IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROYAL CLARK,** Defendant and Appellant.	**S045078** (Fresno Co. Superior Court No. 446252-9)

APPELLANT'S OPENING BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
RENDERED IN FRESNO COUNTY SUPERIOR COURT
HONORABLE JOHN E. FITCH, JUDGE PRESIDING

(VOLUME TWO OF TWO)

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ARGUMENT SECTION 4

ARGUMENTS REGARDING CONSTITUTIONAL ERRORS IN THE SELECTION OF THE GUILT, SANITY, AND PENALTY PHASE JURY.[52]

Introduction

As will be demonstrated in Arguments XXVIII - XXXI, the entire jury selection process was constitutionally infirm. During the death qualification process, the trial court repeatedly and deliberately made so-called "credibility" findings in a biased manner which consistently favored the prosecution rather than the defense. The court systematically refused to grant defense "for cause" challenges in the face of very strong evidence of pro-death penalty bias, or bias stemming from panelists' suspicion, and distrust of lawyers, or psychiatric or psychological evidence, yet often granted the prosecution's "for cause" challenges where jurors answers were clearly not disqualifying. The defense was forced to abstain from using its last peremptory challenge to avoid placement of an extremely pro death-penalty juror on the jury -- a juror the court had earlier refused to excuse "for cause." The defense repeatedly expressed dissatisfaction with the jury as constituted, and motions for a new jury venire, and for more peremptory challenges were denied.

Furthermore, although Roy is Black, and the alleged victims were White, the trial court declined to find a *prima facie* case of invidious discrimination and refused to order a new jury venire, even after the prosecutor had excused all but one Black juror from the panel. The errors in jury selection, individually and cumulatively, require reversal of the entire judgment.

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[52] A different jury was selected to decide the issue of Roy's competency to stand trial.

THE INTERRELATED FACTS PERTAINING TO JURY SELECTION ISSUES

Prosecution "for cause" challenges granted:[53]

Prospective Juror Larry Costa

Larry Costa gave written answers to questions in relevant part as follows:

Mr. Costa indicated that he was "not really for" the death penalty but he could "consider it." (SCT #6 1654.) He believed that persons sentenced to life imprisonment without parole would, in fact, never be paroled. (SCT #6 1656.) He did not believe in the adage "An eye for an eye". (SCT #6 1657.) Mr. Costa was not certain how he would vote if the death penalty were on California's ballot. (SCT #6 1658.) He did not believe the death penalty should be imposed on all persons who for whatever reason killed another human being, and felt he could set aside his personal beliefs and follow the Court's instructions in the case. (SCT #6 1658, 1660.)

During oral *voir dire*, Mr. Costa reaffirmed that he could keep an open mind and consider either death, or life imprisonment without parole. (RT 642.) If he had a chance to vote on whether California should have a death penalty, he would probably vote for it. (RT 645.)

Explaining his written answer, indicating that he was not "really for"

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[53] The Court excused a number of jurors for anti-death penalty bias, where the question of disqualification was submitted with no objection by defense attorneys. (Sheila Davidson Rollin: RT 692; Ricardo Delgado: RT 754; Carlos Duarte: RT 808, 822; Kevin Faukenberry: RT 883, 887; Beth Goering: RT 1115; Jacqueline Hughes: 1297; Joan Leeds: RT 1436; Patricia Martin: RT 1573; Victor Martinez: RT 1567; Rosa Palacios: RT 1756; Adan Rodriguez: RT 1887; Gregory Sierra: RT 1949-1954; Paula Peargin: RT 2116; Patricia Evans RT 2228-2229; Dr. Hagop Tookoian: RT 2294-2295; Oballo Ochoa: RT 2415; Ronald Borden: RT 2493; Robert Long: RT 2640; Elizabeth Manfredi: RT 2722-2723; Yolanda Lopez: RT 2938-2939; Cindy Kuckenbaker: RT 1435-1436.) Appellant has only summarized the testimony of dismissed jurors where defense counsel objected to their excusal.

the death penalty, Mr. Costa stated: "Like I said, it depends on the crime, like I said earlier. It's some of the cases I've been reading in the paper that, you know, deserve – I think deserve the death penalty. But that would be a tough vote, like I said. Right now, on a vote right now, that would be a tough issue to vote on. If it really came down to hard core to make it yes or no, I probably would vote yes because of some of the things I've been reading in the papers lately." (RT 645.)

Mr. Costa answered "yes," when asked if murder during an attempted rape was the type of crime that could be serious enough to warrant the death penalty. (RT 646.) He said he "probably could" impose the death penalty on another human in a real situation. (RT 646.) Mr. Costa explained his use of the phrase "I think" by saying that imposing the death penalty was a "heavy responsibility." (RT 647.) He said it would be "kind of hard" to impose death, but he "probably could." (RT 648.)

Mr. Costa said that having the life of a human being in his hands would "scare" him, but he reiterated that the death penalty "has to be enforced sometimes." (RT 649.)

Under questioning by the court, Mr. Costa answered "yes," when asked if he could set aside his personal feelings and beliefs and decide whether to impose death or life without the possibility of parole. (RT 651.) When the court asked the same question in a slightly different way, Mr. Costa again said "yeah," he could set aside his personal feelings and vote for the death penalty. (RT 651.) He also indicated he could vote for life without the possibility of parole if he "felt it was appropriate." (RT 651-652.) When the court asked Mr. Costa for the third time whether he would have the ability to impose a death judgment if he felt it was appropriate, he responded, "yeah." (RT 652.)

Mr. Cooper then asked Mr. Costa: "Mr. Costa, do you – could you – only you can tell us, could you, really, put aside your – what personal beliefs

you have and actually impose the death penalty on another human being?" Mr. Costa responded, "Yes." (RT 653.)

The prosecutor challenged Mr. Costa for cause, alleging that he was "equivocal" but the bulk of his answers indicated he could not give a definitive answer as to whether he could ever impose the death penalty in an appropriate case." (RT 654.)

The defense opposed the motion. (RT 654.)

The trial court said that the juror's answers indicated that he could apply the law fairly "yet is demeanor contradicted that."[54] The court granted the motion, stating the juror "definitely has a bias against the death penalty." (RT 655.)

Prospective Juror Anne Keller

Prospective juror Anne Keller answered written questions about the death penalty in relevant part as follows:

Ms. Keller stated that she believed in the death penalty "if the person is convicted beyond a doubt." (SCT #6 4771.) She felt it would be "ridiculous" to automatically impose death for any type of crime. (SCT #6 4772.) She felt most of the death sentences imposed "have been appropriate. (SCT #6 4773.) Ms. Keller also indicated that there "may be certain circumstances" under which a death judgment should not be imposed. (SCT #6 4775.) She responded affirmatively, that she could set aside her personal feelings about the death penalty and follow the law as the court instructed her. (SCT #6 4777.)

During oral *voir dire*, Ms. Keller answered questions in the following

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[54] The judge, describing the prospective juror's demeanor, said Mr. Costa appeared he might lose emotional control over himself. He needed water. He had difficulty swallowing. He had a dry mouth. He was visibly upset and nervous, commendable given the weighty responsibility of serving on a capital-case jury. (RT 655.)

manner:

Ms. Keller had "no problems" with the nature of the case. (RT 2163.) She felt she could be a fair and impartial juror. (RT 2163.) She knew of no reason why she might be prejudiced one way or another. (RT 2163.)

Ms. Keller indicated that she could consider either life imprisonment without parole as a possible penalty, even in a case involving attempted rape and robbery, and the killing of a witness. She "would have to hear all the evidence first" to say whether she would impose the death penalty. (RT 2165.) She affirmed her belief in the death penalty. (RT 2165.)

The court explained that jurors would be given some basic guidelines but the life or death decision would be in the hands of the jurors; he then asked whether Ms. Kelller could consider either penalty, death or life without parole, equally and fairly. Ms. Keller said "I think I would be fair." (RT 2166.) She affirmed that "a case of this kind would be serious enough" to consider death. (RT 2166.)

Ms. Keller indicated that "in a personal sense" she might find it difficult to vote for death, even though she believed in the death penalty. (RT 2167.)

The court inquired: "We would need to now if you felt that, depending on the evidence, of course, that your belief at that time that the death penalty was appropriate, if you could cast your vote for death." Ms. Keller responded, "I think I could . . . I think so. I can't tell for sure." (RT 2167.)

Ms. Keller acknowledged that she might "feel a little uncomfortable" although she was not saying she "couldn't do it." (RT 2167-2168.)

Under questioning by defense counsel, Ms. Keller reaffirmed her previous responses. She expressed a willingness to consider both penalties, while acknowledging that she would probably have " a little problem" with the death penalty, which she would need to work through at a personal level.

(RT 2169.) She said she would have to have "no doubt of a person's guilt" before imposing death. (RT 2170.)

The Court asked Ms. Keller, " . . . I want you to assume it's not beyond any doubt, but beyond a reasonable doubt. And now you're asked to consider the death penalty. Do you think you could vote for the death penalty in that type of case?" Ms. Keller replied: "I think I could. But I would have trouble with it personally, myself. I wouldn't want to do that, you know. But then it would depend on what I hear as a juror. . . ." (RT 2170.)

The Court asked Ms. Keller if she "could set that aside." Ms. Keller responded affirmatively, "I think so." (RT 2170.)

Again, the Court asked: "And only you can tell us whether you can do that. When I say 'that', I mean either consider life without the possibility of parole or death. You believe you could choose either of the two if either were warranted?" Ms. Keller responded. "I think so. I think so." (RT 2171.)

D.D.A. Cooper then examined Ms. Keller, inquiring whether she had "a personal complication or a question about . . . being the one to impose the death penalty on anyone . . . ." (RT 2172.) Ms. Keller responded, "I guess you can say that's probably right." (RT 2172.) However, she reiterated that she "strongly" believed in the death penalty, and "would probably try to do what's right." (RT 2172.)

Ms. Keller apologized that she could not tell Mr. Cooper "exactly what she would do." (RT 2173.)

Mr. Cooper asked: " . . . As you sit there right now, at the thought of being the one to make such a decision, at the thought of being a person to cast a vote to actually impose the death penalty on someone else, do red lights go off and say that, 'Hey. I don't know that I could do that, could impose the death penalty on another human being.' Is that what you're saying?" Ms. Keller replied, "I think so, yeah." (RT 2174.)

Mr. Cooper then asked: " . . . if you were a juror and you were confronted with casting a vote in favor of the death penalty, first you would have to see if you could – you'd have to work that personal problem first?" Ms. Keller responded affirmatively, "Probably I would, yes." (RT 2174.) She said she would "have a hard time with it" even though she believed in it. (RT 2174.)

Later, on further questioning by Mr. Cooper, Ms. Keller explained that it "would be a problem" to make a decision, but she noted that she had not yet "heard the evidence." (RT 2175.) Mr. Keller indicated she would "rather probably have someone else make that decision instead of [her]." (RT 2177.)

The trial court, after a series of equivocal responses to questions asked: "But we have to come back to this original question. Is this a big problem or is this just kind of a small problem. In other words, is this going o substantially impair your ability or can you just set it aside? Ms. Keller responded: "I feel that I could make the decision, but I would not like it." (RT 2177.) The court inquired, "Well, does that mean you could set it aside?" Ms. Keller said that she thought so. (RT 2178.)

The trial court continued to press for clarification of Ms. Keller's answers. Ms. Keller reiterated several times that she could not predict in advance what she would do. (RT 2179.) She also stated that would consider it "strictly selfish" not to vote for death. (RT 2180.) At one point, she said she could "probably not" set aside her feelings about the death penalty. (RT 2180.) It "might" impair her ability to select the death penalty in a case. (RT 2181.) A motion to excuse Ms. Keller for cause was granted over defense objection. (RT 2183.)

Prospective Juror Patrick Young

Mr. Young responded to written death qualification questions in relevant part, as follows:

Mr Young described his general feelings about the death penalty in the following manner: "Not a yes or no, simple question. I am not a vengeful, vindictive person, and strive to be understanding & compassionate. The only reason someone should be killed by the state is if it brings a greater good. The only example I know of was the Clarence Ray Allen case. I would think an equally good alternative would be very strict life incarceration, completely incommunicado. (Clarence Ray Allen commissioned another murder, while imprisoned for murder. This is inexcusable. He was the man who killed Mary Kitts – a neighbor of mine - then ordered the Fran's Mkt killings.)" (SCT #6 9373.)

Mr. Young responded that the death penalty was "too serious to be 'automatic'" in any type of case. (RT 9374.)

To a three-choice question asking whether prospective jurors thought the death penalty was imposed too often, too seldom or randomly, Mr. Young responded that the available answers were "too simplistic." He explained in the space reserved for comment: "As stated earlier there are probably better alternatives I do not like to see anyone who is mentally retarded put to death. But society must also be assured of safety." (SCT #6 9375.)

Mr. Young did not indicate membership in any organization supporting or opposing the death penalty. (SCT #6 9377.) He did not know whether he would support California legislation to establish a death penalty law; he indicated it would "depend[] on how it [the law] was written." (SCT #6 9377.)

Mr. Young did not feel that the death penalty should be imposed on every person, who for whatever reason, killed a human being. He opined that the question was "silly" and "utterly simplistic." (SCT #6 9377.)

Mr. Young indicated that he knew that "blacks get the death penalty disproportionately." (SCT #6 9378.)

To question #100, which inquired whether prospective jurors could set aside their personal feelings and follow the law as instructed by the court, Mr. Young responded: "Anybody who answers yes to this question is a liar. When people are arguing in the jury room, it's very heavily based on personal feelings, regardless of what they say." (SCT #6 9379.)

Answering an open ended question about his "present state of mind", Mr. Young wrote: "I believe in justice, not sloganeering. I am pragmatic. I would do my absolute best to be fair if I'm called. I'm thoughtful, perhaps to a fault. I do my best to examine and hear all sides. I deplore/abhor simplistic thinking. (And my hand is about worn out from this lengthy questionnaire. Good luck w/your work, both sides.)."[55] (SCT #6 9379.)

To a question asking if he could be a "completely fair and impartial juror," Mr. Young replied: "What's impartial in today's society? We don't live in a vaccuum [sic]. I will do my best to be fair." (SCT #6 9380.)

During oral *voir dire*, the trial court asked Mr. Young whether he held personal views that would interfere with his ability to be totally objective and impartial about the penalty. (RT 2151.) Mr. Young responded by discussing the reasons for his support for the death penalty in the case of Clarence Ray Allen. (SCT #6 2151.)

The court asked if in this particular case, if there were a verdict of first degree murder of a 14-year-old girl, during an attempted rape, or during a robbery, or for purposes of killing a witness, would Mr. Young feel the case was serious enough that "death would be the appropriate remedy." (RT 2152.)

Mr. Young responded: "'Appropriate' is – you know, when we get into legal terminology, we're still trying to define something that are undefinable

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[55] On his jury questionnaire, Mr. Young listed as a medical problem, damage to his right hand which made his handwriting sloppy. (SCT #6 9355.)

[sic]. Is it appropriate? For me, I can almost give you a categorical answer for that stuff. For the public good and public safety, it would have to be weighed, for instance, in the Clarence Ray Allen case, that would be one. I don't think taking someone's life is something to be taken lightly, whether legally or illegally." (SCT #6 2152.)

The court asked several further questions seeking clarification of whether Mr. Young could consider a sentence of death. Mr. Young gave this response: "I think so. I want to be honest with you. When we're talking about things I'm unfamiliar with and we're almost not being theoretical here, but talking about a situation which is going to occur with 12 other people, I think I could follow and get the directions of the Court." (RT 2153-2154.)

Mr. Young was then asked about his written response to question no. 100 of the jury questionnaire, to which he had responded that anyone who said they could put their feelings and emotions completely out of the way would be lying. Mr. Young confirmed that this was still his feeling. (RT 2154.) He also explained that he "would view the death penalty in terms of what is the best thing for the public good, if necessary to protect the public." (RT 2154.) Mr. Young expressed the belief that the death penalty was a "damned serious thing" and that "putting somebody in prison for life will generally take care of the problem." (RT 2154.)

No follow up questioning was conducted by either the prosecution or the defense. (RT 2157.) Thereafter, the court granted the prosecutor's motion to excuse Mr. Young for cause, over defense counsel's strong objection that Mr. Young's answers did not render him unqualified. (RT 2157-2162.)

Defense "for cause" challenges denied

Prospective Juror Vincent Donovan

Vincent Donovan answered written death qualification questions in the

juror questionnaire in relevant part, as follows:

"85. What are you [sic] GENERAL FEELINGS regarding the death penalty. [Answer] Approve."

"87. Do you feel that the death penalty should be automatic for any type of crime? [Answer] No. Please Explain: [Answer] Just for Pre Meditated Murder."

"89. Have your views about the death penalty changed substantially in either intensity or nature in the last few years. [Answer] Yes. Please Explain: [Answer] to many People getting away With Murder." (SCT #6 2186.)

"90. What are your feelings about the punishment of life imprisonment without the possibility of parole? [Answer] good in some instances." (SCT #6 2187.)

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] No. Please comment: [Answer] Prison officials often intervene." (SCT #6 2187.)

"92. Do you feel the death sentence is imposed: Too often ___ Too seldom ___ Randomly ___ [Answer] Too seldom." (SCT #6 2187.)

"93. (a) Do you believe in the adage: 'An eye for an eye'? [Answer] Yes. (b) What does the adage 'An eye for an eye' mean to you: [Answer] Punishment to fit the crime." (c) Is your belief in this adage based on a religious conviction? [Answer] Yes." (SCT #6 2188.)

"94. California law has not adopted the 'eye for an eye' principle. Will you be able to put the 'eye for an eye' concept out of your mind and apply the principles the Court gives you? [Answer] Yes." (SCT #6 2188.)

"95. Do you hold to any religious or philosophical principle that would affect your ability to impose death as a judgment in this case? [Answer] Yes. Please Explain: [Answer] [Blank]."

"96. Do you belong to any organization that either advocates the death penalty or the abolition of the death penalty? [Answer] No." (SCT #6 2189.)

"97. If the issue of whether California should have a death penalty law was to be on the ballot this coming election, how would you vote? [Answer] For." (SCT #6 2189.)

"98. Do you believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being? [Answer] No. Please Explain: [Answer] Not so in Accidental Death." (SCT #6 2189.)

Prospective juror Donovan answered several other questions, indicating he could set aside his personal feelings about the death penalty and follow the law as the court instructs, there was nothing about his present state of mind he thought the attorneys should know, and he was certain he could be a fair and impartial juror in the case. (SCT #6 2191, 2192.)

During oral *voir dire*, Mr. Donovan gave the following responses.

Under questioning by the Court, Mr. Donovan confirmed that he would vote for having a death penalty law if if were put up to a vote today. (RT 794.) He indicated he could set aside his personal feelings and follow the court's instructions. (RT 795.) Donovan himself felt he could be a "completely impartial juror." (RT 795.)

On *voir dire* by defense counsel, Donovan was asked "Do you think that everyone convicted of first-degree murder should receive the death penalty? He responded, "Well, there may be circumstances, but mostly I think it should be an eye for an eye." (RT 796.)

Donovan denied that his "eye for an eye" beliefs were based on religion: "It doesn't have anything to do with religion." (RT 797.)

Defense counsel asked, "Do you think that everyone convicted of first-degree murder during the commission of a robbery should get the death penalty?" Donovan responded, "I think they should mostly, in most

instances." Asked what he meant by that, Donovan replied, "Well, I think I answered that once before. There may be extenuating circumstances – well –" (RT 798.)

Counsel posed the question: "Do you think that life without the possibility of parole could ever be an appropriate sentence for someone convicted of first-degree murder during a robbery?" Donovan responded: "There's too many chances that years to come the judge, or whoever it is, may change their mind and think he's been a pretty good prisoner so let them go and go out on the street and do the same thing again." (RT 798.) Counsel followed up: "Are you saying that you feel that a sentence of life without the possibility of parole does not mean life without?" Mr. Donovan said, "I don't think it does. Very seldom." (RT 799.)

Mr. Donovan again expressed skepticism that life without parole meant life without parole. However, asked by the Court if he could set his beliefs aside if instructed by the Court that life without the possibility of parole meant life without the possibility of parole, Donovan said, "Yes. If they said that, I could go along with it." (RT 799.)

Thereafter, Mr. Donovan confirmed his belief that the death penalty was imposed too seldom: "Well, a lot of times we read in the paper where I think they should have had the death penalty and they didn't. I don't think that's right." (RT 799.) He indicated there were some circumstances where he could impose a sentence of life without the possibility of parole: "No. I could change my mind if the circumstances looked that way." (RT 800.) He could "change [his] mind after hearing the testimony." (RT 800.)

Defense counsel asked: "Knowing that it's going to be your judgment, all right, after you've heard the facts of the case, could you ever vote for life without possibility of parole as an appropriate punishment for someone convicted of first-degree murder with one or more special circumstances

found true?" Mr. Donovan responded: "I doubt it very much." (RT 802.)

The Court asked Mr. Donovan, "if I told you that you're to vote for one or the other, either life without the possibility of parole or death, both are to receive your equal, fair consideration, could you set aside your personal feelings and follow that instruction?" Mr. Donovan responded yes. (RT 802.)

The court then asked, "or do you think you might find it difficult, if not impossible, to set aside your personal feelings?" Donovan replied, "No. I could set aside my feelings." (RT 803.)

Asked about his "leaning" toward the death penalty, prospective juror Donovan acknowledged he leaned towards death, and rated his degree of leaning as "so-so" or "mediocre", or half-way on a scale of 1 to 10. (RT 804.)

After Mr. Donovan was excused, Ms. O'Neill moved to excuse him for cause. (RT 805.) The Court denied the motion, finding that Donovan's "true state of mind is that he can set aside his vows and obey the Court's instruction on this matter." (RT 807.)

Prospective Juror Stephanie Fletcher

Stephanie Fletcher answered written death qualification questions in the questionnaire in relevant part, as follows:

"85. What are your GENERAL FEELINGS regarding the death penalty? [Answer] Feel it is called for in instances that warrant it. I would have no problem giving that punishment if warranted. I feel the punishment itself is not carried out enough and they end up staying on death row forever." (SCT #6 2831.)

"87. Do you feel that the death penalty should be automatic for any type of crime? [Answer] Yes. Please Explain: [Answer] killing of govt officials, law enforcement officers, premeditated murder." (SCT #6 2832.)

"90. What are your feelings about the punishment of life imprisonment without the possibility of parole? [Answer] Very costly for the tax payers."

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] Yes." (SCT #6 2833.)

"92. Do you feel the death penalty is imposed: Too often ___ Too seldom ___ Randomly ___ [Not answered] Please Explain: [Answer] Each case is different & you don't know what should have happened unless you know all the facts." (SCT #6 2833.)

"93. (a) Do you believe in the adage: 'An eye for an eye'? [Answer] Yes. (b) What does the adage 'An eye for an eye' mean to you? [Answer] Equal punishment for the injury inflicted."

"94. California law has not adopted the ' eye for an eye' principle. Will you be able to put the 'eye for an eye' concept out of your mind and apply the principles the Court gives you." [Answer] Yes." (SCT #6 2834.)

"96. Do you believe the state should impose the death penalty on everyone, who, for whatever reason, kills another human being? [Answer] No. Please Explain: [Answer] If you kill someone in self-defense I would not [unintelligible] the death penalty." (SCT #6 2835.)

Ms. Fletcher answered in the affirmative that she could set aside her personal feelings about the death penalty and follow the court's instructions. (SCT #6 2837.)

During oral *voir dire*, Ms. O'Neill asked Ms. Fletcher: "Do you think that -- we did ask you that question in 87. We said, 'Do you feel the death penalty should be automatic for any type of crime?' And your answer was, 'Yes.' Under 'please explain' you put, 'Killing of government officials, law enforcement officers, premeditated murder.' Are you saying that the death penalty should be automatic for those kinds of killing?" Ms. Fletcher responded, "I think so." (RT 929.)

Counsel asked, "Do you think that everyone convicted of first-degree

murder during the commission of an attempted rape should receive the death penalty?" Ms. Fletcher responded, "Un, I think I would probably have to know all the circumstances on that. To me, first-degree murder, I guess is when you sit there and you plan out what you're going to do. You know, if you plan you're going to go rape somebody and then murder them, then, yeah, I would think that." (RT 929.) Ms. Fletcher, asked to clarify, explained, "That they should be – have the death penalty." (RT 929.)

Defense counsel asked Ms. Fletcher about her views on life imprisonment without parole. Fletcher explained that she felt life without parole was costly for taxpayers: "A lot of them live better than a lot of the people who have lost their jobs and living on the street. They have a roof over their head and three meals a day. They don't have to worry about where the next meal is coming from. There's a lot of people who have not committed crimes that don't live as well because they don't have a job." (RT 930.)

Ms. O'Neill followed up: "Do you think – do you – with those feelings about life without being expensive for the taxpayer, could that punishment be considered by you if you were asked to sit on a case such as this or would your feelings that it's too costly make you vote for the death penalty to save the taxpayer money? Ms. Fletcher answered, no, it would not effect her decision. (RT 931.)

Elaborating on her belief in the adage "an eye for an eye", Ms. Fletcher confirmed that this was her belief, and explained "that the punishment should be sufficient enough as far as what the severity of the crime was." (RT 931.) She did not believe that "if someone cut off somebody's finger, they should have their finger cut off." (RT 932.) Pressed to tell whether someone should be killed if he or she killed someone, Ms. Fletcher responded: "It depends on why they were killed. There are killings that are accidental. I don't feel that should be." (RT 932.)

Ms. O'Neill, seeking clarification asked the prospective juror whether if the jury had found the person guilty of first degree murder with special circumstances, did Ms. Fletcher think "the punishment should always be the death penalty." Ms. Fletcher answered, "Not always." (RT 933.)

Upon further questioning, Ms. Fletcher assured the Court she could set aside her favoritism for the death penalty and be completely impartial and follow the law as given by the Court. (RT 935.)

The Court denied defense counsel's motion to excuse Ms. Fletcher for cause, based on her strong leaning toward the death penalty, her belief that life without parole was costly for taxpayers, and the juror's "strange air of dislike coming towards the defense side when she talked to [Ms. O'Neill]." Ms. O'Neill argued that the juror appeared "somewhat angry at us." (RT 936.)

Ms. O'Neill further argued that this prospective juror had a negative attitude toward the criminal justice system, and had indicated on the questionnaire that she had a somewhat negative view towards psychological matters. (RT 937; see SCT #6 2823-2824.) The Court found "that, indeed, she did evidence some amount of hostility toward Ms. O'Neill during the questioning process. And, furthermore, she expressed rather clearly, her ideas about the death penalty, which, in general, were in favor of the use of the death penalty as punishment." (RT 939.) The court gave "greater significance" to the juror's insistence that she would set aside her personal beliefs, and denied the motion for dismissal. (RT 939.)

Prospective Juror Martha Kolstad

Martha Kolstand answered written death qualification questions in relevant part as follows:

"85. What are your GENERAL FEELINGS regarding the death penalty? [Answer] I totally support the death penalty. I believe it would be a deterrent if implemented totally and swiftly." (SCT #6 4809.)

"87. Do you feel that the death penalty should be automatic for any type of crime? [Answer] Yes. Please Explain: [Answer] Molestation (child)/murder, killing a police officer in the line of duty, drug czars/kingpins drive by shooters who do kill someone, carjackers who commit murder."

"89. Have your views about the death penalty changed substantially in either intensity or nature in the last few years? [Answer] Yes. Please explain: [Answer] My feelings have become more intense for the death penalty." (SCT #6 4810.)

"90. What are your feelings about the punishment of life without parole? [Answer] A waste of time, resources & taxpayers dollars. I don't think our prisons make people 'afraid' to be there. In many cases it's an improvement over where they've been." (SCT #6 4811.)

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] No. Please comment: [Answer] There is always loopholes, activist groups, etc. that can or will sway parole boards or bring up new evidence 20 years later." (SCT #6 4811.)

"92. Do you feel the death sentence is imposed: Too often ___ Too seldom ___ Randomly ___? [Answer] Too seldom. Please explain: The punishment should fit the crime. The voters want it – but the system doesn't." (SCT #6 4811.)

"93. Do you believe in the adage: 'An eye for an eye'? [Answer] Yes. (b) What does the adage 'An eye for an eye' mean to you: Degree is important, but in serious & violent crime – it's important. If you kill someone, you should be prepared to pay w/your life if caught and convicted." (SCT #6 4812.)

"94. California law has not adopted the 'eye for an eye' principle. Will you be able to put the 'eye for an eye' concept out of your mind and

apply the principles the Court gives you. [Answer] Yes." (SCT #6 4812.)

"97. If the issue of whether California should have a death penalty law was to be on the ballot this coming election, how would you vote. [Answer] For." (SCT #6 4813.)

"98. Do you believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being? [Answer] No. Please explain: Euthanasia (sp!); a crazed family member who shoots and kills the perpetrator who was witnessed committing the crime, etc. (I'd have trouble w/the Ellie Nessler case.)" (SCT #6 4813.)

"99. (a) There has been a great deal of publicity recently in regarding the death penalty. Please describe what, if anything, you have read, seen or heard: [Answer] The Eric Lucke case – minors are not eligible for it (ridiculous); the man who was just put to death; reviews of death penalty cases where too much time has passed – judges not opening for review again in a majority vote Yes! (b) What are your feelings about what you have read, heard or seen? [Answer] A lot of poppycock. A lot of wasted resources & tax money." (SCT #6 4814.)

Ms. Kolstad answered questions indicating she could set aside her feelings about the death penalty and follow the law as instructed by the court. (SCT #6 4815.)

During oral *voir dire* proceedings, prospective juror Kolstad said she could set aside her personal views and obey the standards set by the court. (RT 1406.) Kolstad acknowledged: "I guess I do feel so strongly about the death penalty and I do have a problem with life imprisonment. If the law called for it and I was picked, I do think I could do that. . . . However, I wouldn't be happy about it." (RT 1408.) Ms. Kolstad reiterated her belief stated in the juror questionnaire that she felt it was "ridiculous" that the death penalty could not be imposed on juveniles. (RT 1409.) Kolstad stated: "And

that makes me really angry." (RT 1409.)

The court asked: "Do you think your personal beliefs might impair your ability to vote for life without the possibility of parole in that kind of case or to give it serious consideration because of how you feel?" Kolstad answered: "it might. It might." (RT 1410.) Asked again, she said: "I think it probably would not. I think it would go with common sense in the way it's written. But I don't know." (RT 1410.)

Juror Kolstad continued to vaccilate about whether her personal beliefs about the death penalty would interfere with her ability to consider life without parole. (RT 1411.) Eventually, Ms. Kolstad indicated she thought she could be objective, but did not know how she would feel in the end. (RT 1412.)

Under questioning by defense counsel, Ms. Kolstad confirmed her belief that a person should automatically get the death penalty if they were convicted of molestation/child murder, killing a police officer in the line of duty, drug czars, kingpins, drive by shooters who do kill someone and carjackers who commit murder. (RT 1413.) Ms. O'Neill asked if Kolstad could "ever consider life without the possibility of parole as the appropriate punishment for someone convicted of first degree murder during the rape of a child." (RT 1413.) The prospective juror explained that her first impulse would be to say, no, she could not consider life without the possibility of parole, but she said she would "have to know the facts." (RT 1413-1414.)

The court inquired of Ms. Kolstand: "You're already giving us little warning signs that maybe the facts will be such that you won't be fair and won't consider life without the possibility of parole as an appropriate measure of punishment. Do you think that is something we have to fear from you?" (RT 1417.) Kolstad replied: "Well, I hear the warning signs myself, actually. As I say, I think I could be fair. I mean, if I were sitting in that chair, I'd want

everbody else to be fair with me. And that's what I – I do try to live my life that way. I am very dogmatic about how I feel in the written word, what I've listed here. But I think I'm a fair person. And I think I could be a fair person." (RT 1417.)

Ms. O'Neill probed further: "If you feel a certain way, that's fine. Maybe this kind of jury isn't the right kind of jury for you if you have strong feelings either way. What we would like to know from you is could you consider life without possibility of parole as appropriate punishment for someone convicted of first-degree murder during an attempted rape? Kolstad responded: "If you're not getting a true feeling – if it is a heinous crime that's being presented, maybe the answer is no, I don't know that I could do that and be totally objective." (RT 1418.)

Under further questioning, Ms. Kolstad criticized the press's reporting as "liberal" because demonstrations against the death penalty were reported, but everyone she knew supported the death penalty and could not understand why it was not swiftly implemented. (RT 1420.) Kolstad agreed that she had a "substantial leaning" toward imposing the death penalty on one convicted of first degree murder with one or more special circumstances. (RT 1420.)

On *voir dire* by the prosecutor, Ms. Kolstad said she did not think every person who commits murder should be executed. (RT 1421.) However, she indicated that if someone committed a murder during the commission of an attempted rape, she would "definitely lean" toward the belief that the death penalty should be imposed. (RT 1421-1422.) Ms. Kolstad equivocated about whether she could set her beliefs aside and make a decision. (RT 1422.)

Ms. Kolstand, at one point stated, "Maybe this just wouldn't be a good one for me." (RT 1423.) Later, she told the court she thought she could be fair and make a decision on the evidence. (RT 1424.)

The defense moved to excuse Ms. Kolstad for pro-death penalty bias.

(RT 1425-1427.)

The Court observed: "Certainly her entire questionnaire and her answers to our questions indicated an opposition – excuse me, a bias in favor of the death penalty. Again and again the ultimate question was whether or not she could set aside her views and obey the Court's instructions. And, finally, we narrowed it down with Mr. Cooper's question of distinguishing between aggravating circumstances and unfairness. I believe her answer was that she felt she could set aside her person beliefs, but she wasn't sure." (RT 1428.)

The prosecutor disputed the court's characterization of the jurors' answers. (RT 1428.)

The prospective juror was brought back in for further questioning. (RT 1429.) The court asked: "Do you think you could set aside your personal beliefs and follow my instructions?" Ms. Kolstad responded, "Yes." Asked if she was sure, Ms. Kolstad said she was a fair person, and she would follow the court's instructions. (RT 1430.) The court then found considering the "totality of the evidence" that Ms. Kolstad was not substantially impaired. (RT 1431.)

Prospective Juror David Madden

Mr. Madden answered written death qualification questions in the juror questionnaire in relevant part, as follows:

"46. Have you ever considered working in law enforcement? [Answer] No. Please explain: [Answer] Law enforcement officials are generally handcuffed from doing their job thanks to judicial gridlock manufactured by lawyers." (SCT #6 5590.)

"55. Do you believe that the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes." [Answer] Yes. Please explain: Gridlock manufactured by lawyers has overloaded the

judicial system. (SCT #6 5593.)

"63. Regarding radio and/or television broadcasts, were there incidents relating to the criminal justice system that have been presented during the past five years which have attracted your attention? [Answer] Yes. Please comment: Anything that blasts lawyers for becoming obstacles to justice (i.e., stories on '60 minutes' regarding low-life attorneys milking the system." (SCT #6 5597.)

"65. Do you have bumper stickers, license plate holders or declas on your vehicle? [Answer] Yes. If so, please state what it or they say: [Answer] 'Have you kicked a lawyer today?' (Sorry but I do have a very low opinion of lawyers . . .) (SCT #6 5598.)

"71. What is your opinion about the value and validity of psychiatric or psychological testimony in court? [Answer] By and large, I see it as a lawyer's ace-in-the-hole (to get his client back to the street). (SCT #6 5600.)

"85. What are your GENERAL FEELINGS regarding the death penalty? [Answer] all for it; not only for those found guilty of felonies but also for habitual offenders of lesser crimes." (SCT #6 5607.)

"87. Do you feel that the death penalty should be automatic for any type of crime? [Answer] Yes. Please explain: [Answer] Any crime of violence should have death as the automatic penalty; there should be one and only one automatic appeal which can only be overturned by the Governor." (SCT #6 5608.)

"89. Have your views about the death penalty changed substantially in either intensity or nature in the last few years? [Answer] Yes. Please explain: [Answer] The older (and more conservative) I become, the more I see the need for swift and severe punishment for felons." (SCT #6 5608.)

"90. What are your feelings about the punishment of life imprisonment without the possibility of parole? [Answer] I see it as free room & board, free

medical/dental, conjugal visits, recreation rooms and exercise facilities all at public expense." (SCT #6 5609.)

