IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| Plaintiff and Respondent, | ) | No. S026408 |
| v. | ) | |
| FRANKLIN LYNCH, | ) | Alameda County Superior Court No. H-10662 |
| Defendant and Appellant, | ) | |



Appeal from the Judgement of the
Superior Court of the State of California
for the County of Alameda

The Honorable Philip V. Sarkisian, Judge Presiding

# APPELLANT'S REPLY BRIEF

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**STATUTES**



**JURY INSTRUCTIONS**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **PEOPLE OF THE STATE OF CALIFORNIA,** | ) | |
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| **Plaintiff and Respondent,** | ) | **No. S026408** |
| | ) | |
| **v.** | ) | |
| | ) | **Alameda County** |
| **FRANKLIN LYNCH,** | ) | **Superior Court** |
| | ) | **No. H-10662** |
| **Defendant and Appellant,** | ) | |
| | ) | |

## INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented.

## I.

## APPELLANT'S *FARETTA*[1] MOTION WAS FILED IN GOOD FAITH, WELL BEFORE TRIAL AND NOT FOR PURPOSES OF DELAY. IN DENYING THE MOTION, THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR.

### A. Introduction

Respondent makes little attempt to defend the trial court's several rulings that appellant's *Faretta* motion was *untimely*, and in failing to address the timeliness of the motion, has apparently conceded this point. Since the original motion was filed five to ten weeks before the date on which the trial was expected to begin,[2] and since appellant was never asking for a continuance, one would be hard-pressed to show the motion was untimely. Given that a *Faretta* request *must be granted* if it is "timely, not for the purposes of delay, unequivocal, and knowing and intelligent," (*United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167), respondent now takes a different position – one not originally advanced by the trial court – that the motion was denied *not just* for being untimely but, more importantly, because appellant filed it for purposes of delay. (RB 34.)

However, when the trial court first ruled on appellant's motion on October 7, 1991, Judge DeLucchi made no suggestion whatsoever that

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[1] *Faretta v. California* (1975) 422 U.S. 806.

[2] Timeliness is judged by what the trial court knew at the time it ruled on the motion, not by what subsequently took place. (*People v. Moore* (1988) 47 Cal.3d 63, 80.) Since no trial date was set at the time either of appellant's *Faretta* motions was filed, and since two different judges ruled on the motion at different times, there are several ways to calculate the timeliness issue. (See discussion, pages 9-11, *infra*). However, even using the most conservative approach, appellant's *Faretta* motion was filed five weeks before the anticipated, or most likely, trial date.

appellant's motion was dilatory or made for purposes of delay. In fact, Judge DeLucchi stated twice that he was denying the motion simply because, in his view, it had not been timely filed ("[T]his motion is *not timely* made. . . . "[I]t's the Court's feeling it's *not timely* made" [RT 10/7/91:25, emphasis added].) It was only after appellant refused to give up, and filed his motion again two weeks later, that Judge DeLucchi called the *second* motion a "dilatory" one. (Sealed RT 10/17/91:43.) Even at that, Judge DeLucchi stated *five more times* that both motions (the first one of September 27 and the second one of October 16) were denied because they were untimely.[3] Later, when Judge Sarkisian ruled, he said the same thing.[4]

Nevertheless, because respondent has tossed out this "red herring" of purposeful delay, a careful review of the pretrial proceedings is needed to refute this claim. (*People v. Marshall* (1997) 15 Cal.4th 1, 14-27 [de novo review of the entire record is appropriate].) This review will show that appellant had nothing to do with the four-year delay in bringing his case to trial. Rather, the busy trial schedules of the lawyers on both sides of this case caused appellant's case to be put on back burner. As other cases were being prepared and tried, appellant's case was neglected for a full two and

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[3] "I denied it at that time on the grounds it *wasn't timely* made. . . . [S]ince I ruled the other one was *not timely* filed, since this one is even later in time, I'm also going to deny that motion, Mr. Lynch, as *not being timely* made" (RT 10/17/91:43, emphasis added); "[Y]our motion wasn't speedy, *wasn't timely* made" (Sealed RT 10/17/91:69, emphasis added); "[I]t's *not timely* made." (*Id.* at p. 70, emphasis added.)

[4] Although Judge Sarkisian's ruling referred to the motion's *potential* for delay and appellant's "proclivity to substitute counsel" (1RT 8-9), a statement for which there was no basis (see pages 30-31, *infra*), the denial of the *Faretta* motion was ultimately denied simply because it was untimely.

one-half years.

Ironically, it was appellant's own frustration with this unconscionably long delay that led him to finally file a *Marsden* motion, and then eventually, the *Faretta* motion. At the time each motion was filed, no trial date was set. In fact, the trial court had been unwilling to set a firm date because of its own busy calendar. It was only after appellant withdrew his time waiver, demanded a speedy trial, and asked for self-representation that things began to move forward. Appellant had good reason to be exasperated when the prosecutor turned these facts upside down and accused appellant of "cruel . . . dilatory tactics" simply because he had filed a *Faretta* motion.

While this is only a brief overview of the events leading up to the denial of the *Faretta* motion, the more detailed history, documented below, will expose just how far respondent has distorted the record. Respondent's claim of "purposeful delay" has been cobbled together by twisting the facts, quoting out of context, and then blurring the law. However, the record shows that appellant did all he could reasonably, or fairly, be expected to do to exercise his right of self-representation. His request, therefore, should have been granted.

### B. The Attorneys' Caseload and The Trial Court's Crowded Calendar Caused The Long Delays Which Prompted Appellant To File The *Faretta* Motion. Nothing Suggests Appellant Had A Purpose To Delay The Trial.

Appellant was arrested in October of 1987, and was not arraigned until a year later, in October of 1988. None of this delay was caused by

appellant.[5] For the next two and one-half years following his arraignment, virtually nothing happened in appellant's case, either in terms of court activity,[6] or contact with defense counsel, Michael Ciraolo. Appellant had not even seen his attorney throughout all of 1990 and half of 1991.[7] At the one hearing which did take place, in November of 1989, the prosecutor opposed a defense motion for a conditional exam, specifically because no trial date was yet in sight. The prosecutor predicted that neither he nor Mr. Ciraolo would have any time for appellant's case for more than another year, well into 1991:

> MR. ANDERSON [the prosecutor]: The reason why I can state that . . . is that *I am going to trial on that January 24 [1990] date with Mr. Mike Ciraolo* . . . and the jury selection alone. . . is going to take probably six to seven months. . . . The trial in [appellant's case] will not commence, to my best belief, until sometime in early 1991.

(RT 11/7/89:7, emphasis added.) And so it was. Neither side had any time to handle appellant's case. As a result, the trial court granted one long

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[5] The preliminary hearing proceedings stopped and started for nearly a year, finally concluding in August of 1988. (CT Volumes 2-12.) The arraignment was delayed another two months, until October 26, 1988 (CT 2965), while the court-appointed attorney program evaluated the proposed fee arrangement. (RT 10/20/88; RT 10/26/88.)

[6] See RT's for 1/31/89 [continuing case until June, 1989]; 6/14/89 [continuing case until September, 1989]; 9/20/89 [discussing scheduling and continuing case]; 9/28/89 [continuing case until January, 1990]; 1/24/90 [continuing case until December, 1990].

[7]Mr. Ciraolo told the trial court that he had visited appellant only three times since the arraignment in 1988, and all three times were in 1989 (January, April and November of 1989). (Sealed RT 8/1/91:14.) Thus Mr. Ciraolo had no personal contact with appellant during all of 1990 and at least half of 1991, while Mr. Ciraolo worked on other cases. (*Id.* at p. 13.)

continuance after another, for over two years. (See fn. 6, *supra.*)

While the court and the prosecutor may have been genuinely concerned about the advanced ages of some of the witnesses in this case,[8] those concerns were obviously set aside during these years, while other cases were given priority. Appellant's counsel, Michael Ciraolo, had been juggling three capital cases, including appellant's, and was also involved in a 16-month capital trial that lasted until the spring of 1991. Mr. Ciraolo took full responsibility for being unavailable on appellant's case. (Sealed RT 8/1/91:13.) All of these delays may have been perfectly understandable, and perhaps even unavoidable, but one thing is certain: appellant caused none of them. In fact, it was *precisely* this lengthy dormant period that prompted appellant to file the *Marsden* motion on June 10, 1991.

A review of that written *Marsden* motion (Sealed CT 11876-11881) reveals appellant's serious disillusionment with the progress of his case. Along with other complaints, appellant was most upset about having been incarcerated for nearly four years, without any significant progress having been made on his case and virtually no contact with his attorneys for years. (*Id.*) Mr. Ciraolo's admissions (see fn. 7, *supra*) and the trial court's minute orders[9] show that appellant's complaints were in fact well-founded.

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[8] Both Judge DeLucchi and Judge Sarkisian cited the advanced ages of the victims in this case as a reason for denying appellant's *Faretta* motion. (RT 10/7/91:25; RT 8-9.) The prosecutor also called appellant's *Faretta* motion a "dilatory tactic," that was a "cruel blow" to the elderly victims in this case. (RT 10/7/91:23.)

[9]Minute orders show that five of the six hearings held during this period (January, 1989 through June, 1991) were simply called to continue the case or to discuss the difficult scheduling issues. (See fn. 6, *supra.*) The only hearing of substance was the November, 1989, defense motion for a conditional examination (CT 3018-3020), which the prosecutor opposed

On the same date that appellant's written *Marsden* motion was filed (June 10, 1991), the court convened in appellant's absence, to discuss the status of his case. Since the prosecutor and Mr. Ciraolo had finally completed their other cases, they suggested setting a trial date for late September or October, three to four months in the future. (RT 6/10/91:1-2.) However, those dates were *too soon* for the trial court, and the judge refused to set a firm date. Because no court dates were available,[10] the judge was only willing to set October 7th for pretrial motions and trial setting. The judge made himself very clear: "That's a target date. *I don't want to give you a trial date because if we pull a time waiver we have got problems*." (RT 6/10/91: 2, emphasis added.)[11]

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because he knew neither side would be available to try appellant's case until well over a year later. (RT 11/7/89: 6-7.)

[10] When Mr. Berger inquired about "a court that might be amenable" to an October trial date, the judge responded, "I need a date, not a court." (RT 6/10/91: 1.)

[11] It is interesting to note, as well, that since appellant was not present at this June 10th hearing, he would not have heard the court's comment about having "problems" if the time waiver were pulled. Normally, this would not be important except for the fact that when appellant *did pull his time waiver* in September, the court blamed *him* for the pressure which that put on the court. Judge DeLucchi chastised appellant for this: "[Y]ou withdrew your time waiver, so you get everybody jumping around here putting this case together." Appellant said the time waiver was not *his* idea, but his attorney's idea "because of some strategic move." (Sealed RT 10/7/91: 14-15.) Mr. Ciarolo, however, later told the court that appellant had pulled the waiver because of "calendaring." (RT 10/28/91:1.) The record does not settle the question of *whose idea* it was to pull the time waiver, nor should it really matter. Either way, appellant in fact demanded a speedy trial, hardly evidence that he sought a delay. The judge's complaints also show that even a November trial date, which the time waiver would have necessitated, was squeezing the court's calendar.

The judge's comments show a concern about statutory speedy trial requirements.[12] Although appellant had entered a general time waiver at his arraignment (RT 8/31/88:3), the judge knew that two things could upset that: (1) appellant might "pull a time waiver" and demand a speedy trial within sixty days, or (2) if the parties agreed to set a date certain for trial, the court would be bound by that date (plus an additional ten days), and could only continue the case by obtaining another waiver from appellant. The judge understood that either scenario was likely to create scheduling problems for the court.

The record thus establishes that even after the *attorneys* were finally available to start moving appellant's case to trial, the court itself would not consider setting a firm trial date, even for later in the Fall of 1991. Appellant was not present at this June 10 hearing, but those who *were* present – defense counsel, the court, and the prosecutor – were all amenable to delaying the case until at least October or November of 1991, if not longer. If anyone had concerns about the "advanced aged of the victims" in this case (see fn. 8, *supra*), that concern was not mentioned on June 10, 1991.

Since appellant *had not* been transported to court for this June 10th hearing, his *Marsden* motion could not be heard until June 12, 1991, before Judge Goodman. (RT 6/10/91:3.) When appellant appeared on that date,

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[12] A felony defendant must be brought to trial within 60 days of arraignment, unless the right is waived. (Pen. Code, sec. 1382; *People v. Lewis* (2001) 25 Cal.4th 610, 628.) Once a defendant has entered a general waiver of the right, the court may continue the case beyond the 60-day limit until the waiver is withdrawn. (Pen. Code, sec. 1382, subd. (a)(2)(A).) Once a date certain is set, however, he must be tried by that date or within ten days thereafter. (Pen. Code, sec.1382, subd. (a)(2)(B).)

he told the judge that he had not been given access to the county jail law library and asked if he could have two weeks to prepare for the hearing. (Sealed RT 6/12/91:4-5.) *This single request for a two-week continuance, was the only time appellant ever asked the court for additional preparation time during the entire five years of court proceedings.* Judge Goodman agreed to this short continuance, but neither the attorneys nor the court were available for another *six weeks*, until July 26. (*Id.* at p. 8.) On July 26, the *Marsden* hearing was continued *again*, until August, because of "the court's loaded calendar." (RT 7/26/91:1.)

The record of the hearing on August 1, shows that appellant had good reasons for wanting new counsel. This was a capital case and his attorneys had assured him he would be able to participate in the planning and strategy. Not only was that not happening, but they also had not visited him in nearly two years and would not accept his phone calls from jail. (Sealed RT 8/1/91:4-6.) The record provides ample evidence that appellant's complaints were legitimate. The filing of this *Marsden* motion, both in terms of its timing and the pretrial history, provides no basis for concluding that appellant was trying to delay the proceedings or had some ulterior motive. Quite to the contrary, it was his attorney's admitted delays and failure to communicate that had prompted the *Marsden* motion.[13]

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[13] At the *Marsden* hearing appellant explained that his attorneys, when first appointed, assured him that "due to the severity of my case that we would be working very closely together on tactical decisions." (Sealed RT 8/1/91:4-5.) However, that did not happen: "[I]nstead I've . . . sort of somewhat seen the opposite . . . to the point to where it's given me doubt in going to trial . . .with the attorneys of record. . . . *I feel counsel has failed to confer with* me concerning preparation of our defense in many ways. As a matter of fact, he hasn't even consulted with me in any parts of our defense. (*Id.*) Appellant continued to explain: "*I've been incarcerated since October*

Moreover, at the time appellant filed this motion, no trial date had been set, and the court was unwilling to set a date for several more months.

The record thus clearly establishes that appellant had no part in causing the delay between 1987, and June of 1991. The next three-month period, between August 1, when his *Marsden* motion was denied, and October 31, when Judge Sarkisian ultimately denied the *Faretta* motion, is equally devoid of any evidence which would suggest that appellant had a desire, much less a plan, to delay his trial. All of the evidence shows that appellant had simply lost confidence in his attorney, was tired of the delays, and wanted to proceed to trial representing himself.

Indeed, on September 4, 1991, appellant withdrew his time waiver and demanded a speedy trial. (CT 3033.) A week later, the court asked the parties, in light of the speedy trial demand, when the sixty days would run for purposes of trial setting. The defense said November 4; the prosecutor said November 1. (RT 9/11/91, Argetelis hrg: 3.) As respondent notes in its brief (RB 35, fn. 16), the correct date was *November 4*; and with the extra ten days allowed by statute [Pen. Code, sec. 1382, subd.(a)(2)(B)], the last possible date for the start of trial would have been *November 14, 1991.* However, the judge did not set a date certain, but continued the matter until October 7, for pretrial motions, which were expected to take three weeks to complete. (RT 9/11/91; RT 10/7/91:26.)

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*of 1987. Now it's August of 1991. A few months it will be four years I've been behind bars. . . . But during that time I hadn't had an interview with Mr. Ciraolo but a few times.* As a matter of fact, he doesn't accept or hasn't accepted my phone calls, you know. That I've tried to contact him several times, you know, before now." (*Id.* at pp. 5-6, emphasis added.)

Appellant was exactly correct. Mr. Ciraolo had only visited appellant three times since the arraignment and their last visit had been in November of 1989, almost two years previously. (See fn. 7, *supra.*)

It was within this procedural context that appellant filed his *Faretta* motion on September 27, 1991. As discussed below, this clear and unequivocal motion was timely filed, and not for purposes of delay. The trial court erred in denying appellant's "constitutionally mandated" request. (*People v. Windham* (1977) 19 Cal.3d 121, 127.)

### C. Both Judge DeLucchi and Judge Sarkisian Erred in Finding Appellant's Motion Untimely; Under The Circumstances, They Had No Discretion to Deny Appellant's Motion.

On September 27, 1991, approximately two weeks after appellant had withdrawn his time waiver, appellant filed a six-page typewritten *Faretta* motion, requesting self-representation. (12 CT 3037-3042.) This document, complete with a supporting declaration and legal memorandum, reflects the seriousness with which appellant approached this request. He had not simply signed a prepared form in haste. Rather, his hand-drafted motion contained correct, original legal analysis, noted by the trial court.[14] At the time appellant filed this *Faretta* motion, the *earliest* anticipated trial date was November 1, 1991, exactly *five weeks away*. However, as will be discussed below, by the time Judge DeLucchi ruled on the motion, he knew that the trial was not likely to begin until even later, around November 11, 1991.[15]

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[14] For example, appellant objected to having to complete court forms (which he compared to an "employment application") which asked about any legal background or education he may have had. Appellant argued that legal expertise, or lack thereof, was not relevant at a *Faretta* hearing. Judge DeLucchi told appellant, "That's the first time I heard that. You might be right." (Sealed RT 10/7/91:17.)

[15] As previously mentioned, the last possible date for the start of the trial was November 14, assuming appellant waived no further time (i.e.,

It should also be noted here that the timeliness of a *Faretta* motion is judged by the situation which existed at the time the trial court ruled on it, not by what ultimately took place. (*People v. Marshall* (1997) 15 Cal.4th 1, 24, fn. 2; *People v. Moore, supra,* 47 Cal.3d at p. 80.) In addition, the *filing date*, not the date on which the *hearing* is held, is the operative date for computing timeliness. (See AOB 64.) Moreover, the date on which pretrial motions are scheduled to begin is not necessarily the same as the "trial date," and certainly was *not the same date* in appellant's case. When pretrial motions are expected to take some time to complete, as was true here, the trial will necessarily commence some time *after* the pretrial motions begin. (See *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [parties agreed pretrial motions would be concluded on July 26, after which the case would be continued on a day-to-day basis; *Faretta* motion filed on August 13, while trial was trailing, was considered to be filed "on the eve of trial."] In appellant's case, as in *Clark, supra*, by the time the judge ruled on appellant's September 27 motion, everyone had agreed that the pretrial motions would begin on October 21, and take three weeks to complete (RT 10/7/91: 26), bringing the trial date to November 11, 1991.

**1. The October 7, 1991, ruling (Judge DeLucchi)**

The hearing on appellant's *Faretta* motion took place on October 7, 1991, before Judge DeLucchi, and is the most critical hearing for purposes of this appellate issue. Had this motion been granted, as it should have been, appellant would not have been forced to go back to the trial court a second time, to repeat his request for *pro per* status. The filing of the *second* motion is what led to Judge DeLucchi's later critical remarks, which

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September 4, plus sixty days plus ten.)

respondent cites throughout its brief. However, if the court had ruled correctly at this first, October 7, hearing, the court's later comments would never have been made.

The October 7 hearing began in chambers. The judge started by asking appellant's counsel, Mr. Ciraolo, to describe the work he had performed on appellant's case and how long he had represented appellant. As the judge later recalled, he had "*treated* Mr. Lynch's [*Faretta*] motion as sort of a quasi-*Marsden* motion." (RT 10/7/91:19, emphasis added.) That approach, in itself, was inappropriate since appellant's written motion was clearly designated and argued as a *Faretta* motion, *not* a *Marsden* motion. (CT 3037-3042.) The *Faretta* hearing should have only focused upon whether appellant had made a knowing and intelligent waiver of his right to counsel, not whether trial counsel's performance had been adequate.

Nevertheless, in response to the court's inquiries, Mr. Ciraolo described his work to date, and through this questioning the court established that many "boxes of police reports," and other discovery had been gathered. (Sealed RT 10/7/91: 6-7, 10-11.)

Then the court asked appellant why he wanted to go *pro per*, a relevant question as it related to whether the request was unequivocal. Appellant explained:

> [M]y main reason is – is because I feel that by representing myself, I can sort of somewhat guide my case the way I feel – in the *direction that I feel it should be going* in. . . . Mr. Ciraolo has set up certain strategic, you know, ideas or whatever in relation to my case. I'm not in charge. He is in charge. . . I don't have the say-so that I feel I should have, . . . within my case because, as it is, *my life [is] on the line*. . . .

(Sealed RT 10/7/91:8, emphasis added.)

After this explanation, the judge turned his attention to the items

appellant had asked for in his written motion (*id.* at pp. 9-10), specifically for investigative services (12 CT 3039), telephone time (15 hours per week) and the use of a typewriter (20 hours per week). (12 CT 3042.) Significantly, appellant did not ask for a continuance of the trial date at any time. Nevertheless, the judge began focusing on "time," and exactly how much appellant thought he would "need," an issue first raised by the judge in a leading question:

> THE COURT: [Y]ou want the Court to appoint private investigators in order for you to - -
> THE DEFENDANT: I'm not saying that I wouldn't use or continue to use the one that I already have.
> THE COURT: *But you need some time; right?*
> THE DEFENDANT: Yes.

