C.T. indicated he had an open mind; he would listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties; and he could be fair to both sides. (16JQCT 4650-4672.)

(4) M.A.K. had contradictory views about the death penalty in theory and the death penalty when one is actually a juror on a capital case. M.A.K. was a 67-year-old who did part-time office

work. She believed people should be put to death if they are found guilty because it wastes taxpayers money to keep them in prison for life. She also strongly favored the death penalty because it stops further crime. She had “no idea” which was the worse punishment. She thought death was imposed randomly and said she had no answer to how often it was imposed. Despite these views, M.A.K. did not believe the death penalty should be automatic for killing a child. She would not always vote for death; she had an open mind; and she would listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. She wrote, “I would not be able to sleep at nite knowing I had made such a judgment,” but she also could be fair to both sides. (8JQCT 2326-2346.)

(5) J.J., a 25-year-old freelance animator who lived with his parents, expressed concern with having to be a juror. He wrote that he could not be fair because "I have never been around anyone who has been emotionally unstable or psychologically unfit. It is hard for me to believe that a person could commit a crime with no self restraint." His views about the death penalty were moderate yet contradictory. J.J. believed the death penalty was just, but he would be uncomfortable voting to put someone to death. He somewhat supported the death penalty as a way to get murderers off the street. He believed the death penalty was sought randomly and imposed about the right amount. He thought

the death penalty should be automatic for killing a child, but he also viewed life without parole as the worse punishment. J.J. marked that he was not open minded about the penalty in this case, but he also marked that he would not always vote for the death penalty; he would be able to listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties; and he could be fair to both sides. (8RT 2276-2298.)

(6) G.K. described herself as "an unbiased juror," but questioned whether her age (76), the distance she lived from court, and some physical issues could be a hardship.[19] G.K. had mixed feelings toward the death penalty and thought life without parole sometimes fit the crime. She was neutral towards the death penalty. It could keep a violent prisoner from being a danger. She believed the death penalty should not be automatic for killing a child --it should depend on the circumstances. G.K. once believed the death penalty was immoral but has changed. She would not always vote for death --she would try to be fair. She wrote, "It would be hard for me to judge a person to that extent even if he or she was guilty." G.K. had an open mind and would listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. (9JQCT 2601-

[19] There is no indication in the record that G.K. was dismissed for hardship. (3rd Supp. CT 114.)

2623.)

(7) Y.D., a 30-year old married woman with two school-age children who was born in Vietnam and worked as a traffic clerk for the Santa Barbara courts, gave inconsistent answers. Y.D. believed in the death penalty and strongly favored it because it serves as punishment. She did not think it was sought often enough or imposed often enough. She viewed death as worse than life without parole. Y.D. checked that she would always vote for death, but she also marked that she felt so strongly against the death penalty she would refuse to find any special circumstances true. She checked that she was not open-minded about the penalty and wrote in "life in prison," and said death should not be automatic for killing a child. Despite her strong support for the death penalty and her view that it should always be imposed, she wrote that she thought appellant should get life without the possibility of parole. Y.D. also marked yes that she would be able to listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. (4JQCT 951-973.)

(8) S.P. was a 66-year-old married maintenance mechanic who was born in Italy and sometimes had difficulty with English. One of his sons was a Ventura County deputy sheriff.[20] Although S.P.

[20] Prior to filling out his questionnaire, S.P. raised with the court the issue of his son being a deputy and possibly having (continued...)

knew a lot about this case, he could decide the case solely on the evidence and could be fair to both sides. S.P. was neutral towards the death penalty. He did not believe it served any purpose, and he did not believe it should be automatic for killing a child. In his view, life without parole was the worse punishment. His views about the death penalty would not affect his voting at any stage of the case. S.P. checked that his religious beliefs would make it difficult to sit in judgment on another person and sit on a death penalty case, but he also checked that he had an open mind and would listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. (13JQCT 3726-3748.)

(9) E.K., a 43-year-old D/E operator[21] who was married with a child in high school and was active in her church, marked that she was neutral towards the death penalty but, like the juror in *Buenrostro*, she did not answer most of the questions regarding her views of the death penalty, writing "N/A" or "don't know" or "no comments" or "not sure." She did, however, answer two questions in this section: she believed life without the possibility of parole was worse than death and she had no

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[20](...continued)
been at the scene. S.P. said he had read a lot about the case because it was stressful for his son. The court found no hardship, and the prosecutor would not stipulate to his excusal. (7RT 1057, 1066, 1070-1071.)

[21] Her questionnaire does not explain what a D/E operator is.

religious or other beliefs that would make it difficult to sit in judgment of another. For the question whether she could maintain a position in deliberations that she believed in even if most of the jurors disagreed with her, she wrote "depends." She was "not sure" whether she had feelings about appellant's guilt or punishment based on what she knew about the case, but she checked that she could decide the case based solely on the evidence. She also checked that she had some biases or prejudices that would interfere with her ability to decide the case fairly but she did not explain what she was referring to. She concluded her questionnaire with an explanation that filling out the questionnaire made her uncomfortable "because I don't feel good writing all personal information and answering these questions." (9CT 2401-2423.)

