IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, vs. WARREN JUSTIN HARDY, Defendant and Appellant.	No. S113421 Los Angeles County Sup.Ct. No NA039436-02

Automatic Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	No. S113421
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APPELLANT'S REPLY BRIEF

Appellant Warren Justin Hardy submits the following in reply to the Respondent's Brief. As for any matter not specifically addressed herein, Hardy will rely on the arguments and points and authorities in Appellant's Opening Brief. The effort to keep briefing short and concise should not be interpreted as a lack of

confidence in the merits of the matters not expressly addressed, but reflects Hardy's view that the issue has been adequately presented. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

JURY SELECTION ARGUMENTS

ARGUMENT

I

REVERSAL OF THE JUDGMENT OF DEATH IS REQUIRED BECAUSE TWO PROSPECTIVE JURORS WHO WERE ABLE TO CONSIDER ALL SENTENCING ALTERNATIVES AND FOLLOW THE TRIAL COURT'S INSTRUCTIONS WERE IMPROPERLY EXCUSED FOR CAUSE, IN VIOLATION OF HARDY 'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, A REPRESENTATIVE JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND DUE PROCESS.

With respect to this issue and Argument II, *post.*, respondent complains the opening brief relied on "evidence outside the record." (RB 77, fn. 25, citing AOB 97, fn. 7, 110, fn. 8.) The references cited by respondent included data that this Court not only can, but also should, consider. Respondent attempts to turn appellate practice on its head and reverse decades of accepted practice by seeking to have this Court ignore perfectly legitimate and authoritative sources. Appellate courts

have both the luxury and the burden of time to consider these very authorities.

As the Third District Court of Appeal commented almost 40 years ago, "[t]he 'Brandeis brief,' which brings social statistics into the courtroom, has become a commonplace. A measure of fame now surrounds footnote 11 in *Brown v. Board of Education* (1954) 347 U.S. 483, 494 [98 L.Ed. 873, 880, 74 S.Ct. 686, 38 A.L.R.2d 1180], which cites published sociological and psychological studies for the proposition that racial segregation tends to retard educational and mental development." (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal. App. 2d 576, 590; see also *Muller v. Oregon* (1908) 208 U.S. 412, 421-422 [52 L.Ed. 551, 28 S.Ct. 324].) Such briefing is so named because "[i]n the 1920's, Louis Brandeis, then a labor lawyer litigating before the U.S. Supreme Court, included sociological and economic data in his briefs. His distinctive briefs became known as 'Brandeis Briefs.' The data in these briefs was eventually accepted and relied on by the Court as a source of law. (Article: *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights*

Law on the Interpretation of the U.S. Constitution (Fall 2006) 30 Hastings Int'l & Comp. L. Rev. 1, 13.) Thus, Brandeis is credited with devising this "simplified, low-cost and noninsistent means of bringing foreign laws and sociological data to the attention of the Supreme Court . . . ." (Article: *From Lerotholi to Lando: Some Examples of Comparative Law Methodology* (Winter, 2005) 53 Am. J. Comp. L. 261, fn. 11.) Including authorities common in "Brandeis Briefs" is well accepted. Indeed, that is one reason the California Style Manual provides for the proper method of citation to these sources. (Cal. Style Manual (4th ed. 2000), ch. 3.)

A. Introduction.

The prosecutor challenged nine prospective jurors for cause, and the court granted eight of those challenges based on a claimed pro-defendant bias against the death penalty.[1] The

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[1] The prosecutor challenged the following prospective jurors for cause, arguing the prospective juror would be prevented or substantially impaired from imposing the death penalty:

G8100 (RT 1089)	0256 (RT 1382)
AG4871 (RT 1121)	3674 (RT 1450)
6840 (RT 1256)	7333 (RT 1711)
F4283 (RT 1308)	1642 (RT 1271).

opening brief argued that two of the excused jurors (DD, No. 6840, and FK, No. 4283) merely harbored legitimate reservations or concerns about capital punishment that did not prevent or substantially impair either from considering or imposing the death penalty, and thus were improperly removed for cause. (AOB 76-114.) The record does not support the trial court's ruling excusing either DD or FK. Neither prospective juror expressed views that would have prevented or substantially impaired their performance of their duties as jurors. The trial court's comments when excusing these two jurors failed to provide any meaningful explanation for the rulings. The court also did not solicit or invite further questioning - - by either the prosecutor, to establish clearly a cause for challenge, or Hardy's counsel to clarify the prospective jurors' positions. (Cf., *Uttecht v. Brown* (2007) 551 U.S. 1, 10-11 [167 L.Ed.2d 1014, 127 S.Ct 2218].)

Respondent argued the trial court properly excused both DD or FK, and any error was harmless. (RB 61-101.)

B. The Trial Court Erroneously Granted Challenges to Two Jurors Who Would Consider Voting Both for the Death or Life Without Parole, and Whose Views on the Death Penalty Did Not Prevent, or Substantially Impair, Any One of Them from Considering or Imposing a Sentence of Death.

As to both DD and KF, the prosecutor had the burden of persuasion. The record demonstrated the prosecutor failed to carry that burden. Therefore respondent cannot satisfy the constitutional burden that either DD or KF was substantially impaired to sit on a capital jury. The trial court's determination is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 9 [20 L.Ed.2d 776, 88 S.Ct. 1770]; *People v. Heard* (2003) 31 Cal.4th 946, 958-959 [4 Cal.Rptr.2d 131].)

This Court has recognized that California's death penalty sentencing process allows jurors to take into account their own values in weighing aggravating and mitigating factors. (*People v. Stewart* (2004) 33 Cal.4th 425, 447; *People v. Kaurish* (1990) 53 Cal.3d 648, 699) Hence, a juror may vote for life without the possibility of parole even when the penalty phase evidence consists only of aggravating factors. However, eliminating DD

and KF, jurors with reservations about capital punishment, effectively eliminated them because they might make the choice to sentence more leniently as permitted under *Stewart* or *Kaurish*. Excusing DD and KF violated *People v. Kaurish, supra,* 52 Cal.3d at page 699, which held a prospective juror may not be excluded for cause simply because: (1) conscientious views on the death penalty might lead the juror to impose a higher threshold before voting to impose the death penalty; or (2) personal views would make it very difficult for the juror ever to impose the death penalty.

"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." (*People v. Pearson* (2012) 53 Cal.4th 306, 332.) That is what occurred in Hardy's trial.

1. The Erroneous Excusal of DD.

DD took quite seriously his task as a juror who would be asked to consider imposing the death penalty. Both briefs previously quoted in full a lengthy discussion with DD about capital punishment. (AOB 82-92; RB 66-75.) In that discussion,

DD made clear he would have to be persuaded to vote to impose the death penalty, but that he could follow the law and do so. After reminding DD that the decision on whether to vote for the death penalty or life imprisonment would be his, the court asked DD if he would "be able to vote for the death penalty knowing the court is never going to tell [him] that [he] should or shall or anything like that." DD's answer was, "I think I could, yes." (7RT 1267-1268.) In answer to the written question, whether it would be impossible for him to impose the death penalty, DD answered, "No." (21CT 5488.) DD did not state he would vote for life imprisonment automatically. Rather he said he was unsure. (21CT 5489.) This made sense because DD would not be considering every case. He would be considering a single case, and he had not heard the evidence in that case.

Hardy disagrees with respondent's contention that DD would only impose the death penalty if the law required it. (RB 77, citing 7RT 1260.) The last question by the court was whether DD could impose the death penalty, understanding neither the court (nor the law) would ever require that vote. DD responded, that he thought he could do so. Respondent overlooks the trial

court's own reasons and assessment of DD. The court noted that DD's *initial* answers made him appear substantially impaired. (7RT 1270.) Yet, when questioned more specifically, DD answered he could vote for the death penalty if the evidence persuaded him to do so. He twice stated unequivocally he could follow that law and vote for death if aggravation outweighed mitigation, or life if mitigation outweighed aggravation. (7RT 1257-1258 [quoted at AOB 83].)

The trial court and respondent cited to DD's indications that he could vote for the death penalty only if other jurors did so. (7RT 1270; RB 78.) That did not constitute substantial impairment. The trial court commented that if the jury imposed the death penalty, it would not "be worth much" because it would mean only 11 other jurors "voted for death and so did DD." (7RT 1270.) The court's reasoning founders. If DD were the only juror to vote for the death penalty, there would be no death penalty imposed. If 11 jurors plus DD voted for the death penalty, it would mean DD was persuaded by the evidence and deliberations to vote accordingly.

Each party identified isolated responses by DD that tend to support opposite conclusions. But DD's responses - - both written and oral - - must be considered as a whole. In context, DD's response reveal he was qualified to sit on a capital jury. Additionally, DD's specific responses when engaged in direct exchange with the trial court demonstrate he was qualified to sit. His removal was error.

With respect to DD and KF (see discussion *post.*), respondent refers to statements DD and KF made on their questionnaires and in voir dire, suggesting less-than-friendly attitudes about law enforcement, social issues, and the like. (See e.g., RB 64, 66.) The attitudes, if any, respondent attributes to the prospective jurors are irrelevant to the *Witherspoon* inquiry. At most, these attitudes might have been grounds for a peremptory challenge, but not a challenge for cause.

Similarly, the fact AG asked to be excused from the jury for hardship (RB 66) is a red herring as to this issue. Respondent appears to insinuate in a footnote that DD's request was a sham, motivated by DD's reluctance to serve on a capital jury. (RB 81, fn. 28.) First, other prospective jurors expressed reluctance to

serve, and the reluctance objectively was normal based on the trial length and content. This reluctance was not disqualifying. Jurors 3164, 4635, 8868, 7421, 5904, and 9343 all expressed reluctance to serve on the jury.[2] Second, it was clear that *if* DD really had wanted to be excused, all he had to do was say he would be unable to follow the law because of a personal opposition to the death penalty. DD never said that. DD repeatedly stated he could keep an open mind and follow the law. He knew making such statements might result in his being seated as juror, despite his earlier request for a hardship discharge. The reasonable inference is that DD's responses were honest at both stages.

Finally, respondent misunderstands and misapplies both *Witherspoon* and *Witt* when arguing that "with DD on the jury,

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[2] Juror 3164 wrote, "I don't look forward to it, but it is something I am willing to do. (5CT 1150.) Juror 4635 wrote, "don't want to [sit on the jury], the nature of the crime alone makes me sick." (4CT 901.) Juror 8868 did not want to sit because, "takes too long . . . ." (5CT 1386.) Juror 7421 did not want to sit because of the "violent nature of this case," which was "disturbing." (4CT 1011.) Juror 7421 he did not want to serve because, "takes me away for too long from my responsibilities at work . . . ." (4CT 1031.) Juror 5904 did not want to sit because of "time out of work." (3CT 793, 813.) Juror 9343 wrote three times he did not want to sit a juror because of work. (6CT 1439, 1440, 1457.)

any verdict of death would be worthless and immediately reversed on appeal." (RB 81.) Respondent's argument concerns DD's statements that it would be difficult for him to vote to impose death, and he would feel intense pressure if all other jurors were voting for death. (See 7RT 1262-1264 [quoted verbatim at AOB 87-88].) The *Witherspoon* standard made total impairment the necessary condition for excusing a prospective juror based on personal views about the death penalty. *Witt* did not alter the *Witherspoon* standard, but rather acknowledged that trial judges can find a juror excusable under *Witherspoon* based on less-than-clear responses by the juror. Thus, substantial impairment is a finding that the prospective juror cannot or will not *ever* vote to impose the death penalty in the case being tried even though the juror's answers are not clearly or directly disqualifying.

DD did not suffer from total or substantial impairment. Instead, DD's responses throughout voir dire were consistent assertions that he could follow the law and impose the death penalty. DD was qualified to sit on the capital jury and his removal was error.

2. The Erroneous Excusal of KF.

KF told the court and the parties he would do his best, and could follow the law:

> MR. YANES: But you're telling me that you think you can or you'd do your best?
>
> PROSPECTIVE JUROR NO. 4283: I'd do my best.
>
> MR. YANES: And you can follow the law?
>
> PROSPECTIVE JUROR NO. 4283: Right.

(See AOB 104 and RB 91, quoting 7RT 1308-1318.)

This questioning of KF showed that, like DD, he was not predisposed to vote for the death penalty, and expressed reservations about doing so. Many do. That did not disqualify KF. KF's written responses said he recognized the death penalty was "needed and will continue to be needed . . . ." (20CT 5270.) KF wrote the decision to vote for the death penalty was "hard," but acknowledged "some crimes offer no other meaningful response." (20CT 5270.) Like many, KF had considered the death penalty over his own life, had been a proponent when younger, but became "more unsure." (20CT 5270.) In those

years, KF's personal evolution paralleled much of the nation. The prosecutor parlayed some of KF's misgivings by honing in on his religious beliefs to provide a distorted picture. The prosecutor asked whether it was "god's right" to decide matters of life and death, leaving KF with no choice but to agree based on his religious beliefs. Even so, KF attempted to clarify his agreement, stating, "I mean to a certain extent." (7RT 1318-1319, quoted at AOB 106-107.)

Like DD, the overall content of KF's written and oral answers revealed he would be a thoughtful and careful person when deciding whether to impose the death penalty. Respondent focuses only on the last of KF's responses to present a misleading picture suggesting KF was not qualified. It may be that KF did not want to sit on a capital jury involving these charges (7RT 1319 [agreeing with prosecutor that "it would be best if [he] were not a juror"]), but that sentiment did not disqualify him.

In direct questioning about the death penalty, KF told the court he would "be able to keep an open mind." (7RT 1310.) When asked directly if he would refuse to follow the law, KF said he would not do so, and "would try to follow the law as much as

possible." (7RT 1312.) He reaffirmed he could vote for the death penalty "if [he] felt it was the appropriate case." (7RT 1313.) The prosecutor had the burden of persuasion. This record does not satisfy the constitutional standard that KF was substantially impaired. Accordingly, the trial court's determination is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, fn. 9.)

As with DD, respondent asserted other reasons why KF was disqualified to sit as a juror, e.g., he expressed bias against people who commit crimes against women, and his determination of guilt would be impacted if the defendant did not testify. As with DD, these reasons perhaps could have formed a ground to challenge KF peremptorily, but neither side did so. They were not grounds to challenge KF for cause. Respondent is wrong in arguing that had KF sat as a juror, his answers on the questionnaire would have resulted in reversal. (Contra RB 95.) Further, KF was not questioned during voir dire at all about the answers respondent now raises. (See RB 95.)

More importantly, KF's answers that respondent now cites were not the reasons the prosecutor stated for challenging KF,

and those were not the reasons the court used to excuse KF. A reviewing court may not affirm based on a theory not litigated in the trial court. (*Dunn v. United States* (1979) 442 U.S. 100, 106 [99 S.Ct. 2190, 60 L.Ed.2d 743]; *Chiarella v. United States* (1980) 445 U.S. 222, 236 [100 S.Ct. 1108, 63 L.Ed.2d 348].) As this Court stated, "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241; in accord *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 [arguments raised for the first time on appeal are forfeited]); *Saville v. Sierra College* (2006)133 Cal.App.4th 857, 872 [under the "theory of the trial doctrine," a party is "not permitted to change [its] position and adopt a new and different theory on appeal"].) These principles require this Court to disregard respondent's new explanations. Moreover, as demonstrated *ante,* the explanations lack merit.

C. The Error was Prejudicial as Respondent Acknowledges.

This type of error complained of requires reversal. (See e.g., *Witherspoon v. Illinois, supra,* 391 U.S. at pp. 521-523; *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [107 S.Ct. 204595 L.Ed.2d 622]; contra RB 99-101.) A defendant who establishes that a trial juror was biased against him is entitled to a reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Nonetheless, respondent asks this Court to revisit established precedent by conducting a harmless error analysis. (RB 99-101.) This is not appropriate, and would violate case authorities from the United States Supreme Court.

The United States Supreme Court explained why the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], that respondent urges, cannot apply to the fundamental constitutional issues at stake here. "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury [citation] and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply.

We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' [Citation.] The right to an impartial adjudicator, be it judge or jury, is such a right. [Citation.] As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpability determined by a 'tribunal "organized to convict."' [Citation.] (*Gray v. Mississippi, supra*, 481 U.S. at p. 668.) 668.) Respondent relies on the concurring opinion in *People v. Riccardi* (2012) 54 Cal.4th 758, 843 (conc. op. of Cantil-Sakauye, C.J.).) But that reliance is misplaced.

In separate concurring opinions in *Riccardi*, Chief Justice Cantil-Sankauye and Justice Liu disagree whether *Gray v. Mississippi, supra,* and *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80] can be reconciled. But *Gray* and *Ross* decided different questions. In *Ross*, a prospective juror who would automatically voted to impose the death penalty was included, then excused, based on a defense peremptory challenge. (*Ross v. Oklahoma, supra*, 487 U.S. at pp. 83-87.) "*Ross* . . .

declined to apply . . . *Gray* . . . - that an error in ruling on a challenge for cause, which might have affected the ultimate composition of the jury as a whole, always requires reversal." (*People v. Riccardi, supra*, 54 Cal. at p. 843 (conc opn. of Cantil-Sakauye, C.J.).) Chief Justice Cantil-Sankauye noted, "the difference between *Gray* and *Ross* perhaps boils down to a question of policy," and invited further clarification from the United States Supreme Court. (*Id.* at pp. 842-845.) "Appellate courts around the country would certainly be assisted if the United States Supreme Court were to provide further elucidation on this important subject . . . ." (*Id.*, at p. 846.)

Justice Liu wrote separately in *Riccardi* to address *Gray* and *Ross*. Justice Liu's concurrence noted *Ross* factually distinguished *Gray*. One of the principal analytical concerns in *Gray*, regarding the composition of the jury panel as a whole, was the inability to know to a certainty whether the prosecution would and could have used a peremptory challenge to remove the wrongly excused juror. In contrast, in *Ross*, the prospective juror was removed, did not sit, and therefore there was no reason to speculate about whether the juror would have been removed but

for the erroneous ruling. *Ross* accordingly had declined to extend the prejudice standard of *Gray* beyond circumstances involving an erroneous excusal for cause when it was unknown whether the prosecution would have removed that prospective juror through the use of a peremptory challenge. (*People v. Riccardi, supra*, 54 Cal.4th at p. 847 (conc. opn. of Liu, J.).) As Justice Liu pointed out: both case authorities are decades old. *Gray* was decided in 1987; *Ross* in 1988. In those years, both have been followed and applied by state and federal courts. Therefore the doctrine of stare decisis offers no basis for reconsidering this issue.

Based on the foregoing, the judgment of death should be reversed.

II

REVERSAL OF THE JUDGMENT OF DEATH IS REQUIRED BECAUSE APPLICATION OF THE SUBSTANTIAL IMPAIRMENT STANDARD TO DETERMINE DEATH-QUALIFICATION OF PROSPECTIVE JURORS VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, A REPRESENTATIVE JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND DUE PROCESS.

The opening brief argued the substantial impairment test in *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], should be reexamined due to its failure to secure capital juries that represent the conscience of the defendant's community. (AOB 115-133.) Respondent avers this Court is the incorrect forum to re-evaluate death-qualification of jurors. (RB 101-102.) Not so. This Court cannot impose a *less* rigorous test for capital juries than that mandated by the United States Supreme Court under the Sixth Amendment,[3] but it can impose a *more* rigorous one within the borders of California. This Court's

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[3] The United States Supreme Court decided *Witt* and *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] based on the Sixth Amendment to the federal Constitution. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 423.)

decision on the question would be merely persuasive primary authority outside of California. Additionally, Sixth Amendment jurisprudence has undergone an evolution, even revolution, in recent years. There is no reason to presume *Witt* is sacrosanct, and Hardy raises this issue to permit reconsideration by the United States Supreme Court.

This Court can and should review the procedures and set guidelines for establishing representative death qualified juries within California. There is precedent for doing so. For example, in another evolving area, that is, the fallacy of eyewitness identification, the New Jersey Supreme Court took the step to impose new rules concerning eyewitness identification. (*State v. Henderson* (2011) 208 N.J. 208, 288-294[27 A.2d 872, 919-922].) The New Jersey Supreme Court did not wait for the United States Supreme Court to act. Moreover, this Court certainly has authority to decide differently from the United States Supreme Court based on California law.

California law differs from the Sixth Amendment in several ways that warrant different analysis. The California Constitution terms the right to trial by jury "an inviolate right."

(Cal. Const., art. I, § 16.) To effect this right, the California Legislature expressly has recognized that "the right to trial by jury is a cherished constitutional right." (Code of Civ. Proc., § 191.) The Code of Civil Procedure repeatedly stresses and mandates the requirement for random selection of those in the "juror pool," "potential jurors," "prospective jurors," and "qualified jurors." Section 191 requires "that all persons selected for jury service shall be selected at random from the population of the area served by the court," and "that *all qualified persons* have an equal opportunity" to serve. (Code Civ. Proc., § 191 [emphasis added].) Section 198, subdivision (a), requires that "*[r]andom* selection . . . be utilized in creating master and qualified juror lists . . . ." (Code Civ. Proc., § 198, subd. (a) [emphasis added].) Subdivision (b) requires the jury commissioner to "*randomly* select names of prospective trial jurors." (Code Civ. Proc., § 198, subd. (b) [emphasis added].)

Code of Civil Procedure section 203 sets forth the only exceptions to jury service. (Code Civ. Proc., § 203, subd. (a).) Reservations, qualms, or opposition to capital punishment is not one of them. Section 204 provides that: "No eligible person shall

be exempt from service as a trial juror by reason of occupation, economic status, or any characteristic listed or defined in Section 11135 of the Government Code, *or for any other reason.*" (Code Civ. Proc., § 204, subd. (a) [emphasis added].)

The opening brief identified three prospective jurors (DD, KF and ML) who were denied the opportunity to serve on the capital jury, based on the expression of varying degrees of concern or reservation about imposing the death penalty. Their relevant written and oral answers were set out fully in the opening brief, and therefore are merely summarized below. A review of those written and oral answers by these prospective jurors demonstrates the three were representative of the citizenry of California and the community in Los Angeles County. They took imposition of the death penalty very seriously, and had given the issue thought over time.

DD noted on the written questionnaire an abhorrence of the death penalty. DD self-described as being "strongly against the death penalty" based on "strongly held beliefs." DD nevertheless stated these beliefs would not necessarily result in a vote for life

without the possibility of parole. (See 7RT 1258-1264, quoted in full at AOB 82-91.)

