SUPREME COURT COPY

No. S081700

**IN THE SUPREME COURT OF CALIFORNIA**

SUPREME COURT
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**PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

vs.

**WILLIE LEO HARRIS,**

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Kern County
Case No. SC071427a
Honorable Roger D. Randall, Judge

# APPELLANT'S REPLY BRIEF

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DEATH PENALTY

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(Continued)

**TABLE OF CONTENTS**
(Continued)

**TABLE OF CONTENTS**
(Continued)

## TABLE OF AUTHORITIES

### CASES

## TABLE OF AUTHORITIES
(Continued)

**TABLE OF AUTHORITIES**
(Continued)

## TABLE OF AUTHORITIES
(Continued)



### CONSTITUTIONS



### STATUTES

## TABLE OF AUTHORITIES
(Continued)

### JURY INSTRUCTIONS

## INTRODUCTION

Appellant does not seek to answer herein each of the contentions made in the Respondent's Brief. Rather, only those points warranting a reply are discussed in this brief. The absence of a reply herein to a point made in respondent's brief must not be deemed a concession on the issue. Rather, it is only reflects appellant's belief that the issue has been fully briefed in the appellant's and respondent's briefs and is thereby fully joined.

## COMMENT ON RESPONDENT'S STATEMENT OF THE FACTS

Before setting forth responses on specific arguments, appellant wishes to note in particular one matter arising from the Statement of the Facts set forth in Respondent's Brief (hereinafter cited as "RB"). Respondent, in a footnote, states that Charles Hill's alibi witness, Pat McCarthy, "[c]ould not remember if anyone else came over to his house on that day, but he always had friends coming and going since he lived at the house by himself. (30 RT 7009-7010.)" (RB 23, fn. 25.) The difference in this from McCarthy's actual testimony is subtle but important:

> Q. [by the Prosecutor] Now, on May the 20th, on that afternoon and evening of that particular day, do you recall anyone else being at the residence while Mr. Hill was there?
>
> A. Not that I remember. I always had like friends coming by . . .

(20 RT 7010.) The point is this: Respondent's wording suggests that McCarthy couldn't remember whether anyone else came by. McCarthy's actual response was that he did not recall that anyone came by that afternoon and evening.

Moreover, McCarthy shortly thereafter affirmed that there were other days when both Hill and other friends were there; but on the day in question, he and Hill were "playing pool, video games. That's about it." (20 RT 7011.) In other words, while McCarthy remembered what he and Hill did that day, he did not remember doing these things with anyone else. And the difference is crucial, given Charles' testimony that 10-15 other friends of McCarthy *did* come by. (30 RT 6966-6967.) Indeed, on cross-examination, defense counsel asked McCarthy to refresh his recollection by reading from a report by Detective Stratton. Trial counsel then asked McCarthy whether he remembered telling Stratton there was no one there except for "the two of you." McCarthy answered "I don't remember saying that exactly . . . I don't deny it. I don't remember it." Was it possible he said it? McCarthy responded, "Possible." (30 RT 7016:10-20.) In fact, o Detective Stratton's report, which he dictated on the day of the interview,

reads: "He [McCarthy] stated there was no else there except for the two of them . . . ." (1 CT 8.)[1]

Thus, contrary to respondent's representation that McCarthy "could not remember if anyone else came over to his house that day," (RB 23, fn. 25), the record reveals that McCarthy's testimony remained much closer to what McCarthy said in the first trial, responding to the question whether, to the best of his memory, it was just the two of them: "That I can recall, yes." (14 RT 3279-80.)

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[1] Actually, the report indicates that McCarthy was interviewed on June 13, 1997, and that it was dictated on June 12, the day before. Appellant can only speculate that the dictation was begun on the 12th and continued on the 13th, but was labeled the 12th.

## ARGUMENT

### I. RESPONDENT BOOTSTRAPS THE FINDINGS OF THE TRIAL COURT TO SUPPORT THE TRIAL COURT'S FINDINGS REGARDING THE DENIAL OF APPELLANT'S CHANGE-OF-VENUE MOTION

The most important part of respondent's argument regarding the trial court's denial of appellant's change-of-venue motion appears in two statements of law at its beginning:

> "Reasonable likelihood means something less than 'more probable that not' and something more than merely 'possible.' (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court sustains any factual determinations supported by substantial evidence, and independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Hart* (1999) 20 Cal.4th 546, 598.)"

(RB 59.) Appellant submits that respondent has not given this court any reason, upon its independent review, *not* to find that more than a reasonable likelihood existed that appellant would not get a fair trial.

It is striking to note, for example, that the whole of the government's response to appellant's presentation of extensive psychological research on the question of whether or not jurors could be expected to give accurate answers, in an open-court voir dire conducted with the sort of closed-ended and leading questions the court engaged in here, was to merely quote the juror's answers to the court's questions. (*Compare* AOB 139-157, RB 55-59.) Respondent has not presented *any*

evidence or studies to refute appellant's assertion that prospective jurors' answers, in such a setting, are unreliable. Instead, respondent merely presents a "brief summary" of each juror's voir dire testimony. The summaries repeat, mantra like, such phrases as "he/she had not formed any opinions as to appellant's guilt or innocence," or that the pretrial publicity "had not caused him to prejudge the case," or both. (RT 55-58.) *Of course* they all said that – if they hadn't, they would not have been allowed to remain on the jury.

The issues raised in appellant's opening brief, and thus far not answered, are not what the prospective jurors said. Rather, they are the reliability of what they said (not very), and the pervasiveness and one-sidedness (very) of the publicity. If all it takes is for prospective jurors to say that they can be fair and have not prejudged the case, in answer to a judge who has made very clear the desired answers (see examples at AOB 154-156, 195, 198-205), then there are, henceforth, no grounds on which to change venue, and *Sheppard v. Maxwell* (1966) 384 U.S. 333 and its California progeny have been rendered, *sub silentio*, a nullity.

## A. THE SIZE OF THE COUNTY IS AT BEST A NEUTRAL FACTOR

Respondent cites four cases in which a venue change denial was upheld in counties smaller than Kern to counter appellant's argument that the size of Kern County argued in favor of a venue change. (RB 60; AOB 125-128, 135-136.) It is meaningless, however, to cite only the size of the counties without reference to the other factors which were determinative of the case. On those, the four cases are eminently distinguishable.

In *People v. Vierra* (2005) 35 Cal.4th 264, which took place in a Stanislaus County case (pop. 370,000), the media coverage lasted from May 22 to June 1, 1990, after which, "it quickly subsided and was not persistent and pervasive as in other cases in which a change of venue was warranted." (*Id.* at p. 280; citation and internal quotations omitted.) In such a case, and certainly without the sort of re-introduction of publicity related to the first trial here, this Court would not have reversed even in a county of 10,000. But the instant case *did* involve the renewed publicity attending the first trial, and is on this ground distinguishable. (*Cf.*, *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 583 [change of venue granted following recent co-defendant's trial]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 53 [change of venue granted for penalty retrial

following well-publicized trial, convictions, appeal, and reversal on appeal]; *and see* discussion of primacy effect at AOB 116-122.)