This Court independently reviews the excusal of a prospective juror for cause when that excusal is based solely on questionnaire responses. (*Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 742; *People v. Riccardi* (2012) 54 Cal.4th 758, 779 [dismissals for cause based only on written answers are reviewed de novo].) An independent review of the questionnaires of these nine jurors demonstrates that none of these excused jurors should have been excused for cause. Prospective jurors who write that they oppose the death penalty but who can set aside that view and follow the law as instructed cannot be excused for cause without being

questioned further to clarify their views. (*Leon*, 61 Cal.4th at p. 592.)

Here, prospective jurors R.E., E.D., and C.T. indicated in their questionnaires that they had moderate to strong opposition to the death penalty, yet each of them also indicated that they could be open-minded jurors who would be able to "listen to all the evidence, as well as the judge's instructions on the law, and give honest consideration to both death and life without parole before reaching a decision."

Prospective jurors Y.D., M.A.K., J.J., G.K., and S.P. had neutral, mixed, or supportive feelings about the death penalty but they all expressed some hesitation in imposing or having to make the decision to impose death in this case. Nevertheless, all five marked "Yes" to whether they could "listen to all the evidence, as well as the judge's instructions on the law, and give honest consideration to both death and life without parole before reaching a decision."

Prospective juror E.K. was neutral towards the death penalty but did not answer many of the questions in the questionnaire including whether she was open to considering both penalties.

Not one of these nine prospective jurors had questionnaire responses that clearly demonstrated that his or views of the death penalty would prevent or substantially impair his or her performance of his or her duties as a juror. Like the

questionnaires of the prospective jurors in *Leon, Zaragoza*, *Covarrubias*, *Woodruff*, and *Buenrostro*, the questionnaires of these nine prospective jurors contained ambiguities or inconsistencies or other issues that called for further questioning to allow for clarification of amplification of their responses. And, like the prospective jurors in *Leon, Zaragoza*, *Covarrubias*, *Woodruff*, and *Buenrostro*, none of these prospective jurors should have been excused for cause on the basis of their questionnaires.

For example, in *Woodruff*, prospective juror D.K. wrote, "I don't believe in death penalty," rated himself as "strongly against" the death penalty, and voiced his belief that only God, not men, can make those choices. On the other hand, D.K. marked that his opinion would not make it difficult for him to vote for death and wrote, "I would follow the law." He also marked that he would consider all the evidence and instructions and impose the penalty he personally felt appropriate. The trial court, after initially denying the prosecutor's motion to excuse D.K. for cause, reconsidered and concluded there was not even a "theoretical possibility" that D.K. would vote for death. (*Woodruff*, 5 Cal.5th at p. 623-624.) This Court found the ruling to be error because D.K.'s lack of belief in the death penalty did not preclude him from putting those feelings aside and considering the aggravating and mitigating evidence, and making

the difficult decision about the appropriate penalty. In fact, his own words that he would follow the law showed that he was not substantially impaired in his ability to serve as a juror. (*Id.* at p. 625.)

Like D.K. in *Woodruff*, prospective juror C.T. in appellant's case also did not believe in the death penalty. While C.T. believed in accountability for behavior, he did not think a civilized society should be in the business of killing for punishment. He favored life without the possibility of parole but was only "somewhat opposed" rather than "strongly opposed" to the death penalty. When asked whether the death penalty should be automatic for the murder of a child, C.T. marked no and wrote in: "Not all cases are the same." For the questions about whether he would automatically refuse to find guilt or the special circumstances or sanity to avoid getting to the penalty phase, C.T. marked no and, like the juror in *Woodruff*, wrote: "I will follow the law." C.T. also checked "yes" that he would "be able to listen to all of the evidence, as well as the judge's instructions on the law, and give honest consideration to both death and life without parole before reaching a decision. (16JQCT 4650-4672.) As this Court found with D.K. in *Woodruff*, C.T. was not substantially impaired in his ability to sit as a juror. Although he had some opposition to the death penalty, he repeatedly indicated he could put those feelings aside and follow

the law. C.T. should not have been excused for cause.

Prospective juror 129 in *Zaragoza* indicated in her questionnaire that her religious convictions would interfere with her ability to sit on a capital jury and wrote, ""Don't feel I have the right to decide if a person is to die" and "Don't believe I have the right to make judgement [sic] for another human being to die." Despite these sentiments, Juror 129 also marked that she would not refuse to find the defendant guilty or refuse to find the special circumstance true to avoid having to decide penalty. She also indicated she would not automatically vote for life without parole and she could put aside her personal feelings and follow the law as it was given to her. (*Zaragoza*, 1 Cal.5th at p. 37-38.) The court found her to be excusable for cause because her responses showed a "substantial impairment to prevent her ability to be neutral" and "to follow the court's instructions." (*Id.* at p. 38.) This Court found the trial court erred because Juror 129's responses did not make it "clear" that she was unable or unwilling to put beliefs aside temporarily and follow the law. Neither "conscientious objection" to the death penalty nor an expressed "difficulty" in voting for death are sufficient to warrant an excusal for cause. When a prospective juror questions whether her personal opposition might interfere with their ability to serve as a juror but also indicates a willingness to follow the instructions that raises an

ambiguity that must be resolved through further questioning. (*Id.* at p. 38-40.)