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] No. Please comment: "Parole Boards will insure that such felons will aways have a way to escape." (SCT #6 5609.)

"92. Do you feel the death sentence is imposed: Too often___ Too seldom ___ Randomly ___ [Answer] Too seldom. Please explain: Far too seldom. (SCT #6 5609.)

"92. (A) Do you believe in the adage "An eye for an eye"? [Answer] Yes. (B) What does the adage "An eye for an eye" mean to you? [Answer] If you take a life, you lose your own." (c) Is your belief in this adage based on a religious conviction? [Answer] Yes. (SCT #6 5609.)

"94. California law has not adopted the "eye for an eye" principle. Will you be able to put the "eye for an eye" concept out of your mind and apply the principles the Court gives you. [Answer] Yes. (SCT #6 5610.)

"95. Do you hold to any religious or philosophical principle that would affect your ability to impose the death as a judgment in this case? [Answer] No. Please explain: [Answer] As stated earlier, I am a life-long Christian who has always supported the death penalty. (SCT #6 5610.)

"97. If the issue of whether California should have a death penalty was to be on the ballot this coming election, how would you vote? [Answer] For.

"98. Do you believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being? [Answer] No. Please explain: [Answer] Self defense should be an exception. (SCT #6 5611.)

"99. (a) There has been a great deal of publicity recently in regarding the death penalty. Please describe what, if anything, you have read, seen or heard: [Answer] I've seen nothing recently except groups of people holding

candles outside execution sites as they protested the death penalty. (b) What are your feelings about what you have read, heard or seen? [Answer] I see these people opposing the death penalty as social scientist-bleeding heart-liberals who must share in the responsibility for today's high crime rate. (c) Has what you have read, heard or seen affected your feelings about the death penalty? [Answer] Yes. Please explain: [Answer] Only strengthens my belief in this tool of justice. (SCT #6 5612.)

"100. Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the court instructs you? [Answer] Yes. Please comment: [Answer] Though I strongly believe in the death penalty, I am also an unswerving supporter of law in general. (SCT #6 5613.)

"101. Is there anything about your present state of mind that you feel either of the attorneys would like to know? If so, please explain. [Answer] As can be seen in earlier answers, I have little regard for attorneys. Nevertheless, I continue to look forward to serving on a jury at some point in the future. (SCT #6 5613.)

During oral *voir dire*, Mr. Madden gave the following responses. Asked if his personal views would get in the way, once the jury found the defendant guilty of first degree murder with at least one special circumstance finding, Mr. Madden answered: "No sir. Not at all. I'm very much in favor of the death penalty. I think that I always have been." (RT 1531.) Mr. Madden voluntarily added, "Not only for heinous crimes but, also, for people found guilty of far lesser crimes. Crimes of violence, for example . . . Right. I'm very much for that." (RT 1531.) The court then asked, "So you would probably have the death penalty if somebody was convicted of a crime of violence?" Madden answered, "Yes, sir." (RT 1531.)

The Court then explained to Mr. Madden that he would have to set

aside his personal views, and act like a judge, "totally impartial and objective" about the penalties. Mr. Madden replied, "I believe I could set aside those because I just have great respect for the law. Even though the state of California might not allow that kind of finding, I'm going to rule on the case by the evidence presented and by whatever guidelines are issued. So I really believe I could disassociate myself from that. Bottom line." (RT 1533.)

Under examination by defense counsel, Mr. Madden reaffirmed that he had "a very pronounced aversion to lawyers." (RT 1533.) He had a bumper sticker on his car which read, "Have you kicked a lawyer today?" (RT 1533.) Mr. Madden explained further, "But, again, I have such respect for the law that I would see what attorneys might try to do in a courtroom as being – I guess you would say minor irritants. I see attorneys as sometimes roadblocks to finding justice and dispensing justice. But again, I would look upon the rule of law and the evidence cited and not lean too much on my aversion to attorneys. I would try to be fair, let's put it this way. Again, my questionnaire I completed in total honesty. Perhaps I was more honest than I should have been." (RT 1534.)

When Madden was asked if he felt the death penalty should be imposed on all persons convicted of a felony he replied: "Unless special circumstances exist. For example, self-defense, or a wife who shoots her husband because he beats her up again. Although, to me, those wouldn't really be crimes that should be tried in a court of law. What I was referring to, there are the kinds of career criminals who are predators. They get out of jail or prison, create more victims and just go right to prison for it, you know, a short sentence." (RT 1535, see also 1540.)

Mr. Madden confirmed the he felt the death penalty should be imposed on habitual violent offenders. (RT 1535.) He also reaffirmed his belief that there is "an endless appellate process for career criminals." He explained, "It

just seems to overload our prison system, overload our judicial system. And the dispensement [sic] of justice is not swift, severe, when you have an endless appeal process. I've always believed there should be one automatic appeal. But the endless array of appeals does not serve the people. There should be some finality to that." (RT 1536.)

While acknowledging the accuracy of the sentiments expressed in his written questionnaire, Mr. Madden insisted he could set his strong opinions about the death penalty aside, and consider life without the possibility of parole as a punishment. However, he said "There would have to be some strong evidence to show that that was appropriate." (RT1537-1538.)

Defense counsel asked Mr. Madden whether he would automatically vote for death in the event the evidence showed the defendant had committed some bad prior acts, or had prior convictions, but an objection by the prosecutor was sustained. (RT 1539.)

Defense counsel also asked whether Mr. Madden believed that "everyone convicted of first degree murder during the commission of an attempted rape should receive the death penalty. Mr. Madden said yes, "unless there's some extraordinary mitigating circumstances," but no sufficiently mitigating factors came to his mind. (RT 1540.)

Mr. Madden answered, "Generally speaking, yes," when asked if everyone convicted of first degree murder during the commission of a robbery should receive the death penalty. (RT 1540.)

During a second round of *voir dire* by defense counsel, Mr. Madden was asked whether he had a leaning either way of what the appropriate punishment should be for a person convicted of first degree murder. He responded, "Unless significant circumstances are a part of the case, I'm all for the death penalty." (RT 1543.) At one point, when defense counsel's questioning of Mr. Madden drew an objection from the prosecutor, the Court

stated, "I thought he made it very clear he leans very positively and clearly toward the death penalty. I don't think he's hidden that fact." (RT 1544.)

Ms. O'Neill asked Mr. Madden about his answer to question 71 of the written questionnaire, asking about psychological and psychiatric testimony in court. In response to a follow up question about pleas of not guilty by reason of insanity, Mr. Madden stated: "Let me be very clear about this. When I read in the newspaper that a team of psychologists hired by the defense comes up with reports supporting the case for the defense, I don't see a lot of credibility in those. Conversely, if the prosecution comes up with a battery of psychological reports supporting his case, I don't see a lot of credibility there as well. When I see reports coming from a court-appointed team, then I would tend to see a lot more credibility on it. My view is that psychologists will come up with a report that will support whoever is paying his or her bill. I know that's very pessimistic. But if I see this report comes from either prosecution or the defense, I don't see a lot of credibility in it. If it comes from a court-appointed – and I draw a distinction between court-appointed and prosecution appointed – then I see credibility in it." (RT 1545.)

Ms. O'Neill asked if Mr. Madden could keep a fair and open mind if he had to sit in a case where the defendant had pled not guilty by reason of insanity. He responded, "I'd see a lot more credibility if the psychologists were hired by a neutral party." (RT 1546.)

The Court followed up with a question about whether the witness could be fair if directed to determine insanity on the basis of psychological and psychiatric testimony by defense, and prosecution witnesses, but no court-appointed psychologist. (RT 1546.) Mr. Madden responded: "I guess I'd have to see a preponderance of evidence on both sides. What I'd be left with are reports from two sources, either of which I would tend to question." (RT 1546.) Mr. Madden assured the Court that, nevertheless, he could be fair to

both sides. At the conclusion of questioning, Mr. Madden indicated he had been "brutally honest" in his questionnaire and hoped some of his answers did not disqualify him. (RT 1548.)

After Mr. Madden was excused, the defense made a motion to disqualify him for cause, based his hatred of attorneys, his disbelief in psychiatric or psychological testimony, his belief that life without parole was a luxury vacation, and his pro-death penalty bias, reflected in his belief that all violent felons should be executed. (RT 1549-1551.) Ms. O'Neill noted for the record that the prospective juror "had a little smile on his face the whole time" like he was "playing cat and mouse". (RT 1549.)

The Court acknowledged that Mr. Madden was "extremely opinionated on a number of topics that bear on this trial," but found him substantially unimpaired to serve and denied the motion to excuse. (RT 1551-1552.)

Later, defense counsel renewed their motion to excuse Mr. Madden. They asked the Court to review answers 46, 55, 63, 65 and 71 of the questionnaire, and argued that Mr. Madden's dislike of attorneys was likely to spill over to Roy. (RT 3137.) The Court denied the motion because Mr. Madden had declared he could set aside his personal beliefs. (RT 3137-3138.)

Prospective Juror Reverend Lindall McDaniel

Mr. McDaniel, a Minister with the Selma Church of Christ (SCT #6 5963), responded to written questions about the crime, mental illness and death penalty as follows:

"55. Do you believe that the criminal justice system makes it hard for the police and prosecutors to convict people accused of crime? [Answer] Yes. Please explain: [Answer] Too many legal restrictions and too many protections & delays in a criminal procedure. (SCT #6 5974.)

"69. What is your attitude about the field of psychology/psychiatry? [Answer] The field in general seems to be heavily weighted toward the

Fraudean [sic] approach on treating man as just an improved animal rather than a being created by God & subject to the laws of God. (SCT #6 5980.)

"70. Do you believe there is such a thing as 'mental illness'? [Answer] Yes. Please explain: [Answer] My understanding of 'mental illness' is that it is caused by some organic chemical or physical defect imbalance & not just a behavioral defect or tendency. (SCT #6 5980.)

"71. What is your opinion about the value and validity of psychiatric or psychological testimony in court? [Answer] For the most part, I doubt if it is very valuable. (SCT #6 5981.)

"85. What are your GENERAL FEELINGS regarding the death penalty. [Answer] The 'death penalty' is appropriate in criminal cases involving first degree murder, kidnapping, etc. It is essential to the protection of the law abiding citizen & the maintaining of a civilized society." (SCT #6 5988.)

"86. Do you feel that the death penalty should be automatic for any type of crime. [Answer] No. Please explain: Only the most serious of premeditated crimes." (SCT #6 5989.)

"90. What are your feelings about the punishment of life imprisonment without the possibility of parole? [Answer] In most cases, I doubt if these [sic] is a very good alternative. (SCT #6 5990.)

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] No. Please comment: [Answer] Such people have been paroled in the past, I could be mistaken about this. (SCT #6 5990.)

"92. Do you feel the death sentence is imposed: Too often ___ Too seldom ___ Randomly ___ [Answer] Too seldom. Please explain: [Answer] The shame of America is that we have not inforced [sic] the death penalty. (SCT #6 5990.)

"93. (a) Do you believe in the adage 'An eye for an eye'? [Answer] Yes. (b) What does the adage 'An eye for an eye' mean to you: [Answer] It simple [sic] means that the punishment must fit the crime. It is a 'concept' not a literal eye for an eye. (c) Is your belief in this adage based on a religious conviction? [Answer] Yes. (SCT #6 5991.)

"94. California law has not adopted the 'eye for an eye' principle. Will you be able to put the 'eye for an eye' concept out of your mind and apply the principles the court gives you? [Answer] Yes. (SCT #6 5991.)

"98. Do you believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being? [Answer] Should only be imposed in the case of premeditated or murder with by [sic] malice & not accidental murder. (SCT #6 5992.)

"99. (a) There has been a great deal of publicity recently in regarding the death penalty. Please describe what, if anything you have read, seen or heard. [Answer] that would be hard to say for I have studied this issue for a long time & always notice references to it. (b). What are your feelings about what you have read, heard or seen? Since I strongly support the death penalty, my feelings are affected accordingly." (SCT #6 5993.)

During oral *voir dire*, Reverend McDaniel indicated that his previous answers about mental illness had been "rash", that he felt someone could be mentally ill without it just being "organic." (RT 1618.)

Ms. O'Neill asked Reverend McDaniel whether he believed "everyone convicted of first degree murder should get the death penalty. He responded, "Probably do, yeah. First degree murder would be deliberate murder. It's not accidental. (RT 1619.)

Mr. McDaniel was asked if he believed that everyone convicted of first degree murder during an attempted rape should get the death penalty. He responded, "Probably would, yeah." (RT 1620.) He voiced less certainty

about whether someone convicted of first degree murder during a robbery should receive the death penalty. (RT1620.)

Ms. O'Neill several questions to determine what Reverend Mc Daniel had meant when he said life without parole was not a very good alternative. He explained that, if it was established in his mind that the crime was first degree murder, he would probably believe capital punishment would be better than life without parole. (RT 1621.) He indicated he would consider life without parole if there were "extenuating circumstances." (RT 1622.)

Ms. O'Neill asked, "Are you saying you'd put the burden on the defense, then, to prove to you that it shouldn't be the death penalty, that you've already made up your mind, and now the defense would have to show you why it shouldn't be at that point?" Reverend McDaniel replied, "Yeah, probably so." He also responded affirmatively when asked if he had a "strong leaning toward the death penalty." (RT 1622.)

Reverend explained his comment about the "shame of America" as follows: "Well, because people that take life because of the sanctity of life and the preciousness of life, when they take it deliberately with malice, they ought to have their life taken away, and not as revenge or anything, but simply as penalty and safeguard to society. So I strongly believe in the death penalty." (RT 1632.)

Ms. O'Neill asked if Reverend McDaniel could set aside his strong feelings about the death penalty and give life without parole serious consideration. He answered: "I don't know how to answer that except we all have to look at the extenuating circumstances and judge accordingly." (RT 1624.) On further questioning, he stated that reaffirmed that he would probably place the burden on the defense, if there was malice and intent, to show why the death penalty was not warranted. (RT 1624.) Reverend McDaniel denied that his ability to be fair and unbiased would be impaired by

his views. (RT 1624-1625.)

Under questioning by the prosecutor, Mr. McDaniel asserted that he would obey the court's instructions, not place a burden on the defense, and give fair consideration to both death and life without parole. (RT 1627.)

The defense moved to dismiss Reverend McDaniel for cause. (RT 1630.) The motion was denied. (RT 1632.)

Prospective Juror Colleen Wiginton

Ms. Wiginton's answers to written questions about the death penalty were unremarkable, other than that they indicated support for the death penalty, generally, and a belief that life imprisonment without parole was "expensive." (SCT #6, 9145, 9147.)

During oral *voir dire*, Ms. Wiginton gave the following responses. Ms. Wiginton had read accounts of the crimes in this case in the newspaper and recalled that two girls had been dropped off at a theater and got in the car with a person they recognized. She remembered that the person took them to a restroom in Lost Lake where an alleged attack took place. (RT 2097-2098.) Ms Wiginton admitted that the ages of the victims would make her think of her daughters, who were age 15 and 12. (RT 2102.) Ms. Wiginton wondered why the girls were being dropped off at the theater by themselves. (RT 2105.) She had formed the opinion, that if the allegations were true, "that would be just the ultimate awful crime by somebody that you would recognize that would do something like that." (RT 2105.)

The defense moved to dismiss Ms. Wiginton for cause.

Ms. Wiginton was visibly emotional during questioning. (RT 2105.) Although she denied having hostility toward the defense (RT 2106), after she was questioned Ms. O'Neill stated for the record that Ms. Wiginton had been "uncomfortable with the defense," and acted like she did not wish to speak with them. (RT 2110.) Ms. O'Neill felt the juror's body language

demonstrated obvious hostility toward her while she was asking questions. (RT 2110.)

In addition, Ms. O'Neill pointed out that Ms. Wiginton felt life without parole cost too much money, she had failed to answer the last page of the questionnaire, and had become hostile toward defense counsel when asked about why she did not answer question no. 71. (RT 2111.)

The motion to excuse prospective juror Wiginton was denied. (RT 2112.)

Prospective Juror Mary Lopez

Ms. Lopez, who had been jailed for shoplifting at age 21 (SCT #6 5360), in 1974, answered questions in the following manner.

"55. Do you believe that the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes? [Answer] No. Please explain: [Answer] Attorney can sometime help a criminal get away with murder as well as other types of cases." (SCT #6 5365.)

"69. What is your attitude about the field of psychology/psychiatry? [Answer] It helps some people with understanding there problems in life." (SCT #6, 5371.)

"70. Do you believe there is such a thing as 'mental illness'? [Answer] Yes. Please explain: [Answer] You can tell when most people are mentally ill." (SCT #6 5371.)

"71. What is your opinion about the value and validity of psychiatric or psychological testimony in court? [Answer] Some people use [] to get away with crimes." (SCT #6 5372.)

"85. What are your GENERAL FEELINGS regarding the death penalty? [Answer] I am for the death penalty." (SCT #6 5379.)

"92. Do you feel the death sentence is imposed: Too often ___ Too seldom ___ Randomly ___ [Answer] Too seldom. Please explain: [Answer]

Too many murder have no death sentencing." (SCT #6 5381.)

"96. Do you believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being? [Answer] Yes. Please explain: [Answer] The death penalty is needed." (SCT #6 5383.)

"100. Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the court instructs you? [Answer] Yes. Please comment: I know what I feel, that if it is right or wrong if the death penalty is needed or not." (SCT #5385.)

During oral *voir dire*, Ms. Lopez answered questions in the following manner:

Ms. O'Neill asked Ms. Lopez to explain what she meant when she said in the written questionnaire, that sometimes attorneys help criminals get away with murder. (RT 2656.) Ms. Lopez stated: "Sometimes people can be guilty and lawyers have a way of covering up – how do I put it? Have a way of shading that over, shall I say, to where it won't look as if they did. It could also work vice versa . . . . The opponent lawyer also to the same thing to the other – you know, make him guilty when he's not." (RT 2657.)

Ms. O'Neill also asked: "If someone is already found guilty of first degree murder during an attempted rape, do you think the punishment should always be the death penalty for a person already convicted in that situation?" Ms. Lopez answered: "Oh, gosh. Yes." (RT 2661.)

Subsequently, the prosecutor asked Ms. Lopez: "So then right now, without evidence, as you're sitting there, you do not have a belief that everybody who does murder during an attempted rape, that if they do it they get the death penalty." (RT 2663.) Ms. Lopez responded, "I basically think, yes, they should. I've never been through this, so I'm not absolutely sure. . . ." (RT 2664.) On further questioning she explained: "I did say, yes, I think

they should get the death penalty. Yes, if they were found guilty. I still feel that, but maybe there will be special circumstances - I don't know. You know. I actually think, yes, if he's found guilty, he should get the death penalty." (RT 2664.)

In later questioning, Ms. Lopez was insistent that she would listen to the evidence and decide the issue of penalty based on the facts. (RT 2665-2669.)

The defense moved to excuse Ms. Lopez for cause based on her unambiguous written answers to death qualification questions and her appearance of hostility toward the defense attorneys. (RT 2670-2671.) The court found Ms. Lopez's answers "ambivalent" and "outright conflicting," and denied the motion. (RT 2673-2674.)

Prospective Juror Samuel Lopez.

Samuel Lopez, who worked in law enforcement for seven years (SCT #6 5438) gave the following answers in his questionnaire.

"85. What are your GENERAL FEELINGS regarding the death penalty? [Answer] If need it should be done." (SCT #6 5455.)

"90. What are your feelings about the punishment of life imprisonment without the possibility of parole? [Answer] I don't feel – in a case like this – I wld [original abbreviation] go toward DP." (SCT #6 5457."

"91. Do you believe that a person who is sentenced to prison without the possibility of parole will, in fact, never be paroled? [Answer] No." (SCT #6 5457.)

"92. Do you feel the death sentence is imposed: Too often ___ Too seldom ___ Randomly ___ [Answer] Too seldom." (SCT #6 5457.)

During oral *voir dire*, Mr. Lopez gave the following responses to questions.

Regarding life without parole, Mr. Lopez told the court: "Life

imprisonment, I don't feel, you know, in a case like this, you know – if a person kills someone, I would go toward the death penalty than life imprisonment." (RT 2678.) Asked for clarification, Mr. Lopez explained: "I don't think they're [personal beliefs] that strong. I'd have to listen to all the facts to see what really, you know, happened. But if it was, you know, a person that did, in fact, kill somebody, I would lean more to the death penalty than to life imprisonment if everything led to that." (RT 2679.)

The court again asked: "Okay. Well, we're asking you to pretend that we're at the stage where, in fact, someone has been convicted of first degree murder during an attempted rape. In that kind of situation, could you consider life without the possibility of parole to be an appropriate punishment?" Mr. Lopez replied: "No. I think the death penalty would be appropriate for that." (RT 2680.)

The court then asked, "Okay. We're, again, pretending that an individual has been convicted of first degree murder during a robbery. Could you ever consider life without the possibility of parole to be an appropriate punishment in that kind of situation." Mr. Lopez answered: "I don't think so . . . . I'd go toward the death penalty." (RT 2680.)

The court reiterated the same questions again, and received the same assurances that Mr. Lopez would consider the death penalty the appropriate punishment for a murder during an attempted rape or a robbery. (RT 2680-2681.) However, he could "consider both" penalties, and "be fair." (RT 2681-2682.)

The defense moved to excuse Mr. Lopez for cause. (RT 2690.) Without hearing argument from the prosecution, the court denied the motion. (RT 2691.)

The defense's objections to the selection of a death-prone jury:

At the conclusion of Hovey *voir dire*, defense counsel objected to the

jury panel under the Sixth, Eighth, and Fourteenth Amendments. Counsel argued that the jury included too many jurors with a pro-death penalty bias, and too many jurors with death penalty scruples had been improperly excluded. (RT 3014-3015.) Defense counsel asked to start the death qualification process all over again with a new panel. (RT 3016.) The trial court denied the motion. (RT 3019.)

The First Defense's Wheeler-Batson Motion

During jury selection, defense attorneys challenged the excusal of four Black jurors as racially motivated in violation of People v. Wheeler (1978) 22 Cal.3d 258 and Batson v. Kentucky (1986) 476 U.S. 79.

The first Wheeler-Batson challenge was brought on October 5, 1993, after the prosecutor had exercised three peremptory challenges against Black panelists, Sarah Blue (RT 3159), Albert Mitchell (RT 3209) and Joy Johnson (RT 3159). (RT 3211-3212.)

In response to the motion, the prosecutor stated for the record that the panel had originally included six Black panelists, including two -- Fifer, who was excused for hardship due to a sleep disorder (RT 3105), and Perry, who was excused on motion of the defense for pro-death penalty bias (RT 1770, 3095). (RT 3212.) The prosecutor admitted peremptorily excusing three Black jurors. One Black woman, Mrs. Cregar - who ended up serving on the jury - remained a panelist. (RT 3212 -3213.)

The Court took judicial notice of the 1990 U.S. Census, which established that Blacks comprised five percent of the population of Fresno County, 33,423 Black persons out of a total population of 490,000.[56] (RT 3215.) Ms. O'Neill pointed out that they had examined a total of 250

[56] The trial court's estimate was off: the percentage of Black jurors in Fresno County based on the census figures was closer to seven percent.

prospective jurors.[57]

The Court found that Mr. Cooper had exercised a total of 15 peremptory challenges, of which 3 had been against Black potential jurors. (RT 3216.) The Court found that no *prima facie* case of discriminatory exclusion had been made. (RT 3216.)

Just in case there was a "higher authority" that disagreed with the Court's finding, the prosecutor was asked to set forth racially neutral reasons for his excusals. (RT 3217.) The prosecutor proffered reasons. Afterward, the Court denied the Wheeler-Batson motion for the reasons previously stated by the court. (RT 3220.)

The Second Wheeler-Batson Motion

The defense renewed its Wheeler-Batson motion for a new jury panel on October 6, 1993 after the prosecutor used a peremptory challenge to excuse prospective juror Cato. (RT 3291.) Ms. O'Neill argued that Mr. Cato obviously appeared African American, and the Court agreed. (RT 3293.)

The trial court asked Mr. Cooper if he wanted to be heard regarding whether a *prima facie* case of discrimination had been made. (RT 3294.) Mr. Cooper declined to argue. The court, once again, made a finding that there had been no *prima facie* showing of racial bias. The court also asked Mr. Cooper to state his racially neutral reasons for dismissing Mr. Cato, in the event the higher courts disagreed, then "formally" denied the motion. (RT 3294, 3296.)

The defense motion for more peremptory challenges:

On October 6, 1993, after the defense had exercised 19 of 20

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[57] If 6 of 250 panelists were Black, the Fresno County Black population was significantly under represented on the jury panel. There were just under two-and-a-half percent Black panelists. Mr. Cooper had at this point exercised 20 percent of his peremptory challenges against Black panelists.

peremptory challenges allowed by the court, Ms. O'Neill expressed dissatisfaction with the jury, and moved for additional peremptory challenges. (RT 3296.) Ms. O'Neill explained:

> "... The defense had one peremptory challenge left. We used 19. The reason the defendant chose not to use it, the next juror coming up, juror number 70, is so bad, and she –
>
> "* * *
>
> "Number 70, Mary Lopez. If we exercised another challenge of the 12 people that we passed, Ms. Lopez – then we would have no challenges left. Ms. Lopez would be put in and be a juror since we both used up our challenges. Ms. Lopez is not only a zero, she's a double zero. She totally, totally was pro death.
>
> "We challenged her for cause during Hovey, and we feel she is just totally over the line and vote death penalty [sic] every single time. And she was antagonistic to the defense. I did put that on the record – or appeared to be. And that is why we did not use our last challenge.
>
> "We are not happy with the jury as constituted. We would ask the Court at this time for more peremptory challenges understanding that, of course, the other side would get the equal amount. We are not happy with the jury as constituted, and we would ask the Court for more challenges. (RT 3296-3297.)

The Court denied the motion, which was not joined by the district attorney. (RT 3298.)

During the selection of alternates, the defense used one of its peremptory challenges to excuse prospective juror Lopez. (RT 3308.)

XXVIII THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT ENGAGED IN A DISCRIMINATORY PATTERN OF RULINGS ON FOR-CAUSE CHALLENGES AND ERRONEOUSLY EXCUSED THREE JURORS WITH DEATH PENALTY SCRUPLES WHO WERE NOT SUBSTANTIALLY IMPAIRED TO ACT AS JURORS ACCORDING TO WAINWRIGHT V. WITT.[58]

Under both the federal and state constitutions, a juror may not be excused for cause simply because of a strong opposition to capital punishment if the juror can nevertheless follow the court's instructions and fairly consider imposing the death penalty in a specific case. (Adams v. Texas (1980) 448 U.S. 38 [hereafter "Adams"]; People v. Lewis (2001) 25 Cal.4th 610, 631.) This Court has explicitly adopted the standard enunciated by the United States Supreme Court in Wainwright v. Witt (1985) 469 U.S. 412 [hereafter "Witt"], for evaluating trial court error in excluding a prospective juror for anti-death penalty bias. (People v. Ghent (1987) 43 Cal.3d 739, 767-768; see Greene v. Georgia (1996) 519 U.S. 145, 146-147.) Witt held it constitutionally permissible to exclude a juror opposed to capital punishment only if the juror's views "would 'prevent or substantially impair the performance of his duties as a jury in accordance with his instructions and his oath.'" (Witt at p. 424; citing Adams at p. 45.)

In Witt, the United States Supreme Court also abandoned its earlier holding in Witherspoon v. Illinois (1968) 391 U.S. 510 [hereafter "Witherspoon"], to the extent that case contained language implying that a juror's bias had to be proved with "'unmistakable clarity'". (Witt, at p. 424.)

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[58] Wainwright v. Witt (1985) 469 U.S. 412.

Instead, since Witt, courts will "'uphold a trial court's ruling on a for-cause challenge by either party if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.'" (People v. Lewis, supra, 25 Cal.4th at p. 631; citations omitted; Wainwright v. Witt, supra, 469 U.S. at p. 425-435.) A trial court's finding of disqualifying bias will only be struck down if the "'evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law.'" The erroneous exclusion of even one prospective juror expressing death penalty scruples requires automatic reversal as to penalty, but not as to guilt. (People v. Ashmus (1991) 54 Cal.3d 932, 962; Gray v. Mississippi (1987) 481 U.S. 648, 666-667.)

Prospective Juror Larry Costa

The trial court's dismissal for cause of prospective juror Larry Costa fails to meet the constitutional standards imposed by the United States Supreme Court's decisions in Witherspoon, Witt, and Adams. (See Prosecution 'for cause' challenges granted," supra.) Mr. Costa's answers to death qualification questions on the written questionnaire were neither conflicting nor ambiguous. This panelist voiced no conscientious, religious, or philosophical objections to the death penalty. Mr. Costa said he was "not really for" the death penalty but he gave answers clearly indicating he would "consider it." (SCT #6 1654; RT 645.) During oral questioning, he indicated that the decision whether to impose death was a heavy responsibility; however, in the wake of current events which he had read about in the newspapers, it was likely he would vote for it. (RT 645-646.)

Mr. Costa gave an unequivocal "yes" as an answer when he was asked if murder during an attempted rape was a serious enough crime to warrant consideration of the death penalty. (RT 646.) Mr. Costa was *repeatedly*

asked the same questions and *repeatedly* gave the same unwavering, unequivocal assurances; he could set aside his personal beliefs and he would impose a death sentence if he felt it was appropriate. (RT 649-652.)

This prospective juror's use of the phrases "I probably would" or "I think," while answering questions, did not render his answers ambiguous or equivocal. Such answers are no different than the answers given by the erroneously excused juror in Gray v. Mississippi, supra. In that case, a prospective juror who was erroneously excluded from jury service was asked if she "could vote for the Death Penalty." Her answer was, "I think so." (481 U.S. at p. 654.) Mr. Costa gave no indication through his answers that he could not follow the court's instructions and impose a death judgment if appropriate under all of the circumstances presented.

Numerous recent appellate court decisions, both federal and state, lend support to appellant's position. For example, in Szuchon v. Lehman (3rd Cir. 2001) 273 F.3d 299 [hereafter, Szuchon], the federal circuit court reversed a death judgment because the trial court had improperly allowed the exclusion "for cause" of a single prospective juror who had voiced opposition to the death penalty. In Szuchon, the juror had stated conscientious scruples against the death penalty: "I do not believe in capital punishment." (Id. at p. 329.) No further questions were asked to explore whether the juror's views about the death penalty would have prevented or substantially impaired his ability to apply the law. The federal appellate court concluded that the factual record did not fairly support the panelist's exclusion under the standards established by Witt. (Id. at pp. 329-330.) The Court explained: "He merely insisted that he did not 'believe' in capital punishment, which is by no means the equivalent of being willing to impose it." (Id. at p. 331.)

In United States v. Chanthadara (10th Cir. 2000) 230 F.3d 1237 [hereafter, Chanthadara], the Tenth Circuit reversed a death sentence where

at least one prospective juror was excluded "for cause" on the basis of questionnaire answers indicating the panelist would have difficulty imposing the penalty of death. (Id. at p. 1271.) In Chanthadara, the prospective juror had written: "I believe the death penalty is proper in some cases although I don't think I would be able to vote for the death penalty in a case." (Id. at p. 1271.) She had also written: "I feel the death penalty is proper in some cases but I don't feel I could ever think there was enough evidence to come to that conclusion even though I might feel the person has been proven guilty." (Ibid.) However, this same prospective juror had given other responses in her questionnaire indicating a belief that the "'death penalty is proper in some cases.'" (Id. at p. 1272.) The Tenth Circuit Court of Appeals concluded that the record was insufficient to show that the excused prospective juror was opposed to the death penalty to a degree which would have made it impossible for her to follow the law. (Ibid.)

In a third federal decision, Gall v. Parker (6th Cir. 2000) 231 F.3d 265 [hereafter, Gall], the death penalty was reversed because a "for cause" challenge was granted to dismiss a prospective juror who had voiced discomfort about imposing a death judgment. In Gall, the venireman had said, "'very possibly'" he would feel the death penalty was appropriate in certain factual scenarios. (Id. at p. 331.) He also told the court his mind was not "closed" – he was merely "undecided" about the death penalty. (Ibid.) Obviously, Mr. Costa's responses displayed much less discomfort and equivocation with the death penalty than did the responses of panelists in the Szuchon, Chanthadara, and Gall cases. Mr. Costa stated there were some cases in which he would vote *for* the death penalty. (RT 645-646.)

A number of out-of-state appellate court decisions have also vacated death judgments based on similarly clear violations of Witt principles. The following cases from Texas and Georgia are illustrative.

In Farina v. State (Fla. 1996) 680 So.2d 392, a death judgment was reversed where the trial court wrongfully excused "for cause" a juror who said she had "mixed feelings" about the death penalty but she would "try to do what's right." (Id. at p. 396.) In Jarrell v. State (Ga. 1992) 413 S.E.2d 710, the Georgia Supreme Court upset a death sentence where the trial court excused a prospective juror who had repeatedly answered that she would "lean" toward the a life sentence, but she had also promised to consider the death penalty and follow the instructions by the court. (Id. at p. 881.)

In Clark v. State (Tex. App. 1996) 929 S.W.2d 5, the Texas Court of Criminal Appeals reversed a death judgment because the trial court failed to conduct an adequate inquiry regarding whether a prospective juror's religious scruples would foreclose his imposition of the death penalty under any circumstances. The venireman had admitted feeling that "God should take care of it." However, he also stated, "if I feel someone has committed a crime and evidence proves that they have, I am for [the death penalty]." (Id. at p. 7.) The responses given by the dismissed panelist in the Clark decision are quite similar to the responses given by Mr. Costas. For similar reasons, his excusal was error according to Witt.

This is the rare case in which the appellate record is utterly devoid of substantial evidence to support the trial court's finding of disqualifying anti-death penalty bias. This case is unlike other cases, in which this Court has applied a deferential standard and upheld the disqualification of juror expressing death penalty scruples. For example, in People v. Holt (1997) 15 Cal.4th 619, this Court affirmed the dismissal of two scrupled panelists. One of the excused prospective jurors had made statements indicating he would refuse to apply the death penalty for any felony-murder, in which the defendant did not intend to kill. (Id. at pp. 651-652.) The second dismissed prospective juror repeatedly declared that she did not believe in the death

penalty, and never would consider it. (Id. at p. 653.)

In People v. Ashmus, supra, 54 Cal.3d 932, this Court affirmed the dismissal of three scrupled jurors. One "on more than one occasion during *voir dire*, . . . made plain his feelings about the ultimate sanction would lead him to apply to the question of guilt or innocence a standard of proof higher than proof beyond a reasonable doubt." (Id. at p. 963.) The second prospective juror declared without qualification, "'My decision is not going to be the death penalty.'" (Ibid.) The third dismissed panelist "asserted unreservedly: 'The way I feel now and the way I was raised and what I have always believed that nobody has the right to take a life.'" (Ibid.; accord: People v. Lewis, supra, 25 Cal.4th at pp. 632-633; People v. Ghent, supra, 43 Cal.3d at pp. 767-769 ["At some point during the examination of these venirepersons, each of them demonstrated an inflexible inability to impose death."]; People v. Coleman (1989) 48 Cal.3d 112, 136-137 ["I'm afraid I would avoid the death penalty. I would vote so that I wouldn't have the death penalty on my mind."].)

Statements of this kind are absent in the case of Mr. Costa. Mr. Costa's answers on the written questionnaire, and in person "'are so opposed to the decision of the trial court'" that deferential review cannot be applied. (People v. Ashmus, supra 54 Cal.3d at p. 962, citing People v. Fredericks (1895) 106 Cal. 554, 559.)

The trial court based its decision to dismiss Mr. Costa on his demeanor, principally his emotionality and nervousness, as evidenced by his dry mouth, need for water, and difficulty swallowing. (RT 655.) As the United States Supreme Court declared in Adams v. Texas, supra, 448 U.S. at p. 50:

> "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of jurors to follow the courts' instructions and obey their oaths, regardless of their feelings about the death penalty."