In *People v. Weaver* (2001) 26 Cal.4th 876 (in Kern County, as was this case), it is first notable that the evidence included *12* articles from the *Bakersfield Californian*, a far cry from the *37* articles introduced here – 11 of them from the first trial, recent enough for prospective jurors to have carried forward their underlying beliefs. (*Id.* at p. 905; see AOB 105-114; 30 CT 8687-8747.) But *Weaver* is notable – and cuts in appellant's favor – precisely for what it says about the relationship between Kern County and the attendant publicity:

> The size of the community is relatively neutral; as defendant asserts, Kern County is "neither large nor small." At the time of trial, the county had a population exceeding 450,000 and Bakersfield, where the trial was held, had a population of 200,000. The key consideration is "whether it can be shown that the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.' " [Citations omitted.] As explained, *post*, the adverse publicity in this case was neither relentless nor virulent. The moderate size of Kern County thus does not undermine the trial court's decision to deny the change of venue motion.

(*Id.*) In stark contrast, as amply and exhaustively explained in appellant's opening brief herein, the publicity here was both relentless and virulent. (See, *e.g.*, AOB 101-122.) This both distinguishes this case from *Weaver* and cuts against the size of the population being large enough that it

"'neutralizes or dilutes the impact of adverse publicity.'" (*Weaver*, 26 Cal.4th at p. 905, quoting *Lansdown v. Superior Court* (1970) 10 Cal. App. 3d 604, 609, as quoted in *People v. Jennings* (1991) 53 Cal. 3d 334, 360.)

*People v. Hayes* (1999) 21 Cal.4th 1211 [Santa Cruz County, pop., under 200,000] involved a motion which, when initially filed, the trial court said it would grant, but would not take up until closer to trial. Some 18 months later, after dissipation of the publicity, after some in the venire said they had moved to the county after the publicity, and others said they had no memory of the details, the motion was denied. (*Id.* at 1249-1251.) Moreover, *Hayes* found that the media coverage in that case was factual, not inflammatory – a finding appellant considers unsupportable in his case. (See AOB 105-125 for exhaustive review of publicity in this case.) Moreover, much of the media coverage in *Hayes* took place almost three years before jury selection in the trial, while in this case the renewed media coverage of the first trial took place less than six months prior to jury selection, and had the effect – as explained by Dr. Bronson and not countered by respondent – of renewing memories of the earlier, most prejudicial, coverage. (*Id.* at p. 1251; see AOB 77-78, 138.)

Finally, in *People v. Coleman* (1989) 48 Cal.3d 112 [Sonoma County, pop. 299,681], the contrast with this case is most striking in the fact

that the nine newspaper stories found in that case insufficient to bias the jury pool, not "persistent and pervasive." (*Id.* at p. 134; citation omitted.) By comparison, the publicity in this case was clearly both persistent and pervasive. So are differences in the defense-conducted survey results: In *Coleman*, the recognition rate after two questions – that is, how many respondents remembered the case after two questions prompting them with facts of the case – was 46 percent. (*Id.* at p. 135.) In this case, the recognition rate after two questions was 71.5 percent. (17 RT 3985; 30 CT 8767.)

Regarding the size of the county, then, at least to the extent that respondent appears to be making an *a fortiori* argument regarding size of community as ameliorating the publicity here, using the four cases just discussed, the argument fails. Each of those cases is distinguishable, and the factors which make this case distinguishable from them – principally the nature and extent of the publicity, close in time to jury selection – cut strongly in appellant's favor. Moreover, even if in comparison to other small counties the size of Kern County can be said to be a neutral factor in the change of venue analysis (*Weaver, supra*), Kern County is significantly strikingly smaller than Los Angeles and San Diego counties. In *People v. Ramirez* (2006) 39 Cal.4th 398 and *People v. Prince* (2007) 40 Cal.4th

1179, respectively, the vast populations of those counties were deemed sufficient to ameliorate the effects of the adverse publicity. (See AOB 134-139 for a more complete discussion distinguishing *Ramirez* and *Prince* from this case.) Kern County's population was simply not large enough to similarly ameliorate the effects of adverse publicity regarding appellant, as demonstrated by the extraordinarily high recognition rate.

### B. RESPONDENT IGNORES THE RENEWING EFFECT OF THE RECENT FIRST-TRIAL PUBLICITY ON JUROR'S INITIAL IMPRESSIONS FORMED FROM THE INITIAL, PERVASIVELY NEGATIVE PUBLICITY

Respondent seeks support for its argument regarding the nature of the coverage by making the conclusory statement that "[t]he record supports the trial court's conclusion that the media reported both prosecution and defense theories of the case." (RB 62.) In doing so, respondent focuses entirely on snippets of fact found in the articles. Appellant has never disputed that these facts appeared in the media coverage of the case. What respondent has failed to mention or acknowledge, let alone refute, is the clear imbalance in the *nature* and *emotional salience* of the coverage, discussed at length by appellant's expert, Dr. Bronson, and in his opening brief. (See AOB at 74-81, 101-125.)

## C. THE PASSAGE OF TIME FROM THE FIRST TRIAL WAS INSUFFICIENT TO AMELIORATE THE PREJUDICIAL EFFECTS OF THE PUBLICITY

Respondent argues that the passage of time "appears" to have ameliorated the effect of the publicity, again citing the statements of the sworn jurors during their *voir dire* examination. (RB 62-63.) However, the evidence before the trial court at the time of the motion – prior to jury selection – was otherwise. The testimony of Dr. Bronson – uncontested at trial and still uncontested in respondent's brief – was that the natural result of the first-trial publicity would be to revive people's initial conclusions about the defendant's guilt. That is, their emotional reaction to the early, pervasive, emotionally salient, publicity would have been revived by the publicity about the first trial. This is the "primacy effect," discussed in appellant's opening brief at pages 77. 79, 103, and 116-128. (And see *Martinez v. Superior Court* and *Fain v. Superior Court*, cited *ante* at p. 6.) The actual passage of time – just a few months in this case – is far, far shorter[2] than that cited by this court as an ameliorating factor in any of its

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[2] Reporting on the first trial took place in November and December, 1998 (30 CT 8728-8745); the sentencing on the one count, burglary, for which appellant was convicted in the first trial was reported on January 8, 1999 (30 CT 8746); and one final small item concerning the change of venue motion appeared on February 3, 1999 (30 CT 8747). The change of venue motion was heard on May 18, 1999 (14 CT 3824-3826).

cases affirming denials of change of venue; yet respondent has somehow transformed a negative factor into a positive factor, merely by asserting without support that the passage of time "has had the [hoped-for] expected effect." (RB 62.)

Again, respondent relies on the fact that the seated jurors – even those with knowledge of the case – said that they had not prejudged it. (RB 63.) Of course they *said* they had not prejudged defendant's guilt – if they had not so pledged, they would nott have been on the jury. It is a circular argument, and one which completely ignores, and surely does not refute, the extensive psychological research showing that in a courtroom setting, with a judge making clear what the correct answer is ("I can be fair," or "I have not prejudged the case," or "I will listen to both sides evenhandedly"), and even badgering some witnesses into coming around to the desired answer (AOB 197-205), the answer that will be given by most prospective jurors will conform to the socially desirable answer, whether or not they are actually prejudiced. (See AOB 139-157.)