In appellant's case, several prospective jurors provided conflicting answers such as the answers given by Juror 129 in *Zaragoza* that did not clearly demonstrate that they were unable or unwilling to temporarily set aside their views and follow the law but which required further inquiry. R.E. strongly opposed the death penalty and wrote, "Nobody has the right to end another's life" and "I feel I am not the person to decide whether someone should live or die." While R.E. checked that he would always vote against the death penalty, he, like Juror 129, also marked that he was open minded about what the penalty should be, that he could be a fair and impartial juror, and that he would be able to listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties. (5JQCT 1251-1268.)

E.D.'s responses were similar. E.D. wrote several times in her questionnaire that she did not believe in the death penalty, and she marked that she would always vote against it. But E.D. also embraced all of the questions showing that she would be a fair and impartial juror: she checked that she was open minded about what the penalty should be, could be a fair and impartial juror, would follow the law as instructed even if she disagreed with it, and marked yes that she would be able to listen to all

the evidence and instructions at the penalty phase and give honest consideration to both penalties. (4JQCT 976-993.)

Likewise, J.J. thought the death penalty was just and that it should be imposed automatically for killing a child. But J.J. also marked that he thought life without the possibility of parole was the worst punishment; he would not always vote for the death penalty; he would be able to listen to all the evidence and instructions at the penalty phase and give honest consideration to both penalties; and he could be fair to both sides. (8RT 2276-2298.)

None of these responses materially differ from the presentation of Juror 129 in *Zaragoza*. These potential jurors had strong feelings about the death penalty but they also indicated they could set those feelings aside and listen to the evidence, follow the law, and consider both penalties.[22] This Court's recent cases, as discussed, establish that this type of profile is not disqualifying on the basis of questionnaire responses alone. Further probing might establish that the prospective juror was, in fact, impaired. Conversely, additional questioning might prove that the juror honestly could aside her views and weigh the aggravating and mitigating factors and determine the appropriate punishment. But, without further information, these types of

[22] This same reasoning applies to prospective jurors Y.D., M.A.K., G.K., and S.P.

written responses do not clearly establish a prospective juror's inability to sit as a juror in a capital case. (*Zaragoza*, 1 Cal.5th at p. 40; *Covarrubias*, *supra*, 1 Cal.5th at p. 863 ["[I]f a juror's questionnaire responses are inconsistent and do not clearly reveal an inability to serve, the court may not grant a cause challenge without further questioning to clarify the juror's views"].)

Prospective juror E.K. marked that she was neutral towards the death penalty, but failed to fill out a large part of the questionnaire. Juror B.R. in *Buenrostro* also failed to answer a significant number of questions but, unlike E.K., the responses B.R. did give identified her as strongly against the death penalty and likely to have difficulty voting for death. (*Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 742-743.) Despite the strong feelings shown by B.R. in the answers she did provide, this Court found her excusal for cause to be wrong because her answers did not show that she was unwilling to consider both penalties. (*Id.* at p. 744.) B.R.'s unanswered questions provided a reason for further questioning, they did not justify an excusal for cause. (*Id.* at p. 746.) If B.R.'s excusal was erroneous despite her strong feelings, then E.K.'s excusal with her neutral view of the death penalty was surely erroneous.

This Court's warning in *People v. Pearson* (2012) 53 Cal.4th 306, 332 is appropriately applied here:

> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from conscientiously considering all of the sentencing alternatives, including the death penalty where appropriate, the juror is not disqualified by his or her failure to enthusiastically support capital punishment. (*People v. Pearson* (2012) 53 Cal.4th 306, 332 [internal citation omitted].)

In the end, the court excused 48 prospective jurors for cause because the parties submitted to the court an email list of prospective jurors they agreed could be excused for cause and not because the questionnaire responses of those jurors clearly demonstrated that their views on the death penalty would prevent or substantially impair the performance of their duties as a juror. That was improper. "Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." (*Uttecht v. Brown* (2007) 551 U.S. 1, 22.)

The wrongfully excusal of even one of the prospective jurors discussed above requires this Court to reverse appellant’s death judgment. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659–667; *Buenrostro*, *supra*, 240 Cal.Rptr.3d at p. 740, 746.) Here, nine jurors were wrongly excused. Appellant’s death sentence must be

reversed.

D. The Process By Which Prospective Jurors Were Excused Based Solely on Their Questionnaire Responses Also Violated the Rights of the Improperly Excused Jurors and the Rights of the Community at Large

When the court does not follow core constitutional principles in capital jury selection, the rights of others are implicated in addition to the rights of the defendant. Qualified jurors, for instance, have an independent right to serve on a criminal trial jury. The community as a whole has a right to an impartial jury in criminal trials, free from bias or discrimination. Further, the public has a right to open, public trials where important actions such as excusing prospective jurors for cause in a capital case take place on the record and not via email or otherwise off the record. None of these rights may be waived by the parties or the court by mutual agreement, strategy or any other trial considerations.