KF expressed hesitancy about voting to impose the death penalty, and repeatedly agreed orally to do his best, yet had reservations (attributed to the Lutheran church) about the death penalty. (7RT 1308-1320, relevant portions quoted at AOB 97-107.) KF, in his written questionnaire, described the decision to vote for the death penalty as "hard," but acknowledged "some crimes offer no other meaningful response." (20CT 5270.) Like many, KF revealed he had considered the death penalty over his own life, had been a proponent when younger, but had since become "more unsure." (20CT 5270.) In those years, KF's personal evolution of thought mirrored that of Californians, revealing him to be representative of the community.

ML, a self-described Catholic, considered his religion "very important." (23CT 6200.) He confessed to having mixed feelings about the death penalty, and thought there were instances it might apply. (23CT 6232.) Of the three jurors Hardy discussed in the context of this issue, ML was the only one who clearly stated that his religious beliefs likely prevented him from voting to

impose the death penalty. (8RT 1383-1387, quoted at AOB 119-122.)

After the opening brief was filed, a note in the Harvard Law Review made arguments similar to the one Hardy raised in this issue in the opening brief. (See *Note: Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents* (May 2014) 127 Harv.L.Rev. 2092 [hereinafter *Purging Capital Juries*].) Eliminating jurors with qualms about the death penalty results in capital juries predisposed to impose the death sentence. "Accounting for one bias may serve only to tilt the jury toward an opposite one." (*Id.* at p. 2108.) The Note comments that, "the substantive content of impartiality is elusive and . . . the closest the system can achieve is to strive for representative diversity. Diversity fosters impartiality." (*Ibid.*) But that diversity and resultant impartiality is denied when capital juries do not represent the community.

"Nearly forty percent of Americans believe their views on the death penalty would disqualify them from serving on a capital jury," and they are probably right. (See *Purging Capital Juries*, *supra,* 127 Harv.L.Rev. at pp. 2092-2093, citing Richard C. Dieter,

Death Penalty Info. Ctr., A Crisis of Confidence 2 (2007), [available at http://www.deathpenaltyinfo.org/CoC.pdf].) Continuing with a jury selection system sanctioned under *Witt*, that excludes an ever-growing number of citizens from serving, is wrong and should be revisited and rejected.

Because Hardy's jury was not representative of the community, and was predisposed to impose the death penalty, the judgment of death should be reversed.

III

HARDY'S CONVICTIONS, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO APPLY THE CORRECT STANDARD TO HARDY'S *BATSON/WHEELER* MOTION AND ERRED IN CONCLUDING THAT THE CIRCUMSTANCES DID NOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. THE COURT'S RULING VIOLATED THE REPRESENTATIVE CROSS-SAMPLE GUARANTEE OF THE CALIFORNIA CONSTITUTION, AND HARDY'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AN IMPARTIAL JURY, A FAIR TRIAL, A TRIAL BY JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, A RELIABLE FINDING OF GUILT AND SENTENCE, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The opening brief argued that the prosecutor peremptorily challenged three prospective jurors improperly based on their race because they were black. (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258; see AOB 134-177.) The brief identified the three black jurors, and argued the prosecutor systematically and impermissibly had excluded blacks from the jury. The challenged jurors were black, as is Hardy The totality of the circumstances

supports the inference the prosecutor's peremptory challenges were "motivated by race." (*Boyd v. Newland* (9th Cir 2006) 467 F.3d 1139, 1143.)

Respondent argued there was no showing of a prima facie case of discrimination, the prosecutor's stated reasons were race neutral, and comparative analysis revealed no seated juror substantially similar to the challenged jurors. (RB 102-103, 121-145.)

A. Introductory Overview.

Prosecutors have historically employed race and gender stereotypes to exclude blacks from jury service. (See *Batson v. Kentucky, supra,* 476 U.S. at pp. 87-99 ["The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors."].) Prosecutors have done so with good reason. "[J]uror race affects jury decisions in some cases." (King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich.L.Rev. 63, 77 [summarizing studies].) "If the jury must choose between a life sentence and a death

sentence, existing research suggests that, as the proportion of white jurors on the jury increases, the probability that the jury will impose the death penalty also increases." (*Id.* at p. 96.) Thus, black defendants disproportionately are sentenced to death when the victim is a white woman and evidence suggests or shows she was raped. (See, e.g., Crocker, *Is the Death Penalty Good for Women* (2001) 4 Buff. Crim.L.Rev. 917; Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* (2000) 26 Ohio N.U. L. Rev. 689; King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev.63, 81-82 [summary of studies].) That is what happened here: Hardy was convicted and sentenced to death by a jury that was mostly white, and had not a single black juror.

Respondent rightly corrected the opening brief's characterization of Hardy's jury as all-white. (See e.g., AOB 134, 176 and RB 103-104, fn. 35.) The correct characterization is that no black person sat on the jury. The fact the jury included a Pacific Islander, a Japanese, and an Hispanic, however, does not alter the fact there was no black juror. Nine of the 12 jurors were white; none was black. As the Ninth Circuit recently explained,

"Our cases have acknowledged that the composition of the empaneled jury is relevant to the *Batson* inquiry. [Citation.] Those cases have also cautioned, however, that that fact, without more, is insufficient to overcome the prima facie showing of purposeful discrimination . . ., and cannot 'salvage [the prosecutor's] discredited justification.'" (*Castellanos v. Small* (9th Cir. 2014) 766 F.3d 1137, 1149.)

There is no dispute: one third of the prosecutor's peremptory challenges were against blacks. The prosecutor exercised only nine peremptory challenges total, and three were against black prospective jurors. (RB 103 [stating same].) The prosecutor successfully challenged the *only* black prospective juror who was voir dired for the actual jury, and also two prospective black jurors who could have served as alternates. The prosecutor's challenges to prospective jurors who could have served as alternate jurors is very relevant. (Contra, RB 103, fn. 35.) Those challenges shed light on the prosecutor's motives and can "be considered part of an overall and deliberate plan to remove all [blacks] from the jury in violation of his constitutional rights." (*People v. Mills* (2010) 48 Cal.4th 158, 182.) Further,

when the trial court considered the defense's *Batson* motion, the trial court could not have known or predicted whether any alternate juror would be seated as a juror during the trial.

The trial below was the perfect recipe to obtain conviction and the death sentence. Hardy was a young black man who faced trial for murdering and sexually assaulting an older white woman.

The trial occurred in November 2002. (10RT 1925; 11RT 2422, 2528-2534.) *Johnson v. California* (2005) 545 U.S. 162, 172-173 [125 S.Ct. 2410, 162 L.Ed.2d 129], was decided on June 13, 2005. *Johnson* held that California erroneously applied *Batson* by requiring a defendant to show a prima facie case of discriminatory challenges under the "more likely than not" standard. (*Id.* at p. 173.) The trial judge in Hardy's case did not have the benefit of the *Johnson* decision when assessing whether there was a prima showing, and undoubtedly applied the incorrect, higher standard. In the underlying case of *People v. Johnson* (2003) 30 Cal.4th 1302, Justice Kennard had dissented, writing, "'[r]equiring a defendant to persuade . . . at the first *Wheeler-Batson* stage short-circuits the process, and provides

inadequate protection for the defendant's right to a fair trial . . . .'" (*Id* at p. 1333 (dis. opn. of Kennard, J.), quoted with approval in *Johnson v. California, supra,* 545 U.S. at p. 168, fn.3.) The High Court adopted Justice Kennard's dissent, noting, "[t]he proper standard for measuring a prima facie case under *Batson* is whether the defendant has identified actions by the prosecutor that, 'if unexplained, permit a reasonable inference of an improper purpose or motive.' [Citation.] (*Ibid.*) But at the time of Hardy's trial, Justice Kennard's dissent was merely a dissenting view in California, and would not have been how the judge evaluated the inference of discrimination. Thus, it is without question the judge in Hardy's trial applied the wrong (higher) standard when determining whether there was a prima facie showing.

B. The Trial Court Erred by Finding No Prima Facie Case Because the Record Demonstrates an Inference of Discrimination in the Prosecutor's Peremptory Challenges to Black Prospective Jurors and Alternates.

"Racial identity between the defendant and the excused juror . . . may provide one of the easier cases to establish... a prima facie case . . . that wrongful discrimination has occurred."

(*Powers v. Ohio* (1990) 499 U.S. 400, 416 [111 S.Ct. 1364, 113 L.Ed.2d 411].) There were very few prospective black jurors from the outset of jury selection. (See 9RT 1876-1877.) As respondent acknowledges, there was no black juror who ultimately sat in judgment of Hardy, or who sat as an alternate juror. (RB 103-104, fn. 35.) Respondent nevertheless incorrectly asserted that Hardy failed "to prove a prima facie case of discrimination. [Citation]." (RB 123.) But "proof" was not the requirement. A *suspicion* that discriminatory intent may have infected the jury selection process is enough to establish a prima facie case. (*Johnson v. California, supra,* 545 U.S. at pp. 172-173; *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920 [burden is "small" and "easily met"]; *United States v. Stephens* (7th Cir. 2005), 421 F.3d 503, 512 [prima facie case established by circumstances raising a suspicion discrimination occurred].)

The fact that there were still potential black jurors when the prosecutor peremptorily challenged FG is both irrelevant and misleading. (Contra RB 123.) Voir dire was still ongoing at the time the prosecutor challenged FG. Later events made other, additional discriminatory challenges unnecessary for the

prosecutor. This was not a situation where the prosecutor repeatedly had accepted a panel that included black jurors. (Compare, *People v. Streeter* (2012) 54 Cal.4th 205, 224.) In contrast for example, in *People v. Streeter, supra*, the prosecutor five times previously had accepted the jury with black jurors. Nothing of the sort happened in Hardy's case. Nor was this a situation where there were many blacks in the venire.

Respondent incorrectly argued "[t]here was no 'pattern' of striking jurors of a specific race, and [Hardy] failed to prove a prima case of discrimination." (RB 123.) Proof of a "pattern" is not required. (Contra, RB 123-124.) As long ago as *Batson*, the United States Supreme Court "declined to require proof of a pattern or practice because '[a] single invidiously discriminatory government act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (*Johnson v. California, supra,* 545 U.S. at p. 169 fn. 5.) Requiring a "discernible pattern" of unlawful challenges "would improperly sanction the use of racially motivated challenges when [as here] only one or two members of the targeted race are present in the

venire." (*People v. Howard* (1992) 1 Cal.4th 1132, 1207 (conc. & dis. opn. of Mosk, J.).) As the Ninth Circuit explained:

> A pattern of striking panel members from a cognizable racial group is probative of discriminatory intent, but a prima facie case does not require a pattern because 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.' *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); accord *United States v. Esparza-Gonzalez*, 422 F.3d 897, 904 (9th Cir. 2005) (holding that a prima facie case was shown where the prosecutor struck the only Latino prospective juror as well as the only Latino potential alternate juror).

(*United States v. Collins, supra*, 551 F.3d at p. 919.)

Numerous case authorities hold that a single challenge to a single black prospective juror demonstrated a prima facie case of discrimination at the first *Batson* step. (See, e.g., *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 955-956 [challenge of the only black prospective juror]; *United States v. Collins, supra,* 551 F.3d at pp. 921-923 [challenge of the only remaining black prospective juror]; *Heno v. Sprint/United Management Co.* (10th Cir. 2000) 208 F.3d 847, 854; *Morse v. Hanks* (7th Cir. 1999) 172 F.3d 983, 985; *Highler v. State* (Ind. 2006) 854 N.E.2d 823, 827; *Hollamon*

v. State (Ark. 1993) 846 S.W.2d 663, 666; *State v. Walker* (Wis. 1990) 453 N.W.2d 127, 135; see also *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1176 [prosecutor challenged the only blacks in the jury pool].) In cases such as Hardy's, where blacks comprised only a small number of prospective jurors, a challenge to one black juror is suspect and may alone be sufficient to raise an inference of discrimination. (See e.g., *United States v. Clemons* (3d Cir. 1988) 843 F.2d 741, 748, fn. 6; *State v. Walker, supra*, 453 N.W.2d at p. 133, fn. 5.) If it were otherwise, "[b]lack defendants would more often than not be forced to forfeit their rights under *Batson* merely because of the statistical likelihood that their jury venires would be overwhelmingly non-black." (*United States v. Clemons, supra*, 843 F.2d at p. 748 fn. 6.) Similarly, in Hardy's trial where the panel from which the jury was chosen contained only a few blacks, "close scrutiny" of any challenge to a black prospective juror was warranted. (*United States v. Collins, supra,* 551 F.3d at p. 921.)

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C. The Prosecutor's Explanations for Using Peremptory Challenges to Remove Prospective Black Jurors Were Pretextual.

1. Defense Counsel Did Not Accept the Prosecutor's reasons.

The record does not support respondent's claim that "even defense counsel appeared to be satisfied with the prosecutor's explanations" for her peremptory challenges. (Contra RB 137.) Whether defense counsel was satisfied or not is irrelevant. Counsel's declining the opportunity to respond to the prosecutor simply reflected counsel's belief that a reasonable inference had been made, which was the only question before the trial court at the time. (9RT 1884.)

The prosecutor offered justification for her challenges to the black prospective jurors. Those explanations require close examination. As one commentator noted "if prosecutors exist who have read *Hernandez* [4] and cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy." (Johnson, *The Language and Culture (Not to Say*

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[4] *Hernandez v. New York* (1991) 500 U.S. 352 [111 S.Ct. 1859, 114 L.Ed.2d 395].

Race) of Peremptory Challenges (1994) 35 Wm. & Mary L.Rev. 21, 59.) This was precisely the situation Justice Marshall foretold in his concurring opinion in *Batson*, warning against "easily generated" race-neutral reasons. (*Batson v. Kentucky, supra,* 476 U.S. at p. 106 (conc. opn. of Marshall, J.) ["Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."].) Justice Marshall also identified the failure of *Batson* to address the situation where:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

(*Ibid.*)

2. Respondent's Attempt to Manufacture Additional Reasons the Prosecutor Might Have Had Must Be Rejected.

"The prosecutor must 'stand or fall on the plausibility of the reasons [s]he gives,' and courts must evaluate those reasons in

light of '" 'all relevant circumstances.' "' (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 492 (conc. op. of Liu, J.) quoting *Miller–El v. Dretke* (2005) 545 U.S. 231, 240, 252 [125 S.Ct. 2317, 162 L.Ed.2d 196].) The prosecutor's explanations for her challenges to the prospective jurors were quite specific and limited.

The opening brief set forth the prosecutor's reasons with record citations for each. (AOB 150-151 [re FG], 160 [DB], 165 [MH].) Yet respondent attempts to obfuscate the analysis by inappropriately sifting the record for possible, speculative reasons the prosecutor could have had for challenging the prospective jurors. (See e.g., RB 125-126 [citing "numerous additional race-neutral reasons" re FG], 127 [same re DB], 129 [same re MH].) Respondent acknowledged that the prosecutor's statement of reasons made this inquiry a "first stage/third stage *Batson* hybrid." (See RB 119, fn 40, [prosecutor's statement of reasons make first stage inquiry moot, citing *People v. McKinzie* (2012) 54 Cal.4th 1302, 1320; *People v. Mills* (2010) 48 Cal.4th 158, 174-175; and other authorities]; see also RB 128 [making clear this is a first stage/third stage *Batson* analysis].) This approach must be rejected.

As Justice Liu's concurring opinion in *People v. Sattiewhite* explained, "A prosecutor's statement of actual reasons necessarily moves the *Batson* inquiry to the third stage. (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 491 (conc. op. of Liu, J.), citing *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].) *Johnson* instructed, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citation.] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California, supra*, 545 U.S. at p. 172.) Therefore, since the sole purpose of the first stage is to determine whether the prosecutor must provide a reason for the challenge, the determination is moot after the prosecutor provides a reason - - "whether the prosecutor was required to do so or not." (*People v. Sattiewhite, supra,* 59 Cal.4th at p. 492 (conc. op. of Liu, J.).)

It may be that respondent searches for additional and different reasons from those the prosecutor gave because her

reasons are suspect on their face. The prosecutor declined to explore the majority of her stated reasons with the prospective jurors, thereby supporting the inference that her stated reasons were pretexts for discrimination. (*Miller–El v. Dretke, supra,* 545 U.S. at p. 246 ["The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."].)

3. The Defense Was Not Required to Commit its Own *Batson* Error to Remedy the Prosecutor's Race-Based Challenges.

Proper jury selection is not a peremptory war between the parties to see which party either effects or neutralizes group-biased challenges. Respondent repeats, and appears to endorse, the prosecutor's incorrect assertion that defense counsel could have remedied the problem, but failed to so when he did not peremptorily challenge non-black prospective jurors in order to try to seat black prospective jurors who waited in the wings. (RB 123, fn. 41; see also 9RT 1881; 14RT 3182, 3184.) That is incorrect, and would sanction just another level of *Batson* error.

Respondent also dilutes the prosecutor's actual argument, which was not as respondent coined it, that "defense counsel had peremptory challenges remaining, and could have use them if he was unhappy with the final composition of the jury." (RB 123, fn. 41.) The "final composition" language is a wink and a nod, which avoids the crux of the matter, which was that the prosecutor removed blacks from the jury. What the prosecutor actually argued - - both at the time of the *Batson / Wheeler* motion, and again at sentencing - - was that the defense could have challenged non-black prospective jurors for the purpose of seating black jurors. (9RT 1881; 14RT 3182, 3184.) First, this argument assumes it was possible for defense counsel to predict with certainty that one or more black prospective jurors would be called into the box for voir dire and then remain seated as a juror. There is no support for the notion that defense counsel could have balanced out or negated the prosecutor's peremptory challenges. Second, had defense counsel done what the prosecutor and respondent suggest, that would have resulted in yet another *Batson* error, not a cure for the prosecutor's improper use of

peremptory challenges. (See AOB 139-140 [discussing same in more detail].)

4. Prospective Juror FG.

The opening brief set forth the prosecutor's stated reasons for her challenges. On appeal, respondent adds additional reasons the prosecutor might have had for the challenges. A "*Batson* challenge does not call for a mere exercise in thinking up any rational basis" for the challenge. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.) The test is not whether some race-neutral reason for the peremptory challenge can be teased from the record as respondent has done. Indeed, that is precisely what should not be done:

> While [the California appellate court] purported to undertake a comparative juror analysis, it did so backwards. Rather than examining each of the reasons proffered by the prosecutor for striking African-American jurors to determine whether any, many, or most were pretextual, the appellate court sifted through the prosecutor's justifications, ignoring numerous pretextual rationales, in search of at least one reason that happened not to apply equally to a retained juror. Both Supreme Court precedent and our case law make clear that a court conducting comparative juror

> analysis must do the opposite - that is, it must examine each of the proffered justifications in turn. If any - or, worse, several - are equally applicable to seated jurors, an inference of pretext arises, rendering suspect the permissibility of the challenge. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 246, 250-52 [parallel citation omitted]; *Kesser v. Cambra*, 465 F.3d 351, 360, 369 (9th Cir.2006) (en banc) ["A court need not find all nonracial reasons pretextual in order to find racial discrimination."].

(*Briggs v. Grounds* (9th Cir. 2012) 682 F.3d 1165, 1181-1182 (dis. opn. of. Berzon, J.).)

Hardy identified four reasons the prosecutor stated for challenging FG. (AOB 151.) Respondent added to the list that the prosecutor complained FG had not smiled at her. Respondent mis-characterized the prosecutor's reasons as "numerous." (RB 116; see also RB 124-125 ["great detail'].) Four (or five) reasons are not numerous, and the reasons proffered lacked substance. Those reasons were: (1) FG said police were not always truthful and they exaggerated; (2) FG knew 50 to 60 attorneys, and spoke with them daily; (3) FG did not want to be a juror on the case; (4) FG had been arrested in 1992 by the Los Angeles County Sheriff,

and (5) FG did not smile. (9RT 1881-1882.) Hardy will address each reason and reveal that each was a pretext.

First, FG believed that prosecutors *and defense counsel* alike were not always truthful and tended to exaggerate. (11CT 2906 [questions 42 and 44.) The prosecutor misstated FG's belief as one about police. The prosecutor's misstatement reveals how little FG's answer really meant to the prosecutor. FG's stated belief - - that trial attorneys were not always truthful and exaggerated - - was one that reflected a reasonable layperson's assessment of the adversarial processes of the criminal justice system. The result of this assessment was that FG would have held counsel for both parties to a high standard. The prosecutor's assertion of a factually inaccurate reason for the challenge suggests a pretext. "*Miller–El* teaches that if a 'stated reason does not hold up, its pretextual significance does not fade because . . . an appeals court, can imagine a reason that might not have been shown up as false.' (*Miller–El, supra*, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332.)" (*People v. Huggins* (2006) 38 Cal.4th 175, 233.)

Second, California, unlike other jurisdictions, does not exempt attorneys from juror service. (See e.g., *Rawlins v Georgia* (1906) 201 U.S. 638 [50 L.Ed. 899, 26 S.Ct. 560] [upholding law excluding attorneys from juror service]; see also Annot., *Jury: Who Is Lawyer or Attorney Disqualified or Exempt from Service, or Subject to Challenge for Cause*, 57 A.L.R.4th 1260.) Making attorneys eligible to sit as jurors reflects California's position that attorneys are qualified as jurors. If attorneys individually can sit as jurors, merely knowing attorneys cannot be a reasonable ground for questioning a non-attorney prospective juror's qualifications. Here again, respondent attempts to improperly expand on the prosecutor's stated reason by arguing "clearly . . . [FG] may have been biased toward the defense." (RB 124, fn. 42.) For this dubious conclusion - - and one not drawn by the prosecutor - - respondent cites to page 2914 of the clerk's transcript, volume 11. (RB 124, fn. 42.) On that page, FG actually wrote:

> In my occupation I speak with lawyers on a daily basis regarding civil litigation and know about 50-60 civil and criminal defense attorneys.

(11CT 2914.) FG's answer neither reveals nor suggests a defense bias. In any event, a possible or likely defense bias was not what the prosecutor stated as her reason.