Respondent makes the surprising comment that appellant "fails to show that he, in fact, did not receive a fair trial by an impartial jury." (RB 63.) Appellant responds that the gravamen of his entire opening brief is that, in fact, a fair trial was far from what he received.

Respondent then makes the further argument that none of the jurors were challenged for cause, citing *People v. Farley* (2009) 46 Cal.4th 1053, 1085. (RB 64.) *Farley*, however, was a case in which the change of venue motion was decided *after* voir dire. That is, the trial judge had the benefit both of the voir dire and of the fact that during it, there were not challenges for cause. The issue in this case is whether the trial court's denial of the motion to change venue, heard before voir dire, was an abuse of discretion. Moreover, this is another circular argument. Appellant makes clear in his opening brief that the voir dire process was severely flawed, in part by the lack of individual voir dire, and in part by the reliance on open-court, judge-dominated questioning designed to lead jurors to the acceptable answers. In such a setting, there were no challenges for cause because the grounds for challenges for cause were precluded by the very process of which appellant complains.

Respondent even goes so far as to speculate that, if the jury were truly unacceptable, "it seems likely that [the defense] would have exercised their last peremptory challenge even if that may have allowed someone equally undesirable onto the panel." Defense counsel in fact explained their choice not to exercise their last peremptory: They were not afraid of getting someone equally undesirable, but rather someone "worse" than those

already seated. (26 RT 5994.) Additionally, respondent fails to counter appellant's argument that, indeed, there were "worse" jurors still in the venire that he had every reason to be afraid would end up on the jury. (See AOB 197-205.)

### D. THIS CASE REMAINS DISTINGUISHABLE FROM THIS COURT'S RECENT CASES AFFIRMING DENIALS OF VENUE-CHANGE MOTIONS

Respondent claims that there is no meaningful distinction between this case and *People v. Prince* (2007) 40 Cal.4th 1179 and *People v. Ramirez* (2006) 39 Cal.4th 398. (RB 65-66.) Appellant stands by his arguments distinguishing those cases (AOB 134-138), with this additional point: Appellant did not cite in his argument this Court's finding, in *People v. Weaver, supra*, 26 Cal.4th at p. 905, that Kern County is "neither large nor small," rendering it size, as a factor, "relatively neutral." *Weaver* also says, "The key consideration is 'whether it can be shown that the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.'" (*Id*; citations omitted.) In *Weaver*, however, the publicity was "neither relentless nor virulent," (*Id.*), while in this case it was certainly virulent. Moreover, as Dr. Bronson testified, the recently-concluded first-

trial's publicity revived initial impressions from the earlier, relentless publicity about defendant's guilt.

Respondent would have it otherwise, relying on the trial court's finding that the coverage was evenhanded to show that the coverage was, in fact, evenhanded. (RB 66.) To support the trial court's finding by quoting it is a tautology,amply refuted by the evidence and the respondent's failure to answer appellant's discussion of the wealth of evidence in the record to the contrary.

The larger point, however, in terms of distinguishing this case from *Prince* and *Ramirez*, remains: Absent the ameliorating effects of very large populations, such as present in those cases, and given the media concentration in Kern County, there is nothing in either *Prince* or *Ramirez* that undercuts appellant's contention that the trial court erred in failing to grant his change of venue motion.

### E. THE TRIAL COURT'S STATED REASONS FOR DENYING THE CHANGE-OF-VENUE MOTION REMAIN UNSUPPORTED BY THE EVIDENCE

It is worth reviewing, briefly, the enormity of the trial court's failure to credit the evidence demonstrating a reasonable likelihood that appellant would not get a fair trial in Kern County. Thus, the trial court found the

media coverage to be even-handed, which it was not, in either content or emotional salience (AOB 121-125); it found that the defendant's story was told, while ignoring *how* it was told – surrounded by facts and emotionally-loaded (though factual) language that was pro-prosecution (AOB 101-103); it found that the coverage had been ameliorated by time, while entirely ignoring the effect of the coverage of the recent first trial, described by Dr. Bronson's uncontradicted testimony about the primacy effect (AOB 166-122); it found that the size of the county was ameliorating, while this court has found it at best "neutral"; it found that the coverage did not paint an unsympathetic view of the defendant, while any reasonable jurist reviewing the publicity as a whole, rather than cherry-picking from it, would reach the opposite conclusion (AOB 104-116); and while the court gave lip service to the nature and gravity of the offense, it consistently ignored the racial and sexual aspects of the case – and especially their inter-relationship to the detriment of appellant (AOB 133-134).

The sheer distance between what the evidence showed and what the trial court found is sufficient without more to establish an abuse of discretion, requiring reversal.

## II. THE TRIAL COURT'S LIMITED AND INEFFECTIVE VOIR DIRE DID NOTHING TO LIMIT THE EFFECTS OF THE RACIAL ASPECTS OF THE CASE

### A. THE TRIAL COURT'S FAILURE TO FIND A PRIMA-FACIE CASE OF IMPERMISSIBLE MOTIVE UNDER THE RELEVANT CASES IS REVERSIBLE ERROR

Regarding appellant's and respondent's arguments concerning racial bias in the jury selection, the inadequacies of *voir dire* with regard to it, and the trial court's refusal to find a prima-facie showing of discriminatory intent under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson* v. *Kentucky* (1986) 476 U.S. 79,[3] appellant adds the following to his opening-brief argument:

Respondent, at page 77 of its brief, cites *People v. Yeoman* (2003) 31 Cal.4th 93, 116, for the proposition that the finding that defendant has not made out a prima facie showing of discrimination should not be countered by an appellate court's comparative analysis for the first time on appeal. Appellant notes that *Yeoman* preceded *Miller-El v. Dretke* (2005) 545 U.S. 231, and while this court has continued to eschew such early-stage comparisons, even post-*Miller-El* (*e.g., People v. Howard* (2008) 42 Cal.4th

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[3] Appellant's counsel has discovered that, despite numerous references to *Batson* in the opening brief, and one "*supra*" citation to it, what should have been the initial complete citation was inadvertently left out of both the brief and its Table of Cases. Counsel acknowledges and apologizes for the error.

1000, 1019), appellant believes that federal equal protection jurisprudence is to the contrary.