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. (*Powers v. Ohio* (1991) 499 U.S. 400, 413.)

In appellant's case, as discussed above, the trial court abdicated its duties under *Witherspoon/Witt* to directly rule on the parties submitted requests to excuse certain jurors for

cause. The trial court failed to make an adequate record of whether there was "sufficient information" to exclude any of the prospective jurors. (*Leon*, *supra*, 61 Cal.4th at p. 592 ["Before granting a challenge for cause, the court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair performance as a capital juror"].) This omission violated not only appellant's rights, but the rights of the prospective jurors and of the community at large, under the Fifth, Sixth, Eighth and Fourteenth Amendments.

The law places a heightened value on a citizen's right to be considered for jury service and protects citizens from being denied this right improperly. With the exception of voting, jury service may be the most important honor and privilege citizens have to participate in our democratic process. (*Powers v. Ohio*, *supra*, 499 U.S. at p. 402 ["Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life"].) While the right to serve as a juror is not mentioned explicitly in the Constitution, it is implicitly protected by it. (*See e.g. Tennessee v. Lane* (2004) 541 U.S. 509, 523 [quoting *Taylor v. Louisiana* (1975) 419 U.S. 522, 530] ["We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury ... noting that

the exclusion of 'identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial'"].) Improper exclusion from jury service in criminal trials harms the prospective juror and also the community at large. The failure to select a fair, impartial and balanced jury "undermines public confidence in the fairness of our system of justice." (*Batson v. Kentucky* (1986) 476 U.S. 79, 87.)

Nowhere are these rights more important than in capital cases. The Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society," (*Trop v. Dulles* (1958) 356 U.S. 86, 101), are informed, in part, by the sentencing decisions made by actual jurors in capital cases. (*Enmund v. Florida* (1982) 458 U.S. 782, 788.) For jurors to serve this important role, it is essential that all citizens have the right to have their voices heard as part of juries. Thus, the right to serve as a juror is fundamental to the integrity of criminal trials and to the reliability of penalty phase verdicts.

In *Powers v. Ohio*, *supra*, the United States Supreme Court held that criminal defendants have standing to raise the violation of an excused juror's constitutional rights. (*Powers*, 499 U.S. at 410-411 [a criminal defendant may challenge a prosecutor's discriminatory use of peremptory challenges].) In appellant's case, the trial court's excusal of prospective jurors

who may have been qualified to serve on appellant's jury improperly deprived each of those prospective jurors their fundamental right to serve as a juror in violation of the equal protection and due process clauses of the Fourteenth Amendment. As discussed in subsection C(2), above, at least nine of the prospective jurors who may have been qualified to serve as a capital juror in this case, or at least required further voir dire to assess their qualifications, had no opportunity to do so.

The process utilized in this case also violated the constitutional right of the community to open, public trials. Secret or incomplete court proceedings can shield jury selection practices and court determinations from public view and violate the community's right to an open, public trial. This fundamental right belongs to the public and the community and cannot be waived by the trial court or the parties.

Closed or private proceedings are the rare exception in criminal trials. In this case, the lack of any explanation in the record as to how the parties arrived at a list of potential jurors to be excused for cause coupled with the trial court's silence regarding the qualifications of ***any*** of the prospective jurors listed as excusable for cause unconstitutionally precluded the public from its rightful access to open and transparent proceedings.

"Trial courts are obligated to take every reasonable measure

to accommodate public attendance at criminal trials." (*Presley v. Georgia* (2010) 558 U.S. 209, 215.) The Sixth Amendment right to a public trial helps to ensure a defendant's right to a fair trial. At the same time, open trials serve many other civic and process-related purposes beyond the rights of any one individual. For example, the right to a public trial extends beyond the accused and can be invoked under the First Amendment. (*Press-Enterprise*, *supra*, 464 U.S. at p. 516 [Stevens, J., concurring].) *Press-Enterprise*, *supra*, dealt specifically with press access to jury selection in a capital trial. "[T]he primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." (*Id.* at p. 508.) Openness enhances both the fairness of the criminal trial and "the appearance of fairness so essential to public confidence in the system." (*Id.*) "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct ***by jurors fairly and openly selected***." (*Id.* at p. 509, emphasis added.)

The United States Supreme Court also dealt with public access to jury selection in *Presley v. Georgia*, *supra*, 558 U.S. at p. 209. In *Presley*, the trial court closed the courtroom during jury selection proceedings to a family member of the defendant. The Georgia Supreme Court upheld this ruling, but the

United States Supreme Court reversed. The Court went on to hold that the defendant is entitled to the same open, public jury selection under the Sixth Amendment as the press and the community are under the First Amendment. (*Id.* at p. 213; *accord Waller v. Georgia* (1984) 467 U.S. 39, 46 [Sixth Amendment public trial right no less protective than First Amendment right].