Even assuming for the sake of argument prospective juror Costa's nervousness renders his otherwise clear answers "conflicting" or "ambiguous," the trial court's credibility findings should still not be treated with any deference in this case. The court's pattern of rulings during death qualification demonstrates that the judge repeatedly and deliberately made so-called "credibility" findings in a biased manner which consistently favored the prosecution, rather than the defense. Time after time, when the *defense* was the moving party, panelists who gave rabidly pro-death penalty responses in writing, or during oral *voir dire*, were found qualified to serve as jurors upon providing any assurance, however incredible, that they could set aside their views and consider life imprisonment as an alternative to death. (See, Ross v. Oklahoma (1988) 487 U.S. 81, 91, fn. 5, suggesting application of a different review standard where the court deliberately misapplies the law ["No claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force petitioner to use his peremptory challenges to correct these errors."].)

For example, the trial judge gave "greater significance" to prospective juror Stephanie Fletcher's promises to set aside her very strong personal beliefs about the death penalty and life without parole, than he did to her many, *many* statements showing strident pro-death penalty bias. This prospective juror not only openly admitted feeling that death should be "automatic" for any first degree murder, as well as intentional murder during an attempted rape. She also made no secret of the fact she believed life without parole to be a mere vacation for prisoners at taxpayer expense. Ms. Fletcher was so transparently hostile toward the defense attorneys that even the court remarked upon it. Still, based on observations of demeanor, this juror survived the court's screening for pro-death penalty bias. (SCT #6 2831-2837; RT 929-939.)

The court also found that the "totality of the evidence" supported prospective juror Kolstad's bald assertions of impartiality, despite her self-described "intense" preference for death over life without parole. Kolstand was candid in her belief that the death penalty should be *automatic* for first degree murder during the rape of a child. She frankly admitted she had a "problem" with life without parole, because of "loopholes, activist groups, etc., that can or will sway parole boards and bring up new evidence 20 years later." (SCT #6 4809-4814; RT 1408-1428.) Ms. Kolstad ridiculed, and expressed great anger about the fact that the death penalty was not being applied to juvenile offenders. (SCT #6 4814; RT 1409.) She described her own leaning toward the death penalty as "substantial", and repeatedly said she was not sure she could set aside her personal beliefs. Finally, under pressure from the court, Ms. Kolstad gave assurances she would set aside her personal beliefs and give a life sentence due consideration. (RT 1420-1422, 1428, 1429-1430.)

The court found prospective juror David Madden sufficiently unbiased to serve, even after acknowledging on the record that the panelist was "extremely opinionated" in several areas directly bearing on issues involved in the trial. (RT 1551-1552.) This panelist was of the opinion that "gridlock manufactured by lawyers ha[d] overloaded the judicial system." (SCT #6 5593.) His hostility toward lawyers was so pronounced, he had a bumper sticker on his car which stated, "Have you kicked your lawyer today?" (SCT #6 5598.)

Aside from his antagonism toward counsel, Mr. Madden also had extreme views on the death penalty. He felt that the death penalty should be automatic for recidivists, as well as for "any crime of violence", not just murder. (SCT #6 5608.) He shared prospective juror Fletcher's dim view of life without parole; in Mr. Madden's words, it amounted to "free room &

board, free medical/dental, conjugal visits, recreation rooms and exercise facilities all at public expense." (RT #6 5609. Mr. Madden called his own support for the death penalty "unswerving". (RT SCT #6 5613.)

Another example is found in the case of prospective juror Colleen Wiginton. Like prospective juror Costa, Ms. Wiginton was visibly emotional during questioning, and exhibited body language demonstrating her discomfort being questioned by the defense. (RT 2105-2110.) Unlike Mr. Costa, her emotional state was not, however, found to be a factor detracting from her credibility.[59] Of course, Ms. Wiginton was an admitted *proponent* of the death penalty, who felt that life without parole was too "expensive" for the public. (SCT #6 9145, 9147.) Ms. Wiginton, a mother of two teenage girls, had read newspaper accounts of Roy's crimes. She had clearly prejudged the case, having concluded that if the stories were true it would be the "ultimate awful crime." (RT 2102, 2105.) Yet her assertions of impartiality were accepted by the trial court.

Despite admittedly "ambivalent" and "outright conflicting" responses to death qualification questions, the court found prospective juror Mary Lopez sufficiently unbiased to sit in a death penalty case. This panelist expressed a dim view of both attorneys and psychological testimony; she also admitted having a strong pro-death penalty bias. Ms. Lopez freely admitted the belief that attorneys sometimes helped criminals "get away with murder." (SCT #6 5365.) She expressed doubts about the utility of psychiatric or psychological evidence, which she suspected was sometimes used to help people "get away with crimes." (SCT #5381.) Ms. Lopez candidly admitted she thought too many murderers got away without a death sentence, and that death should be

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[59] Another alternate juror, Cheryl Stollar, frankly told the Court that participating in a death penalty case would be a "very emotional" experience. (RT 3205.)

imposed on everyone who killed another human being, for whatever reason, including persons convicted of a murder during an attempted rape. (SCT #6 5381-5383; RT 2663-2664.)

The court made similar "credibility" findings for other obviously pro-death penalty jurors as well. The court made a finding that prospective juror Donovan's "true state of mind" was that he could set aside is pro-death penalty bias. (RT 807.) Yet Mr. Donovan was of the opinion that the death penalty was used "too seldom". (SCT #6 2187.) He also felt death should be imposed for all first degree murders except possibly, in "extenuating" circumstances. (RT 798.) Mr. Donovan also felt that a sentence of life without parole seldom meant the person would actually spend his life in prison. (RT 799.)

The Reverend Lindall McDaniel gave similar answers to death qualification questions, consistently endorsing the death penalty over life without parole for any first degree murder (RT SCT #6 5963-5993; RT 1618-1627), except possibly under the most "extenuating" circumstances (RT 1622). Reverend McDaniel said he had a "strong leaning toward the death penalty" (RT 1622) and he called it the "shame of America" that the death penalty had not been enforced. (SCT #6 5990.) Yet despite the "shame of America" comment, the court found credible the Reverend's promise to obey the court's instructions to consider both penalties. (RT 1630-1632.)

Prospective juror Samuel Lopez strongly favored the death penalty and consistently answered that he would impose the death penalty on someone convicted of first degree murder during an attempted rape or a robbery. (RT SCT #6 5455-5457; RT 2679-2681.) The court did not even need to hear argument from the prosecutor, before deciding that this prospective juror could consider both life and death penalties and be fair. (RT 2681-2682.)

The judge's abuse of the trial court's province, conferred by Witt, to

use so-called "credibility" findings to immunize blatantly pro-death penalty jurors from challenge could not be more clear. Consequently, the court's finding that Mr. Costa, whose comparably mild apprehension about the gravity of the life-death decision-making process, was disqualified by anti-death penalty bias should be given no credence. The granting of the prosecutor's motion to excuse Mr. Costa was error of constitutional dimension.

Prospective Juror Anne Keller

Similar analysis supports a finding by this Court that it was error to grant the prosecutor's motion to dismiss prospective juror Anne Keller for harboring disqualifying anti-death penalty scruples.

Ms. Keller voiced no religious, philosophical or other conscientious objections to the use of the death penalty, so long as there was sufficient proof of the condemned person's guilt "beyond a doubt." (SCT #6 4771.) She characterized her support for the death penalty as "strong." (RT 2172.) Ms. Keller also believed that most death sentences imposed had been "appropriate." (SCT #6 4773.)

Although she had voiced no objections to the death penalty generally, Ms. Keller was repeatedly invited to, and consistently agreed to set aside any personal feelings she had about the death penalty and follow the law as instructed by the court. She voiced no inherent problems whatsoever about the nature of Roy's case, or the appropriateness of the death penalty in a case involving a murder during an attempted rape. Ms. Keller expressed some modicum of personal discomfort about the magnitude of participating in the decision to impose death, and she declined to predict exactly what she would do without hearing the evidence. (RT 2170-2179.) However, this panelist never wavered from saying that philosophically she supported the death penalty, and her personal choice of life verses death would depend on what

she heard as a juror, and the instructions of the trial court. (RT 2163-2183.)

Ms. Keller's statements during death qualification stand in stark contrast with the strong anti-death penalty sentiments expressed by disqualified panelists with death penalty scruples in People v. Holt, supra, 15 Cal.4th 619, and People v. Ashmus, supra, 54 Cal.3d 932. In addition, as in the case of Mr. Costa, this panelist's responses were no more disqualifying than the responses of prospective jurors who were held improperly excused in violation of Witt according to federal court decisions. (See, e.g., Szuchon v. Lehman, supra, 273 F.3d at p. 329 ["I do not believe in capital punishment."]; United States v. Chanthadara, supra, 230 F.3d at p. 1271 ["I believe the death penalty is proper in some cases although I don't think I would be able to vote for the death penalty in a case."]; Gall v. Parker, supra, 2231 F.3d at pp. 331 [regarding an excused venireman who felt discomfort but could "'very possibly'" impose the death penalty in an appropriate case].)

In Ms. Keller's case, after noting that it "devolve[d] upon the Court to determine her true state of mind," the trial court found that Ms. Keller's "views on capital punishment would either prevent or substantially impair her ability to vote for the death penalty in this case. . . ." (RT 2183.) The court's finding of disqualification in Ms. Keller's case cannot be reconciled with the court's dissimilar pattern of rulings on the prosecutor's motions for disqualification for anti-death penalty bias.

Therefore, the court's finding of disqualification should be disregarded as both disingenuous, and not supported by the record as a whole. (Wainwright v. Witt, supra, 469 U.S. at p. 431; People v. Ashmus, supra, 54 Cal.3d at p. 962.) The trial court's pattern of rulings on the parties' motions and objections demonstrates that the dismissal of Ms. Keller was simply one of many rulings calculated to purge the jury of any juror expressing even the mildest death penalty scruples, not just jurors genuinely disqualified

according to Witt standards.

Prospective Juror Patrick Young

Disqualification for anti-death penalty bias was also constitutional error in the case of prospective juror Patrick Young.

Mr. Young's greatest fault was his offensive personality. He gave long-winded, ponderous, circuitous, and sometimes editorial responses to death qualification questions in the written questionnaire, and during oral voir. However, the totality of Mr. Young's overly frank responses clearly establish his support for the death penalty, and willingness to impose it, depending on circumstances, in the appropriate case. (SCT #6 9373-9380.)

If one separates the chafe from the grain this prospective juror's case, it is clear from the record as a whole that Mr. Young was willing to give fair consideration to the death penalty and life without parole. Mr. Young responded affirmatively that a case involving a first degree murder during an attempted rape, during a robbery, or committed for the purpose of killing a witness, was a sufficiently serious crime to warrant consideration of a death sentence. (RT 2152-2154.) Mr. Young emphasized the weightiness of the jury's death penalty decision -- "I don't think taking someone's life is something to be taken lightly, whether legally or illegally" (SCT #6 2152; see also RT 2154) – but also gave assurances that he would do his "absolute best to be fair" (SCT #6 9380), and would "weigh" the circumstances and "follow and get the directions of the court." (RT 2153-2154.)

Mr. Young did not make any strong anti-death penalty statements comparable to statements made by the properly disqualified prospective jurors in Holt and Ashmus. (People v. Holt, supra, 15 Cal.4th 619; People v. Ashmus, supra, 54 Cal.3d 932.) In fact, his responses to death qualification questions were no more disqualifying than were the responses provided by disqualified jurors in other cases in which death judgments have been

overturned because the trial courts violated Witt. (See, Szuchon v. Lehman, supra, 273 F.3d at p. 329-331; United States v. Chanthadara, supra, 230 F.3d at pp. 1271-1272; Gall v. Parker, supra, 231 F.3d at pp. 330-331; Farina v. State, supra, 680 So.2d at p. 396; Jarrell v. State, supra, 413 S.E.2d at p. 881; Clark v. State, supra, 929 S.W.3d at p. 7.)

In Mr. Young's case, as in the case of other disqualified jurors, the trial court's "credibility" finding cannot be trusted, and it is not supported by the record as a whole. (Wainwright v. Witt, supra, 469 U.S. at p. 431.) The dismissal of Mr. Young, viewed in context, does not appear calculated to guarantee Roy a fair and impartial jury. Rather, the dismissal of Mr. Young was a part of a discernable pattern of disqualification designed to purge the venire of any person voicing the slightest hesitation about the prospects of choosing the ultimate penalty of death, while packing the panel with panelists strongly favoring death. The dismissal was error. (Ibid.)

A jury culled of all persons revealing any conscientious scruples or opposition to the death penalty does not meet federal or state constitutional standards. (Adams v. Texas, supra, 448 U.S. at p. 43; citing Witherspoon v. Illinois, supra, 391 U.S. at p. 519; People v. Ghent, supra, 43 Cal.3d at pp. 767-768.) In Roy's case, at least three jurors excused for anti-death penalty bias did not give answers to questions, either in writing, or during oral *voir dire*, establishing any bias that would "prevent or substantially impair" them from performing the duties of juror in a death penalty case. (Wainwright v. Witt, supra, 469 U.S. at p. 433.) The trial court's findings to the contrary are "'not fairly supported' by the record viewed 'as a whole.'" (Id. at p. 431.) Furthermore, if even *one* of these three prospective jurors was improperly dismissed, reversal of the death penalty is mandatory. (Gray v. Mississippi, supra, 481 U.S. at p. 668.)

XXIX THE GUILT, SANITY AND DEATH JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ENGAGED IN A DISCRIMINATORY PATTERN OF RULING ON FOR-CAUSE CHALLENGES, AND ERRONEOUSLY DENIED DEFENSE FOR-CAUSE CHALLENGES TO SEVEN JURORS WITH DISQUALIFYING BIASES.

As will be more shown in detail below, during jury selection the trial court ruled on the defense's "for cause" challenges in a highly discriminatory manner, skewing the jury in favor of death. The court refused to excuse seven substantially impaired jurors who exhibited extremely strong anti-defense, or pro-death penalty biases, and improperly restricted *voir dire* of one juror who had voiced the opinion that all habitual and violent criminals -- not just murderers -- should automatically receive death. Defense counsel were forced to exhaust peremptory challenges to keep five of the seven biased panelists off of the jury. Defense counsel expressly forwent the use of their last peremptory challenge, because its use would have placed one of these seven strongly pro-death penalty panelist on the jury. The court refused to grant the defense's request for more peremptory challenges, and denied its request for a new jury panel. Even though none of the seven disqualified jurors ultimately ended up on the jury, appellant was clearly prejudiced. The record as a whole shows that the trial judge did *not* preside over jury selection in an impartial fashion and consequently, the overall composition of the jury was actually and adversely affected.

A. The trial court improperly refused to excuse seven substantially impaired jurors who exhibited strong anti-defense, and/or pro-death penalty biases; the judge's findings of impartiality are not supported by the record as a whole.

This Court has "long recognized that '[t]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.'" (People v. Earp (1999) 20 Cal.4th 826, 852; citation omitted.) When a state provides for capital sentencing by a jury, "'the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.'" (People v. Earp, supra, at p. 852; quoting People v. Williams (1997) 16 Cal.4th 635, 666; see also Morgan v. Illinois (1992) 504 U.S. 719, 726-728.) California's Constitution provides coequal guarantees. (People v. Earp, supra, at p. 853; People v. Williams, supra, at p. 666.)

The standards of review set forth in Wainwright v. Witt, supra, 469 U.S. 412, generally govern appellate review of a trial court's denial of defense motions to disqualify prospective jurors for guilt or penalty phase bias. (People v. Ashmus, supra, 54 Cal.3d at p. 962; People v. Ghent, supra, 43 Cal.3d at p. 767.) On appeal, a trial court's decision will not be disturbed if supported by substantial evidence, and trial court's determination as to how the prospective juror's personal views would affect his or her performance as a juror is entitled to deferential review. Where a challenged juror has given ambiguous, equivocal, or conflicting responses, the trial court's conclusions are usually binding. (People v. Gordon (1990) 50 Cal.3d 1223, 1262; People v. Cooper 1991) 53 Cal.3d 771, 809; People v. Daniels (1991) 52 Cal.3d 815, 875; People v. Ashmus, supra, 54 Cal.3d at p. 962.) On the other hand, a trial court's denial of a for-cause challenge will *not* be affirmed if the record of the

prospective juror's responses, viewed as a whole, does not support the trial court's findings. (People v. Ashmus, supra, at p. 962; People v. Fredericks, supra, 106 Cal. at p. 559; Wainwright v. Witt, supra, 469 U.S. at p. 431.)

The defense moved to excuse "for cause" seven prospective jurors who exhibited extremely strong pro-death penalty, and/or anti-defense bias stemming from negative views about the sentence of life without the possibility of parole, and the dislike or distrust of lawyers and/or psychiatric and psychological testimony: Donovan, Fletcher, Kolstad, Madden, McDaniel, Wiginton, Mary Lopez, and [unrelated] Samuel Lopez. Review of the panelists' answers to written and oral questions during *voir dire* shows that each of these panelists gave obviously disqualifying responses. Yet in each case, the trial judge purported to make a "credibility" finding, that despite an admitted bias, the panelist was qualified to serve.

Prospective Juror Stephanie Fletcher

In answer to oral and written questions, Stephanie Fletcher strongly voiced her opinion that the death penalty should be automatic for premeditated murder. (SCT #6 2832; RT 929.) On the written questionnaire, and again during oral *voir dire*, Ms. Fletcher voiced antipathy for the penalty of life without parole based on its generous benefits to prisoners, and great cost to taxpayers. (SCT #6, 2832; RT 930-931.) Ms. Fletcher exhibited hostility toward the defense attorneys during questioning, observed by the Court. (RT 939.) A for-cause challenge was denied although the Court itself found that this juror had expressed clearly her favoritism for the death penalty. (RT 939.)

Prospective Juror Martha Kolstad

During oral and written *voir dire*, prospective juror Martha Kolstad overwhelmingly favored capital punishment over life without parole, and she repeatedly admitted that she might have difficulty setting those strong views aside. (SCT #6 4809-4815; RT 1406 ["I wouldn't be happy about [life

without parole]; RT 1410 [Her personal beliefs "might" impair her ability to vote for life without parole]; RT 1413-1414 [Her "first impulse" would be to say she could not consider life without parole for first degree murder during the rape of a child]; RT 1418 ["I don't know that I could do that (impose life without parole for first degree murder during attempted rape) and be totally objective"]; see also RT 1422.)

Ms. Kolstad's intensely emotional support for capital punishment was evidenced not only in direct responses to written and oral questions, but in her manner of answering. She often employed strong editorial comment in describing feelings for the death penalty, and against life without parole. For example, the refusal to apply the death penalty to juveniles was dismissed as "ridiculous." (SCT #6 4814; RT 1409.) In animated language, Ms. Kolstand discounted the likelihood of a true sentence of life without parole, blaming "loopholes," "activist groups" and "parole boards." (SCT #6 4811.) She called life without parole a "waste of time, resources & taxpayer dollars." (SCT #6 4811.) On paper, Ms. Kolstad figuratively cheered judges who refused to reopen and review death penalty cases -- "Yes!" (SCT #6 4813.) She referred to recent press coverage about the death penalty as "a lot of poppycock. A lot of wasted resources & tax money." (SCT #6 4814.) She denounced the "liberal" press for reporting about demonstrations against the death penalty. (RT 1420.)

Faced with such obvious bias, the trial court nonetheless went to great lengths to exact personal assurances from this prospective juror that she could be fair. (RT 1408; 1410.) The court at one point finally said it was hearing "little warning signs" that Ms. Kolstand might not be able to fairly consider life without parole, she responded, "Well, I hear warning signs myself, actually." (RT 1417.) Over and over again, this panelist expressed skepticism that she could be fair. (RT 1410-1422.) At one point, she suggested that this

"wouldn't be a good [case] for me." (RT 1423.)

At the conclusion of Hovey questioning, the court was still not convinced that Ms. Kolstad could set aside her strong pro-death penalty bias. The court said to the parties, "I believe her answer was that she felt she could set aside her personal beliefs, but she wasn't sure." (RT 1428.) Instead of excusing Ms. Kolstad for cause, however, the court called her back in for further questioning for the apparent purpose of rehabilitation. Ms. Kolstad finally uttered words assuring the court that she was a "fair person" and would "follow instructions" at which point questioning ceased. (RT 1430.) At no time did this panelist say that she could fairly consider the penalty of life without parole in a first degree murder case. Yet, in the face of Ms. Kolstand's palpable, unwaivering, and completely *unequivocal* hostility toward the penalty of life without parole, *and* any person or group responsible for obstructing or limiting the death penalty's use, the trial court -- inexplicably -- accepted at face value Ms. Kolstand's final, but obviously disingenuous assertion that she could be "fair", and denied defense counsel's motion to excuse this panelist for cause.

Prospective Juror David Madden

The responses of prospective juror David Madden were far from equivocal or conflicting, insofar as his bias toward the death penalty, psychological and psychiatric testimony, and lawyers was concerned. Mr. Madden strongly disliked and distrusted lawyers, so much that the bumper sticker on his car read, "Have you kicked a lawyer today?" (SCT #6 5598.) In his opinion, "low-life" lawyers "manufactured" gridlock, "overloaded" and "milked" the judicial system, acted as "roadblocks" to justice, and used psychiatric and psychological testimony as their "ace in the hole" to get guilty clients back on the street. (SCT #6 5590-5598, 5600: RT 1534.)

Mr. Madden also had strong views regarding psychiatric and

psychological testimony. He made it quite clear he would discount the credibility of any testimony coming from a psychiatrist or psychologist who had been hired by the defense. He said he could only give credence to the opinion of an expert hired *by the Court* (RT 1545-1546.)

Mr. Madden expressed a very strong pro-death penalty bias in both written and oral *voir dire*. He advocated the use of the death penalty for *any violent crime*, and *recidivist offenders*, not just for murder. (SCT #6 5608; 1535, 1540.) He felt that life without parole was a mere vacation at public expense for prisoners, and that parole boards would always provide prisoners with the means of "escape." (SCT #6 5609.) He described death penalty opponents as "scientist-bleeding heart-liberals" and blamed them for the "high crime rate." (SCT #6 5612.) Although when pushed, he claimed he could disregard these views and consider life without the possibility of parole, he frankly admitted that it would take "some strong evidence to show that . . . was appropriate." (RT 1537-1538.)

At one point, the trial court interrupted questioning by defense counsel, explaining, "I thought he made it very clear he leans very positively and clearly toward the death penalty. I don't think he's hidden that fact." (RT 1544.) The court called Mr. Madden "extremely opinionated on a number of topics that bear on this trial." (RT 1551-1552.)

Mr. Madden promised that he would keep a fair and open mind regarding the sanity and penalty determinations. (RT 1533, 1537-1538, 1548.) Mr. Madden did not, however, say he could ever credit the testimony of a defense expert at the sanity phase of the trial -- he merely said he would give credence to any experts hired by a "neutral party." (RT 1546.) And his professed "fair" consideration of life without parole was likewise qualified – it would depend on proof of "strong evidence" of "extraordinary mitigating circumstances." (RT 1537-1538, 1540.)

Prospective Juror Mary Lopez

Mary Lopez, like Mr. Madden, distrusted lawyers, as well as psychiatric and psychological testimony. In her opinion, lawyers sometimes helped criminals "get away with murder" (SCT #6 5365); attorneys for both sides sometimes "covered up" or "shaded over" the truth. (RT 2656-2657.) Ms. Lopez believed that the "value" of psychiatric and psychological testimony at a trial was to help people "get away with crimes." (SCT #6 5372.)

Ms. Lopez was strongly in favor of the death penalty and felt it should be imposed on *every* person who, for whatever reason, killed a human being. (SCT #6 5383.) Ms. Lopez gave an emphatically positive response when asked if the death penalty should be imposed for first degree murder during an attempted rape – "Oh, gosh. Yes." (RT 2661.)

At first, Ms. Lopez candidly admitted she could not set aside her strong feelings -- "No. I think I go by my feelings." (RT 2661.) Later, asked if she could set aside her personal views, she responded: "I would try my best. I think I could." (RT 2665.) Finally, she claimed she could be open to either side. (RT 2666.)

Prospective Juror Samuel Lopez

Samuel Lopez gave answers to written and oral questions which evidenced an equally strong, unequivocal pro-death penalty bias. Mr. Lopez, a former deputy sheriff (SCT #6 5431), repeatedly admitted that he would strongly lean toward imposing the death penalty over life imprisonment without parole, particularly in a case involving first degree murder during an attempted rape. (SCT #6 5438-5457; RT 2679-2680.)

Mr. Lopez frankly and *repeatedly* admitted he did not think he could ever consider life without the possibility of parole the appropriate penalty for either first degree murder during an attempted rape, or first degree murder

during a robbery. (RT 2680, 2681.) In such cases, Mr. Lopez acknowledged that he would almost always prefer the death penalty. (RT 2681.) Yet under further pointed questioning, he finally claimed he could set his beliefs aside and consider both penalties. (RT 2680, 2681, 2682, 2688.)

Prospective Juror Colleen Wiginton

Colleen Wiginton clearly favored the death penalty, and disfavored life without parole because it was too expensive. (SCT #6 9145, 9147; RT 2103-2104.) Ms. Wiginton also had two daughters close in age to the victims in Roy's case and had formed the opinion that if press reports of the crimes were true, the "ultimate awful crime" had been committed. (RT 2105.)

Ms. Wiginton initially said, "sure," the age of the victims in the case would possibly influence her in deciding the case because of her teenage daughters. (RT 2102.) When asked if it would bias her against the defense, her spontaneous response was affirmative, that she would tend to favor the child. (RT 2103.) This panelist also became visibly emotional and nervous when she was asked if she could be impartial in a case involving 14 and 15 year old victims. (RT 2105-2106.) In the end, she somewhat defensively asserted she could be impartial. (RT 2105.)

Prospective Juror Vincent Donovan

Vincent Donovan gave written responses strongly favoring the death penalty over life without parole, which he confirmed during oral *voir dire*. (SCT #2186-2192; RT 796-800.) Mr. Donovan expressed strong doubt, based on what he knew of Roy's case, that he could vote for life without parole as an appropriate punishment for one convicted of first degree murder with one or more special circumstances. (RT 802.) Eventually, Mr. Donovan assured the Court he could set aside his personal feelings and be fair. (RT 802-807.)

Prospective Juror Lindall McDaniel

Reverend Lindall McDaniel gave little credence to the value of

psychological and psychiatric testimony in the courtroom because the "field" of psychology did not treat man as "subject to the laws of God." (SCT #6 5980-5981.) He felt the criminal justice system made it difficult for police and prosecutors to convict people accused of crime. (SCT #6 5974.)

Reverend McDaniel strongly disfavored life without parole, and wrote that it was the "*shame of America*" that the death penalty was not often enforced. (SCT #6 5990; emphasis added.) He "strongly believe[d]" in the death penalty and felt it should be imposed in all cases of first degree murder with malice, that were not accidental, including a first degree murder committed during an attempted rape. (SCT #6 5993; RT 1619-1620, 1632.) Only under "extenuating circumstances" would Reverend McDaniel even consider life without parole. (RT 1622.) Moreover, even then he would place the burden on the defense to show why the death penalty should not be imposed. (RT 1622, 1624.)

Reverend McDaniel initially said he did not know with certainty whether he could give life without parole serious consideration in view of his strong feelings favoring the death penalty. (RT 1624.) Subsequently, Reverend McDaniel denied that his ability to be fair would be impaired by his views. (RT 1624, 1627.)

Like the juror challenged for cause in People v. Boyette (2002) 29 Cal.4th 381, each of the seven challenged jurors -- Fletcher, Kolstad, Madden, Wiginton, Donovan, McDaniel, and Mary and Samuel Lopez -- articulated very strong views favoring capital punishment, or disfavoring life without parole. (Id. at pp. 416-418.) Several of these panelists also expressed antipathy toward lawyers, and/or they had negative preconceptions regarding the value of psychological or psychiatric testimony in establishing mental illness as a *bona fide* defense.

In Boyette, the challenged juror ["K.C."] answered a written question,

saying he was "strongly in favor" of the death penalty. He also indicated that the death penalty should automatically be imposed on those defendants convicted of committing multiple murder, the type of special circumstance involved in that case. During oral *voir dire*, K.C. confirmed that he was "strongly in favor of the death penalty" and he responded, "I would probably have to be convinced," when he was asked if he could consider a verdict of life without the possibility of parole. K.C. also admitted that he would be "more inclined" to impose death than life. (Id. at p. 417.)

In Boyette, as here, the challenged juror gave lip service to his ability to be impartial. He told the court he could in fact impose a life sentence "if there was enough to make it seem appropriate." However, K.C. also admitted having doubts about whether life imprisonment without the possibility of parole really meant a natural life term. (Boyette at pp. 417-418.)

In Boyette, this Court held:

> "Although we pay great deference to the decisions of our trial courts in their determinations a to whether a prospective juror can remain impartial, we conclude the trial court should have sustained the defendant's challenge for cause against this juror." (People v. Boyette, supra, 29 Cal.4th at p. 418.)[60]

As in Boyette, the record in this case shows that the above seven panelists harbored such strongly antagonistic views toward life without parole, mental illness, and/or in some instances *lawyers*, that they "would be unable to faithfully and impartially apply the law." (Ibid.; Wainwright v. Witt, supra, 469 U.S. at p. 424.) When a juror exhibits very strong bias, and merely equivocates over whether he or she can set aside the bias and be fair, for-cause

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[60] In Boyette, the trial court's error was found harmless because the defendant had used a peremptory challenge to excuse the disqualified juror. In this case, however, the jury selection errors cannot be dismissed as harmless because the composition of the jury was actually affected by the court's pervasive pattern of discriminatory rulings. (See this Argument, infra.)

dismissal is required. (People v. Boyette, supra, 29 Cal.4th at p. 418.)

United States v. Price (2nd Cir. 2001) 277 F.3d 164, is in accord. In Price, the defendant challenged a Jewish juror who had expressed grave doubts about his ability to be objective about the case due to issues in the trial affecting the Jewish community. (Id. at p. 199.) The District Court denied the for-cause challenge, even though the prospective juror had expressed uncertainty about his ability to be impartial. The Circuit Court vacated the convictions and remanded the matter for a new trial.

The federal circuit court aptly explained. "As two of our sister courts have said, 'doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid.'" (United States v. Price, supra, 277 F.3d at p. 202; quoting Bailey v. Bd. Of County Comm'rs (11th Cir. 1992) 956 F.2d 1112, 1127 and United States v. Nell (5th Cir. 1976) 526 F.2d 1223, 1230.) The Second Court of Appeals also quoted a decision by the Eighth Circuit: "And as a third [sister court] has added, 'a juror who "could probably be fair and impartial"' should not be considered impartial, because '"probably" is not good enough.'" (United States v. Price, supra, at p. 202; quoting United States v. Sithithongtham (8th Cir. 1999) 192 F.3d 1119, 1121.)

In the case at bench, the trial court elicited words of assurance from each of the seven jurors, that they would be willing to set aside their strong personal beliefs and be impartial. In the face of such strongly voiced biases, however, these assurances were "pallid' and frankly, unbelievable.

In many instances, the record overwhelmingly militates against the trial court's finding of impartiality. It strains credulity to believe that Mr. Madden, for example, could momentarily set aside his hatred and suspicion of lawyers, and strident advocacy of the death penalty for all violent felons, much less

murderers, to give Roy's case fair consideration. Similarly, Ms. Kolstad's promise to "fair" appears hollow, indeed, in the face of her blunt ridicule of the notion that life without parole amounted to "punishment" and her condemnation of the fact that juvenile offenders were spared the ultimate penalty of death. (RT 929-935; see also Prospective Juror Colleen Wiginton: SCT #6 9145, 9147 [life without parole is "expensive"].)

Even in the case of some of the less strident, pro-death penalty jurors, their answers as a whole suggest, at best, a mere probability that such jurors would do their best – i.e., try hard – to set aside personal views, and be fair. The record as a whole strongly suggests that the goal of impartiality would be very difficult, if not impossible, to achieve. Prospective juror Donovan doubted very much that he could ever consider life without parole for first degree murder. He agreed that he could consider life without parole, but only under "extenuating circumstances." (RT 798, 802.) Reverend McDaniel referred to failure to use the death penalty enough as the "shame of America." (SCT #6 5990.) He too claimed he could disregard his "strong leaning" toward the death penalty and consider life without parole if there were "extenuating circumstances." (RT 1622.) Mary Lopez favored automatic imposition of the death penalty for murder during attempted rape. (RT 2661.) This juror candidly admitted that if she felt something "real strong," she would not set her feelings aside. (RT 2661. 2663.) Later on, she claimed she could set aside her personal feelings. (RT 2667.) Samuel Lopez said he did not "think so," when he was asked if he could *ever* consider life without parole for a murder committed during a robbery or attempted rape. (RT 2680.) Mr. Lopez was evasive when asked if he could consider both penalties, without having a "favorite choice." (RT 2681.) In the end, he said, "I *think* I could be fair." (RT 2682; emphasis added.)

As previously stated, the "probability" of receiving a fair trial by an

impartial jury is not good enough. Accordingly, it was error to deny Roy's seven for-cause challenges. (United States v. Price, supra. 277 F.3d at pp. 203-204; People v. Boyette, supra, 29 Cal.4th at p. 418; Morgan v. Illinois (1992) 504 U.S. 719.)

B. Deferential review should not be applied because the trial court's pattern of rulings on for-cause challenges demonstrates that the court was applying Witt in a discriminatory manner, which favored the prosecution over the defense.

"Deferential review" should not be accorded here for an additional reason. The trial court's pattern of rulings suggest that the court was intentionally applying Witt in a discriminatory manner, which favored the prosecution over the defense. Deference is not appropriate when a court's pattern of rulings in a given case suggests that the court is deliberately and unfairly misapplying the law. (Ross v. Oklahoma, supra, 487 U.S. at p. 91, fn. 5.)

Almost any time the trial judge exercised its prerogative to assess the credibility of an equivocating, pro-death penalty juror's claim of impartiality, he made "findings" which favored the prosecution, not the defense, and found the juror qualified to serve. In contrast, jurors expressing the slightest scruples about capital punishment were nearly always found unqualified to serve, even if they expressed certainty they could set aside their personal beliefs and fairly consider both of the penalties allowed by law. (Compare: Argument XXVIII, ante.)