(Sealed RT 10/7/91:8, emphasis added.) The court then asked about appellant's request for phone calls, and other "pro per privileges," but interrupted appellant's response to ask him once again about "time," the one thing appellant had not requested in his pleadings:

> THE COURT: How much time are we talking about here?
> THE DEFENDANT: Actually, I *hadn't considered any time* as far as what – how long it would take for me to go over, you know, some of the, you know, evidence and, you know.
> THE COURT: But [defense counsel] is talking about boxes, boxes of discovery.
> THE DEFENDANT: That's what I'm saying.
> THE COURT: *You're going to have to review all that stuff; right*?
> THE DEFENDANT: Yes, and there is no way that I could say *exactly* how long that would take. You know.
> THE COURT: You're talking about months?
> THE DEFENDANT: Yeah. *I'm not sure.*

(*Id.* at pp. 9-10, emphasis added.)

It is clear from even a cold record that appellant was being candid with the court, and that he had no "hidden agenda," as respondent claims.

When asked by the court about all of the work that would be entailed in self-representation, appellant agreed with the court's statement that he would "need some time," to review the evidence. However, the fact that appellant could not say precisely how long it would take him to go through the "boxes of discovery," mentioned by the court, does not suggest that appellant was being "coy" or hiding his true intentions.

Moreover, the trial was *at least five weeks away,* if not longer. Everyone agreed that pretrial motions would not begin for two weeks and were expected to take three weeks to complete. (RT 10/7/91:26.) With trial more than a month away, it was not unreasonable for appellant to feel that he had sufficient time to review trial counsel's files, even though he could not say "exactly how long that would take." (*Id.* at p. 9.) The bottom line is that if the trial court really believed that appellant was cleverly hiding a plan to delay the trial, the court could have easily resolved this by asking appellant directly if he wanted, needed or otherwise planned to ask for, a continuance of the trial. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 101 [trial judge conditioned granting of *Faretta* motion on defendant's agreement that he would be ready to go on the day that trial had been set].) However, the subject of a continuance never came up. Appellant was not "hiding" the subject, any more than the trial court was. The record strongly suggests that no one was *hiding* anything, but that appellant and the judge were being quite candid with one another.

The record also shows that if and when appellant thought he *needed* a continuance, he was forthright about asking for one. For example, just four months earlier at his *Marsden* hearing, the first thing appellant did was to ask the judge for two weeks to prepare, which the trial court granted.

(Sealed RT 6/12/91:4.)[16]

Respondent claims that Judge DeLucchi "quickly ascertained" that appellant "fully contemplated a substantial delay," and that appellant's "coy refusal to specify exactly how long he wanted," showed that appellant had a "hidden agenda" to delay the trial. (RB 43.) A fair reading of the record of this October 7 hearing, however, makes plain that Judge DeLucchi did *not believe* that appellant was being dishonest or hiding an agenda, and if he had he would have insisted that appellant *not* request a continuance. Instead, the record shows that the court was simply hoping to convince appellant that he had neither the time nor the ability to handle his own representation in a death penalty case:

> THE COURT: Well, I mean, [defense counsel] spent weeks and weeks reviewing [the discovery]. *You can't – you can't get involved in this case when you're talking about your life*, Mr. Lynch, you know, *just on a shoestring*. Otherwise, *it's not a fair – it's not a level playing field*. You know what I'm talking about?
> DEFENDANT: I understand. I'm just saying —
> THE COURT: I don't want to sit up there and have some guy just beat you to death *because you don't know what you're doing*. You know what I'm saying?

(*Id.* at pp. 12-13, emphasis added.) There is no question that Judge DeLucchi was concerned about appellant being outperformed and overwhelmed in a case where the stakes were the highest, and was hoping to talk appellant out of his intended course.

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[16] See also appellant's written *Marsden* motion of October 16, 1991, in which he states: "Declarant *will be requesting a continuance* on this matter, so that additional counsel may be appointed to assist defendant . . . ." (CT 3062.) Appellant made no similar request in his *Faretta* motion, however. (CT 3037-3042; CT 3054-3059.)

While *Faretta* motions are disfavored,[17] and the judge may have had the best of intentions, he simply had no authority to deny the motion because this was *a capital case* and appellant would not have "a level playing field." As this Court knows, that is not a basis for denying an otherwise proper *Faretta* motion. "When a motion to proceed *pro se* is timely interposed, a trial court must permit [it] upon ascertaining that [the defendant] has voluntarily and intelligently elected to do so, *irrespective of how unwise such a choice might appear to be.*" (*People v. Windham supra,* 19 Cal.3d at p. 128, emphasis added; see also *People v. Dent* (2003) 30 Cal.4th 213, 218 [motion improperly denied because it was a capital case]; *People v. Nicholson* (2002) 24 Cal.App. 4th 584, 589 [trial court's concern over "a level playing field" was not sufficient grounds for denying a *Faretta* motion, where no continuance was sought, even though motion was filed just six days before trial].) Although Judge DeLucchi did not deny the *Faretta* motion for this reason, his comments show that he was exploring all possible avenues for denying this disfavored motion.

From the tenor of the judge's questions, appellant saw that the court was concerned about time pressures, and the time for trial preparation. Apparently confused, appellant asked why, only then, after he had filed his *Faretta* motion, there seemed to be a rush to get to trial. He appeared not to know that the withdrawal of his time waiver had squeezed the court's calendar. Once the judge explained it, appellant tried to offer a solution, implying that he could reinstate the time waiver, if that were the court's

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[17] Courts must indulge every reasonable inference against waiver of the right to counsel. (*Brewer v. Williams* (1977) 430 U.S. 387, 404; *People v. Marshall* (1997) 15 Cal.4th1, 20-21.)

only problem with the *Faretta* request.[18] These proceedings demonstrate that appellant did not have any clever plan to delay the proceedings. His offer to reinstate the time waiver was only made in response to the court's complaint about appellant's *withdrawal* of the time waiver, and demand for a speedy trial.

However, the court was not interested in any of appellant's offers. The court clearly did not want to grant the *Faretta* motion and was more interested in exploring additional grounds upon which the motion might be denied. For example, the court next asked trial counsel how many *Marsden* motions appellant had filed, another inquiry that was neither relevant nor appropriate, under these circumstances.[19] Still, Mr. Ciraolo confirmed that appellant had filed just one *Marsden* motion (on June 10, 1991). (*Id.* at p.

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[18] "THE COURT: You withdrew your time waiver, so you get everybody jumping around here putting this case together.
THE DEFENDANT: Yes, but actually - -
THE COURT: Everybody says, "I want to have my trial." Everybody is ready to go to trial now. I'm just answering your question, sir.
THE DEFENDANT: But, see, actually by me requesting to represent myself, that's somewhat in a sense requesting to vacate that time waiver. . . Because, truthfully, actually, the time waiver wasn't my idea. It was my attorney's idea because of some strategic move or whatever." (Sealed RT 10/7/91:14-15.)

[19] The court's inquiry into the number of *Marsden* motions was presumably for purposes of trying to establish that appellant had a "proclivity to substitute counsel." Such an inquiry would have been appropriate had appellant's motion been filed mid-trial (*People v. Windham supra,* 19 Cal.3d at p. 128) or was otherwise untimely. Since appellant has already established that his motion was timely, this inquiry was irrelevant. However, had there been a history of repeated *Marsden* motions, it might also have helped to establish that appellant had filed the *Faretta* motion simply to further delay the trial. Appellant had no such history, nor such an intent, as all of the evidence has shown.

17.)

The judge next questioned the *prosecutor* about the ages of the victims and witnesses in this case, a similarly irrelevant inquiry under the circumstances.[20] (RT 10/7/91:20-23.) Picking up on the court's concern, the prosecutor told the court about one couple who believed "dilatory tactics are being played." The prosecutor then unfairly blamed appellant:

> I assured [the couple] *that [the delay] was not done by Mr. Ciraolo* [but] the way I view it, . . . this 11th hour request by Mr. Lynch is a *cruel blow* to all the victims in this case. And I would urge the Court to deny this motion by him . . . . And *deny him the fruits of his dilatory tactic*.

(*Id.* at p. 23, emphasis added.) This outrageous accusation, blaming appellant for the delays (and vindicating Mr. Ciraolo) was 100% false and completely disingenuous. The prosecutor had previously told the court that Mr. Ciraolo's caseload was precisely why appellant's case would be delayed for well over a year.[21] Nevertheless, by simply making the accusation, the prosecutor was able to lend false credence to the claim that appellant's *Faretta* motion was a "cruel . . . dilatory tactic," which should be denied.

The prosecutor then cited *People v. Frierson* [53 Cal.3d 730,742] for

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[20] Such extraneous factors may only be considered when the trial court has the discretion to grant or deny the *Faretta* motion, because it has not been filed "within a reasonable time prior to the commencement of trial," (*People v. Windham, supra*, 19 Cal.3d at p. 128.) A motion filed "weeks before trial," however, is outside of the trial court's discretion to deny. (*Faretta v. California, supra*, 422 U.S. at p. 835.)

[21] See hearing of November 7, 1989, at page 7, where the prosecutor said that he and Mr. Ciraolo would be in a lengthy capital trial that would take all of 1990 to try, making them both unavailable to try appellant's case until at least 1991.

the proposition that appellant's motion had been filed "on the eve of trial." (RT 10/7/91:24.) The judge, clearly picking up on the prosecutor's direction, followed up with the rhetorical question: "Now I would assume that these witnesses . . . are getting older by the day; correct?" (RT 10/7/91: 24.)

By the close of this October 7 hearing, Judge DeLucchi mistakenly believed he had accumulated enough information to articulate grounds for denying appellant's *Faretta* motion.[22] (RT 10/7/91:25.) However, Judge DeLucchi misapplied the law. In fact he had no discretion to deny a *Faretta* request which was "timely, not for the purposes of delay, unequivocal, and knowing and intelligent." (*United State v. Erskine, supra*, 355 F.3d at p. 1167.) By improperly concluding that appellant's motion was "*untimely*," the judge erroneously took into account those factors which are only appropriate for consideration in the case of mid-trial *Faretta* motions, or *Faretta* motions filed so close to trial as to be considered untimely. Since appellant's September 27 motion was filed *five weeks* before the earliest likely trial date (November 1) and *more than six* before the later, and more likely, trial date (November 11), the trial court had no discretion to deny the motion "absent an affirmative showing of purposes to secure delay." (*Fritz*

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[22] He ruled as follows: "[T]he Court's of the opinion that because of the advanced age of the victims . . . and because of the *possible delay in the proceedings which might arise* in the event I granted Mr. Lynch his pro per status, the Court's going to rule that this motion is not timely made. We're on the eve of the trial. The trial is to begin within two weeks. There was a time waiver (sic). The Court's made space and time available for the trial of this case. Both sides are prepared to proceed. And so it's the Court's feeling that *it's not timely made*, so the petition to proceed in pro per will be denied for the reasons I've stated on the record. (RT 10/7/91:25, emphasis added.)

*v. Spaulding* (9th Cir. 1982) 682 F.2d 782, 784.) No such showing had ever been made, nor did Judge DeLucchi reach this conclusion when he denied appellant's motion.

Rather, in denying the *Faretta* request, Judge DeLucchi referred to the factors mentioned in *People v. Windham, supra,*[23] to conclude that the motion was "not timely made."[24] Although the judge gave several reasons for the denial (see fn. 22, *supra*), what is most significant about the ruling is what is missing from his list of reasons. Despite his clear desire to deny this motion, the judge never found that appellant had a purpose to delay the trial or otherwise disrupt the proceedings. Judge DeLucchi certainly would have noted it if he had found such a purpose, but the evidence was not there. Everything pointed to the conclusion that the motion, as ill-advised as the court may have viewed it, had been made in good faith.

The most the judge could say was that if the motion were granted, a "possible delay in the proceedings . . .might arise." However, as the courts have recognized, "[T]he 'potential' for delay is always greater when a defendant represents himself," (*People v. Nicholson* (2002) 24 Cal.App.4th 584, 594), and that alone cannot be the basis for denying an otherwise timely and proper *Faretta* motion. Much more is needed – such as a

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[23] The factors cited in *Windham* include: (1) the quality of counsel's representation; (2) the defendant's prior proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow the granting of such a motion. (19 Cal.3d at p. 128.)

[24] *Windham* addressed a midtrial motion, but this Court announced a general rule that timely *Faretta* motions must be filed "within a reasonable time prior to the commencement of trial." (*Windham, supra*, 19 Cal. 3d at p. 128.) Since *Windham*, this Court has not set a bright-line rule about what is "reasonable time." This is addressed in the AOB, at pages 63-70.

history of delaying tactics combined with a request for a continuance at the time the motion is made – to establish a purposeful delay. (*Id.*)[25]

Although Judge DeLucchi said that the trial would start in two weeks and that, "We're on the eve of trial," he was obviously mistaken. Trial was still at least five weeks away. However, since the prosecutor had used those very words ("eve of trial") just moments before the judge ruled,[26] the court may have simply adopted the prosecutor's representation without ever having calculated the time between the filing of the motion and the trial

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[25] The cases cited by respondent (RB 40-41) are all immediately distinguishable and/or support appellant's position. See, e.g., *People v. Burton* (1989) 48 Cal.3d 843 [motion filed day before jury selection and defendant said he was not ready to start trial]; *People v. Marshall*, supra, 15 Cal.4th at pp. 14-15 [pretrial history disclosed manipulation by defendant to delay trial; repeated demands for pro per status, all revoked later]; *Hisrchfield v. Payne* (9th Cir. 2005) 420 F.3d 922 [motion filed day before trial; trial court found "objective . . . pattern of delay and manipulation," including four *Marsden* motions filed on the eve trial]; *United States v. George* (9th Cir. 1995) 56 F.3d 1078 [defendant's two escapes had caused substantial pretrial delay; motion filed on eve of trial along with continuance request]; *United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669 [a pretrial "pattern of dilatory activity" entitles trial court to insist that *pro per* defendant be ready on trial date, but no such pattern shown]; *Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552 [court erred in denying motion made six weeks before trial, and again on day trial was to begin; defendant's request for three-week continuance would have been unnecessary if court had properly granted earlier motion]; *Fritz v. Spaulding, supra*, 682 F.2d 782 [motion made same day as trial must be granted unless there is an affirmative showing of purposeful delay; *effect* of delay insufficient; pretrial history must show conduct causing substantial delay, request for a continuance, etc.].

[26] The prosecutor told the court, "[I]t is not a reasonable time on the eve of trial to make a request under *Faretta* to represent himself." (RT 10/7/91:24.) The court's ruling, finding that the motion had been made "on the eve of trial," is found on the next page of the transcript. (*Id.* at p. 25.)

date. Had the judge done so, he would have known that the motion had *not* been filed on the eve of trial at all. In fact, it had been filed at least five weeks before the earliest trial date and, as such, was certainly timely. Motions filed "weeks before trial" (*Faretta v. California, supra*, 422 U.S. at p. 835), four weeks before trial (*People v. White* (1992) 9 Cal.App.4th 1062, 1076); and three weeks before trial (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1314, 1320, 1323) have all been presumed timely. Appellant's motion, filed five to six weeks before trial,[27] was certainly timely, and therefore outside of Judge DeLucchi's discretion to deny.

**2. The October 17, 1991, ruling (Judge DeLucchi)**

Since the September 27 *Faretta* motion should have been granted, but was not, appellant tried again. On October 16, he filed three new motions: a new *Faretta* motion (renewing the one filed on September 27, 1991); a new *Marsden* motion (renewing the one raised on June 10, 1991); and a motion to disqualify Judge DeLucchi pursuant to Code of Civil Procedure, section 170.6. These three motions, filed simultaneously, show that appellant was still serious about representing himself, but prepared to ask for substituted counsel, if the *Faretta* motion was denied again. Since appellant knew that Judge DeLucchi was not likely to oblige him, he also sought a change of judge, hoping that a new judge would rule correctly, in his favor.

The three motions were heard on October 17,1991, and the record

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[27] At the October 7 hearing, the judge confirmed that pretrial motions would take three weeks to complete and would begin in two weeks, on October 21. Thus, at the time he made this statement, he should have known that the trial was still five weeks (not two weeks) away. (RT 10/7/91: pp. 20, 26.)

shows that Judge DeLucchi was annoyed by appellant's persistence. The *Faretta* motion had been denied once, but appellant refused to let it go. That did not sit well with the judge and he said so on the record. (See e.g., Sealed RT 10/17/91:69-71.) Respondent quotes from those comments to build its case about why the *Faretta* motion was *actually* denied. Although the judge complained that the motion was, in his opinion, just "postpon[ing] this some more," (Sealed RT10/17/91:70), the judge was obviously speaking only of that *renewed* motion, and not the original one. As discussed below, that comment had no bearing on Judge DeLucchi's original decision, and cannot be applied retroactively, as respondent would like, to the judge's previous ruling.

When it came time to rule on these newly filed motions, the court denied both the section 170.6 motion and the *Faretta* motion as being untimely filed. (Sealed RT 10/17/91:43.) The judge reminded appellant that since the original *Faretta* motion had been denied *as untimely*, then obviously the renewed motion, filed "even later," was untimely as well. (*Ibid.*) Then as a final chastisement, and picking up on the *same words* used by the prosecutor the week before, the judge added:

> Also I think it's a *dilatory motion. It doesn't have any merit at all* except just to postpone the proceedings, an attempt to postpone the proceedings further.

(*Ibid*, emphasis added.) Unlike the judge's attitude at the October 7 *Faretta* hearing, the judge was now clearly displeased about having to deal with the *Faretta* motion *again*. However, the judge's characterization of appellant's motion as a "dilatory" one, was not supported by anything in the record and appears to have been simply a repetition of the prosecutor's earlier disingenuous remarks, erroneously blaming appellant for the delays. (See

RT 10/7/91:23.)

Nevertheless, as annoyed as Judge DeLucchi seemed to be about the refiling of the *Faretta* motion, he never said that the motion was denied (either the first time or the second time) *because he considered it a delaying tactic*. Both times he made it clear that the motion was denied because he believed it *had not been timely filed.*

Moreover, even if this Court were to find that Judge DeLucchi's critical remarks at this second hearing constituted a finding that the second (October 16) *Faretta* motion had been denied because he considered it a stall tactic (a position appellant strongly disputes), the judge's comments were *directed only to the renewed motion and not to the original September 27th* motion, which was denied on October 7. The earlier motion had been denied, as Judge DeLucchi confirmed, simply because he considered it untimely.

At the conclusion of the October 17 hearing, the court ruled on appellant's renewed *Marsden* motion. The court began by misstating the record, claiming that it was "either the third or fourth *Marsden* motion, which the record should reflect." (*Id.* at p. 43.) Again, the court was wrong. Appellant had filed *just one Marsden* motion, as Mr. Ciraolo had told the judge earlier. (Sealed RT 10/7/91:17.) The pending motion was a renewal of that first (June 10) request, *but it was not the third or fourth.*[28] This mistake initially seemed insignificant; but it would become significant

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[28] Perhaps one reason the court thought that so many *Marsden* motions had been filed, when they had not, was because the court had decided to "treat" appellant's *Faretta* motion "as a *Marsden* motion." (RT 10/7/91:19.) The court had no reason to do this since appellant had properly labeled and argued his motion for self-representation as a *Faretta* motion. (See CT 3037-3042.)

later, when Judge Sarkisian reviewed the record and made his own ruling on the *Faretta* motion. (See RT 8-9.)

While appellant was in chambers with Judge DeLucchi for the *Marsden* hearing, appellant still tried to argue his *Faretta* motion. He complained that the prosecutor's remarks, blaming him for the delays in the case, had caused the court to change its attitude and deny the motion:

> THE DEFENDANT: For example, from the last *Faretta* hearing . . . *the blame was shifted to me* as far as trying to delay this trial. I *haven't been in charge of this case for the last four years.*
> THE COURT: I shifted it to you. I said that your motion wasn't speedy, wasn't timely made.
> DEFENDANT: You shifted it, *but after the D.A. changed gears* . . . . [The prosecutor] sat there, and he specifically . . .stated that he *[was] sure it wasn't Mr. Ciraolo's dilatory tactics*, that he's trying to imply to delay the trial –

(Sealed RT 10/17/91: 69, emphasis added.)

However, the words were lost on Judge DeLucchi, who repeated his position that the *Faretta* motion had been filed "too late, man." Then, after accusing appellant of just trying to "postpone this some more," the judge told appellant that the case law supported the ruling:

> *There is law on it. I cited the case, People versus Frierson. There's law on it.* I didn't make this up out of whole cloth. I'm the guy that made the ruling, not your attorney, and not the D.A. It's my decision to make, and you lost.

(*Id.* at p. 70, emphasis added.) Again, appellant tried to tell the judge that the prosecutor had unfairly placed the blame on him for the delays:

> THE DEFENDANT: But what I'm saying is, to me you were somewhat led to believe – that my attorney didn't even . . . counterattack the statement the D.A. made. I haven't been in charge of this case for the last four years. It's not my fault

> they're just now arriving or coming at a trial date. . . [Defense counsel's] been busy with other cases, with other clients. The D.A. has been tied up. So, it's not my fault. It's just now that I've recently seen that – what I have been seeing – to make me want to exercise my Sixth Amendment rights –
>
> ***
>
> *And [the Faretta motion] wasn't untimely. We haven't even started pretrial motions. We haven't started selecting the jury. We haven't set a trial date.* . . . I can't see how the motion was untimely.
>
> * * *
>
> If you bring up the old age clause, *you had four years to worry about the old age clause [i.e., the age of the victims].*

(Sealed RT 1/17/91:69 - 71, emphasis added.)

Appellant's arguments were exactly on point. He did his best to point out what the trial court should have already known; that (1) the attorneys, *not appellant*, had caused the long delay in the case; (2) that the prosecutor had unfairly shifted this blame to appellant, which had influenced the court's ruling; (3) that his own attorney did not defend the truth, but let the prosecutor's false accusation stand uncorrected; (4) that his *Faretta* motion *was timely* because it was filed before a trial date had been set and before any of the lengthy pretrial motions had even been presented; and (5) that no one worried about the age of the victims ("the old age clause") for the past four years until appellant asked to go *pro per*.