In appellant's case, a critical part of jury selection --the formation of a list of 48 non-hardship prospective jurors the parties believed to be excusable for cause-- was created off the record. No discussion about the jurors on the list ever took place on the record. The trial court never made any findings on the record about the qualifications of the prospective jurors other than to make the email list a part of the record and to treat the 62 prospective jurors named on the list as excused. The 48 prospective jurors excused without any discussion or ruling from the court regarding cause constituted almost 22% of the 221 prospective jurors who completed questionnaires. The right to a public, open trial is particularly important in capital cases where stakes are highest. The public, like appellant, had a constitutional right to know and understand why these jurors were excused.

For these reasons, as well as the reasons set forth earlier in this argument, the process followed in this case violated the First, Fifth, Sixth, Eighth, and Fourteenth Amendments. The end

result was the off-the-record excusal of at least nine prospective jurors who were not clearly disqualified for cause based on their questionnaire responses. Appellant's death judgment must be reversed and she must be afforded a new penalty phase trial with an open jury selection process that comports with the Constitution.

E. The Jury Selection Process Employed by the Court in Appellant's Case Not Only Violated Appellant's Constitutional Rights, but it Also Violated California's Statutory Rules Governing Jury Selection

In addition to all of the constitutional violations discussed in the above subsections, the process by which the 48 non-hardship prospective jurors were excused also violated Code of Civil Procedure sections 222, 223, and 230, and the legislative policy of random jury selection codified in Code of Civil Procedure section 191.

Code of Civil Procedure section 191 sets out California's policy of random jury selection:

> It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose;....

Code of Civil Procedure sections 222 and 223 establish the procedures for conducting voir dire in criminal cases. The system

contemplated by sections 222 and 223 begins with the jury commissioner randomly selecting prospective jurors for the venire using source lists that represent a cross-section of the community. (Code Civ. Proc. § 197.) From these lists the jury commissioner creates a random master list to be used in summoning jurors. (Code Civ. Proc. § 198.) Those prospective jurors are then randomly selected and assigned to courtrooms for voir dire. (Code Civ. Proc. § 219.) Once in the courtroom, the court is to "randomly select the names of the jurors for voir dire" except if the court received a randomized list prepared by the jury commissioner, then the court must seat the prospective jurors for voir dire in the order provided by that list. (Code Civ. Proc. § 222.) Finally, section 223 mandates, in relevant part, that "in a criminal case, the court ***shall*** conduct an initial examination of prospective jurors." (Code Civ. Proc. § 223, subd. (a), emphasis added.)

In appellant's case, by deferring to a list of potential excusals generated by the parties outside the record and removing those potential jurors from the jury pool before voir dire began, the court disregarded the requirements that jurors be randomly called for voir dire. In addition, the off-the-record removal of potential jurors from the randomly selected jury pool prior to voir dire violated the requirement that jurors be subjected to voir dire examination to determine their fitness to serve.

Further, the possible excusal list put together by the attorneys violated the proscription in section 223 that attorneys not become involved in jury selection until ***after*** the trial court conducts the initial questioning of the jurors:

> To select a fair and impartial jury in a criminal trial, the trial judge shall conduct an initial examination of prospective jurors. At the first practical opportunity prior to voir dire, the trial judge shall consider the form and subject matter of the voir dire questions. Before voir dire by the trial judge, the parties may submit questions to the trial judge. The trial judge may include additional questions requested by the parties as the trial judge deems proper.
>
> ***Upon completion of the trial judge's initial examination***, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors. (Code Civ. Proc. § 223, subds. (a) & (b), emphasis added.)

Lastly, by never deciding whether the jurors identified by the parties actually qualified for excusal for cause, the court violated Code of Civil Procedure section 230 which requires challenges for cause to be tried by the court:

> Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness in the trial of the challenge, and shall truthfully answer all questions propounded to them.

The violation of appellant's rights under Code of Civil Procedure sections 191, 222, 223, and 230 deprived appellant of her rights under the Fifth and Fourteenth Amendments, and the analogous state constitutional guarantees, to due process of law

and a fair trial. This Court has cautioned "that adherence to the Legislature's statutorily prescribed jury selection procedures remains the proper and authorized way to ensure selection of a fair and impartial jury." (*People v. Wright* (1990) 52 Cal.3d 367, 398 [disapproved of on other grounds by *People v. Williams* (2010) 49 Cal.4th 405].) The trial court's procedure in this case effectively allowed a critical portion of jury selection to occur off the record making it impossible to know counsel's motivation or rationale for suggesting that numerous prospective jurors could be excused for cause without any voir dire.

Appellant recognizes that, although trial counsel never affirmatively agreed to this procedure, counsel also did not object to this procedure. Nevertheless, this claim is not waived because these jury selection procedures implicate public policy and not simply the rights of the parties. California Civil Code section 3513 specifically prohibits the personal waiver of a law established for the public good.[23] "Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally." (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 629.)