It is true that many other prospective jurors were excused for pro-death penalty, or anti-defense bias, on motion of the defense. This does not demonstrate, however, that the trial court was fairly exercising discretion in the cases of the seven panelists discussed above. On each occasion when defense for-cause challenges were *granted*, prospective jurors had given very

unambiguous, unequivocal answers admitting that they could not be impartial, or that they were too "impaired" *in their own opinions* to serve.[61] In most

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[61] For example, prospective jurors excused by the court on motion of the defense for pro-death penalty bias and/or anti-insanity defense bias include: Bonnie Andrews ["Yes, my personal views would interfere with my judgment." (RT 421)]; Robert Close ["I'd automatically vote for [death]." (RT 590)]; Cassandra Coey ["I think, after all, I probably couldn't [follow the instructions and the evidence.]" (RT 603)]; I.G. Cole [Q: "Are you saying that you feel – do you think that everyone who commits a murder should automatically get the death penalty?" A: "That's the way I feel about it." (RT 620.)]; Lynette Truax ["I think my feelings would get in the way." "I'm afraid I would have already made up my mind . . . ." (RT 626.)]; Richard L. Coleman [""No, if he did it, he should die?"" Q: "Is that still your feelings?" A: "Yes, sir." (RT 630)]; Janice D. Dansby ["I would rather not see them do life . . . They're not going to get out, so why just let them stay there and the taxpayers have to take care of them." (RT 690.)]; Hope Donoho ["If you willfully commit murder, your life is also to me given up your rights and forfeit . . .I would probably be biased . . . ." (RT 778-779.)]; George Downs ["Well, if they were guilty of a crime of violence and killed somebody and they were guilty and the death penalty was there, I'd have to go with the death penalty." (RT 771.)]; Albert Everett [Q: "You feel they [pro-death penalty sentiments] would? Would impair your duty to follow the instructions?" A: "(Nods head.) Indication: Yes." (RT 866-867.)]; Helen Facciani [Q: "Do you feel your own personal feelings and beliefs about the death penalty would substantially impair your ability to be completely fair and unbiased?" A: "Honestly, yes, sir, I do." (RT 881.)]; Larry Freeman ["I advocate the death penalty. And, again, I have very severe reservations. If the facts were such that this man I felt was guilty, I would very much press for a death penalty." (RT 944.)]; Morris Gamble ["I would probably vote for the death penalty . . . . I guess it will [impair my judgment]." (RT 1023.)]; David Gilchriest [" . . . I'm being honest and tell you I'm probably a little prejudiced towards a crime of this nature, that I think that's a very violent crime so that I'm going to tend to be very strong towards the death penalty towards it." (RT 1079.)]; James Glass [Q: "Are you saying that you feel that you couldn't be fair and impartial in that [sanity] phase of the trial such as this?" A: "No I couldn't." (RT 1102.)]; Betsy Gustafson [Q: "And in other words, if given that choice, not even hearing, you know – we're not asking you to vote in the case now, but just in the abstract, that your choice would always be death; is that right?" A: "Correct." "I would not be impartial." (RT 1185.)]; Debra Huddleston [Q: "We're asking you, as you sit here now . . . do you feel that your own views

– it would be very difficult to set aside your own views?" A: "I would think so." (RT 1295.); Mary Johnson [Q: "Do you think your views about this case and everything you've read and everything and your views about the death penalty are such that it would be – that it would either prevent you or substantially impair you from being a totally fair and objective and unbiased juror?" A: "Yes. . . That's the truth." (RT 1360.)]; Ralph Lenamon [Q: "If you were chosen to be a juror in a case such as that, if you got to that part of it, would you be leaning so strongly towards the death penalty that you couldn't be fair or impartial to the defense?" A: "At this point, I'd probably have to say yes." (RT 1444, 1445.)]; Manual Mancha [Q: "You have stated, I believe, that whether or not you could set aside these strong opinions, your answer was that 'I think I'd still think as a cop.' Meaning, you probably could not set those aside; is that correct?" A: "That's correct." (RT 1553-1554.)]; Elizabeth Middleton [Q: "Do you think that your views would substantially impair, then, your ability to follow the instructions of the Court, then, if we ever got to that death penalty phase?" A: "Yes." (RT 1635.)]; Benny Ramirez [Q: "Do you think that what would be in your mind would substantially impair your ability to be totally fair and impartial?" A: "Yes, I do." (RT 1812.)]; Ruben Ramirez [Q: "In other words, you would have a bias in favor of the prosecution as opposed to the defense?" A: "I would have to say so, yes." (RT 1843, 1844.)]; Connie Randall ["I have a hard time with people that claim insanity." (RT 1876, 1881.)]; Rowena Shaterian ["I think I would have already made up my mind . . . I think that's a pretty firm 'made up my mind' . . . ." (RT 1936.)]; Mike Silva [Q: "You wouldn't consider life?" A: "No." Q: "You would automatically prefer death?" A: "Uh-huh." (RT 1963.)]; Diana Tinoco ["Um, I just don't feel that I could be unbiased. Again, I would want the death penalty." (RT 2026.)]; Alice Trippel ["Like I said, I don't see the punishment - the reason for the punishment to keep the man alive all that time . . . After he's already been guilty and proven guilty." (RT 2007.)]; Arvilla Truhett ["If it's what I think it is, I probably couldn't, to be honest with you. I'd already have, like, a predecision [that the defendant should be killed]." (RT 2035.)]; Carol Walthen ["Well, I think that – that would be – it could possibly impair my decision." (RT 2085-2086.)]; Karen Welch ["It [a personal preference for the death penalty] would probably influence me." (RT 2091.)]; Bikramjit Chohan [Q: "Do you feel your own views are pretty strong on this matter?" A: "Yes, sir." Q: And would they substantially impair your duty to be a totally impartial juror in this case?" A: "Yes, sir." (RT 2195.)]; Tabrina Combs [Q: "You said to Ms. O'Neill that this fear would probably make you vote against the defendant. Am I correct?" A: "I have to be honest, yes." (RT 2222.)]; Rex Davidson: ["Well, my feeling right now is, you know, insanity is not a justification for a criminal act . . . At that point, I still think

instances, there was little or no argument against dismissal offered by the prosecution. In these instances, the trial court had little choice but to excuse; there was no room for "credibility" determinations. Jurors simply said they could not be fair.

Almost any time the trial court was left room for the exercise of discretion was exercised, rulings favored the prosecution over the defense. By this method, the court, in effect, packed the jury venire with panelists selected to convict, as well as "'organized to return a verdict of death.'" (Morgan v.

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they should be held responsible." (RT 2249.)]; Clyde Smith [Q: "And that was a view – and that is a view that you feel you could not set aside; is that correct, sir?" A: "That's correct." (RT 2233.)]; Lisa Bihn [Q: "Do you know of any circumstances under which you could vote in favor of not guilty by reason of insanity?" A: "No, Your Honor." (RT 2316.)]; Delores Cornelius ["I don't know if I would be able to set aside my personal feelings because the term 'eye for an eye' is engrained in all my life into me." (RT 2516.)]; Carol Hunter ["I'm a Morman. And one of the Scriptures that I believe kept the sanity and kept the law-abidingness of people was mentioned in one of the scriptures that people did not do things that were against the law because they knew they would be punished. And one of the punishments was that if they murdered they would die for that sin. And I feel that's how we should be conducting our affairs today legally." (RT 2590.)]; John Easterbrook [Re bias against insanity defense: "I think I should answer yes to that. I think I would not be listening. I would be predisposed, yes." (RT 2536.)]; Sally O'Hara [Q: "So, then, for you it would not be a decision based on the individual case, what happened in this particular first degree murder, because for you every first degree murder gets the death penalty?" A: "If first degree murders means someone killing someone not out of self-defense." (RT 2746.)]; Barbara Olson [Q: "I'll ask whether or not those views that you have about the death penalty, or capital punishment, would substantially impair your ability to be a fair juror in this case?" A: . . . "I really don't know if I could or not." Q: "When you say you don't know if you could, do you feel you probably could not or do you feel you probably could?" A: "Probably couldn't." (RT 2767.) "To be honest, I really don't think I could." (RT 2769.)]; Mike Reyes [" . . . you know, I already made up my mind. . . .I think the person is guilty." (RT 2836.)]; Carlos Villareal ["I just feel I couldn't give him a fair trial." (RT 3161.)]; William Yanes ["I couldn't think of life imprisonment or death. To me, deep down inside, it would still be death penalty." (RT 3271.)].

Illinois, supra, 504 U.S. at p. 731; citing Witherspoon v. Illinois, supra, 391 U.S. at p. 520-523.) Accordingly, the trial court's "findings" that clearly biased jurors could be fair should be given no weight.

C. The trial court improperly restricted *voir dire* of Mr. Madden to elicit bias stemming from his belief that habitual and violent criminals should automatically receive death.

During Hovey *voir dire*, defense counsel asked the following question of Mr. Madden: "If you heard evidence about someone having some prior bad acts or prior convictions in their life would that automatically make you vote for the death penalty every time?" (RT 1539.) The prosecutor objected that the question called for "a judgment on assumed facts." (RT 1539.) The trial court sustained the objection, then asked Mr. Madden a more general question regarding he was aware of "anything" that might automatically trigger a vote for the death penalty. (RT 1539.)

One of the central purposes of *voir dire* is to remove jurors with particular prejudices or biases. Adequate *voir dire* protects the right to an impartial jury by "exposing possible biases, both known and unknown, on the part of potential jurors." (McDonough Power Equipment, Inc., v. Greenwood (1984) 464 U.S. 548, 554.)

This principle applies with special force in capital cases. (California v. Ramos (1983) 463 U.S. 992, 998-999.) The state must assure reliability in the process by which a person's life is taken. (Gregg v. Georgia (1976) 428 U.S. 153, 196-206 (Opinion of Stewart, Powell & Stevens, J.J.).) When the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." (Maddox v. United States (1892) 146 U.S. 140, 149; see Aldridge v. United States (1931) 283 U.S. 308, 314 [risk in denying adequate *voir dire* is "most grave when the issue is of life or

death"].)

The prosecutor's objection, that defense counsel's question of Mr. Madden called for a judgment on assumed facts, was completely without merit and should have been overruled. "'A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case to be tried, without regard to the strength of aggravating or mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstances that would be determinative for that juror have been alleged in the charging document.'" (People v. Ervin, supra, 22 Cal.4th at p. 70; quoting People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005.) "Consequently, to preserve the right to a fair and impartial jury on the question of penalty, the death qualification process must probe 'prospective jurors' death penalty views as applied to the general facts of the case, whether or not those facts [have] been expressly charged.'" (People .v Farp (1999) 20 Cal.4th 826, 853.)

For example, in People v. Cash (2002) 28 Cal.4th 703, a death sentence was reversed because the trial court refused to allow questioning on whether prospective jurors would automatically vote for the death penalty for any particular crimes. (Id. at p. 719.)

Roy had prior robbery convictions involving the use of violence, or threatened violence, which were destined to be received in evidence at guilt, sanity and penalty phases of the trial, for impeachment, as foundational material for the opinions of testifying mental health professionals, and/or as aggravating evidence. The question posed by defense counsel was proper to determine whether Mr. Madden might have a bias based on facts and circumstances likely to be present in Roy's case. (People v. Cash, supra, 28 Cal.4th at p. 720.) Such questioning was even more appropriate and necessary in Roy's case given prospective juror Madden's clear indication that

he favored use of the death penalty on "habitual offenders of lesser crimes," and for any crime of violence, not just murder, and felt psychiatric and psychological testimony was "a lawyer's ace-in-the-hole to (to get his client back to the street)." (SCT #6 5607, 5600; RT 1531, 1535, 1540.)

Apart from Mr. Madden's bias, prior crimes evidence is well known to create in the minds of jurors ""an overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts."" (People v. Holt (1984) 37 Cal.3d 436, 450-451; citations omitted; see also Old Chief v. United States (1997) 519 U.S. 172.) The barring of questions concerning possible prejudice stemming from prior felonies or prior violent acts amounts to a failure to test prospective jurors for impartiality, and constitutes an abuse of discretion. (People v. Chapman (1993) 15 Cal.App.4th 136, 141.) Likewise, it was an abuse of discretion for the trial court to prohibit inquiry into a bias which very likely rendered this prospective juror predisposed to impose the death penalty, based solely on the fact that Roy had suffered prior felony or violent convictions, without regard to the strength of mitigating and aggravating circumstances. (People v. Chapman, supra, at p. 141; People v. Cash, supra, at p. 720.)

D. Appellant preserved the right to challenge the denial of for-cause challenges on appeal.

"The peremptory challenge is a part of our common law heritage. Its use in felony trials was already venerable in Blackstone's time. [Citation omitted.] We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to a trial by an impartial jury." (United States v. Martinez-Salazar (2000) 528 U.S. 304, 307.) Nonetheless, the right to peremptory challenges is generally not considered a right of federal constitutional dimension. (Ross v. Oklahoma, supra, 487 U.S. at p. 88.) In California, "[t]o preserve a point based on the overruling of a challenge for

cause against a prospective juror, a defendant 'must either exhaust' his 'peremptory challenges and object to the jury as finally constituted' at trial, or else 'justify' his 'failure to do so' on appeal." (People v. Waidla (2000) 22 Cal.4th 690, 715; citing People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005.)

In this case, the test articulated in Waidla has been satisfied. During guilt-phase *voir dire*, defense counsel used peremptory challenges to excuse five of the seven biased jurors: Donovan (RT 3146); Madden (RT 3145); McDaniel (RT 3146); Wiginton (RT 3181-3182, 3186); and Samuel Lopez (RT 3145). The defense used a total of 19 of its 20 guilt-phase peremptory challenges, but then declined to exercise the 20th peremptory challenge, because the next prospective juror in line was Mary Lopez. Use of the peremptory challenge would have meant that Ms. Lopez, for whom a for-cause challenge had been denied, would be seated as a juror. (RT 3296-3297.)

Defense counsel thrice expressed dissatisfaction with the jury as constituted and motions for a new jury panel and more peremptory challenges were denied. (RT 3014-3019; 3221; 3296-3298 .)[62]

The defense was provided a total of three additional peremptory challenges during the selection of alternates, all of which were used. The defense used two of these three peremptory challenges to prevent Ms. Lopez and Ms. Fletcher from sitting as an alternates, since defense "for-cause" challenges had been denied. (RT 3308-3309.)

Accordingly, Roy has preserved his right to challenge the denial of for-cause challenges by using 19 peremptory challenges, by objecting to the jury as constituted, and by stating reasons, at the time of trial, for not using the one

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[62] Earlier, during *voir dire* on October 5, 1993, Ms. O'Neill commented that she had only exercised 18 peremptory challenges so far because the upcoming jurors were even worse than the prospective jurors previously called. (RT 3221.)

additional peremptory challenge. (See, People v. Williams (1997) 16 Cal.4th 635, 667.)

E. Roy suffered actual prejudice and a violation of his federal constitutional rights.

As a general rule, with the exception of an erroneous Witt exclusion, an erroneous ruling on a for-cause challenge is not automatically reversible, but is subject to scrutiny for prejudice under harmless error analysis. (People v. Ashmus, supra, 54 Cal.3d at p. 965.) Prejudice turns on whether the defendant's right to a fair and impartial jury was affected. (Ibid.) If a biased juror actually sits on a jury that imposes a death sentence, and the right to challenge the trial court's failure to remove the juror has been properly preserved for appellate review, the death sentence must be overturned. (People v. Williams, supra, 16 Cal.4th at p. 666; Ross v. Oklahoma, supra, 487 U.S. at p. 85.)

Even though none of the challenged jurors actually sat on the jury, the right to a fair and impartial jury was no less denied in this case. The trial court's discriminatory pattern of ruling on for-cause challenges, whether intentional or the result of unacknowledged personal bias, violated Roy's state- created right to twenty peremptory challenges guaranteed by Code of Civil Procedure section 231, applicable to defendant's subject to death or life imprisonment.

In effect, Roy received only fourteen peremptory challenges of the guaranteed twenty, because he was forced to use five peremptory challenges to excuse obviously disqualified jurors, and he relinquished the right to use a sixth peremptory challenge to avoid placing a disqualified juror on the panel. He was forced to use two of three peremptory challenges to excuse alternate jurors for whom for-cause challenges had been improperly denied. "'The failure of a state to abide by its own statutory commands may implicate a

liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.'" (Vansickel v. White (9th Cir. 1999) 166 F.3d 953 [granting only ten peremptory challenges in state capital trial violated federal due process].)

Furthermore, the composition of the jury was adversely affected even though the challenged jurors did not sit. Several seated jurors had distinct pro-law enforcement, anti-lawyer, or pro-death penalty leanings even if not to a disqualifying degree. These jurors could have been removed by peremptory challenges had the defense "for cause" challenges not been improperly denied.

Alternate juror Fees, who replaced Juror Cregar during the sanity phase trial and thus participated in the sanity and penalty phase verdicts, gave written answers to death qualification questions suggesting a pro-death penalty bias, rooted in the adage "An eye for an eye." (SCT #6 2682, see also SCT #6 2683.) Mr. Fees also disliked lawyers. During oral *voir dire*, Mr. Fees expressed the wish that lawyers "weren't necessary," equating them with "salesmen," a necessary evil. (RT 899.)

Juror Robert Givens expressed the view that society was becoming "more violent all the time," and that the criminal justice system was not working as a deterrent. He had considered moving out of California due to the crime problem. (SCT #6 3236.) Mr. Givens also felt criminals had "more rights than the ordinary person." (RT 3236.) Regarding the death penalty, Mr. Givens felt that it would be a deterrent to murder, if enforced. (SCT #6 3250.) He adhered to the adage, "An eye for an eye," explaining that "what you deliberately do to another should be paid by you in a like way." (SCT #6 3253.) Mr. Givens expressed strong antipathy toward the penalty of life without parole, saying he did not "see the point of it." (SCT #6 3252.) He also expressed doubt that the penalty of life without parole really meant life without parole. (SCT #6 3252.)

Juror Jess Lujan, a supporter of the death penalty, felt that the criminal justice system made it too hard for the police and prosecutors to convict people accused of crime, and that sometimes legal technicalities allowed guilty parties to go free. (SCT #6 5517; RT 1520-1521.) Mr. Lujan also seemed to agree with the notion that, "[i]f you take a life you may have to pay with your own." (RT 1522.)

Juror Margaret Murray expressed the view that the criminal justice system made it too hard for police and prosecutors to convict people accused of crimes. At times she felt that "the innocent were being prosecuted more than the accused." (SCT #6 6316.) Ms. Murray was a death penalty proponent, who felt appeals should be limited. (SCT #6 6330, 6335.)

Juror Stephen Wakefield felt that the death penalty was used too seldom. (SCT #6 8920.) He also candidly admitted that the fact that teenage victims were involved might have an impact on his impartiality. (RT 2804.)

Mr. Wakefield went to high school with Fresno County Deputy District Attorney Steve Polacek, whose wife also taught Wakefield's son. (RT 3265, 3273.) Mr. Polacek had recently been accused of paying a witness to be available and Roy's attorney, Ms. O'Neill, had been the one to make the accusation. (RT 3274.)

During a discussion of the three phases of the trial, Mr. Wakefield indicated that a plea of not guilty by reason of insanity was tantamount to an admission of guilt with respect to the first phase of the trial. (RT 3266-3267, 3268.) He said "in all probability" he could set aside any prejudice stemming from the defendant's not guilty by reason of insanity plea, but he might still have a "lingering question" in the back of his mind. (RT 3283-3284.)

Juror Sandra Schmidt expressed doubt that life imprisonment without parole really meant life imprisonment without parole. (RT 1911-1912.) She also stated that she might lean toward the death penalty if she thought the

defendant was "horrible and so bad" even if the special circumstances were not true. (RT 1913-1914.) She expressed concern that victims were sometimes forgotten in the criminal justice system. (SCT #6 7724; RT 3285.)

Other jurors who failed to qualify for "hardship" exemptions expressed concerns about the impact of jury service on their personal lives or careers. Mr. Givens, a sixth grade teacher, wrote that he was "really" concerned about the effect that serving as a jury would have on his ability to teach school, a concern revisited during oral *voir dire*. (SCT #6 3256; RT 1112-1113.) Mr. Gleason, a seventh grade teacher and coach, expressed similar concern about the potential impact of jury service on his employment. (RT 2528-2530.)

Juror Patricia Gosland expressed outright resentment about being called for jury service: "I have been eligible for 40 years to serve – Now when I wish to travel and enjoy life I must cancel plans to do my duty." (SCT #6 3485; RT 1137-1138.) Ms. Gosland also suffered from arthritic knees which made prolonged sitting uncomfortable. (SCT #6 3460; RT 1136.)

Juror Sandra Schmidt expressed concern that jury service would interfere with scheduled job training, out of state. (RT 1907-1908.) She candidly stated that she did not want to serve as a juror. (RT 1911.)

Juror Stephen Wakefield expressed some concern about the hardships would be imposed on his business partner if he were required to serve as juror. (RT 2798, 2802.)

Ms. O'Neill did not move to excuse these jurors for cause. However, it is quite clear from the trial court's pattern of rulings that for-cause challenges would have been completely futile. Each of the above jurors was willing to give the court assurances that he or she could be impartial and fair. In all other similar cases, the court had routinely denied defense for-cause challenges.

Ms. O'Neill's remarks to the court, just prior to the selection of

alternates, makes it clear that she would have exercised peremptory challenges against a number of seated jurors had her motion for additional peremptory challenges been granted. Roy's last peremptory challenge was not exercised precisely because it would have resulted in the placement of an extremely biased panelist -- Mary Lopez -- on the jury. (RT 3296-3297.)

Hence, the defense was actually and palpably prejudiced by the court's erroneous rulings because the composition of the jury was adversely impacted.

Furthermore, the prejudice infected all phases of the proceedings, not just the penalty phase. Mr. Madden exhibited a visceral hatred for "low-life" attorneys who obstructed criminal justice, and he admitted he would not credit expert psychiatric or psychological testimony elicited from an expert hired by either party. (SCT #6 5593-5600; 1546-1548.) Prospective juror Fletcher was also palpably hostile toward Roy's attorneys. (RT 936, 939.) Mary Lopez regarded criminal lawyers, and psychiatric and psychological testimony, as potential tools for helping criminals get away with murder. (SCT #6 5365, 5372; RT 2657.) Reverend McDaniel's religious beliefs directly impacted his view of the value of psychiatric or psychological testimony. (SCT #6 5980.) Colleen Wiginton's bias plainly infected her ability to be fair in a case involving teenage girl victims. (RT 2102-2105.)

Accordingly, reversal of the guilt, sanity and penalty phases is required because the erroneous denial of defense for-cause challenges was not limited to jurors with pro-death penalty bias. Jurors expressed biases infecting the guilt and sanity phases of the trial as well. (Cf. Gray v. Mississippi, supra, 481 U.S. at pp. 666-667.)

F. Roy is entitled to automatic reversal, even if this Court finds no actual prejudice.

Even if Roy cannot establish actual prejudice, the errors in jury selection should be considered structural, and reversal of the guilt, sanity and

penalty phase judgments should be automatic. No showing of actual prejudice is necessary when the record as a whole shows that the trial court repeatedly and deliberately misapplied the law, and forced the accused to use peremptory challenges to correct the court's errors. (Ross v. Oklahoma, supra, at p. 91, fn. 5.) In such circumstances, presented here, federal constitutional rights are implicated, and harmless error analysis does not apply.

Furthermore, the trial court's extremely biased pattern of rulings on for-cause challenges demonstrates that Roy did not receive his state and federal constitutional right to an impartial tribunal. (See, e.g., Walberg v. Israel (7th Cir. 1985) 766 F.2d 1071.) The trial judge consistently denied defense "for-cause" challenges with respect to any panelist willing to give lip service to impartiality. The prosecutor's "for-cause" challenges were given vastly different treatment; at the slightest hint of equivocation, the challenged "scrupled" juror was excused.

Denial of an impartial tribunal denies due process. (Tumey v. Ohio (1927) 273 U.S. 510.)

> "'The Due Process Clause entitles a person to an impartial tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and promotion of participation and dialogue by the affected individuals in the decisionmaking process . . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted concept of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.'"

(Porter v. Singletary (11th Cir. 1995) 49 F.3d 1483, 1487-1488, citing Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 242.) The denial of an impartial

tribunal is structural error, which requires automatic reversal of the entire judgment. (Arizona v. Fulminante (1991) 499 U.S. 279, 294 [Opinion of White, J. Dissenting in part and concurring in part]; People v. Flood (1998) 18 Cal.4th 470, 488.)

XXX THE GUILT, SANITY AND PENALTY JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTIONS FOR A NEW JURY PANEL AFTER THE PROSECUTOR VIOLATED DUE PROCESS AND EQUAL PROTECTION RIGHTS BY USING PEREMPTORY CHALLENGES TO SYSTEMATICALLY REMOVE BLACK PERSONS FROM THE JURY PANEL.

Roy is Black. (RT 165.) It is undisputed that a petit jury comprised of 11 White and Hispanic or Hispanic surname jurors and 1 Black juror convicted Roy of all charges and found true all enhancements and special circumstance allegations. During the sanity phase trial, the sole Black juror was excused for cause after she wrote the court a note saying she could not remain on the jury due to stress at home and the need to find employment. (RT 9586, 9612.) Thereafter, an all White and Hispanic or Hispanic surname jury rejected Roy's pleas of not guilty by reason of insanity, then imposed a death judgment. (RT 9947, et seq.; RT 12044 et seq.)

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.'" (Batson v. Kentucky (1986) 476 U.S. 79, 86 [hereafter "Batson"]; quoting Strauder v. West Virginia (1880) 100 U.S. 303, 308 [hereafter, "Strauder".) "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, . . . the Equal Protection Clause forbids

the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (Batson at p. 89; citations omitted.)

In addition, "those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" (Batson at pp. 86-87, quoting Strauder at p. 309.) "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at trial." (Batson at p. 87.) "A person's race simply is 'unrelated to his fitness as a juror.'" (Batson at p. 87, quoting Thiel v. Southern Pacific Co. (1946) 328 U.S. 217, 227 (Frankfurter, J., dissenting).) "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (Ibid.)

The use of peremptory challenges to remove prospective jurors on the sole ground of group bias also violates the right to trial by a jury drawn from a representative cross-section of the community contrary to Article I, section 16 of the California Constitution. (People v. Wheeler (1978) 22 Cal.3d 258 [hereafter "Wheeler"].) "The error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guarantees of the constitution. Where it has been infringed, no inquiry as to the sufficiency of evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'" (Wheeler at p. 283.)

In Batson, the United States Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. First, the

defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court considers the persuasiveness of the justification tendered, and determines whether the defendant has carried his burden of showing purposeful discrimination. Batson v. Kentucky, supra, 476 U.S. at pp. 96-98; Hernandez v. New York (1991) 500 U.S. 352, 359-362 [hereafter "Hernandez"]; Purkett v. Elem (1995) 514 U.S. 765, 768 [hereafter "Purkett"]; accord: People v. Gutierrez (2002) 28 Cal.4th 1083, 1122.)

As a matter of federal constitutional law, California is bound by Batson's rules for evaluating whether a *prima facie* case of invidious race discrimination has been established. (Wade v. Terhune (9th Cir. 2000) 202 F.3d 1190, 1197; Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824, 827, fn. 5.)

A. The trial court's findings that Roy had failed to establish a *prima facie* case of racial discrimination were error.

Two Batson-Wheeler challenges were made on Roy's behalf, the first after Ms. Johnson, Ms. Blue and Mr. Mitchell were excused, and the second after Mr. Cato was excused. (RT 3211-3212. 3291-3293.) Following the first challenge, the court noted that there was still one Black prospective juror available -- Ms. Cregar. (RT 3213.) The court also expressed gratitude for the "great number of Afro-American folks" on the panel, given that often the court did not get "what appears to be a proper share in accordance with our community." (RT 3215.)

The court then took judicial notice of the 1990 Census, which established a population of 490,000 in Fresno County, including 33,423 Black persons, which the court characterized as "five percent." (RT 3215.

Thereafter, the court found that no *prima facie* case of discrimination

had been made:

> "I found no particular racial bias with Mr. Cooper's challenges. I count that he has made 15 challenges thus far, and out of those he did exercise a challenge against three black potential jurors. He certainly has passed and has not exercised the challenge against Mrs. Cregar, but I don't find the *prima facie* case has been met in this case, namely, that he has excused people on racial grounds.
>
> "In fact, with regard to two of those folks I think I would readily know reasons why they were excused, but I'm not going to let that enter into the consideration at this time. I just do not find a prima facia [sic] case has been made.
>
> "But, nevertheless, if there is a higher authority that would disagree with that finding on my part, thus nevertheless I would wish you to set forth for the higher authorities the reasons for the challenges that you did make." (RT 3216-3217.)

Following the second Wheeler-Batson motion, the court made a similar finding.

> "Once again, Ms. O'Neill, I find there has not been a challenge made in the case of Mr. Cato on a racial basis. In other words, the prima facial [sic] case has not been made. And once again, as before, should the higher court disagree with my findings in that regard, I will ask Mr. Cooper to state the reasons why on the record Mr. Cato was excused." (RT 3294.)

"When a trial court expressly rules that a *prima facie* case was not made, but allows the prosecutor to state his or her justification for the record, the issue of whether a *prima facie* case was made is not moot." (People v. Box (2000) 23 Cal.4th 1153, 1188.) If the appellate court is confronted with such a record, it must still determine whether the trial court properly determined that no *prima facie* case of discrimination was made. (Ibid.)

The trial court did not expressly articulate what standard it was applying to decide whether the defense had established a *prima facie* case of racial discrimination. At the time of appellant's trial, however, the California courts were still applying the unconstitutionally relaxed standard of scrutiny established by this Court in People v. Bernard (1994) 27 Cal.App.4th 458, 465

(overruled by People v. Box, supra, 23 Cal.4th at p. 1188, fn. 7) – the "strong likelihood" standard. According to the relaxed Bernard standard, which the trial court presumably applied, a *prima facie* case was established if the defendant could show a "strong likelihood" that panelists were being excused because of their group association. (Ibid.) Accordingly, this Court should review *de novo* the Batson *prima facie* case issue, applying the more stringent "reasonable inference" standard mandated by the federal constitution. In other words, the question for this Court's determination is whether the record of *voir dire* establishes a "reasonable inference" that peremptory challenges were being used on the basis of race. (Cooperwood v. Cambra (9th Cir. 2001) 245 F.3d 1042, 1046; People v. Box, supra, 23 Cal.4th at p. 1188, fn. 7.) Appellant respectfully submits that the record shows much more than a reasonable inference that peremptory challenges were being used by the prosecutor on the basis of race. (Miller-El v. Cockrell (2003) 537 U.S. 322, 123 S.Ct. 1029.)

There is no dispute among the parties regarding the total number of Black jurors on the available panel -- seven. One Black juror was excused for medical reasons; he suffered from narcolepsy. (RT 3105.) A second Black panelist was excused on motion of the defense after he came forward and said he could not be fair and impartial with respect to Roy's plea of not guilty by reason of insanity. (RT 309-3035.) Of the remaining five qualified Black jurors, four were excused by the deputy district attorney, using peremptory challenges – prospective jurors Johnson, Blue, Mitchell, and Cato. (RT 5159, 3209, 3159, 3287-3291.)

The judicially noticed facts establish that Blacks were significantly under-represented on the jury panel as a whole. Blacks comprised slightly less than than 7 percent of the total population of Fresno County. Counsel estimated that 250 panelists were examined, 7 of whom were Black. The

Table of Contents for the Supplemental Clerk's Transcript on Appeal lists 248 prospective jurors who were not initially excused for hardship, and were asked to fill out juror questionnaires. (SCT #6; Vol. 1.)[63]

Assuming 7 of these 248 were Black, the available venire began with just under 3 percent Black persons.

At the time of the first Wheeler-Batson motion, the prosecutor had exercised a total of 15 peremptory challenges, 3 of which had been used to excuse Black persons – 20 percent. Clearly, the prosecutor was excusing Black panelists in disproportionate numbers, relative to the total percentage of Black potential jurors available.

At the time the second Wheeler-Batson motion was made, the prosecutor had used 4 of 16 total peremptory challenges available to excuse Black panelists -- 25 percent. Three additional peremptory challenges were exercised by the prosecutor before the second Wheeler-Batson motion was actually heard. (RT 3074 [Barnes]; 3146 [Garcia]; 3158 [Ariola]; 3159 [Johnson]; 3159 [Blue]; 3159 [Berberian]; 3185 [Paala]; 3185 [Genaro]; 3186 [Fulfer]; 3191 [Wasser]; 3192 [Steele]; 3197 [Pillow]; 3209 [Mitchell]; 3210 [Lewis]; 3291 [Gonzalez]; 3291 [Cato]; 3291 [Masters]; 3292 [Bickley]; 3292 [Cordova].) Hence, at the time the motion was heard, the prosecutor had used 21 percent of his total peremptory challenges to eliminate 80 percent (4 of 5) of the eligible Black jurors, even though Black panelists comprised little more than 5 percent of the panelists not excused for hardship or cause.[64] As

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[63] Since the court lost or discarded the original questionnaires, and the record had to be reconstructed using copies retained by the Fresno County District Attorney's and Public Defender's offices, it is still possible 250 is the accurate number. Some of the questionnaires may have been lost and not able to be reconstructed.

[64] Appellate counsel estimates that approximately 95 of the original 248-250 panelists were not excused for either cause or hardship. In 13

in the Miller-El case, the record "demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were." (Miller-El v. Cockrell, supra, 123 S.Ct. at p. 1036 .)

The fact that the prosecutor allowed one Black juror to remain on the jury does not exclude the possibility that other peremptory challenges were racially motivated. (People v. Snow (1987) 44 Cal.3d 216.) "[F]or to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (Id. at p. 457; citing People v. Motton (1985) 39 Cal.3d 596, 607-608.)

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instances, panelists remained on the jury after motions for cause by either party were denied. (Donovan (RT 3146); Fletcher (RT 940); Kolstad (RT 1429); Madden (RT 1552, 3138); McDaniel (RT 1613); Olson (RT 1697); Wiginton (RT 2112); Mary Lopez (RT 2672); Samuel Lopez RT 2674); Masters (RT 1579); Arriola (RT 455); Barnes (RT 487); Garcia (RT 1026, 1039); Levan (RT 1451); Zarasua (RT 2296).) Both parties passed for cause or simply offered no comment, as to the remaining 82 prospective jurors. (Arrendondo (RT 432); Behnsch-Hill (RT 498); Balange (RT 443); Bell (RT 475); Bickley (RT 517); Blue (RT 525); Framstead (RT 579); Cato (RT 568); Cordero (RT 639); Cordova (RT 662); Cregar (RT 678-679); Cruz (RT 685); Davis (RT 707); Delafuente (RT 747-748) ; Dunn (RT 843); Eldridge (RT 855-856); Fees (RT 904); Fields (RT 894-895); Fulfer (RT 1001); Genaro (RT 1057); Givens (RT 1114); De Beaord (RT 1153); Gonzalez (RT 1132); Gosland (RT 1142); Graves (RT 1170); Henson (RT 1232); Ho (RT 1243); Honn (RT 1272); Horrell (RT 1263); Howard (RT 1283); Johnson (RT 1345); Kawahata (RT 1376); Belk (RT 1402); Lewis (RT 1479-1480); Liles (RT 1508); Longley (RT 1518); Lujan (RT 1529); Samarco (RT 1563); Mayoral (RT 1613); Miranda (RT 1648); Mitchell (RT 1671); Moffett (RT 1679); Murray (RT 1695); Odom (RT 1736); Paala (RT 1769); Pillow (RT 1792); Pitts (RT 1805); Michelle Ramirez (RT1834); Ramos (RT 1861); Schmidt (RT 1921); Sylvester (RT 1992); Varela (RT 2050); Veach (RT 2066); Yahnian (RT 2129); Yoshida (RT 2145); Harriger (RT 2265); Wasser (RT 2291); Anderson (RT 2461); Berberian (RT 2474); Bucay (RT 2490); Gleason (RT 2533); Hicks (RT 2593); Hinman (RT 2556); Bishop (RT 2572); Kauffman (RT 2627); Martinez (RT 2735); Perez (RT 2789); Wakefield (RT 2808); Steele (RT 2904); Strong (RT 2887); Sweeten (RT 2928); Thompson (RT 2951); Stollar (RT 2999).)

There can be no dispute that the defense had established a reasonable inference that the prosecutor was using his peremptory challenges to exclude venire members on the basis of race. The trial court's finding that the defense failed to make a *prima facie* showing of racial discrimination is simply unsupported by the available facts. (People v. Turner (1986) 42 Cal.3d 711, 720; see also United States v. Battle (8th Cir. 1987) 836 F.2d 1084, 1085-1086 [government's use of five of six (83%) of allowable peremptory challenges to strike five of seven (71%) of blacks was sufficient to establish *prima facie* case].)

B. Reversal is required because the trial court failed to fulfill its duty to determine whether the defense had established purposeful discrimination.

A trial court's failure to discharge its duty to conduct a meaningful three-step analysis under Batson and Wheeler constitutes reversible error. (Lewis v. Lewis, supra, 321 F.3d at p. 830-832; People v. Turner, supra, 42 Cal.3d at p. 828; People v. Hall (1983) 35 Cal.3d 161, 169.) In this case, the trial court asked the prosecutor to state race-neutral reasons, if any for his disqualification of the four Black jurors. On its face, this would appear the court proceeded through step two of the Batson analysis. However, it is clear from the face of the record that the court elicited the information without any intention to evaluate whether the prosecutors' race-neutral explanations were credible. Instead, the trial court had the prosecutor state reasons just in case this reviewing Court disagreed with the trial court's finding of no *prima facie* case of discrimination.

After the prosecutor stated for the "higher authorities" (RT 3216) his reasons for excusing the first three black panelists, the trial court denied the Wheeler-Batson motion for the "reasons stated." (RT 3220) The only "reason stated" was the failure of the defense to make a *prima facie* showing that the prosecutor was using his peremptory challenges in a racially

discriminatory manner.

The trial court thus accepted the prosecutors statement of reasons "at face value." (People v. Turner, supra, 42 Cal.3d at p. 727.) The court also failed entirely to make a "'sincere and reasoned' effort . . . to evaluate their genuineness and sufficiency in light of all the circumstances of the trial." (Id. at p. 728.)