Judge DeLucchi, however, believed that denying the motion was proper under *People v. Frierson* (1991) 53 Cal.3d 730. (Sealed RT 10/17/91:70.) His ruling even cited language from that case ("We're on the 'eve of trial.'"[29] [RT 1/7/91:25]). However, the judge was wrong on both

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[29] In *People v. Frierson* (1991) 53 Cal.3d 730, 742, the defendant filed his *Faretta* motion on September 29, two days before an October 1

scores. Unlike the defendant in *Frierson,* whose untimely motion had been filed just two days before trial, appellant's timely motion had been filed more than a month before trial. Moreover, since Frierson's motion was untimely, *that* court had the discretion to deny the motion, and did so in light of Frierson's simultaneous request for a 60-day continuance of the trial. Appellant, by contrast, never sought to continue the trial date. The judge's reliance on *Frierson* to deny appellant's *Faretta* motion was obviously misplaced.

A week after Judge DeLucchi had denied all three of these motions, he reversed himself and vacated his rulings.

**3. October 23, 1991, ruling (Judge DeLucchi)**

Although the hearings on the pretrial motions were supposed to begin on October 21, because of the Oakland fire, the hearing was continued until October 23, 1991. On that date, Judge DeLucchi reversed his prior rulings and granted appellant's section 170.6 motion. (RT 10/23/91:85.) After recusing himself, Judge DeLucchi then vacated his previous rulings on the *Marsden* and *Faretta* motions, and sent the case back to Department 1 for transfer to another court. (*Id.* at p. 86.)[30]

**4. October 31, 1991, ruling (Judge Sarkisian)**

Appellant's next court appearance was on October 28, 1991, before Judge Goodman. Judge Goodman began by saying:

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trial. As such, the motion clearly *was* "on the eve of trial."

[30]A minute order indicates that when the parties appeared in Department 1, before Judge Argetelis, he continued the matter to October 28, 1991, for trial setting in Department 7. It does not appear appellant was present for that hearing in Department 1. (Minute Order of 10/23/91.)

> It's my understanding, Mr. Ciraolo, that your client is willing to enter a time waiver so that this matter can be assigned to Judge Sarkisian for trial *with the understanding that the trial will commence on or before – by way of pretrial motions* on November 18th; is that correct?
>
> MR. CIRAOLO: That's correct. . . . Mr. Lynch is willing to give a limited time waiver up to and including November 18th.

(RT 10/28/91:1, emphasis added.) This interchange provides additional evidence that appellant was *not* trying to delay his trial. The fact that he was only willing to give a "limited time waiver" which would allow pretrial motions to begin on November 18, shows that *he did not want his trial delayed further*. Following this limited time waiver, and with pretrial motions still expected to take three weeks, the new anticipated trial date, at this point, would have been approximately *December 9, 1991.*

The matter was then sent forthwith to Judge Sarkisian. Mr. Ciraolo updated the court about the previous *Marsden* and *Faretta* rulings, and Judge Sarkisian agreed to review the record and rule on both motions at the next hearing, October 31, 1991. (RT 2-7.)

Judge Sarkisian began the October 31 hearing by announcing that he was denying the *Marsden* motion. (RT 8.) With respect to the *Faretta* motion, he promptly denied that motion as well:

> Turning to the defendant's motion to represent himself, it's my independent conclusion from a review of the record, *that this request is untimely. Among the factors that I have considered* in assessing the defendant' request are *his prior proclivity to attempt to substitute counsel*, the stage of the proceedings, and *in particular the disruption and the delay that might reasonably be expect to follow the granting of his motion.* This record indicates that many of the witnesses in this case are elderly. I will note that Mr. Lynch has been represented by present counsel for a number of years.

> Accordingly, in the exercise of my discretion, I am denying the defendant's motion for self-representation.

(RT 8-9, emphasis added.)

Judge Sarkisian's ruling was virtually identical to the original ruling made by Judge DeLucchi, with just one exception. Judge Sarkisian cited appellant's alleged "proclivity to attempt to substitute counsel," as an additional ground, not cited by Judge DeLucchi. While such a finding, if true, might have arguably suggested a "purpose to delay" on appellant's part (see, e.g., *People v. Marshall, supra*, 15 Cal.4th at p. 22), in fact, appellant had no such "proclivity," and Judge Sarkisian's finding was most likely based upon Judge DeLucchi's erroneous statement the week before.

As previously discussed (*supra* at pp. 17-18), appellant had filed just one *Marsden* motion on June 10, 1991, which had been prompted by his attorney's apparent abandonment of the case. After Judge DeLucchi improperly denied appellant's *Faretta* motion on October 7, 1991, appellant's last hope was to seek a new judge and start over, which he did. The renewed *Marsden* and *Faretta* motions, filed on October 16, were filed in conjunction with a motion to disqualify Judge DeLucchi and were *only* filed because Judge DeLucchi had erred in refusing appellant his right to proceed in *pro per*. In fact, appellant remained with his same attorneys, Mr. Ciraolo and Mr. Berger, throughout the entire pendency of the four-year case.

Since the record certainly does not support a finding that appellant had a "proclivity to substitute counsel," (*Windham, supra*, 19 Cal.3d 121), Judge Sarkisian's finding to the contrary could only have been based upon Judge DeLucchi's mistaken remark the week before: that appellant had filed *three or four Marsden* motions, "which the record should reflect."

(Sealed RT 10/17/91:43.) That statement was simply untrue, as appellant has already established. (See page 25 and fn. 28, *supra*.)

In all other respects, Judge Sarkisian's ruling was identical to Judge DeLucchi's. Both rulings erroneously decided the threshold issue: whether appellant's motion had been timely filed. (*People v. White* (1992) 9 Cal.App.4th 1062, 1071-1072 [the first step in resolving a *Faretta* motion is to decide whether it was made reasonably in advance of trial].) "If it was [timely], the trial court was without discretion to deny the motion." (*Id.* at p. 1072, citing *People v. Joseph* (1983) 34 Cal.3d 936, 943.) However, if the motion was not timely filed, the ruling "was within the trial court's sound discretion, upon consideration of the factors set forth in *People v. Windham, supra*, [citations omitted]. . . ." (*People v. White, supra*, 9 Cal.App.4th at p. 1072.)

In deciding whether a *Faretta* motion has been timely filed, reviewing courts necessarily must compare the date when the motion was *filed* with the date when the *trial is set* or is most likely to begin. By comparing these two dates, the court is able to state whether the motion was filed months, weeks, or only days before trial, and on that basis make a reasoned judgment about whether the motion had been timely filed. (See, e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197, 1204 [four days before trial was untimely]; *People v. Silfa* (2001) 88 Cal.App.4th 1311, 1314, 1320, 1323 [three weeks before trial was *timely*]; *People v. Clark, supra*, 3 Cal.4th at p. 99 [three weeks after pretrial motions had been completed and while trial was trailing, was untimely]; *People v. White* (1992) 9 Cal.App.4th 1062, 1076 [four weeks before trial was *timely*]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [five days before trial was untimely]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [six days before trial was

untimely]; *People v. Wilks* (1978) 21 Cal.3d 460 [more than a month before trial was *timely*]; *People v. Freeman* (1977) 76 Cal.App.3d 302, 307 [five to six weeks before trial was *timely*].)

In appellant's case, there is nothing in the record to suggest that Judge Sarkisian had any idea about what the actual time frame was between the filing date of the *Faretta* motion and the anticipated trial date. The judge mentioned neither date and did not even indicate whether he was ruling on appellant's *original* September 27th *Faretta* motion, the later-filed October 16th motion, or both. Since the filing dates were different and the likely trial date at those times was also different, computing the timeliness of one or both of those filings would have necessarily involved a discussion of those various dates. The record suggests that Judge Sarkisian never even considered this first, critical step.

Judge Sarkisian may have simply relied on Judge DeLucchi's finding, at the October 7 hearing, that the trial was to begin "in two weeks," and that they were "on the eve of trial," findings which were both clearly incorrect. The trial was *at least* five weeks away when appellant filed his original motion, and the parties were certainly not on the "eve of trial." Nevertheless, regardless of how the time may have been computed, both of appellant's motions were filed well in advance of trial and clearly timely under this Court's standard, as well as the standard applied by the Ninth Circuit.[31] From the perspective of either Judge DeLucchi or Judge

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[31] Under the standard applied by the Ninth Circuit, to be timely as a matter of law a *Faretta* motion must be filed before jury empanelment. (*Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 264.) Under California's standard, the motion must be filed within a reasonable time prior to the commencement of trial. (*People v. Windham, supra*, 19 Cal.3d at p. 128.) While motions filed as much as six days before trial have been held

Sarkisian, the motion was filed between five and ten weeks before any likely trial date.[32] As such, it was timely and the trial court had no discretion to deny it.

**D. Conclusion**

Appellant's *Faretta* motion, filed on September 27, 1991, was filed a minimum of five weeks before any anticipated trial date. Whether viewed from Judge DeLucchi's perspective or from Judge Sarkisian's perspective, the motion was filed well in advance of trial. The trial court's failure to properly discern that fact, led to its erroneous belief that it had the discretion to deny this motion. The only possible grounds for denying an otherwise proper and timely filed *Faretta* motion, is if there has been an "affirmative showing" that the motion was made simply to delay the trial or disrupt the proceedings. (*Fritz v. Spaulding, supra*, 1682 F.2d 782)

The record here suggests exactly the opposite. Appellant's motion

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untimely (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 791), motions filed as little as three weeks before trial have been *presumed timely* (*People v. Silfa* (2001) 88 Cal.App.4th 1311), as have been motions filed four weeks, five weeks and six weeks before trial. (*People v. White, supra* 9 Cal.App.4th 1062; *People v. Wilks, supra,* 21 Cal.3d 460; *People v. Freeman, supra,* 76 Cal.App.3d 302.)

[32] The September 27, motion was filed at a time when the court expected the trial to begin somewhere between November 1 and November 11, *five to six weeks* later. The October 16, motion was filed at a time when the court expected the trial to begin on about December 9, *seven to eight weeks* later. If Judge Sarkisian had considered only appellant's first motion and compared that date to the *new* anticipated trial date of December 9, 1991, he would have found that appellant's first motion had been filed more than *ten weeks* prior to trial date then pending when Judge Sarksian ruled. Appellant is aware of no case which has found that a *Faretta* motion filed "weeks" before trial was untimely.

was properly filed, well before trial and without any request for a continuance. Appellant had not even considered needing time to prepare for trial until the trial court repeatedly insisted that he would. Appellant agreed he would need "some time" to read the files, but he already had more than five weeks to do so, and presumably believed that was sufficient. In any event, he did not ask for a continuance of the trial date. The trial court could have required appellant to be ready for trial by the time it was set, but never explored this option. Appellant's responses to the court suggest no "hidden agenda" to delay the proceedings. He was clearly just cooperating with the trial court's questioning.

Respondent has made every effort to slant the record in a way that would suggest the trial court's denial of the *Faretta* motion was proper. However, the record simply does not support a finding either that the motion was untimely, or that it was filed for an improper purpose. Appellant's constitutionally based motion for self-representation was outside of the trial court's discretion to deny. It should have been granted and its erroneous denial is reversible constitutional error. (*Faretta v. California, supra*; *People v. Frierson, supra*, 53 Cal.3d at p. 742.)

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## II.

## THE TRIAL COURT'S ERROR IN REMOVING QUALIFIED JURORS LEFT APPELLANT WITH A JURY "ORGANIZED TO RETURN A VERDICT OF DEATH."[33] REVERSAL IS REQUIRED.

### A. Introduction

Respondent concedes that all four of the venirepersons who were challenged by the prosecutor and removed for cause "expressed a willingness to impose the death penalty." (RB 47.) However, respondent claims that they "each also expressed a contrary view." (*Id.*) While none of these women were *eager* to vote for death, each of them clearly stated they would be willing and able to do so in the proper case. Nevertheless, respondent claims that the jurors gave conflicting responses, and on that basis contends that the trial court's ultimate decision to remove the jurors is now "binding" upon this Court. However, the record shows that all four jurors repeatedly affirmed they would impose the death penalty in the proper case, and none contradicted or retracted that position. Any equivocation they may have expressed had only to do with matters which were not critical to, or even relevant to, the duties which their oath required them to perform. Since all of the jurors were "willing to consider all of the penalties," (*Witherspoon, supra,* 319 U.S. at p. 523, fn. 21), and since the State did not demonstrate that the jurors were unable to perform their duties in accordance with their oaths, (*Wainwright v. Witt* (1985) 469 U.S. 412, 424), the trial court's decision to remove the jurors for cause was not supported by "substantial evidence." Controlling United States Supreme Court precedent requires reversal of the death sentence since the trial

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[33] *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.

court's decision to remove these four jurors "produced a jury uncommonly willing" to convict appellant of the crimes as well as to condemn him to die. (*Witherspoon, supra*, 391 U.S. at pp. 520-521.)

### A. The Three Jurors Who Did Not Want To "Announce" Their Death Verdict Did Not Equivocate On Any Issue That Was Essential To Their Ability To Serve.

It is settled that a juror may not be removed for cause because of her feelings about the death penalty "unless those views would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45.) In appellant's case, three of the four jurors in question, i.e., jurors M, C and K, all stated that they felt the death penalty was appropriate in certain cases, but they were all dismissed for cause immediately after they had expressed varying degrees of unease about having to come down into open court to "announce" that they were "voting to send that man at the end of the table to die. . . in the gas chamber." (RT 623; RT 629; RT 959; RT 1683-1685.) A fair reading of the record reveals that it was the jurors' response to this question that was the deciding factor for the trial court. As soon as a juror said she could not "announce" a death verdict, the trial court would grant the prosecution's challenge for cause.

Respondent claims that the women's reluctance to make such an announcement *contradicted* their previously expressed (1) support for the death penalty; (2) willingness to consider both penalties; (3) willingness to vote for the death penalty in the proper case; and (4) insistence that they would fairly consider the evidence as instructed by the court. From there, respondent argues that the trial court had virtually unreviewable discretion to resolve this supposed conflict by removing the jurors for cause. (RB 47.)

However, as discussed below, an unwillingness to *announce* the verdict does not conflict with a juror's promise to follow the law and consider both penalties since neither requires a juror to "announce" to a defendant that she is sending him to die in the gas chamber. In the event the jurors were polled, which is an option either side might have requested, the most that any individual juror would have had to say was "yes," in response to whether the verdict, as read, was their verdict. Other than the word "yes," no individual juror would have been required to say or do anything at all, following a vote for the death sentence. Moreover, all of these women unequivocally confirmed their willingness and ability to be impartial and follow the court's instructions.

Respondent cites *People v. Samoyoa* (1997)15 Cal.4th 795, 853, for the proposition that it is proper for a prospective juror to be asked whether or not she would be able to "look at the defendant" or "stand up and tell" the defendant that she had voted for death. Respondent then argues that if the *question* is proper, the trial court must also be able to remove for cause any juror who balks at the prospect of having to "look at the defendant" or announce a death verdict. (RB 63.) However, respondent's logic fails. Many questions may be proper for voir dire without being the determinative factor in removing for cause an otherwise qualified juror. For example, although it may be proper to ask a juror if she is opposed to the death penalty, an affirmative response to that question is not a ground for removal from a capital jury. (*Witherspoon, supra*, 391 U.S. at pp. 515-519.) Similarly, it may be proper to ask a juror how he or she would vote on a ballot proposition instituting capital punishment; however, the answer to that question, in and of itself, could not serve as a basis for removal of the juror. (*Id.*) Rather, in order to excuse a juror for cause, it must be clear

from the record that the prospective juror is unwilling or unable to follow the court's instructions or obey the juror's oath. The juror's level of discomfort should the jury be polled may be the proper subject of questioning, but since no juror has an obligation to "look the defendant in the eye" and announce that he is being "sent to the gas chamber," the juror's answer to that question cannot be determinative of her qualification to serve.

Respondent also cites *People v. Haley* (2004) 34 Cal.4th 283, 306, for the very broad proposition that if a prospective juror equivocates "regarding the death penalty," the trial court's ultimate decision to excuse the juror for cause is binding on appeal. (RB 47-48.)[34] However, respondent has misinterpreted *Haley,* and stretched its holding beyond any logical boundary. *Haley* stands for the proposition that when a juror gives conflicting answers *to a particular question*, the trial court may resolve that particular conflict. Because the trial court is in the best position to observe the juror's demeanor, the trial court's determination of the juror's "true state of mind," as to that particular conflicting issue will be binding.

However, when jurors are being selected for a capital case, the United States Supreme Court has made it clear that the criteria for removal of scrupled jurors must be narrowly drawn. (*Adams v. Texas, supra*, 448 U.S. at p. 44.) It would clearly thwart this important aim if trial judges had unreviewable discretion to remove jurors who equivocated on any question

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[34] The excerpt respondent quotes is as follows: "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence." (*People v. Haley, supra*, 34 Cal. 4th at p. 306.)

related to capital punishment. Obviously, the trial court's ultimate determination about the juror's qualifications to serve is still subject to appellate review and may only be upheld if supported by substantial evidence. (*People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

Tracing the roots of the *Haley* excerpt[35] (from *People v. Carpenter* (1997) 15 Cal.4th 312, 357, *People v. Mayfield* (1997) 14 Cal.4th 83, 122 and *People v. Crittenden* (1992), through *People v. Bittaker* (1989) 48 Cal.3d 1046, 1089), reveals that the *correct* underlying quotation is as follows:

> Where a prospective juror gives conflicting answers to questions *relevant to his impartiality*, the trial court's determination as to his state of mind is binding upon an appellate court.

(*People v. Bittaker, supra*, emphasis added, quoting *People v. Linden* (1959) 52 Cal.2d 1, 22; see also *People v. Pride* (1992) 3 Cal.4th 195, 229 [where a juror gives conflicting answers "concerning his impartiality" the trial court's assessment is binding].) While initially this distinction might seem insignificant, by offering additional examples it becomes apparent that the distinction is important, particularly in light of the questions which were posed to the prospective jurors in appellant's case.

For example, had a prospective juror stated she was open to voting for either penalty in the proper case, and agreed to impartially consider the

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[35] The excerpt which respondent quotes from *People v. Haley, supra*, is: "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence." (RB 47-48.)

evidence and follow the court's instructions, but equivocated about whether she would vote to abolish the death penalty on a ballot initiative, it would be fair to say that she had given equivocal statements "regarding the death penalty." The trial court might determine, based on the juror's responses and demeanor, that her "true state of mind" was that she *would* indeed vote against a death penalty initiative. The trial court's determination of that issue would be considered "binding." However, if it were apparent that the trial court excused this juror for cause based upon the fact that she might well vote against a death penalty initiative, the trial court's decision would still be subject to appellate review and, to be upheld, would still have to be supported by substantial evidence. The trial court's determination of the ultimate question – the juror's ability to be impartial and obey her oath as a juror – does not become an unreviewable decision simply because the "juror's statements [regarding the death penalty]" had been "equivocal or conflicting." (RB 47, quoting *People v. Haley, supra.*)

Similarly, jurors will often give conflicting responses as to whether or not they "support" the death penalty. However, simply because the juror may equivocate on this question, does not elevate the trial court's ultimate decision on the juror's qualifications from one that is subject to review upon substantial evidence, to one that then becomes binding on appeal. A trial court may not, as a matter of constitutional law, disqualify a venireperson simply because of his or her support for or opposition to the death penalty. A trial court's decision to remove a juror on this basis would not only be reviewable, it would be reversible. It stands to reason that if a juror cannot be removed for cause simply because he opposes the death penalty, a juror who is confused, conflicted or equivocal about whether he supports the death penalty, is similarly not subject to removal on this basis.

Respondent, however, would have this Court adopt the position that any time a "juror's statements [regarding the death penalty] are equivocal or conflicting" (RB 47), the trial court's decision regarding a challenge for cause is binding. However, only if a juror equivocates regarding the "*disqualifying concept* of substantial impairment of a juror's performance of his or her legal duty" (*People v. Stewart* (2004) 33 Cal.4th 425, 447, citing *Witt, supra*, 469 U.S. 412, emphasis added), can the trial court's determination of the juror's qualifications be considered binding.

Unless a juror has made statements that call into question her ability to faithfully abide by her oath or otherwise perform the duties required by law, the trial court's decision to remove the juror for cause cannot be upheld on appeal. In *Stewart, supra*, this Court distinguished between the "nondisqualifying concept," of finding it "very difficult" to vote for death and the "disqualifying concept," of being unable or unwilling to perform the legal duties required by the juror's oath. A prospective juror who equivocates about a nondisqualifying concept may not be removed for cause. If the trial court removes such a juror, that decision is reviewable upon substantial evidence. It does not become a "binding" determination, simply because a juror gave conflicting answers about, for example, whether she would find it difficult to vote for death. The critical issue is not whether the juror equivocates, but whether the juror equivocated with regard to a "disqualifying concept."

As long as a juror agrees that she will fairly listen to the evidence presented by both sides, follow the instructions given by the trial court, and be open to the possibility of imposing either punishment, any individual reticence she may feel about being a juror in a serious case, is not a disqualifying concept. In California, where no juror is ever *required* to

vote for the death penalty, a juror's views on the death penalty may not be the basis of a challenge for cause as long as the juror is willing *to consider* imposing the death penalty in the case before her. (*Adams v. Texas* (1980) 448 U.S. 38, 44; *People v. Ledesma* (2006) 39 Cal.4th 641, 672; *People v. Schmeck* (2005) 37 Cal.4th 240, 262.) This requirement, to be willing to "consider" imposing death in the case at hand, was all that was required in *Witherspoon, supra*. In light of the broad discretion which California jurors have to vote for a life sentence, similar to the discretion afforded to the jurors in *Witherspoon*, the more specific standard articulated in *Witherspoon*, rather than the broader standard described in *Adams v. Texas* should apply.