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[23] Section 3513 states:

> Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

Consistent with section 3513, this Court has held that although criminal defendants generally may waive their rights, the scope of permissible waiver is limited by public policy concerns. "An accused may waive any rights in which the public does not have an interest and if waiver of the right is not against public policy."(*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 [citation omitted].) Thus in *Cowan* this Court held that while the statute of limitations defense could not be forfeited, it could be waived – though only under specific conditions: "(1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes." (*Id.* at p. 372 [citation omitted].)

Similarly, this Court has found that a defendant cannot waive requirements imposed by the Legislature on courts in criminal cases when those requirements serve a public purpose. For example, in *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834, this Court held that a capital defendant cannot waive the statutorily required automatic direct appeal because the statute requiring such an appeal not only manifested a concern for the defendant but "also imposed a duty upon this court to make such review." The California Supreme Court could not "avoid or abdicate this duty merely because defendant desires to waive

the right provided for him." (*Id.*) "The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.'" (*Id.* at p. 834 [quoting Civ. Code § 3513] [citation omitted].)

This Court took a similar approach in *People v. Chadd* (1981) 28 Cal.3d 739, when it held that a trial court could not waive the requirement in Penal Code section 1018 that counsel must consent before a capital defendant can plead guilty, and further held that, while a defendant has a right to self-representation, there is no concomitant right to waive counsel for a guilty plea. In *Chadd*, the defendant sought to overturn his guilty plea which the trial court had allowed over defense counsel's objection. In overturning the plea, this Court noted that the plain language of the statute mandated that no guilty plea to a capital offense "shall be received ... without the consent of the defendant's counsel." (*Chadd*, *supra*, 28 Cal.3d at p. 746.)

In rejecting the Attorney General's argument that the statute permitted counsel to veto a capital defendant's choice to plead guilty, this Court chided the Attorney General for failing to recognize "the larger public interest at stake" in pleading

guilty to a capital offense:

> It is true that in our system of justice the decision as to how to plead to a criminal charge is personal to the defendant: because the life, liberty or property at stake is his, so also is the choice of plea. [Citation.] But it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus, it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen. Code, § 1016), when he may do so (id., § 1003), where and how he must plead (id., § 1017), and what the effects are of making or not making certain pleas." (*Id.* at pp. 747-748 [footnotes omitted].)

This Court recently reaffirmed this point in *People v. Miracle* (2018) 6 Cal.5th 318 [240 Cal.Rptr.3d 381, 401].)

These cases, read in conjunction with section 3513, support that certain rights and procedural protections related to the administration of criminal justice which implicate a public purpose or benefit cannot be waived by a criminal defendant. The jury selection requirements set out in Code of Civil Procedure sections 222, 223, and 230 codify public policy concerns that bar waiver of these procedures. Indeed, the statutes neither allow for the waiver of these procedures nor contemplate the pre-voir dire removal of jurors in the manner that occurred in this case.

The jury selection statutes were enacted to serve a public purpose that is broader than the interests of the individual defendant: "The process of juror selection is itself a matter of importance, and not simply to the adversaries but to the criminal

justice system." (*Press-Enterprise*, *supra*, 464 U.S. at p. 505.) The legislatively mandated jury selection procedure was a carefully constructed scheme to ensure the public's right to a system that assures fair trials. The Judicial Council's Blue Ribbon Committee of Jury System Improvement recognized this public interest, stating: "A properly conducted voir dire is critical to a fair trial and to promote respect by litigants and the public for the jury's decision." (See *Report by the Judicial Council's Blue Ribbon Committee of Jury System Improvement* (1996) at p. 51 [www.courts.ca.gov/documents/BlueRibbonFullReport.pdf].) Indeed, this Court has recognized that "parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random [jury] selection." (*People v. Visciotti* (1992) 2 Cal.4th 1, 38.)

This Court has not addressed the application of California Civil Code section 3513 to a situation such as this where the parties agreed outside the record to submit to the court a list of prospective jurors who they agreed could be excused for cause after having passed hardship screening and completed a lengthy questionnaire but who had not yet been questioned by the court and where the court then excused those jurors without questioning, without discussion, and without actually determining whether the jurors met the requirement for an excusal for cause.

Although this Court has previously ruled that violations of Code of Civil Procedure sections 222 and 223 are subject to forfeiture in the absence of an objection (*see e.g. People v. Visciotti*, *supra*, 2 Cal.4th at p. 38 [§ 222]; *People v. Benavides* (2005) 35 Cal.4th 69, 88[§ 223]), these decisions failed to consider the effect of Civil Code section 3513.

Allowing the wholesale removal of prospective jurors from the available jury pool before they can be randomly selected for voir dire, as the court did here, constitutes a material departure from the statutory procedures set forth by the Legislature. (*See People v. Johnson* (1894) 104 Cal. 418, 419 [allowing bailiff to select jurors to be called for voir dire "differed materially" from statutory procedures for selecting a jury]).[24] Because sections 191, 222, 223, and 230 afford appellant a legitimate expectation as to how jury selection will be conducted under state law, appellant is constitutionally entitled under the Fourteenth Amendment to the benefit of that statutory scheme. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].)