Third, FG like most of the prospective jurors expressed reluctance to sit on the jury. This was not an unusual or suspect sentiment. Quite the opposite. A prospective juror who actively wanted to sit on this jury would have been suspect. The trial involved serious, even heinous, charges and evidence, and was estimated to require two weeks. This two-week estimate undoubtedly was longer than the trials many prospective jurors would have envisioned when summoned for service. Moreover, the principal reason FG expressed reluctance concerned ongoing civil litigation. The judge assured FG there would not be a problem, and FG accepted that assurance. (7RT 1297 [FG responded "okay" following court's assurance].)

Fourth, we can be only thankful that respondent is correct: FG was the only prospective juror to have been falsely arrested. (RB 141.) Even so, FG concluded that justice had been served in his case, and that he had been treated fairly. (1CT 2920.) What is significant about FG's arrest is that the prosecutor chose not to

question FG at all about the experience.[5] That is likely because questioning would not have revealed anything worthy of a challenge. FG's questionnaire revealed he was treated fairly and harbored no grudge about the incident. (11CT 2920.)

Fifth, respondent inaccurately equates FG's lack of smiling at the prosecutor to a hostile look. (RB 125.) Not smiling is not the same as a hostile look. Respondent seeks support in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125, for a failure to smile as a non-pretextual reason, but respondent's reliance is misplaced. *Gutierrez* does not assist respondent. In *Gutierrez*, the challenged juror had "seemed to keep agreeing with the defense." (*Ibid.*) FG did not do so. In addition, the challenged juror in *Gutierrez* did far more than commit a failure-to-smile, the juror gave the prosecutor multiple "looks" that made the prosecutor

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[5] The opening brief summarized the voir dire questioning of FG. (AOB 149-150.) That summary includes the prosecutor's questioning of FG about FG's belief that life without the possibility of parole was worse than a death sentence. (AOB 149-150.) Despite this summary, respondent incorrectly asserted that "[c]ontrary to appellant's claim (see AOB 151-152) . . . the prosecutor asked F.G. about several . . . of her . . . concerns . . . ." (RB 125.) Respondent simply overlooked or ignored the discussion of the prosecutor's questioning that appeared in the brief's preceding pages. (See AOB 149-150.)

"uncomfortable." (*Ibid.*) The voir dire process cannot reasonably be considered a good time or place for inducing smiles. The prosecutor claimed that FG "smiled at the defense," but did not claim this was an ongoing practice or when it occurred. FG's questioning appears at pages 1287 through 1298 in the seventh volume of the reporter's transcript. Neither counsel, the court, nor the reporter recorded any nonverbal communications from FG.

The fact that the prosecutor had no "pattern" of striking black prospective jurors when she challenged FG is irrelevant. (Contra RB 123.) "The journey of a thousand miles begins with one step." (Lao Tzu.) Similarly, every pattern begins with the first instance. As discussed in Section C, subsection 2, *ante*, a pattern is not required under *Batson.*

FG was not negative regarding the criminal justice system. Rather, he honestly admitted he had experienced racial prejudice, and felt blacks were rarely treated fairly. (11CT 2927.) Respondent claims FG "refused" to explain this view. For those suffering prejudice, little explanation is likely required from their viewpoint. The printed juror questionnaire form provided less

than two lines of space to explain the belief about prejudice. (11CT 2927.) It is reasonable to conclude that was insufficient space even to summarize a lifetime of experiences leading to the belief. More significantly, the prosecutor did not ask FG to explain this view. (See e.g., 7RT 1287-1298.) Nor did the prosecutor cite this as a reason to challenge FG.[6] There was no refusal to respond orally. If never having experienced racial prejudice were a prerequisite for blacks to serve on juries, there would be few or none who could serve. (Contra RB 132.) FG's life experiences, and belief that prejudice against blacks was alive and well, left FG believing that he himself would not be prejudiced "either for, or against" a black person. (11CT 2927.)

FG's view on the harshness of life imprisonment was yet another pretext for challenging him. Respondent argues on appeal this was a ground to challenge FG peremptorily. (RB 133.) To support this claim, respondent cites *People v. Davis* (2009) 45 Cal.4th 539, 584.) *Davis* does not assist respondent.

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[6] The prosecutor stated she challenged FG because: (1) he said police were not always truthful and they exaggerated; (2) he knew 50 to 60 attorneys, and spoke with them daily; (3) he did not want to be a juror on the case; and (4) he had been arrested in 1992 by the Los Angeles County Sheriff. (9RT 1881.)

The relevant challenged prospective juror in *Davis* expressed two totally inconsistent beliefs: (1) that she would favor imprisonment over a death sentence, and (2) life imprisonment was the more severe penalty. This Court explained: "Prospective Juror L.F. also expressed scruples about imposing the death penalty by testifying that she would 'favor the possibility of life imprisonment without the possibility of parole over the death penalty in a murder special circumstance case,' and by writing in her juror questionnaire that she considered imprisonment for life a more severe penalty than death." (*Ibid.*)

5. Prospective Juror DB.

It is helpful to review the prosecutor's stated reasons for challenging DB since respondent has sought to augment the prosecutor's reasons with additional reasons. (See RB 127.) Indeed, respondent incorrectly suggests the prosecutor actually considered and evaluated the supplemental reasons identified for the first time on appeal. (RB 127 [asserting additional reasons were "why the prosecutor chose to excuse DB"].) The prosecutor identified six reasons: (1) he was on probation, (2) police once "roughed" him up, (3) she suspected DB had been arrested for

indecent exposure, (4) DB believed mental defects could alter intent, (5) DB was concerned about the fairness of indigent defendants on death row who later were exonerated, and (6) DB was an attorney. (9RT 1882-1883.) Analysis must be limited to those reasons. (See discussion of authorities, in Section C, subsection 2, *ante.*)

There is a difference between objective criticism of the criminal justice system and distrust. Respondent lists DB's observations about faults with the criminal justice system as a proper reason for the peremptory challenge . (RB 134-135.) Yet DB's comments reflect common criticisms of many, including those seeking to improve the system by correcting problems. For example, DB mentioned corrupt lawyers and police, and the disparity in the treatment of those with money and indigents. No one reasonably can deny corruption has been present in the criminal justice system, and is often publicized.[7] Similarly, the defense provided to indigent defendants commonly is viewed as

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[7] Judith Grant, *Assault Under Color of Authority: Police Corruption as Norm in the LAPD Rampart Scandal and in Popular Film*, (2003) New Political Science 25, no. 3.

less than the defense achieved by wealthy defendants.[8] Even so, respondent apparently expects prospective jurors to ignore a white elephant in the room by pretending either to deny, or be unaware of, such phenomena. (RB 134.)

DB was on three-years probation for driving under the influence. DB told the prosecutor during voir dire that his status as a probationer would impact his conduct as a juror "not at all." (8RT 1565; see AOB 155 [quoting prosecutor's only five questions to DB about probation].) While respondent now asserts the

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[8] In *Kaley v. United States* (2014) ___ U.S. ___ [134 S.Ct. 1090, 188 L.Ed.2d 46], the Court considered the propriety of freezing the assets of criminal defendants that the defendants intended for use to hire a criminal defense attorney. In his dissent, Chief Justice Roberts wrote: "An individual facing serious criminal charges brought by the United States has little but the Constitution and his attorney standing between him and prison. He might readily give all he owns to defend himself." (*Id.* at p. 1105 (dis. op. of Roberts, C.J.).) The Chief Justice went on to observe: "A person accused by the United States of committing a crime is presumed innocent until proven guilty beyond a reasonable doubt. But he faces a foe of powerful might and vast resources, intent on seeing him behind bars." (*Id.* at p. 1114.) In our state, Californians no doubt recall the expensive and effective defense team who presented a successful defense in the trial of O.J. Simpson, a defense that no appointed counsel for an indigent defendant could have or would have presented. (See e.g., Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional,* N.Y. Times (Sept. 24, 2014); Abrahamson, *Simpson Legal Fees Could Run Into Millions,* L.A.Times (July 9, 1994).)

prosecutor's concern about DB having been "roughed up" by police (RB 141, citing 12CT 3072), the prosecutor refrained from asking about the incident.

The opening brief pointed out that "Juror 4635 also had been arrested for drunk driving, but was not challenged by the prosecutor. (See 4CT 895.) Furthermore, Juror 4635 had witnessed two police officers beating someone. (4CT 892, 895)." (AOB 173.) Respondent attempts to call the seated juror's arrest into question (RB 142-143), and tries to explain the different treatment for a white prospective juror by speculating that somehow probably neither the prosecutor nor defense counsel "was even aware of 4635's potential DUI arrest or conviction." (RB 142.) Both respondent's attempts fail.

Respondent referred to Juror No. 4635's written answer to the question whether he had ever "visited or been inside a jail," and if so, to provide the name of the inmate. (RB 142.) Respondent claimed the juror's answers only raised the possibility the juror "*potentially* had a DUI arrest or conviction." (RB 142 [italics in original].) Appellant disagrees. Respondent omitted from its argument and citation that Juror No. 4635 not

only answered in the affirmative, but also identified the "name of the inmate" as "**self.**" (4CT 895 [emphasis added].) The only reasonable interpretation of this answer was that Juror No. 4635 was the inmate and/or arrestee. Respondent also does not explain how or why the prosecutor would have failed to read or understand 4635's questionnaire, when the record shows the prosecutor was well familiar with all jurors' questionnaires in preparation for voir dire. Despite white Juror No. 4635's similarities to challenged black prospective juror DB, 4635 was not challenged.

Respondent's attempt to provide race-neutral reasons why the prosecutor did not challenge Juror No. 4635 also fail. Those attempts also expose the prosecutor's reasons for challenging DB as a pretext. Respondent argued Juror No. 4635 was "formerly employed by the California Highway Patrol," which the prosecutor possibly considered "a favorable trait." (RB 143.) But DB was similarly situated. DB had been a clerk in the prosecutor's office. (12CT 3062, 3071.) He had been on a police ride-a-long, and had friends in the Long Beach Police Department. (12CT 3057, 3062.)

6. Prospective Juror MH.

Respondent similarly asserts new and different race-neutral reasons for the prosecutor's challenge to MH. (RB 129.) In fact, the prosecutor's reasons were: (1) MH watched the television show CSI (Crime Scene Investigation); (2) the prosecutor suspected MH had special knowledge about jails; (3) MH found it difficult to judge another, and did not want to be on the jury; and (4) it would be hard for MH to sentence someone to death (citing to question number 231). (8RT 1884.)

Objectively, MH's character and experience revealed she was qualified for jury service. Indeed, she had served not once, but twice, on criminal juries before. (8CT 2106.) There was nothing different about MH when she was called to serve on Hardy's jury. She was just as qualified to be a a fair, impartial juror in Hardy's trial as she had been in the previous two criminal trials. As a result of MH's experience in those two trials, she had formed a favorable opinion of the criminal justice system. (8CT 2107.) Also, based on her experience she found sitting in judgment of another difficult. That only would have made MH a better juror. One would hope that all jurors and judges who sit in

judgment of guilt and determine sentences do consider it difficult tasking.

D. Reversal is Required.

Respondent acknowledges that the error requires reversal per se (RB 145, see also *People v. Wheeler, supra*, 22 Cal. 3d at p. 283), yet argues because two of the three prospective jurors would have served as alternates, reversal is not required. (RB 145-147.) Respondent's argument ignores the peremptory challenge to FG who would have sat on the jury but for the prosecutor's peremptory challenge. Moreover, reversal is the only appropriate remedy in light of the *Wheeler* objection, and the passage of time that makes any alternative remedy, such as, a limited remand, unworkable.

When defense counsel made the objection/motion to the prosecutor's peremptory challenges, he argued the prosecutor violated *Batson* and *Wheeler*. Thus, counsel made a record that the prosecutor's peremptory challenges violated both federal and state law. The California Constitution in article 1, section 16 provides a state constitutional right to a jury drawn from a representative cross-section of the community. Thus, *Wheeler*

error presents an independent state law ground and requires automatic reversal under California law. (See, *People v. Johnson, supra*, 38 Cal.4th at p. 1105 (conc. opn. of Werdegar, J.).) To the extent that a lesser remedy, such as remand, could be appropriate in some cases because there was error at the *Batson* first stage, no lesser remedy is feasible in this case. Hardy was tried in 2002. The time between trial and any possible future remand is too long. There is simply no "realistic possibility" that the "subtle question of causation could be profitably explored on remand at this late date, more than a decade after . . . trial." (*Snyder v. Louisiana* (2008) 552 U.S. 472 486 [128 S.Ct. 1203, 170 L.Ed. 2d 175]; see *People v. Carasi* (2008) 44 Cal.4th 1263, 1333, fn. 8 (conc. & dis. opn. of Werdegar, J.).)

Based on the foregoing, the composition of Hardy's jury as a result of the prosecutor's race-based challenges and the trial court's ruling violated Hardy's constitutional rights, and requires reversal.

GUILT PHASE TRIAL EVIDENTIARY ISSUES

IV

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON ALL COUNTS SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCLUDED RELEVANT DEFENSE EVIDENCE OF THE VICTIM'S BLOOD LEVELS OF METHAMPHETAMINE AND ALCOHOL. THE ERROR VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief argued it was error for the trial court to exclude from the guilt phase evidence of Sigler's toxicology report showing she had blood levels of .73 methamphetamine and .22 alcohol at the time of death. (12RT 2690.[9]) Sigler's drug and alcohol levels were relevant to the credibility of Hardy's statements to police, and to explain Sigler's conduct. These levels

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[9] The evidence is in the record because the toxicology report was introduced during the penalty phase. (See 12RT 2690.)

had some tendency in reason to explain Sigler's provocative racial statements, and lack of inhibition and judgment when confronting three, young black men on a darkened street late at night.

Respondent argued Sigler's toxicology report was irrelevant because it was purely speculative how her levels of methamphetamine and alcohol would have affected her conduct. (RB 149-151.) Respondent argued there was no evidence how methamphetamine or alcohol affected Sigler personally, and producing any such evidence would have required an undue consumption of time, and would have confused the jury. (RB 151-152.) Respondent also claimed the substances in the victim's system were irrelevant to Hardy's state of mind as an aider and abettor. (RB 152.)

The trial court found the toxicology report corroborated Hardy's account of events, but did so only marginally in comparison to the amount of time the evidence would require. (10RT 1894.) Thus, the trial court found the toxicology report

relevant, but excluded it under Evidence Code section 352.[10] Thus, respondent's argument is contrary to the trial court's finding.

The relevance of the toxicology report is also evident from the prosecution's theory. The prosecutor wanted jurors to believe the three young black men went prowling the streets at night looking for a victim to rob. She argued the three men intended to rob Sigler, but realized she only six dollars worth of food stamps, which made them mad. (11RT 1256.) This theory ignored that the men were already angered by Sigler's racial insult. It is more likely that the confrontation, which began with racial slurs, continued and escalated, not only into battery but also into the resulting homicidal attack.

Sigler's conduct was key to understanding events. The prosecutor argued the men threw Sigler over the fence, deciding to rape her out of public view. (11RT 1256.) The evidence, however, equally supported the inference that the rape originated

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[10] Respondent reaches the same conclusion - - that the trial court excluded the report under Evidence Code section 352. (RB 152, fn. 47.)

with Pearson, who directed Hardy and Armstrong to further Pearson's goal. (10RT 2139, 2142-2145; 11RT 2169, 2188.)

Further, the only evidence of when Hardy bit Sigler came from Hardy's statement. He said he bit her defensively while on the street after she grabbed at him. Hardy and Sigler both were five feet, four inches tall - - suggesting a more equal physical match than might otherwise be assumed between a man and a woman. (11RT 2238, 2252, 2256.) Hardy's statement explained he bit her during the initial confrontation on the street. Sigler had yelled, "Fuck you, niggers." Then Hardy and his two companions crossed the street and approached her. (10RT 2102-2103; 11RT 2179.) They all were yelling at each other. (10RT 2103.) Sigler grabbed Hardy, and he bit her left breast. Then she slapped Hardy in the face. (10RT 2137-2138.) The prosecutor did not want jurors to believe this version.

The prosecutor wanted jurors to believe robbery was the intent underlying the initial encounter. The men were angry and disgruntled because Sigler did not have anything of value, so they in turn decided to kidnap, then rape, then kill her. To support this version of events, the prosecutor downplayed both the

genesis and violence of the initial encounter. She argued the bite happened during the rape (11RT 2408), not as Hardy explained, that is, through clothing at the beginning of the attack. (11RT 2351.)

The fact the prosecutor referred to "some racial remarks" in her opening statement, and that defense counsel referred specifically to Sigler's use of the word "nigger," did not dispense with Hardy's right to present evidence further explaining Sigler's conduct. (Contra RB 149.) The prosecutor did not, as respondent suggests, concede in either her opening statement or closing arguments that Sigler had made the racial slurs Hardy described. (RB 151.) The prosecutor's remarks made it clear that she was merely summarizing the defense evidence. In any event, counsel's statements were not evidence, and the jury was so instructed. (2CT 512; CALJIC No. 0.50.) Likewise, Hardy's reporting to the detective that he thought Sigler was drunk or on drugs (11RT 2184) was not the equivalent of a toxicology report showing Sigler, in fact, had methamphetamine and alcohol in her system. (Contra RB 149.) Jurors could have rejected Hardy's statement as self-serving. An objective toxicology report,

however, would have been weighty evidence corroborating Hardy's personal assessment of Sigler's condition.

Evidence of Sigler's toxicology report, showing methamphetamine and alcohol in her blood, supported Hardy's account, not the prosecution's theory. It was relevant. The toxicology report also was bad for the prosecution's case. A victim's use of alcohol negatively affects jurors' perceptions of them in cases involving all types of offenses. (See e.g., David P. Bryden and Sonja Lengnick *Criminal Law: Rape in the Criminal Justice System* (Summer 1997) 87 J. Crim. L. & Criminology 1194, 1350.)

It is common knowledge that alcohol reduces inhibition. Lay jurors would likely be familiar with California's driving under the influence laws, and sayings, such as, "Candy is dandy, but liquor is quicker."[11] The toxicology report was needed to establish that Sigler's blood alcohol level supported an inference of reduced inhibitions. There was nothing particularly confusing or time-consuming about the evidence. (Contra, RB 152.) As

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[11] Attributed to Ogden Nash. (John Bartlett, *Familiar Quotations* (15th ed. 1980) 855.)

defense counsel noted, the deputy medical examiner was going to testify about the autopsy, which included Sigler's toxicology report. (10RT 1895.)

Respondent's argument equates two different types of relevant evidence: the effects of alcohol on humans generally, and the effects on Sigler individually. This suggests incorrectly that Sigler was somehow immune to the effects of alcohol. While detailed evidence about how a particular blood alcohol (or methamphetamine) level affected Sigler also would have been relevant, it remained relevant that she had a blood alcohol level that exceeded the legal limit for driving *for anyone*. (12RT 2598, 2618.) Additionally, Hardy did not need to show the exact effects on Sigler, but he had a right to present evidence that cast doubt on the prosecutor's theory.

Respondent's reliance on *People v. Stitely* (2005) 35 Cal.4th 514, is misplaced. (Contra, RB 150-151.) Respondent cited *Stitely* for the proposition that Sigler's toxicology report was inadmissible because it would have invited the jury to speculate. *Stitely* is inapposite. In *Stitely*, the victim was brutally raped and strangled. The parties stipulated the victim's blood alcohol at the

time of her rape and murder was 0.26 percent. The defense counsel sought to call an expert witness to testify that such a high blood alcohol content lowered sexual inhibitions and would have made the victim more likely to have consensual sex. (*People v. Stitely, supra,* 35 Cal. at p. 549.) This Court concluded it was speculation as to whether or not intoxication would have made the victim more likely to have consensual sex. (*Id.* at p. 549.) Based on the circumstances in *Stitely*, the outcome was correct. The ravaged condition of the victim's body showed choke marks, bruises, and vaginal abrasions, which effectively eliminated the possibility of consensual sex. (*Id.* at pp. 524-525.) The victim's intoxication as evidence of lowered inhibitions was not relevant in *Stitely*. But Hardy did not seek to introduce evidence of Sigler's intoxication to show consent.

Respondent also cited to this Court's decisions in *People v. Kraft* (2000) 23 Cal.4th 978, 1035, *People v. Edwards* (1991) 54 Cal.3d 787, 817, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, and *People v. Babbit* (1988) 45 Cal.3d 660, 681, for the proposition that Sigler's toxicology report was irrelevant and "purely speculative." (RB 150.) These authorities do not assist

respondent. *Kraft* and *Edwards* each upheld the admission of prosecution evidence over a defense objection like the one the prosecution raised below. Likewise, *Rodrigues* upheld the admission of prosecution evidence over a defense Evidence Code 352 objection. *Babbit* is inapplicable because there the defendant's defense to murder was Post-Traumatic Stress Disorder, which was exacerbated on the night of the murder by violent television programs being aired. *Babbit* held the evidence was speculative because there was no evidence the defendant had seen any of the violent programs. In contrast, the toxicology report showed definitively and objectively that Sigler had ingested methamphetamine and alcohol, and that her blood alcohol level remained above the legal limit for driving. The toxicology report also showed that Hardy's statements to the interrogating officers described behaviors consistent with Sigler's level of intoxication, verified in the toxicology report.

The opening brief argued the exclusion of the toxicology report during the guilt phase significantly reduced Hardy's ability to demonstrate the reasonable doubt present in the prosecution's case. (AOB 186-189.) The toxicology report would have helped to

explain the circumstances surrounding the initial encounter between Hardy and his companions, and Sigler, and demonstrated that what followed was a spontaneous reaction to the racial slur, shouting, cursing, and physical grabbing and slapping by Sigler. This, in turn, tended to cast doubt on the existence of any specific intent to commit the target felonies, torture, to aid and abet, or to premeditate and deliberate. (See 11RT 2356-2359, 2365 [prosecutor identifying these theories for Hardy's culpability].) Thus, respondent's reliance on *People v. Cunningham* (2001) 25 Cal.4th 926, 999, is misplaced. (Contra RB 153-154.) *Cunningham* reached its conclusion because the excluded defense evidence in that case involved a minor or subsidiary point. Therefore, there was no due process violation. In contrast, the exclusion of Sigler's toxicology report related to a significant point, and was more than just an error of law. It was a violation of Hardy's right to due process of a law; a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The error requires reversal.