After prosecutor stated for the "higher court" (RT 3294) his reasons for excusing the fourth black panelist, Mr. Cato, the judge said, "And if I didn't say so before, I formally deny the motion that was made pursuant to People verses Wheeler and its progeny." (RT 3296.) The court did not "point out inconsistencies and ask probing questions", in a manner suggesting any bona fide effort to assess the prosecutor's credibility. (People v. Silva (2001) 25 Cal.4th 345, 385.) The record shows that the trial court did not, in fact, evaluate the prosecutor's demeanor, how reasonable or improbable his explanations were, and whether his explanations had some basis in accepted trial strategy. (See, Miller-El, supra, 123 S.Ct. at pp. 1040-1044.)

In short, the trial court "failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor." (People v. Turner, supra, 42 Cal.3d at p. 728.) This is the type of error that Batson and Wheeler say is reversible *per se.* (Ibid.; accord: People v. Hall, supra, 35 Cal.3d at p. 169 ["Such abdication is inconsistent with the court's obligations under Wheeler, and on authority of that case must be held to constitute error requiring reversal."]; Lewis v. Lewis, supra. 321 F.3d. 824.)

As the United States Supreme Court recently stated in the Miller-El case:

> """In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney

> who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial court's province."'"

(Miller-El, supra, 123 S.Ct. at p. 1041; quoting Hernandez v. New York, supra, 500 U.S. at p. 365; which in turn quotes Wainwright v. Witt, supra, 469 U.S. at p. 428.)

"Unlike a trial court, a court of appeal is not in an ideal position to conduct a step three evaluation." (Lewis v. Lewis, supra, 321 F.3d at p. 832.) Appellate courts must rely on the "'good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to admitting acts of group discrimination.'" (People v. Fuentes (1991) 54 Cal.3d 707, 714; quoting People v. Wheeler, supra, 22 Cal.3d at p. 282.)

It is true that sometimes reviewing courts will attempt to determine whether the prosecutor has used peremptory challenges in a racially discriminatory fashion, based on the trial court's findings, and evidence in the record. (Lewis v. Lewis, supra, 321 F.3d at pp. 831-835.) Nevertheless, it would be inappropriate for this Court to do so in this case. Here, the prosecutor's credibility was not evaluated. No findings at all were made, except for the erroneous findings of no *prima facie* case. Ten years after the jury selection proceedings, it would be nearly impossible for this Court evaluate D.D.A. Cooper's state of mind, and determine in hindsight, whether "purposeful" discrimination occurred. The record is inadequate for that purpose. Automatic reversal is therefore required.

C. Reversal is required because the prosecutor's "race-neutral" reasons for excusing the four Black panelists were obviously pretexts for racially motivated exclusion.

Even if this Court decides the record is adequate to permit appellate

review of the prosecutor's reasons for exercising peremptory challenges against prospective jurors Johnson, Mitchell, Blue and Cato, the record as a whole shows that the prosecutor's stated reasons were a mere pretext for purposeful discrimination against Black jurors. As is more fully explained below, the record as a whole establishes that jurors Johnson, Mitchell, Blue and Cato were all challenged, first and foremost, because of their group association. (See, People v. Box, supra, 23 Cal.4th at p. 1188.)

Prospective Juror Johnson

Mr. Cooper explained that Ms. Johnson had been excused for the following reasons:

> "Potential Juror Johnson, Your Honor, was a person who at one point in her life told us she did not believe in the death penalty. And that is one thing that I considered. In addition to that is the fact that she is a person that has been referred to by yourself, here in the courtroom as judge and she's identified herself as an Administrative Law judge. And it is my personal view that no such person should be a part of a jury of 12 persons drawn from the community to reach a legal judgment and decision because of the extreme potential for that person to, whether it be consciously or unconsciously, control the deliberative process. Persons – the other 11 people can look to that person to explain the instructions . . . ." (RT 3218.)

The prosecutor's claim that he considered Ms. Johnson's prior disbelief in the death penalty as justification for her dismissal is "inherently implausible in light of the whole record." (People v. Turner, supra, 42 Cal.3d at p. 720.). There is nothing in the record suggesting that this panelist's past opposition to the death penalty would make her reluctant to return a death penalty in the case before the court. (People v. Silva, supra, 25 Cal.4th at p. 385.)

In her written questionnaire, Ms. Johnson voiced no strong opinions about capital punishment either way, although she acknowledged that at one time, she had been against capital punishment. (SCT #6 4544.) She indicated she would set aside any personal beliefs and obey the court's instructions.

(SCT #6 4549.)

During oral *voir dire*, Ms. Johnson explained to the district attorney that she had previously been undecided about capital punishment, twenty years earlier when she was in college, but was now in favor of it. (RT 1344.) She had changed her mind, and now felt it might be "inhumane" to put people in prison for the rest of their lives, without parole. (RT 1344.) When asked, she expressed no hesitation saying she could impose death in a real case, depending on the circumstances. (RT 1345.)

For all intents and purposes, the answers given by Ms. Johnson were like the answers given by prospective Black juror struck by the prosecutor in Riley v. Taylor (3rd Cir. 2001) 277 F.3d 261.) In the Riley case, the prosecutor had asserted as a race-neutral justification that he doubted the struck juror would be willing to impose a death sentence based on a "significant pause" that occurred when the juror was asked about the death penalty. Like Ms. Johnson, the struck panelist in Riley had denied having any conscientious scruples or beliefs against imposing a death sentence. Furthermore, in Riley, a White empaneled juror giving the same answers to questions by the court was not peremptorily challenged. (Id. at p. 279.) The federal appellate court granted a new sentencing hearing, finding the prosecutor's race-neutral explanation to be "entirely unsupported by the record." (Id. at p. 279.)

Furthermore, because the prosecutor offered at least one obviously flawed reason for exercising a peremptory challenge -- alleged anti-death penalty bias -- all other reasons proffered for excusing Ms. Johnson should also be disregarded as insincere and incredible. (Lewis v. Lewis, supra, at p. 833; citing United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695, 698-699 [reversing trial court's finding of no discrimination where prosecutor gave one good reason and one bad reason for each peremptory challenge].)

The district attorney's second reason for excusing Ms. Johnson was her occupation -- an administrative law judge. This reason, too, fails to pass constitutional scrutiny. There is nothing about the job of administrative judge which would necessarily render a person unable to perform the duties of a juror. (People v. Turner, supra, 42 Cal.3d at p. 722; see also People v. Silva (2001) 25 Cal.4th 345, 379.) It is not enough that the prosecutor's reason *appears* facially race-neutral. The reason must be both neutral and "'related to the particular case to be tried.'" (Purkett v. Elem, supra, 514 U.S. at p. 767; quoting Batson v. Kentucky, supra, 476 U.S. at p. 98.) A prospective juror's supposed "dysfunctionality" in terms of "jury dynamics" is mere "psychological jargon" which does not furnish a legitimate ground for peremptory challenge. (People v. Turner, supra, 42 Cal.3d at p. 722.)

Furthermore, the prosecutor asked few questions of Ms. Johnson and he conducted no *voir dire* regarding her occupation. "A prosecutor's failure to engage Black prospective jurors 'in more than desultory *voir dire*, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (People v. Turner, supra, 42 Cal.3d at p. 727; quoting People v. Wheeler, supra, 22 Cal.3d at p. 281.)

Furthermore, "[a] comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination. Peremptory challenges 'cannot lawfully be exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. [Citation.]" (Turner v. Marshall (9th Cir. 1997) 121 F.3d 1248, 1251-1252; cited with approval in Lewis v. Lewis, supra, 321 F.3d at p. 831; see also Miller-El v. Cockrell, supra, 123 S.Ct. 1029 [Majority, concurring, and dissenting opinions all engage in comparative juror analysis].)

Previously, this Court has declined to engage in comparative analysis of characteristics of persons peremptorily challenged and persons the prosecutor accepted as jurors. (People v. Ervin (2000) 22 Cal.4th 48, 76.) The approach was previously rejected on the theory that "comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.'" (People v. Fuentes (1991) 54 Cal.3d 707, 715; quoting People v. Johnson (1989) 47 Cal.3d 1194, 1219-1220.)

However, in February 2003, the United States Supreme Court filed its decision in Miller-El v. Cockrell. In Miller-El, the Supreme Court reversed a Fifth Circuit Court of Appeals judgment, which had upheld a Texas state court judgment, in part based on the fact that "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." (123 S.Ct. at p. 1043.) The Supreme Court declined to make a final determination regarding whether the comparative juror analysis would demonstrate that the prosecutor's rationales were pretexts for discrimination. However, the high court held that the evidence made "debatable the District Court's conclusion that no purposeful discrimination occurred." (Ibid.) Even the concurring and dissenting opinions engaged in comparative jury analysis.

Shortly after Miller-El was decided, the Ninth Circuit Court of Appeals filed its decision in Lewis v. Lewis, supra, which held that the California Court of Appeal unreasonably applied the law clearly established by the United States Supreme Court in Batson, to affirm a Santa Barbara Superior Court judgment. The Lewis case also endorses "comparative analysis" of struck and empaneled jurors as a integral part of a court's Batson review of a prosecutor's proffered reasons for using peremptory challenges. (Lewis v. Lewis, supra, 321 F.3d at pp. 832-834.)

The Ninth Circuit's decision in Lewis clearly provides that where there is a conflict in the standards imposed by state and federal law, and the federal law imposes a higher standard, the state court's decisions will be judged against the more stringent federal standard. (Lewis v. Lewis, supra, 321 F.3d at p. 827, fn. 5.) Accordingly, as a matter of federal constitutional law, California's courts appear bound to apply comparative analysis of struck and empaneled jurors as an essential component of their analysis under Batson.

When comparative analysis is considered, the prosecutor's reasons for excusing Ms. Johnson appear pretextual. White juror, Cheryl Stollar, was accepted as an alternate juror by the prosecution without challenge. Ms. Stollar, like Ms. Johnson, had legal training.

Ms. Stollar was a law school graduate awaiting bar examination results. (RT 2986-2987.) Logically, the risk was equally present that someone with law degree, likely to become licensed as a lawyer during the course of the trial, might intentionally or unintentionally control the deliberative process, or instruct other jurors in the law. Indeed, one might expect a recent law graduate to pose a greater risk than an administrative law judge. An experienced judge would be *less* likely to violate known rules governing jury deliberations by seeking to usurp the function of the trial judge or jury.

In fact, Ms. Stoller was excused from jury service, midtrial, after it was revealed that she had been explaining the rule against hearsay to several other jurors. (RT 5046-5077.) It was the defense that moved to dismiss her. Mr. Cooper, *faced with a sitting juror who had actually been giving legal instruction to other jurors*, objected to dismissal! (RT 5074.)

Mr. Cooper's actions speak louder than his words. If the prosecutor sincerely exercised a peremptory challenge against prospective juror Johnson because of his concern that she might control the deliberative process, he would not have objected to the dismissal of Cheryl Stollar when she was

caught red-handed instructing other jurors in the law.

Moreover, Ms. Johnson had attributes which would logically have made her attractive as a juror, from a prosecutor's standpoint, had she not been Black. (People v. Turner, supra, 42 Cal.3d at p. 726; Turner v. Marshall, supra, 121 F.3d at p. 1252.) For example, she had previously been employed as a district attorney in San Francisco. (RT 1343.) She had a young daughter, and two stepdaughters, suggesting the potential for identification with the young female victims in the case. (RT 3083.) Ms. Johnson's husband and mother had been victims of burglary, and she had a friend who had been the victim of an assault. (SCT #6 4522-4523.) Ms. Johnson had several policewomen and correctional officers in her family. (SCT #6 4526.)

Hence, the record as a whole simply fails to support the credibility of the race-neutral justification proffered by Mr. Cooper for excusing Ms. Johnson.

Prospective Juror Mitchell

Mr. Cooper asserted as reasons for excusing Mr. Mitchell:

> "Mr. Mitchell was someone who both times that he – was it three times? I don't remember if he was in on hardship. I don't remember if he was in on hardship. But both times I listened to Mr. Mitchell speak. And at the time that I talked with him during the private questioning, I was impressed with Mr. Mitchell – he negatively impressed me as a person that I wanted as a juror from – just from his demeanor and – but more importantly than that, his – what he said during the individual questioning when he spoke about his belief that – and these were my words, not his, but we talked about this concept back and forth, that in a courtroom that jurors could be hoodwinked by the advocates in the case." (RT 3219-3220.)

The prosecutor's somewhat tongue-tied explanation was twofold: (1) this panelist "negatively" impressed him as someone he did not want on the jury; (2) this juror had expressed the belief that he could be "hoodwinked" by the lawyers in the case.

The first reason stated is facially insufficient to justify the use of a peremptory challenge to excuse another Black juror in a case involving a Black defendant and a White victim. Without more, observations of a juror's demeanor in the courtroom will not suffice to explain away the apparently discriminatory use of peremptory challenges. (See People v. Hall (1983) 35 Cal.3d 161, 165.) The explanation "was so vague as to be of little assistance." (People v. Turner, supra, 42 Cal.3d at p. 726; see also Turner v. Marshall, supra, 121 F.3d at p. 1254 ["Such vague musing simply does not suffice to explain a peremptory challenge under Batson."].) The prosecutor's generalized negative impression also does not satisfy the need for some explanation how the panelist's demeanor was likely to affect his ability to decide the "particular case to be tried." (Batson v. Kentucky, supra, 476 U.S. at p. 98.)

The second reason offered for excusing Mr. Mitchell -- his purported belief that he might be "hoodwinked" by lawyers -- likewise fails to survive examination under Batson and Wheeler, and the United States Supreme Court's recent decision in Miller-El. In the written questionnaire, Mr. Mitchell had described his "general attitude" toward lawyers as "needed in society." (SCT #6 6137.) Mr. Mitchell had described his "general feelings" about the death penalty this way: "No problem with death penalty as long as there is no corruption in case. All members of society have a just and honest trail [sic] . . . ." (SCT #6 6140.)

During Hovey *voir dire*, Mr. Mitchell expressed complete neutrality towards the options of death, or life without parole, and a willingness to consider both, even in a case involving murder during a robbery, or an attempted rape. (RT 1654-1668.) Asked to explain his "corruption" remark in relation to a question about the death penalty, Mr. Mitchell stated:

> ". . . it involves manipulation, manipulation of facts. Manipulation is – let me put it point blank, lawyers and other

> attorneys. There has to be a very, very strict move to make everything very sincere, very honest in appeal to a juror. You're dealing with a woman's or a man's life. And I think that element alone makes it very, very serious and that evidence presented is based on the fact and that it's not been manipulated to manipulate jurors into giving the desired decision from jurors for the death penalty or for life in prison. This is very serious. It's not a play game. This is somebody's life. And if I am to say, yes, this person deserves life in prison or the death penalty, I want the feeling, hey, this was presented very, very beautifully and without corruption." (RT 1664-1664.)

The explanation communicates nothing more than this panelist's concern that, given the gravity of the life or death decision involved, the presentation of evidence should be free of corrupting influences. The remarks do not suggest any unusual fear, paranoia, or belief on the part of Mr. Mitchell, that he would be "hoodwinked" by anyone, much less the lawyers in this case.

Furthermore, reliance on Mr. Mitchell's relatively mild concern about lawyers is patently disingenuous when compared with the prosecutor's attitude toward prospective jurors exhibiting far greater hostility toward lawyers than Mr. Mitchell.

For example, prospective juror Madden viewed "low-life" lawyers as "roadblocks to finding and dispensing justice." Mr. Madden also had a bumper sticker on his car declaring, "Have you kicked your lawyer today?" (SCT #6 5613; RT 1533, 1534.) Mr. Cooper used a peremptory challenge to excuse Mr. Mitchell; yet he opposed the defense attorneys' motion to excuse panelist David Madden for cause, with the following explanation:

> "Your honor, what Mr. Madden thinks of lawyers I don't think has anything to do with the issue before the Court right now." (RT 1551.)

Prospective juror Mary Lopez wrote that sometimes lawyers helped criminals "get away with murder." (SCT #6 5365.) During oral *voir dire*, she

admitted the view that attorneys on both sides of a case sometimes "covered up" or "shaded over" the truth. (RT 2656-2657.) When defense counsel moved to excuse Ms. Lopez for cause, the prosecutor objected: "Your Honor, she's not excludable taking the totality of her responses." (RT 2671.)

Seated juror Robert Fees, called lawyers a "necessary evil." (SCT #6 2676.) Juror Gleason described his attitude toward lawyers as "questionable". (SCT #6 3323.) Juror Lujan wrote that lawyers "charge too much." (SCT #6 5528.) Yet these jurors were not even questioned about their views. The prosecutor's disparate treatment of these prospective and seated jurors constitutes strong evidence that the purported race-neutral justifications were a mere pretext for purposeful discrimination. (Lewis v. Lewis, supra; Miller-El v. Cockrell, supra, 123 S.Ct. 1029.)

In addition, like Ms. Johnson, Mr. Mitchell had other attributes which should have made him an attractive juror from the prosecution's perspective. (People v. Turner, supra, 42 Cal.3d at p. 726; Turner v. Marshall, supra, 121 F.3d 1248.) His brother was a police officer. (SCT #6 6123.) Mr. Mitchell himself had employment which involved some work inside the jail. (RT 3199.) Hence, the reasons offered in support of Mr. Mitchell's excusal should clearly be disbelieved as a mere pretext for invidious discrimination.

Prospective Juror Blue

Mr. Cooper said he excused Black panelist Sarah Blue for the following reasons:

> "On the basis of her answer in the questionnaire that's part of the record and her response here today, I had a concern about that, about given the serious nature of the charges and her sometimes articulation of a belief that if somebody goes out and just kills, there's got to be something wrong with the person in their mind from the fact of killing someone." (RT 3219.)

In response to a written question regarding jurors' beliefs in "mental illness", Ms. Blue had answered: "I feel like this if someone goes out and

commit a crime or what-have-you and they wasn't born mentally ill, I feel its got to be something wrong with them in their mind because you don't just go out and kill someone." (SCT #6 659.)

During general *voir dire*, Mr. Cooper asked Ms. Blue about this statement. The panelist assured the prosecutor she would "hear the psychiatrists and psychologist reports and everything like that" and then decide the case. (RT 3139.) She also insisted that she would have to hear the evidence to really decide any mental illness related issue. (RT 3139-3140.) Mr. Cooper asked Ms. Blue directly whether she could "ever find that someone had committed murder and yet also find that there was not something wrong with them in their mind." (RT 3141.) Ms. Blue answered affirmatively. (RT 3141.) She explained several times that she would not really know whether someone had something wrong with them in their mind without hearing the evidence; in some cases she would feel that way, but in others she would not. (RT 3141.)

On its face, the prosecutor's statement of reasons appears race neutral. However, his disparate treatment of another seated juror, Jose Perez, shows that the proffered reason was really a clever pretext to keep Black persons off the jury. Mr. Perez had stated on his questionnaire that "some people have to be mentally ill for some of the rapes and murders and so many other cases of children molestation, etc." (SCT #6 6779.) Mr. Cooper questioned Mr. Perez about this statement, just as he questioned Ms. Blue. Mr. Perez, like Ms. Blue, acknowledged that persons who commit certain types of crimes may or may not be mentally ill, and that some serious crimes could be committed by persons who were sane. (RT 2782-2783.) Yet, the Black juror, Ms. Blue, was peremptorily excused; Mr. Perez was not.

Another seated juror, Mr. Givens, also wrote on his written questionnaire that "mental imbalances could cause a person to be mentally

sick." (SCT #6 3242.) Moreover, Mr. Givens expressed fairly strong personal antipathy for the death penalty, which the prosecutor focused on during questioning. (RT 1107, 1114.) Yet this juror was not even questioned about his views on mental illness, and the prosecutor did not use a peremptory challenge to excuse him. (RT 1114, 3111, 3114-3115.)

Hence, in light of the disparate treatment of seated jurors, and the prosecutor's overall pattern of exercising peremptory challenges against Black prospective jurors for apparently pretextual reasons, the prosecutor's stated reason for peremptorily challenging Ms. Blue is not credible. (Turner v. Marshall, supra, 121 F.3d at pp. 1251-1254; Lewis v. Lewis, supra, 321 F.3d 824; Miller-El v. Cockrell, supra, 123 S.Ct. 1029.)

Prospective Juror Cato

Mr. Cooper explained that Mr. Cato had "specific training and experience in issues that bear on this case," and on that basis alone it was his opinion that a jury should not be "controlled by any one personality from a particular relevant profession . . . ." (RT 3294.) Mr. Cato had done advanced academic work in psychology and counseling, and had been involved in "certain kinds of social programs." Mr. Cooper expressed concern that Mr. Cato would be receptive to appeals to his sensitivity to "social factors, environmental factors of the defendant." (RT 3295.) He also compared his reasons for excusing Mr. Cato with his reasons for excusing three other jurors, using peremptory challenges: William Bickley, Ruth Masters and Gary Cordova. (RT 3295.)

Mr. Cooper also noted that Mr. Cato had voiced some concerns regarding opportunities for advancement in his career. (RT 3295-3296.)

In the written questionnaire, Mr. Cato reported his present occupation as self-employed and truck driver for Conway Western Express. (SCT #6 1096, 1098.) He attended Vision Christian University and was a "licensed

Pastoral counselor." (SCT #6 1097, 1113A.)

During individual Hovey oral *voir dire*, Mr. Cato voiced no strong views or preferences for the death penalty or life without parole. (RT 565-568.) He reported that he had earned a masters degree in theological studies and was working on a Ph.D. (RT 568.)

Mr. Cato explained that two Sundays per month, he and his wife held religious services for homeless people living on the streets. Cato and his wife also worked trying to get help, including food and shelter, for homeless families. (RT 3287-3288.) Mr. Cato had taken Christian and secular psychology courses, and he did drug rehabilitation, marriage, and child abuse counseling. (RT 3288-3289.) He said his religious views did not conflict with the death penalty. (RT 568.)

During *voir dire*, Mr. Cato mentioned his need to go to Los Angeles for 15 weeks on November 1st, for manager training. (RT 3239.) He assured the Court and the prosecutor he could be fair and impartial even if not excused for hardship, and characterized the situation as "not that big of a conflict." (RT 3239-3240, 3289-3290.)

The prosecutor's explanation for excusing Mr. Cato appears on its face to be race-neutral. Serious credibility questions arise, however, when one considers the prosecutor's overall pattern of dismissing Black jurors. Comparative analysis of Mr. Cooper's treatment of other jurors also tends to suggest that Mr. Cato was excused for reasons other than those stated. (Lewis v. Lewis, supra.) As this Court has observed, "in some cases the reviewing court may conclude that the explanation is inherently implausible in light of the whole record." (People v. Turner, supra, 42 Cal.3d at p. 720; Turner v. Marshall, supra, 121 F.3d at pp. 1251-1255.)

For example, Mr. Cooper did not offer to stipulate to remove the Reverend Lindall McDaniel, when the defense sought to remove him for

cause, perhaps because this panelist so strongly favored the death penalty. (RT 1632.) Reverend McDaniel was the Minister for the Selma Church of Christ, and he expressed "very strong convictions concerning belief in God and the Bible." (SCT #6 5963; RT 1629.) During *voir dire*, the prosecutor exhibited no interest, and asked this panelist no questions about his ministering activities.

A number of seated jurors had taken higher education courses in psychology, or other subjects with some bearing on the trial, and some had even done some type of counseling. Jurors Gosland and Stollar had taken courses in psychology. (SCT #6 3469, 8261.) Juror Behnsch-Hill was working on a teaching credential; she had studied Constitutional Law and taken classes in psychology. (SCT #6 375, 384, 392.) Juror Belk was a high school teacher for the Department of Corrections. She taught remedial education for adult women in prison and did counseling for pre-release inmates. (SCT #6 411, 414, 415, 424.) Most significantly, Juror Perez had training in psychological and psychiatric theory, and he had counseled soldiers while he was in the military. (SCT #6 6777-6779; RT 2782-2783.) It appears obvious from comparison of Mr. Cato's attributes with those of seated jurors, especially Ms. Belk and Mr. Perez, that his advanced academic work and counseling activities were not the true reasons for the exercise of a peremptory challenge.

The prosecutor's reliance on Mr. Cato's employment difficulties was likewise a mere subterfuge. *Many* seated jurors voiced substantially greater unhappiness about their conflicts with employment than did Mr. Cato. For example, Mr. Givens and Mr. Gleason both voiced a lot of concern about the impact jury service would have on their ability to fulfill their school-year teaching obligations. (RT 1112-1113; RT 2528-2530.) Juror Schmidt did not want to serve as a juror at all, in part because it was going to interfere with

scheduled out of state job training. (RT 1907-1911.) Juror Wakefield was concerned that his jury service would work a hardship on his business partner. (RT 2798-2802.) Yet Mr. Cooper's peremptory challenge was used on a Black juror, Mr. Cato, who had reassured the Court that any employment problem would not work a substantial hardship, nor would it interfere with his ability to be fair.

In Riley v. Taylor, supra, 277 F.3d 261, the Third Circuit Court of Appeals reversed a death judgment on Batson grounds, where the prosecutor claimed as a race-neutral reason for exercising a peremptory challenge that the struck Black juror had asked to be excused from jury service and therefore might be an inattentive juror. In reversing, the reviewing court relied on the fact that peremptory challenges had not been used to exclude *White* jurors who had requested to be excused from jury service, and who therefore might also be inattentive jurors. (Id. at pp. 279-280.) The Court stated: "A comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual." (Id. at p. 282.)

"The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that the court should sustain a Batson challenge." (Lewis v. Lewis, supra; see also Turner v. Marshall, supra, 121 F.3d at pp. 1251-1255; United States v. Chinchilla, supra, 874 F.2d at pp. 698-699.) In Mr. Cato's case, the prosecutor's reliance on a totally specious reason for exercising a peremptory challenge weighs in favor of finding purposeful discrimination, regardless of other reasons stated.

Mr. Cooper's comparison of Mr. Cato with other peremptorily dismissed White or Hispanic jurors likewise provides little support for the claim that peremptory challenges of Black jurors were exercised for

completely race-neutral reasons. Two of the panelists identified by Mr. Cooper as excused for reasons similar to Mr. Cato presented much more convincing cases for peremptory disqualification.

The first, prospective juror Bickley, a retired psychiatric social worker, sometimes still worked on a retained basis for the Fresno County Department of Health. (SCT #6 527, 544.) Formerly, Mr. Bickley had worked for 25 years doing psychotherapy for the Mental Health Department. He had supervised youth case management in Juvenile Hall, in his later years. (SCT #6 528, 544: RT 3279.)

Mr. Bickley was acquainted with Dr. Seymour, appellant's treating psychiatrist, on a professional basis. (RT 510.) This panelist had actually *testified* as an expert witness in mental health matters on a number of occasions, including matters in Judge Fitch's courtroom. (RT 3279-3280.) He had experience with insanity as it related to competency issues in Juvenile Court matters. (RT 3280.)

The second, Dr. Ruth Masters, was a professor of criminology at Fresno State University. (SCT #6 5886-5887; RT 3280.) During Hovey *voir dire*, Dr. Masters had candidly admitted she was against the death penalty "in an enlightened society." (SCT #6 5912; RT 1581-1582) The prosecutor made a motion to excuse this panelist for anti-death penalty bias, but the motion was denied. (RT 1579-1598.) Dr. Masters' dismissal was obviously based, first and foremost, on her anti-death penalty bias, not on any professional disqualification.

A third White or Hispanic surname prospective juror selected for peremptory challenge for analogous reasons, Gary Cordova, was a construction worker, who resided with a father who was a pastor. (SCT #6 1553, 1552.) Though not a man of the cloth himself, Mr. Cordova had attended Latin American Bible Institute and had majored in Bible and

theology. (SCT #6 1552.) Mr. Cordova was active in his Church and did ministry work, preaching in the jails, prisons and Juvenile Hall. (SCT #6 1559; RT 3242.)

Mr. Cordova engaged in his counseling activities *within the prison system*, whereas Mr. Cato had counseled persons in the streets or in homeless shelters. Consequently, even Mr. Cordova presented a much more credible case for peremptory challenge than Mr. Cato, because his personal involvement with prisoners might logically be considered a potential source of sympathy for the accused in a criminal case. Appellant was not a homeless person, and there was nothing about Mr. Cato's volunteer efforts on behalf of the homeless which logically should have produced any bias in favor of him in this case.

In People v. Turner, supra, this Court rejected a prosecutor's explanation under similar circumstances. The prosecutor's explained his use of a peremptory challenge on a Black juror by saying that there was something about the juror's work and background in hospital administration that "would not be good for the People's case." (Id. at p. 725.) The prosecutor also indicated that he had excused this juror "'along with quite a few other people, too, for the same reason.'" (Id. at p. 726.) This Court found the explanation "so vague as to be of little assistance." (Id. at p. 726.) In addition, this Court considered the fact that at least one other excused panelist with a medically-related job was actually excused because of her scruples against the death penalty. (Id. at p. 726.) This, too, was the case here, where Dr. Masters was obviously excused for anti-death penalty bias, apart from her educational level or criminology background. Furthermore, the prosecution's inconsistent use of peremptory challenges to excuse persons who had done advanced academic work, or who had involved themselves in "social programs," belies the sincerity of that explanation as applied to Mr. Cato's case.

D. Reversal of the guilt, sanity and penalty phase trials is mandated.

In this case, the trial court unreasonably found that the prosecution's actions failed to establish a *prima facie* case of racial discrimination. (See, Miller-El v. Cockrell, supra, 123 S.Ct. at p. 1044.) Consequently, the trial court never discharged its duty to evaluate the prosecutor's purported "race-neutral" explanations offered by the prosecutor. *De novo* review of the entire record of *voir dire* establishes a reasonable inference – indeed, an overwhelming inference -- that the prosecutor exercised peremptory challenges against four prospective Black jurors for racially discriminatory reasons. This alone requires reversal of the guilt, sanity and penalty phase trials. (Lewis v. Lewis, supra, 321 F.3d at pp. 834-835; People v. Turner, supra, 42 Cal.3d at p. 728; People v. Hall, supra, 35 Cal.3d at p. 169.)

Furthermore, even if this Court wishes to consider the merits of the prosecutor's purported "race-neutral' reasons – stated entirely for the benefit of this reviewing Court and never considered by the judge – reversal is still required. As previously noted, a comparative analysis of struck jurors with empaneled jurors demonstrates that the "race-neutral" reasons proffered by D.D.A. Cooper to justify the dismissal of prospective jurors Johnson, Mitchell, Blue and Cato, were pretextual. The explanations included recitation of characteristics shared with seated jurors, or even prospective jurors which the defense sought unsuccessfully sought to excuse for cause, *over the prosecutor's objection.* Because appellant was convicted by a jury from which persons of his own race were systematically excluded, the entire judgment must be reversed. (Batson v. Kentucky, supra, 476 U.S. 79; Miller-El v. Cockrell, supra; Lewis v. Lewis, supra; People v. Wheeler, supra, 22 Cal.3d 258.)

XXXI THE ERRORS ASSERTED ARGUMENT SECTION FOUR (ARGUMENTS XVIII - XXX) INDIVIDUALLY AND CUMULATIVELY VIOLATED THE IMPARTIAL JURY AND DUE PROCESS GUARANTEES OF THE STATE AND FEDERAL CONSTITUTIONS, AND DEPRIVED THE DEATH JUDGMENT OF ITS RELIABILITY IN VIOLATION OF BOTH CONSTITUTIONS.

As is more fully set forth in Argument XVIII through XXX, the trial court in this case: (1) engaged in a discriminatory pattern of ruling on the parties' for-cause challenges, clearly favoring the prosecution; (2) improperly excused jurors with death penalty scruples who were not disqualified according to Witt standards; (3) denied defense for-cause motions to excuse seven jurors whose attitudes so strongly favored death over life imprisonment without parole that their inclusion on the jury would have violated Morgan v. Illinois, supra, 504 U.S. 719; (4) denied for-cause challenges of several jurors whose biases against criminal lawyers, and mental defense evidence, would have made it difficult if not impossible to receive a fair guilt or sanity phase trial; (5) unconstitutionally restricted *voir dire* by defense counsel which sought to elicit guilt and/or penalty phase sources of bias stemming from appellant's prior record of violent felonies; and (6) allowed the prosecutor to use peremptory challenges to purge the jury panel of nearly all Black jurors in a case involving a Black defendant and White victims. The trial court's rulings during jury selection individually, and cumulatively, violated the impartial jury, equal protection and due process guarantees of the state and federal constitutions, and deprived the guilt, sanity and death judgments of their reliability in violation of state and federal constitutional provisions. (U.S. Const., Amendments V, VI, VIII, & XIV; Cal. Const., Art. I, §§ 7, 15, 16 & 17.)

Article I, section 16 of the California Constitution declares in relevant part: "Trial by jury is an inviolate right and shall be secured to all . . .. .In criminal actions in which a felony is charged, the jury shall consist of 12 persons." (See also, People v. Wheeler, supra, 22 Cal.3d at p. 265.) This provision of the state constitution does not explicitly guarantee the right to an "impartial" jury, but the right is implicitly guaranteed. (Ibid.; People v. Bennett (1926) 79 Cal.App.76, 91; People v. Suesser (1901) 132 Cal. 631, 632.) The Sixth Amendment of the United States Constitution explicitly guarantees the right to a fair trial by an "impartial" jury. The denial of an impartial jury also violates the Due Process Clause of the Fourteenth Amendment. (Irwin v. Dowd (1961) 366 U.S. 717, 725-729.)

For many decades, the state and federal constitutional guarantees of an impartial jury have held that petit juries must be truly representative of the community, not just representative of any one special group or class. (Smith v. Texas (194) 311 U.S. 128, 130; Glasser v. United States (1942) 315 U.S. 60, 85-86; People v. Wheeler, supra, 22 Cal.3d at p. 267; People v. Garceau (1993) 6 Cal.4th 140, 173-174.) The American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community. (Thiel v. Southern Pacific Co. (1946) 328 U.S. 217; Wheeler at p. 268; Hovey v. Superior Court (1985) 38 Cal.3d 69, 98.) This means that juries must be selected without systematic and intentional exclusion of any cognizable economic, social, religious, racial, political, or geographical group. (Thiel at p. 220; Wheeler at p. 268.) Such systematic exclusion by either party of a cognizable racial group violates equal protection as well as due process guarantees. (U.S. Const., Amendment XIV; Cal. Const., Art. I, § 7; Batson v. Kentucky, supra, 476 U.S. at p. 89; People v. Silva, supra, 25 Cal.4th at p. 386; Georgia v. McCollum (1992) 505 U.S. 42, 44-54 .)

No state may entrust the determination of whether a man is innocent or

guilty to a tribunal organized to convict. (Witherspoon v. Illinois, supra, 391 U.S. at p. 522; Lockhart v. McCree (1986) 476 U.S. 162, 179; quoting Fay v. New York, supra, 332 U.S. at p. 294.) Moreover, under our state and federal constitutions, a capital defendant enjoys a coequal constitutional right not to be sentenced by a tribunal organized to return a verdict of death. (Gray v. Mississippi, supra, 481 U.S. at p. 668; Witherspoon v. Illinois, supra, 391 U.S. at pp. 520-522.) "No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Witherspoon at pp. 522-523; cited by People v. Fields (1983) 35 Cal.3d 329, 344.)

"*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (Rosales-Lopez v. United States (1981) 451 U.S. 182, 188; In re Hitchings (1993) 6 Cal.4th 97, 110; see also Mu'min v. Virginia (1991) 500 U.S. 415.) The risk in denying adequate *voir dire* is "most grave when the issue is of life or death." (Aldridge v. United States (1931) 283 U.S. 308, 314.)

Each of the above principles applies with special force in capital cases. (California v. Ramos, supra, 463 U.S. at pp. 998-999.) A state must assure reliability in the process by which a life is taken. (Gregg v. Georgia (1976) 428 U.s. 153, 196-206 (Op. of Stewart, Powell & Stevens, JJ.).) When the government seeks to impose the ultimate penalty, the jury must pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. (Mattox v. United States, supra, 146 U.S. 140, 149.) A capital sentence must be struck down when the circumstances under which it has been imposed creates an unacceptable risk that the death penalty has been meted out arbitrarily or capriciously. (Caldwell v. Mississipi (1985) 472 U.S.

320, 343; California v. Ramos, supra, at p. 999.)