Appellant is assisted in this assertion by the decision in *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, where the lower-court venire contained but two African-Americans in the trial of an African-American. The first of these was struck by the defense. When the second was struck by the prosecutor, the defense brought a *Batson* motion. The District Court found that as there was no pattern shown, no *prima-facie* case had been made out. (*Id.* at pp. 919-920.) The Court of Appeals reversed. First, it noted that no pattern was necessary, because the Equal Protection Clause protects against even one instance of discrimination in jury selection. (*Id.* at p. 919.) Second, it discussed the interplay between the lack of minority members in the venire and the making out of a prima facie case, refusing to hold against the government the small number of minorities in the venire. Nevertheless, it continued:

> The lack of diversity in the panel, along with the removal of each African-American, however, does justify close scrutiny of the challenge. *See United States v. Chinchilla*, 874 F.2d 695, 698 n.5 (9th Cir. 1989) ("However, although the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury."). *Moreover, if we do not look closely at the prosecutor's challenge of the sole African-American, it would*

*be impossible for a defendant in Collins's position to establish a case of prima facie discrimination.*

(551 F.3d at pp. 920-921; emphasis added.) Third, the Ninth Circuit proceeded, in this first-stage case, to engage in just such an analysis, citing *Miller-El v. Dredke, supra*, 545 U.S. at pp. 247-248, and *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351-360. (553 F.3d.at pp. 921-922.) Finally, the court, despite any one clear factor, found that a *prima facie* case had been made out because "the totality of the circumstances raises an inference of impermissible discrimination." (*Id.* at p. 923.)

Similarly instructive is *Boyd v. Newland* (9th Cir. 2005) 467 F.3d 1139, reversing a finding of no *prima facie* showing of discrimination by the trial court and affirmed by the California Court of Appeal, which did so without having before it a complete *voir dire* transcript. (*Id* at p. 1144.) Noting that *Johnson v. California* (2005) 545 U.S. 162 had emphasized that the burden for showing a *prima facie* inference is quite low, the Ninth Circuit also referenced *Miller-El*'s comparative juror analysis. (*Id.* at p. 1145.) Under *Miller-El* and *Johnson*, the Ninth Circuit said, "Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either step one or step three of Batson was unreasonable in light of Supreme Court precedent[,]" because, even at the first *Batson* stage, it "assists a court in determining

whether the totality of the circumstances gives rise to an inference of discrimination . . . ." (*Id.* at p. 1149.)[4]

On the issue of whether there were simply too few minority jurors in the venire to make a meaningful finding (RB 80), the numbers of minority jurors in *Boyd* differ little from appellant's case. In this case, the motion was brought when two of three minority jurors remaining in the venire had been struck. At the time of Boyd's *Batson* motion, one of four African-American jurors had been struck for cause, and three remained when the juror that was the subject of the *Batson* motion was struck. (*Id.* at p. 1147.)

Respondent further asserts that the lack of bias in the instant case is shown because "Only two of the prosecutor's 20 peremptory challenges were exercised against African-Americans." (RB 79.) Respondent fails to add the additional fact that there were only three left in the venire on which

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[4] The history in *Boyd* is also instructive: In its initial, pre-*Johnson*-and-*Miller-El* decision, the Ninth Circuit affirmed the district court's denial of appellant's habeas claim. (*Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013. Following the Supreme Court's opinions in *Johnson* and *Miller-El*, the Ninth Circuit called for new briefing and issued the opinion discussed in the text herein. (467 Fed.3d at p. 1144.) Moreover, the opinion makes clear that because of its failure to order the transcripts of the entire jury voir dire, "the California appellate courts could not have considered the circumstances surrounding the contested strike, could not have evaluated the potential inference of racial bias, and therefore could not properly have found that Petitioner failed to establish a prima facie case." (*Id.* at pp. 1144-1145.)

the prosecutor could have exercised challenges. Respondent then cites several cases that add up to the proposition that when the defendant's race is under-represented in the venire, the fact that two of the three blacks in the venire are excused cannot form the basis of a prima-facie finding. (RB 79-80.) This approach, however, unconstitutionally adds the insult of rendering such a finding impossible to the injury of the under-representation of defendant's race in the venire. Such a result cannot withstand the constitutional underpinnings of *Wheeler*, *Batson*, and their progeny. (And see *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198 [sample so small that statistical significance of percentages is slight in *Batson* analysis].)

Finally, respondent complains that juror H.C. admitted an unspoken connection with defendant, based on the fact that both were African-American. It is ironic that after the constant recitation of the sitting juror's averments that they could be fair as support for that fact, respondent chooses to ignore H.C.'s statement, "but I will be able to listen to the facts and make a decision on the facts, yes . . . ." (23 RT 5239.) Moreover, appellant would assert that this unspoken kinship is precisely why *Wheeler* and *Batson* and *Miller-El* and their progeny exist – because there is a recognition that just such a connection between persons of the same race exists, perhaps especially those who have the shared experience of growing

up Black in America. But whether or not Juror's H.C.'s articulation of this unspoken principle is legitimate, it is overwhelmed by the remainder of his *voir dire*, which made clear that he was among the strongest supporters of the death penalty in the venire. (See AOB 181-183.)

### B. EVEN IF JUROR R.C. DID NOT DELIBERATE WITH THE JURY, THE FAILURE OF DEFENDANT'S CHALLENGE FOR CAUSE CONFIRMS THE TRIAL COURT'S PATTERN OF ABUSE OF DISCRETION IN RACIALLY-BIASED WAYS

Respondent is correct that Juror R.C. remained an alternate, and to that extent appellant cannot argue that the jury itself was biased by his presence on it. (RB 85.) Respondent is not correct, however, that appellant forfeited his claim to the error (RB 84-85), for the reasons set forth in his opening brief, at pages 205-207 and noted *ante*, concerning trial counsel's fear of ending up with a worse jury if he did exercise his final remaining challenge.

The fact that Juror R.C. did not deliberate with the jury, moreover, does not minimize the fact that the court's refusal to grant the challenge for cause remains indicative of the court's overall pattern of abuse of discretion in both the denial of the change of venue motion and in jury voir dire, as summarized in appellant's opening brief at pages 208-210.

Appellant therefore disagrees with respondent's off-hand dismissal of his claim of cumulative error in the pre-trial proceedings. Respondent fails entirely to (1) answer appellant's claim that the court's persistent efforts to rehabilitate likely prosecution-leaning jurors, in combination with (2) its refusal to change venue and (3) its persistent refusal to acknowledge and account for the racial aspects of the case, resulted (4) in a jury unfairly tilted toward both the prosecution and death. This resulted in a denial of appellant's Fifth, Sixth, and Fourteenth Amendment rights.

## III. RESPONDENT'S TREATMENT OF THE EVIDENTIARY ISSUES RAISED IN APPELLANT'S OPENING BRIEF MIS-CHARACTERIZES APPELLANT'S ARGUMENTS, MISREADS THE RECORD, AND MISUNDERSTANDS THE LAW

### A. THE ERRONEOUS ADMISSION OF THE TORIGIANI BURGLARY

Arguing in support of the trial court's erroneous admission of the facts of the already-adjudicated Torigiani burglary, respondent correctly sets forth the applicable statutory provisions and the trial court's limiting instruction. (RB 86, 87-88.) Respondent also sets forth the prosecution's list of similarities between that burglary and the evidence surrounding the Manning homicide, but conveniently overlooks the dissimilarities between the two crimes. (RB 86-87.) It is of no matter, however, because *on the facts of this case*, respondent loses the point.

To begin with, respondent asserts that "these facts were sufficiently similar to the facts of the charged offense to support an inference that appellant probably had the intent to steal when he entered Manning's apartment." (RB 89.) Not even the jury agreed with this. As respondent admits, they acquitted on the burglary charge.