V

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNTS 1, AND 3 THROUGH 8, SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED TESTIMONIAL HEARSAY BY PERMITTING ONE DEPUTY CORONER TO TESTIFY ABOUT PROCEDURES PERFORMED BY THE DEPUTY'S SUPERVISOR. THE ERROR VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, AND HIS RIGHTS TO CONFRONT WITNESSES AND TO EFFECTIVE ASSISTANCE OF COUNSEL AND A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

This issue challenged the deputy medical examiner's testimony about the autopsy to the extent he testified about work performed by at least two other people. (AOB 190-219.) Hardy argued this testimony violated his constitutional rights to due process, a jury trial, confront witnesses and to effective assistance of counsel. (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314];

Bullcoming v. New Mexico (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610]; *Williams v. Illinois* (2012) ____U.S. ____ [132 S.Ct. 2221; 183 L.Ed.2d 89]; Respondent argued the issue was forfeited, and the evidence did not violate Hardy's right to confront witnesses. (RB 157-165.)

A. The Issue Was Not Forfeited.

The issue was not forfeited. (Contra, RB 157, 159.) Based on the abrupt change in the interpretation of the Confrontation Clause occasioned by *Crawford v. Washington*, which "dramatically departed from prior confrontation clause law," and was unforeseeable, counsel's failure to object did not forfeit the issue. (*People v. Pearson* (2013) 56 Cal.4th 393, 462.) This is not a mere "chain-of-custody-type" issue as respondent asserts. (Contra, RB 160-161.) At bottom, chain of custody issues involve merely the chronological documentation of the evidence from seizure to introduction in court. Here, the wrong person testified about the splinter evidence at issue. It is precisely the same "constitutional objections lodged in *Clark* and *Pearson*." (Contra RB 161.) The only difference is that Hardy does not know who the "entirely different deputy medical examiner" was who

removed the splinters. That is because Djabourian did not know.

The location where the splinters were extracted was significant because the prosecution focused on that evidence.

B. There Was No Foundation for Djabourian's Testimony About Splinters He Did Not Remove, Did Know Who Did, and Could Not Verify the Location of Extraction.

There was no question about Sigler's cause of death. Djabourian conducted most of the autopsy personally. This issue concerns Djabourian's opining about the genital injuries, specifically relating to splinters removed during the autopsy. (10RT 1971.) Djabourian did not remove certain splinters, and could not determine from where they had been removed. (10RT 1955 ["I'm unable to determine where that was."].) Indeed, he could not identify whose initials - - C.H.L. - - appeared on the envelope containing the splinters. Djabourian could identify and relate only one of the splinters specifically to Sigler's autopsy. (10RT 1956-1957.) He testified, "The only one I can recall is that smaller one that was two millimeters." (*Ibid.*)

Djabourian based several portions of his opinion on the splinters, including the larger one that he knew nothing about. This testimony included speculation about the order of the

injuries, and the amount of pain suffered. He testified the genital area was sensitive, akin to having something in the eye, although the eye is much more sensitive. (10RT 1972.) Djabourian concluded that, except for the defensive injuries, it was difficult to determine which injuries Sigler sustained while conscious. Whether an injury occurred before or after death could be determined based on bleeding. But there was nothing about many of the injuries to signal whether Sigler was conscious. (10RT 1973.) While Djabourian allowed that it was hard to say whether the sexual assaults happened before the fatal head injuries, his opinion was that the sexual assaults occurred first. (10RT 1976-1977.)

While this was not a situation where the doctor testified about, or opined based on, an autopsy report prepared by someone else, he clearly testified about, and opined on, actions taken, and observations made during the autopsy, about which he knew nothing. Djabourian's testimony[12] made that clear.

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[12] The testimony was quoted by both parties in their briefs, and will not be repeated herein for the sake of brevity. (AOB 196-197; RB 158-159.)

C. The Issue Presented Differs from that Considered and Decided in *People v. Dungo* (2012) 55 Cal.4th 608.

The issue presented differs from the issue considered and decided in *People v. Dungo*, which was narrowly tailored to decide whether there was a confrontation violation from the admission of a surrogate witness' description of the victim's body at the time of the autopsy. (*People v. Dungo, supra*, 55 Cal.4th at pp. 618-620.) Like *Dungo*, the autopsy report was not introduced into evidence in Hardy's trial. (*Id.* at p. 619.) The testifying witness in *Dungo* related objective facts from the autopsy report prepared by a nontestifying witness. As respondent agrees, the expert testified "about objective facts *known to him from the autopsy report* . . . ." (RB 162 [italics added].) Those objective facts in *Dungo* were clearly set forth in the report, and there was no question about the details related by the testifying witness. The expert in *Dungo* also relied on autopsy photographs from the report in reaching his own independent opinion. (*People v. Dungo, supra*, 55 Cal.4th at p. 619.)

In contrast to what occurred in *Dungo* (and *People v. Lopez* (2012) 55 Cal.4th 569, and *Williams v. Illinois, supra*, 132 S.Ct.

2221), some of the critical information about the splinters did not constitute "objective facts" because: (1) it was not clear from the report (or chain of custody) where the splinters had been removed, or who removed them: (2) Djabourian testified he had removed only one of splinters; and (3) he based his opinion on Sigler's suffering and consciousness on speculation. Undoubtedly, the Los Angeles County coroner performs many autopsies, and gathers and catalogs a lot of evidence. Sigler sustained injuries from the wooden stick or stake to multiple areas of her body, both external and internal. Blunt force trauma to her head from the stick was the cause of death. (10RT 1975.) The splinter could have come from any number of sites on Sigler. Djabourian did not know. Indeed, Djabourian could not confirm the initials on the bag containing the splinter evidence were from someone who participated in Sigler's autopsy. The splinter evidence even could have come from a different autopsy for all Djabourian knew.

The situation here contrasts to a crime scene where law enforcement personnel place numbered placards at various locations, and relate pieces of evidence to the numbers on the placards. Photographs might show placard number one where a

casing was recovered. Placard two might depict the location of a bloody footprint. Placard three might mark a bullet hole in a wall. In this situation, the location of the evidence is objectively recorded and reported. That did not happen with the splinter evidence in Hardy's case. Instead, there was splinter evidence in with other evidence - - evidence that was documented and represented objective facts. Djabourian could not account for the second envelope of splinter evidence. He had a reasonable guess about it, and testified to it, but the record reveals he did not know. The record also reveals what he testified about was not an objective fact. Another pathologist could not have looked at that splinter evidence, or the envelope that contained it, and determined anything relevant about it. Returning to the example of placards used at a crime scene: this would be like a second casing being included with the evidence of the first casing and photographs of the footprint and wall. The mystery second casing, like the splinter evidence Hardy challenges, would not constitute an objective fact whose origin and relevance were determinable from the photographs of the scene.

D. This Court Should Expressly Overrule *People v. Geier* And Reconsider *People v. Dungo.*

1. This Court Should Clarify This Area by Expressly Overruling *People v. Geier.*

This area of the law has changed after *Geier.* In *Lopez*, this Court implicitly recognized that *Geier* runs afoul of *Melendez-Diaz v. Massachusetts, supra*, 557 U.S. 305, 315, which said "a [] report may be testimonial, and thus inadmissible, even if it 'contains near-contemporaneous observations of [a scientific] test' [Citations]." (*People v. Lopez, supra,* 55 Cal.4th at p. 581.) *Geier* set out a three-part test for determining admissibility. One part of the test was invalidated by *Melendez-Diaz v. Massachusetts* and *Bullcoming, supra*, 131 S.Ct. at pages 2714–2715. Specifically, *Geier* held, " [A] statement is testimonial if (1) it is made . . . by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*People v. Geier, supra*, 41 Cal.4th at p. 605.)

The second *Geier* factor is no longer viable after *Melendez-Diaz* and *Bullcoming*. (*People v. Lopez, supra,* 55

Cal.4th at p. 581.) Moreover, the United States Supreme Court identified, and has balanced, four factors in determining whether a statement is testimonial. The High Court never has required that all factors be present as *Geier* required. (See *People v. Lopez, supra,* 55 Cal.4th at p. 594 (dis. op. of Liu, J.) ["no high court decision has found that [absence of one factor, formality] is alone sufficient to render a statement nontestimonial."].) Rather *Crawford* identified three factors for testimonial evidence by way of example: (1) an "ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford v. Washington, supra,* 541 U.S. at pp. 51-52.) *Davis* added a fourth factor: requiring analysis of the primary purpose

of the statement at the time it was made. (*Davis v. Washington, supra,* 547 U.S. at p. 822.) A decision from this Court clarifying these four factors, and rejecting the *Geier* test is appropriate.

2. This Court Should Reconsider *Dungo.*

Federal circuits and state courts remain divided over the question of whether an autopsy report, or its contents, violates confrontation rights when testified to by a surrogate witness. Federal and state courts that have attempted to extract a rule from United States Supreme Court authorities have reached different conclusions. The Courts of Appeals for the Eleventh and District of Columbia Circuits concluded autopsies are testimonial. (*United States v. Ignasiak* (11th Cir. 2012) 667 F.3d 1217, 1219; *United States v. Moore* (D.C. Cir. 2011) 651 F.3d 30, 73.) Nine states have agreed autopsy reports are testimonial: Maryland, Massachusetts, Michigan, Missouri, New Mexico, North Carolina, Oklahoma, Texas, and West Virginia. (*Malaska v. State* (Md. 2014)216 Md. App. 492, 511 [88 A.3d 805]; *Commonwealth v. Reavis* (Mass. 2013) 992 N.E.2d 304, 311, affirming *Commonwealth v. Avila* (Mass. 2009) 912 N.E.2d 1014, 1027; *People v. Lewis* (Mich. 2011) 806 N.W.2d 295 [vacating court of

appeals holding that autopsy was not prepared in anticipation of litigation]; *State v. Davidson* (Mo. 2007) 242 S.W.3d 409; *State v. Navarette* (N.M. 2013) 294 P.3d 435, 441 [no meaningful distinction between factual observations and conclusions requiring skill/judgment]; *State v. Locklear* (N.C. 2009) 681 S.E.2d 293, 305; *Cuesta-Rodriguez v. State* (Okla. 2010) 241 P.3d 214, 229; *Martinez v. State* (Tex. 2010) 311 S.W.3d 104, 111; *State v. Kennedy* (W. Va. 2012) 735 S.E.2d 905, 910, 917.) Four of these states issued opinions after *Dungo*, reached a different conclusion than this Court, and warrant consideration. (See *post.*)

The First Circuit concluded there is no controlling United States Supreme Court authority, and it is unclear how the Supreme Court would resolve the question. Thus, for purposes of a federal habeas, the First Circuit concluded that *Crawford* did not bar the admission of an autopsy reports contents based on a surrogate witness' testimony. (*Nardi v. Pepe* (1st Cir. 2011)662 F.3d 107, 112.) Similarly, the Sixth Circuit, in an unpublished decision,[13] concluded there was no on-point Supreme Court

[13] Rule 32.1 of the Federal Rules of Appellate Procedure, authorizes citation of decisions notwithstanding an unpublished designation.

precedent, and so denied a habeas petition in *Mitchell v. Kelly* (6th Cir. 2013) 520 F. App'x 329, 330 (per curiam) by applying Ohio evidence law.

Three circuits and eight states, including California in *Dungo*, have concluded autopsy reports are not testimonial. (*United States v. James* (2d Cir. 2013) 712 F.3d 79, 95-96; *McNeiece v. Lattimore* (9th Cir. 2012) 501 F. App'x 634, 636;[14] *United States v. MacKay* (10th Cir. 2013) 715 F.3d 807, 812-813; *State v. Medina* (Ariz. 2013) 306 P.3d 48, 55; *Banmah v. State* (Fla. 2012) 87 So. 3d 101, 103; *People v. Leach* (Ill. 2012) 980 N.E.2d 570, 578; *State v. Russell* (La. 2007) 966 So. 2d 154, 159-160; *State v. Bass* (2013) No. 07-12-2903, 2013 WL 1798956; *State v. Craig* (Ohio 2006) 853 N.E.2d 621,637; *State v. Cutro* (S.C. 2005) 618 S.E.2d 890, 896.)

The foregoing illustrates that reasonable judicial minds differ drastically on the question; "it is uncertain how the [Supreme] Court would resolve the question;" (*Nardi v. Pepe, supra*, 663 F.3d at pp. 109-110); and guidance is needed. The foregoing is not offered as a type of "nose-counting," eschewed by

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[14] This is also an unpublished decision.

Justice Liu in his dissent in *Lopez.* (*People v. Lopez, supra,* 55 Cal.4th at p. 593 (dis. op. of Liu, J.).) Rather, these conflicting authorities are reasonable grounds for this Court to reconsider its decision in *Dungo.*

Justice Corrigan's dissent in *People v. Edwards* (2013) 57 Cal.4th 658, described the rule in *Dungo* as "unworkable." After this Court issued its decision in *Dungo*, Maryland, Massachusetts, New Mexico and West Virginia each held an autopsy report is testimonial for confrontation clause purposes. (*Commonwealth v. Reavis, supra,* 992 N.E.2d at p. 311; *State v. Navarette, supra,* 294 P.3d at p. 441; *State v. Kennedy, supra,* 735 S.E.2d at pp. 910, 917.) It is instructive to review the analyses and rationales in these more recent authorities, which were unavailable for this Court's consideration at the time of *Dungo.*

In January of 2013, in *State v. Navarette*, the Supreme Court of New Mexico considered a case similar to Hardy's where the autopsy report was not admitted into evidence. (*State v. Navarette, supra,* 264 P.3d at p. 441.) In *Navarette*, however, it was a surrogate pathologist who testified. (*Id.* at p. 440.) Relying on a New Mexico statute requiring an autopsy in the case of "any

sudden, violent, or untimely death," and noting the case "involved a violent death," the New Mexico Court concluded the pathologist who conducted the autopsy should have "anticipated that criminal litigation would result from her autopsy findings . . . ." (*Id.* at pp. 440-441.) *Navarette* concluded that under *Bullcoming* a document created solely for an evidentiary purpose, made in aid of a police investigation, is testimonial. Thus, an autopsy conducted "in the context of a violent death caused by this type of injury will automatically trigger a duty by the medical examiner to report their findings to the district attorney [citation], we conclude autopsy reports regarding individuals who suffered a violent death are testimonial." (*Id.* at p. 441.)

The *Navarette* court also honed the issue, noting, "In this case, the autopsy report was not admitted into evidence. Thus, the issue here is whether an expert can relate out-of-court statements to the jury that provide the basis for his or her opinion, as long as the written statements themselves are not introduced. This question was answered by the United States Supreme Court in *Williams*." (*State v. Navarette, supra,* 264 P.3d at p. 441.) Under New Mexico evidence law, like California

evidence law, an expert may reveal otherwise inadmissible evidence, if it has probative value in assisting the jury to evaluate the expert's opinion. (*Id.* at p. 442.) Even so, *Navarette* pointed to the opinions authored by Justices Thomas and Kagan, to explain why the content of the report was nevertheless inadmissible.

Navarette first quoted Justice Thomas:

> Of course, some courts may determine that hearsay of this sort is not substantially more probative than prejudicial and therefore should not be disclosed under Rule 703. But that balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused. See *Crawford*, 541 U.S., at 61, 124 S.Ct. 1354 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

(*State v. Navarette, supra,* 264 P.3d at p. 442, quoting *Williams v. Illinois, supra,* ___ U.S. at___, 132 S.Ct. at p. 2259 (conc. op. of Thomas, J.).)

Navarette then pointed to Justice Kagan's opinion, which was joined by three other justices (Scalia, Ginsburg and Sotomayor, JJ.):

> Imagine for a moment a poorly trained, incompetent, or dishonest laboratory analyst. (The analyst in *Bullcoming*, placed on unpaid leave for unknown reasons, might qualify.) Under our precedents, the prosecutor cannot avoid exposing that analyst to cross-examination simply by introducing his report. Nor can the prosecutor escape that fate by offering the results through the testimony of another analyst from the laboratory. But under the plurality's approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, "the best DNA witness I have ever heard"), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given ("the DNA extracted from the vaginal swabs matched Sandy Williams's")—all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion's basis. (And this tactic would not be confined to cases involving scientific evidence. As Justice Thomas points out, the prosecutor could similarly substitute experts for all kinds of people making out-of-court statements.) The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick-but really, what a way to run a criminal justice system. No wonder five Justices reject it.

(*State v. Navarette, supra,* 264 P.3d at p. 442, quoting *Williams v. Illinois, supra*, ___ U.S. at___, 132 S.Ct. at p. 2272 (dis. op. of Kagan, J.).)

In *Dungo*, this Court noted that Government Code section 27491 "requires a county coroner 'to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths . . . .'" (*People v. Dungo, supra,* 55 Cal.4th at p. 620, citing Gov't Code, § 27491.) In addition, the Penal Code makes coroners and deputy coroners peace officers. (Pen. Code, § 830.35, subd. (c).[15]) As such, they are authorized to make arrests and "may carry firearms . . if authorized . . . ." *Dungo* did not discuss this statutory aspect of a coroner's duty.

Navarette also reached a different conclusion from *Dungo* concerning the nature of the contents of an autopsy report. *Navarette* concluded:

> [T]he autopsy findings do not involve objective markers that any third party can examine in order to express an independent opinion as to the existence or non-existence of soot or stippling. Such observations

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[15] The Penal Code recognizes coroners as "peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest . . . ." (Pen. Code, § 830.35.) Peace officer status is granted to: "[t]he coroner and deputy coroners, regularly employed and paid in that capacity, of a county, if the primary duty of the peace officer are those duties set forth in Sections 27469 and 27491 to 27491.4, inclusive, of the Government Code." (Pen. Code, § 830.35, subd. (c).)

> are not based on any scientific technique that produces raw data, but depend entirely on the subjective interpretation of the observer . . . .

(*State v. Navarette, supra,* 264 P.3d at p. 443.)

Navarette then quoted from *Bullcoming,* quoting *Melendez-Diaz,* that "'the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."'" (*State v. Navarette, supra,* 264 P.3d at p. 443.)

In February of this year (2014), Maryland also concluded that autopsy reports are testimonial in *Malaska v. State.* There the Court of Special Appeals of Maryland considered an autopsy performed by two medical examiners, one of whom was the supervisor responsible for making the final determination regarding the cause of death. The supervisor testified. *Malaska* concluded the autopsy report was testimonial, and its admission implicated the defendant's confrontation rights. (*Malaska v. State, supra,* 88 A.3d at pp. 815-816.) However, because the supervisor who testified, "was involved in, and *had first-hand knowledge* of, the tests and procedures employed" during the autopsy, and ultimately "carried the responsibility and authority

to make the ultimate determination as to the cause and manner of death, he was the proper witness for confrontation clause purposes . . . ." (*Id.* at p. 818 [italics added].) Thus, the outcome in *Malaska* turned, in part, on the fact the testifying witness had first-hand knowledge. While Djabourian was present and performed most of the autopsy on Sigler, he had no first-hand knowledge about the splinter evidence at issue.

In *State v. Kennedy*, the Supreme Court of Appeals of West Virginia, the month after *Dungo* was decided, concluded an autopsy report is testimonial. *Kennedy* distinguished between testimony that merely reiterated the contents of the report, or like *Dungo*, constituted an independent expert opinion based on the autopsy. *Kennedy* noted that "the autopsy and required report's use in judicial proceedings is one of its statutorily defined purposes." (*State v. Kennedy, supra,* 735 S.E.2d at p. 916 [noting this was a factor in the Eleventh Circuit's decision in *United States v. Ignasiak, supra,* 667 F.3d 1217, citing a similar Florida statute governing autopsies].) Thus, under a "primary purpose" analysis, the autopsy report was testimonial. (*State v. Kennedy, supra,* 735 S.E.2d at pp. 916-917.)

The *Kennedy* court divided the testimony into three categories to determine whether the defendant's confrontation rights were violated: opinions regarding the cause of death, non-fatal stab wounds, and whether the injuries were consistent with being struck with a rock. (*State v. Kennedy, supra,* 735 S.E.2d at pp. 920-921.) The court concluded the cause of death opinion was not the surrogate witness' own, but merely a recitation of the report. Accordingly, the defendant's rights to confront the witness were not satisfied. (*Id.* at p. 921.) The fact the testifying surrogate seemed to concur with the autopsy report's conclusion on cause of death did not transform the opinion/conclusion into the witness' own for confrontation clause purposes. (*Ibid.*) As to the other two opinions, *Kennedy* concluded, as did this Court in *Dungo*, that the opinions rendered were those of the testifying witness who was subject to cross-examination. (*Id.* at pp. 921-922.) Therefore, there was no confrontation violation.

The Supreme Judicial Court of Massachusetts, like the Supreme Court of Appeals of West Virginia in *Kennedy*, most recently considered the same question, and also divided the autopsy into three categories: cause of death, time of death, and

facts underlying the autopsy report. (*Commonwealth v. Reavis, supra,* 992 N.E.2d at pp. 311-312.) In *Reavis,* the medical examiner who performed the autopsy on the victim no longer worked for the office and had moved out of state. (*Id.* at p. 310.) A substitute medical examiner testified. The defendant challenged the surrogate's testimony on confrontation grounds. *Reavis* concluded a surrogate examiner "may offer an opinion on the cause of death based on . . . review of an autopsy report;" and "may also offer an expert opinion as to the time . . . between injury and death, the force required to inflict the injury, and the effect that certain types of injuries would have on the victim." (*Id.* at pp. 311-312.) But a surrogate "may not, however, testify to facts in the underlying autopsy report where that report has not been admitted." (*Id.* at p. 312.) Accordingly, *Reavis* concluded the "portions of the substitute medical examiner's . . . testimony about the number and location of the wounds, were improper and should not have been admitted." (*Ibid.*)

Under the foregoing primary authorities from other states, Djabourian's testimony about the splinter evidence was improper because it violated Hardy's right to confront witnesses. (See also

People v. Edwards, supra, 57 Cal.4th 769-774 (dis. op. of Corrigan, J.) [concurred in by Liu, J.]) The portion of the testimony the *Reavis* court found improper is similar to the portion of Djabourian's testimony that Hardy challenges. It was based on the location of splinter evidence, about which Djabourian had no real personal knowledge, and based on matters in the autopsy file or records. Likewise, under *Kennedy*, Djabourian's testimony on the challenged splinter evidence was improper because he could not be cross-examined about it. He simply lacked the personal knowledge to answer questions. So too under *Malaskai,* Djabourian lacked first-hand knowledge. He was not the supervisor of the other pathologist present.