Of course, appellant does not retreat from his position earlier advanced. The trial court's errors, dismissing qualified jurors in violation of Witt, constitutes reversible error *per se*. (People v. Ashmus, supra, 54 Cal.3d at p. 962; Gray v. Mississippi, supra, 481 U.S. at pp. 666-667.) Similarly, the prosecutor's purposeful discrimination against Black jurors, left uncorrected by the trial court, also mandates *per se* reversal of the guilt, sanity and penalty phase judgments. (People v. Wheeler, supra, 22 Cal.3d at p. 283; Batson v. Kentucky, supra, 476 U.S. at p. ; Miller-El v. Cockrell, supra, 123 S.Ct. 1029; Lewis v. Lewis, supra.) Appellant likewise argues that reversal *per se* is required because the trial court's pattern of rulings on for-cause challenges evidences invidious discrimination against the defense by a partial tribunal. Ross v. Oklahoma, supra, 487 U.S. at p. 91, fn. 5; Tumey v. Ohio, supra, 273 U.S. 510; Arizona v. Fulminante, supra, 499 U.S. at p. 294 [Opinion of White, J. Dissenting in part and concurring in part].)

Even assuming for the sake of argument, this Court finds the absence of any single error requiring *per se* reversal of the judgment for all phases of the trial, the cumulative errors of the court so infected the trial with unfairness that the conviction and sentence must still be reversed. This Court should not ignore the overall prejudice to appellant's right to a fair trial, an impartial jury, and a reliable guilt, sanity and penalty phase determinations that resulted from the trial court's transparently skewed handling of jury *voir dire*. (Cf. People v. Hill, supra, 17 Cal.4th at p. 845.)

"Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal." (United States v. Necoechea (9th Cir. 1993) 986 F.2d 1273, 1282.) "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors."

(United States v. Frederick (9th Cir. 1996) 78 F.3d 1370, 1381.)

In this case, evidence that Roy committed a robbery, or an attempted rape, was insufficient, or at least very weak. The evidence supporting each of the three special circumstances findings was also marginal, at best, if not constitutionally inadequate. (See Argument Section 1, ante.) Evidence of Roy's sanity was sharply conflicted, as was evidence that he was incapable of forming the requisite intent for murder. Under the circumstances, "[t]he collective presence of these errors [during jury selection] is devastating to one's confidence in the reliability of this verdict, and therefore requires, at the very least, a new trial." (William v. Poole (9th Cir. 2002) 282 F.3d 1204, 1211.)

ARGUMENT SECTION 5

ARGUMENTS PERTAINING TO THE TRIAL COURT'S FAILURE TO HAVE A COURT REPORTER REPORT ALL CONFERENCES, AND BENCH AND SIDE BAR PROCEEDINGS, AND APPELLANT'S EXCLUSION FROM UNREPORTED, SUBSTANTIVE LEGAL PROCEEDINGS HELD AT THE BENCH, OR IN THE HALLWAY OUTSIDE THE COURTROOM DURING THE TRIAL.

THE INTERRELATED FACTS

On more than 180 occasions during proceedings in the trial court, Roy was personally absent from proceedings held at the bench, or outside the courtroom in the hallway.[65] This circumstance was largely the result of a policy of the trial court, which allowed attorneys to object in the jury's presence, but required them to argue objections at bench, or in the hallway, outside the earshot and/or presence of jurors, the court reporter, and Roy. The Court explained its policy this way, prior to commencement of jury selection for the guilt phase trial:

> "Both of you have been in my court before and you know I do not -- all three – no, Margarita [Martinez] has not, but Ms. O'Neill and Mr. Cooper have been in my court, and you know I do not permit speaking objections in front of the jury. I'm rather strict on that."
>
> "The only objections you can make are two-word objections such as 'objection, hearsay'; objection leading,' et cetera. I guess 'lack of foundation' requires more than one word. And no arguments are permitted in the presence of the jury . . . . I'll just rule.
>
> "And if you feel that I've ruled incorrectly, then ask for

---

[65] In the record of the trial, when the court reporter refers to proceedings "at the bench", it means the discussion occurred inside the courtroom, but out of the hearing of the jury and Roy. When the record refers to a conference, a "side bar" or "side bench", it refers to proceedings held in the hallway, outside the courtroom, outside the presence of the Roy, the jury and the court reporter. (SCT #7 228-229.)

> a side bench. We'll go outside and have a side bench. In this court it's impossible to – well, not impossible but very difficult to drag a reporter in and out, so we usually confer. And if we don't reach agreement, then we'll put the matter on the record.
>
> "Side bench is properly used to argue with the judge if you feel his rulings on evidentiary matters are incorrect and properly used to warn the Court and perhaps opposing counsel of a mistrial that you feel is coming around the corner . . . ." (RT 121.)

As the result of the court's policy, most bench and side bar conferences were also not reported in direct violation of Pen. Code, § 190.9.

Following appointment of counsel on appeal, settlement proceedings were conducted in the trial court with all trial counsel except Margarita Martinez, and the trial judge, for the purpose of attempting to reconstruct what occurred during all unreported proceedings, and which parties or attorneys were present. The result of settlement proceedings was an 82-page Engrossed Settled Statement on Appeal. (SCT #7 147 et seq.)

During settlement proceedings, the parties and the court were in agreement that certain proceedings concerned only administrative or non-substantive procedural or scheduling matters, or clarification of what had occurred during reported proceedings. (SCT #7 158-226; RT 759, 1109, 1378, 1792, 1965, 2188, 2270, 2649, 3196, 3225, 3234, 3263, 3318, 3331, 3364, 3509, 3681, 3974, 3999, 4188, 4272, 4399, 4617, 4625, 4654, 4680, 4697, 4785, 5165, 5191, 5196, 5210, 5329, 5401, 5698, 5744, 6505, 6561, 6593, 7290, 7375, 7596, 7597, 7714, 7715, 7787, 7902, 8069, 8150, 8152, 8438, 9142, 9522, 9683, 9960, 9980, 10661, 10698, 11062, 11111, 11288, 11293, 11414, 11500, 11507.)

All parties agreed that certain unreported conferences held during jury selection were for the purpose of discussing motions, objections or substantive legal matters affecting selection of a jury. (SCT #7 159-162; RT 1058, 2157, 2714, 2805, 3270.)

Several exhibit and jury instructional conferences were also held in Roy's absence, although he expressly waived his presence for conferences on guilt-phase and sanity-phase jury instructions. (SCT #7 168, 212, 227; RT 7595, 9033, 9034, 9182-9185, 9486-9487, 11824-11831.)

At least one unreported conference was held at which Mr. Kinney discussed his inability to proceed with Roy's trial due to health problems. (CT 1494; SCT #7 225.)

For a significant number of unreported conferences, the parties could not agree on what occurred, and the trial court no longer had no recollection of the proceeding, so the proceedings proved incapable of post-conviction settlement. (SCT #7 162, 163, 164, 169, 170, 181, 187, 223, 226; RT 2905, 3007, 3107, 3177, 3556, 4518, 5014, 11252, 11274, 11781.)

The remainder of the unreported conferences were determined from context to have concerned substantive legal matters, including objections to evidence or testimony asserted on hearsay, foundational, chain-of-custody, relevance, or other grounds, including untimely discovery; objections to prejudicial evidence; objections to the manner of questioning; or discussions of the court and counsel regarding collateral issues like Roy's requests to discharge counsel. In many instances, reasonably definitive settlement of what occurred was possible, because the court had summarized what had gone on during off-the-record proceedings when proceedings resumed on the record. In many instances, however, the record was not as clear and the parties to settlement proceedings were only able to ascertain that a certain general subject matter had been discussed, but it was not possible to reconstruct the particular statements or arguments of the parties in any detail. (See, SCT #7 147-229.)

A summary of each unreported proceeding is set forth in the Engrossed Settled Statement on Appeal and it would be redundant, and burdensome to

attempt to summarize each proceeding in the Appellant's Opening Brief. The Engrossed Settled Statement on Appeal is therefore incorporated by reference as though set forth in full at this point.

XXXII THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT WILFULLY VIOLATED APPELLANT'S STATUTORY, AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE PERSONALLY PRESENT AT ALL CRITICAL PHASES OF THE PROCEEDINGS IN A PROSECUTION FOR A CAPITAL OFFENSE.

A. Appellant's right to be personally present is guaranteed by the due process and confrontation clauses of the state and federal constitutions, and state statute.

"A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code." (People v. Waidla (2000) 22 Cal.4th 690, 741.)

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. (Lewis v. United States (1892) 146 U.S. 370, 372.) The defendant's right to be present at every stage of trial "is scarcely less important to the accused than the right of trial itself." (Diaz v. United States (1912) 223 U.S. 442, 455.) The United States Supreme Court recognizes that "the right to personal presence at all critical stages of the trial" is a fundamental federal constitutional right. (Rushen v. Spain (1983) 464 U.S. 114, 118.)

One of the most basic rights guaranteed by the Sixth Amendment's Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. (Illinois v. Allen (1970) 397 U.S. 337, 338.) Under the Sixth Amendment's confrontation clause, a criminal defendant has a right

to be personally present at a particular proceeding if his appearance is necessary to prevent interference with the opportunity for effective cross-examination. (Kentucky v. Stincer (1987) 482 U.S. 730, 744-745; People v. Waidla, supra, 22 Cal.4th at p. 741.)

Even when witnesses are not testifying, the Fourteenth Amendment's due process clause independently guarantees a criminal defendant the right to be personally present at any proceeding which is critical to the outcome, or where personal presence would contribute to the fairness of the proceeding. (Kentucky v. Stincer, supra, 482 U.S. at p. 745; People v. Waidla, supra, 22 Cal.4th at p. 742.) The presence of a defendant is a condition of due process if a fair and just hearing would be thwarted in his absence. (Snyder v. Massachusetts (1934) 291 U.S. 97, 107-108; see also Campbell v. Rice (9th Cir. 2002) 303 F.3d 892.)

California's Constitution also contains provisions which independently guarantee due process and the right of confrontation in state criminal proceedings. (Cal. Const., Art. I, §§ 7, 15.) "Our state Constitution guarantees that 'the defendant in a criminal cause has the right . . . to be personally present with counsel, and to be confronted with the witnesses against the defendant.'" (People v. Gutierrez (2003) 29 Cal.4th 1196, 1202; quoting Cal. Const., Art. I, § 15.) "A defendant's right to presence is 'fundamental to our system of justice and guaranteed by our Constitution.'" (People v. Gutierrez, supra, at p. 1209; quoting People v. Lewis (1983) 144 Cal.App.3d 267, 279.)

California's statutory scheme, comprised of Pen. Code, §§ 977 and 1043, implements the state's constitutional protections. (People v. Gutierrez, supra, 29 Cal.4th at p. 1202.) Pen. Code, § 1043 requires that a defendant in a felony case be present at a trial. Only two exceptions are provided: (1) any defendant, even a capital defendant, may be removed from the courtroom for disruptive, disorderly or disrespectful behavior; and (2) a defendant in a

prosecution for an offense which *is not punishable by death* may be voluntarily absent. (People v. Jackson (1996) 13 Cal.4th 1164, 1210.)

Pen. Code, § 977 provides that in all cases in which a felony [other than a capital felony] is charged, the accused "shall" be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of imposition of sentence, unless the accused, with leave of the court, executes in open court a written waiver of the right to be personally present.

B. Roy did not expressly or impliedly waive his right to be personally present at unreported bench and side bar conferences.

This Court has held that, as a matter of both federal and state constitutional law, a capital defendant "may waive his right to be present even at critical stages of a trial." (People v. Edwards (1991) 54 Cal.3d 787, 810; accord People v. Jackson (1996) 13 Cal.4th 1164, 1210.) However, as a state statutory matter, a capital defendant may *not* voluntarily waive his right to be present during the proceedings enumerated in Pen. Code, § 977. (People v. Jackson, supra, 13 Cal.4th at p. 1211.)

Waiver is not an issue here. Roy was not excluded from at bench, or side bar conferences due to disorderly, disruptive, or disrespectful behavior. Roy signed no *written* waiver of his right to be present during any part of the proceedings in the trial court, so there was no compliance with Pen. Code, § 977. Roy engaged in no behavior which from which voluntary relinquishment of his right to be present can be implied. In only a few instances involving discussion of jury instructions, did Roy give verbal authorization for proceedings to be held in his absence. The vast majority of conferences at bench, or in the hallway or in chambers were held in Roy's absence, without his express or implied consent.

Indeed, the record suggests that Roy's involuntary exclusion from

participation in side bar, and at bench conferences was one source of his dissatisfaction with counsel, and a motivating factor in his numerous Marsden motions. On October 19, 1993, during one Marsden hearing, Roy specifically complained that the deputy public defenders had been distancing themselves from him, and excluding him from side bar conferences. (RT 4362-4363; see Argument Section 2.)[66]

Trial counsel initially all obeyed the trial court's directive to hold argument in the hallway of the courtroom, or at the bench, outside the presence of Roy and the court reporter. However, the record as a whole suggests that counsel did not necessarily approve of the practice. Before the trial started, the court characterized its own enforcement of the off-the-record procedure as "strict", without really giving counsel any opportunity to respond. (RT 121.) Part way through the trial, Ms. O'Neill objected to having any more "side benches," and demanded that all objections be addressed on the record. (RT 2289.) Yet many unreported conferences were held in Roy's absence after this point.

In any event, it is clear that Roy personally did not waive his right participate in most off-the-record proceedings.

C. Roy was excluded from critical phases of his capital trial in violation of the state and federal constitutions, and state law.

Roy was excluded from bench and side bar conferences at which a broad range of matters were discussed, including administrative and

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[66] Although counsel were not discharged following this Marsden motion, as a result of Roy's complaints, Ernest Kinney was appointed to act as liason between Roy and Ms. O'Neill and Ms. Martinez, with whom communication had broken down. Yet Mr. Kinney also did not participate in at bench, or side bar conferences for the first few weeks of his involvement in the case. (See, SCT #7 186-195.) Accordingly, the appointment of liason counsel did not directly address Roy's objection that he was being excluded from side bar proceedings.

scheduling matters, jury instructional and exhibit conferences, issues pertaining to the selection of the jury, and substantive arguments supporting or opposing objections or legal positions advanced by either party. He was not absent during proceedings when witnesses were testifying before a jury.

This Court has held that, as a matter of state statutory and constitutional law, a defendant is *not* entitled to be personally present in chambers or at bench discussions which occur outside of the jury's presence, on questions of law or other matters to which the defendant's presence does not bear a "reasonably substantial relation to the fullness of his opportunity to defend against the charge." (People v. Carpenter (1997) 15 Cal.4th 312, 377; accord: People v. Bradford (1997) 15 Cal.4th 1229, 1357; People v. Holt (1997) 15 Cal.4th 619, 706; People v. Box (2000) 23 Cal.4th 1153, 1191.) At such proceedings, defendant "is entitled (but not required) to be present." (People v. Ochoa (2001) 26 Cal.4th 398, 435.) According to the decisions of this Court, Pen Code, §§ 977 and 1043 generally do not require a defendant's presence, or even a written waiver of presence, at proceedings which do not impinge on the opportunity to defend. (People v. Bradford, supra, at p. 1357.)

Using similar language, the federal courts have held that federal constitutional due process and confrontation rights are denied if a defendant's absence occurs when witnesses are testifying, or if the defendant's exclusion from proceedings impairs the "fullness of his opportunity to defend against the charge." (United States v. Gagnon (1985) 470 U.S. 522, 526.) For example, a number of federal court decisions have held that the federal constitution is not necessarily violated by a trial judge's *in camera* interaction with a juror, outside the defendant's presence. (United States v. Gagnon, supra; accord: United States v. Willis (11th Cir. 1985) 759 F.2d 1486, 1500 [defendant's absence from in chambers *voir dire*]; United States v. Watchmaker (11th Cir. 1985) 761 F.2d 1459, 1466 [defendant's absence from conference with juror]; United States v. Santiago (10th Cir. 1992) 977 F.2d

517, 522 [defendant's exclusion from *ex parte* questioning of a juror, on the record]; United States v. Bertoli (3rd Cir. 1994) 40 F.3d 1384, 1397 [defendant's exclusion from reported *ex parte* interviews with members of the jury]; United States v. Feliciano (2nd Cir. 2000) 223 F.3d 102, 110-111 [questioning of prospective jurors at bench, in presence of counsel].) Similarly, the Ninth Circuit Court of Appeals has held that a mere re-reading of reported testimony in a defendant's absence does not necessarily offend the federal confrontation clause or due process. (Hegler v. Borg (9th Cir. 1995) 50 F.3d 1472, 1476; Snyder v. Massachusetts, supra, 291 U.S. 97 [no due process or confrontation clause violation results from a jury's "bare inspection" of the scene of a crime, in defendant's absence].)

The fact that off-the-record proceedings in Roy's absence generally involved discussions of legal matters held outside the presence of the jury does not, as a matter of law, mean that Roy was *not* absent during any "critical" phases of the trial, or that his state and federal due process and confrontation rights were not compromised. As the United States Supreme Court has said:

> "Due process of law requires that proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results."

(Snyder v. Massachusetts, supra, at p. 116.)

This case is distinguishable from cases in which a defendant was absent for just "a short interlude in a complex trial." (Cf. United States v. Gagnon, supra, 470 U.S. at p. 527; see also United States v. Watchmaker, supra, 761 F.2d at p. 1466.) Here, there were an unprecedented number of proceedings from which Roy was excluded -- 181or more – and the sheer volume of proceedings from which Roy was excluded calls into question the fundamental fairness of the trial.

Furthermore, the "fullness" of Roy's ability to defend against the

charges was substantially impaired by the combined effect of several factors present here, not present in other cases considered by this Court. These factors include the impossibility of settlement of several significant unreported proceedings held in Roy's absence, the significant breakdown of Roy's relationship with public defenders, Barbara O'Neill and Margarita Martinez, and the absence of Ernest Kinney, as well as Roy, during legally significant unreported proceedings.

There were a total of ten instances where the court reporter indicated for the record that unreported conferences occurred, yet by the time record settlement proceedings were held, settlement of the record was impossible because the parties did not agree about what occurred and the trial judge no longer had any recollection. (SCT #7, 162, 163, 164, 169, 170, 181, 187, 223, 226; RT 2905, 3007, 3107, 3177, 3556, 4518, 5014, 11252, 11274, 11781.) Some of the unsettled proceedings occurred during the selection of the jury. Others, which occurred during the guilt phase, included one side bar during the testimony of Venus Farkus, Laurie's mother, a witness whose prior misdemeanor welfare fraud conviction later became the impetus for the declaration of a conflict by the public defender, and collateral litigation over the district attorney's failure to disclose the witness's conviction, prior to trial. (SCT #7 169; RT 3556.) Another such conference, on October 19, 1993, followed on the heels of one of many Marsden hearings at which Roy sought to discharge his attorneys. (SCT #7 181; RT 4518.) Still another unsettled, unreported conference, occurred during a recess following an objection to the admissibility hearsay statements by the deceased victim Laurie, regarding Roy's plan to kill her. (RT 5011-5014; SCT # 187.)

Roy was also excluded from several unreported at bench or side bar conferences that occurred during the penalty phase of the trial, and later proved incapable of settlement. Once such conference occurred during the penalty phase testimony of David Atwood. (SCT #7 223; RT 11252.)

Another occurred during the testimony of Roy's mother, Daisy Clark. (SCT #7 226; RT 11781.)

All of these unreported, unsettled discussions occurred at times and in contexts which suggest that the discussions may have regarded objections or rulings having important legal significance to the trial. Consequently, it cannot be said with any certainty that Roy's ability to confront witnesses, or defend against the charges was *not* compromised by his exclusion from these unsettled conferences. Because the record is unavailable, Roy cannot "suggest how his presence would have had any impact on matters discussed at of the proceedings." (Cf. People v. Holt, supra, 15 Cal.4th at p. 707.)

In addition, the entire proceeding is infected with unfairness because of counsel Ernest Kinney's absence from all unreported bench and side bar conferences until November 9, 1993. Roy's problems communicating with public defenders O'Neill and Martinez surfaced very early in the guilt phase trial, while jury selection was still in progress. (RT 2848-2863, 2849-2850.) At Marsden hearings on September 29, October 8, and October 12, 1993, Ms. O'Neill and Ms. Martinez, in essence, admitted that their communication with Roy had substantially broken down. One source of tension between Roy and Ms. O'Neill and Ms. Martinez, which contributed to the breakdown of the attorney-client relationship, was their failure to include Roy in at bench or side bar conferences. (RT 4362-4363.) (See Argument Section 2; Argument X.) Following a Marsden hearing at which Roy was represented by another outside attorney, Roy's motions to discharge counsel were denied.

Between September 29, 1993, and October 25, 1993 -- a time when Roy's relationship with counsel was exceedingly strained because of the pendency of Marsden proceedings and the involvement of outside counsel -- approximately 53 unreported bench and side bar conferences were held outside Roy's presence, attended by Ms. O'Neill and/or Ms. Martinez, but *not* the attorneys appointed to assist Roy in arguing his Marsden motions. (SCT

#7 162-185.) During this period, Roy was excluded from bench and side bar conferences running the gamut from administrative discussions or jury selection issues to substantive discussions of legal issues, including the admission of exhibits and testimony. This situation can only have contributed to the rift between Roy and his court-appointed attorneys.

Then on October 25, 1993, Mr. Kinney was finally brought in for the limited purpose of acting as a "liason," to facilitate improved communication between Roy and his trial attorneys, but surprisingly, he did not participate in any side bar conferences until November 9, 1993, following his appointment as a third attorney of record, on November 7, 1993. (SCT #7 186-195; RT 4790, 4479-5583.) Between October 25, 1993 and November 9, 1993, Mr. Kinney was apparently in court on most occasions, but did *not* participate in approximately 20 unreported bench or side bar conferences from which Roy was also absent. (SCT #7 186-195.) During this intensely litigious stage of the trial, a full half of the unreported proceedings held in the absence of Mr. Kinney and Roy involved discussions bearing on critical aspects of the prosecution's efforts to prove that Roy had sexual interest in Laurie and tried to rape her. (SCT #7 186; RT 4861 [conference re defendant's black gym shorts with semen stain]; SCT #7 186; RT 4910 [conference re admissibility of Donna Kellogg's personal knowledge of Roy's sexual relationships with other persons]; SCT #7 189; RT 5208, 5210 [conferences re Dr. Story's testimony regarding sexual stimulation as the cause for ejaculation of semen on Roy's pants]; SCT #7 190; RT 5315 [conference re objections to Dale Caudle's testimony re when Donna Kellogg last had sex with Roy]; SCT #7 191; RT 5320 [conference re testimony proffered by Dr. Nelson that Laurie's anal canal was dilated]; SCT #7 192 [conference re when defense counsel received notice from Mr. Cooper of evidence of semen or P-30 being detected on Roy's black gym shorts]; SCT #7 193; RT 5504 [conference re admissibility of black gym shorts with semen stain]; SCT #7 193; RT 5542

[conference re objections to Dr. Story's expert testimony on the quantity and sexual source of semen]; SCT #7 195; RT 5553 [conference re admissibility of testimony of Dale Caudle regarding Donna Kellogg's hearsay statements about when she last had intercourse with Roy].)

Under the circumstances, not only was Roy's pure right of personal presence compromised by this situation. In addition, there was a *de facto* interference with the right to counsel caused by Roy's exclusion from bench and side bar conferences during a time when relations with Ms. O'Neill and Ms. Martinez were strained, in part, as the result of his exclusion from such conferences, and unresolved Marsden motions were pending. This is not a situation where counsel O'Neill and Martinez can be deemed to have properly have waived Roy's right to be present for conferences, and bench and sidebar proceedings. (Cf. People v. Riel (2000) 22 Cal.4th 1153; People v. Mayfield (1997) 14 Cal.4th 668, 738.)

Furthermore, once Mr. Kinney assumed the role of "liason," Roy's right to counsel was impaired because the *only* counsel with whom he was actually communicating – Mr. Kinney – was absent from many legally substantive, yet unreported bench and side bar proceedings. The United States Supreme Court recognizes "that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." (Rushen v. Spain, supra, 464 U.S. at p. 117; see, e.g., Key v. People (Colo. 1994) 865 P.2d 822 [counsel's absence from a trial court's *ex parte* scheduling conference with jurors during deliberations occurred during "critical" stage and resulted in substantial risk to defendant's right to fair trial].)

Later, when Mr. Kinney was forced, against his will, to assume the duties of lead counsel for the penalty phase trial, he did so handicapped by his absence from substantial portions of the trial, including the numerous unreported bench and side bar conferences from which Roy too had been

absent. This caused a direct but immeasurable harmful impact on Roy's state and federal right to confront and cross-examine witnesses. Mr. Kinney, himself, later complained of his impairment, as he struggled to represent Roy during the penalty phase trial. (RT 11929; CT 1505.) In contrast to the situation presented in United States v. Watchmaker, supra, 761 F.2d 1459, Mr. Kinney did not have ample opportunity to review transcripts to evaluate any prejudice to Roy's interests that may have arisen from unreported proceedings. As a result of the same problems, fundamental fairness and due process were denied because Roy was absent from proceedings which were "critical" to the outcome of his trial, and thus interfered with Roy's – and trial counsel's – meaningful "opportunity to defend."

D. Roy's absence from unreported bench and side bar proceedings was structural error, and thus reversible per se.

"An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part, insofar as the trial court's decision entails a measurement of the facts against the law." (People v. Waidla, supra, 22 Cal.4th at p. 741.) Ordinarily, this Court has applied the harmless error test of People v. Watson (1956) 46 Cal.2d 818, 836 [hereafter, "Watson"] to evaluate the prejudicial impact of "absence error" which is alleged to have occurred in violation of state statute. (People v. Jackson, supra, 13 Cal.4th at p. 1211; see also People v. Anderson (2001) 25 Cal.4th 543, 595-596 [Error excluding counsel and the defendant from an *in camera* hearing on the need for physical restraints was harmless].) In evaluating "absence" claims brought under the California Constitution, this court has simply determined on a case-by-case basis whether the proceedings from which the defendant was absent "bear any substantial relation to the opportunity to defend." (See, People v. Holt, supra, at p. 706; People v. Ochoa, supra, 26 Cal.4th at p. 434.)

Roy respectfully submits, for the reasons set forth previously in

subsection C, that this Court should not take a piecemeal approach to the ascertainment of prejudice. Even if Roy's exclusion from any single unreported, at bench or side bar proceeding, or conference, is not found prejudicial, the trial court's deliberate pattern of disregard for Roy's right of personal presence, which resulted in an astonishing 181 unreported proceedings in his absence, cannot be disregarded as harmless. This is particularly true when the numerous disruptions in the continuity of counsel are taken into account. In contrast to the usual case, in Roy's numerous absences from proceedings, he was not consistently represented by effective, conflict-free counsel. Rather, during many key legal discussions which took place in Roy's absence, Mr. Kinney was also absent. Viewing the record as a whole, Roy's many absences were prejudicial because they did impair both the fullness of his opportunity to defend against the charges, and his ability to assist counsel then and later in the proceedings.

Furthermore, federal due process was violated. It is settled that a trial court's incorrect and arbitrary violation of a state statute violates a defendant's state-created liberty interest in violation of the Fourteenth Amendment's due process clause. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346; Hewett v. Helms, supra, 459 U.S. at p. 466; Ford v. Wainwright, supra, 447 U.S. at p. 428 [Concurring op., O'Connor, J.].) The trial court arbitrarily and incorrectly disregarded Roy's statutory right to be personally present at all times, even during bench and side bar conferences.

While the federal courts also apply harmless error analysis to alleged "absence error" in violation of the federal constitution, they also recognize that in "egregious circumstances" a violation of the right to personal presence may amount to structural error, immune from harmless error review. (Yarborough v. Keane (2nd Cir. 1996) 101 F.3d 894, 897.)

> "In the usual case, such an error will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity

> of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (United States v. Feliciano (2nd Cir. 2000) 223 F.3d 102, 112.)

A defendant's absence from proceedings may be structural if it calls into question the fundamental fairness of the framework within which the trial proceeds. (Arizona v. Fulminante (1991) 499 U.S. 279, 307-310; cf. Rice v. Wood (9th Cir. 1996) 77 F.3d 1138, 1141.)

In this case, the error is "structural" and reversible *per se* because Roy's fundamental right to counsel, as well as his right to personal presence, was impaired. When counsel is functionally absent, it renders the verdict so unreliable that a case-by-case inquiry for prejudice is unnecessary. (Holloway v. Arkansas, supra, 435 U.S. at p. 490; Mickens v. Taylor, supra, 535 U.S. 162, 167, fn. 1.) Roy *and* Mr. Kinney were absent from many unreported proceedings. Given that Mr. Kinney was the *only* attorney with whom Roy was communicating -- as acknowledged by the trial court who appointed Mr. Kinney as "facilitator" -- counsel was functionally if not physically absent from many of the proceedings that were held in Roy's absence. Roy's absence from more than 180 unreported bench, side bar, and in chambers conferences, was therefore structural error, requiring *per se* reversal of the judgment.

XXXIII THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT DELIBERATELY VIOLATED PENAL CODE SECTION 190.9, WHICH MANDATES REPORTING OF ALL PROCEEDINGS IN A CAPITAL CASE, AND CREATED AN INADEQUATE RECORD FOR POST-CONVICTION REVIEW.

A. The trial court violated Pen. Code, § 190.9, which mandates reporting of all proceedings in a capital proceeding.

Pen. Code, § 190.9 provides in relevant part:

> "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present."

Although Pen. Code, § 190.9 has been amended from time to time, its general mandate to report and transcribe all proceedings in capital cases has been in effect since January 1, 1985. (People v. Freeman (1994) 8 Cal.4th 450, 509; Deering's California Codes Ann., Pen. Code, § 190.1; History.) Even though Roy's trial occurred well after the statute's effective date, the trial court systematically ignored the requirements of the statute by directing counsel to utilize an off-the-record procedure to address objections and arguments arising during proceedings before the jury. (RT 121.) The trial court persisted in holding many off-the-record, unreported conferences, after Roy complained about his exclusion from bench and side bar conferences (RT4362-4363), and even after trial counsel finally objected. (RT 2289.)

This was plainly a violation of the statute. "It is important that trial courts 'meticulously comply with Pen. Code, § 190.9, and place all proceedings on the record.'" (People v. Seaton (2001) 26 Cal.4th 598, 700; citation omitted.) "An incomplete record is a violation of section 190.9,

which requires that all proceedings in a capital case be conducted on the record with a court reporter present and transcriptions prepared." (People v. Frye (1998) 18 Cal.4th 894, 941.)

B. Reversal is required because the trial court's violation of Pen. Code, § 190.9, and the consequent lack of an adequate record, violated Roy's constitutional rights to due process, to a reliable death judgment, and to the effective assistance of counsel at trial and on appeal.

Under the due process clauses of the United States and California Constitutions, the record of a capital trial must be sufficient to permit adequate and effective appellate review. (People v. Caitlin (2001) 26 Cal.4th 81, 166; see also Britt v. North Carolina (1971) 404 U.S. 226, 117; Hardy v. United States (1964) 375 U.S. 277, 279-280; Draper v. Washington (1963) 372 U.S. 487, 497; Chessman v. Teets (1957) 354 U.S. 156, 165 ["consistently, with due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petition has had no voice in determining, cannot be allowed to stand."].) Under the Eighth Amendment, and its California counterpart (Cal. Const., Art. I, § 17), the record must also be sufficient to ensure that there is "no substantial risk the death sentence has been arbitrarily imposed." (People v. Howard (1992) 1 Cal.4th 1132, 1166; People v. Caitlin, supra, 26 Cal.4th at p. 167.)

This Court has consistently held that, when a trial court fails to conform to the requirements of Pen. Code, § 190.9, the error is not reversible *per se*. (People v. Cummings (1993) 4 Cal.4th 1233, 1333, fn. 70.) The complaining party bears the burden of demonstrating that the appellate record is not adequate for meaningful appellate review, i.e., that the deficiencies in the record are prejudicial. (People v. Howard (1992) 1 Cal.4th 1132, 1165; accord: People v. Padilla (1995) 11 Cal.4th 891, 966.) "'The test is whether in light of all the circumstances it appears that the lost portion is "substantial"

in that it affects the ability of the reviewing court to conduct meaningful review and the ability of the defendant to properly perfect his appeal.'" (People v. Pinholster (1992) 1 Cal.4th 865, 921.)

Federal courts have also declined to adopt a *per se* rule of reversal when there is no complete verbatim transcription of proceedings in a criminal trial, in contravention of federal rules. Some prejudice to the defendant must be shown before reversal is mandated. (United States v. Carrillo (9th Cir. 1990) 902 F.2d 1405, 1409.)

Where transcription is unavailable, both state and federal cases impose a burden on the defendant to pursue available alternative methods of creating a record adequate to permit appellate review. (People v. Hawthorne (1992) 4 Cal.4th 43, 66; Britt v. North Carolina, supra, 404 U.S. at p. 227.) Roy engaged in such efforts in this case. Unfortunately, a number of unreported proceedings were incapable of settlement because counsel could not agree what occurred, and the trial judge no longer had any recollection. (SCT #7 162-226; RT 2905, 3007, 3107, 3177, 3556, 4518, 5014, 11252, 11274, 11781.) Furthermore, for many unreported proceedings, the best that could be accomplished was to determine the general subject matter discussed, but not the text of specific statements, arguments or objections by the parties. (See SCT #7 147-229.)

The settled record is not, in any event, the same thing as a transcript, especially in a case where a substitute counsel, such as Mr. Kinney, is forced to pick up in the middle of a trial following withdrawal by another attorney. (See, e.g., United States v. Jonas (7th Cir. 1976) 540 F.2d 566 [rejecting the proposition that the trial judge's notes of witness testimony at a prior trial could supplant the need for a transcript of trial to be used during cross-examination of the same witness at subsequent trial]. The importance of a transcript to a new attorney entering a case is beyond question. (United States v. Jonas, supra, at p. 571, fn. 7.)

> "No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal. Nor should this be required of an appointed lawyer. An appointed lawyer, whether or not he represented the defendant at trial, needs a complete trial transcript to discharge his full responsibility . . . ."

(Hardy v. United States, supra, 375 U.S. at p. 288.)

Mr. Kinney did not have the benefit of the settled record, when he became involved as counsel in the middle of this case. Consequently, the trial court's violation of Pen. Code, § 190.9 directly and prejudicially interfered with Roy's Sixth Amendment right to the effective assistance of counsel, because there was no record of bench and sidebar conferences available for Mr. Kinney to review. (Cf. United States v. Jonas, supra, 540 F.2d at p. 571 [error to refuse defense counsel a transcript of defendant's prior trial for retrial]; see also Peterson v. United States (9th Cir. 1965) 351 F.2d 606, 608.)

The lack of a verbatim transcription has also had the effect of impairing Roy's right to the effective assistance of *appellate* counsel. Neither Roy nor his appellate counsel were present at unreported proceedings (see Argument XXXII); hence, neither has the ability nearly ten years after the trial to determine or even guess at what occurred. Nor was Roy even capable of offering input at proceedings to settle the record since he was excluded from nearly all off-the-record proceedings. (See, Chessman v. Teets, supra, 354 U.S. 156.) Objections vital to preservation of an issue on appeal may well have gone unrecorded. Indeed, the timing of some of the unsettled conferences suggests that the discussions may have involved important legal issues. (See RT 3556 [unreported, unsettled proceeding during testimony of Venus Farkus]; RT 4518 [unreported, unsettled proceeding following Marsden hearing]; RT 5011-5014 [unreported, unsettled proceeding during recess immediately following objections to the admissibility of hearsay statements by the victim, Laurie, regarding Roy's plan to rape and/or kill her];

see also Argument XXXII, ante.)

> "When, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him, unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. . . . The right to notice 'plain errors or defects' is illusory of no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended."

(Hardy v. United States, supra, 375 U.S. at p. 279-280; fn. omitted.) Under the circumstances, the defects in the trial record impaired Roy's Sixth Amendment right to the effective assistance of counsel on appeal.

Due process was also violated. If a state provides appellate review, the procedure must comport with due process. (Griffin v. Illinois (1956) 351 U.S. 12, 18.) Due process is denied when a court deliberately violates state statutes designed to insure adequate appellate review in a death penalty case. Furthermore, Roy had a state-created liberty interest in the correct and non-arbitrary application of Pen. Code, § 190.9, which was violated by the trial court's intentional insistence on holding all bench and side bar conferences in a capital trial "off-the-record". (Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

Last but not least, death penalty trials must be policed at all stages for procedural fairness, due the increased need for reliability and fairness in factfinding. (Satterwhite v. Texas, supra, 486 U.S. at p. 262-263; Strickland v. Washington, supra. 466 U.S. at p. 704.) This Court applies a more exacting standard of review when it assesses the prejudicial effect of state law errors affecting a capital trial. (People v. Brown, supra, 46 Cal.3d at p. 447.) Accordingly, because the violation of Pen. Code, § 190.9 prejudicially impacted Roy's rights to due process, and the effective assistance of counsel at all stages of a capital trial, the entire judgment must be reversed.