Similarly, respondent repeats the canard that appellant "armed himself with a weapon from inside the apartment." (RB 89.) This is ludicrous. There is evidence only that appellant *moved* a bayonet from

beneath Ms. Torigiani's brother's bed to her bedroom. Appellant is aware of no principle of law under which the *moving* of a potential weapon from one location to another (if indeed he did, for no one actually saw him do it), without any evidence of a violent, as opposed to a larcenous purpose, constitutes *arming*. And, of course, when confronted, appellant both left the bayonet behind and ran away.

Respondent is arguing separate elements of two different crimes to say that they were alike: (1) that because appellant burgled Torigiani, he must have had an intent to burgle Manning; and (2) that because appellant raped and murdered Manning, he must have been arming himself when he presumably moved the bayonet. That does not constitute a *modus operandi.* Moreover, there was no intent to rape or murder in the Torigiani crime; indeed, no one was home, and when Ms. Torigiani came home, appellant ran. Thus, there was no similarity of intent.

Nor do several of respondent's other asserted similarities (RB 88) withstand scrutiny. Respondent does not say how the two apartments were so similar as to constitute a pattern; that they were both apartments merely states the obvious. Respondent says they were both inhabited by women, but Torigiani's brother also lived in her apartment, and there is nothing to indicate the appellant even knew who the inhabitants were until one of them

came home. Moreover, Harris did not know either of the Torigiani's, while he knew both Bucholz and Manning.

Neither were the items stolen similar, with the one exception of a VCR, certainly one of the most commonly-stolen items and not in itself sufficient to show anything other than a propensity to steal easily removable items of value. And this is the crucial point: there was nothing here to show anything but propensity, and in this case that showing was magnified by the racial aspects of the case. (See AOB 220-226.)

Finally, respondent seeks to convince this court that the error was harmless because "the prosecutor presented strong evidence of appellant's guilt in this case . . . ." (RB 90.) But the presence of semen in or on the victim is "strong" evidence only that they engaged in sex; appellant's apartment's proximity to the victim's apartment is no more probative than the countervailing fact that the victim was the roommate of a friend of his, making unlikely any intent to steal from, rape or murder the friend's roommate; the asserted lack of an alibi for the time of the murder ignores that Lori Hiler testified that she saw a white man that looked like the victim's boyfriend carrying the TV set to the car, so it is likely that appellant's lack of an alibi resulted from his being on his way to his apartment when Manning was murdered and the items stolen; his

conflicting statements are entirely understandable as those of a petty thief and burglar knowing that as a black man placed of the rape and murder of a white college student, the investigation would immediately focus on him and, as happened, never shift away; the so-called evidence of his attempts to sell "similar" merchandise were ambiguous and contradictory; and the real fact is that none of the actual items stolen were *ever* found in the possession of Harris or his friends.

Without the strength provided by the propensity evidence supplied by the facts of the Torigiani burglary, the direct evidence against Harris was practically non-existent; we *know* only that he was present in the apartment and had sex with Manning that night. And the circumstantial evidence was subject to interpretation – an interpretation greatly enhanced for the prosecution by the Torigiani facts, which added up to nothing more than an unspoken message, "here is this black man who preys on white women." That is the very harm that Evidence Code section 1101(a) is intended s to prevent. Moreover, the effect of erroneous admission of the Torigiani burglary is compounded by other errors previously noted, especially the trial court's wrongful denial of appellant's motion to change venue and errors committed in the course of jury selection. Individually and cumulatively, these errors denied appellant a fair trial and require reversal.

## B. RESPONDENT FAILS TO OVERCOME THE LACK OF EVIDENCE REGARDING WHEN THE INTENT TO STEAL WAS FORMED

### 1. Respondent's Argument Contradicts Itself, by Stating Correctly the Law that Requires a Jury to Adopt the Innocent Version of Two Interpretations but Failing to Apply It By Constructing an Alternative "Likely" Scenario

Respondent correctly recites the standard that if circumstantial evidence points to two interpretations, the innocent interpretation must be adopted. (RB 92, citing and quoting *People. v. Hodgson* (2003) 111 Cal.App.4th 556, 574.) However, in discussing the facts to which this principle should be applied, respondent departs from the evidence as presented at trial and instead constructs a scenario about what was "likely" when appellant entered the apartment. (RB 94.) Respondent's "likely" scenario – that appellant formed the intent to rob Alicia after she let him in and he determined that Thea was not there – is "*un*likely," because it ignores too many other facts : Appellant, a man with some history of theft of none of violence, would be *un*likely to rob the roommate of a friend, with whom he was acquainted, and, according to what he told the police, with whom he had engaged in consensual sexual relations on a prior occasion; and that appellant, who had no history whatsoever of entering an *occupied*

apartment to steal would suddenly decide to steal, from someone he knew, who was present, and whose roommate was a friend of his.

Returning to *Hodgson*, then, and the familiar notion that if the circumstantial evidence is susceptible of two interpretations and one of them points to innocence – or in this case, to the time of formation of an intent to steal – respondent's "likely" scenario must fail.

More important, it simply does not add up to the level of "substantial evidence" required by law. As appellant made clear in his opening brief (AOB 227-231), there was a complete absence of *evidence* on which a rational juror could make the determination – other than on the basis of respondent-like speculation – of when the intent to take the items was formed. That the jury did find a robbery was not because of the evidence, but rather the unfortunate and prejudicial confluence of the propensity evidence discussed *ante*, and the prosecutor's and court's statements and instructions, discussed below.

### 2. Respondent Misreads Both Appellant's Argument and the Record Regarding Appellant's Argument that the Jury was Misled by the Prosecutor and the Court on the Issue of the Timing of the Formation of Intent to Steal

Respondent's arguments VII(C) and (D) (at RB 95-101) proceed from misreading and mischaracterizing both appellant's argument and, more crucially, the record on appeal.

In his opening brief, appellant showed how the prosecutor's argument was likely to mislead the jury regarding the need to determine when the intent to rob was formed. The prosecutor correctly stated the importance of the timing of intent with respect to burglary, but not with robbery, implying *sub silentio* that when the intent to steal was formed was of no importance. This omission was then exacerbated by the trial court's sending in to the deliberations an erroneous version of CALJIC 8.81.17. (AOB 231-236.)

Respondent initially asserts waiver regarding the prosecution's omission: "[A]ppellant did not object at trial to the prosecutor's closing argument as it related to the explanation of the intent required for the robbery special circumstance." (RB 95.) Accordingly, respondent asserts, "appellant forfeited any claim of misconduct based on this argument." (RB 95-96, citing *People v. Williams* (1997) 16 Cal.4th 153, 254.) Appellant

submits that this case is distinguishable. In *Williams*, the appellant complained of the prosecutor's three references to his lack of remorse, and error, if any, of commission. (*Id.*) Insofar as the prosecutor's misconduct in this case was an error of omission rather than commission, there was nothing upon which to object.

There is, in addition, another and more crucial difference between this case and *Williams*. In this case, the prosecutor's misconduct was directly related to, and was exacerbated by, the trial court's sending into the jury deliberations an erroneous version of CALJIC 8.81.17. (See AOB 233-236.) In this regard, Respondent's argument VII(D), misreads, and therefore misstates, the record.