In *Adams v. Texas, supra*, 448 U.S. at p. 44, the Supreme Court recognized that the death penalty law which was in effect in Illinois at the time *Witherspoon* was decided "accorded the jury absolute discretion as to whether or not to impose [the death penalty]." Given that broad discretion, in order to "accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths," jurors were only required to "at least *consider* the death penalty." (*Ibid.*, emphasis in original.) "A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, *would clearly be unable to follow the law of Illinois in assessing punishment*." (*Ibid.*, emphasis added.)

However, when *Adams v. Texas* was decided, the Supreme Court recognized that, given the significant differences between the Illinois and Texas capital sentencing laws, Texas jurors who were merely willing to "consider" the death penalty would not necessarily be qualified to serve because of the obligations imposed on capital jurors by Texas law. In Texas, capital jurors were required to answer a series of questions which, if

answered affirmatively, required the trial court to impose the death penalty. To be qualified to sit, a Texas juror would have to be willing to take an oath to decide the facts impartially and "conscientiously apply the law as charged by the court." (*Adams, supra*, 448 U.S. at p. 45.) Simply being willing "to consider" the death penalty (the criteria deemed sufficient under the Illinois statute in *Witherspoon*), was obviously not sufficient under Texas law.

This distinction between the sentencing statutes of Illinois and Texas is what led to what is now known as the *Adams/Witt* standard for qualifying capital jurors.[36] However, like the Illinois statute addressed in *Witherspoon*, California gives unlimited discretion to a capital juror to vote for a life sentence. The only substantial restriction upon a California juror's sentencing discretion is upon his ability to vote for death.[37] Consequently, like the capital jurors in *Witherspoon*, "a [California] juror wholly unable *even to consider imposing the death penalty*, no matter what the facts of a given case, would clearly be unable to follow the law of [California] in assessing punishment." (*Adams v. Texas, supra*, 448 U.S. at p. 44, emphasis added.) Conversely, a California juror who agrees to "at least

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[36] In order to accommodate the differences among the various state capital sentencing laws, while retaining the intent of the *Witherspoon* rule, *Adams* announced the "general proposition" that a juror may not be challenged because of his or her views on capital punishment "unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams, supra*, 448 U.S. at p. 45.)

[37] Only if aggravating evidence substantially outweighs mitigating evidence *may* a California juror vote for the death penalty; and even then he or she may still vote for life without the possibility of parole since a vote for death is never required. (*People v. Burgener* (1986) 41 Cal.3d 505, 542-543.)

*consider* the death penalty" satisfies the *Witherspoon/Adams/Witt* standard in California. (*People v. Ledesma, supra,* 39 Cal.4th at p. 672.)

In appellant's case the three jurors who were removed for cause after expressing doubt about their ability to announce their verdict in the manner described by the prosecutor, were all fully willing and able "to consider imposing the death penalty" in this case. (Juror M: RT 618 [she is open to either punishment, depending on the evidence], RT 619 [death penalty is proper for certain crimes], RT 627 [open to either punishment in this case], RT 628 [will keep an open mind as to the appropriate punishment]; Juror C: RT 957 [she could probably vote for death in this case, depending on circumstances]; Juror K: RT 1676 [the crimes in this case are serious enough that either penalty could apply], RT 1678 [open to voting for either punishment depending on the totality of the evidence], RT 1679 [some criminals should get the death penalty], RT 1683-1684 [she can vote for death if she feels it is justified].) Although nothing more should have been asked of these jurors, the prosecutor and the trial court actually demanded far more.

First of all, the questions posed by the trial court and the prosecutor improperly asked these jurors to prejudge the case and *commit* to one penalty over the other prior to hearing any of the evidence. Then, the court and the prosecutor misled the jurors as to the nature of the duties required by their oath. Juror M, Juror C and Juror K were all qualified jurors who were wrongfully excluded simply because they would not commit to performing tasks that were not part of their duties as jurors and/or because they were unwilling to commit to a death vote before hearing the evidence.

**1. Juror M**

Juror M believed in and supported the death penalty (5 RT 614) but

strongly resisted committing to one punishment over the other prior to hearing any of the evidence ("No, I couldn't just decide one way or the other right on the spot" [5 RT 616].). After telling her that California law does not ever tell the juror which penalty he or she must choose, the trial court asked her to decide whether she could vote for death *in this case.* (5 RT 615-616.) When Juror M equivocated about how to answer that question, the trial court explained again that they just wanted to know "whether . . . both punishments would be options or possibilities." (5 RT 616.) This, of course, was the relevant question, and the only one that had to be answered affirmatively in order to establish Juror M's qualification to serve on the jury.

However, the court did not allow Juror M to answer *that question*, but instead embellished further on the question and in the process changed the original question. Ultimately, the inquiry became not simply whether Juror M was open to both possibilities, but rather, whether Juror M could "say right now" that she knew there was no way she could "walk into this courtroom and say that I vote for the death penalty, and it just doesn't matter what happens in this trial." (5 RT 616.) By her response, it was apparent that Juror M did not understand the gist of this rather convoluted question. Juror M responded, "No, I couldn't just decide one way or the other right on the spot." (*Ibid.*) By changing the essence of the question, and focusing on whether she could say "right now" if she would be able to announce that she was voting for death ("and it just doesn't matter what happens in this trial"), the trial court not only confused Juror M but, more importantly, failed to obtain the answer to the only relevant question – whether she would fairly consider both punishment options. When properly asked *that question* Juror M answered affirmatively. ("Do you. . .believe

that you would be open to the possibility of either of those punishments, depending on the evidence?" [Answer:] Yes, I think so." [5 RT 618]).

When the prosecutor took over the questioning, he focused on finding out from Juror M if the crimes in this case warranted the death penalty (5 RT 618), something Juror M had already indicated she was unwilling to decide before hearing the evidence. The prosecutor then asked her to assume that she had already decided that death was the appropriate punishment and then told her that if she "got cold feet" and did not vote for death, she would not be serving "the system at all." (5 RT 624.) The implication was that there was only one correct answer and that if the evidence pointed towards the death penalty and the other jurors were voting for death, Juror M would do a disservice to "the system" if she voted against death. However, as the trial court pointed out to her previously, the law did not require her to vote in a particular way; she was only required to be open to both possibilities.

Juror M was misled into believing that she was not qualified unless she were truly able to commit to a certain verdict of death *in this case.* When asked the *proper* questions, including whether she would vote for death if the facts and seriousness of the crimes warranted it, and whether she would keep an open mind and hear all of the facts and circumstances before deciding, Juror M immediately answered that she would. (5 RT 627.) She promised to be fair to both sides, to reserve judgment about the penalty until she had heard all of the evidence, and that she would make "a decision as to the appropriate penalty." (5 RT 628.) She again promised to keep an open mind and to follow her conscience regarding penalty. (*Ibid.*) Juror M was exactly the kind of juror who should sit on a capital case: one who was not eager to impose death, but willing to if she fairly and in good

conscience believed it were the appropriate penalty. Substantial evidence thus supported a finding that Juror M was qualified to serve.

Nevertheless, the trial court asked Juror M a final question that had nothing to do with her ability to be fair and impartial, but rather unfairly highlighted her understandable trepidation over having to decide whether appellant should live or die. With a leading question, the trial court characterized Juror M as someone who would be unable to "face Mr. Lynch" and announce that she was causing him "to be put to death in the gas chamber." (5 RT 629.) Upon her agreement with that assessment (Juror M had only to answer "yes"), the trial court removed her for cause. (5 RT 630.)

Her removal, however, was without a proper legal foundation, was not supported by the substantial evidence in the record and should not be upheld by this Court. Under the *Witt* and *Witherspoon* standards, Juror M was fully qualified to serve. Although she was unwilling to "face Mr. Lynch" and announce her verdict of death, she never indicated that she could not vote for death. Rather, all of her responses demonstrated that she was able and willing to follow California law, to impartially weigh the evidence, to keep an open mind, to be fair to both sides, to be open to the possibility of either penalty and, in the appropriate case, impose the death penalty. Neither the law nor her oath required any more.

If the prosecutor did not believe that Juror M was sufficiently *eager* to return a death verdict, then he was free to exercise a peremptory challenge. The trial court, however, did not have cause to remove her. Juror M did not equivocate about any issues that were determinative of her ability to serve on appellant's trial. By removing her the trial court helped create a jury that was "organized to return a verdict of death." Reversal of

the death sentence is required.

**2. Juror C**

When Juror C was questioned by the trial judge, most of the questions were leading questions related to the process itself, describing the guilt and penalty phases and the type of evidence that would be presented. (8 RT 951-954.) When asked whether she felt she would always vote for life and never for death, Juror C simply said, "Sometimes." (8 RT 954.) When asked to explain her answer Juror C correctly explained that in some cases death would be appropriate, while in other cases, life would be the appropriate sentence. (8 RT 954-955.) The trial judge then asked her about this particular case, and asked her to recall what she could about the types of crimes that were committed. The trial court then asked a completely appropriate question: "[A]re those crimes serious enough where the death penalty is a possibility or not?" (8 RT 955.) Although this was the relevant question, again, the court did not allow Juror C to answer it. Instead, as it did with Juror M, the court embellished the question with a misleading explanation, so that by the time Juror C was able to respond, the question was no longer apparent:

> THE COURT: I mean if it's not, then we need to know that, just say so, because there are some people that they say well, for me to vote for death, it would have to be something even more terrible. Someone puts a bomb on an airplane and blows it up and 300 people die or someone, you know, murders and rapes a small child or something like that. But, this type of crime, it's terrible, but it's not so terrible that I would do – even vote for death, life in prison is always going to be fine.

(8 RT 955-956.) After describing crimes that were obviously intended to suggest circumstances far more extreme than those presented in this case,

the trial court did not ask a question, but merely stopped, presumably to allow Juror C to respond. Her response, "I would probably say life in prison," (8 RT 956) suggests that she believed the court was asking her which penalty she would apply in this case. Compared to the extreme examples mentioned by the court, Juror C may have reasonably concluded that life in prison was the appropriate penalty for the crimes charged in this case. In any event, the record demonstrates that prospective jurors were not being asked the appropriate questions and, as a result, their answers should not have been used to remove them for cause. Nevertheless, the prosecutor immediately challenged Juror C for cause based strictly upon that response.

When the defense questioned Juror C, however, she confirmed that she was not of the belief that she would never vote for the death penalty and said that voting for death, even in this case, was a definite possibility. Asked if she thought she could do it, she said, "Probably so." (8 RT 957.) Upon questioning by the prosecutor, Juror C said she had no preference for one penalty over the other in every circumstance. (8 RT 959.) Once again, as with Juror M, the response which led to Juror C's immediate dismissal as a juror was when she merely expressed doubt about her ability to "come down here in open court" and "announce" that she was "voting to send that man at the end of the table to die . . . in the gas chamber." (8 RT 959.)

Juror C's voir dire was an abbreviated version of Juror M's voir dire. In both instances, the prospective jurors were willing and able to carry out all duties which the law and their oath required of them and they only "equivocated" about whether they would be able to "announce" in open court. Not only was this misleading but it was also a "nondisqualifying concept," (*Stewart, supra,* 33 Cal. 4th at p. 447) since jurors are not required to personally "announce" a verdict.

### 3. Juror K

Juror K's responses to voir dire questions demonstrate her confusion about what was expected of her. After a somewhat lengthy description of how the capital trial process is supposed to work (13 RT 1673-1678), the court asked whether Juror K was the type of person who would invariably vote for death regardless of the evidence. Several times Juror K said that she "couldn't say right now," and that she'd "rather not say at this point." (13 RT 1676.) As with Juror M and Juror C, Juror K apparently understood that the she was being asked to commit to a particular penalty before actually hearing the evidence. Juror K also expressed discomfort about having "to be put in the position to make that decision." (13 RT 1676.) However, when asked the *relevant question*, in a simple, direct and understandable form, she answered appropriately:

> Q: Do you think that these crimes, as they have been described to you, are serious enough *where the death penalty could possibly apply?*
>
> A: *Yes.*

(13 RT 1376, emphasis added.) She also agreed that she would not vote automatically for death (13 RT 1677), but was never asked the other "defining" question, whether she would vote automatically for life. Based upon her other answers in the record, it is reasonable to conclude that had she been asked that question she would have also agreed that she would not vote automatically either way. Juror K properly agreed that she would be able to follow the court's instructions with respect to evaluating the penalty phase evidence, and confirmed that she would honestly "be open to the possibility of voting for either punishment, depending upon the totality of the evidence presented." (13 RT 1678.)

When questioned by the prosecution, Juror K confirmed her

questionnaire answer that she believed in the death penalty, "if warranted," (13 RT 1679) and stated that she would vote for the death penalty if it were presented in a ballot initiative. In her own words, she believed that "if someone was to commit any crime of that [nature] – that they should get what they deserve. In that sense, sometimes it warrants death." (13 RT 1681.) This candid response unequivocally establishes that Juror K was willing to consider the death penalty in a case such as appellant's. On a scale of one to ten, she rated herself as a "six" in favoring death. Rather than accept these answers, the prosecutor focused on Juror K's original statement that she was uncomfortable having to make such a serious decision. However, even upon further inquiry by the prosecutor, Juror K confirmed that she would not allow her discomfort to keep her from following the court's instructions. (13 RT 1682.)

The prosecutor, having succeeded in having two previous prospective jurors dismissed for cause who were reluctant to "announce" their verdict, pushed Juror K to admit that she too would be unable to do so. (13 RT 1683-1684.) However, Juror K, several times confirmed that she would, in fact, be able to so. (*Ibid.*) Despite answers which showed that she was not only fully qualified to serve, but also willing to "announce" her verdict, the trial court allowed the prosecutor to ignore Juror K's responses, in an attempt to convince her that she would not, in fact, be able to do so. After a lengthy lecture about how difficult it would be for her to carry out the duties that she had already agreed to perform, Juror K agreed that the decision would be difficult and responded, "That's why I say I'm not comfortable in making the decision." (13 RT 1685.) The trial court then told her that if she voted for death she would have to "come down into court and announce that that's your decision." (*Ibid.*) After being pressed again

by the court, to answer a question she had already answered twice, Juror K finally agreed with the court that she did not think she could do that (announce her verdict in open court) after all. With that, she was immediately excused for cause. (13 RT1686.)

Once again, the trial court based its ruling on factors irrelevant to the question of whether Juror K was qualified to serve as a juror. None of her answers established that she was unable or unwilling to perform the duties required by law or by her oath.

Although respondent has cited several California decisions which appear to allow the removal of jurors who are merely reluctant to impose death (RB 61-63, citing *People v. Roldan* (2005) 35 Cal.4th 646 and *People v. Haley, supra*, 34 Cal.4th 283) to the extent those cases approve the removal of capital jurors who would have a "hard time" voting for death, or would find the decision "very difficult," (*Roldan, supra* at p. 697) those cases conflict with decisions of the United States Supreme Court and are not binding under federal constitutional standards. (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 515 [trial court improperly removed for cause a prospective juror who twice said that although not opposed to capital punishment "she would not like to be responsible for . . . deciding somebody should be put to death."]; *Adams v. Texas, supra*, 448 U. S. at p. 50 ["neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability . . . to follow the court's instructions and obey their oath, regardless of their feelings about the death penalty."]. Without demonstrable evidence that a juror is not qualified to serve, the trial court's decision to excuse the jurors cannot be upheld on appeal. (*Gray v. Mississippi, supra*, 481 U.S. at p. 652 [motion to excuse venire member for

cause "must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."].)

### B. Juror P Was Not Excusable For Cause Simply Because She Believed Only The Most Extreme Cases Warranted The Death Penalty.

Respondent argues that Juror P was properly excused for cause because "she could not vote for the death penalty in appellant's case." (RB 61.) However, respondent has mischaracterized Juror P's responses to the questions posed during voir dire. When asked the proper questions, Juror P gave appropriate, relevant responses. When asked specifically whether she would vote automatically for death, she said she would not. (15 RT 1845.) When asked specifically whether she felt the crimes in this case were "serious enough where the death penalty could possibly apply," Juror P said, "Yes, that – that could be possible." She qualified her answer by saying that the evidence in the "second trial" [penalty phase] would have to "warrant" it. Juror P had obviously heard and understood what the trial court had been explaining to her about the purpose of the penalty phase trial. When asked by the court if the death penalty "could possibly" apply, she agreed that it was possible in appellant's case. (15 RT 1846.)

Even though she answered the question once, the trial court repeated the same question: "Do you really believe that you would be open to the possibility of either punishment, if we reach that stage, that penalty stage, depending upon all of the evidence that you hear?" (15 RT 1846.) Like so many of the other prospective jurors who were removed for cause, Juror P believed that she was being asked how she would actually vote in this particular case, before she had heard any of the evidence. (15 RT 1846.) Her interpretation was reasonable since she had already once answered the

question about whether she would "possibly" vote for death in this case. Because the trial court continued to press her with the same question, it was reasonable for her to think the court was now asking her a different question, i.e., how she would actually vote.

After the trial court explained again that it was only interested in knowing if she were open to the possibility of voting for either punishment, Juror P properly answered that "it depends on the circumstances, the evidence." The court said, "Fair enough," (15 RT 1847) which should have been a sign that she had satisfactorily answered the relevant question. Nevertheless, the trial court asked the same question over again[38]. This time Juror P answered, "I guess so." (15 RT 1847.)

Although the trial court seemed to be satisfied that Juror P had adequately responded to the questions posed, it asked her one final open-ended question – whether she would like to tell the court anything further about her "views on the death penalty." (15 RT 1848.) As respondent has noted, Juror P said the crime would have to be "horrible" beyond wildest imagination, before she would condemn someone to die. While such a limitation might not be the personal viewpoint of many jurors, it is certainly a *permissible point of view*, considering that the death penalty is never mandatory under California law and, in any event, is supposed to be reserved for "the worst of the worst." (*Kansas v. Marsh* (2006) ___U.S. ___, 126 S.Ct 2516, 2543 (dis.opn., Souter, J.); see also *Roper v. Simmons* (2005) 543 U.S. 551, 568 ["Capital punishment must be limited to those

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[38] "So I take it from your answers that if at the end of the case you thought that the death penalty was the appropriate punishment, if you felt the aggravating circumstances were so bad, and death was really the appropriate punishment that you could vote for the death penalty, am I correct?" (15 RT 1847.)

offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins v. Virgina* (2002) 536 U.S. 304, 319)].)

However, the trial court asked another question of Juror P, whether she thought that the crimes alleged in this case were serious enough to possibly warrant death. When Juror P said, "No, not really," (15 RT 1848) the trial court immediately excused her. Since Juror P had already responded that she was willing to consider the death penalty as a possible punishment in this case, her initial reaction that she did not really think, at this stage, that the death penalty should apply was not a sufficient reason to excuse her for cause.

Once again, a scrupled juror was removed by the court on the basis of answers that were either not relevant to what should have been the underlying issue – whether the juror would *consider* both penalties in this case – or because the trial court had led the juror to believe that she had to commit to a particular penalty prior to hearing the evidence. Each of the four jurors in question repeatedly affirmed that they would decide the case only on the basis of the evidence presented, did not want to prejudge the case before hearing that evidence, and were open to either penalty, based on the evidence. Nothing more should have been required of them.

The removal of the Jurors M, C, K and P, for cause, by the trial court, deprived appellant of his right to a fair and impartial jury under the Sixth and Fourteenth Amendments. Appellant's death sentence must be reversed.

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## III.

## THE TRIAL COURT'S FAILURE TO GRANT SEVERANCE OF THESE FIVE CASES DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

Since joinder is permissible in this case, severance is only required if it can be shown (either at the time of trial or on appeal) that appellant was so prejudiced by the joinder of the cases against him that it denied him a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 947.) Appellant has certainly met that burden. Had the prosecution been required to try these five cases separately, it is virtually certain that appellant would not have been convicted of the burglaries, robberies or murders. At most, appellant would have been convicted of receiving stolen property in the case of the Constantine bracelet. The evidence was so flimsy that, in the case of the attack on Mrs. Durham, the prosecutor admitted that had it been tried separately, it would have been dismissed for lack of evidence. (RT 3907.)

Rather than address the obvious prejudice to appellant caused by the joinder of these cases, respondent avoids the issue by claiming that the evidence in these five cases was all cross-admissible. (RB 67.) Appellant agrees that if the evidence is cross-admissible, "any inference of prejudice is dispelled." (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172.) However, as was thoroughly discussed in the AOB, the evidence was not cross-admissible. The only possible purpose for cross-admitting this evidence would be to establish the identity of the perpetrator. However, identity is established only when the circumstances of the separate crimes are *unique – or so distinctive* that they clearly separate the crimes from other crimes of this type. Their distinctiveness acts as a "signature."

Respondent relies on several cases to support its claim that the evidence in all of these cases was cross-admissible. However, in those

cases, the multiple crimes in question were either particularly related to each other (such as in *People v. Jenkins* (2000) 22 Cal.4th 900 [evidence re killing of two witnesses to same robbery was cross-admissible]), or involved unique characteristics which clearly set the charged offenses apart from other crimes of that type (such as *People v. Bradford* (1997) 15 Cal.4th 1229 [victims were both young white females, induced by defendant to go with him to a remote desert area to be photographed to further their professional modeling ambitions; victims were strangled within nine days of each other].)

In appellant's case, the five joined crimes were all burglary-robberies. Although respondent claims that all of these five cases shared ten "prominent similarities," (RB 70), upon closer examination it is apparent that respondent has simply listed very general features that some of the cases shared, while ignoring their many differences. Obviously, all burglary-robberies will necessarily share common elements (e.g., the breaking and entering of a dwelling and the taking of property by force). At the same time, burglary-robberies often involve additional non-essential features which are so commonplace or predictable that they could not properly be characterized as *modus operandi* evidence. (See *People v. Bean* (1988) 46 Cal.3d 919.) Examples of such features might be: choosing vulnerable locations and/or victims, rendering the victim helpless through assault and/or binding, ransacking to search for valuables, and taking small valuables that can be removed quickly and easily, notably cash and jewelry. Although respondent has listed ten "prominent similarities" among these five cases (RB 70), upon closer examination the similarities are actually quite ordinary.