XXXIV THE ERRORS ASSIGNED IN ARGUMENT SECTION 5 (ARGUMENTS XXXII AND XXXIII) INDIVIDUALLY AND CUMULATIVELY VIOLATED APPELLANT'S RIGHT TO COUNSEL, TO DUE PROCESS OF LAW AND TO A RELIABLE DEATH JUDGMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The trial court in this case committed wilful violations of Pen. Code, §§ 977 and 1043 and Pen. Code, § 190.9. Consequently, Roy was absent from a substantial number of proceedings at the bench, in chambers, or in the hallway outside the courtroom; in addition, more than 180 proceedings from which he was absent were unreported, making exact reconstruction of the entire missing record a virtual impossibility. (Argument XXXII & XXXIII.)

To complicate matters, early in the proceedings, Roy suffered a serious breakdown in communication with his deputy public defenders. (See, Argument Section 2; Arguments VII, VIII, IX, X, XII.) The breakdown in communication was, in part, due Roy's exclusion from bench and side bar conferences. For a long period during the guilt phase trial, Roy was simultaneously represented by Ms. O'Neill and Ms. Martinez, and independent counsel, while awaiting adjudication of his right to have substitute counsel appointed.

Following a series of Marsden hearings, the court devised an unprecedented remedy -- the appointment Mr. Kinney to "facilitate communication" between Roy and the public defenders -- something that would clearly have not been needed had communication not broken down. Eventually, Mr. Kinney was permitted to participate as co-counsel with Ms. Martinez and Ms. O'Neill. Later on, after Ms. O'Neill withdrew due to illness, Mr. Kinney was forced, over objection, despite serious medical problems, to assume the role of lead counsel for the penalty phase trial. Mr. Kinney complained that he was having problems representing Roy at the

penalty phase, precisely because he had been absent for so much of the guilt phase trial. (Argument Section 2; Arguments VII, VIII, IX, X, XII.)

In addition, Mr. Kinney had been personally absent from a large number of unreported proceedings, including bench and side bar conferences which occurred before he became involved in the case, and numerous more proceedings held before he became actively involved as third chair counsel. Since so many of these proceedings were not reported, Mr. Kinney had no readily available means prior to post-conviction settlement proceedings of reconstructing and reviewing what had occurred in many proceedings which preceded his involvement in the case. (Arguments XXXII & XXXIII.)

Even if this Court finds that no single circumstance (described in Argument Sections 2 and 5) or statutory violation requires reversal of the judgment, the convergence of circumstances and statutory violations created an intolerable interference with Roy's right to the effective assistance of counsel. In addition, the same circumstances deprived the trial of fundamental fairness, and compromised the reliability of the death judgment, in violation of the state and federal constitutions. (U.S. Const., Amendments V, VI, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 16, & 17.) "Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal." (United States v. Necoechea, supra, 986 F.2d at p. 1282; People v. Hill, supra, 17 Cal.4th at p. 845.)

Hence, even if no single error assigned in Argument Sections 2 and 5 require reversal of the guilt, sanity or penalty phase judgments, Roy submits that the cumulative prejudice that resulted from the errors requires reversal of the entire judgment.

ARGUMENT SECTION 6

EVIDENTIARY ERRORS OCCURRING DURING THE GUILT PHASE

XXXV A MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED AFTER THE PROSECUTOR ELICITED TESTIMONY THAT APPELLANT HAD INVOKED HIS RIGHT TO REMAIN SILENT.

Detective John Souza testified that, upon arrest, Roy was advised that he was being charged with attempted murder and murder in connection with Angie and Laurie, but he had no reaction. (RT 3940.)

At a subsequent break in the proceedings, Roy's counsel made a motion for mistrial because Roy's post-arrest silence occurred subsequent to the advisement his Miranda rights, and therefore constituted an invocation of those rights. (RT 3943-3944.) The court ruled that evidence of Roy's post-arrest demeanor and silence should be excluded under Evid. Code, § 352, but denied the motion for mistrial. The court stated it would admonish the jury to disregard the evidence of Roy's lack of response or strike it altogether. Counsel objected that the issue was constitutional, not a matter of a violation of Evid. Code, § 352. (RT 3950-3952.) Subsequently, in the middle of testimony by Todd Frazier, the court admonished the jury that the evidence that Detective Souza advised Roy of the charges and he made no verbal response was stricken and no inference was to be made. (RT 3958.)

The motion for mistrial should have been granted.

The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., Amendment V.) Advice to an accused regarding his right to silence carries an implicit assurance that silence will carry no penalty. (Doyle v. Ohio (1976) 426 U.S. 610, 618 [hereafter "Doyle"].) At a criminal trial, therefore, the prosecution may not use at trial the fact that the defendant stood mute, or

claimed his privilege in the face of an accusation. (Miranda v. Arizona (1966) 384 U.S. 436, 468, fn. 37 [hereafter "Miranda"].) A prosecutor's use of a defendant's silence in the face of Miranda warnings infringes upon the privilege against self-incrimination, and violates fundamental fairness and due process. (United States v. Whitehead (9th Cir. 2000) 200 F.3d 634, 638-639; United States v. Valarde-Gomez (9th Cir. 2001) 269 F.3d 1023, 1032; see also Griffin v. California (1965) 380 U.S. 609 [hereafter "Griffin"]; accord: People v. Quartermain (1997) 16 Cal.4th 600, 619.)

Error under Doyle and Miranda could not be clearer in this case. Roy was advised of his Miranda rights and declined to speak. His silence was used against him in the prosecutor's case-in-chief.

In Chapman v. California (1967) 386 U.S.18, 24, United States Supreme Court held that even errors of constitutional magnitude may be harmless if it is clear beyond a reasonable doubt that the error did not contribute to the conviction. The United States high court has now made it clear that error involving the use of an accused's post-arrest silence in violation of Doyle, or Miranda, is "trial error", amenable to harmless error analysis to determine the effect the error had on the trial. (Brecht v. Abrahamson (1993) 507 U.S. 629; Rice v. Wood, supra, 77 F.3d at p. 1143.)

Even assuming harmless error analysis must be applied in this case to measure the effect of the error upon the trial, testimony that Roy did *not* respond to attempted murder and murder accusations involving two teenage girls cannot be dismissed as harmless beyond a reasonable doubt. Evidence that Roy was silent in the face of the investigators' murder accusation was highly incriminatory, and the prejudicial impact could not be erased. Introducing such evidence in the state's case-in-chief was an especially egregious constitutional violation because there was no risk at that point that exclusion of the evidence would merely provide a shield for perjury. (Wainwright v. Greenfield (1986) 474 U.S. 284, 292, fn. 8.)

Furthermore, Roy's defenses were insanity, diminished actuality and unconsciousness; at the guilt and sanity phases of the trial, as well as at the penalty phase, he claimed to have only piecemeal recall of what occurred at the time of the offenses, and no intent to hurt, much less rape, rob, or kill the victims. Roy also denied that he killed Laurie to prevent her from reporting his commission of any crime. Roy's silence in the face of attempted murder and murder accusations was not only incriminating, it constituted devastating impeachment of his claim that he was suffering from a mental disorder that rendered him incapable of forming the specific intent to commit any of the alleged crimes. By using Roy's silence to overcome Roy's pleas of insanity and diminished actuality, the prosecutor denied Roy his Fifth Amendment rights, and any semblance of a fair trial at all three stages. (Wainwright v. Greenfield, supra, 474 U.S. at p. 292.) The ambiguities attendant in a defendant's post-Miranda silence "do not suddenly disappear when an arrestee's mental condition is brought into issue." (Id. at p. 294.)

The fact that the trial court sustained trial counsel's objection, and directed the jury not to consider Roy's lack of a verbal response to the murder accusation does not compel the conclusion that the error was rendered harmless. (Cf. Greer v. Miller (1987) 483 U.S. 756 [Doyle error held harmless].) It was too late to "unring the bell." Roy's guilt, sanity and penalty phase trials amounted to a war of the defense and prosecution mental health experts. Defense experts opined that Roy did not know what he was doing, and that he could not control himself. Prosecution experts offered contrary opinions. In addition, apart from contested psychiatric and psychological evidence, evidence supporting the robbery and attempted rape counts, and related special circumstance findings was constitutionally deficient, or at best, extremely thin. (See Argument Section 1.) Under the circumstances, testimony regarding Roy's silence in the fa0ce of a murder accusation was endowed with great legal significance, and very likely

contributed to the guilt, sanity and penalty phase verdicts. (See, e.g., United States v. Velarde-Gomez, supra, 269 F.3d at p. 1035; cf. People v. Lucero (2000) 23 Cal.4th 692, 714 [Doyle error harmless where error occurred at penalty retrial, where guilt was not in issue].) Accordingly, the guilt, sanity and penalty phase judgments must be reversed. (Wainwright v. Greenfield, supra, 474 U.S. at p. 641.)

XXXVI APPELLANT WAS PREJUDICED AT THE GUILT, SANITY AND PENALTY PHASE TRIALS BY THE ERRONEOUS RECEIPT OF EVIDENCE THAT THERE WAS SEMEN ON A PAIR OF HIS UNDERSHORTS, AND THE SEMEN WAS SUFFICIENT IN QUANTITY THAT IT MUST HAVE BEEN PRODUCED BY SEXUAL AROUSAL.

Roy was wearing unlaundered white boxer shorts at the time of his arrest, although he denied that these were the shorts he was wearing at the time of the crimes. (RT 5455-5456, 5549-5550) The shorts contained an off-white stain, identified by the prosecution's experts as semen or P-30. (RT 5545-5547.) Forensic analysis failed to conclusively establish the age of the stain or that Roy was the donor of the semen. (RT 5547-5549.) However, the stained white shorts were received in evidence, and a forensic expert, Dr. Gary Storey, testified that the stain was semen and the result of ejaculation produced by sexual arousal. (RT 5543.)

Evidence of semen on Roy's clothing was vehemently opposed by defense counsel.[67] Counsel objected to the admission of the white boxer

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[67] Counsel objected that the white boxer shorts had not been brought to the parties' exhibit conference at which all exhibits were to be produced. (RT 5462.) They also objected that Dr. Story's testimony about sexual excitation should be excluded because the district attorney had not placed Dr. Story on his witness list and given the defense proper notice of his testimony. The defense apparently did not receive notice about Dr. Story's testimony until sometime in October, after the trial had begun. (RT 5469.) The district attorney disputed that the white boxer shorts had not been produced for the exhibit conference, but defense counsel produced her copy of the plaintiff's exhibit list, which did not list the white boxer shorts. (RT 5463- 5465.) In *in limine* proceedings, it was argued that evidence of semen on Roy's undershorts, and a pair of black Raiders gym shorts, should be excluded from evidence on due process grounds because that the district attorney had been holding the items of clothing for three years, and had chosen not to have the items tested until the parties were in the midst of the trial. (RT 5440.)

shorts and the testimony of Dr. Story on relevance and foundational grounds. (RT 5542; SCT #7 193-194; RT 4442, 5411-5412, 5539-5548, 5556.) The defense argued that the district attorney had not shown that Roy was wearing the tested garments at the time of the incident. The items were worn by Roy when he was arrested the following morning. (RT 5440-5444.) The trial court denied the motion to strike, and overruled all objections. (RT 5548, 5556-5557.)[68]

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "As broadly defined by Evidence Code section 210, 'relevant evidence' has two distinct dimensions:

Counsel argued that the defense was unprepared to meet the evidence, and had been unable to obtain a rebuttal expert on such short notice, particularly since Dr. Story was the only expert urologist known to the defense, and he was already serving as the prosecutions' expert. (RT 5440.) Counsel refused to cross-examine Dr. Story during his *in limine* testimony, on the ground that she had not had an adequate opportunity to prepare, and consult with another urology expert. (RT 5451-5452.) The court ruled that the defense had insufficient notice of the black Raiders shorts, and suppressed this evidence. The white boxer shorts were ruled admissible. (RT 5436-5473, 5497, 5509-5510c; CT 705-707.) There were several unreported proceedings regarding Dr. Story's testimony, several weeks prior to his testimony. At one such conference, Ms. Martinez and Ms. O'Neill expressed surprise that Dr. Story's testimony would be needed. (SCT #7 189; RT 5208.)

[68] The defense initially objected to Dr. Storey's trial testimony on the ground that he was testifying to results of P-30 tests he did not perform, and his testimony was being offered prior to the testimony of Andrea DeBondt, who performed the tests. (RT 5556.) The court received Dr. Storey's testimony subject to a motion to strike. (RT 5557.) Following Ms. DeBondt's testimony, in which she admitted that she could not say whether the yellowish stain on the boxers was made by Roy, the defense made another motion to strike DeBondt's testimony, as well as Storey's. The motion was denied. (RT 5557.)

(1) probative value, i.e., the 'tendency [of the evidence] in reason to prove or disprove' the proposition for which it is offered and (2) relationship to a matter which is provable in the action, i.e., the 'tendency [of the evidence] in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (People v. Hill (1992) 3 Cal.App.4th 16, 29; overruled on unnrelated grounds in People v. Nestler (1997) 16 Cal.4th 561, fn. 5.) Furthermore, although trial courts have wide discretion to determine the relevance of proffered evidence, when relevance is a close question in a criminal case, "the trial court should give the defendant the benefit of any reasonable doubt." (People v. Honig (1996) 48 Cal.App.4th 289, 342.)

Roy was charged with attempted rape and an attempted rape special circumstance allegation, not a completed rape. Proof of ejaculation caused by sexual arousal was clearly unnecessary to prove the offense of attempted rape. In advocating the admissibility of semen evidence, the prosecutor asserted that semen stains on Roy's clothing would, however, constitute evidence of his sexual interest in his victim. (RT 4511.) Even if this is true, Roy's state of sexual arousal at any time other than contemporaneous with the alleged attempted rape of Laurie was not relevant to prove any disputed fact at issue at the guilt phase trial.

Absent some proof that Roy was wearing the white boxer shorts at the time of the crimes, and that he personally produced the stain, evidence of a semen stain on his boxer shorts was completely irrelevant. (See, e.g., People v. Davis (1930) 106 Cal.App. 179, 190 [court properly admitted bloody shirt, coat and vest worn by defendant on the night of crimes].) Here, there was no such evidence produced by the prosecution. (Cf. People v. Pride (1992) 3 Cal.4th 195, 241 [evidence properly admitted that the defendant belonged to the small percentage of the Black population who could have contributed semen found near the victim's body]; see also People v. Ashmus (1991) 54 Cal.3d 932, 970 [evidence properly admitted that semen on the victim's body

could have been deposited by 1.5 percent of the male Caucasian population including the defendant].)

Roy testified in defense that, on the night of the crimes, he was wearing briefs, not boxers, black gym shorts with no logo, blue jeans and the same black sweat pants he was wearing when he was arrested. (RT 5907-5909.) Roy changed his clothing prior to arrival of the police, and placed the clothing he was wearing, except for the black sweat pants, in the laundry. He put on the dirty white boxers, because they were cleaner than the briefs he had been wearing. (RT 5910-5911.) Roy was wearing the white boxer shorts at the time of his arrest. (RT 5317, 3959-3961.)

Even assuming the fact that Roy was wearing the white boxers at the time of his arrest constitutes circumstantial evidence that he *might* have been wearing them at the time of the crimes, evidence of the *age* of the semen stain was entirely lacking, as well as any evidence including Roy as a possible source. As such, the inference that Roy ejaculated in the white boxer shorts, and thus experienced sexual arousal on the night of Laurie's death "was too speculative and remote to be permissible." (People v. Simms (1970) 10 Cal.App.3d 299, 311 [accused robber's possession of a knife days after a robbery held too speculative and remote to prove that he used the knife to perpetrate the robbery]; People v. Goedecke (1967) 65 Cal.2d 850, 860 [evidence of a decedent's life insurance policy inadmissible to show motive absent evidence the defendant knew of its existence].) "Speculative inferences that are to be derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact . . . ." (People v. De La Plane (1979) 88 Cal.App.3d 223, 244.)

This case bears resemblance to People v. Schultz (Ct. App. Ill. 1987) 506 N.E.2d 1343, a sexual assault and murder case, in which the prosecution presented evidence that the defendant could not be excluded as a donor of seminal fluid on found in the victim's rectum. (Id. at p. 1346.) The Illinois

appellate court held that the semen evidence was not relevant because it only tended to put the defendant in an extremely large category -- 20 percent of the population -- of possible donors. (Id. at p. 1347.) The Court explained:

> "In order to be admissible, evidence must have some relevance and fairly tend to prove the offense charged. Evidence will be considered relevant where the circumstance or fact offered tends to prove or disprove a disputed fact or render the matter in issue more or less probable. [Citation.] Relevancy is to be determined in light of the logic, experience, and accepted assumptions concerning human behavior. [Citation.] Our review of the record reveals that neither of the experts who testified for the State could identify characteristics in the blood or semen samples which would tend to make the likelihood that defendant committed the crime more or less probable . . . We believe this testimony served no relevant purpose, was totally lacking in probative value, and thereby prejudiced the defendant's cause."

(Id. at p. 1348.)

Here, also, evidence of a semen stain of unknown age and origin, on boxers which may or may not have been worn by Roy the night of the offense, had no relevant purpose, lacked probative value, and prejudiced Roy's cause. The presence of the stain and the fact that it came from ejaculatory matter produced by sexual stimulation did not make Roy's commission of an attempted rape more or less probable. The connection to the crime was too attenuated.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid.

Code, § 353.) There is no question that timely objections were made on specific foundational and relevance grounds in this case. Furthermore, introduction of the semen stain, and Dr. Story's expert testimony resulted in a miscarriage of justice.

Roy submits that the evidence of an attempted rape was constitutionally deficient. (See Argument III.) But even if this Court does not find the evidence insufficient to support conviction, evidence of an attempted rape was extremely weak, particularly if the improperly introduced semen stain evidence is disregarded.

There was no forensic evidence of a sexual assault found on the victim, on Roy, in Roy's car, or at the Lost Lake Park restroom crime scene. To prove the attempted rape charge and special circumstance allegation, the prosecution was forced to resort to types of evidence which have been found insufficient to establish an attempted rape in other cases – prior expressions of sexual interest during conversations with Laurie and her sister, attempted kissing of the victim, the absence of recent sexual activity between Roy and his own girlfriend, and the condition of Laurie's shirt and bra at the time her body was found. (See, Argument III.) Irrelevant evidence of ejaculatory matter on Roy's boxer shorts, attributed by expert testimony to sexual arousal, would have had an overwhelming potential to tip the scales in favor of conviction of both the attempted rape charge and the attempted rape-murder special circumstance allegation. Accordingly, its erroneous receipt cannot be disregarded as mere harmless error. There is no question that the evidence contributed to the guilt phase verdicts. (People v. Schultz, supra.)

XXXVII APPELLANT WAS PREJUDICED BY THE ERRONEOUS RECEIPT OF TESTIMONY REGARDING WHEN HE LAST HAD SEXUAL RELATIONS WITH HIS GIRLFRIEND, DONNA KELLOGG, AND WHETHER HE HAD SEX WITH OTHER WOMEN.

During her direct examination, Donna Kellogg, Roy's girlfriend, was asked how long it had been prior to Saturday night, January 26, 1991, since she had "had sexual relations" with Roy. (RT 4909.) Defense counsel immediately objected on relevance grounds, but the objection was overruled. (RT 4909.) The witness answered, "If I remember, a couple of weeks before then." (RT 4909.) The district attorney then asked Kellogg, "so far as [she] knew was the defendant having sexual relations with any other person." (RT 4910.) Kellogg responded, "Not that I knew of." (RT 4910.) Counsel quickly objected and moved to strike Kellogg's answer on the ground that she lacked personal knowledge. (RT 4910.) The Court sustained the objection and instructed the jury to disregard the answer. (RT 4910; SCT #7 187.)

Mr. Cooper then asked whether Roy had admitted having sex with any other person around January 26, 1991. (RT 4910.) The witness answered, "no." (RT 4910.)

Kellogg was invited to refresh her recollection by reading a one-page report. (RT 4916.) The witness was asked if it helped her remember when she last had sex with Roy before "that Saturday night." (RT 4917.) She responded, "No. It still doesn't click." (RT 4917.) She admitted it would have been easier to recall when she last had sexual relations Roy on the date when the police came to the house and took Roy's shoes. (RT 4917.)

Later, Deputy Sheriff Dale Caudle was called as a witness and testified that he had spoken with Donna Kellogg on January 29, 1991, and Kellogge had advised him that she had sexual relations with Roy approximately two weeks prior to his arrest. (RT 5554.) This testimony was received over

defense counsel's objection that Deputy Caudle's testimony was cumulative and not properly received as a prior inconsistent statement. (SCT #7 195; 5558.)

Any testimony regarding Roy's sexual activity with other women was completely irrelevant and should not have been received. (People v. Flanagan (Ct.App. Mich. 1983) 342 N.W.2d 609, 793-794; accord: People v. Sterling (Ct. App. 1986) 397 N.W.2d 182, 233.) By eliciting such testimony, "the jury was given to understand that a man who had not had sexual intercourse for a considerable period of time would be more inclined to commit rape than one whose sexual desires had been regularly satisfied." (Flanagan at p. 793.) Whether Roy had recently enjoyed consensual sex with Donna Kellogg or any *other* person had no tendency in reason to prove or disprove the charge of attempted rape, or the attempted rape-murder special circumstance allegation. (Ibid.)

The evidence carried great potential for prejudice, particularly with respect to the attempted rape charge and the attempted rape-murder special circumstance allegation. Evidence supporting the jury's finding that Roy tried to rape Laurie was, at best, minimal, if even constitutionally sufficient. There was a total absence of any forensic evidence of rape. (See Argument III, ante.) The suggestion that Roy was sexually deprived, and thus more likely to commit rape, may well have been the deciding factor in the jury's deliberations as to these charges. Accordingly, the error resulted in a miscarriage of justice requiring, at minimum, reversal of the conviction of attempted rape, and the attempted-rape murder special circumstance finding. (Evid. Code, § 353.)

XXXVIII APPELLANT WAS PREJUDICED BY THE ERRONEOUS RECEIPT OF HEARSAY TESTIMONY BY DR. FISHER, THAT ANGIE TOLD HER THAT THE PERSON WHO INFLICTED HER INJURIES HAD THREATENED TO KILL HER.

Prior to trial, defense counsel moved to exclude testimony by emergency room doctor, Ann Fisher, that Angie H. had said that the person who caused her injuries had threatened to kill Angie and Laurie if the girls were not quiet. (RT 3443.) Angie had no current memory of that this threat occurred, so the statement was double hearsay. (RT 3444.) The district attorney offered the evidence under the exception for past recollection recorded. (RT 1237.) The trial court indicated the statement would be received provided a proper foundation were established, and refused to issue a "blanket order" prohibiting reference to this and other evidence in the prosecutor's opening statement. (RT 3445-3450.)

Defense counsel renewed the double hearsay objection to Dr. Fisher's testimony in an unreported bench conference when the statements were offered in evidence. The court ruled the evidence admissible as a spontaneous statement and as past recollection recorded. (RT 5241-5242; SCT #7 190; 5182-5183.)

Dr. Fischer testified that she first saw Angie at 4:50 a.m. on January 27, 1991. (RT 5242.) She completed an emergency room record by asking questions on the form, and noting Angie's answers. (RT 5243.) The responses to questions were received at some time prior to 9:45 a.m. (RT 5243.) Dr. Fisher asked if Angie had been threatened with harm in any way, and Angie responded "that the person who injured her would kill them if not quiet." (RT 5244.) The doctor recorded this answer. (RT 5244.) Dr. Fisher could not recall the conversation with Angie but would have only written down what she was told. (RT 5245.)

Angie had testified prior to Dr. Fisher. (RT 4952.) During her trial testimony, Angie did not testify to any threat to kill the girls made by Roy during the evening of January 26th. Angie testified that, after she was strangled and blacked out, the next thing she remembered was awaking in the hospital. She had only a vague recollection of hearing voices and being asked questions while in the ambulance, and of trying to communicate accurately what had happened. (RT 5133.) Angie could not recall anyone else asking her questions, other than in the ambulance. (RT 5157.) Looking at the emergency room record (People's Exhibit 74) did not refresh Angie's recollection. (RT 5159.)

A. Dr. Fisher's testimony was not properly received as a spontaneous statement.

The trial court erred by admitting Dr. Fisher's testimony about the threat as a spontaneous statement. Evid. Code, § 1240, provides in relevant part:

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

The statement attributed to Angie was not made under the stress of any excitement caused by the events of January 26th. The threat, if in fact uttered, must have occurred between 11 p.m. and 2 a.m. on the night in question. (See RT 5137.) Angie was received in the emergency room and seen by Dr. Fisher at 4:50 a.m. after a period of unconsciousness; questioning was accomplished before 9:45 a.m., many hours after the "event perceived." (Cf. People v. Francis (1982) 129 Cal.App.3d 241, 254 [declarations were made within approximately 20 minutes of a stabbing, precluding the likelihood of reflection and fabrication].)

"A spontaneous declaration is admissible, despite its character as

hearsay, because of its particular reliability as the immediate product of direct perception, before fading memory or the opportunity for fabrication has intervened." (People v. Arias (1996) 13 Cal.4th 92, 150.) In this instance, significant time for reflection had passed. Furthermore the serious nature of the injuries sustained – including post-concussion syndrome (RT 3545-3547, 5230-5231, 5263-5264) and transient global amnesia and temporary deficits in brain function (RT 5285-5291, 5368) – raise questions regarding the accuracy of Angie's recollections immediately after the attack. According to Angie, her memory improved over time and was better as to certain details by the time of the trial. (RT 5180.)[69]

Accordingly, the admission of the hearsay as a spontaneous declaration was clearly erroneous.

B. Dr. Fisher's statement was not properly received as past recollection recorded.

The trial court also received the "threat to kill" evidence as past recollection recorded. Evid. Code, § 1237, provides:

> "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement after the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact and [¶] (4)

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[69] At Roy's trial, Angie testified that she recalled being strangled from behind, while standing by the roadside. She did not recall the part about being strangled when she testified much earlier, at the preliminary hearing. (RT 5179-5180.)

> Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by the adverse party."

The Assembly Committee on the Judiciary "Comment" to Evid. Code, § 1237 indicates: "Sufficient assurance of the trustworthiness of the statement if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement." (Thomson-West Cal. Evid. Code (2003 Desktop Ed.), § 1237, Comment, p. 255.) In this case, only the first foundational requirement for admission was satisfied. Dr. Fisher testified that she accurately recorded Angie's statement. However, Angie was never asked to, and she was evidently incapable of truthfully testifying that all statements made to emergency room personnel were true statements. (People v. Hefner (1981) 127 Cal.App.3d 88, 97; cf. People v. Dennis (1998) 17 Cal.4th 468, 529 [hearsay declarant testified that he was positive about the accuracy of information related to police, and memorialized in a police report]; People v. Miller (1996) 46 Cal.App.4th 412, 423 [hearsay declarant testified that he spoke with detectives when his memory was fresh, and that he told detectives the truth].)

Because Angie's partial amnesia left her with no recollection of her discussions with Dr. Fisher at all, this case presents facts nearly identical to People v. Simmons (1981) 123 Cal.App.3d 677, in which a witness/hearsay declarant [Mr. Jackson] in an arson prosecution had also suffered a serious head injury causing amnesia. Mr. Jackson was interviewed by police and recounted hearsay statements by the defendant, Simmons, discussing his intent to commit arson, and boasting of doing so, shortly afterwards. Called as a witness at the preliminary examination, Jackson could recall some past events, but he could no longer recall being contacted by police or making statements to police attributing extrajudicial statements to the defendant, claiming

responsibility for the arson. Jackson admitted he would have had no reason not to tell the truth if questioned by the police, and testified that he recognized his signature transfixed to the police record of his extrajudicial statement. In Simmons, the trial court admitted the admissions of the defendant under the past recollection recorded exception to the hearsay rule. The appellate court held that this was error; the foundational requirements for past recollection recorded had not been met. (Id. at pp. 679-682.)

For the same reasons, it was error to admit Dr. Fisher's testimony about Roy's alleged threat to kill Angie and Laurie, as past recollection recorded.

C. The admission of Dr. Fisher's testimony was prejudicial, and violated Roy's confrontation rights, guaranteed by the state and federal constitutions.

An accused's Sixth Amendment right to confront the witnesses against him is a fundamental right made obligatory upon the states by the Fourteenth Amendment. (Dutton v. Evans (1969) 400 U.S. 74, 79.) This state's own Confrontation Clause is embodied in Article I, section 15 of the California Constitution. "The central concern of the Confrontation Clause is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the contest of an adversary proceeding before the trier of fact." (Maryland v. Craig (1990) 497 U.S. 836, 845.)

Roy does not concede that the evidence in this case was admitted pursuant to a recognized hearsay exception. Even if so, the United States Supreme Court has not hesitated to find a violation of confrontation values even though hearsay statements were admitted under arguably recognized hearsay exceptions. (Dutton v. Evans, supra, 400 U. S. at p. 82.) "The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. (Idaho v. Wright (1990) 497 U.S. 805, 814.)

The determination whether hearsay evidence violates the confrontation

rights requires a two-pronged analysis. First, for use of out-of-court statements to survive judicial scrutiny, it must first ordinarily be demonstrated that the declarant is unavailable for cross examination. (Ohio v. Roberts (1980) 448 U.S. 56, 66; United States v. Nazemian (9th Cir. 1991) 948 F.2d 522, 525.) In this case, Angie was not physically unavailable; however, her retrograde amnesia rendered her incapable of being cross-examined regarding the threat attributed to Roy. (People v. Simmons, supra, 123 Cal.App.3d at p. 681.)

Secondly, the government must demonstrate that the declarant's statements are trustworthy. (Ibid.) The trustworthiness of a statement must be determined by balancing four factors: (1) whether the statements are assertions of past fact; (2) whether the declarant has personal knowledge of the facts he related; (3) whether there is a possibility of faulty recollection; (4) whether the circumstances suggest that the declarant misrepresented the defendant's role. (Dutton v. Evans, supra, at pp. 88-89; United States v. Monks (9th Cir. 1985) 774 F.2d 945, 952.)

Dr. Fisher's testimony fails to pass constitutional scrutiny under the Dutton test. The statements attributed to Angie regarding Roy's threats were assertions of past fact. Angie may have had personal knowledge of the facts at the time they were related. Unfortunately, at the time of trial she no longer recalled answering the questions posed by Dr. Fisher, much less the answers she gave. She did not and could not attest to the accuracy of any statements given to emergency room personnel, including Dr. Fisher. Given the injuries sustained by Angie, including transient retrograde amnesia, and the severe speech difficulties observed by police, family members and doctors shortly following injury, the trustworthiness of the hearsay statement describing a threat to kill is highly questionable. (See, RT 3545-3547, 3813, 3857-3862, 3889, 5230-5231. 5263-5264, 5283-5287.)

The Sixth Amendment is not violated so long as a defendant has the

ability to confront and *meaningfully* cross examine the declarant at trial. As in People v. Simmons, supra, 123 Cal.App.3d at p. 681, "[h]ere, we lack either contemporaneous cross-examination or the ability to meaningfully confront and cross examine the witness at trial." (Id. at p. 681.) "Observing the demeanor of an amnesiac witness when questioned about that which he is incapable of recalling is as meaningless as attempting to gain information as to the truth of the unknown facts from his responses." (Ibid.)

Accordingly, not only does Dr. Fischer's hearsay testimony regarding threats attributed to Roy fail to meet the requirements for admissibility under any settled hearsay exception, the evidence also violated Roy's right to confrontation and cross-examination, guaranteed by both the United States and California constitutions. Furthermore, "[d]ue process draws a boundary beyond which state rules cannot stray." (Perry v. Rushen (9th Cir. 1983) 713 F.2d 1447, 1453.) Thus, even *if* Roy's confrontation rights were not compromised, because the hearsay threat constituted a pre-offense statement expressing the intent to commit murder, the its admission rendered the trial fundamentally unfair in violation of due process. (See, e.g., Dudley v. Duckworth (7th Cir. 1988) 854 F.2d 967.)

XXXIX APPELLANT WAS PREJUDICED BY THE ERRONEOUS RECEIPT OF EVIDENCE THAT ANGIE WAS REFERRED FOR PSYCHIATRIC TREATMENT BECAUSE SHE WAS A RISK FOR POSTTRAUMATIC STRESS DISORDER.

During the testimony of Dr. Jack Sharon, a physician who treated Angie at the Valley Medical Center, the witness was asked what was his purpose in seeking a psychiatric consultation for Angie. (RT 5267.) Defense counsel objected on relevance grounds, but the objection was overruled. (RT 5267.) Dr. Sharon responded that Angie was at risk to suffer posttraumatic stress disorder, and that early psychiatric involvement would be beneficial. (RT 5268.)

Posttraumatic Stress Disorder [PTSD] is described by the Diagnostic and Statistical Manual of Mental Disorders (4th Ed.) Text Revision [hereafter "DSM IV-TR], "the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a close associate." (DSM-IV-TR, p. 463.) As the name of the disorder connotes, characteristic symptoms of PTSD may include: persistent reexperiencing of the traumatic event; avoidance of stimuli associated with the trauma; numbing of general responsiveness; symptoms of increased arousal, including, without limitation, sleep difficulties, irritability, hypervigilance, and concentration problems; and clinically significant distress or impairment in social, occupational, or other important areas of functioning. (DSM-IV-TR, p. 463-468.)

"No evidence is admissible except relevant evidence." (Evid. Code, §

350.) Evidence that Angie was at risk to develop PTSD had absolutely no relevance to prove any disputed fact of consequence to the determination of the guilt phase trial. (Evid. Code, § 210.) Her need for psychiatric treatment made it no more or less likely that Roy committed the charged crimes, or that the special circumstances of attempted rape-murder, robbery-murder, or witness killing were true. The trial court erred when it overruled defense counsel's objection that the evidence was irrelevant. (See, e.g., People v. Hardy (1992) 2 Cal.4th 86, 201 [irrelevant at guilt phase that victim was raising her cat's kittens at the time she was murdered].)

Although victim impact evidence is not *per se* inadmissible at the penalty phase, it is inadmissible at the *guilt phase* unless directly relevant to the circumstances of the crime. (Payne v. Tennessee (1991) 501 U.S. 808, 825-827.) The victim's impaired psychological condition in the weeks or months following the crime had no relevance to prove the facts and circumstances of the offenses committed by Roy.

Furthermore, appeals to the passions and prejudices of a jury have no proper place in the guilt phase of a capital trial. (People v. Pensinger (1991) 52 Cal.3d 1210, 1250; People v. Fields (1983) 35 Cal.3d 329, 362; People v. Simington (1993) 19 Cal.App.4th 1374, 1378.) The only conceivable purpose for suggesting that Angie was likely to be beset with symptoms of PTSD was to inflame and prejudice the jury. The evidence was highly prejudicial, completely irrelevant and therefore improperly received over defense objection. (Evid. Code, § 352; U.S. Const. Amendment XIV; Cal. Const., Art. I, §§ 7, 15.) In any event, the denial of federal due process does not depend on the presence or absence of a state law violation. (Jammal v. Van DeKamp (9th Cir. 1991) 926 F.2d 918, 920.) Even if the evidence had some tangential relevance to issues to be decided by the jury, due process was denied because the potential of such evidence to inflame the jury's sympathy

for Angie far outweighed any conceivable need for the evidence at the guilt phase of the trial.

XXXX APPELLANT WAS PREJUDICED BY THE ERRONEOUS ADMISSION OF EVIDENCE OF HIS LACK OF EMPLOYMENT TO PROVE A MOTIVE FOR ROBBERY, DURING THE PROSECUTION'S GUILT PHASE CASE-IN-CHIEF.