The error was prejudicial because the evidence was important to the prosecution's case. The prosecutor emphasized the splinters, including the larger one, in her guilt phase argument. (See e.g., 11RT 2350 [referencing the autopsy], 2382.) The prosecutor argued that Hardy raped Sigler, and raped her with the stake, and identified the splinters from the autopsy as evidence of this. (11RT 2350, 2382.) The prosecutor also argued that Sigler knew what was happening, telling the jury that Sigler

knew what was going to happen when she saw stake - - she knew what Hardy would do. (11RT 1250-1251.) When the prosecutor argued for a guilty verdict on count 6 (Pen. Code, §§ 289, subd. (a)(1), 264.1 [sexual penetration by a foreign object while acting in concert]), she argued that the wood splinter was more than four inches into Sigler's vagina. (11RT 2382.)

The prosecutor's arguments about the splinter were viewed as significant enough by defense counsel that he, too, addressed this evidence in closing. Defense counsel argued the prosecutor's theory for rape with a stake was not supported by the splinter evidence or any other evidence. Counsel argued there was no evidence. (11RT 2395.) Counsel observed that Hardy's statement contradicted the prosecution theory, and the prosecutor had introduced his statement. (11RT 2396.[16]) As the foregoing demonstrates, the splinter evidence figured largely in the arguments of both parties. Accordingly, the convictions in counts 1 and 3 through 8, and the judgment of death should be reversed.

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[16] It was also at this point that counsel argued the prosecutor wanted the jury to believe parts of Hardy's statement, not other parts. Counsel's argument relates to the issue in Argument IV.

VI

THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCES UNDER PENAL CODE SECTION 190.2, SUBDIVISION (A)(17), AND THE JUDGMENT OF DEATH, SHOULD BE REVERSED BECAUSE THE EVIDENCE FAILED TO PROVE HARDY COMMITTED ANY OF THE SPECIAL CIRCUMSTANCE FELONIES FOR AN INDEPENDENT FELONIOUS PURPOSE. THE ERROR VIOLATED HARDY'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, TO A JURY TRIAL, A RELIABLE GUILT AND DEATH VERDICT, AND HIS RIGHTS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.

Hardy argued there was no substantial evidence that any of the special circumstance felonies under section 190.2, subdivision (a)(17) and (18), that is, robbery, kidnapping, kidnapping for rape, rape, and rape by foreign object, was committed with an independent felonious purpose. A felony special circumstance allegation cannot stand when the defendant's primary goal was to kill the victim rather than to commit the felony. (*People v. Riel* (2000) 22 Cal.4th 1153, 1201.) Accordingly, under *People v. Green* (1980) 27 Cal.3d 1, and its progeny, the true findings to the felony special circumstances could be upheld only if Hardy had an

independent felonious purpose for committing each special circumstance felony. The felony could not have been merely incidental to the murder. (AOB 219-244.) Felony-murder special circumstance findings cannot be sustained where the defendant's goal was to kill. (*People v. Riel* (2000) 22 Cal.4th 1153, 1201.) The prosecution had the burden of proving beyond a reasonable doubt appellant acted with an independent felonious purpose. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476; *People v. Green, supra*, 27 Cal.3d at p. 62.) Here, there was a complete absence of evidence about the motivation for, or intent to commit, the offenses.

Respondent argued there was "overwhelming evidence" that Hardy committed each of the special circumstances felonies with an independent felonious purpose. There are several problems with respondent's argument. First, the theories advanced by respondent to support the argument Hardy acted with independent felonious intent are purely speculative. (RB 166-176.) The only evidence of how events occurred came from

Hardy's statements[17] to police. Hardy actually provided very few details about the course of events. The parties provided all the details contained in Hardy's statement in their respective Statement of Facts. (AOB 21-29, RB 15-21.) Hardy's statement to police provides no support for an independent felonious purpose. Respondent baldly asserts there was no evidence Hardy "intended to kill . . . at the moment [Sigler] allegedly yelled [a racial epithet.]" (RB 169.) Respondent's argument misses the point, which is: there was no evidence that he did not, and it was the prosecution's burden to provide that fact. It is simply unknown when any intent to kill occurred. It is just as likely that the intent occurred at the initial confrontation, based on the inflammatory racial slurs made to a young black men who had been drinking. Thus, there is insufficient evidence to support the findings. (*Williams v. Calderon, supra,* 52 F.3d at p. 1476; *People v. Green, supra*, 27 Cal.3d at p. 62.)

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[17] While Hardy provided a total of three statements, only his third statement contained information about the offenses. His first and second statements were limited to denials of involvement in the crimes. (10RT 2076-2090.)

The second general problem is respondent ignores that it matters greatly which came first, the chicken or the egg. Respondent's argument essentially is that it does not matter because there was both a chicken and an egg. That is not the law. Cases that have considered this issue are illustrative of the evidence lacking in Hardy's case. For example, in *Green*, the defendant suspected his 16-year old wife of having an affair, so he killed her. (*People v. Green, supra*, 27 Cal.3d at p. 13.) There was evidence the defendant took his wife to a remote location, forced her to undress, then killed her. He took her clothes, purse, and jewelry to make it look like a robbery. (*Id.* at pp. 15-16.) He was convicted of first-degree murder with robbery and kidnapping special circumstances. This Court affirmed the first-degree murder charge, but overturned the special circumstance verdicts because the "sole object [of the robbery was] to facilitate or conceal the primary crime." (*Id.* at p. 61.) This Court explained the Legislature intended section 190.2 be used to punish "those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a

holdup, a kidnapping, or a rape." (*Ibid.*) Here, there was no evidence Hardy, or his companions, killed in cold blood to advance the independent felonious purpose of robbery, kidnapping, kidnapping for rape, rape, and rape by foreign object. To counter the absence of evidence in the record, respondent speculates a theory of events on the night of the murder consistent with independent felonious purposes. (RB 170-174.)

Respondent's reliance on *People v. Huggins* (2006) 38 Cal.4th 175, 215, is misplaced. (Contra RB 170.) *Huggins* instructs the intent to rob must precede the killing, or arise during the killing. This record does not inform when the intent to take Sigler's property arose. Hardy makes no mention of taking her property, i.e., the food stamps. We only know the food stamps she had were, in fact, taken, and the booklet cover was recovered at the scene. There was no evidence of an intent - - either before or during the killing - - to rob Sigler. In contrast, in *People v. Abilez* (2007) 41 Cal.4th 472, 511, there was sufficient evidence to support that the defendant committed murder while engaged in robbery, burglary, and sodomy based on the defendant's need for money. Thus, his taking the victim's property demonstrated an

independent felonious purpose in support of robbery-murder. Additionally, the jury could infer from the defendant's hatred of the victim that he had a separate desire to injure and humiliate her through forced sex. The victim was the defendant's biological mother, about whom he had expressed hatred to several witnesses because she abandoned him. (*Id.* at p. 512.) Thus, it was reasonable to infer he wished to humiliate her, and the forced sex was not incidental to her murder.

Similarly, in *People v. Elliot* (2005) 37 Cal..4th 453, 470, the felony-murder special circumstance based on murder of a bartender during an attempted robbery was sufficiently established by evidence the defendant planned to enter the bar after closing to rob the bartender of the day's receipts. In contrast to *Abilez* and *Elliot*, there was no evidence here of an independent robbery motive: that Hardy or his companions wanted Sigler's food stamps or money, or had any reason to believe she possessed either. Indeed, Hardy's case is more similar to *People v. Marshall* (1997) 15 Cal.4th 1, 41, where the defendant took a letter from his rape victim as a "token" of the rape and murder. That evidence was insufficient to sustain

robbery-murder special circumstance, because the robbery was merely incidental to murder; "robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder." (*Ibid.*) Significantly, there was no evidence when Sigler's property was taken. There was no evidence why it was taken. The food stamps also could have been taken as a "token," or merely included in the general gathering of items before departing the scene. There only was evidence that property was taken. But that is not sufficient.

Respondent asserts there was no evidence Hardy intended to kill by rape (RB 172), apparently implying that this would be the way rape could be incidental to the killing. That is not the law. That is like saying robbery cannot be incidental to the killing unless the defendant robbed the victim to death. To illustrate, Hardy's case differs from *People v. Guerra* (2006) 37 Cal.4th 1067, 1133, where a rape-murder special circumstance was alleged. The rape in *Guerra*, was not merely incidental to the murder because there was evidence the defendant had desired to have sexual intercourse with the victim, attempted to kiss her, then entered her house without permission, and murdered her. No

similar evidence was presented here. In this context, *People v. Carpenter* (1997) 15 Cal.4th 312, 388, explained the rape-murder special circumstance requires the rape not be merely incidental to murder, but does not require the intent to kill arise after rape. Thus, where the defendant lay in wait intending to rape and then kill, both lying in wait and rape-murder special circumstances were established.

The fact that Sigler was alive during the rape and torture is unrelated to when the intent to kill arose. (Contra RB 172.) The deputy medical examiner testified Sigler was still alive when many of the injuries were inflicted. (10RT 1972.) However, he could not determine consciousness. (10RT 1073.) The nature of the injuries were such that death would have followed rapidly, within minutes. (10RT 1964.) Thus, the prosecution had to present evidence that either before, or during, the infliction of the mortal injuries, the independent felonious intent for the felonies existed. There simply was no such evidence.

In respondent's words it was reasonable for the jury to infer Hardy and his companions "were not sure what they wanted to do with [Sigler] when they passed her over the fence . . . ." (RB 171.)

That is because the prosecution presented no evidence to show independent felonious intent. If the intent was to murder Sigler from the time of the initial encounter when she yelled racial epithets, then there was no concurrent intent to commit the felonies. If there was an intent to commit murder, then the felonies were committed only as a part of the plan to commit a murder. The evidence presented made it very likely that Sigler's racial epithets so enraged the young black men that, as soon as the confrontation with shouting and pushing started, there was murderous intent. The other offenses followed and were incidental. Certainly, there was no evidence respondent can, or did, point to establishing a different scenario.

The initial confrontation between Sigler and the three men was hostile and violent. The confrontation included shouting, cursing, grabbing, pushing, biting, and slapping from the outset. Based on those facts and circumstances, it is reasonable the intent to kill arose at that time - - not later as the prosecutor argued. The kidnaping felony special circumstance allegation cannot be affirmed based on *People v. Brents* (2012) 53 Cal.4th 599. (Contra RB 171-174.) The defendant in *Brents* argued with a

woman over the proceeds from a drug sale. The defendant choked the victim then put her in the trunk of a car. He drove her 16 miles to a remote location where he poured gasoline on her and the vehicle, then set the woman and car on fire. She burned to death in the trunk. The jury found true the special circumstance allegation of torture and imposed the death penalty.

The defendant in *Brents* argued on appeal the torture special circumstance allegation had to be reversed because there was no evidence he had an independent felonious purpose for the kidnaping. The defendant argued the evidence established he intended to kill the victim from the time of the initial confrontation. This Court rejected the argument because the jury could have concluded the defendant was deciding whether to kill the victim during the 16 mile drive. (*People v. Brents, supra*, 53 Cal.4th at p. 610.) Hardy's case is distinguishable. While Sigler was moved, nothing made it more likely that she was moved for the sake of movement, rather than as a means to effect the killing. Unlike *Brent*, the actions here were one continuous course of events that did not include a pause to effect the separate act of kidnap. This movement was not a 16 mile drive, during

which there was no contact with the victim. There was time in *Brents* for the defendant to contemplate. He was not merely moving the victim nearby, yet out of sight, while the attack continued. Thus, *Brents* concluded the jury had to find only that the defendant had a concurrent intent to kidnap the victim in order to find true the kidnaping special circumstance allegation. (*Id.* at p. 610.) This Court concluded there was evidence of a concurrent intent because the defendant knew the victim had to have been in a state of terror while he drove around with her locked in the trunk. "The relevant inquiry is whether it would be irrational for a jury to conclude that defendant intended to kidnap [the victim] for some reason (such as to instill fear) that was in addition to and independent of his intent to murder her. [Citation.] Although the evidence of such a goal is far from overwhelming, it is sufficient to support the jury's verdict." (*Id.* at p. 611.)

The error was prejudicial and requires reversal. (Contra RB 175-176.) As explained in the opening brief (AOB 233-244), *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], does not require reversal of all six of the special

circumstance allegations to show prejudice. (Contra, RB 176.) For the sake of brevity, Hardy will not repeat the analysis and argument from his opening brief on this point. As *Brown v. Sanders* explained, "[i]f the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) That is the situation in the instant case.

For the reasons above and in the opening brief, the true findings on the special circumstances, and the judgment of death must be reversed.

VII

THE JUDGMENT OF GUILT TO COUNT 2, ROBBERY, SHOULD BE REVERSED, THE SPECIAL CIRCUMSTANCE FINDING OF A ROBBERY DURING THE COMMISSION OF A MURDER, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT HARDY TOOK THE VICTIM'S PROPERTY IN A ROBBERY, OR TOOK THE PROPERTY WHILE THE VICTIM WAS ALIVE.

The opening brief argued the conviction on count 2, and the true finding of the robbery special circumstance violate due process and must be reversed because: there was insufficient evidence: (1) Hardy, or anyone else, formed an intent to take Sigler's property before the use of force or fear; (2) the amount of force or fear used to take property was greater than that required merely to take the property; and (3) the taking of the food stamps or clothing occurred while Sigler was still conscious or alive. (AOB 245-255; *Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [61 L.Ed.2d 560, 99 S.Ct. 2781].) Respondent argued the issue was a "novel proposition regarding consciousness," and the only case cited involved a circumstances where there was no evidence

of force or fear. (RB 178, citing *People v. Russell* (1953) 118 Cal.App.2d 136, 138-139.)

There is nothing novel at all about the issue. It is the application of basic, well established principles of law to the evidence. Robbery requires the taking of property by force or fear. (Pen. Code, § 211.) The intent to rob must precede the application of force or fear, which must be to effect the robbery. (*People v. Frye* (1998) 18 Cal.4th 894, 956; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) The gravamen of robbery is the taking through force or fear, which a victim must be conscious or alive to apprehend.

The food stamps Sigler possessed on the night of her death were used at the Lorena Market. The owner of the market recognized Hardy, Armstrong, and possibly Pearson as market customers. (10RT 2044, 2046, 2049.) The booklet cover for the stamps was found at the crime scene a week after the killing. (10RT 2054.) Based on nothing but speculation, the prosecution spun a theory that the underlying intent of the confrontation with Sigler was to rob her. The evidence actually presented at trial was otherwise: the genesis of the encounter was a provocative

racial slurs by Sigler, which three young black males found impossible to ignore. There was nothing to suggest Hardy, or any one of his companions, left Gmur's home with a plan to rob anyone.

Respondent's reliance on *People v. DePriest* (2007) 42 Cal.4th 1, 47, is misplaced. (Contra RB 178.) In *DePriest*, there was evidence the defendant planned to travel to Missouri, and needed money and a means of transportation to do so. Based on the evidence showing the defendant's need for funds and transportation, and that he possessed the victim's car, keys, and credit card, this Court concluded "the jury could reasonably conclude that he accosted [the victim] intending to steal her purse and car, that such property was on her person or in her immediate presence at the time, and that he used lethal force to thwart her efforts to retain possession and control of it." (*Ibid.*) No similar evidence was presented in Hardy's case. There was no evidence of an imminent, pressing need for money. Indeed, the young men were headed home for the night at the time of the initial encounter. There was no evidence that Sigler apparently

had anything worth taking - - unlike the victim in *DePriest*, who carried a purse and had a car.

At bottom, the issue concerns when Hardy, Armstrong, or Pearson formed the intent to take Sigler's property. There was no substantial evidence in the record to establish when the intent was formed. Rather, the only evidence was that Sigler's property was, in the end, taken. Without any support in the evidence, respondent asserts that Sigler's plea for help at the end of her ordeal show "the food stamps were taken while [she] was conscious and resisting." (RB 179.) Not so. Respondent's inferences do not flow logically from one another.

The key failure in logic is that no piece of evidence points to, or suggests, when or why the food stamps were taken. There was no evidence about whether Sigler had lost then regained consciousness. (10RT 1972.) Her injuries were extensive, and certainly consistent with that possibility. More importantly, the injuries Sigler sustained at the end of the encounter were rapidly fatal. (10RT 1964.) The men were gathering lots of items as they departed the scene. It is very likely the dropped or discarded food stamp book was among the items gathered at that time. There is

simply no way to know, and no evidence to prove beyond a reasonable doubt that a robbery occurred.

For the reasons above and in the opening brief, the robbery conviction, and the true finding to the robbery special circumstance finding, should be reversed.

GUILT PHASE INSTRUCTION ISSUES

VIII

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF FELONY MURDER, WHICH IMPERMISSIBLY PERMITTED A GUILTY VERDICT BASED ON IMPROPER LEGAL THEORIES, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief explained the modified CALJIC instruction used to explain felony murder resulted in the jury reaching a guilty verdict under a theory of felony murder based on 42 *im*proper legal theories, and only seven legally proper theories. (AOB 256-270.) Because this Court cannot conclude beyond a reasonable doubt that the jury reached its first degree murder verdict based on a valid legal theory, reversal is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; see also

Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Respondent argued the issue was forfeited, CALJIC No. 8.21 was properly modified, and any legal issue erroneously instructed upon was determined adversely to Hardy. (RB 180-186.)

A. The Issue Was Not Forfeited.

The issue was not forfeited. (Contra, RB 182.) The opening brief argued the instruction was a misstatement of the law that impermissibly permitted jurors to find guilt based on multiple improper legal theories. (AOB 259-270.) Respondent attempts to recast the argument as one that merely attacks the clarity of the instruction used. (RB 182.) Not so. The instruction was an incorrect statement of law, and required no objection to preserve it for direct appeal. The issue presents a pure question of law. (*People v. Partida* (2005) 37 Cal4th 428, 435; *People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

The issue arose because the CALJIC pattern instruction apparently did not presuppose its use when multiple felonies were involved. When there is only one felony-murder felony, the instruction is proper. The jury is instructed to return a guilty

verdict on murder based on the felony murder rule, it must find the specific intent to commit the felony-murder, and that the murder occurred during commission of that felony. Thus, the basic CALJIC No. 8.21 was correct, but it was not correct as modified for Hardy's case because there were multiple felonies, any one of which the jury might have found was occurring when death occurred, and any *other* one of which the jury might have found Hardy had the specific intent to commit. Thus, it is not, as respondent claims, an issue involving clarifying, or improving upon, "an otherwise correct instruction . . . ." (Contra, RB 182, citing *People v. Lee* (2011) 51 Cal.4th 620, 638, and *People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Rather, the instruction was wrong because it permitted jurors to find Hardy guilty of murder based on 42 possible improper legal theories.

In any event, "[n]ot all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) Hardy's constitutional right to a jury trial is one of those "fundamental

constitutional rights." (*Id.* at pp. 276-77.) If Hardy had a guilty verdict returned against him based on erroneous instructions, then his "substantial rights" have been "affected." (See *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.) The trial court must instruct correctly on the law, and failure to do so is error. Thus, this Court has explained, "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

Penal Code section 1259 provides as follows:

> The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

This Court has applied section 1259 to review the correctness of jury instructions, despite the defendant's failure to make an objection in the trial court. (*People v. Cleveland* (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506.) Further, a defendant's claim that an instruction misstated the law or violated his right to due process "is not the

type [of error] that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; see also § 1259.)

The type of instructional error in Hardy's case is commonly reviewed despite the lack of objection. That is because instructional errors that affect the defendant's fundamental rights are reversible without objection at trial. (*People v. Dunkle* (2005) 36 Cal.4th 861 [no waiver due to lack of objection; Pen. Code, § 1259]; *People v. Prieto* (2003) 30 Cal. 4th 226, 247 [instructional errors reviewable without objection when defendant's substantial rights affected].)

People v. Smith (1992) 9 Cal.App.4th 196, 207, at footnote 20, explained, "the people make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request a modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. [Citations.] Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial

court's fundamental instructional duty." (In accord *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199-1201[failure to object to CALJIC No. 2.71 directing guilt phase jury to consider defendant's oral admission with caution did not preclude review on appeal to the extent the instruction affected the defendant's substantial rights].)

Here, the instruction affected Hardy's substantial rights because CALJIC No. 8.21 improperly allowed jurors to convict Hardy of murder if the killing occurred during one of the seven felonies, and Hardy had the specific intent to commit another, different one of the seven felonies. As *People v. Renteria* (2001) 93 Cal.App.4th 552, 560, explained, "An instruction, not correct in law, . . . is deemed excepted to, and in this case, it affected the substantial rights of the defendant. For that reason the failure to request the proper instruction containing the admonition does not bar defendant from asserting the point on appeal. [Citations.]"

Even without an objection, this Court has discretionary power to review the issue. The lack of objection below does not mean that an appellate court is precluded from considering the issue. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)

Reversible Error, 36, p. 497.) An appellate court is not prohibited from reaching a question that was not preserved for review by a party. Whether or not to do so is entrusted to the reviewing court's discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Here, the instruction incorrectly explained felony murder. The error in CALJIC No. 8.21 affected not only Hardy's substantial rights, but also the rights of other defendants who are similarly situated. This error is likely to reoccur since the challenged instruction is a widely used pattern instructions.

The purpose of the waiver or forfeiture doctrine is to encourage defendants to bring errors to the attention of the trial court so the matters can be developed and considered fully at trial. (See e.g., *People v. McClellan* (1993) 6 Cal.4th 367, 377.) Here, the question of whether CALJIC No. 8.21 properly explains the law in a case such as Hardy's presents a pure question of law that requires no factual development below. This Court can decide the issue just as readily as the trial court based on the existing record. Further, any such questions of law must be determined de novo by this Court in any event. (See e.g., *Salve Regina College v. Russell* (1991) 499 U.S. 225, 231 [111 S.Ct.

1217, 113 L.Ed.2d 190].) Instructional errors presents a question of law that is reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 588, 569.) The review involves no deference to the trial court. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.)

Finally, federal courts review claims of procedural default of a federal constitutional claim de novo. (See e.g., *Morales v. Calderon* (9th Cir. 1996) 85 F.3d 1387, 1389, fn. 6.) In doing so, a consideration to any claim of procedural waiver will assess whether the state procedural bar is applied consistently. (Cf., *Fields v. Calderon* (9th Cir. 1997) 125 F.3d 757, 761.) Appellate courts in California frequently reach the merits of whether an instruction provided jurors with a correct statement of California law regardless of whether the instruction was objected to below. As such, the inconsistent application of any procedural bar based on waiver makes such a bar inappropriate.