In fact, nothing about these crimes would set them apart from any

number of burglary-robbery cases that, unfortunately, take place throughout the nation every day. Neither the type of victim (elderly women), the various *different* methods of entry (cutting a back screen door, knocking on and entering the front door, or some other non-forced entry), the various injuries inflicted (head injuries and/or beating, strangulation, broken ribs), the actions taken inside the house (sometimes ransacking, sometimes not), nor the items taken (various small items of value, sometimes cash, sometimes jewelry, in one case nothing), which distinguish these five cases from scores of other cases which involve most, if not all, of the same circumstances. In fact, a review of respondent's list (RB 70) reveals that the ten factors cited are "entirely unremarkable," (*People v. Alcala* (1984) 36 Cal.3d 604, 633) and in some cases are even necessary elements of the crimes in question.

***(1) Victims were elderly women***

This first point which respondent cites applied to all five cases. However, that all of the victims were elderly women does not establish "signature" crimes. Senior citizens, particularly females, are often crime victims, presumably because of their perceived vulnerability. For this reason, laws aimed at deterring crimes against the elderly have been enacted. Penal Code section 1203.9 (a), which was charged in this case (CT 2943-2948), provides additional penalties for crimes against persons over the age of sixty. That such a law exists suggests that crimes against the elderly are noticeably frequent and, in any event, not so rare as to point to appellant as a likely suspect simply because the victims in these cases were all older women.

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***(2) and (3) Crimes took place in the San Leando and Hayward areas within a two month period.***

Respondent next notes that these crimes all took place within the described geographic area, defined by the crimes themselves, over a period of time also defined by the crimes themselves. However, there is nothing particularly significant about either factor. Had another assault taken place two months earlier, or even a year earlier, in another nearby community, respondent would have undoubtedly just extended the time period and the geographic area to include that crime as well. While location and time period are certainly factors to be considered in the equation, in this case neither the locations nor the time frame are particularly compelling similarities and they are by no means "unique" combinations which mark appellant as the likely perpetrator. In *People v. Bean* (1988) 46 Cal.3d 919, two murders took place within 12 blocks of each other and three days apart, but were found by this Court to share insufficient commonalities for finding the evidence in each case to be cross-admissible. Moreover, as is true in this case, the common characteristics were held to be "ordinary," not "unique." (*Id.* at p. 937.)

***(4) Afternoon hours***

Although respondent claims that all of these crimes took place in the afternoon, only three of them were shown to have taken place in the afternoon (Durham around 4:30 p.m.; Herrick around 4:00 p.m.; Constantin around 4:00 p.m.). Mrs. Figuerido was murdered in the morning, sometime between 10:30 a.m., and noon (RT 3366), and there was no definitive evidence as to when Mrs. Larson was strangled. She was found late at night by her grandson (RT 3241-3242) and was last seen alive before noon that day. (RT 3143.) While it is possible that all five crimes took place during daylight hours (one in the morning, three in the afternoon and one sometime between noon and midnight), even that has not been established

by the evidence and is not certain. However, what is certain is that respondent has misrepresent the record by claiming that "all of the crimes occurred during the afternoon hours." (RB 70.)

***(5) Victims were "savagely beaten about the head and neck"***

As with the other factors which respondent claims establish appellant's signature on these crimes, respondent sifts through the very different injuries of these five women, to find their common characteristics, while ignoring their far more prominent differences. While it is true that each of the five women sustained *some injury* to either the head or neck area, the truth is that their injuries were also quite different, most notably Mrs. Larson who was strangled, not beaten, to death and Mrs. Constantin, who was attacked with either an iron or a paint can (or both), and whose most serious injury was the rib fracture and injury to her lung cavity. (RT 3675.) While three women died, either at the scene or weeks later, both Mrs. Herrick and Mrs. Durham survived their injuries. It certainly could not be said that the injuries sustained in each of these five cases were so similar that they pointed to a particular suspect. Their differences were more substantial than their similarities.

***(6) Wounds "attributable solely to blunt trauma"***

Respondent's sixth alleged point of "prominent similarity," blunt trauma injury, is just a slightly different way of stating what has already been expressed in point number 5, above. Again, it is true that all of the victims sustained some type of head or neck injury, but most sustained other injuries also, which were the result of being either punched, strangled, or hit with an object of some sort. The seriousness of the injuries varied significantly. Two of the victims were found dead at the scene, one from strangulation. The two who survived their injuries spoke only of being hit

with a fist. Mrs. Constantine was attacked with either an iron or a paint can, knocked down and stepped on, sustained broken ribs and a gash on the back of her head from the metal object. She was expected to survive her attack, but died six weeks later from a blood clot. To the extent that strangulation, which was the cause of death of Mrs. Larson, was considered a "blunt trauma" injury[39], then it is true that all of the victims sustained some form of blunt trauma injury. However, blunt trauma is such a broad description, as is "beaten about the head and neck," that it can hardly be cited as a unique factor identifying appellant as the perpetrator, and in any event cannot be cited as two separate points of similarity.

There is no dispute about the varied injuries that each victim sustained. That such injuries, including strangulation, can also be defined broadly as a form of "blunt trauma" does not establish a separate point of similarity. Respondent exaggerates the importance of these unremarkable similarities, while ignoring differences that are just as apparent.

***(7) and (8) Motive was robbery and attacks inside the home***

Each of the five cases was charged as a burglary-robbery, which by definition requires the breaking and entering of a dwelling house for purposes of committing a felony inside, accompanied by the taking of property by force or fear. Respondent notes that "all of the attacks occurred

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[39] In discussing Mrs. Larson's injuries, Dr. Hermann testified that "[i]njuries to the larynx indicate to me that there has been *blunt trauma* to the neck, *generally [of] a squeezing or compressive nature.* (RT 3281, emphasis added.) While Dr. Hermann did not rule out the possibility that Mrs. Larson suffered a "blow to the neck," (RT 3280) given the "contusions and abrasions with the skin" which were present in this case, Dr. Hermann concluded that Mrs. Larson's injuries were "highly indicative of some degree of asphyxia due to *compression of the neck, strangulation*, if you want to call it." (RT 3281, emphasis added.)

inside a detached dwelling home," and that "in each case the motive for the attack was robbery." (RB 70.) Obviously, both factors would necessarily be present in any burglary-robbery, and certainly do not help to establish appellant as the likely burglar-robber in these cases. Neither of these factors – occurring inside of a dwelling or having robbery as a motive – are ones which "logically operate to set [them] apart from other crimes of the same general variety." *(People v. Sully* (1991) 53 Cal.3d 1195, 1223.) Instead, they are both factors which are elements of the charged crimes themselves.

***(9) Each house was a corner house, near a corner house, or easily accessible for quick getaway***

Once again, respondent has defined the "category" by the varying circumstances of the crimes themselves. Had all five houses been corner houses, then respondent might arguably have made the point. However, only three houses were corner houses. The other two were *not corner houses.* Rather than concede these differences, respondent simply redefines and broadens the category so that the category includes all five of the crimes. While the perpetrator or perpetrators in these cases may well have perceived these homes as being more accessible, and therefore posing less risk of capture, burglars would generally be looking for precisely these types of locations. Choosing more accessible houses to burglarize does not suggest a "unique" mindset any more than breaking into *unlocked* cars would be considered a unique *modus operandi* in car theft cases. Presumably, any burglars who were casing out vulnerable homes would be making similar judgments. In any event, only three houses share the common feature of being a corner house, not five.

***(10) Black man seen in neighborhood around time of attack***

Evidence that a black man was seen in the neighborhoods where these attacks took place is not *modus operandi* evidence, since it does not describe a particular, unique method for carrying out these crimes that distinguishes them from other crimes of this type. Evidence that a black man may have been seen in these neighborhoods would be admissible only if the unique *modus operandi* made these crimes cross-admissible in the first place. (See *State v. Shirley* (Tenn. 1999) 6 S.W.3d 243, 248 [merely noting similarities among offenses is insufficient; to be signature crimes, offenses must have distinct *modus operandi.*]

Respondent also refers to other evidence of common features and argues that a unique *modus operandi* was established. For example, respondent notes that several of the victims had their hands bound. If the binding of the victims' hands is part of appellant's "signature," then the crimes against Mrs. Herrick and Mrs. Durham did not bear such "signature" and should not have been joined with the Constantine, Figuerido and Larson cases. Similarly, respondent notes that the back screen doors were cut in the Constantin and Durham cases. However, if cutting the screen door was part of appellant's signature entry, then the Larson, Herrick and Figuerido cases also do not bear appellant's signature. Respondent cannot have it both ways. If the factors that respondent cites are actually unique, and point to appellant as being the perpetrator, then those factors must at least be present in all five of the cases. While it is true that not all factors must be present in all of the crimes, in this case there is not a single unique characteristic which is present in all five of the crimes.

Without establishing either a unique method of gaining entry, a unique weapon or use of force, the taking of unique kinds of property, or some combination of unusual factors that would set these crimes apart from

other burglary-robberies so as to identify appellant as the only likely perpetrator, respondent has simply identified those relatively unremarkable factors which *some* of these crimes have in common. The fact that each of the victims in this case was an elderly woman, that some form of blunt force was used on them and that the motive appeared to be robbery, simply does not set them apart from other crimes of this type. Based only on a sampling of *reported* California decisions, it appears that crimes of this type and with these circumstances, are not rare. Since reported decisions are small in number compared to the many unpublished decisions, it is fair to assume that these kinds of attacks upon the elderly are relatively commonplace. See, for example, *People v. Crittenden* (1994) 9 Cal.4th 83,107, a burglary/robbery/murder case with nearly all of the generic-type similarities cited by respondent in this case [elderly woman found dead in her northern California home, in 1987; hands bound, a blanket thrown over her head, and signs of severe blunt force trauma to her face and head. She had been killed in the late afternoon. A young black man was seen in the neighborhood on the day of the murder, and robbery was the motive of the break-in.]. A number of other cases also have some of these same generic similarities. See, for example, *People v. Holt* (1997) 15 Cal.4th 619, 639-640 [elderly woman who lived alone, strangled to death in a daytime burglary/robbery in her home; jewelry and cash taken]; *People v. Osband* (1996) 13 Cal.4th 622, 653-654 [elderly woman severely beaten about head and face, in her Northern California home, in the course of a daytime burglary-robbery]; *In Re Jackson* (1992) 3 Cal.4th 578 [elderly women robbed and beaten in their homes]; *People v. Mason* (1991) 52 Cal.3d 909 [defendant convicted of four separate cases of beating and killing of elderly women inside their Oakland homes during a ten-month period in 1980; jewelry and/or money

taken in each of the cases]; *People v. Wright* (1990) 52 Cal.3d 367, 383 [elderly woman beaten to death in her home during the day; victim suffered many blows to the head and evidence of strangulation; cash taken in the robbery]; *People v. Babbitt* (1988) 45 Cal.3d 660 [elderly woman severely beaten about the face and head, in her Northern California home; cash and small items taken from the home defendant charged with burglary, robbery, murder]; *People v. Booth* (1988) 201 Cal.App.3d 1499, 1501 [two separate attacks upon older women inside their homes, one was choked after a towel was placed over her face; cash taken. Another women punched, choked and hit with a heavy iron object; one motive was robbery]; *People v. Hopkins* (1975) 44 Cal.App.3d 669, 672 [89-year old woman punched, kicked, choked and repeatedly hit in the face, inside her home. Hands bound with a cord, money stolen from her purse].)

These cases demonstrate that any number of otherwise unrelated cases can be made to appear very similar by simply focusing on their very general common circumstances. However, establishing a *modus operandi* sufficient for "signature crimes" necessarily requires that otherwise separate crimes involve unique circumstances that clearly set them apart from other crimes of that variety. By refusing to sever the cases, the trial court effectively determined that these five cases were so similar that appellant's "signature" established that only he could have been the perpetrator. This was error.

Respondent has failed to demonstrate anything unique about these cases that would justify joining them in one trial. Since the evidence is not cross-admissible, the "inference of prejudice" has certainly not been "dispelled." (*People v. Balderas, supra*, 41 Cal.3d at p. 172.) To the contrary, joinder significantly lightened – if not eliminated – the

prosecutor's burden to prove each of these cases beyond a reasonable doubt. That standard of proof simply could not have been met had each case been required to rely on just its own evidence.

In fact, it is reasonable to conclude that appellant would not have been convicted of any of these crimes (except for receiving and selling stolen property in the case of the Constantine bracelet), but for the improper joinder of these cases. Standing alone, none of these cases could have survived a dismissal for lack of evidence. Seeing a black man (rarely identified as appellant until after he was "established" by the police to be the likely suspect) in the neighborhood at or near the time of a crime, simply does not establish guilt beyond a reasonable doubt. It was only by joining these cases that the prosecution was able to tell the jury that if appellant had possession of the Constantine bracelet, then he must have robbed Mrs. Constantine, strangled Mrs. Larson, murdered Mrs. Figuerido and assaulted both Mrs. Herrick and Mrs. Durham. The jewelry in the Constantine case was the only physical evidence connecting appellant to any one of these crimes. Given the weakness of the eyewitness evidence in all of the cases, the relative strength of the Constantine case inevitably led to the convictions in the other four cases. The jury was allowed to conclude that if appellant was guilty in one of the cases, he was guilty in all of them. It is precisely this type of spillover effect which severance seeks to prevent.

The trial court failed to adequately address the issue of cross-admissibility and simply assumed, as did the prosecutor, that if the cases bore a few general similarities, then cross-admissibility had been established. Much more is required, however. These five cases were not cross-admissible and the prejudice to appellant was obvious. By joining the cases, appellant's conviction in all five cases was virtually assured.

Appellant was denied his constitutional rights to a fair trial and reliable guilty and penalty determination. His convictions and death sentence must be reversed.

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## IV.

## SPECIAL INSTRUCTION NO. 1 WAS REQUIRED SINCE THE EVIDENCE WAS NOT CROSS-ADMISSIBLE.

Respondent argues that the evidence in support of each of the crimes charged in this case was cross-admissible. However, as was thoroughly discussed in the AOB (pages 142-164), evidence that the defendant has committed one crime is inadmissible to prove the defendant also committed another crime, *unless* the evidence is being offered to prove something other than criminal disposition. (Evid. Code sec.1101.) In appellant's case, the identity of the perpetrator was disputed as to each of the charged crimes. The evidence would have been cross-admissible only if it were being used to prove identity.

However, in order to be probative of identity, the circumstances of the crimes must be *so similar and distinctive* that they set the crimes apart from other crimes of that type. Appellant has already demonstrated that there was no unique *modus operandi*. The only feature common to *all five* cases was that all were daytime burglary/robberies of elderly women – hardly "signature crime" features. Individually, none of the crimes had particularly distinctive features; and the circumstances that *some* of the crimes shared (e.g., binding of the victims in three cases, cutting screen doors in two cases, corner houses in three cases) were still quite ordinary features that are commonplace in many burglary/robberies.

Respondent has failed to adequately distinguish *People v. Grant* (2003) 113 Cal.App.4th 579 or *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, from appellant's case. Respondent merely reiterates that these cases are inapplicable because in both of those cases the evidence *was not cross-admissible*. Since the evidence was *not cross-admissible* in appellant's case

either, *Grant* and *Bean* are exactly on point. Both fully support appellant's position that Special Instruction Number One should have been given as requested by the defense. The jurors should have been told, in clear and certain terms, that they were not to allow the evidence from one count to influence their decision on any other count. Since the prosecutor repeatedly encouraged the jurors to do just that, appellant was obviously convicted on the basis of inadmissible, and highly prejudicial, propensity evidence. Had these cases been tried separately, it is likely that appellant would have been acquitted in each of the five cases, since there was no physical evidence to suggest that appellant had committed any of these assaults. Appellant's connection to the bracelet taken from Anna Constantin only established appellant's possession of stolen property.

The trial court's refusal to instruct the jury with Special Instruction No. 1, combined with the trial court's refusal to sever the counts, led to a fundamentally unfair trial and an unreliable guilt and penalty determination. Reversal of appellant's convictions and death sentence is required.

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## VI

## THE TRIAL COURT'S REMOVAL OF JUROR ANDERSON WAS AN ABUSE OF DISCRETION WHICH COMPROMISED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The facts surrounding the removal of Juror Ronald Anderson are a matter of record and are not in dispute. Juror Anderson had been accused by another juror of drinking on duty, a charge which the court and the parties quickly concluded was untrue. Nevertheless, the false claim left Juror Anderson upset and angry but, perhaps most importantly, changed. His previously-held belief about non-testifying defendants was "shaken:"

> *[I]n the past. . .* I felt that if the defendant did not want to get up on the stand. . . and say, "I did not do it," *I was prejudiced against him. . . .* but somebody. . . made an accusation against me. . . *And it's really kind of shaken my faith.*

(27 RT 3409, emphasis added.) While he had thus previously been biased against a non-testifying defendant, his new experience of being falsely accused made him realize that not everyone who is accused is guilty. The experience transformed Anderson into an arguably more enlightened juror – particularly from a defense perspective. While initially the false accusation had made Anderson quite embarrassed and upset, after venting his feelings in chambers, Anderson seemed to have recovered. After he calmed down he repeatedly affirmed that he would be fair to both sides, and concluded by stating that he would give the trial "one hundred percent." (27 RT 3420.)

Respondent has failed to state what facts show that Juror Anderson was unwilling or unable to fulfill his duties, the standard which must be met when removing a sworn, seated juror mid-trial. Nor has respondent pointed to anything in the record which would support the trial court's "grave

doubts" that Juror Anderson would "be able to act with entire impartiality." (29 RT 3730.) Neither the trial court nor the respondent have pointed to any evidence demonstrating that Anderson was partial to either side. To the contrary, Anderson stated that his experience with being falsely accused had actually caused him to *reject* his previous position of bias against non-testifying defendants. Abandoning a bias against defendants does not amount to a bias in favor of defendants.

Without citing any evidence of partiality, respondent simply relies upon the "broad discretion" afforded trial courts to remove sworn jurors as the basis for upholding the decision. However, the trial court's discretion *is limited* – to jurors who are "no longer able or qualified to serve." (*People v. Milwee* (1998) 18 Cal.4th 96, 142, fn. 19.) Moreover, it has long been held that the juror's inability to perform his duties must appear in the record *as a demonstrable reality*." (*People v. Williams* (1997) 16 Cal.4th 153, 231, emphasis added; *People v. Compton* (1971) 6 Cal.3d 55, 60.)

Respondent claims that the "demonstrable reality" standard *does not* represent a higher standard than the substantial evidence standard normally applied to issues involving an abuse of judicial discretion. (See RB 92, fn. 33.) Respondent argues that requiring proof by a "demonstrable reality" is just an "alternative way of describing the 'substantial evidence' test." (*Id.*) However, as Justice Werdeger noted in her concurring opinion in *People v. Cleveland* (2004) 25 Cal.4th 466, the "demonstrable reality" standard recognizes the need for "*additional protection* of an accused's constitutional rights" (id. at p. 488, emphasis added) when it comes to a trial court's decision to discharge a sworn, seated juror. According to Justice Werdeger, the long-recognized "demonstrable reality standard" (see *People v. Johnson* (1993) 6 Cal.4th 1, 21, quoting *People v. Compton, supra,* 6

Cal.3d at p. 60; *People v. Marshall* (1996) 13 Cal.4th 799, 843) "indicates that a *stronger evidentiary showing than mere substantial evidence* is required to support a trial court's decision to discharge a sitting juror." (*Id.*, emphasis added.)

It is also well-settled that if there is ambiguity in the record, that ambiguity must be resolved by proof, not simply by the trial court "presuming the worst." (*Id.*) "Such a presumption, however well motivated, does not furnish the 'good cause' required by [Penal Code section 1089]." (*Id.*; accord *People v. Lucas* (1995) 12 Cal.4th 825A, 489.) That Anderson was unqualified to serve, or that he was unable to act impartially, did not "appear in the record as a demonstrable reality." The removal of Juror Anderson, at the request of the prosecutor, was prejudicial error, requiring reversal of appellant's convictions and death sentence. (*People v. Hernandez* (2003) 30 Cal.4th 1.)

### A. The Trial Court's Initial Finding That There Was No Basis For Excusing Juror Anderson Was Correct. The Evidence Did Not Change After That Ruling.

When Juror Anderson first revealed his embarrassment and anger over the false accusation, he initially thought that his feelings might "possibly" make it difficult for him to focus on the evidence. (27 RT 3412-3415.) However, after participating in two lengthy in-chambers discussions, which included thorough questioning by the trial court and the parties, Juror Anderson ultimately confirmed that he had no problem with either of the attorneys (27 RT 3414), that he would decide the case according to the facts and the law (27 RT 3413), and would give the trial "one hundred percent." (27 RT 3417.) The parties and the trial court then assured Juror Anderson that they had not seen "anything that has happened .

. . which would disqualify you." (27 RT 3418.) It was during this discussion that Juror Anderson first revealed his previously-held bias against non-testifying defendants. (27 RT 3409-3410.)

After Juror Anderson left the chambers, the parties discussed the matter, for a second time, with the trial court. In this second session, the prosecutor, for the first time, expressed concern about Juror Anderson. The *only* issue which the prosecutor raised was the juror's comment about previously feeling biased against defendants who did not testify on their own behalf. However, in raising this issue, the prosecutor misquoted the juror in such a way as to suggest that he would be biased against the defendant, Franklin Lynch:

> [Prosecutor]: I mean [Juror Anderson] *said something along the line if Lynch doesn't take the stand, he will be prejudiced.*[40]
> * * *
> I say that because [defense counsel] Mr. Ciraolo made a comment to me yesterday, I asked him if Lynch will take the stand, and he said, "I hope not." So I am assuming - -

(27 RT 3421, emphasis added.) The prosecutor mischaracterized the juror's comment. Juror Anderson never said anything about appellant Lynch taking the stand (or not). (See fn. 40, *supra*.) Quite to the contrary, Anderson said that he *used to be biased* against non-testifying defendants,

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[40] In fact, this is not what Juror Anderson had said. Rather, Anderson indicated that *this is how he had felt in the past, before he had been falsely accused*: "*[I]n the past*, when it came to serving any type of a jury trial, I felt that if the defendant did not want to get up on the stand, and look his accuser in the eye and say, 'I did not do it,' I was prejudiced against him. . . . . And here, something had occurred, I don't know when, where, how, but somebody, in my mind, *made an accusation against me. . . .And it's really kind of shaken my faith. . . .* (27 RT 3409-3410, emphasis added.)

but that now [after experiencing the false accusation], his beliefs had been "shaken." (27 RT 3410.)