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[24] While the Court in *Johnson* held this defect was waived by the defendant's failure to object, that decision preceded the enactment of Code of Civil Procedure section 191 and did not consider Civil Code section 3513. Although the Court held in *Visciotti* that the enactment of section 191 did not affect the validity of the decision in *Johnson*, *Visciotti*, as noted, similarly failed to address section 3513.

Here, because of the trial court's failure to abide by the proper statutory procedures, at least nine prospective jurors were excused for cause who should not have been excused for cause under *Witherspoon/Witt*. For this additional reason, appellant's death sentence must be reversed.

XIX.

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

In Argument XVI of her opening brief, appellant argued that the California death penalty scheme, as interpreted by this Court and applied at appellant's trial, violates the federal constitution. (AOB 339-359.) Here, appellant provides new additional support for why California's death penalty system is unconstitutional.[25]

In 2016, after appellant filed her opening and reply briefs, the United States Supreme Court found Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) __ U.S. __ [136 S.Ct. 616, 624].)

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[25] This Court has stated that "routine" challenges to California's death penalty scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

Hurst supports appellant's request that this Court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*see e.g. People v. Anderson* (2001) 25 Cal.4th 543, 589, n.14), does not require factual findings within the meaning of *Ring*, and, therefore, does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*see e.g. People v. Prieto* (2003) 30 Cal.4th 226, 275). (*See* AOB 342-345.)

Appellant recognizes that this Court has rejected this argument that *Hurst* invalidates California's death penalty scheme because this Court has found that California's sentencing scheme is materially different that the one found unconstitutional in Florida. (*See e.g. People v. Case* (2018) 5 Cal.5th 1, 50; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1038.) Nevertheless, for the reasons set forth below, appellant urges this Court to reconsider its findings.

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstances, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required

to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring*, *supra*, 536 U.S. at p. 589; *Apprendi*, *supra*, 530 U.S. at p. 483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as applied to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Id.* at p. 619 [emphasis added].) Further, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (*Id.* at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Id.* at p. 620 [*citing* Fla. Stat. §§ 782.04(1)(a), 775.082(1)].) Under the statute at issue in *Hurst*, after the jury convicted a defendant of a capital offense, it rendered an advisory verdict at the sentencing proceeding. The judge, however, made the ultimate sentencing determinations. (*Id.*) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing

a death sentence. (*Id.* at p. 622 [*citing* Fla.Stat. §921.141(3)].) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Id.*)

Hurst, like *Ring*, held that any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at p. 619, 622.) The Court referred not simply to the finding of an aggravating circumstance but, to the finding of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619 [emphasis added].)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those found in Arizona and Florida laws. In California, although the jury's sentencing verdict must be unanimous (Pen. Code § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (*See People v. Merriman* (2014) 60 Cal.4th 1, 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (*See People v. Rangel* (2016) 62 Cal.4th 1192, 1235, n.16

[distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].)

The law in California, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance: in California, a special circumstance (Pen. Code § 190.2), and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must also make an additional factual finding: in California that "the aggravating circumstances outweigh the mitigating circumstance" (Pen. Code § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593 [*quoting* Ariz. Rev. Stat. § 13-703(F)]); and in Florida, "'that there are insufficient mitigating circumstances to outweigh aggravating circumstances'" (*Hurst*, *supra*, 136 S.Ct. at p. 622 [*quoting* Fl. Stat. § 921.141(3)]).

Although *Hurst* did not decide the standard of proof issue,

the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (*Hurst*, *supra*, 136 S.Ct. at p. 622.) "The relevant inquiry is one not of form, but of effect --does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. p. 494.)

The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (*See e.g. People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty choices are either life without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life without the possibility of parole. (*See e.g. People v. Banks* (2015) 61 Cal.4th 788, 794.) A death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code

§ 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination therefore constitutes factfinding.

C. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not Factfinding Under *Ring* And That It Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination --whether aggravating circumstances outweigh the mitigating circumstances-- is not a finding of fact, but rather a "'fundamentally normative assessment ... that is outside the scope of *Ring* and *Apprendi*.'" (*Merriman*, *supra*, 60 Cal.4th at p. 106 [*quoting People v. Griffin* (2004) 33 Cal.4th 536, 595 [citations omitted]]; *accord Prieto*, *supra*, 30 Cal.4th at p. 262-263.) Appellant asks this Court to reconsider this ruling because, as shown above, its premise is untenable under recent United States Supreme Court law. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition for imposing a death sentence. The jury's finding that the aggravating

circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

The weighing determination, however described, is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at p. 619, 622.) *Ring* requires that any finding of fact required to increase a defendant's authorized punishment to be found by a jury beyond a reasonable doubt. (*Ring*, *supra*, 536 U.S. at p. 602; *see also Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[26] Because California applies no standard of proof to this factual weighing determination, the California death penalty statute violates this beyond a reasonable doubt mandate at the weighing step of the sentencing process.