Based on the foregoing, this Court can and should review the issue.

B. The Modified Version of CALJIC No. 8.21 Impermissibly Permitted Jurors to Find Hardy Guilty of Murder Based on Several Improper Legal Theories.

For ease of reference, Hardy again includes the chart demonstrating the various possibilities of the combination of different intended felony-murder felonies (horizontal row) and felonies during which death occurred (vertical column). The chart shows how jurors could have found a special intent to commit one felony-murder felony, and also found death occurred during a different felony-murder felony.

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Specific intent→ **Death occurred during ↓**	Robbery Count 2	Kidnap for rape Count 3	Rape in concert Count 4	Rape Count 5	Penetrate w/object in concert Count 6	Penetrate w/object Count 7	Torture Count 8
Robbery Count 2	Proper	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**
Kidnap for rape Count 3	**Improper**	Proper	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**
Rape in concert Count 4	**Improper**	**Improper**	Proper	**Improper**	**Improper**	**Improper**	**Improper**
Rape Count 5	**Improper**	**Improper**	**Improper**	Proper	**Improper**	**Improper**	**Improper**
Penetrate w/object in concert Count 6	**Improper**	**Improper**	**Improper**	**Improper**	Proper	**Improper**	**Improper**
Penetrate w/object Count 7	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**	Proper	**Improper**
Torture Count 8	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**	**Improper**	Proper

Taking the robbery in count 2 as an example. Assume the prosecution theory was correct: Hardy, Armstrong, and Pearson intended to rob Sigler. Assume jurors found Hardy intended to rob Sigler. If jurors found Sigler died during the commission of the robbery, then a guilty verdict based on robbery-felony murder would be correct. But if jurors found Sigler died during the commission of any of the other felonies, which they almost certainly did, then the guilty verdict on felony murder is under an improper legal theory. This is represented in the "Robbery Count 2" column, which shows that only one of the possible seven permutations represents a correct theory of guilt for felony murder based on robbery.

The guilty verdicts on the non-murder counts do not demonstrate the issue was resolved adversely to Hardy. (Contra RB 184, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 721.) In reaching this conclusion, respondent's logic fails. Respondent's analysis omits the necessary steps to reach a guilty verdict based on felony murder. Respondent ignores that the specific intent for aider and abettor liability for the felony-murder-felonies differs

(counts 2 through 8) from the specific intent required for felony murder (count 1).

The "specific intent" mens rea for aider and abettor liability requires that the defendant must commit the act of aiding and abetting with the intent or purpose of achieving an additional consequence. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1128 [77 CR2d 428]; see also *United States v. Andrews* (9th Cir. 1996) 75 F.3d 552, 555 [aiding and abetting as "specific intent crime"].) The specific intent for counts 2 through 8, however, differed from the specific intent for count 1 under a felony murder theory. For the underlying felonies (counts 2 through 8), what was required was only that at some point Hardy: (1) knew the perpetrator intended to commit the crime, (2) intended, either before or during the crime, to aid and abet the commission, and (3) did, in fact, aid and abet. A conviction for felony murder, however, required more. It required the jury to find Hardy specifically intended to commit a felony-murder crime, and death occurred during *that* felony-murder crime.

As the chart, *ante*, demonstrates, the jury could have returned a guilty verdict under a felony murder theory based on

various improper theories. The record does not reveal the theory on which the jury found Hardy guilty of murder, and the instruction made it highly likely that the guilty verdict was based on an improper theory.

Finally, the evidence against Hardy came primarily from his statements to law enforcement. Those statements contained precious little detail. There was no definitive explanation of how many critical elements occurred, and no definitive explanation of Hardy's motives or intent. While defense counsel strategically selected to defend against the murder count, that was a choice implicitly made to avoid a death sentence. That choice does not detract from the point that there is a paucity of evidence on specific intent. Indeed, respondent did not cite to any evidence showing Hardy's specific intent when making this argument. (See RB 185.)

Based on the foregoing, and Appellant's Opening Brief, Hardy's conviction for murder and the judgment of death must be reversed.

IX

THE JUDGMENT OF DEATH, AND THE JUDGMENTS OF GUILT ON COUNTS 1 THROUGH 7, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF AIDING AND ABETTING LIABILITY, WHICH IMPERMISSIBLY PERMITTED GUILTY VERDICTS BASED ON IMPROPER LEGAL THEORIES, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

Hardy argued in the opening brief that, similar to Argument VIII, the court incorrectly instructed on aiding and abetting liability. The instruction grouped all seven offenses (counts 1 through 7) together thereby removing the required natural and probable consequence connection that is the foundation to criminal liability. The erroneous instruction permitted conviction without requiring a natural and probable consequence connection between the target offense and the non-target offense. (AOB 271-283.) Respondent argued the issue was

forfeited, and CALJIC No. 3.02 is a correct instruction. (RB 186-194.)

A. The Issue Was Not Forfeited.

The issue was not waived or forfeited. (Contra RB 189.) Hardy incorporates by this reference his argument and authorities from Argument VIII, *ante.*

B. The Instruction Misstated California Law on Aiding and Abetting Liability by Failing to Explain that the Natural and Probable Consequences Doctrine Requires a Nexus Between the Offense of Conviction, the Target and Non-target Offenses, and the Offenses Linked by a Natural and Probable Consequence.

Just as in Argument VIII, the basic pattern instruction is correct when used with a single target offense. It is the existence of seven target offenses, without appropriate revision to the general instruction when there is more than a single target offense, that is the source of the error. Thus, it is not whether CALJIC No. 3.02 usually states the law correctly. The question is whether the modified CALJIC No. 3.02 misstated the law. In Hardy's case, it did.

Proper instruction would have told jurors they could convict Hardy of murder upon finding he aided and abetted one of the six

crimes charged in counts 2 through 7, *and* that murder was a natural and probable consequence of the crime the jurors found Hardy actually had aided and abetted. Another proper approach would have been to require the jury to find preliminarily, under the evidence of the case, which of counts 2 through 7 gave rise to murder as a natural and probable consequence. Then as a next step, jurors would have to decide whether Hardy aided and abetted any one of those crimes. In either of these proposed instructions, the crime Hardy aided and abetted would have been linked inseparably with the crime that had murder as its natural and probable consequence. The instruction the trial court used, however, impermissibly permitted the two (the crime aided and abetted, on the one hand, and the crime having murder as its natural and probable consequence, on the other hand) to be different.

The error in the instruction was prejudicial here because there was so little evidence about the sequence of the offenses and the intent of the perpetrators. The prosecution had theories - - that the initial intent was to rob, or that Sigler was killed so she could not bear witness. But these theories were based on

speculation. The faulty instruction diluted the nexus requirement between the target and non-target offenses.

Based on the foregoing, reversal of counts 1 through 7 and the judgment of death is required.

X

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE VERDICT FORM, COMBINED WITH THE JURY INSTRUCTIONS, INCORRECTLY PERMITTED THE JURY TO FIND HARDY GUILTY OF FIRST DEGREE MURDER BASED ON A LEGAL THEORY THAT SUPPORTS ONLY SECOND DEGREE MURDER, AND RESULTED IN A WRITTEN VERDICT FORM THAT FAILS TO REFLECT THE FINDINGS OF FACT REQUIRED FOR FIRST DEGREE MURDER, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief explained that the verdict form used for count 1 combined both guilt for the count with a finding for special circumstances. As a result, the form permitted jurors to return a guilty verdict for the murder based on an invalid legal theory, that is, if jurors found only that Hardy acted "in reckless disregard for human life." (AOB 284-301.) Respondent argued the issue was forfeited, the court's instructions were proper, the

verdict form was proper, and there was no prejudice. (RB 195-204.)

A. The Issue Was Not Forfeited.

The issue was not forfeited. (Contra RB 198.) Respondent relies on *People v. Houston* (2012) 54 Cal.4th 1186, 1126-1128, for the assertion that Hardy forfeited the issue. In *Houston*, however, the record revealed the trial court had twice inquired of counsel whether there was a problem with either the instructions or the verdict forms. There were specific discussions about the instructions and verdict forms. (*Id.* at p. 1227.) Respondent could not, and did not, cite to similar discussions below. Moreover, the issue in *Houston* was the omission in the indictment of an allegation that the attempted murders were deliberate and premeditated. (*Id.* at p. 1226.)

People v. Webster (1991) 54 Cal. 3d 411, 447, explained: "technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice." (See also, *United States v. O'Looney* (9th Cir. 1976) 544 F.2d 385, 392, fn. 5, cert. denied, 429 U.S. 1023 [97 S.Ct. 642,

50 L.Ed.2d 625] [considering issue despite defense counsel's express agreement to altered verdict form challenged on appeal].) This Court has recognized the relationship between correct instruction and proper verdict forms. "Any failure to provide a form, if error it is, results in no prejudice when the jury has been properly instructed on the legal issue the trial presented." (*People v. Osband* (1996) 13 Cal.4th 622, 689-690.) Hardy has identified instructional errors relating to count 1, the verdict form for which is at issue here. (See Arguments VIII, IX, XI, and XII.) Thus, this case does not present the situation where instructions were perfect, and the verdict forms less than perfect. Rather, it is a situation where the verdict that represents the judgment of the jury on first degree murder count, on its face, might rest on an improper theory that supports only second degree murder.

B. The Verdict Form, for Which the Trial Court Gave No Clarifying Jury Instructions, Resulted in a Guilty Verdict on Count 1 That Likely Rests on an Invalid Legal Theory.

Penal Code section 1162 requires that the intention to convict the defendant of the crime charged be "unmistakably expressed." (See also, *People v. Tilley* (1901) 135 Cal. 61, 62 ; *United States v. Reed* (9th Cir. 1998) 147 F.3d 1178.) The Ninth

Circuit expressed concern that a verdict form like the one used here could pressure the jury to convict. (*United States v. O'Looney, supra,* 544 F.2d at p. 392.) The Court of Appeals explained: "To ask the jury special questions might be said to infringe on its powers to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court. Moreover, any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case." (*Ibid.*)

The situation presented in Hardy's case was more egregious than in *O'Looney*, which was a conspiracy case where two objects of the conspiracy were charged. The jury was told it did not have to agree on the unlawful object of the conspiracy, and both appeared on the verdict form separated by "or." (*United States v. O'Looney, supra,* 544 F.2d at p. 391.) Jurors were confused by this form. Both attorneys agreed to new verdict forms that allowed the jury to find the defendant guilty or not guilty of

conspiracy for each of the two separate objects charged. (*Id.* at pp. 391-392.) Thus, the verdict forms at issue on appeal were specifically altered per the agreement of both counsel. That did not happen in Hardy's case. The Ninth Circuit noted the judge did not impose the verdict forms, and the defendant did not object. (*Id.* at p. 393.)

Hardy disagrees with respondent's assertion that *People v. Pearson, supra,* 56 Cal.4th 306, 322, "specifically approved the [same] verdict form" as respondent claims. (See RB 201.) Apparently the same verdict form was used in Pearson's trial, However, Pearson did not challenge the use of that verdict form on appeal, and this Court did not consider or decide its propriety. This Court discussed the verdict form only in the context of Pearson's challenge to the inclusion of torture in the list of felonies included in a felony murder special circumstance. (*People v. Pearson, supra,* 56 Cal.4th at p. 322.)

The parties also disagree about which side is piece-mealing together a strained and illogical reading. (See RB 200.) On its face, the verdict form represents a purported guilty verdict for first degree murder based on a theory of murder that supports

only second degree murder. The form plainly states the jury found Hardy guilty as "An Aider and Abettor and had the intent to kill; **or** was **a Major Participant and acted with reckless indifference to human life.**" (3CT 597 [emphasis added].) Thus, the jury could have handed up its guilty verdict on first degree murder because jurors found beyond a reasonable doubt that Hardy was "a major participant [who] acted with reckless indifference to human life." But that does not a first degree murder make.

Respondent takes the position there were clarifying instructions, but points only to portions of CALJIC No. 8.80.1. (RB 201-202.) The opening brief explained how the instructions as a whole led to confusion, not clarification, especially in combination with the verdict form. (AOB 289-293.) Hardy will not repeat that analysis herein for the sake of brevity, except to clarify a point respondent misunderstands or mis-characterizes. In a footnote, respondent states Hardy conceded the jury decided murder before making a finding on the special circumstance. (RB 204, fn. 58.) That is not the issue. The issue is the verdict form incorrectly makes it appear that the mental state of reckless

indifference to life was an element of murder, not just of the felony-based special circumstances. It is one thing for respondent's experienced counsel to sift through the vast number of instructions and tease out portions of instructions that represent proper theories. A layperson, however, would also have looked to the verdict form, and doing so undoubtedly would have thought reckless indifference was an element of murder, that is, a way to return a guilty verdict.

The United States Supreme Court noted, "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." (*Boyde v. California* (1990) 494 U.S. 370, 380-381 [108 L.Ed.2d 316; 110 S.Ct. 1190] [discussing instructional error].) The instructions in Hardy's case would have been difficult for lay jurors to sort through and understand. In contrast, the verdict form was quite straightforward - - apparently setting out the nature and elements of possible guilt for first degree murder. Thus, the generally correct standards in the instructions, that respondent relies upon, were inadequate to dispel the specific (and erroneous)

concept contained in the verdict form. (Cf., *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823-824.)

The verdict form, and lack of clarifying instruction, deprived Hardy of his constitutional rights to a jury determination of the facts, and to proof beyond a reasonable doubt on all elements. (*Ring v. Arizona* (2002) 536 U.S. 584, 536 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Jackson v. Virginia, supra*, 443 U.S. at pp. 314-315.) Accordingly, the judgment of guilt on count 1 and the judgment of death should be reversed.

XI

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT TO COUNTS 1 AND 8, AND THE TRUE FINDINGS ON THE TORTURE ALLEGATIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT AIDING AND ABETTING LIABILITY AND TORTURE REQUIRED SPECIFIC, NOT GENERAL INTENT, AND THEREFORE THE INSTRUCTIONS IMPERMISSIBLY PERMITTED GUILTY VERDICTS WITHOUT A JURY FINDING THAT HARDY HAD THE REQUISITE SPECIFIC INTENT, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST EX POST FACTO AND THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief argued that the trial court erred by omitting the offense of torture, the torture allegations, and aiding and abetting from the instruction explaining specific intent and identifying what "crime[s] [and] [allegation[s]]" required specific intent, and the error required reversal of counts 1 and 8, and the torture allegation findings. (AOB 302-315.) Respondent agrees

that both murder by aiding and abetting and torture require specific intent. Respondent also acknowledges the trial court failed to include: (1) aiding and abetting murder, or (2) the torture count, allegations or circumstances in the instruction on specific intent that purportedly identified all specific intent crimes. (RB 205.) Respondent nonetheless argues the issue was forfeited, and a properly instructed jury found specific intent based on the instructions. (RB 208-210.) Hardy disagrees.

A. The Issue Was Not Forfeited.

The issue was not forfeited. The instructions given were incorrect, not, as respondent claims, correct in law, but perhaps unclear. Hardy incorporates the arguments and authorities demonstrating there was no forfeiture from Argument VIII, Section A, *ante.*

B. Respondent Ignores the Difference Between An Aider and Abettor and a Principal, and The Jury's Finding that Hardy was Guilty of Murder as an Aider and Abettor.

Respondent ignores the jury's verdict expressly finding Hardy guilty of murder as "An Aider and Abettor . . . ." (3CT 597.) The verdict form speaks for itself: jurors found Hardy aided and abetted murder, and importantly rejected that he was the

"Actual Killer." (3CT 597.) Thus, his criminal liability rests on a type of vicarious or derivative liability - - not because he personally committed the act. *People v. McCoy* (2001) 25 Cal.4th 1111, 1122, explained that the guilt of an aider and abettor is based on the combination of the perpetrator's acts, and the aider and abettor's own acts and mental state.

Penal Code section 31, upon which CALJIC No. 3.00 is based, defines the classification of parties to a crime: principals and accessories. This classification under the Code is essentially for purposes of punishment as demonstrated by section 33, setting forth the general rule for punishment of accessories. Penal Code sections 31 and 32 do not proscribe distinct crimes, but rather define theories of legal complicity. The statute intended to apply criminal liability as a principal to those who were not direct perpetrators. (Cf., *People v. Morante* (1999) 20 Cal.4th 403, 433.) As case authorities make clear, there remains a distinction between the perpetrator, commonly thought of as a principal, and an aider and abettor. This is why the two can be punished differently for the same offense. (See e.g., *People v. McCoy, supra,* 25 Cal.4th at pp. 1120-1122 [aider and abettor may

be guilty of greater offense than perpetrator]; see also *People v. Nero* (2010) 181 Cal.App.4th 504, 513 [aider and abettor may be guilty of lesser offense than perpetrator].)

The instruction failed to include aider and abettor liability for murder and torture as crimes requiring specific intent. It "is not simply a game of musical chairs--and courts must take care to give appropriate jury instructions and to correlate those instructions to the evidence presented . . . ." (Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of An Offense": A Critique of Federal Aiding and Abetting Principles* (Autumn 2005) 57 S.C.L.Rev. 85, 87 [discussing 18 U.S. Code, § 2.)

The verdict form reflects specifically the jury's unanimous finding of the theory of guilt for murder, which was aiding and abetting. Thus, we must look to whether jurors understood that aiding and abetting required specific intent, and what specific intent meant. CALJIC No. 3.31 was supposed to define for jurors what was meant by the "concurrence of act and specific intent." (See 2CT 539.) In doing so, the modified instruction listed eight different allegations that required specific intent: murder,

robbery, kidnap for rape (each of which was listed twice: once by count number and once by crime), and five special allegations under Penal Code section 667.61. (2CT 539.) Torture was listed erroneously among the crimes requiring only general intent. (2CT 538; CALJIC No. 3.30.)

C. Aiding and Abetting Murder (or Any Other Crime) and Torture Require Specific Intent, But The Instruction Failed to Include Those Among the List of Offense/Allegations/Circumstances Requiring Specific Intent.

The place where jurors were most likely to look for the crimes or allegations that require specific intent was in the instruction on specific intent. That is common sense and that is also the law. Thus, an instruction on a correct standard will not cure an erroneous exception presented to the jury. (*Gibson v. Ortiz* (9th Cir. 2004) 387 F3d 812, 823-824.) The United States Supreme Court, explained that, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Francis v. Franklin* (1985) 471 U.S. 307, 322 [85 L.Ed.2d 344; 105 S.Ct.

1965].) This Court has no way of knowing which conflicting instruction jurors followed: the one on specific intent that eliminated torture and aiding and abetting murder, or other instructions.

CALJIC No. 3.31 was modified in a way that was clearly intended to include each and every crime or allegation that required specific intent. Specifically, CALJIC No. 3.31 identified the crimes and allegations requiring "a union or joint operation of act or conduct and a certain specific intent . . . ." (2CT 539.) Hardy quoted the instruction used in full and verbatim in his opening brief (AOB 309-310; see also RB 208 [same]), and will not do so herein for the sake of brevity. Instead, Hardy emphasizes that nowhere in this list appeared the crime or allegation of torture, or aiding and abetting. Rather, the list was limited to "namely murder, robbery, or kidnap for rape, and the special allegations . . . ." (2CT 539.)

Because specific intent was an element required to find aiding and abetting liability or torture, the instructions erroneously omitted specific intent by failing to include aiding and abetting or torture in the modification to CALJIC No. 3.31.

Conflicting instructions or instructions that misdescribe an element of an offense are harmless "only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record." (*People v. Mayfield* (1997) 14 Cal.4th 668, 774 [citations, quotations omitted]; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1013.)

The jury received numerous instructions on specific intent as the parties have cited. (AOB 307-312; RB 207-213.) Respondent's reliance on other instructions that appeared to require specific intent, when CALJIC No. 3.31 did not, is misplaced. Jurors are presumed to follow the court's instructions (*People v. Hardy* (1992) 2 Cal.4th 86), but when instructions conflict it cannot be known which instruction jurors relied upon. It is "'equally likely that . . . the verdict rested on an unconstitutional ground' as on a constitutional one." (*Gibson v. Ortiz, supra,* 387 F3d at p. 825, quoting *Boyde v. California, supra,*494 U.S. at p. 380.)

Based on the foregoing, the judgment of guilt on counts 1 and 8, the true findings on the torture allegations to counts 1, and 4 through 7, and the judgment of death should be reversed.

XII

THE JUDGMENT OF DEATH AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY IMPROPERLY ON FELONY MURDER THAT INCLUDED TORTURE, MURDER BY TORTURE, TORTURE AS A SPECIAL CIRCUMSTANCE, AND TORTURE, BASED ON CHANGES IN THE LAW THAT HAD NOT BEEN PASSED AT THE TIME OF THE OFFENSES. THE INSTRUCTION IMPERMISSIBLY PERMITTED A GUILTY VERDICT BASED ON AN IMPROPER LEGAL THEORY, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST EX POST FACTO AND THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief argued the trial court erred by instructing on a theory of felony murder that included torture when torture (Pen. Code, § 206) was not added to Penal Code section 189 until 1999, after the date the charged offenses were committed. (AOB 316-323.) Respondent acknowledged the

instruction was erroneous, but argues the error was harmless. (RB 215-217.)

The error was prejudicial. The prosecution argued four theories of murder: deliberate and premeditated, felony murder, torture murder, and aiding and abetting. (See e.g., 11RT 2355-2358, 2365 [prosecutor's closing argument].) The court instructed on all four theories, including the erroneous instruction on torture murder. (2CT 551 [CALJIC No. 8.24 (torture murder)].) The prosecutor expressly argued torture murder as a method of finding Hardy guilty of murder. (11RT 2365-2366.)

Even without the prosecutor's express direction to the jury to use torture murder as a method to convict, the case was replete with the concept of torture. The jury received multiple instructions on torture, including: (1) torture as the felony for felony murder; (2) murder by torture; (3) torture as the felony to find aider and abettor liability; (4) torture as a special circumstance; (5) torture as an enhancement to counts 4 through 7; and (6) the crime of torture in count 8. The violence of the crimes resonated with the concept of torture. The instructional

error had the effect in multiple contexts of lowering the prosecution's burden of proof. While torture was not the only theory argued by the prosecution, it was the likely choice jurors would make in view of the way torture dominated the evidence. Even when the prosecutor was not using the word "torture," the thrust of her argument was based on torture. For example, in final summation, the prosecutor argued Sigler had died in the most brutal way. The prosecutor directed the jury's attention to the 114 injuries inflicted, specifying that 94 were external and 20 were internal. (11RT 2416.) The prosecutor stressed it was an horrific assault before death and unconsciousness. (11RT 2416.)