Nevertheless, the prosecutor subtly suggested that the defense should challenge Juror Anderson. Had the *defense* challenged Juror Anderson, the prosecutor would have benefitted in two ways: the removal of another black juror from the jury, and the removal of a juror who had come to appreciate, first-hand, how easily someone could be falsely accused. However, the defense did not take the bait. Instead, the defense pointed out that because Anderson was one of only three black jurors, his presence on the jury might well be very important from the defense's standpoint:

> Mr. Ciraolo: . . .I am also aware of the racial composition of this juror. Mr. Anderson is a light-complected black man, and there are only two others beside him that are blacks on this jury. *And with the cross-racial identification issues, that is a factor that I have to consider*, as well as the 5th Amendment aspects.

(27 RT 3422, emphasis added.) In addition, Juror Anderson's altered perspective about criminal defendants who do not testify, obviously would have been encouraging words for the defense.[41] Perhaps better than anyone else on the jury, Juror Anderson had come to understand the importance of the Fifth Amendment protections to a defendant. For this reason, as well as his race, Anderson's presence on the jury would have obviously added an important voice for the defense.

Although the prosecutor appears to have wanted the defense to challenge Juror Anderson, when that did not happen, and when the trial

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[41] Juror Anderson had learned first hand about the importance of the Fifth Amendment embodied in CALJIC No. 2.60: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify."

court expressed satisfaction with Juror Anderson's assurances, the prosecutor dropped the issue – at least for that moment. The prosecutor could hardly have pointed to Anderson's race, or his changed view about non-testifying defendants, as grounds for his removal. Juror Anderson's upset and anger had also appeared to have resolved itself and the trial court said it was "not invit[ing] a challenge." (27 RT 3421.) Thus, as of the morning of Thursday, February 27, 1992, after Juror Anderson left the judge's chambers, the trial court had concluded there was no basis under Penal Code section 1089 to excuse him. In the trial court's words: "As far as I am concerned, the matter is closed unless it is brought to my attention either by way of a challenge or stipulation between the attorneys that this juror should be excused." (27 RT 3422, emphasis added.)

For the remainder of that day (Thursday) the trial proceeded as scheduled. The prosecution called three witnesses in the morning (27 RT 3423-3482), and four in the afternoon. (27 RT 3483-3578.) No one mentioned Juror Anderson, so it must be assumed he was a fully engaged juror. Since the trial court had previously asked everyone to be "more alert" to Mr. Anderson's courtroom demeanor (25 RT 3122), the silent record can only mean that nothing unusual was happening. Otherwise someone surely would have noted it on the record.

The trial then continued through the next day (Friday, February 28), with nine more prosecution witnesses testifying – five in the morning (28 RT 3579-3664) and four in the afternoon (28 RT 3665-3723.) Once again, no one mentioned any problems with Juror Anderson. While simple inattentiveness has never been grounds for removal of a seated juror (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348-1349; *People v. Bowers* (2001) 87 Cal.App.4th 722, 731), presumably if one of the parties had had

any qualms about Juror Anderson, that person would have watched carefully, stated those concerns on the record and sought Mr. Anderson's removal. However, that did not happen on either of the two days following the trial court's initial ruling.

Nevertheless, as it later became clear, the prosecutor still retained an interest in having Mr. Anderson removed from the jury. Although the trial court had pronounced the matter "closed" on Thursday, the prosecutor decided to capitalize on the slight opening left by the court. Thus, on the following Monday, March 3, 1992, the prosecutor notified the court that he would challenge Juror Anderson after all. (29 RT 3725.) The motion did not appear to be based on any new or different evidence relevant to Juror Anderson's performance on the jury. Rather, it appeared that the prosecutor had simply changed his mind.

The prosecutor read from the transcript of the in-chambers discussions which had taken place on Thursday morning (29 RT 3725-3726) – all evidence which had already been before the court. The prosecutor simply rehashed the subject of Juror Anderson's initial upset and anger. He did, however, conclude his argument with a new claim: that "[Mr. Anderson's] head was down, and his eyes were closed," between 2:30 and 2:36 p.m., on the previous Thursday afternoon, during the cross-examination of one witness. (29 RT 3726-3727.)

This observation, which allegedly took place four days earlier, was never noted on the record at or near the time it supposedly took place. The prosecutor claimed to have brought it up, *off the record*, during a break. (29 RT 3727.) However, neither the trial court nor defense counsel could confirm having *observed* this conduct, and apparently no one felt the matter was significant enough to put it on the record at the time it allegedly

took place. The prosecutor never objected at the time, nor did he ever indicate that he intended to rely on what he had supposedly observed to call for Juror Anderson's removal *four days later.*

The prosecutor chose to sandbag – to hedge his bets and say nothing. It must be assumed that the prosecutor took no formal action because he knew that the conduct was *de minimus*, and insufficient to merit Juror Anderson's removal from the jury. By doing nothing, the prosecutor tacitly approved of Mr. Anderson's continued participation on the jury. More importantly, regardless of whether Juror Anderson had indeed closed his eyes for six minutes or not, such conduct did not establish that Anderson was not still listening to the cross-examination.

Moreover, the behavior the prosecutor criticized was no different than an incident he had witnessed the week before, on Tuesday, February 25, when he saw Mr. Anderson with "his head down out of sheer boredom." (25 RT 3269.) "His eyes were closed. I'm sure it was that pause in the proceeding; he was probably bored at the end of the day." (*Id.*) The prosecutor was not the least bit concerned about this identical behavior the previous week. In fact, the prosecutor actually defended Mr. Anderson's behavior as being a moment of understandable boredom. The trial court concurred and said, "From everything I have been able to see, he's at least as attentive as others. As far as I'm concerned, this is the end of the matter." (*Id.*)

The earlier incident had taken place *before* Juror Anderson was told about the false accusation, so there was no reason to interpret his apparent "boredom" as hostility. Everyone assumed it had been just an ordinary and insignificant moment of inattention. It was only after Juror Anderson had expressed his changed view of non-testifying defendants that the

prosecutor took issue with Mr. Anderson having his eyes shut briefly.

There was thus no basis for the prosecution to later argue that this identical, innocuous behavior constituted grounds for removal of a seated, qualified, African-American juror – particularly one who had learned first-hand that people can be falsely accused, and that a criminal defendant should never be *presumed* guilty. There was no "new evidence" that Juror Anderson was unable to perform his duties; nor was there any evidence at all that Juror Anderson was "partial" to either side. What was new was that the prosecutor used the weekend break to construct a more polished argument for removing this willing and qualified black juror. With "cross racial identification" being the most critical issue in this case, the defense understood the importance of retaining an African-American man on the jury – particularly one like Mr. Anderson, who understood that the system was capable of entertaining false claims.

In responding to the prosecutor's newly-stated concern with Mr. Anderson's supposed inattention, the trial judge then commented, for the first time, that he had seen Juror Anderson "with his arms folded and star[ing] straight ahead" while witnesses were being examined. (29 RT 3730.) As was the case with the prosecutor's newfound concern, the trial judge said nothing about his observations until well after the conduct had allegedly occurred. All that is known is that the court failed to make a record for three to four days *after* the conduct was supposedly observed.[42]

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[42] The court said it observed this "following the second *in camera*," (RT 3730), which took place on Thursday morning, February 27. The court ruled on Monday, March 3, before the day's proceedings began in open court. Thus, the court would have had to have observed the conduct on either Thursday or Friday but, like the prosecutor, never brought it up on the record so that the defense would have had an opportunity to rebut the

This was well after the defense would have had an opportunity to rebut the claim, or explain the behavior, assuming it even took place. The trial court did not specify *when* it observed the conduct, whether it happened just once or more than once, for *how long* Juror Anderson looked "straight ahead," or what was happening in court while Mr. Anderson was doing this. Without having made a record *at the time this conduct was supposedly taking place,* it was impossible for the trial counsel then, and appellant now, to respond. Without a record, there is also no basis for a reviewing court to evaluate the conduct. At a minimum, the trial court should have asked Juror Anderson if he were paying attention to the trial at the time the conduct was observed.

Moreover, even if Anderson had been looking "straight ahead," from time to time, it simply cannot be said that a juror who folds his arms across his chest and looks straight ahead, for an unspecified period of time, has demonstrated an inability or unwillingness to carry out his duties as a juror. Indeed, even as the trial court ruled to remove him, it conceded that "in fairness, *most of the time* during the presentation of the evidence [Juror Anderson] *did seem to act appropriately.*" (29 RT 3730, emphasis added.)

Respondent cites *People v. Marshall* (1996) 13 Cal.4th 799 as support for its position that jurors who admit that they will not be able to focus on the trial may properly be removed by the trial court. (RB 92-93.) However, the juror who was excused in *Marshall,* continuously maintained that he *would not* be focused on the trial, under the circumstances presented in that case. His assurance that he could do his duty was qualified with the admission, "*except I wouldn't have my mind on what I*

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charge or otherwise explain the conduct.

*am doing here*." (*Id.* at p. 845, emphasis added.) Juror Anderson, on the other hand, assured everyone that he would give "one hundred per cent" to his work as a juror in this case.

Respondent's reliance on *People v. Lucas* (1995) 12 Cal.4th 415 is also misplaced for several reasons. First of all, the juror in *Lucas asked* to be excused from further jury service. Following the guilt verdict she reminded the court that she had pre-paid vacation plans and that proceeding with the penalty trial would force her to lose her vacation. Second, Penal Code section 1089 specifically provides for the discharge of a juror who "requests a discharge and good cause appears therefor." The trial court found that retaining this juror would pose a hardship for her and because of her obvious "distress" would interfere with her ability to carry out her duties. Finally, although defense counsel said it would not stipulate to her dismissal, it told the court that removing her "would be your decision." Then, when the court did remove the juror, the defense offered no basis for its objection. All three of these factors distinguish the *Lucas* case from appellant's. Juror Anderson did *not* ask to be removed, and he promised to do his best for both sides. Moreover, the trial court removed him over appellant's strong objection, in a case where cross-racial identification figured prominently.

Respondent has essentially conceded appellant's position that a trial court may not remove a seated juror simply for exhibiting emotional upset *or* occasional inattention. (AOB 205-211.) Nevertheless, respondent argues that the *combination* of upset and inattention *did* provide good cause. However, this argument still fails. Any anger Anderson felt was all fully expressed and exhibited in chambers on Thursday morning, and everyone still felt satisfied with his remaining on the jury. Similarly, the

claims that Anderson took his seat and then looked straight ahead or had his head down, had to do with behavior that was also observed within the next few hours, during the Thursday proceedings. This supposedly critical "combination" was thus all fully before both the prosecutor and the trial court on Thursday afternoon. Yet no one took *any action* to even express a concern on the record, much less call for Anderson's removal. Indeed, if Anderson had been guilty of misconduct sufficient to justify his removal, then one must wonder why everyone utterly ignored the misconduct, allowing Anderson to continue his duties for another full day of testimony.

Although the trial court concluded that it had "grave concerns" about Mr. Anderson's "impartiality," it never offered a shred of evidence that he was biased. Nor has respondent offered any such evidence. Quite to the contrary, Juror Anderson said that he had *changed his mind* about his previously-held bias *against* non-testifying criminal defendants. While his change of heart certainly explains why the *prosecutor* sought his removal, it does not explain the trial court's decision to grant the prosecution's long-delayed motion. The record simply does not support the decision.

Moreover, even if the record clearly established that Anderson lowered his head, looked straight ahead, and/or closed his eyes for one or two brief periods, that would not establish that he was not still paying attention. This Court, and others, have often recognized that brief periods of inattention among jurors are commonplace in lengthy trials. (*People v. Bradford* (1997) 15 Cal.4th 1229,1347; *People v. Johnson* (1993) 6 Cal.4th 1, 21-22; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1233-1234 [counsel said he had counted four jurors who had their eyes closed and appeared to be dozing]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 733 ["bare fact of sleeping at an unknown time for an unknown duration [even during

deliberations] . . .[was] insufficient to support a finding of misconduct or to conclude the juror was unable to perform his duty"]; *State v. Bolen* (Idaho 2006) 146 P.3d 703, 706-707 [contemporaneous record must be made of sleeping or inattentive jurors].) Mr. Anderson's occasionally bored demeanor certainly did not provide grounds for removing him. Apart from evidence of misconduct, which was never shown, his removal was clearly unwarranted. Both of the parties and the court acknowledged that Anderson was "at least as attentive" (25 RT 3269) as the other jurors, and "in some regards better than other jurors." (*Ibid.*)

Before a juror may be discharged for cause, the juror must have made it clear that "he no longer could be objective." (*People v. Boyette* (2003) 29 Cal.4th 381, 462.) That never happened in this case. Although Mr. Anderson initially expressed anger and doubts, he ultimately promised to do his duty to the utmost. The trial court "was not entitled to [resolve the issue] by presuming the worst." (*People v. Compton* (1971) 6 Cal.3d 55, 60.) Although the trial court "has broad discretion to investigate and remove a juror in the midst of trial where it finds that . . . the juror is no longer able or qualified to serve," (*People v. Boyette, supra,* 29 Cal.4th at p. 462, fn. 19), in this case, the trial court specifically found that "in fairness, most of the time during the presentation of evidence he did seem to act appropriately." (29 RT 3729.) The trial court had no reason to doubt (much less entertain "grave doubts" about) juror Anderson's "impartiality." (29 RT 3730.) The trial court abused its discretion in removing a qualified juror without good cause.

The error compromised appellant's fundamental constitutional right to trial by an impartial jury, guaranteed by the Sixth Amendment of the United States Constitution. (*People v. Hernandez* (2003) 30 Cal.4th 1.)

The right to trial by jury is a cornerstone of our system of jurisprudence, and should be zealously guarded by the courts, which must resolve any doubt in favor of preserving and furthering such right. (See, e.g., *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411.) In this case, the error was prejudicial.

### B. The Erroneous Removal of Juror Anderson Was Prejudicial To Appellant. Reversal of the Convictions and Death Sentence is Required.

Respondent argues that even if the trial court did not have good cause for Juror Anderson's removal, any error was harmless. Respondent cites *People v. Cleveland* (2001) 25 Cal.4th 466 and *People v. Hamilton* (1963) 60 Cal.2d 105), as examples of what is required to establish prejudice. (RB 96.) However, in both *Cleveland* and *Hamilton* the jurors were removed *during deliberations*, and after each had clearly expressed views favoring the defense. While those cases certainly do show that the removal was prejudicial, neither are appropriate for comparison here, where the juror was improperly removed *before* deliberations began. More on point is *People v. Hernandez* (2003) 30 Cal. 4th 1, in which the juror, like Juror Anderson in appellant's case, was improperly removed during the taking of evidence.

In *Hernandez*, seated Juror No. 8 asked for a conference with the trial judge. At that time, she expressed her disappointment in certain aspects of the trial, including her perception that both the judge and the prosecutor were smirking during the testimony of a defense witness. She also admitted being "bothered by the tone of the prosecutor's cross-examination." (*Id.* at p. 4.) The prosecutor was concerned "about the juror's emotional state," and urged her removal, even though she denied

she would be unfair and the record established no bias in favor of the defendant or against the People. (*Id.* at pp. 4, 10.) Based upon the "totality of the circumstances," including the juror's "words and body language," the trial court granted the prosecution's motion to excuse her under Penal Code section 1089.

On appeal, the lower appellate court held that removing Juror No. 8 from the jury was error. Even though the juror had assured the trial court that she had not formed an opinion and vowed to keep an open mind, her remarks had created the impression that she might have been, at least for the moment, sympathetic to the defense. This Court adopted the lower appellate court's view that the juror's erroneous removal *was prejudicial* solely because the defendant suffered "the loss of a juror who *seemed inclined to give serious consideration to the testimony of the defense witnesses*." (*Hernandez, supra*, 30 Cal.4th at p.10, emphasis added.) The finding of prejudice was upheld by this Court, despite no evidence that the removal of Juror No. 8 "gave the prosecutor any concrete advantage whatever." (*Id.* at p. 9.)

The reasoning in *Hernandez* applies with equal force here. In both cases, the jurors in question were visibly upset by something which had occurred during the proceedings. In both cases the jurors requested a conference with the trial judge to discuss what was bothering them. In both cases, the prosecutor expressed concern about the juror's "emotional state." In neither case was there evidence that the juror was biased in favor of or against either party. (*Hernandez, supra* at pp. 9-10; 27 RT 3414.) In fact, here Juror Anderson specifically agreed that he would decide the case according to the facts and the law. (27 RT 3413.) Significantly, after being falsely accused, Juror Anderson admitted that his previously-held

bias against defendants who did not testify had been "shaken." Like Juror No. 8 in *Hernandez*, Juror Anderson "seemed inclined to give serious consideration" to concepts important to the defense. In the present case, that was the presumption of innocence and the right of a defendant not to testify. Since appellant did not take the stand in this case, retaining a seated juror who had specifically expressed an understanding of that right was obviously important to appellant. Juror Anderson's remarks, like those of Juror No. 8 in *Hernandez*, created the impression that, at least for the moment, he was open to the defense. Such a showing was all that was required to establish prejudice in *Hernandez,* and all that is required here.

In exercise of his constitutional right to a jury trial, appellant spent two and one-half months painstakingly selecting jurors for his capital trial. (2 RT 114 [jury selection began on December 4, 1991]; 21 RT 2628 [jury was sworn on February 18, 1992].) Once the jurors were seated, sworn, and listening to the evidence, appellant had a right to expect that they would not be removed except upon the most exceptional of circumstances – certainly not on a whim or merely as a result of afterthought. Of the twelve regular jurors appellant selected, three were African-American like himself. Since the most significant issue in this trial was the validity of several questionable cross-racial identifications (see AOB 120-142), retaining Juror Anderson on the jury was of particular importance to appellant. (See AOB 214-216.) Anderson's voice on the jury would have offered a valuable perspective – and one that his white replacement, Cheryl Goldie, likely could not provide.

However, Juror Anderson made a critical mistake – revealing to the prosecutor that he had come to question a previously-held bias against defendants who did not testify. Had he admitted that he still *retained* such

a bias, grounds to excuse him might have been shown, but Anderson instead said that he had abandoned that bias, based upon his own recent experience. That admission is what appears to have triggered the prosecutor's changed opinion and his belated decision to seek Anderson's removal. If two brief moments of inattention had been considered serious enough to remove Juror Anderson, then they should have been considered serious enough to document those instances on the record at the time (or at least on the day) they allegedly took place. Without such a record, appellant was powerless then, as he is now, to explain Juror Anderson's conduct or otherwise refute the claim. Juror Anderson's partiality or inability to serve on the jury simply *does not appear in the record* as a "demonstrable reality."

Removing Anderson compromised appellant's fundamental constitutional right to a trial by jury. (*Hernandez, supra*, 30 Cal.4th 1.) Appellant was prejudiced by this error and is entitled to a new trial with a properly selected jury. The convictions and death sentence must be reversed.

* * * * *

## VIII

## MRS. CONSTANTIN'S NARRATIVE ACCOUNT OF HER ATTACK WAS THE PRODUCT OF REFLECTION AND WAS NOT A "SPONTANEOUS UTTERANCE." HER DAUGHTER'S RECOUNTING OF THE STORY WAS INADMISSIBLE HEARSAY.

Respondent describes this as a "straightforward issue," (RB 103) suggesting that Vickie Constantin's (Vickie's) hearsay testimony about her mother's attack was merely the typical repeating of a spontaneous declaration, and therefore properly admitted. However, the issue is far from straightforward. In fact, Judge Hora *excluded* this same testimony at the preliminary hearing because she found that it was likely the product of reflection, given the amount of time between the attack and when the statement was made. (CT 2010, 2014.) With reflection, the statement is simply inadmissible hearsay, and no longer subject to the "spontaneous declaration" exception.[43] It was only after Vickie changed her position with respect to the time frame, claiming that most of what her mother told her was communicated at the *house,* rather than at the hospital, that the trial court reversed Judge Hora's previous ruling and allowed Vickie's testimony. (RT 3494.)

The trial court erred in two respects. First, the length and detail of the narrative show that, regardless of when the statement was made, it obviously was the product of *reflection*, and for that reason alone, was not a spontaneous declaration. Second, the trial court failed to differentiate between statements that may have been made spontaneously by Mrs. Constantin upon her daughter's arrival home (short statements such as "Call

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[43] Evidence Code section 1240.

911," and "I was hit from behind"), and those which were admittedly made at the hospital, in response to police questioning ("I could tell by his voice and his accent that he was Black"). The trial court assumed that any statements that Mrs. Constantin gave regarding the attack, whether made at the house or made at the hospital, could all be considered her spontaneous outburst. The trial court's failure to separate these two very different contexts was reflected in its final question to Vickie Constantin, when the court was considering how it would rule:

THE COURT: I just want to make sure I understood your testimony. The statements of your mother that you have testified to this afternoon were statements that were made upon your discovery of her *at your home and that same evening at the emergency room*?

THE WITNESS: Yes.

(RT 3494, emphasis added.) Based upon Vickie's response, the trial court allowed her to testify, without limit, as to what her mother told her (as well as what she told the police) about the attack. Even assuming the initial statements – brief, truly spontaneous utterances blurted out at the home – qualified as spontaneous declarations, the subsequent statements – responses to police questioning at the hospital – were testimonial, not subjected to cross-examination, and thus inadmissible. (*Davis v. Washington* (2006) ___U.S. ____, 126 S.Ct. 2266; *Crawford v. Washington* (2004) 541 U.S. 36.)