Simply put, respondent's quotation of the written version of CALJIC 8.81.17 as sent in to the jury is wrong. (RB 97-98.) On the written instruction, at 15 CT 4172, below the interlineated additions at the end of the crucial paragraph, one of two bracketed alternatives is crossed out, as follows: [or] [~~and~~], leaving the elements in the disjunctive. Accordingly, respondent's entire argument regarding the correctness of the instruction is nugatory.

Neither was the error ameliorated by the giving of CALJIC 9.40 and 8.21, as claimed by respondent. (RB 99-100, citing cases for the

proposition that these two instructions "adequately cover the issue of the time of the formation of the intent to steal.") These cases are distinguishable, for none of them involves the error found here in the giving of CALJIC 8.81.17. (See *People v. Friend* (2009) 47 Cal.4th 1, 71 [giving of 1954 revision of 8.81.17 was proper part of giving full panoply of homicide instructions]; *People v. Valdez* (2004) 32 Cal.4th 73, 112-113 [not error to give truncated version of 8.81.17]; *People v. Hughes* (2002), 27 Cal.4th 287, 360 [correct version of 8.81.17 was given].) In particular, respondent's reliance on *People v. Friend*, *supra*, is misplaced. (RB 98.) Thus, while *Friend* allowed the use of a version of the instruction without any grammatical connectors (RB 98), there was in this case a grammatical connecter, the disjunctive "or." Indeed, respondent quotes from *Friend* the phrase "absent the insertion of express disjunctives . . . ." (RB 98; *People v. Friend, supra*, 1 Cal.4th at p. 79.) In this case, the express disjunctive was not absent.

The other crucial difference between this case and the afore-cited cases is that in this case, the jury had already been misled by the prosecutor. Thus, even if this court were to find the misconduct claim waived, the jury was still left with a mistaken impression of the law, made worse by the court's erroneous instruction. The mis-argument and mis-instruction

exacerbated each other, and there is nothing in either of the other instructions that would clarify the inaccurate instruction.

The bottom line is this: appellant has a constitutional right to a properly-instructed jury; the jury was not properly instructed; and whatever amelioration of the error which could feasibly arise from the giving of other instructions was more than overcome by the prosecutor's misleading explanations of the law. (See AOB 231-233.)

### C. RESPONDENT'S ARGUMENT REGARDING THE EVIDENCE SUPPORTING THE RAPE AND THE RAPE SPECIAL CIRCUMSTANCE CHARGES DOES NOT WITHSTAND SCRUTINY

Regarding the rape conviction and special circumstance, respondent sets forth all of the evidence that shows that Alicia Manning did not like Willie Harris. (RB 103-104.) None of that evidence, however, is inconsistent with his story that he and Ms. Manning had already engaged in consensual sex with her in late April. (29 RT 6765-6767, 6793.) Manning may have been using her apparent dislike of Harris as a ruse to shield their sexual relationship from both her boyfriend Hill and her roommate Bucholz. Beyond this, appellant refers the Court to his argument in the opening brief. (AOB 242 *et seq.*)

Later, respondent seeks to support the trial court's admission of Alicia's two unsent letters. (RB 106-110.) In doing so, respondent states: "Whether it was consensual sex versus rape was a disputed fact of consequence to this case and the status of Alicia and Charles' relationship had a tendency to prove or disprove that fact." But if those are the grounds rendering the letters admissible, then the same should apply to the defense evidence rejected by the trial court.

Thus, regarding the first-trial objections sustained against evidence of problems in Alicia and Charles's evidence, the government cannot have it both ways. If their relationship was sufficiently in issue to admit the letters, then it was sufficiently in issue to admit defense-proffered evidence of problems she had with Hill's relationship with Mike Gonzalez (which involved the use of drugs), and questions to Hill asking him directly about his use of drugs. Both lines of inquiry were directed toward problems between Manning and Hill. (See AOB 254 *et seq.*; RB 110-111.)

Respondent also asserts that the trial court's first-trial rulings are irrelevant to this appeal. The court made clear in the pre-second-trial hearings that it's first-trial *in limine* rulings would carry over. There was no reason for defense counsel to believe that mid-first-trial rulings would not also carry over; seeking admission of this evidence would have been

futile. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal. 4th 800, 820, citing *People v. Arias* (1996) 13 Cal. 4th 92, 159; *People v. Noguera* (1992) 4 Cal. 4th 599, 638.)

## D. RESPONDENT'S ARGUMENTS REGARDING THE REMAINING GUILT-PHASE ERRORS ALSO FAIL

### 1. Regarding the Admissibility of the Blood Evidence on Appellant's Shoe, If Neither Harris nor Manning Was the Primary Donor of the DNA, It Cannot Be Relevant to This Case

Regarding the blood spots on appellant's shoe, respondent argues (1) that the evidence suggests that the court knew its duties under Evidence Code section 352; and (2) that the evidence was relevant. (RB 114-115.) Regarding the first point, appellant will rely on his opening brief argument (AOB 266), for this is not the crucial issue.

What is crucial is that there was no relevant evidence to admit. Ms. Word stated that none of the five test samples she had, including those of Harris and Manning, matched up with the primary source of the DNA in the blood on the shoes. While Word said she could not rule out any of them as the *secondary* source of the mixed-DNA found on the blood spots, if both

Manning and Harris were excluded as the primary source, the blood spot could not have come from the attack on Manning.[5]

Respondent cites and quotes *People v. Burgener* (1986) 41 Cal. 3d 505, 527 for the proposition that blood of unknown-species origin was relevant because it had *some* tendency to prove the defendant might have been present. This is inapposite, because the blood on appellant's shoe *was* determined to be human blood, the primary source of which was *neither* the victim nor appellant. Thus, it has "some tendency" to prove absolutely nothing relevant to this case. Accordingly, it was error for the court to threaten admission of the blood spot in response to the defendant's proffer of evidence that the shirt Harris was wearing that night had no blood on it.

Respondent's argument that "Appellant wants to admit the evidence that tends to show his innocence while preventing the prosecution from presenting related evidence that tends to show his guilt" (RB 116) must fail. The fact is that there is no blood evidence linking appellant to the crime, despite the profusion of blood at the scene. The trial court's decision to

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[5] If appellant had denied ever being in Manning's apartment, the secondary DNA would have been relevant to show that he had at least been in her presence, and probably in her apartment, where the shoe could have come in contact with her or something which contained her DNA. Because he did not deny his presence there, and because the primary source could not have been her blood, it had no relevance to this proceeding.

admit Ms. Word's testimony regarding DNA tests that linked neither the victim nor appellant to the crime is one more indication of the unfairness of appellant's trial. This error, alone or considered with the several other errors raised by appellant, requires reversal.

### 2. The Excluded Expert Testimony Was an Opinion About Facts, Not Facts, and Thus Was Erroneously Excluded as Hearsay

Respondent asserts that the questions to Dr. Ament about whether standard rape-determination procedures were followed in the autopsy were properly excluded because they called for facts, not opinions. (RB 117-118.) Appellant disagrees.