It also was clear from one of the jury's questions that jurors also focused on torture during their deliberations. The jury noted the crimes described in CALJIC No. 3.02 (3CT 590) did not include torture. Inconsistently, the instruction referred to counts 1 through 8, which included count 8, torture in violation of Penal Code section 206. The jury asked whether torture should be included. (3CT 590.) The court responded in the negative. (See 3CT 590.)

The erroneous instruction on murder by torture interfered with the jury's ability to resolve Hardy's criminal liability. The jury was provided with an easy, albeit incorrect, legal road to find Hardy guilty of murder. The erroneous instruction improperly reduced the prosecution's burden of proof and denied Hardy due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const, Art, I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372, cert. den. (1988) 488 U.S. 974 [102 L.Ed.2d 548, 109 S.Ct. 513]; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-779; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-1202.)

Based on the foregoing, the guilty verdict on count 1, and the judgment of death, must be reversed.

XIII

THE JUDGMENT OF GUILT TO COUNT 2, ROBBERY, THE SPECIAL CIRCUMSTANCE FINDING OF THE COMMISSION OF ROBBERY DURING A MURDER, THE FIRST-DEGREE MURDER CONVICTION, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF THEFT, IN VIOLATION OF: (1) HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) HARDY'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

The opening brief argued that, because theft is a lesser included offense of robbery (*People v. Valdez* (2004) 32 Cal.4th 73, 110), and the evidence supported theft, the trial court erred by failing to instruct on theft as a lesser offense to count 2 and the robbery special circumstance. (AOB 324-351.) Respondent argued the defense invited any error, the omitted instruction was inconsistent with the defense theory, and "the most reasonable inference from the evidence" supported only robbery. (RB 217-225.) Hardy disagrees.

A. The Invited Error Doctrine Does Not Apply.

The error was not invited. (Contra RB 220.) The invited error doctrine is based on the premise that an appellate claim is barred when the trial court has given an erroneous instruction at the insistence of defense counsel. (*People v. Hernandez* (1988) 47 Cal.3d 315, 353.) The general rule is that "[e]rror is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness. [Citation.]" (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1031.) The mere failure to request an instruction is not invited error. (*People v. Wickersham* (1982) 32 Cal.3d 307, 333, cited with approval in *People v. McKinnon* (2011) 52 Cal.4th 610, 675.) This Court has explained that invited error applies only where "the trial court accedes to the defendant's wishes . . . ." (*People v. Barton* (1995) 12 Cal.4th 186, 198.)

Invited error "*will only be found if counsel expresses a deliberate tactical purpose* in resisting or acceding to the complained-of instruction. [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 115 [italics added].) Indeed, in *Valdez*, this Court indicated invited error does not apply even when defense counsel

makes a statement indicating a tactical purpose, but the statement is ambiguous. In *Valdez*, defense counsel told the court he "did 'not want to request any lessers.'" (*Id.*, at p. 115.) On appeal, the defendant argued the trial court erred by failing to instruct on a lesser included offense (of second degree murder). This Court declined to find invited error because the record was "ambiguous" as to whether counsel was referring to all lesser offenses or only voluntary and involuntary manslaughter. (*Id.*, at pp. 115-116.) As in *Valdez*, defense counsel's general statement, that he was not asking for any instructions on lesser included offenses for tactical reasons, was ambiguous, and did not trigger the application of the invited error doctrine. (Cf., *People v. Stitely, supra,* 35 Cal.4th at p. 553 fn. 19 ["the court's decision to withhold CALJIC 10.65 with respect to the felony-murder-rape theory was not induced by defendant, but by the court's unwavering belief that the instruction lacked evidentiary support"].)

Whether or not the instruction on the lesser included offense was consistent with the defense theory, it was required sua sponte. (Contra, RB 222-224.) This Court held that *People v.*

Sedeno (2974) 10 Cal.3d 703, requires instruction on a lesser included offenses supported by the evidence, even when the offenses are inconsistent with the defense elected by the defendant, and even if the defendant objects to the instruction. (*People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7; see also, *People v. Eilers* (1991) 231 CA3d 288, 294, fn 4.) However, when a trial court erroneously sustains a defense objection to instruction on a lesser included offense, then the error is invited. (*People v. Horning* (2004) 34 Cal.4th 871, 905-906; see also *Beck v. Alabama* (1980) 447 U.S. 625 [65 L.Ed.2d 392; 100 S.Ct. 2382] [defendant may forego instruction for strategic reasons].) As discussed above, however, the reasons for a strategic decision to forego instruction on a lesser included offense must be unambiguous. A general comment, such as defense counsel made here, will not suffice.

B. The Trial Court Committed Error by Failing to Instruct the Jury on Theft as a Lesser Included Offense to Robbery.

The crux of the issue is evidence about the timing of the intent to take, that is, permanently to deprive Sigler of her property. The prosecution presented no evidence whatsoever on

this. Instead, the prosecution posited that Hardy and his companions intended to rob Sigler from the outset of the encounter. That was a theory, surely, but there was no evidence of that. It was equally likely the men intended to assault Sigler in retaliation for her racial slurs. Or maybe the men intended to rape her. Evidence of the events that night, and the order they occurred, came from one source: Hardy. Despite three separate statements to detectives over a lengthy evening of interrogation, Hardy made not a single reference to Sigler's food stamps, any plan or intent to rob her, or the actual taking. The taking of the food stamps was an afterthought.

Penal Code section 487, subdivision (c), defines the crime of grand theft from the person. It is a lesser included offense of robbery. Penal Code section 642 defines the crime of grand or petty theft from a dead body. It is not a lesser included offense of robbery. (*People v. Yeoman* (2003) 31 Cal.4th 93, 129.) *People v. Green* (1980) 27 Cal.3d 1, explained the circumstances under which the taking of property from an unconscious or dead person constitutes grand theft rather than robbery:

> Defendant first posits the rule that a conviction of robbery cannot be sustained in the absence of evidence that the accused conceived his intent to steal either *before* committing the act of force against the victim (and the intent remained operative until the time of the taking) or *during* the commission of that act; if the intent arose only *after* he used force against the victim - i.e., for a nonlarcenous purpose - the taking will at most constitute a theft. The latter scenario will occur, for example, when an individual kills or renders another unconscious for reasons wholly unrelated to larceny - e.g., because of anger, fear, jealousy, or revenge - and then, seeing that his victim has been rendered defenseless, decides to take advantage of the situation by appropriating some item of value from his person.

(*People v. Green, supra*, 27 Cal.3d at p. 53.)

Green further explained, "If the victim is alive at the time of the taking, that offense will be grand theft from the person (§487, subd. (2)); if he is not, it will be grand or petty theft from a dead body (§642). The defendant will also be guilty, of course, of any crime constituted by the act of force itself, e.g., assault, battery, or homicide." (*People v. Green, supra*, 27 Cal.3d at p. 53, fn. 42.)

Under *People v. Green*, Hardy was guilty of grand theft from the person if he and his companions assaulted Sigler for

reasons unrelated to the desire to obtain her property, and then took her property after she had been rendered unconscious, but before she died. The trial court was required to give jury instructions on all lesser included offenses raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Instructions on lesser included offenses should be given "when the evidence raises a question of as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (*Id.* at pp. 154-155.) Substantial evidence to support an instruction on a lesser included offense exists when a jury composed of reasonable persons could conclude the lesser offense, but not the greater, was committed. (*Id.* at p. 162.)

A reasonable jury could have concluded Hardy and his companions assaulted Sigler for all sorts of reasons unrelated to any desire to take her property, and that they took her property after she had been rendered unconscious but before she died. Djabourian testified Sigler's injuries would have been rapidly fatal, however, he could not identify any point or points in time when she lost consciousness. (10RT 1972-1973, 1976.) Certainly,

with the extent of the injuries sustained, it was a reasonable inference Sigler lapsed in and out of consciousness, or lapsed into unconsciousness before dying. Thus, there was one or more periods of time when Sigler was unconscious and alive. Her property likely was taken from her during one of those periods.

Respondent's reliance on *People v. Whalen* (2013) 56 Cal.4th 1, is misplaced. (Contra RB 220-224.) *Whalen* did not consider a "highly analogous" situation at all. In *Whalen*, there was substantial evidence the defendant pointed a gun at the still-living (and conscious) victim, demanding to know the location of his wallet. (The defendant certainly would not have made this demand of an unconscious person.) The defendant then ordered the victim to be tied up, and directed others to carry personal property, such as, a microwave, typewriter, stereo, etc., from the house into a car readied for that purpose. (*Id.* at p. 69.) All the while, the victim was still alive. (*Ibid.*) This Court considered the evidence supporting robbery while the victim was still alive and conscious. Thus, this Court concluded "there was no substantial evidence from which the jury reasonably could have concluded that the taking . . . was anything less than a robbery,"

or "from which the jury could have ascribed responsibility for the robbery solely to [others]." (*Ibid.*) There was no such similar evidence about the robbery in Hardy's case. The only evidence was: Sigler possessed the food stamp booklet shortly before she was attacked, and coupons from the booklet were used within a few days later at the Lorena Market, which Hardy and Armstrong (and possibly Pearson) frequented. (10RT 2046-2047.)

Respondent's claim that Sigler's property was "unquestionably removed while [she] was conscious and violently resisting" is not supported by the evidence. (Contra RB 221.) Since there was no evidence of when any one of the three men took the food stamp booklet, it is just as likely Sigler dropped it while fleeing. Also, respondent ignores the high probability that Sigler did not remain continuously conscious throughout the ordeal.

Whether instructing on the lesser included offense of theft would have been inconsistent with Hardy's defense is of no legal consequence. (Contra RB 222-223.) The sua sponte duty to instruct on lesser included offenses exists "even in the absence of a request" or "over any party's objection." (*People v. Lewis* (2001)

25 Cal.4th 610, 645; see also *People v. Anderson* (2006) 141 Cal.App.4th 430, 442, citing *People v. Birks* (1998) 19 Cal.4th 108, 112). "[N]either the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*People v. Barton, supra*, 12 Cal.4th 186, 196.) "Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged." (*Ibid.*)

Finally, respondent failed to respond to the opening brief's argument that case authorities allowing refusal of instructions on theft as a lesser offense to robbery as the predicate crime to felony murder or the special circumstance are unconstitutional.

A contention in appellant's brief uncontradicted by respondent amounts to a concession that appellant's statement is correct. (*Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal. 2d 502, 504; *Blanton v. Curry* (1942) 20 Cal.2d 793, 810.) The state's failure to respond to an argument raised by appellant is an apparent concession of the point. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

Based on the foregoing, the trial court erred by failing to instruct the jury on the lesser included offense of theft. The error was prejudicial requiring reversal of the judgment of guilt to count 2, and the special circumstance finding of a robbery during the commission of a murder and felony-murder. This modification of the judgment also requires reversal of the judgment of death.

XIV

REVERSAL ON COUNT 1, AND THE JUDGMENT OF DEATH, IS REQUIRED BECAUSE THE INSTRUCTIONS GIVEN BY THE TRIAL COURT MISSTATED THE LAW, BY FAILING TO INSTRUCT THE PROSECUTION HAD TO PROVE BEYOND A REASONABLE DOUBT THE ABSENCE OF UNREASONABLE HEAT OF PASSION OR PROVOCATION THAT RENDERED HARDY UNABLE TO DELIBERATE AND PREMEDITATE, AND THEREBY VIOLATED HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, AND RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION.

The opening brief argued that, because Sigler made racial slurs to Hardy and his companions, including the words "fuck you," and "nigger," there was subjective provocation, and jurors were not adequately instructed on such provocation. (AOB 352-374.) Respondent argued the issue: (1) was forfeited; (2) was contrary to *People v. Rogers* (2006) 39 Cal.4th 826, 878; (3) was not prejudicial because of the application of the felony murder doctrine; and (4) that Hardy's defense at trial was not the he acted under heat of passion but that his participation in the

crimes was minimal and under the direction of co-defendant Pearson. (RB 225-230; see also Pen. Code, § 189)

The issue was not forfeited for the reasons set forth in Argument VIII, *ante*, and incorporated by this reference.

Regarding respondent's second argument, the general instruction on deliberate and premeditated murder discussed heat of passion generally at the end of its fourth of seven paragraphs. (2CT 548; CALJIC No. 8.20.) CALIJIC No. 8.20 did not discuss provocation anywhere.

While attorneys and jurists may equate "heat of passion" with "provocation," lay jurors would not. That is why there are separate pattern instructions that address provocation: CALJIC Nos. 8.42 and 8.73, neither of which was given in this case. The former discusses a "sudden quarrel or heat of passion" that may reduce murder to manslaughter. (CALJIC No. 8.42.)

CALJIC No. 8.73 discusses provocation. CALJIC 8.73, which explains provocation in the context of murder, expressly permits jurors to consider both adequate and inadequate provocation. For example, even when the provocation was not sufficient to reduce the homicide to manslaughter, the instruction

instructs jurors they "should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." (CALJIC No. 8.73.)

Even assuming jurors somehow would have understood heat of passion related to provocation, Hardy was not required to rely on the juror's referencing to another instruction (CALJIC No. 8.20) to explain provocation. (Contra RB 225-227 [essentially arguing CALJIC No. 8.20 was adequate].) "Each party has an absolute right to instruction based on its own theory of the case if there is any evidence to support it. [Citations.]" (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607; see also *Logacz v. Brea Community Hospital, et al.* (1999) 71 Cal.App.4th 1149.)

Mullaney v. Wilbur (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 44 L.Ed.2d 508], considered the former Maine statute that required a defendant prove he acted in the heat of passion on sudden provocation to reduce homicide to manslaughter. *Mullaney* noted, "the presence or absence of the heat of passion on sudden provocation - has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful

homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact." (*Id.* at p. 696.) The State of Maine made an argument similar to respondent's here, that "as a formal matter the absence of the heat of passion on sudden provocation is not a 'fact necessary to constitute the crime' of felonious homicide in Maine." (*Id.* at p. 697.) The Court rejected this position under *In re Winship* (1970) 397 U.S. 358 [90 S.CT. 1068, 25 L.ED. 2d 368].

Mullaney explained that the principles of *Winship* are not "limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." (*Mullaney v. Wilbur, supr,* 421 U.S. at p. 698.) The same is true here. There was evidence of provocation of the most offensive and inflammatory nature. (See AOB 352, 360-363 [discussing case authorities on racial provocation].)

That the gist of Hardy's primary defense was to show he was a minor participant in the crimes did not obviate the need for instruction on provocation. (Contra RB 228.) For example, a defendant even has a right to instruction on defenses that are downright inconsistent with one another. (*Mathews v. United States* (1988) 485 U.S. 58, 63-64 [108 S. Ct. 883, 99 L.Ed.2d 54]; *People v. Randle* (2005) 35 Cal.4th 987, 1004.) Here, provocation was not inconsistent at all with Hardy's defense. And the jury was not limited to selecting only a theory advanced by Hardy or the prosecutor.

Finally, respondent argues that, because of the felony murder doctrine and the jury's true findings on intent required for robbery, kidnapping for rape and torture, the jury rejected provocation. (RB 228-230.) Hardy disagrees. The jury was never instructed to decide, and therefore did not consider or decide provocation. The jury was instructed on both willful, deliberate and premeditated murder and felony murder, with no requirement that they find guilt unanimously under either theory. The felony murder instructions did not require an intent to kill. Those instructions presented the factual issue to the jury

of whether Sigler was killed during the commission of specific felonies. The felony murder instructions did not require the jury to resolve whether Sigler was killed because of provocation. The instruction on first degree murder presented the factual question whether the killing was an intentional, premeditated, deliberate killing. Hence, the factual issue of whether Sigler was killed as the result of provocation, was neither addressed by other instructions, nor decided by the jury.[18] Moreover, it cannot be determined from the verdict whether particular jurors found Hardy guilty under one theory of murder or the other.

Based on the foregoing, the failure of the trial court to instruct the prosecution had to prove the absence of provocation when there was substantial evidence of provocation, requires reversal of count 1 and the judgment of death.

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[18] The provocation at issue here is Sigler's use of racial epithets, including the word "niggers," at the outset of her interaction with Hardy and his companions while Sigler was still across the street from the men. It was *not,* as respondent appears to suggest her cursing or whatever names she might have called the men that occurred during the attack. (See RB 229.)

XV

THE JUDGMENT OF DEATH, THE SPECIAL CIRCUMSTANCES FINDING THAT HARDY COMMITTED MURDER IN THE COMMISSION OF A KIDNAPPING AND A KIDNAPPING FOR RAPE, THE SECTION 667.61, SUBDIVISION (D) KIDNAPPING ALLEGATIONS TO COUNTS 4, 5, 6 AND 7, AND THE JUDGMENT OF GUILT ON COUNT 3, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

As to this issue, Hardy will rely on the arguments, authorities, and discussion in Argument XV Appellant's Opening Brief. (AOB 375-393.)

XVI

THE JUDGMENT OF DEATH, THE SPECIAL CIRCUMSTANCE FINDING THAT HARDY COMMITTED MURDER IN THE COMMISSION OF RAPE WITH A FOREIGN OBJECT, AND THE JUDGMENTS OF GUILT ON ALL COUNTS SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPERMISSIBLY FAVORED THE PROSECUTION BY INSTRUCTING 35 TIMES USING THE PROSECUTION'S UNDULY PREJUDICIAL CHARACTERIZATION OF THE FOREIGN OBJECT, IN VIOLATION OF HARDY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTION, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION.

The opening brief argued error occurred when the instructions referred 35 times to the weapon as a "stake" when the evidence was the weapon was a stick, and the information described the weapon as a "stake/stick." The word stake was highly inflammatory, not supported by the evidence, and favored the prosecution by creating an unfair advantage. (AOB 393-402.) Respondent argued the claim was forfeited, lacks merit, and that

the word "stake" accurately described "objects holding up the black screening material" in the crime scene area. (RB 241-243.)

The issue was not forfeited for the reasons set forth in Argument VIII, *ante*, and incorporated by this reference.

As explained in the opening brief, the wooden weapon was never found. There were only two sources of evidence about the wooden weapon: (1) Hardy's statements, and (2) the medical examiner's report. Hardy repeatedly used only one word to describe the weapon: "stick." He never called the weapon a stake. (See e.g., 10RT 2148-2151, 2189-2191.) The deputy medical examiner described the victim's injuries as being consistent with the use of a *stick*, and testified a wood splinter was removed from the victim internally. (10RT 1949, 1951-1952, 1954-1955, 1974-1975.) Thus, respondent's description of stakes in the area used to hold up screening is interesting, and it may be tempting to speculate the stick was one of those stakes. But there was no evidence of that, and speculation is not evidence. (See e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 735.)

The fact that there were stakes around did not make the weapon used a stake. There likely were other items that also

could have been deadly weapons, but there was no evidence any of those items was used either. All the Caltrans employee's testimony showed was that stakes were in the surrounding area. The concept of a stake as a weapon is more inflammatory and shocking than the use of a stick. Children use sticks when they fight. Stakes conjure more horror. Criminals and suspected witches once were burned at the stake (http://en.wikipedia.org/wiki/Death_by_burning), folklore and horror movies required staking a vampire to destroy it (http://en.wikipedia.org/wiki/Vampire).

Wardius v. Oregon (1973) 412 U.S. 470, 473 fn. 6 [37 L.Ed.2d 82; 93 S.Ct. 2208], recognized that the gravamen of due process "speak[s] to the balance of forces between the accused and his accuser." (*Ibid.* [discussing reciprocal discovery].) Thus, "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-27]; in accord, *Reagan v. United States* (1895) 157 U.S. 301, 310 [39 L.Ed. 709, 15 S.Ct. 610] [discussing instruction warning jurors to weigh "the deep personal interest" the defendant had in the case when he testified]; *People v.*

Santana (2000) 80 Cal.App.4th 1194, 1208-1209 ["the cavalier manner in which relevant jury instructions were deleted because they assertedly would only confuse the jury, reveals the extent to which the trial court had aligned itself with the prosecution . . . ."].)

The instructions repeatedly referred to the weapon as a stake throughout the numerous instructions.[19] Obviously, the CALJIC instructions do not contain the work "stake," so each time it was included in the instruction, a pattern instruction had to modified. Reference to a stake was not a generic factor, but rather it was averred to have been a specific piece of evidence. (Compare, *People v. Daniels* (1991) 52 Cal.3d 815, 870 [proper pinpoint instruction should focus on theory of case, not specific evidence]; *People v. Battle* (2011) 198 Cal.App.4th 50, 85 [instruction is proper when it invites the jury's attention to "generic" matters disclosed by the evidence; compare *People v. Mouton* (1993) 15 Cal.App.4th 1313 (Op. of Werdegar, J.) [criticizing including aiding and abetting factors in the

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[19] The opening brief set forth the specifics of the 35 instances the instructions used the word "stake." (AOB 396.)

instruction that *People v. Lucas* (1997) 55 Cal.App.4th 721, 736, later described as "bogus factors"].) Moreover, the question of the weapon used was a question of fact, not one of law. This Court long ago held, that "[a]n instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue." (*People v. McNamara* (1892) 94 Cal. 509, 513.)

The multiple references to a stake in the instructions implicitly told jurors the prosecution had proved the weapon was a stake, and it was similar to the stakes the prosecutor introduced into evidence. (10 RT 1027-1028; Exhibits 3A, 3B, 3C [looked like stakes, or broken stakes found at/near crime scene].) An improperly argumentative instruction is one "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 486.) That is because an instruction should not be "'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.] " (*People v. Lewis* (2001) 26 Cal.4th 334, 380.) A proper instruction should not recite facts or

inferences drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.) That is what these instructions did when repeatedly referring to the weapon as a stake.

Based on the foregoing, the convictions and the judgment of death should be reversed.

PENALTY PHASE

XVII

THE JUDGEMENT OF DEATH SHOULD BE REVERSED BECAUSE, OVER DEFENSE OBJECTION, THE TRIAL COURT ADMITTED IRRELEVANT NON-STATUTORY EVIDENCE IN AGGRAVATION, AND THEREBY VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A REASONABLE DETERMINATION OF PENALTY.