Respondent disputes appellant's claim that the length of a statement could be a disqualifying factor in determining whether it is a spontaneous utterance, and claims there is no authority for this proposition. (RB 109.) However, respondent is wrong. Numerous jurisdictions have recognized that a long, detailed, narrative (such as the one Vickie presented to

appellant's jury) cannot be a "truly spontaneous outburst" admissible under the hearsay exception. (*Boyd v. City of Oakland* (N.D. Cal. 2006) 458 F.Supp.2d 1015, 1026-1032; *State v. Machado* (Hawaii 2006) 127 P.3d 941, 947-948; *West Valley City v. Hutto* (Utah Ct.App. 2000) 5 P.3d 1, 4; *State v. Hansen* (Idaho Ct. App. 1999) 986 P.2d 346; *State v. Thomas* (Utah 1989) 777 P.2d 445.) See also *Commonwealth v. Gray* (Pa.Super.2005) 867 A.2d 560, 570 [whether the statement was in narrative form is a factor that must be considered in deciding whether or not it qualifies as a spontaneous declaration].)

The reason why the length of the narrative is a factor to be considered is best understood in this case by simply reading Vickie's testimony as to what her mother "spontaneously" uttered. That testimony is provided below. Whenever it was that Mrs. Constantin provided this statement, its length and detail demonstrate that she had to have been fully capable of reflective thought. The narrative is properly sequenced, beginning with details about events that took place before the attack (garbage, lawn watering, feeding dogs) and concluding with all of the sights and sounds of the attack as well as opinions about the bindings and instruments used, and the reasons for concluding that the attacker was Black. In apparent disregard of this factor – the lengthy, narrative character of the statement itself – the trial court admitted the testimony, and in so doing necessarily concluded that the "utterance [was] spontaneous and unreflecting" and made while "the reflective powers [were] yet in abeyance," (*People v. Poggi* (1988) 45 Cal.3d 306, 318), a finding clearly contrary to any reasonable interpretation of this evidence.

Vickie Constantin testified that when she came home from work, she found her mother badly beaten, sitting on the floor and propped up against

the doorway. Vickie asked her mother what happened, but her mother just told her to call 911. (27 RT 3537.) Vickie made the call, then came back and asked again what had happened. In the moments before the ambulance arrived (which, Vickie had previously testified, arrived "immediately" [8 CT 2001]), Mrs. Constantin allegedly gave the following narrative report:

> She went to the garbage can twice to put the garbage away because the next day was the refuse pickup. She had come back. She had latched the screen door but she did not lock the back door. She went upstairs. She fed the dogs. While the dogs were eating, she proceeded out the front to water the front yard. Very shortly after, maybe couple minutes or whatever, she heard the dogs barking. She went in and they were by the kitchen door that leads downstairs towards the back of the house. They were barking viciously, ferociously.
>
> So, she proceeded to go through the door, lock them upstairs, proceeded down the stairs, proceeded to turn to her right to exit from the den to the utility room, to proceed to the back door, when she was hit from behind. . . .
>
> [S]he did not go down the first time she was hit. She tried to turn around, tried to steady herself. That's when somebody tried pushing, shoving her down and pushing the backs of the legs, where you would kneel to get her down. . . .And she finally went down. . . .
>
> He started beating her back. She tried to turn her head and take a look at who was doing it. In that process, this person stepped on her face and neck to prevent a total turnaround, and proceeded to beat her some more.

(27 RT 3538-3539.) This was just the *first part* of the narrative which was admitted as a spontaneous utterance. There was much more.

The prosecutor then asked Vickie if her mother was "ever" able to

describe the voice of the person.[44] Vickie testified: "Her words were, 'The accent and the voice was that of a black person.'" (RT 3539.) Vickie also quoted her mother as saying that:

> [s]he did not get all of what this person was saying to her but what she distinctly heard was, . . . "Fuck you, bitch, I'll kill you," not once but several times.

(27 RT 3540.) Vickie then continued to relate the rest of her mother's narration, all of which, according to Vickie, was communicated at the house in the moments before the police arrived:

> She still kept trying to get up or get over. This person proceeded to sit on her, and continued beating her with his fists and with other objects, another object. This went on for a long time, and she kept asking, "Why, why?" And that made him more mad, where he just intensified the beating. That's when it got, as she said, "savage." . . .
>
> She got quiet after a while. . . .
>
> This person got off of her and walked to the other side of the room. You could hear the motions. At that point, she heard some, some things being moved, shoved around. He came back. That was when he put a blanket over her. He tied up her hands and he proceeded to beat her some more. . . .She believed she was struck with the iron, the clothes iron.

(27 RT 3540-3541.) The prosecutor then asked about the ambulance ride to the hospital. Vickie said that her mother was in a lot of pain and quoted her

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[44] Since Vickie should have only been testifying about what her mother said "spontaneously," what her mother was "ever" able to say about the voice of the attacker was irrelevant. Since the trial court put no limits on Vickie's testimony, however, she answered the question without giving the context or time frame. It is unlikely that her mother "blurted out" this information spontaneously. It is far more likely that the *police asked* why Mrs. Constantin believed that the man, whom she never saw, was Black.

mother as saying that she would tell Vickie "more later." (27 RT 3543.) The scenario described by Vickie at trial was considerably different from her earlier testimony. At the preliminary hearing, her position was that she did not hear about any of the *details* of her mother's attack until after they arrived at the hospital. Although Vickie tried to find out, while she was riding in the ambulance, what had happened at the house, her mother was in too much pain to answer and said she would talk to Vickie later. After they arrived at the hospital Vickie began getting the first details about what had happened:

> Q [by the prosecutor]: Did you go in the emergency room?
> A [by Vickie]: Yes.
> Q: Did you talk to her then?
> A: Yes.
> Q: Did she relate to you what happened ***then****?*
> *A:* ***Yes****.*

(8 CT 2008, emphasis added.) Judge Hora relied on this account to conclude that Mrs. Constantin's statement would have been the product of reflection, and therefore hearsay. (8 CT 2010.)

However, when Vickie testified at trial on voir dire, her position changed. By then she claimed that all but a few of the details were communicated by her mother *at the house*, with the story being "finished" in the ambulance:

> Q: Did you go with her [in the ambulance]?
> A: Yes, I did.
> Q: Did you try to *finish off the story* as to the happenings that occurred inside the home that particular afternoon?
> A: Yes.
> Q: And did the story proceed by you asking her questions in the ambulance on the way to the hospital?
> A: *Yes. It was more of her trying to get it out and tell me, so I would know what happened.* And if she could not speak for

some reason, that I would know what happened.

(27 RT 3488-3489, emphasis added.) According to this second version, Mrs. Constantin was apparently lucid enough that she could tell nearly the entire story at the house, and complete it in the ambulance, before they arrived at the hospital. After giving this version, the trial court permitted Vickie to testify as to everything her mother told her, as a spontaneous declaration. (27 RT 3494.)

As appellant pointed out in the opening brief (AOB 240-241; fn. 97), up until the time Vickie testified on voir dire (27 RT 3485-3495), everyone including the prosecutor (see 13 CT 3187) understood that Anna Constantin *was unwilling or unable to relate details* of what had happened to her until after she arrived at the hospital. Significantly, those details were provided in response to police questioning, with Vickie translating. (1 CT 109.)

On that point, respondent concedes that the prosecutor's written pleadings "mentioned only the statement at the hospital, not the first statement made at the house." (RB 106.) However, respondent passes over this point, without explaining why the prosecutor would have ignored this important evidence, had it existed. The prosecutor needed to establish that Mrs. Constantin made her statement the moment her daughter arrived home. It simply is not reasonable to assume that the prosecutor had evidence of this, but instead chose to argue that Mrs. Constantin's statement was made at the hospital.

Respondent argues that "the transcription of Vickie's interview with Sergeant Kitchen clearly indicated the existence of such a statement [made at the home.]" (RB 106.) However, Sergeant Kitchen's interview reveals that Mrs. Constantin made only the following statements before the ambulance arrived:

> She said, "go dial 9-1-11.". . . [I asked her at the time what happened] and she said, "It came up from behind and hit me . . . . He put something over my head and he beat me up."

(1 CT 105.) When asked by Sergeant Kitchen whether her mother told her anything in the ambulance, she answered, "No. She was in too much pain." (1 CT 105.) Vickie went on to explain to him that after her mother arrived at the hospital, her mother began to explain the details of what took place. (1 CT 105-106.) Respondent's reliance on Sergeant Kitchen's interview is clearly misplaced. The interview confirms appellant's position that Mrs. Constantin told her daughter *almost nothing* at the house, *nothing at all* in the ambulance, and waited until they were at the hospital to tell the story of what happened. That story came out as a result of police questioning in the emergency room, not as the result of a spontaneous outburst at the house.

When Vickie testified before the jury, she continued with what she claimed was her mother's narration. The following was information that Vickie gleaned from her mother, while she was at the hospital, and would have been in response to questioning by Detective Meenderink,[45] as noted in his report. (1 CT 109.) Once again, all of the following was admitted as part of Mrs. Constantin's "spontaneous utterance:"

> After he beat her the second time, he went upstairs and ransacked the house. She didn't know exactly how long that took. She heard the dogs fighting him or trying to fight him. She heard him ransacking the house. Then what she

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[45] Respondent portrays this interview as a conversation between Mrs. Constantin and her daughter which Detective Meenderik simply overheard. (RB 104.) However, this was clearly part of the police investigation into the crime and Vickie was acting as the translator. As the report indicates, "Through her daughter, the victim explained. . . ." Mrs. Constantin was explaining *to the officer* what happened, through the help of her daughter, who translated from the Russian.

> remembered was when he came out, he had to go out towards the back. He came down the stairs, he beat her some more and then he left.

(27 RT 3543.) Although the trial court held this entire narrative admissible as a spontaneous declaration, the cases cited previously suggest otherwise.

Particularly on point is the case of *State v. Machado*, *supra*, 127 P.3d at pp. 947-948. *Machado* involved an incident of domestic violence in which the victim had been choked, stepped on and threatened with a knife. Within ten minutes of her 911 call, the police arrived and the victim gave her story. The officer testified that the victim was "hysterical" when they arrived and so was permitted to recount her story in court, on the grounds that it was the victim's "excited utterance." The lower level appellate court affirmed, but the Hawaii Supreme Court reversed. It concluded that the *contents* of the statement itself suggested that it was something more than simply a spontaneous outburst. The detailed, specific and inclusive nature of the statement suggested that the victim had had time for reflective thought:

> The [victim] discussed the length of her relationship with the Petitioner, the period they had lived together, their plans to meet at the Asian Sports Bar that evening, his failure to arrive, her preparation of dinner, her removal of his possessions from the apartment, and a detailed account of the physical struggle that ensued. *Based on the particularized and comprehensive nature of [the victim's] statement*, we conclude that the statement, made in response to questioning by the police, exceeded a "truly spontaneous outburst." (Citation omitted.) Rather, it was a specific and inclusive rendition of the circumstances leading up to the incident and of the incident itself.

(*Ibid*, emphasis added.)

In *State v. Hansen, supra,* 986 P.2d 346, the Idaho Court of Appeal

applied the same reasoning. It held that the victim's statements to a police officer was not "an exclamation or burst of words," (*Id.* at p. 349) and so reversed the trial court's finding that the statement was a spontaneous declaration. Although the statement was given just ten minutes after the fight had occurred, the court looked to the content of the statement itself to evaluate whether or not the victim had had time for reflective thought. Since the account was "a lengthy recitation of the circumstances surrounding the fight and a request to press charges," the court found that the victim's "protracted narrative" was not the sort of spontaneous reaction that carries the indicia of reliability contemplated by the hearsay exception.

The reasoning applied in *Machado* and *Hansen* applies here as well. While it is unlikely that Mrs. Constantin actually gave this entire narrative account in the moments before the police arrived, ultimately that was Vickie's sworn testimony[46] which the trial court apparently credited. However, the statement itself belies the state of "nervous excitement" required for a spontaneous declaration. Mrs. Constantin was badly injured. She would not have been calmly describing her day – including such details as watering the lawn, feeding the dogs, two trips to the garbage can, and offering the additional detail that the next day was garbage pick-up day. It is reasonable to believe that those facts were elicited later, as a result of the police inquiry.

Respondent cannot have it both ways. Mrs. Constantin was either so injured and upset that she likely would have said little more than "Call 911!

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[46] As discussed previously, *supra* at pp. 91-93, Vickie initially claimed that her mother gave little information at the house, did not want to talk at all in the ambulance and at the hospital began giving the details of what took place, in response to police interviews.

Someone attacked me from behind!" as Vickie told Sergeant Kitchen, or Mrs. Constantin had calmed down so much in the hour or two before Vickie arrived that she truly *was able* to provide a comprehensive narrative account in the 3-minute period before the police arrived. Unlike "particularized utterances," (*Boyd v. City of Oakland, supra*, 458 F.Supp.2d at p. 1026) which suggest that the nervous excitement of the event still dominates over one's reflective powers, the narrative account admitted here suggests just the opposite.

Moreover, the fact that Vickie's recounting of her mother's words changed in some respects each time she repeated it also refutes a finding that it was a spontaneous utterance. In *West Valley City v. Hutto, supra*, 5 P.3d 1, the court explained that "[t]he classic example of an excited utterance is a witness's *exact recollection* of the declarant's spontaneous 'sound bite' – an uncoached blurting out – made while the declarant observed the exciting event or closely thereafter." (Id. at p. 4, emphasis added.) Since Vickie Constantin's versions of what her mother said (and when she said it) changed between the preliminary hearing and the trial, it simply cannot be said that she provided an *exact recounting* of her mother's statement. The narrative that she claimed was her mother's was simply too long and too detailed for anyone to have memorized it without extraordinary effort. While Vickie's memory lapses are understandable, the trial court should have insisted that Vickie's testimony be strictly limited to just those "sound bites" which her mother uttered upon Vickie's return home – something Vickie could have recounted exactly.

Long narrative accounts simply do not lend themselves to being remembered with precision, in the way that short, excited outbursts do. In *Hutto, supra*, the court offered examples of the type of "sound bite" that

generally would qualify as an excited utterance ("You're a dead man," "Daddy shot Mommy. Mommy is dead," "Oh my god," "It won't turn, Mom" (referring to a steering wheel), "Oh, God ... It wasn't your fault," and "That son-of-a-bitch cut me." (*Hutto, supra*, 5 P.3d at p. 4.) Similarly, in *Boyd, supra*, the court cited examples of statements that were admitted under the Ninth Circuit's interpretation of excited utterance law. Those examples parallel the type of "sound bite" identified in other jurisdictions: "He killed me, he killed me; (*U.S. v. Napier* (9th Cir.1975) 518 F.2d 316, 317; "[My] pee pee hurt[s];" (*People of Territory of Guam v. Ignacio* (9th Cir. 1993) 10 F.3d 608, 614; "He got my baton, Sarge;" (*U.S. v. Rivera* (9th Cir. 1995) 43 F.3d 1291, 1296;A description of a robber, including that he had tattoos and the direction in which he fled; (*People of Territory of Guam v. Cepeda* (9th Cir. 1995) 69 F.3d 369, 371; "What's going to happen to my wife? What are you going to do?"(*U.S. v. Torrejon* (9th Cir. 1996) 81 F.3d 171, 1996 WL 137091 at 1 (West unpublished opinion). (*Boyd v. City of Oakland, supra*, 458 F.Supp.2d at p. 1027.)

California courts have likewise found that short statements such as "I know he shot her. I know she is hurt bad," (*People v. Brown* (2003) 31 Cal.4th 518, 540), and "He was trying to shoot us, but we ducked," (*People v. Riva* (2003) 112 Cal.App.4th 981, 994-995), typify the kind of statement that is blurted out under stress. It is brief and simple enough that a person hearing the statement is likely be able to recall it – exactly – later on.

Respondent acknowledges that Vickie's statement to Sergeant Kitchen on August 14 did not include the "detail about the voice of the attacker." (RB 110.) However, a truly spontaneous utterance does not change from one day to the next, depending on how well the witness recalls the details. Rather, it should be the witness's *exact recollection* of what the

declarant said. Otherwise, critical portions of the statement could be lost, or worse, added as an afterthought to embellish or enhance an account, based upon information gathered later on.

In this case, Vickie Constantin's testimony was a sequentially organized account of what her mother was doing before, during and after the attack. Each time Vickie recounted the story, it changed somewhat, but generally followed the sequence outlined in the police reports and recorded interviews. (See e.g., 1 CT 104-106; 1 CT 109-110.) Nevertheless, it was not her mother's single reaction to a startling event. It was apparent from Vickie's testimony – at the preliminary hearing, during voir dire, and her trial testimony for the jury – that she was never purporting to give a verbatim account of her mother's words. Trial counsel made this point during Vickie's cross-examination. (27 RT 3490-3492.)

Appellant does not dispute that Mrs. Constantin, with her daughter's assistance and input, did provide this information to the police over time, but that is not the issue. The issue is whether these verbatim statements were blurted out spontaneously to Vickie, before police questioning, or whether they represent facts gathered in a criminal investigation. The statement itself is the best evidence.

In evaluating the issue, the trial court looked only to the purported time sequence and concluded that if the statements were made within a few hours of the attack, as Vickie testified, then they were all admissible. That reasoning fails under these circumstances. When the statement in question goes beyond a few words blurted out in the heat of the moment, and instead takes on the qualities of a detailed, ordered narrative, the trial court must look to the statement itself in evaluating whether "nervous excitement may be supposed to still dominate" or whether "reflective powers" have instead

taken hold. (*Poggi, supra,* 45 Cal.3d at p. 318.)

Respondent argues that the remedy for the discrepancies in Vickie's testimony was thorough *cross-examination* of Vickie Constantin, rather than *exclusion* of her testimony. (RB 111.) However, respondent overlooks the threshold issue – whether the mother's narrative account of the attack was truly a spontaneous declaration. If it was not, then Vickie's testimony was hearsay and should never have been before the jury in the first place. Cross-examining *Vickie* might have exposed the fact that only a tiny portion of her mother's statement was made at the house, while the rest was gleaned from police questioning. However, the jury would have still heard from the real "witness," Anna Constantin, without ever having *her* testimony tested through cross-examination.

The Confrontation Clause of the Sixth Amendment "bars 'admission of testimonial statements of a witness who did not appear at trial unless [s]he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" (*Davis v. Washington, supra,* ___ U.S. ___, 126 S.Ct. at p. 2273, quoting *Crawford v. Washington, supra,* 541 U.S. at p. 51.) The fact that the defense was able to cross-examine Vickie was obviously an inadequate substitute. Had appellant been given the opportunity, among other things, he could have cross-examined Mrs. Constantin about the basis for her belief that her attacker was a black man. Her opinion may well have been shaped by a previous bad experience in her neighborhood, or simply a general prejudice against African Americans. Appellant was denied an opportunity to explore those possibilities by the trial court's erroneous admission of prejudicial hearsay testimony.

With respect to appellant's position that any statements made at the hospital were testimonial statements, barred by *Crawford v. Washington,*

*supra,* 541 U.S. 36 (AOB 251-255), respondent offers little argument. Respondent does not deny that Mrs. Constantin was interviewed by the police at the hospital and claims only that "the record contains nothing to suggest that Anna made her statements at the hospital *in order to preserve them for a later trial.*" (RB 114, emphasis added.) Insofar as respondent is suggesting that Anna's *subjective* reasons for making the statements are controlling, respondent is wrong. *Davis v. Washington, supra*, specifically held that the test is an *objective* one.

> [Statements] are testimonial when the circumstances *objectively indicate* that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis, supra,* ___U.S. ___, 126 S.Ct. at pp. 2273-2274, emphasis added.)

The circumstances here suggest no other purpose than to gather evidence for a criminal prosecution. Shortly after Mrs. Constantin was delivered by ambulance to the hospital, Detective Sargeant Meenderink was in the emergency room with her, taking a tape-recorded statement, and using Vickie as the translator.[47] (1 CT 109.) Although Anna would have reasonably anticipated that her statement would eventually be used in court, (cf. *People v. Rincon* (2005) 129 Cal.App.4th 738, 757), the Supreme Court has now made it clear the declarant's subjective view of what was taking place is not determinative. The circumstances objectively demonstrate that Anna's statement was testimonial, and as such should have been excluded

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[47] Electronically preserving an interview suggests that a statement is being taken for testimonial purposes. (See *People v. Cage* (2004) 120 Cal.App.4th 770, 784, which distinguishes *People v. Sisavath* (2004) 118 Cal.App. 4th 1396 ["We also find it significant that the interview in *Sisavath* was videotaped."].)

under *Crawford, supra,* and *Davis, supra.*

Finally, respondent claims that appellant suffered no prejudice from the trial court's error. However, Vickie Constantin's testimony provided compelling first-hand information that the person who stole (as opposed to sold) Anna Constantin's bracelet was a black man. While it did not establish that *appellant* was that person, it did provide a significant link between possession of the bracelet and the attack upon Mrs. Constantin. The identification was all the more important because it purported to come from the victim herself, yet was never subjected to any cross-examination. Vickie's testimony also included the words that were allegedly said by the attacker, as well as all of the other very disturbing details of the attack. That evidence came in without the defense having any opportunity to challenge it through cross-examination. The evidence could have only created further animosity towards appellant that necessarily contributed to his convictions and death sentence. It cannot be said, beyond a reasonable doubt, that the admission of Vickie's testimony did not contribute either to the guilt or penalty verdict. (*Chapman v. California* (1976) 386 U.S. 18, 24; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Appellant's convictions and death sentence must be reversed.

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## X.
## APPELLANT WAS CONVICTED ON THE DURHAM COUNTS ONLY BECAUSE OF THE PREJUDICIAL EFFECT OF THE OTHER CRIMES IN THIS CASE.