Respondent relies on Evidence Code section 801. As relevant here, section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is :
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter . . . perceived by or personally known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ."

An expert may use "any matter," including inadmissible hearsay to form his opinion. In addition, "the expert may explain the reasons for his

opinions, including the matters he considered in forming them. However, prejudice may arise if, 'under the guise of reasons,' the expert's detailed explanation '[brings] before the jury incompetent hearsay evidence.' " (*People v. Montiel* (1993) 5 Cal. 4th 877, 918 (citations and some internal quotation marks omitted).) The questions and answers excluded by the trial case here bore no danger of inadmissible evidence coming in under the "guise of reasons" for his opinions.

Doctor Ament was *not* being asked what was done in the autopsy; he was being asked his *opinion* about whether what was done comported with standard procedures for determining whether or not the victim had been raped. Moreover, it was quintessentially material (an autopsy report) that is sufficiently beyond common experience to require an expert to assist the jury in understanding.

Certainly the defense had a Sixth Amendment right to question the competence of the investigation. The medical examiner's report reflected the procedures used in that part of the investigation, and the defense was entitled to its experts opinion regarding whether or not the procedures used comported with standard practice for determining rape. Denying appellant that opportunity prejudiced his presentation of a full defense, including testimony undermining the prosecution's case. Reversal is necessary.

### 3. The Detective's Violation of the *In Limine* Order Regarding Appellant's Reference to Manning as "The Bitch" Was Not Believably Accidental

There is authority for appellant's claim that the trial court should have granted a mistrial after Detective Stratton quoted appellant's statement referring to Manning as "the bitch" despite the trial court's pre-trial order not to do so. (RB 119-120.) A mistrial can be granted for prosecutorial misconduct (e.g., *People v. Williams* (1936) 12 Cal.App.2d 207, 213 [prosecutor urged jury to convict because of consequences of not doing so]), and on appeal it is subject to the abuse-of-discretion standard (e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 683.) If Stratton's testimony had been just a slip of the tongue, were the only transgression, perhaps a lack of prejudice argument would lie. Sadly, it was not.

Respondent is correct that the trial court has considerable discretion regarding a mistrial.[6] (RB 120.) None of the cases cited by respondent, however, involve a member of the prosecution team willfully ignoring an order of the court to get before the jury the highly prejudicial statement. Although the prosecutor stated that he "didn't, obviously realize he

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[6] Curiously, respondent cites cases in which trial counsel *did not* object during the course of trial, giving rise to an ineffective assistance on which the court was ruling in *People v. Haskett* (1982) 30 Cal. 3d 841, 854-855. The context here is entirely different, as counsel both objected and sought a mistrial.

[Stratton] was going to use the word bitch," (29 RT 6801), the record suggests the contrary. Just prior to Detective Stratton's prejudicial statement, the prosecutor asked him if Harris "ever use(d), in making the statements to you during the interview, the word conniving at any point in time?" (29 RT 6799.) After Stratton answered "Yes, he did," the prosecutor asked him to "describe *specifically* what he said in that regard." (29 RT 6799-6800; emphasis added.) The *only* possible reason to ask Stratton about Harris' use of the term "conniving," was to lead him to the sentence in Stratton's report quoting Harris as saying "I'm conniving just like you're conniving, but I didn't kill the bitch." (1 CT 269.) Certainly the prosecutor was not looking to bring out appellant's denial that he killed Ms. Manning; nor to demonstrate that appellant had engaged in a back-and-forth with the detectives about who was conniving the most. It is simply not believable that Prosecutor Somers did not know exactly what he was doing when he led Stratton to quote Harris in violation of the court's *in limine* order. And it goes hand in hand with his regrettable pattern of playing up the racial aspects of the case, such as his use of "Willie Horton" in place of "Willie Harris" in the penalty phase closing argument. (AOB 221-222, fn. 76.) Thus, even if, viewing the mistrial ruling alone, it might be said there was no abuse of discretion, repeated instances of "mistakes" by this skilled

and experienced prosecutor enhanced the already racially- and sexually-charged atmosphere of appellant's trial point to a conclusion that the prosecutor's conduct was not innocent. It undercut the reliability of the verdicts reached in appellant's trial.

Moreover, to the extent respondent is relying on cases in which the effects of offensive language are minimized, those cases are distinguishable. *People v. Edelbacher* (1989) 47 Cal.3d 983, 1009, involved a tape recording containing "an unidentified person's reported comment that defendant was 'a crazy son-of-a-bitch,' and numerous instances of offensive language." Morever, the defendant did not seek redaction of that tape, even though invited to by the judge. The same term, son of a bitch, was the "offensive language" in *People v. Halsey* (1993) 12 Cal.App.4th 885, in which the trial court allowed a friend of defendant's to testify to a conversation, a month after the crime, in which he stated, "I shot the son of a bitch, and if I have [sic] to do it again, I would." (*Id.* at p. 891.) Both of these cases are orders of magnitude distinguishable from a case in which a black defendant is accused of raping and killing a white college student and later refers to her as "bitch," where much of appellant's defense rested on his claim to have engaged in consensual sex with her.

As noted above, and throughout appellant's opening brief, what is important here is the cumulative effect of the persistent pattern of misconduct by the prosecution and rulings by the court. That the prosecutor knew just how far beyond the line of propriety he could go with impunity in the trial court does not reduce the cumulative effect of his ventures in violating appellant's Sixth and Fourteenth Amendment rights to a fair trial, nor the need for reversal on appeal.

### 4. Defense Counsel's Argument About the Prosecutor's Motives During His Interview with Hiler Was Proper Argument and Improperly Excluded

Respondent asserts that defense counsel's argument about the prosecutor's possible motives for not correcting – and indeed repeatedly affirming – Lori Hiler's statements to him, that she left her apartment at or after 9:00 p.m. rather than 10 p.m., was improper argument. Defense counsel, respondent claims, was urging the jury to make conclusions about the prosecutor's motives "based on pure speculation." (RB 121-122.)

Not so. It would have been pure speculation if there was not before the jury *evidence*, in the form of a tape recording, which the jurors could listen to, and use, to form their own conclusions regarding what the prosecutor's motives might have been.

And as for respondent's argument that the prosecutor's motives were not in issue in the trial (RB 122), counsel would have been incompetent if he had not suggested a reason to the jury why Hiler was seemingly confused about the time. The prosecutor made his motives an issue by the manner in which he conducted the interview; it was entirely proper for defense counsel to "urge whatever conclusions counsel [believed could] be properly drawn" from the tape recording of the interview. (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 133-134.)

### 5. Appellant Stands on His Opening-Brief Argument Regarding the Guilt-Phase Instructional Error

Regarding respondent's argument that the court's modification of the pinpoint argument was proper and harmless (RB 122-124), appellant refers the Court to his opening brief argument, at pages 279-282.