Over defense objection, the prosecution during its penalty phase rebuttal introduced evidence that, on the night of the murder, Hardy participated in "jumping in" a gang member and had a verbal argument about gangs while riding the bus. Hardy argued this evidence was improper, irrelevant, non-statutory aggravation, and improper rebuttal. (AOB 403-422.) Respondent argued the evidence was properly admitted, and not prejudicial. (RB 244-258.)

The evidence was neither proper rebuttal, nor was it statutorily permitted penalty phase evidence in its own right. The prosecution did not introduce the evidence of Hardy's participation in a "jumping in," and a gang argument on a bus in its case-in-chief, because even the prosecutor realized that

neither was admissible evidenced under Penal Code section 198.3, factors (a), (b), or (c). The prosecutor expressly acknowledged it would have been "misconduct" to present this evidence in her case-in-chief, and also "would have been grounds, probably, for a mistrial." (13RT 2893 [quoted in full at AOB 408-409.) Rather, the prosecutor hunted for an excuse, however speculative, to introduce the evidence in so-called rebuttal of Hardy's defense case during the penalty phase.

Respondent's argument that evidence was proper under Penal Code section 198.3, factor (b), is not only even more speculative, but also wrong. (Contra RB 251-258.) As this Court explained, "evidence admitted under [Penal Code section 198.3, factor (b)] must establish that *the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime.* [Citations.]" (*People v. Moore* (2011) 51 Cal.4th 1104, 1135 [italics added].) While the conduct may be either a felony or a misdemeanor, it must be an actual crime. (*People v. Phillips* (1985) 41 Cal.3d 29, 71.) Neither Hardy's participation in initiating a gang member, nor his arguing over the bus fare and rival gangs, was a crime.

The evidence of the gang jumping in did not include evidence that Hardy had been violent in any way, or that the initiate had been harmed. The expert testified that a jumping in usually involved a brief beating. (14RT 3084.) However, there were exceptions, for example, when the initiate was escorted. Thus, the inference from the evidence was that Hardy and his companion went with the initiate, which meant he was escorted and not beaten at all. In any event, there was no evidence whatsoever the initiate was beaten. Gmur saw the initiate immediately after he was jumped in, and he showed no signs of any injury. (13RT 3043.) Respondent strains to shoehorn something that may or may not have been a brief, ceremonial, and consensual, roughing up of an initiate to the brotherhood of the Capone Thug Soldiers into a crime of violence. Even the prosecutor rejected this approach, by acknowledging that it would have been misconduct for her to present the evidence in her case-in-chief. (13RT 2892-2893.) This Court should do the same.

Hardy's conduct on the bus involved disputing the fare demanded by the driver and arguing with either his companions, or, a fourth male, about gangs. (13RT 2049, 3051, 3053, 3056.) It

is not yet a crime, let alone a crime of violence, to question a bus fare or engage in a verbal argument. The conduct was not criminal within the meaning of Penal Code section 198.3, factor (b), or *People v. Phillips, supra,* 41 Cal.3d 29.

The evidence the prosecution introduced in rebuttal was also improper rebuttal. As the trial court concluded, Hardy had not presented evidence he had good character that would warrant the prosecutor's proposed rebuttal. (13RT 2887-2888 [court asked prosecutor, "What does it rebut?" noting Hardy had not "presented a picture of a wholesome, loving individual"].) Thus, respondent's comparison to the situation in *People v. Fierro* (1991) 1 Cal.4th 173, is wrong. (Contra, RB 256.) Rather than presenting evidence of Hardy's good character, the gist of the defense evidence portrayed Hardy as a long-troubled youth, who suffered disorders and a violent family life . (See AOB 49-69.) Admittedly, the evidence included some of Hardy's life events, all of which were not negative, such as, his fathering and testifying for the prosecution in a gang case. In no way, however, could the defense evidence have been interpreted as presenting a picture of

Hardy as a good guy. So rebuttal evidence that amounted to nothing more than his being a bad guy, was improper.

Unlike *Fierro*, where the defense evidence during the penalty phase conspicuously omitted the defendant's gang participation, Hardy's evidence referred to his gang activities multiple times. For example, Hardy's mother testified he became involved with gang members when he was 13 years old. (13RT 2795, 2804.) The mother of Hardy's children testified Hardy was involved with a gang, and had a gang moniker. (13RT 2844.) The prosecutor who testified about Hardy's cooperation in a gang prosecution also testified Hardy was a Bloods gang member. (13RT 2741.) There was nothing to rebut by presenting *additional* evidence Hardy was involved in gang activities. It was nothing more than an attempt to portray Hardy as the very worst of the worst in jurors minds, so they would vote for the death sentence. "A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3" (*People v. Jones* (2003) 29 Cal.4th 1229, 1265), but that is precisely what the prosecutor did.

The prosecutor and respondent argued the jumping-in episode tended to rebut other evidence that Hardy was a follower because Hardy told Pearson to ask Gmur to let them jump Chris into the gang in Gmur's music room. Afterward Hardy called someone to tell them that Chris had become a member of the gang. Nothing in the episode suggested anything beyond the three men trying to decide which one would ask Gmur, and nothing suggested whether Hardy made the telephone call because he was the leader, because one of the others ordered him to, or because they drew straws for the job. Respondent then engages in another strained parsing of the record to make yet another argument never advanced by the prosecutor: that the jumping in and the argument on the bus were relevant as circumstances of the crime because both episodes showed them ganging up in "a three-to-one scenario" on another person. (RB 257.) Whatever the doubtful merits of this theory as an argument for relevance of the incidents in the prosecution's case-in-chief, it has nothing to do with whether the evidence was proper rebuttal.

The evidence was prejudicial in two significant ways. (Contra, RB 258.) First, it impermissibly suggested Hardy had a

significant role in the gang in initiating new members: identifying, approving or recommending, and hazing them. Thus, he must have been a leader of sorts, despite his small physical stature compared to his companions, his low mental abilities, and his lifelong trait of being a follower. The prosecutor's overarching theory why Hardy deserved the death penalty was because he was the leader of the group that night. She argued, "He is the leader," and that Hardy "was the leader in this case." (14RT 3144, 3146.) The theory was unrealistic in view of the objective evidence. Second, it impermissibly connected Hardy to a violent street gang by suggesting the gang was a fundamental part of his life. The suggestion was he was a hardcore gang member since he had engaged in quasi-gang related activity immediately before and after the offenses that night.

In sum, the improperly admitted gang evidence, supposedly admitted as rebuttal, was prejudicial, and the death penalty should be reversed.

XVIII

THE JUDGEMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT PRECLUDED CROSS-EXAMINATION OF A PROSECUTION WITNESS CONCERNING A PRIOR INCIDENT DURING WHICH HARDY'S SON SUFFERED A STABBING INJURY. THE ERROR DENIED HARDY THE RIGHT TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL, AND THEREBY VIOLATED HARDY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT WITNESSES, PRESENT EVIDENCE, DUE PROCESS, A FAIR TRIAL, AND A REASONABLE DETERMINATION OF PENALTY.

The opening brief challenged the trial court's preclusion of defense cross-examination of a prosecution witness in aggravation. The police officer witness testified to an incident about two years earlier when Hardy's son was injured by a stab wound to his leg. Law enforcement suspected at the time of the incident that Hardy had intentionally stabbed his son. Hardy gave conflicting accounts to police officers at the scene. Certainly, the incident appeared on its face to be aggravating. The trouble with the evidence was that Hardy's five-year old son told nurses at the hospital where his wound was treated that he had felt the pain in his leg as he climbed up on Hardy and wrapped his legs

around him - - an account consistent with both the physical evidence and an accidental wound.

Defense counsel sought to cross-examine the witness, one of the officers who responded to Hardy's 911 call, and one who later investigated the incident, to show that no charges were filed against Hardy and his son was not removed from the home. (See 12RT 2629-2630.) Respondent argued the evidence of the outcome of the investigation was irrelevant, the issue was not preserved, and Hardy was not prejudiced by the exclusion. (RB 261-266.)

The police officer witness presented half the picture or less: merely the initial investigation, but not the results of the investigation. As Justice Scalia wrote, the goal of the Confrontation Clause is to test evidence "by testing in the crucible of cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 61 [124 S.Ct. 1354, 158 L.Ed.2d 177].)

This evidence was prejudicial to Hardy because it portrayed him as a child abuser despite defense evidence to the contrary, and despite an absence of evidence to prove the assertion. Yes, Hardy's son suffered a stabbing injury. There was no evidence

Hardy intentionally and unlawfully inflicted the injury. Yet, that is what jurors would have believed from the state of the evidence. The mother of Hardy's children testified he was a loving and devoted father - -not only to the children they had together, but also to her two children by a different father. (13RT 2821.) Hardy's son maintained his injury was accidental. (12RT 2923-2824.) The son's account never varied. (12RT 2923-2824.)

Finally, the issue was not waived or forfeited. (Contra, RB 261-262.) While relying on Evidence Code section 354, respondent failed to quote the section in its entirety, thereby omitting the very exceptions to the general rule that apply in the instant case. Section 354 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was *made known to the court by the questions asked*, an offer of proof, or by any other means;

> (b) The rulings of the court made compliance with subdivision (a) futile; or
>
> (c) *The evidence was sought by questions asked during cross-examination or recross-examination.*

(Evid. Code, § 354 [italics added].)

Thus, under subdivision (a): "A formal offer of proof is necessary only when the question to which the objection has been sustained does not disclose what the scope of the inquiry would have been had counsel been permitted to pursue it . . . ." (21 Ca. Jur. Criminal Law: Trial § 413.) Under subdivision (c), no offer of proof is necessary as a prerequisite to raising on appeal the prejudice resulting from ruling out a pertinent question asked on cross-examination or re-cross-examination. Both exceptions applied in this instance.

Based on the foregoing, the judgment of death should be reversed.

XIX

THE PROSECUTOR'S USE OF DIFFERENT AND WHOLLY INCONSISTENT THEORIES AT THE PENALTY PHASES OF THE SEPARATE TRIALS OF HARDY AND HIS SEVERED CO-DEFENDANT KEVIN PEARSON VIOLATED HARDY'S TRIAL AND DUE PROCESS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ALSO RESULTED IN A VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRING VACATION OF THE DEATH PENALTY SENTENCE.

The opening brief argued the prosecutor used inconsistent theories of leadership in the trials of Hardy and Pearson, and thereby impermissibly exaggerated Hardy's role in the offenses to persuade the jury to select the death penalty. (AOB 432-460.) Respondent argued the prosecution theories were not inconsistent, and the claim is not properly before this Court. (RB 267-271.)

On June 24, 2013, after the filing of Appellant's Opening Brief, Hardy filed a request for judicial notice of certain portions of the reporter's transcript from Pearson's trial. Respondent opposed the request on July 3, 2013. Hardy filed a reply to respondent's opposition on July 15, 2013. (http://appellatecases.

courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1845100&doc_no=S113421.) This Court's ruling on the still-pending request will inform, if not outright determine, whether the issue is properly before the Court.

The prosecution's theories of the level of culpability warranting a death sentence were, on their face, inconsistent. (Contra RB 268-269.) Respondent essentially advances the position that the first-tried defendant can never be a victim of an inconsistent prosecution theory. Appellant's Opening Brief discussed two United States Supreme Court opinions concerning first-tried defendants raising the issue of inconsistent prosecution theories, and one Unites States Supreme Court matter involving a first-tried defendant with this issue. (AOB 442, 455-458 [discussing *Bradshaw v. Stumpf* (2005) 545 U.S. 175 [135 S.Ct. 2398, 162 L.Ed.2d 143]; *Calderon v. Thompson* (1998) 523 U.S. 538, 550 [118 S.Ct. 1489, 140 L.Ed.2d 728]; *Jacobs v. Scott* (1995) 513 U.S. 1067 [115 S.Ct. 711, 130 L.Ed 2d 618]].) Respondent declined to discuss either *Bradshaw v. Stumpf*, or *Calderon v. Thompson*. Respondent also declined to discuss the fact that this

Court's decision in *In re Sakarias* (2005) 35 Cal.4th 140, preceded *Bradshaw v. Stumpf*.

Respondent speculates that the prosecutor may have relied on evidence discovered between Hardy's and Pearson's trials in making her argument regarding Pearson's role. This seems unlikely, given that the trials were back-to-back, and is belied by the record in any event. The prosecutor's argument in Pearson's trial references no evidence not presented at Hardy's trial.

Respondent then engages in a strained argument that Hardy and Pearson may have been leaders at different points of the confrontation. Again, the record of the prosecutor's argument in Pearson's trial shows this was not what the prosecutor argued.

Finally, respondent argues that any error as to Hardy must be harmless because Armstrong, who the prosecutor did not claim to be the leader, was nevertheless sentenced to death. This ignores the fact that the evidence presented at Armstrong's trial, as to guilt and aggravation and mitigation of penalty, was inevitably different from the evidence presented at Hardy's trial. The two outcomes cannot be compared merely based on the charges. (See *People v. Dyer* (1988) 45 Cal.3d 26, 70 ["the fact

that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury."].)

In all other respects, Hardy will rely on the arguments, authorities, and discussion in Argument XIX Appellant's Opening Brief. (AOB 432-460.) The inconsistent prosecution theories for culpability based on a theoretical leadership role requires reversal of the judgment of death.

XX

THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL AND WARRANTS REVERSAL OF HARDY'S DEATH SENTENCE.

As to this issue, Hardy relies on the arguments, authorities, and discussion in Argument XX Appellant's Opening Brief. (AOB 461-463.)

XXII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS.

As to this issue, Hardy relies on the arguments, authorities, and discussion in Argument XXII[20] Appellant's Opening Brief. (AOB 464-492.)

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[20] Appellant's Opening Brief identified the issue as Argument XXII in error. The issue is the twenty-first and last issue in Appellant's Opening Brief.

XXIII

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT AN AIDER AND ABETTOR CAN BE GUILTY OF FIRST DEGREE PREMEDITATED MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, WHICH IMPERMISSIBLY AND UNCONSTITUTIONALLY PERMITTED A GUILTY VERDICT BASED ON AN IMPROPER LEGAL THEORY.

The supplemental opening brief argued reversal was required based on *People v. Chiu* (2014) 59 Cal.4th 155, 158-159, which held "an aider and abetter may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (Supp. AOB 3-15.) Respondent conceded the instructions Hardy's jury received on this point were incorrect (Supp. RB 5-6), but argued Hardy cannot demonstrate prejudice from the erroneous instruction, and is not entitled to relief. (Supp. RB 1-7.)

After *Chiu*, a jury can find that murder, but not first degree premeditated murder, is a natural and probable consequence of another crime the defendant aided and abetted. (*People v. Chiu,*

supra, 59 Cal.4th 155.) "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless it can be concluded beyond a reasonable doubt the verdict was based on a valid ground. (*People v. Chiu, supra*, 59 Cal.4th at p. 167; *People v. Chun* (2009) 45 Cal.4th 1172, 1201-1205.) In *Chiu*, the Court found no such valid ground. (*People v. Chiu, supra*, 59 Cal.4th at p. 168.) There is none in Hardy's case.

Respondent puts the cart before the horse when arguing the true findings on the special circumstances demonstrate the jury had a valid legal theory for handing up a guilty verdict on first degree murder. (Contra Supp. RB 6.) That is because the jury had to have first returned a guilty verdict on count 1 before considering the special circumstances at all. The instructions told the jury, "If you find [the] defendant guilty of murder of the first degree, you must then determine . . . the following special circumstances . . . ." (2CT 553.) Thus, the jury first found Hardy guilty of count 1, and could have done so for felony murder or wilful, deliberate and premeditated murder based on aider and abettor liability - under the natural and probable consequences

doctrine. Only then - - after reaching a guilty verdict on murder - - did the jury consider and decide the special circumstances.

Respondent also ignores that the jury could have found, and most likely did find, the special circumstances true also based on aider and abettor liability under the natural and probable consequences doctrine. That is because in the aiding and abetting instruction, which included the instruction on the natural and probable cause doctrine, the jury was told it could convict Hardy of any of the offenses charged in counts 1 through 7. (2CT 543-544.[21]) Counts 2 through 7 included the special circumstances offenses. While *Chiu* does not extend directly to the offenses charged in counts 2 through 7, those offenses (in the guise of special circumstances) cannot be used to bootstrap a valid theory for first degree murder when those convictions likewise might be based on aider and abettor liability under the natural and probable consequences doctrine. Indeed, the fourth paragraph of CALJIC No. 8.80 instructed jurors they could find

[21] The initial instruction included count 8, torture, which the court corrected in response to a jury question. (3CT 590.)

the special circumstances true based on aider and abettor liability:

> If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or **[an aider and abettor]** [or] [co-conspirator],] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill **[aided,] [abetted,]** [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [**aided,] [abetted**,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object (a wooden stake) or torture pursuant to (Penal Code, § 190.2(a)(17) which resulted in the death of a human being, namely Penny Keptra also known as Penny Sigler.

(2CT 553-554 [emphases added].)

Moreover the special circumstances instructions also told the jury it could find the special circumstances true if the jury found:

> The murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, or rape by a foreign object (a wooden stake).

(2CT 555; CALJIC No. 8.81.17.)

"Accomplice" was not defined in the instructions, although the pattern instructions provide a definition in CALJIC No. 3.10.[22] However, the everyday meaning of "accomplice" likely was known to jurors as something like, "a person who works with or helps someone who is doing something wrong or illegal." (http://www. merriam-webster.com/dictionary/accomplice.) In other words, jurors would have equated an accomplice with an aider and abettor, and under CALJIC No. 8.81.17 and found the special circumstances true based on aider and abettor liability under the natural and probable consequences doctrine.

None of the special circumstances: robbery, kidnap, kidnapping for rape, rape or rape by a foreign object included as

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[22] The instruction provides: "An accomplice is a person who [is] [was] subject to prosecution for the identical offense charged [in Count[s]] against the defendant on trial by reason of [aiding and abetting] [or] [being a member of a criminal conspiracy]." (CALJIC No. 3.02.)

an element an intent to kill. Thus, the jury was not required to find an intent to kill in order to find the special circumstances true. Paragraph three of CALJIC No. 8.80.1, told the jury:

> Unless an intent to kill is an element of a special circumstance, if] [If] you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

(2CT 553.)

What the foregoing discussion demonstrates is that the jury could have found Hardy guilty of count 1 based on aider and abettor liability under the natural and probable consequences doctrine, which *Chiu* prohibits, and thereafter found the special circumstances true also based on the vicarious liability. That is why respondent's analysis fails. Nothing in the special circumstances true findings cures the error identified in *Chiu*.

Like the defendant in *Chiu*, the prosecutor at Hardy's trial specifically argued he was guilty of first degree murder based on multiple theories, including aider and abettor liability. (11RT 2355-2358, 2365; compare *People v. Chiu, supra*, 59 Cal.4th at p. 170 (conc. & dis. opn. of Kennard, J.).) In closing argument, the

prosecutor argued there were two types of aider and abettor liability that applied: to the special circumstances, and to all the charged crimes. (11RT 2353.) The prosecutor told jurors there were two kinds of liability to each of the charged offenses, and the prosecutor listed each offense: murder, robbery, kidnap for rape, rape, rape in concert, penetration with foreign object in concert, penetration with a foreign object, and torture. The prosecutor explained that principals included: those who directly or actively commit the crime or anyone who aids and abets in the commission. (11RT 2354.) She went on to define the elements of aiding and abetting. (11RT 2355.)

The prosecutor argued expressly that an aider and abettor is responsible for all crimes of a principal and also those crimes that are the natural and probable consequences of the crimes aided and abetted. (11RT 2356.) The prosecutor later focused on the murder charge, and told jurors they did not have to agree on the theory of murder. (11RT 2363.) She argued some jurors could find it was deliberate, premeditated murder. Others could find it was felony murder. And others also could find Hardy aided and abetted the murder. (11RT 2363-2364.) She again

discussed aider and abettor liability for murder. (11RT 2365.) So while one of the prosecution's theories was that Hardy was the instigator, the prosecutor made sure to argue liability for the murder as an aider and abettor, and specifically discussed the natural and probable consequences doctrine when doing so.

Further, like *Chiu*, Hardy's record reveals that the jurors focused on aider and abettor liability. Not only did the jury verdict form reflect this focus, but also one of the few questions the jury posed in the case concerned the aiding and abetting instruction. The detail of the jury's question suggests the jury was very focused on aider and abettor liability. That is because the jury caught an error in the instruction that neither party, nor the court, had discovered. The jury asked about "instruction 3.02," referring to CALJIC No. 3.02. (3CT 590.) The jury noted the crimes described did not include torture, but the reference was to counts 1 through 8, and count 8 was torture. The jury wanted to know whether torture was included, and the court responded in the negative. (See 3CT 590.)

Chiu is an ameliorative decision preventing the conviction of individuals not shown to have intended to kill—or even to have

realized that murder might result from the target crimes they intended to aid and abet—from being convicted of one of the most serious crimes recognized by the law. Thus, it must be seen as "vindicating a right which is essential to a reliable determination of whether an accused should suffer a penal sanction." (*People v. Guerra* (1984) 37 Cal.3d 385, 411 [discussing full retroactivity of such decisions].)

Based on the foregoing, Hardy's conviction for murder and the judgment of death must be reversed.

CONCLUSION

Based on the foregoing, and on the arguments and authorities in the Appellant's Opening and Supplemental Opening Briefs, Hardy was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The foregoing errors deprived Hardy of his right to a meaningful determination of guilt and a reliable determination of penalty. Accordingly, the judgment of guilt must be reversed. Alternatively, the judgment of death must be vacated.

Respectfully submitted,

DATED: November 18, 2014

/s/_____
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c:\Hardy\hardy.ARB

CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO RULE 8.360(B)(1), CALIFORNIA RULES OF COURT

I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.630(b), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X6. The word count for the brief is 35,615, including footnotes, but not including the cover or tables. Because the brief does not comply with the rule, which limits the word count to 102,000, appellant previously filed a motion seeking leave to file an oversized brief, which this Court granted on April 30, 2013. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: November 18, 2014

/s/_____
SUSAN K. SHALER

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action. My business address is: Susan K. Shaler Professional Law Corporation, 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075.

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