Respondent argues that the charges involving the attack on Mrs. Durham were properly permitted to go to the jury. Significantly, the first evidence respondent cites is not the ambiguous and conflicting eyewitness accounts, which only placed appellant in the neighborhood, but rather the similarities between the attack on Mrs. Durham and the other four cases which were joined for trial in this case. (RB 122.) Respondent makes appellant's point. Had it not been for the fact that these similar, *but certainly not signature*, crimes had been joined for trial, appellant likely would have been acquitted of all of the charges involving the attack on Mrs. Durham, as well as the other cases. The joinder of these cases, and the prejudicial spillover effect that joinder created, is clearly what led to the convictions on the Durham counts.

The prosecutor admitted this to the trial court: that standing alone, there would not have been sufficient evidence against appellant in the Durham case to survive a motion for acquittal.[48] While it is true that the prosecutor's comment was not evidence, his opinion regarding the strength of his own case is certainly worth consideration. In fact, the prosecutor was exactly right. But for the improper joinder of these cases, the Durham counts could not have stood on their own. The trial court's denial of the motion for a judgement of acquittal on the Durham counts was reversible error.

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[48] Speaking of the defense motion for acquittal on the Durham counts, the prosecutor said, "[I]f you take the Durham incident standing by itself, I would be in agreement with [appellant's] counsel." (30 RT 3907.)

## XIII.

## THE TRIAL COURT'S FAILURE TO GIVE AN ATTEMPTED ROBBERY INSTRUCTION REQUIRES REVERSAL OF THE JURY'S ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING.

Appellant was charged with robbery of Pearl Larson.[49] He was not charged with *attempted* robbery; the prosecutor never argued attempted robbery to the jury, and no attempted robbery instructions were given to the jury. In fact, the jury was never even provided with CALJIC No. 6.00, the legal definition of "attempt." With only the robbery instructions as a guide, the jury acquitted appellant of the robbery of Pearl Larson. Although the acquittal signified that one or more of the required elements for a robbery were missing, the jury nevertheless found the robbery-murder *special circumstance* true.

Faced with this apparent inconsistency, the trial court surmised that the jury had found an attempted robbery, and on that basis upheld the robbery-murder special circumstance. Even assuming, for the sake of argument, that the trial court accurately assessed the evidence, since the jury received no instruction on the meaning of an attempted robbery, it cannot be said that the *jury*, as opposed to the trial court, considered the facts, applied the law and found an attempted robbery. Allowing the special circumstance to stand under these circumstances is reversible error.

### A. Failure To Instruct On Attempted Robbery Was Error.

Respondent claims the failure to instruct on attempted robbery was not error for several reasons, none of which have merit. First, respondent

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[49] The Third Amended Complaint alleged that Pearl Larson had been robbed of personal property, "to wit, a ring." (1 CT 17.) The Information charged robbery of a ring "and other property." (12 CT 2953.)

argues that since appellant failed to specifically request an attempted robbery instruction, the claim has been forfeited. (RB 135.) However, it is well settled that attempted robbery is a lesser included offense of robbery, (*People v. Bonner* (2000) 80 Cal. App. 4th 759, 765; *People v. Webster* (1991) 54 Cal.3d 411, 443; *People v. Crary* (1968) 265 Cal.App.2d 534, 540), and as such, the trial court had a *sua sponte* duty to instruct the jury on the elements of the lesser included crime. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 220.) This duty applies "even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued." (*People v. Beames* (2007) 40 Cal.4th 907, 926, citing *People v. Breverman* (1998) 19 Cal.4th 142, 162.) In *Breverman*, this Court explained:

> [I]nstructions [on the lesser offense] are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. (Citations omitted.) "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed. (Citations omitted.)

(*Breverman, supra,* 19 Cal.4th at p. 162.) Since the trial court held that there was sufficient evidence for the jury to have found an attempted robbery, the trial court necessarily had a *sua sponte* duty to instruct on that lesser included offense. Its failure to do so, even absent a request by appellant, was error.

Respondent next argues there was no need to instruct the jury with CALJIC No. 6.00 because the instruction is simply a creation of the "CALJIC committee," not derived from any "statutory definition" of attempt, and provides only a "commonly understood" (and therefore

superfluous) definition, not "tantamount to the elements of an offense." (RB 135.) Again, respondent is wrong. While the attempt instruction may not have come from the legislature, it is well-grounded in the common law of attempt as it has developed over the centuries. The United States Supreme Court very recently recognized this history, and in so doing, made it clear that the attempt to commit a crime can only be established *if specific elements* have been proven:

> At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed "'some open deed tending to the execution of his intent.'" 2 W. LaFave, Substantive Criminal Law § 11.2(a), p. 205 (2d ed.2003) (quoting E. Coke, Third Institute 5 (6th ed. 1680)); see Keedy, Criminal Attempts at Common Law, 102 U. Pa. L. Rev. 464, 468 (1954) (noting that common-law attempt required "that some act must be done towards carrying out the intent"). More recently, the requisite "open deed" has been described as an "overt act" that constitutes a "substantial step" toward completing the offense. 2 LaFave, Substantive Criminal Law § 11.4; see ALI, Model Penal Code § 5.01(1)(c) (1985) (defining "criminal attempt" to include "an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime"); see also *Braxton v. United States*, 500 U.S. 344, 349, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) ("For Braxton to be guilty of an attempted killing under 18 U.S.C. § 1114, he must have taken a substantial step towards that crime, and must also have had the requisite mens rea").

(*United States v. Resendiz-Ponce* (2007) ___U.S. ___, 127 S.Ct 782, 787.) Thus CALJIC No. 6.00, rather than being simply a creation of the CALJIC committee, embodies long-recognized principles that go well beyond a simple dictionary definition of the word "attempt."

CALJIC No. 6.00 begins by requiring the trier of fact to find two elements: "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." The instruction then provides guidance for determining whether the second element has been met.[50] These instructions are certainly not "commonly understood." However, even if they were, as Justice Scalia recently explained, it would be irrelevant for purposes of what the law requires:

> [W]e have always required the elements of a crime to be explicitly set forth . . . , *whether or not they are fairly called to mind by the mere name of the crime*. Burglary, for example, connotes in common parlance the entry of a building with felonious intent, yet we require those elements to be set forth. . . . I *doubt that the common meaning of the word "attempt" conveys with precision what conviction of that crime requires.*

(*U.S. v. Resendiz-Ponce*, *supra*, 127 S.Ct. 782, 790 (disn. opn. of Scalia, J.), emphasis added.) While an attempted robbery instruction should have been given *sua sponte*, at the very least the jury should have been given the

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[50] "In determining whether such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design." (CALJIC No. 6.00.)

definition of attempt found in CALJIC No. 6.00. (*People v. Miranda* (1988) 44 Cal.3d 57, 92 [omitting attempted robbery instruction was error, but not prejudicial since CALJIC No. 6.00 was given].)

Finally, respondent relies on *People v. Cain* (1995) 10 Cal.4th 1, to argue that omitting the instruction was not error. (RB 135-136.) However, that was not *Cain's* holding. In *Cain*, the defendant was acquitted of rape, but the jury found true the rape special circumstance. Cain's jury received no instruction on attempt or attempted rape and, on appeal, this Court *assumed* the instructional error: "The Attorney General *concedes* the failure to instruct the jury on the elements of an attempt *was error.*" (*Id.* at p. 44, emphasis added.)

Although the *Cain* Court concluded that the error was harmless beyond a reasonable doubt, as discussed below, *Cain* is readily distinguishable on its facts. More importantly, as discussed in part C, *infra*, *Cain's* conclusion that harmless error analysis was applicable is no longer tenable in light of more recent decisions of the United States Supreme Court.

### B. The Failure to Instruct on Attempt Was Not Harmless Beyond a Reasonable Doubt. The Robbery-Murder Special Circumstance Must Be Reversed.

Respondent argues that even if the trial court's failure to give an attempted robbery instruction was error, the error was harmless beyond a reasonable doubt. (RB 136-138.) Respondent relies upon *Neder v. United States* (1999) 527 U.S. 1, and *People v. Cain, supra*, 10 Cal.4th 1, to support its position that harmless error analysis is applicable even when an element of a special circumstance has been omitted from the jury

instructions. As explained further in subsection C, *infra*, although this was the holding of the 5-4 *Neder* decision, a majority on the High Court now consider such errors structural, and not subject to harmless error analysis. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; and *Blakely v. Washington* (2004) 124 S.Ct. 2531.)

Nevertheless, even under harmless error analysis, appellant's case is distinguishable from *Neder and Cain, supra*, and both cases support appellant's position that the error in this case was *not* harmless. In *Neder, supra*, 527 U.S. at p. 11, the Supreme Court recognized that the effect of a trial court's failure to instruct on an element of an offense, was that it *prevented* the jury from making a finding on the omitted element. Likewise, in the instant case, the trial court's failure to *instruct* the jury on attempted robbery necessarily *prevented* the jury from finding true the robbery-murder special circumstance on the theory of attempted robbery.

Moreover, unlike the evidence that was presented in support of the omitted element in both *Neder* and *Cain, supra*, the evidence of attempted robbery in this case was not "overwhelming." (*Neder, supra*, 527 U.S. at p. 17.) Although respondent argues that the "strength of the evidence" is irrelevant to the finding that the error was harmless in this case, both *Neder* and *Cain* clearly *did* consider the strength of the evidence in deciding that the instructional error was harmless.

*Neder, supra*, 527 U.S. 1, was a tax fraud case in which the defendant had failed to report over one million dollars, which he claimed was not income. The amount of the unreported money was never disputed, but it was clearly a "material" amount. The trial court failed to instruct the jury on this one element of fraud – materiality – and the Supreme Court

recognized that the error *prevented* the jury from actually making a finding on materiality. However, the five-member majority[51] held that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence* . . . the erroneous instruction is properly found to be harmless." (*Id.* at p. 17, emphasis added.) Those two factors, that materiality was uncontested and the evidence to support it was overwhelming, led the *Neder* Court to conclude that the instructional error was harmless.

The strength of the evidence was also the deciding factor for finding the error harmless in *People v. Cain, supra*, 10 Cal.4th 1, the primary case upon which respondent relies. *Cain* was a capital case, in which rape was charged as the special circumstance. The court gave rape and rape special circumstance instructions, but did not define attempted rape or attempt in general, pursuant to CALJIC No. 6.00. While the State conceded the instructional error, the *Cain* Court found the error to be harmless since "no explanation *other than rape or attempted rape* was sufficient to explain the position of [the victim's] body and the presence of the pubic and body hair in her clothes." (*Ibid.*, emphasis added.) As in *Neder*, the evidence in support of the underlying crime, either rape or attempted rape, was simply overwhelming.

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[51] The five-member majority was comprised of Justices Rehnquist, O'Connor, Kennedy, Breyer and Thomas. Four members, Justices Scalia, Souter, Ginsburg, and Stevens, all dissented from the view that harmless error analysis could apply when the trial court had failed to instruct on an element of the offense. (*Id.* at pp. 30-40 (disn.opn. of Scalia, J. and 527 U.S. at pp. 25-30 (conc. and disn.opn. of Stevens, J.)

By contrast, in appellant's case, it cannot be said that the evidence of robbery or attempted robbery was even approaching "overwhelming." Nor was either crime "uncontested." The *Cain* Court could find no explanation for the crime scene evidence "other than rape or attempted rape;" but in appellant's case, the crime scene evidence suggested a number of possible explanations, including sexual assault.

Mrs. Larson was found lying on her bed, with her house dress pulled up above her waist, wearing no underclothes. (25 RT 3134-3135.) Her house had not been ransacked; nothing in the house appeared to be out of order; and no one could point to anything that was missing. (25 RT 3130-3133.) In fact, numerous items of value were still in place throughout the house (25 RT 3133), including the jewelry that Mrs. Larson was still wearing. (26 RT 3292.) Sergeant Fisher testified that the case had initially been investigated as a sexual assault. (25 RT 3135.) Although the information charged appellant with taking a ring "and other property," (12 CT 2953), in fact Mrs. Larson was still wearing the ring and the "other property" which was supposed to have been taken was never identified.

Unlike *Cain,* in which the court could find no other explanation for the evidence, in this case the evidence could, and did, suggest several possible explanations: sexual assault (found by the investigators, but later rejected), robbery (the prosecutor's sole theory, but rejected by the jury) and attempted robbery (never argued by the prosecutor, but found by the trial court).

Respondent points to an abrasion on Mrs. Larson's ring finger, and a photo showing a wallet near the body, as sufficient evidence for the jury to have found attempted robbery. (RB 134.) However, abrasions on the hand

of a victim of a violent attack would not only be expected, but could be explained in any number of ways. Moreover, the prosecutor apparently did not consider these abrasions significant, since he did not even mention them in his argument to the jury. In arguing that Mrs. Larson was robbed, the prosecutor pointed only to the presence of the wallet to suggest that cash had been taken. (32 RT 4099.) By acquitting appellant of robbery, the jury unquestionably rejected the only theory which the prosecutor argued. The paucity of evidence to support either robbery or attempted robbery in this case clearly distinguishes it from *Neder* and *Cain,* both of which found harmless error because of the overwhelming evidence in support of the omitted instruction.

Finally, respondent makes the circular argument that since the jury found the robbery special circumstance true, it "necessarily" found that the murder took place during an attempted robbery. (RB 136-137.) According to this logic, the jury's true finding on the rape special circumstance had to have been based on *something*, so it must have been based on a properly reasoned finding of attempted robbery. The *Cain* court appears to have used this same reasoning, but it is equally circular.

*Cain* concluded that the jury in that case had "necessarily considered and found to be true the elements set forth in CALJIC No. 6.00," by virtue of the jury's "*finding* defendant raped or attempted to rape" the victim. (*Cain, supra,* 10 Cal.4th at p. 44, emphasis in the original.) However, other than the true finding on the rape special circumstance, there was no "finding" by the jury that the defendant had raped or attempted to rape the victim; and without the attempted rape instruction, the jury was legally *prevented* from making such a finding. (*Neder, supra*, 527 U.S. at p. 11.)

Without the tools for applying the facts to the law, it simply could not be assumed that the jury had properly considered and applied the law of attempt. The *Cain* court (and respondent here) attempted to use the *fact* of the verdict to *establish* that the jury had properly applied the law. However, it is the verdict itself which is being questioned *because* the law was not properly applied.

Taken to its logical conclusion, respondent's circular reasoning would dispense with the need for jury instructions altogether, as long as the court could verify the existence of sufficient facts to support the verdict and the crime which was one whose meaning was "commonly understood." The fact of the jury's verdict (or true finding) would be considered the proof that the jury had "necessarily found" all of the required elements of the crime. The only check would be the trial court's own analysis of the evidence. If the trial court determined that the evidence was sufficient to meet the definition of the crime, the failure to instruct the jury on one or more elements would be considered harmless. The court, not the jury, would have made the actual determination.

Justice Scalia criticized this same kind of logic in his dissenting opinion in *Neder, supra,* 527 U.S. 1:

> A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. [Citations omitted.] The question that this raises is why, if denying the right to conviction by jury is structural error, *taking one of the elements of the crime away from the jury should be treated differently from taking all of them away – since failure to prove one, no less than failure to prove all, utterly prevents conviction.* The Court never asks, much less answers, this question. Indeed, we do not know, when the Court's opinion is done, how many elements can be taken away from the jury

> with impunity, so long as appellate judges are persuaded that the defendant is surely guilty.

(*Id.* at pp. 32-33 (disn.opn. of Scalia, J.)

In the present case, the trial court omitted the necessary instructions but assumed that if it found, after the fact, that there was evidence to support the missing element, then it could simply presume that the jury would have reached the same result.

Respondent also argues that the jury must have found that appellant had the intent to steal from Mrs. Larson's residence since it convicted defendant on the burglary charge, because "the only target offense for which the jury received instructions was theft." (RB 136.) This is interesting logic, since it presupposes that certain findings can be assumed if, and only if, the jury has first been instructed on that theory, the very premise which respondent disputes in the case of the attempt instruction.

Respondent cannot have it both ways. If the jury is free to convict based upon its "common understanding" of certain terms rather than the required instructions, then the burglary could have just as easily been based on a sexual assault crime as a theft crime. "Sexual assault," is commonly understood and there was evidence to suggest that this burglary may have been for the purpose of sexual assault. According to respondent's logic, this combination would have been enough for the jury to conclude (and the trial court to find) that the burglary was based upon an intent to commit a sexual crime, not a theft, inside the residence.

Respondent cannot escape the conclusion that jury verdicts are only valid to the extent that they are based upon factual findings guided by proper legal instructions. Appellant's jury received no instructions on

attempted robbery. That omission prevented the jury from finding attempted robbery, regardless of whether the trial court found that sufficient evidence to support it or not. Appellant never conceded attempted robbery and the evidence of such was far short of "overwhelming." Under both *Cain* and *Neder*, the error was not harmless beyond a reasonable doubt.

### C. The Failure To Instruct The Jury On An Element Of An Offense Or A Special Circumstance Is Structural Error.

While respondent is correct that *People v. Cain, supra*, 10 Cal.4th 1, *People v. Prieto* (2003) 30 Cal.4th 226 and *Neder v. United States, supra*, 527 U.S. 1, have all held that the failure to instruct on an element of an offense or a special circumstance is subject to harmless error analysis, that position is no longer viable. Since the United States Supreme Court decided *Neder*, a new five-member majority has emerged on the Court which no longer accepts the premise that harmless error analysis is appropriate under those circumstances.

*Neder v. United States, supra*, 527 U.S. 1, was decided on June 10, 1999. Justice Rehnquist wrote the 5-3-1 decision, with Justices Scalia, Souter, Ginsburg and Stevens[52] all dissenting from the majority's view that the failure to instruct on the materiality element was subject to harmless error analysis. Just one year later, on June 26, 2000, the High Court handed down *Apprendi v. New Jersey, supra*, 530 U.S. 466. Justice Stevens, one of

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[52] Justice Stevens concurred in the result because he found that the jury necessarily decided the materiality issue, but specifically rejected the majority's holding that harmless error analysis could ever apply when the jury had not actually made a finding on an element of the crime, due to a faulty instruction.

the *Neder* dissenters, wrote the majority opinion. Writing for another divided Court, Justice Stevens concluded that the United States Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, *must be submitted to a jury and proved beyond a reasonable doubt.* (*Apprendi, supra*, 530 U.S. at p. 490, emphasis added.) Predictably, the other three *Neder* dissenters, Justices Scalia, Souter and Ginsburg, joined Justice Stevens in the *Apprendi* decision. The fifth vote to form the majority in *Apprendi* came from Justice Thomas, who had been part of the *Neder* majority just a year before.

In *Apprendi*, Justice Thomas changed his opinion about the right to have a jury decide all the facts necessary for the imposition of punishment. In fact, Justice Thomas wrote a lengthy special concurrence to document his new outlook on the right to a trial by jury. He conceded his past misunderstanding, expressed doubt about the correctness of earlier Supreme Court opinions, based upon his new position, and actually declared that the right to jury fact-finding required a broader, more all-encompassing rule than the one adopted in Justice Steven's majority opinion. (*Apprendi, supra*, 530 U.S. at pp. 499-523, (conc.opn. of Thomas, J., joined in part by Scalia, J.) ["I write separately to explain my view that the Constitution requires a broader rule than the Court adopts. . . . "[T]he fact of a prior conviction is an element under a recidivism statute."].)

It is therefore apparent that a new five-member majority (composed of Justices Scalia, Thomas, Stevens, Ginsburg and Souter) has emerged since *Neder* was decided. This same five-member block joined in *Ring v. Arizona, supra*, 536 U.S. 584, in 2002, with Justice Ginsburg writing the

majority opinion, and again two years later in *Blakely v. Washington, supra*, 542 U.S. 296, authored by Justice Scalia.

In light of this new five-member block comprised of Justices Scalia, Stevens, Ginsburg, Souter and Thomas, it is apparent that if *Neder* were decided today, Justice Scalia's dissenting opinion would now be the majority opinion. *Neder's* harmless error analysis has thus been effectively overruled by *Apprendi, Ring and Blakely*, and to the extent that *People v. Cain, supra*, 10 Cal.4th 1, *People v. Korbin* (1995) 11 Cal.4th 416, and *People v. Prieto, supra,* 30 Cal.4th 226, all rely on *Neder* for applying harmless error analysis to instructional error, those decisions no longer reflect current United States Supreme Court law.

Where, as here, the jury received *no* instruction on attempted robbery, or even the definition of attempt, it simply cannot be said that the jury could have made a "finding" of attempted robbery. Having also acquitted appellant of the robbery itself, the robbery special circumstance was necessarily without a legal foundation. Without the benefit of the necessary instructions, the jury's true finding on the special circumstance was invalid and should have been stricken by the trial court. The error was not harmless; it was structural error which requires reversal of the jury's robbery special circumstance finding.

* * * * *

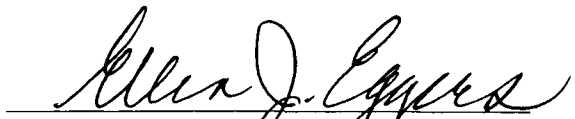
## CONCLUSION

For all of the foregoing reasons, appellant asks that this Court set aside his death sentence, reverse his convictions and remand the case for a new trial.

Dated: June 4, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ELLEN J. EGGERS
Deputy State Public Defender

## DECLARATION OF SERVICE BY MAIL

Case Name: People v. Franklin Lynch

California Supreme Court. No. S026408
Superior Court Case No. H 10662

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 801 "K" Street, Suite 1100, Sacramento, California 95814.

On **June 4, 2007**, I served the attached :

**APPELLANT'S REPLY BRIEF**

by placing a true and correct copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the U.S. Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by U.S. Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I declare under penalty of perjury that the foregoing is true and correct. Executed on **June 4, 2007**, at Sacramento, California.

Saundra alvarez

Saundra alvarez