## E. FAR FROM RESPONDENT'S SIMPLISTIC ASSERTION THAT THERE WERE NO ERRORS TO ACCUMULATE, THE ERRORS HERE ROSE CUMULATIVELY TO CONSTITUTIONAL DIMENSION

Appellant has not responded in many of the foregoing sections regarding prejudice, for several reasons. First, the prejudice arguments were already made in his opening brief, regarding both individual claims

and the cumulative error there argued. (AOB 282-285.) Second, respondent's dismissive argument – that since there were no errors, there is nothing to accumulate (RB 124-125) – does not admit of much response, other than that it ought to be deemed a concession that if there were indeed multiple errors, together they were prejudicial. Third, appellant has shown in the argument above that at minimum, and contrary to respondent's misreading of the record, there was certainly error in the giving of CALJIC 8.81.17. Fourth, appellant has further shown, in his supplemental and supplemental reply briefs, that there was additional error of constitutional dimension, the admission of the DNA evidence through the lab official rather than the technician. And finally, regarding cumulative error, no matter whether prejudice is shown in any one individual error, this was death by a thousand cuts, on a playing field so tilted toward the prosecution that appellant was playing uphill and in shackles.

Metaphors notwithstanding, this is a case of such number and magnitude of errors that the prejudice is of constitutional proportion: This was a failure to provide Fifth and Sixth and Fourteenth Amendment guilt-phase protections from start to finish. The trial court failed to provide a jury not unfairly tainted by pre-trial publicity, and failed by conducting a limited, massively ineffective voir dire. The trial court allowed the

prosecutor to scrub the jury of minorities, save one prosecution-oriented African-American, and failed to apply *Batson* correctly. The trial court made numerous evidentiary rulings that were unreasonable and imbalanced, consistently favoring the prosecution and unconstitutionally hampering the defense. And the trial court failed to exercise control of the prosecution's argument, allowing him to aggravate the racial aspects of the case where the pre-trial publicity had already inflamed the local population such that the jury appeared already inclined to convict appellant. The errors here, individually and cumulatively, were prejudicial.

## IV. PENALTY PHASE ISSUES

### A. AT MINIMUM, JUROR NO. 6 SHOULD HAVE BEEN DISMISSED FROM THE JURY FOLLOWING HER OBSERVATION OF WHAT SHE THOUGHT WERE WORDS MOUTHED BY APPELLANT

In the penalty phase, after the jury retired for deliberations, it was reported to the court that Juror No. 6 thought she saw appellant glaring at her and mouthing the words "I hate you." (35 RT 8036-8039.) Appellant's opening brief argues that the court erred in (1) not allowing the defense to re-call Juror No. 6 to the stand to seek more information than they initially garnered before the jury was dismissed for the weekend; and (2) not either dismissing Juror No. 6 or granting appellant's request for a mistrial. (AOB 286-190; 35 RT 8036-8046.)

Respondent's argument mischaracterizes appellant's argument regarding Juror No. 6: Respondent suggests appellant urges that the trial court's refusal to dismiss Juror No. 6 deprived him of his rights to confront witnesses against him and to a fair and impartial jury. (RB 129.) Respondent is partially correct, but it was the court's refusal to allow appellant to question Juror No. 6 further that deprived him of his right of confrontation, rather than its refusal to dismiss her.

The cases respondent cites involving conduct that all or a number of the jurors saw are inapposite; this case involves demeanor witnessed by

only one juror, who reported it (or her interpretation of it) to the others in the jury room and then to the court. (35 RT 8036 *et. seq.*) She thereby became a witness against the defendant, in the jury room *during deliberations*. Because she was a juror, though, she was not subject to either the further examination sought by counsel or to cross-examination before the remaining jurors that would test her observation and interpretation. (See AOB 292-297 [distinguishing cases].)

*People v. Williams* (1988) 44 Cal.3d 1127, cited by respondent, is similarly distinguishable, because the alleged misconduct in that case occurred before the penalty phase began; was seen by more than one jurur; and, significantly, was not discussed among the jurors during their deliberations. (*Id.* at pp. 1154-1155.)

It is not sufficient to argue, as does respondent, that the jury was entitled to rely on in-court observations of appellant's character. (RB 130.) The issue is not the jury's reliance on appellant's general conduct, because the specific conduct perceived by Juror No. 6 was observed by no other juror. Instead, the remaining eleven members of the jury heard only Juror No. 6's interpretation of what she thought she saw.

Respondent, discussing *arguendo*, appellant's view that this incident more resembles improper extra-judicial evidence, argues that

appellant's alleged mouthing of the words "I hate you" was "not so inherently prejudicial that it is substantially likely to have influenced the jury." This misstates the standard noted by respondent just one paragraph before, that "[c]onsideration of extraneous material creates a presumption of prejudice that may be rebutted by a showing of no prejudice." (RB 131, citing *People v. Williams* (2006) 40 Cal.4th 287, 333.) The precise quote from *Williams* is: "'It is misconduct for a juror to consider material [citation] extraneous to the record. [Citations.] Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred.'" (*Id.*, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 467.) Respondent has not shown, and cannot show, that "no prejudice actually occurred." Moreover, reliance on *Williams*, *supra*, is misplaced, because the ruling in that case relied explicitly on the fact that the alleged misconduct had not been discussed by the jury in order to reach the conclusion that the presumption of prejudice had been rebutted. (*Id.* at p. 1158.) In contrast, in the instant case, a single juror's observations (and her individual interpretation of them) were reported by her to the other jurors, during their deliberations. (35 RT 8041.)

This court admonished, in *People v. Nesler* (1997) 16 Cal.4th 561, 579, that:

> If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

In spite of the statements of Juror No. 6 and the other jurors, it is highly *un*likely that the jury, in part or in whole, was not biased, consciously or unconsciously, by what Juror No. 6 reported.

As for the remainder of respondent's argument, appellant refers to his opening brief (pp. 291-297), and, regarding the prejudice to appellant due to this trial court error, page 297.

## B. WHETHER OR NOT THE PROSECUTOR'S CONFLATION OF "WILLIE" AND "HORTON" WAS ACCIDENTAL, THE TRIAL COURT HAD A DUTY TO ADMONISH THE JURY

Even if respondent is correct that due to his recent reference to "Mr. Horton," meaning prosecution witness Lyle Horton, the prosecutor's subsequent politically- and racially-charged references to "Willie Horton" were entirely accidental (RB 132-134), that does not diminish the damage done to the jury's neutrality, nor does it lessen the trial court's duty, having clearly known of the mistake, to ensure a fair trial. (*NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal. 4th 1178, 1195 [trial court has

duty to ensure fair trial].) It was the trial court that alerted the prosecutor to his misstatements. At a minimum, the trial court was required to admonish the jury to ignore the remarks. Appellant's argument (AOB 298-299) stands, even had the misstatement happened just once rather than three times.

## CONCLUSION

For the reasons set forth in this brief, appellant's opening brief, and his supplemental briefs, the judgement should be reversed.

DATED: April 2, 2010

Respectfully submitted

RICHARD I. TARGOW
Attorney for Appellant

## CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.630(b)(2), that the length of this brief is 10,553 words, well within the limits for the opening brief set forth in rule 8.630(b)(1)(C).

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Willie Leo Harris _____ No. S081700

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S REPLY BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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Each said envelope was then, on April 2, 2010, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 2, 2010

RICHARD I. TARGOW
Attorney at Law