The Florida Supreme Court's post-remand decision in *Hurst* v. State (Fla. 2016) 202 So.3d 40, supports appellant's claim. There, the Florida court reviewed whether a unanimous jury verdict was required in capital sentencing. The court began by

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[26] The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Accordingly, once the jury finds a fact required for a death sentence, it may still return the lesser sentence of life without the possibility of parole.

looking at the terms of the statute, requiring a jury to "find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Hurst*, *supra*, 202 So.3d at p. 53; Fla. Stat. § 921.141(1)-(3).) Each of these considerations, including the weighing process itself, were described as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Id.*) The court emphasized:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

(*Id.* at p. 57.) There was nothing that separated the capital weighing process from any other finding of fact.

The decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430, further supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth

Amendment under *Hurst*. In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Rauf*, *supra*, 145 A.3d at p. 457.) Nonetheless, the Delaware Supreme Court found the state's death penalty statute violated *Hurst*. (*Id.* at p. 433-434.)

One basis for the court's ruling is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id.* at p. 436 [per curiam opn.], 485-486 [conc. opn. of Holland, J.].) With regard to this defect, Justice Holland stated:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors…." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Id.* at p. 485 (conc. opn. of Holland, J.) [footnotes omitted].)

The Florida and Delaware courts are not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like finding the existence of an aggravating circumstance, comes within the *Apprendi*/*Ring* rule.

(*See e.g. State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 ; *see also Woodward v. Alabama* (2013) 571 U.S. 1045 [134 S.Ct. 405, 410-411] [Sotomayor, J., dissenting from denial of cert] ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; *contra*, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [Under *Apprendi* and Ring, the finding that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*]; *State v. Mason* (Ohio 2018) 108 N.E.3d 56, 65-66 [same].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made by a jury and be made beyond a reasonable doubt. Because appellant's jury was not required to make this finding, her death sentence must be reversed.

CONCLUSION

For all of the reasons set forth in this brief as well as appellant's opening and reply briefs, appellant respectfully urges the Court to reverse her convictions, special circumstance finding, and death sentence and order a new guilt and/or penalty phase trial.

Dated: January 7, 2019

Respectfully submitted,

_____
TRACY J. DRESSNER
Attorney for Appellant
Socorro Caro

CERTIFICATE OF COMPLIANCE

I certify pursuant to CA Rules of Court, Rule 8.630, subdivision (b)(2), that this supplemental opening brief in a capital case contains 25,149 words according to my word processing program.

Dated: January 7, 2019

Respectfully submitted,

_____
TRACY J. DRESSNER
Attorney for Appellant
Socorro Caro

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action.

My business address is 2629 Foothill Blvd, #324, La Crescenta, CA 91214.

On January 7, 2019, I served the foregoing document described as:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Socorro Caro
(not served per attached
declaration)

Clerk of the Court for delivery to
The Honorable Donald D. Coleman
Ventura County Superior Court
800 South Victoria Avenue
Ventura, CA 93009

By MAIL I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Nyack, NY. I am a member of the Bar of the Supreme Court of California.

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

Executed on January 7, 2019, at Nyack, New York.

_____
TRACY J. DRESSNER

DECLARATION OF TRACY J. DRESSNER

I, TRACY J. DRESSNER, declare:

1. I am the attorney appointed on July 16, 2006, to represent appellant, Socorro Caro, on her automatic appeal from a judgment of death imposed by the Ventura County Superior Court.

2. As she did with her opening and reply briefs, Ms. Caro has asked me not to send her a copy of any supplemental brief. Instead, she has asked that I send a copy of the briefing to a family member, and I will do so.

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

Executed this 7th day of January, 2019, at Nyack, NY

TRACY J. DRESSNER

DECLARATION OF SOCORRO CARO

I, SOCORRO CARO, declare:

1. I am the defendant in the automatic appeal case of *People v. Caro*, S106274. My appellate attorney is Tracy J. Dressner.

2. Ms. Dressner visited me recently and explained to me that she would be filing supplemental briefing in my case that includes new issues that have come to light since the filing of the opening and reply briefs as well as new legal argument on pending issues she has raised in my appeal. As I have done with all other briefing in this case, I have asked Ms. Dressner not to send me a copy of any supplemental briefing related to this appeal. I have provided Ms. Dressner with instructions regarding where my copy of any supplemental brief should be sent.

3. I understand that I am entitled to a copy of the briefing in my case, including any supplemental briefing, and I have made a decision not to have that briefing in my possession. I will inform Ms. Dressner if I change my mind and desire a copy of any briefing.

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

Executed this 8th day of December, 2018, at Chowchilla, CA.

Socorro Caro

SOCORRO CARO

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CARO (SOCORRO SUSAN)**
Case Number: **S106274**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

1/7/2019
Date

/s/Tracy Dressner
Signature

Dressner, Tracy (151765)

Last Name, First Name (PNum)

Tracy Dressner

Law Firm