During the case-in-chief, the prosecutor attempted to elicit testimony from Donna Kellogg, that Roy was unemployed and living on AFDC [Aid to Families With Dependent Children]. The evidence was offered as relevant to prove that Roy needed money, and therefore he had a motive to commit robbery and robbery-murder. (RT 4900-4901.) The defense objected, properly, that the proffered evidence was irrelevant and highly prejudicial. (RT 4901.) The trial court excluded evidence that Roy lived off of AFDC, but allowed testimony by Donna Kellogg that Kellogg's income of $700 per month was the couple's sole source of support. (RT 4906.)

The rule governing evidence of poverty as a motive for crime has been well established for more than 100 years. "Generally, evidence of the wealth or poverty of a defendant is not admissible; but the sudden possession of money, immediately after the commission of a larceny, by one who before that had been impecunious, is clearly admissible as a circumstance in the case." (People v. Kelly (1901) 132 Cal. 430, 431-432; People v. Hogan (1982) 31 Cal.3d 815, 854.) "Wigmore states that a general policy of exclusion of this type of evidence as motive for crime because 'the practical result of [admission] would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence.'" (People v. Hogan, supra, 31 Cal.3d at p. 854; quoting, 2 Wigmore, Evidence (3d ed. 1940) § 392, p. 341.)

Specifically, in California, it has been held that "[e]vidence of a defendant's poverty or indebtedness, without more, is inadmissible to

establish motive for robbery or theft because it is unfair to make poverty alone a ground of suspicion and the probative value of the evidence is deemed to be outweighed by the risk of prejudice." (People v. Edelbacher (1989) 47 Cal.3d 983, 1023-1024; accord: People v. Wilson (1992) 3 Cal.4th 926, 939.)

The rule against using evidence of a defendant's poverty to establish a motive for crime is also followed by the federal courts. Admission of such evidence rests "solely on the general (and impermissible) assumption that those who are not well-off cannot live within a budget and that they crave money and will commit crime to obtain it." (Davis v. United States (D.C. Cir. 1969) 409 F.2d 453, 458.)

> "Today, when the law has recognized a commitment to the underprivileged to bridge the chasm between the 'poor man's' and 'rich man's' justice, courts must be especially alert to prevent a man's rights or liberty from turning on his economic and social status. Thus, while inquiry into an accused's financial background may be relevant to the Government's case, the prosecution must proceed gingerly in its exploration and the trial judge should permit this inquiry only where there is a proffer that the evidence, in light of other proof, is highly probative."

(Davis v. United States, supra, at p. 458; accord: United States v. Jackson (9th Cir. 1989) 882 F.2d 1444, 1449-1450.)

None of the narrowly circumscribed exceptions to the rule against admissibility apply in this case. There was no evidence that Roy faced potentially dire consequences if he failed to meet a large, imminent financial burden. (See, e.g., United States v. Saniti (9th Cir. 1979) 604 F.2d 603, 604; cert. denied, 444 U.S. 969.) Likewise, there was no evidence that Roy was impecunious, then came into the sudden possession of money on the date of the crime. (See, e.g., People v. Gorgol (1953) 122 Cal.App.2d 281, 303-304.) Evidence was entirely absent that Roy was living above his means, as, for example, one suffering from a $250 per day drug habit. (United States v.

Saniti, supra, 604 F.2d at p. 604.) Nor was evidence of Roy's lack of income necessary to refute testimony, in defense, that Roy did not commit a robbery because he did not need money. (See, People v. Edelbacher, supra, 47 Cal.3d at p. 1024; People v. Gorgol, supra, 122 Cal.App.2d at p. 303.) To the contrary, Roy's testimony that he needed no money was only introduced to rebut the state's evidence that Roy's impoverishment furnished a motive to rob. (See RT 5785-5786.)[70]

Evidence that Roy and Ms. Kellogg had little income with which to support a family that included three children was highly prejudicial. Roy was convicted of two counts of robbery, including one count against each of the victims, and the robbery-murder special circumstance allegation was found true. Yet little more was proven to support these serious charges than that the victims each had a few dollars in change for which there was never any accounting. (See Argument Section 1.) The jury was permitted, impermissibly, to infer that Roy's lack of employment made it more likely he "craved money" (Davis v. United States, supra, 409 F.2d at p. 458), so much that he was willing to use force or fear – or even to commit murder and attempted murder – for a few dollars in change. Under the circumstances, the error clearly resulted in a miscarriage of justice because it is more probable than not that the error contributed to the verdicts on the robbery counts and robbery-murder special circumstance finding.

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[70] Roy testified in defense that Donna Kellogg handled all of their money, and gave Roy cigarettes and spending money whenever he needed it. Roy also denied that he needed money for drugs. (RT 5786.)

XXXXI APPELLANT WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE OF HIS LAZINESS, FAILURE TO PROVIDE CHILD SUPPORT AND LACK OF INTEREST IN OBTAINING EMPLOYMENT AS REBUTTAL EVIDENCE.

Defense counsel objected to the introduction of evidence, in rebuttal, offered to show that Roy was a lazy, failed to help with household chores, did not provide child support and had no interest in looking for work. (RT 8063, 8123, 8160, 8169.) Counsel argued that these categories of rebuttal evidence were collateral, cumulative, highly prejudicial and unnecessary to rebut any evidence presented by the defense. (RT 8123-8129, 8158.) Initially, the trial court agreed with the defense that the fact that Roy was a bad father, that he took no responsibility for the children, did not help with household chores, and played basketball and fooled around all day, had no relevance except to paint Roy as a bad person. (RT 8162, 8163, 8180.)

Later, the trial court modified its ruling precluding such evidence, and allowed testimony that Roy never worked or looked for work, and did not support his children, on the theory that the evidence was relevant to prove the diagnosis of the state's experts – antisocial personality disorder – a diagnosis not disputed by defense experts. (RT 8156, 8167, 8266-8267, 8705.)[71] An offer by Ms. O'Neill to stipulate on the record that Roy suffered from

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[71] The defense had also objected to expert opinion testimony by the state's expert, Dr. Thackrey, that Roy suffered from antisocial personality disorder. Counsel argued that this evidence was not proper rebuttal inasmuch as the defense expert, Dr. Berg, had also testified that Roy suffered from antisocial personality disorder and organic personality syndrome, which were not mutually exclusive diagnoses. The trial court rejected this argument and ruled that Dr. Thackrey's testimony constituted proper rebuttal. (RT 8241-8248.)

antisocial personality disorder was rejected. (RT 8705.)

Several of the experts who testified for the prosecution opined that Roy suffered from antisocial personality disorder. (RT 8256-8259 [Dr. Thackrey], 8293-8301, 8338 [Dr. Missett].) Dr. Thackery's diagnostic impression of antisocial personality disorder was based, in part, upon cited aspects of Roy's history, including an adult history of "being unemployed for a significant period of time when one could, presumably work," and "failure to provide financial support for one's children . . . ." (RT 8258.) Dr. Missett's diagnosis also relied, in part, on Roy's, "[f]ailure to adequately support his wife and children." (RT 8338.)

Following the testimony of Dr. Missett and Dr. Thackrey, a number of lay witnesses were called for the purpose of establishing Roy's antisocial characteristics. Ms. Kellogg testified that Roy had no income of his own, that she never observed him to read the want ads or complete a job application, and that he did not express any unhappiness with his lack of a job. (RT 8741-8743.) Tina Edmonds testified that, during the time she lived with Roy and Kellogg, Roy usually slept until 1 p.m. and spent evenings out. Edmonds further testified that she never observed Roy to fill out a job application or read the classified ads and he never talked to her about getting a job. (RT 8776-8777.) On one occasion when Kellogg and Roy were moving from one residence to another, Roy was there, but did not help move anything, including heavy objects like the stove and refrigerator. (RT 8784.) According to the testimony of Michael Hall, Roy slept until early afternoon, never worked, did not read the classified ads, and did not express any desire to get a job or find a career. (RT 8846-8847.) Admission of this evidence constituted reversible error.

Evidence of Roy's laziness, and antisocial work ethic was ostensibly received as "rebuttal," to support a diagnosis of antisocial personality disorder.

Under the circumstances, this was not proper rebuttal evidence. The scope of rebuttal "must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (People v. Ramirez (1990) 50 Cal.3d 1158, 1193.)

In this case, the guilt phase defenses advanced were diminished actuality and unconsciousness at the time of the offenses. Roy's experts testified that Roy suffered from poor judgment, poor impulse control, unreliability and immaturity, which could have been produced by OPS – organic personality syndrome. (RT 6328-6336, 5458, 6456.) At the time of the crimes, defense experts believed Roy was suffering from a brain damage induced rage-reaction, and possibly unconsciousness produced by a seizure. (RT 6447-6456, 7529-7530.)

The diagnosis of antisocial personality disorder was *not* disputed by the defense or defense experts. Defense psychologist Dr. Berg testified that Roy had sustained diagnoses consistent with antisocial personality disorder on a number of occasions in the past. (RT 7304-7305.) Dr. Berg also admitted that Roy met many of the diagnostic criteria, and that his MMPI test results were consistent with the disorder. (RT 7309-7310, 7666.)[72] This expert also

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[72] The DSM IV-TR lists the following diagnostic criteria for Antisocial Personality Disorder:

"A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

"(1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest

"(2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure

"(3) impulsivity or failure to plan ahead

"(4) irritability and aggressiveness, as indicated by repeated physical fights or assaults

"(5) reckless disregard for the safety of self or others

"(6) consistent irresponsibility, as indicated by repeated failure to

opined that persons suffering from brain dysfunction or injury could manifest antisocial personality disorder. (RT 7664.) The state's own expert, Dr. Thackrey, testified that a diagnosis of antisocial personality disorder could co-exist with other disorders, including OPS. (RT 8242.) Defense counsel even offered to stipulate that Roy suffered from antisocial personality disorder. (RT 8705.)

Hence, evidence of Roy's laziness and disinterest in finding employment was not relevant because it had no tendency in reason to prove or disprove any *disputed* fact of consequence to the guilt phase trial. (Evid. Code, § 210; People v. Hill, supra, 3 Cal.App.4th at p. 29.) The fact that Roy's past behavior met the diagnostic criteria for antisocial personality disorder was not disputed and did not make the defense experts' diagnoses and opinions any more or less probable. "Evidence is considered irrelevant if it fails to make any fact of consequence more or less probable." (McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1380.) The evidence was also not proper rebuttal because it was "not responsive to the evidence presented by the defense." (People v. Ramirez, supra, 50 Cal.3d at p. 1193.)

Even if relevant, this excessive rebuttal evidence of Roy's antisocial personality characteristics should have been excluded on motion of the defense pursuant to Evid. Code, § 352. Any evidence offered to prove Roy's "failure to sustain consistent work behavior or honor financial obligations" (DSM IV-TR, at p. 706), was cumulative because this particular diagnostic

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sustain consistent work behavior or honor financial obligations

"(7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

"B. The individual is at least age 18 years.

"C. There is evidence of Conduct Disorder (see p. 98) with onset before age 15 years.

"D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode."

criteria was amply established by other evidence that did not place undue emphasis on Roy's bad character. Roy himself had described his lack of consistent employment in the years preceding the crime. (RT 5757, 5761, 5766-5767, 5785, 6054.) Furthermore, evidence of Roy's work ethic had great potential to bias the jury because its effect – and evident purpose – was to portray Roy as a lazy, despicable, good-for-nothing bum, who slept late, refused to help out around the house, and had no interest in obtaining work to help support his children.

"The rule against using character evidence to show behavior in conformance therewith . . . has persisted since at least 1684 to the present, and is now established not only in California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the commonlaw precedents of the remaining twelve states and the District of Columbia." (McKinney v. Rees, supra, 993 F.2d at p. 1381; footnote omitted.) The gravamen of the rule is to "force the jury, as much as humanly possible, to put aside emotions and prejudices and prejudices . . . in order to decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty of the crime charged." (McKinney at p. 1384.) A prosecutor is barred from showing a defendant's prior trouble with the law, his specific bad acts, or bad reputation among his neighbors, "even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." (Ibid.) Such evidence weighs too heavily with juries, and denies an accused a fair opportunity to defend against the actual charges. (Ibid.)

When the jury is permitted to draw impermissible inferences from propensity evidence, it violates due process. (McKinney v. Rees, supra, 993 F.2d at p. 1384.) In this case, jurors were allowed to consider evidence of Roy's antisocial personality characteristics, without limitation, to decide

whether he was guilty or innocent of the charged crimes.[73] As previously argued, emphasizing Roy's lack of employment also created the danger, impermissibly, that Roy was not only lazy, but that he also "craved money", and therefore he was more likely than others to commit certain crimes. (See Argument XXXX; Davis v. United States, supra, 409 F.2d at p. 458; People v. Hogan, supra, 31 Cal.3d at p. 854.) Therefore, evidence of Roy's laziness and disinterest in employment made it more than reasonably likely the jury did not follow the instructions to weigh the evidence carefully, but instead skipped careful analysis of the logical inferences and convicted Roy on the basis of his antisocial character traits, rendering the guilt phase trial fundamentally unfair in violation of due process. (McKinney v. Rees, supra, 993 F.2d at p.1385.)

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[73] The Court gave CALJIC 2.23, a limiting instruction barring consideration of a witness' prior felony conviction to prove the defendant's disposition to commit a crime. (CT 948.) The Court also gave CALJIC 2.09, which instructed the jury not to consider evidence admitted for a limited purpose for any purpose other than the purpose for which it was admitted. (RT 940.) The jury was not, however, instructed that the character evidence involved here was being admitted for a limited purpose.

XXXXII APPELLANT WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE IN "REBUTTAL" THAT HE HAD SEX WITH WOMEN OTHER THAN DONNA KELLOGG.

Over defense objection, evidence of Roy's sexual conduct with other women was admitted at the guilt phase trial on theory that such evidence was admissible to rebut Roy's testimony that he loved Donna Kellogg and regarded her as his wife. The evidence was improperly received for this purpose.

Roy's direct testimony regarding Ms. Kellogg came in the midst of a chronological account of his life up to the time of the charged crimes, including testimony regarding how and when Roy met Ms. Kellogg, and began living with her. Roy testified that he met Ms. Kellogg in Long Beach, in 1986, and they became boyfriend and girlfriend. (RT 5766-5767.) They began living together, and having children, but never legally married. (RT 5768.) In this context, the following colloquy occurred during the direct examination of Roy by Mr. Kinney:

"Q. It's called a common law marriage?
"A. Yes.
"Q. You were living together as man and wife?
"A. Yes.
" * * *
"Q. When you moved to Fresno with Donna, how did you feel about her? What were your feelings towards her?
"A. I loved her.
"Q. Did you have a good relationship as far as you were concerned?
"A. Yes." (RT 5769.)

The foregoing passages demonstrate that Roy's testimony regarding his relationship with Ms. Kellogg was extremely limited, and the strength of Roy's emotional bond with Ms. Kellogg was simply intended as background information, completely collateral to any of the issues to be decided by the

jury. In fact, this series of questions and answers had so little obvious significance, that it caused the prosecutor to object that the evidence was *irrelevant*. (RT 5769.)

Roy's cross-examination was then interrupted to hear testimony from several of the defense mental health experts, including Dr. Berg. (RT 6307.) Dr. Berg testified briefly regarding Roy's history, recapitulating what he had learned about the development of Roy's putative spousal relationship with Donna Kellogg. (RT 6417.) Dr. Berg mentioned that Roy had raised three children with Ms. Kellogg, and regarded himself as married to her. (RT 6417-6418.)

When cross-examination of Roy resumed, the prosecutor sought to question Roy about the nature of his "marital" relationship with Ms. Kellogg, including whether he had enjoyed sexual relationships with other women. The defense objected under Evid. Code, § 352, that the evidence was more prejudicial than probative, but the objection was overruled. (RT 6684-6686.) Mr. Kinney asked to have a "side bar" to discuss the objection, but trial court denied the request, and allowed the prosecutor to continue questioning Roy. (RT 6687.) Roy then acknowledged that he had "slept around" on Ms. Kellogg. (RT 6687.)

Subsequently, outside the presence of the jury, defense counsel again argued that Roy's sexual conduct with other women had limited relevance to disprove Roy's claim that he regarded Ms. Kellogg as his wife, yet it had great potential to prejudice the jury. (RT 6688, 6690-6691.) Initially, the trial court ruled that the district attorney would be permitted to cross-examine Roy about his assertion that he was a good common law "husband". (RT 6689.) After further argument, the court decided to limit further evidence proving that Roy was unfaithful to Ms. Kellogg, because the probative value of such evidence would be "de minimus" compared with the undue consumption of court time.

(RT 6695.)

On re-direct examination, defense counsel sought to minimize the damage caused by the Roy's admission of infidelity during cross-examination, by eliciting testimony that Roy had been unfaithful to Ms. Kellogg on only one occasion, when Roy was in Long Beach and Ms. Kellogg was in Fresno. (RT 6922.) On redirect-examination, over objection, the district attorney was again permitted to probe the frequency with which Roy had sex with other women. (RT 7009.) This time, Roy admitted having sexual relations with two other women during his relationship with Ms. Kellogg. (RT 7010-7012.)

Evidence of Roy's infidelity was improperly received as rebuttal evidence. "[T]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (People v. Ramirez, supra, 50 Cal.3d at p. 1193; accord: People v. Jones (1998) 17 Cal.4th 279, 307 [quoting Ramirez, supra.) As the trial court acknowledged, Roy never claimed sexual fidelity, nor did defense experts' opinions and diagnoses rest on the supposition that Roy was monogamous during the time he lived with Ms. Kellogg. (See, RT 8135, 8174; Ibid.) Whether Roy occasionally "slept around" on Ms. Kellogg was totally collateral to any of the disputed fact issues to be decided by the jury. The trial court even agreed that evidence that Roy "fooled around sexually" had no relevance except to paint Roy as a bad person. (RT 8163.)

Nor was the fact that Roy had sex with several other women properly introduced as rebuttal evidence, to support a diagnosis of antisocial personality disorder. (See, Argument XXXXI.) Roy's sexual contact with other women, in and of itself, does not establish any of the listed diagnostic criteria for antisocial personality disorder. (See DSM IV-TR at p. 706.) Even assuming Roy's sexual behavior was among the many social history facts

considered by the state's doctors[74] (see, RT 8338), this highly inflammatory evidence should have been precluded for the same reasons that testimony offered to prove Roy's character trait for laziness should have been excluded. (See Argument XXXXI.)

The diagnosis of antisocial personality disorder was not in substantial dispute. Experts from both sides agreed that Roy met the diagnostic criteria. (RT 7304-7305, 7309-7310, 7664-7666, 8242.) Defense counsel even offered to stipulate that Roy suffered from the disorder. (RT 8705) Therefore, evidence that Roy met individual diagnostic criteria for an antisocial personality was not an issue. Consequently, Roy's fidelity, or lack thereof, failed to make any fact of consequence to this action more or less probable. (McKinney v. Rees, supra, 993 F.2d at p. 1380.) Roy's infidelity did not make it any more or less likely that, at the time of the crimes, he suffered from OPS, rage-reaction, or unconsciousness produced by a seizure. Those conditions were capable of coexisting with antisocial personality disorder.

Allowing the prosecution to probe Roy's sexual conduct invited the jury to conclude that Roy's status as a philanderer made it more likely he committed the charged crimes with deliberate intent, rather than as the product of a brain-damage induced rage-reaction, unconsciousness or seizure. Not only did the trial court abuse its discretion in failing to exercise discretion to exclude the evidence as more prejudicial than probative (Evid. Code, § 352), admission of the evidence also rendered the guilt phase trial fundamentally unfair, in violation of due process. (McKinney v. Rees, supra, at pp. 1384-

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[74] Persons with antisocial personality disorder "may be irresponsible and exploitative in their sexual relationships" or "may have a history of many sexual partners and may never have sustained a monogamous relationship." (DSM IV-TR at p. 703.) However, there is no evidence in this record that Roy's sexual relationship with Kellogg, or any other woman, was irresponsible or exploitative, that he had many sexual partners, or that he had never in his life sustained a monogamous relationship.

1385; People v. Flanagan, supra, 342 N.W.2d 609, 793-794; People v. Sterling, supra, 397 N.W.2d at p. 233.)

XXXXIII APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S RULINGS WHICH PERMITTED EXCESSIVELY BROAD IMPEACHMENT WITH TWO PRIOR ROBBERIES, MISDEMEANOR MISCONDUCT, AND EXTRAJUDICIAL STATEMENTS ADMITTING OTHER UNCHARGED ACTS OF DISHONESTY, MANIPULATIVE BEHAVIOR OR MISCONDUCT.

Evidence of an accused's commission of other crimes and bad acts is inherently prejudicial. (People v. Balcom (1994) 7 Cal.4th 414, 422; In re Jones (1996) 13 Cal.4th 552, 581-582.)

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the common law invests the defendant with a presumption of good character [citation], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

(Michelson v. United States (1948) 335 U.S. 469, 475-476; accord: Old Chief v. United States (1997) 519 U.S. 172.)

Despite the sound public policy embodied in common law rule against the use of bad character evidence, in 1982, as a part of the enactment called "The Victims' Bill of Rights," sections 28(d) and (f) were added to article I

of the California Constitution. These provisions sought to *expand* the permissible use of evidence of an accused prior crimes and bad acts beyond well-established statutory exceptions. (See, Evid. Code, §§ 786, 787, 788, 790, 1101 & 1102.) Subdivision 28(d) provides in relevant part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . .Nothing in section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. . . ." Subdivision 28(f) provides, inter alia: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment. . . ."

By the time Roy was tried, it was well settled that the adoption of the above state constitutional provisions did not entirely eliminate Evid. Code, § 352 as a basis for excluding evidence of prior felony convictions. (People v. Castro (1985) 38 Cal.3d 301, 313-314.) In Castro, in fact, this Court ruled that impeachment using prior felony convictions amounted to a violation of due process unless the convictions used for impeachment demonstrated a general "readiness to do evil." (Ibid.)

By the time of Roy's guilt phase trial, the permissible scope of misdemeanor impeachment under "The Victims' Bill of Rights" was equally well settled. In People v. Wheeler (1992) 4 Cal.4th 284, 292, this Court ruled that misdemeanor misconduct could be used for impeachment, unless exclusion was allowed or required by existing statutory rules of evidence relating to privilege or hearsay, or Evid. Code, § s 352, 782, and 1103. Misdemeanor impeachment evidence is still required to pass the threshold of relevancy; to be usable for impeachment in a criminal trial, a witness's past misconduct must involve moral turpitude, i.e., must be probative of a

willingness to lie. (Id. at p. 297.) Most importantly, this Court held that the trial courts retained discretion under the "Truth-in-Evidence" provision of the state constitution to exclude misconduct evidence to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (People v. Wheeler, supra, 4 Cal.4th at p. 296.)

At *in limine* hearings held prior to Roy's testimony, the defense sought to severely circumscribe the nature and quantity of evidence that could be used by the prosecution for impeachment, in the event Roy testified. Over defense objection, the trial court ruled that Roy could be impeached with two prior robbery convictions, a 1981 Texas conviction and a 1985 California conviction (RT 5680, 5682, 5708, 5692, 5703, 5708, 6589),[75] a 1984 misdemeanor burglary offense (RT 5667, 5679, 5692), and a 1984 misdemeanor vehicle theft (RT 5667, 8225).[76]

In addition, the prosecution was given license, over defense objection, to elicit evidence of a number of extrajudicial statements attributed to Roy, documented in prison and hospital records, in which he admitted other bad or dishonest acts, or purportedly dishonest or manipulative conduct. Extrajudicial statements ruled admissible for impeachment included claims by Roy that he had traveled around robbing people, and obtained tickets for

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[75] In proving the robbery convictions, the prosecutor was limited to the judgment roll. Later, in response to defense evidence that Roy had problems with explosions of violence and women, it was stipulated by the defense that the prior robberies were committed against male victims. (RT 7459, 7589.) After Roy testified that was experiencing a blackout when he strangled the victims in this case, the defense also stipulated that Roy was not experiencing a blackout when he committed a robbery in California. (RT 6637.)

[76] Use of Roy's prior assaults on a girlfriend and prior juvenile court offenses was initially precluded. (RT 5660, 5662, 5663, 5665, 5674-5675, 5683, 5692.) Some evidence of Roy's prior misdemeanor misconduct, including prior assaults upon former girlfriend Theresa Parks, and several fire-setting incidents, was presented in support of Roy's theory of defense.

transportation without paying for them (RT 5665, 5679, 5684), that he threatened to commit suicide, or feigned suicide to secure his release from Juvenile Hall to a mental hospital (RT 5664, 5676), and that he made untruthful statements to get admitted to U.S.C. Medical Center for food and shelter (RT 5666, 5679, 5691-5692).

Roy thereafter testified. In anticipation of impeachment, on direct-examination Roy admitted sustaining California and Texas robbery convictions. (RT 5765.) He also admitted the facts underlying his 1984 misdemeanor convictions for vehicle theft and burglary. (RT 5759, 6599, 5760-5761, 6602.) Also on direct-examination, Roy admitted that he begged and robbed for food while in Texas, and that he had possibly made admissions to prison doctors regarding his practice of robbing for food. (RT 5755.) Roy also admitted traveling by bus, train and plane without paying for his tickets. (RT 6666.)[77]

Regarding the alleged feigned suicide attempt, Roy testified on direct examination, and was questioned extensively on cross-examination, about whether he had once feigned suicide to get out of juvenile hall, into the county hospital. (RT 5990-5991, 6018-6021, 6084, 6244-6245.) In an apparent effort to minimize the damaging effect of this evidence, the defense also elicited testimony from defense expert, Dr. Berg, minimizing the dishonesty intrinsic in Roy's efforts to get out of juvenile hall. (RT 6390-6395.)

Given that Roy was charged with two counts of robbery and a robbery-murder special circumstance allegation, introduction of two prior robbery convictions and an unspecified number of other uncharged crimes, including

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[77] Roy said he boarded trains, then hid in the bathroom until the conductor passed. He purchased plane tickets, picked up a boarding pass, returned the ticket, then used the boarding pass to catch the identical flight the following day. He boarded buses by getting on when the driver was not watching. (RT 6666.)

an unknown number of "robberies" was excessively prejudicial and unnecessary. Since "Truth-in Evidence" provisions were added to our constitution, appellate courts have tended to condone the use of multiple and identical prior felonies for impeachment, where "no other prior felony convictions were available for impeachment." (See, e.g. People v. Tamborino (1989) 215 Cal.App.3d 575, 590 [admitting two prior robbery convictions].) In this case, however, the Court allowed impeachment not only with two robbery convictions, but also with two other moral turpitude offenses – a burglary, and the theft of an automobile, and numerous other uncharged dishonest acts. Even without using both robbery convictions, and Roy's admission to committing other robberies, there would have been no danger of endowing Roy with a "false aura of veracity," as there was in the Tamborino case.

Unbridled impeachment using Roy's misdemeanor misconduct, admissions to robberies, fare theft, and assorted other temporally remote, dishonest or manipulative acts committed by Roy as a child, compounded the prejudice that resulted from using not just one, but two prior felony convictions identical to charged crimes. The *corpus delicti* rule, requiring proof by extrinsic evidence of *uncharged* as well as charged crimes, exists precisely because extrajudicial admissions of crime are suspect and untrustworthy if not corroborated. (See, People v. Williams (1988) 44 Cal.3d 883, 910-911.) In this case, evidence of Roy's claims that he committed other uncharged robberies, and traveled freely by stealth and fraud, was received despite defense counsel's well taken objection that these unsubstantiated claims might amount to nothing more than exaggeration or bragging. (RT 5679.) Furthermore, the use of this additional impeaching material was wholly unnecessary, as adequate impeachment could have been accomplished using one or more of Roy's prior felonies and acts of dishonest misconduct

which actually resulted in misdemeanor convictions.

The use of evidence that Roy, as a juvenile, possibly engaged in manipulative behavior such as threatening or feigning suicide to get out of Juvenile Hall and into a mental hospital, was a clear abuse of discretion. The incident occurred many years earlier when Roy was a young teen suffering from psychological and emotional problems, and had little probative value to prove that Roy was lying in the present adult criminal proceedings.

As this Court observed more than 35 years ago in People v. Eli (1967) 66 Cal.2d 63, 79:

> "Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box' [citation]. To avoid excesses in efforts to destroy or to rehabilitate character evidence, trial courts are invested with discretion to limit the number of witnesses on the subject and to control cross-examination. There is also a responsibility on trial courts to scrupulously prevent cross-examination based upon mere fantasy."

A trial court's obligation to protect against "random shots" and cross-examination based on mere fantasy still exists today. (Accord: People v. Ramos (1997) 15 Cal.4th 1133, 1173; quoting People v. Eli, supra.)

As a result of the trial court's rulings, authorizing not only felony *and* misdemeanor misconduct impeachment, but forays into Roy's prior extrajudicial statements admitting numerous other allegedly dishonest and manipulative behaviors, the guilt phase trial *did* degenerate into a "nitpicking war of attrition" over issues collateral to Roy's credibility. (See, People v. Wheeler, supra, 4 Cal.4th at p. 296.) Defense counsel, obviously seeking to blunt the negative impact of cross-examination eliciting this evidence, chose to present much of this evidence through Roy's testimony, on direct-examination. This resulted in protracted and argumentative examination, cross-examination, re-direct examination and re-cross examination of Roy, as

well as expert witnesses, on collateral issues, such as whether Roy always, or just sometimes committed crimes to obtain food and shelter, the reasons why he felt compelled to do so, including his employment history, and difficulties finding and keeping jobs, and whether, on occasion, he had lied and/or feigned mental illness and/or suicide, to get himself transferred from penal institutions, such as juvenile hall, or Texas prison, to mental health treatment facilities. Undue emphasis on Roy's bad character traits could have been avoided by restricting impeachment evidence to a single felony conviction, or Roy's dishonest acts of burglary, and/or car theft.

Evidence of Roy's commission of uncharged, unspecified "robberies," his fraudulent use of public transportation to travel, and purportedly untruthful, and manipulative statements attributed to Roy in years past, by penal, or mental institution staff, clearly had great potential to create prejudice in the minds of jurors. Moreover, the evidence was largely cumulative of other more reliable impeachment evidence heard by the jury. (Evid. Code, § 352.)

"'Other acts' evidence may be relevant to a fact of consequence, or it may be relevant only insofar as it proves the character of the defendant in order to show action in conformity therewith, in which case it is a form of character evidence." (McKinney v. Rees, supra, 993 F.2d at p. 1380.) In this case, evidence intended as mere "impeachment" took on a life of its own as bad character evidence. The jury received instructions on the limited uses of prior *felony* impeachment, but no comparable instruction was given to restrict the use of instances of prior dishonest acts or statements or manipulative conduct to the purposes for which such evidence was originally offered. As a result, jurors were free to consider proof of Roy's numerous prior convictions and instances of misconduct as demonstrative of his bad character, ergo, as proof of his predisposition to commit the charged crimes.

By refusing to strictly circumscribe the proffered impeachment to evidence which was *reliable*, not cumulative, and probative of Roy's readiness to do evil, the court in essence invited the jury to find Roy's bad character predisposed him to commit the charged crimes. This was not only an abuse of judicial discretion under Evid. Code, § 352, but a violation of Roy's right to a fair trial and due process. (United States v. San Martin (5th Cir. 1974) 505 F.2d 918, 920-924 [in a prosecution for assault, it was reversible error to admit evidence of a defendant's misdemeanor convictions involving resisting, opposing, interfering with a public officer, and assault and battery on a member of the military].)

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1044.) As a result of excessive use of prior bad acts evidence for impeachment, Roy was, regrettably, tried for "who he is", and not for "what he did." (Ibid.)

ARGUMENT SECTION 7

GUILT PHASE INSTRUCTIONAL ERROR

XXXXV THE TRIAL COURT FAILED TO PERFORM ITS SUA SPONTE DUE TO GIVE A CAUTIONARY INSTRUCTION ON PRE-OFFENSE STATEMENTS.

When evidence is introduced that an accused made pre-offense statements of intent, plan, motive or design, the trial court has a *sua sponte* obligation to give a cautionary instruction pursuant to CALJIC No. 2.71.7, which states:

> "Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which he is charged was committed. It is for you to decide whether the statement was made by the defendant. Evidence of an oral statement ought to be viewed with caution."

(See, California Jury Instructions, Criminal, 6th ed.) (People v. Carpenter (1997) 15 Cal.4th 312, 392.)[78]

Evidence of a number of pre-offense statements of intent, plan, motive or design were introduced against Roy in this case. For example, Laurie's sister, Angelique Farkas, testified that Roy had asked Laurie and Angie about whether they were virgins, and whether they girls would like to have an "older, experienced boyfriend" like Roy. (RT 3613.) Michael Hall testified that Roy, some time before the night of the crimes, had remarked, "she wants me," referring to Laurie, and also seemed undeterred in pursuing Laurie by the fact that she was Donna Kellogg's cousin and only fourteen. (RT 8727, 8849-

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[78] CALJIC No. 2.71.7 is among the instructions "Not Given" contained in the Clerk's Transcript. (See, CT 1056.) The form instruction contains no indication why the instruction was not given and the record of the guilt phase jury instructional conferences reveals no objection to the instruction, or request that the instruction not be given.

8852.) Laurie's brother William testified that, on the evening Laurie was killed, Roy, upon finishing a video game, walked in the direction of Laurie and Angie with a newspaper in his hand, and said he was going to see what movie Laurie and Angie intended to see. (RT 3624-3625.) Laurie's mother testified that on the evening her daughter was killed, Roy noticed that Laurie and Angie and Laurie's father were missing approximately 15 minutes after they had left the house for the movie theater, and inquired where they had gone. (RT 3584.) Angie testified that, earlier in the evening on January 26th, she heard Roy mention the word "cruising," and indicate to Laurie that he had an interest in doing something with her that night. (RT 4964.)

Under the circumstances, the failure to give CALJIC No. 2.71.7, *sua sponte*, was error. (People v. Stankewitz (1990) 51 Cal.3d 72, 93; People v. Bunyard (1988) 45 Cal.3d 1189, 1224.) Moreover, the error was prejudicial because it is reasonably probable the jury would have reached a different result on the attempted rape count and the attempted rape-murder special circumstance allegation had the instruction been given. Evidence proving an actual attempt to rape Laurie was exceedingly spare, if not constitutionally insufficient. (See, Arguments III and IV.) Roy took the stand and denied that he raped, or even attempted to rape Laurie. Indeed, he denied any sexual interest in Laurie and asserted he loved her like a sister. The pre-offense statements attributed to Roy were actually relied upon by the prosecution to prove that Roy, contrary to his testimony, had a preconceived plan to take Laurie to a remote location to have sex with her. In his closing argument, Mr. Cooper emphasized the statements attributed to Roy by Angelique and Mr. Hall, suggesting sexual interest. (RT 9055-9056.) Yet no instruction was given to apprize the jury of its duty to make sure that the pre-offense statements were in fact made. (People v. Carpenter, supra, 15 Cal.4th at p. 393; People v. Beagle (1972) 6 Cal.3d 441, 456.)

The conviction of attempted rape must be reversed, as well as the true finding on the attempted rape-murder special circumstance finding because it cannot be said with reasonable certainty that the error in instruction did not contribute adversely to the jury's verdicts. Furthermore, for the reasons more fully set forth in Argument VI, supra, if any one conviction or special circumstance is reversed, the death judgment must also be reversed. It must be presumed that the jury followed the trial court's penalty phase instruction to take into account both the circumstances of the crime and the special circumstances found true. (Pen. Code, § 190.3(a); CT 1614; People v. Welch, supra, 20 Cal.4th at p. 773.) In deciding to impose the death penalty, the jury would necessarily have considered the fact that Roy attempted to rape Lauric, then murdered her while engaged in the commission of that offense. The sexual motives underlying murder was strongly emphasized by the prosecution as the reason why the death penalty should be selected. Accordingly, the penalty must be reversed because "any substantial error occurring during the penalty phase of a capital trial . . . must be deemed to have been prejudicial." (People v. Hamilton (1963) 60 Cal.2d 105, 137.)

XXXXVI THE TRIAL COURT GAVE A CONSTITUTIONALLY DEFICIENT JURY INSTRUCTION WHICH FAILED TO ADEQUATELY DEFINE THE TERM "SEXUAL INTERCOURSE."[79]

Roy's guilt phase jury was given the definition of rape contained in CALJIC No. 10.00, which refers to an act of sexual intercourse with a female who is not the wife of the accused. (CT 988-994.) That instruction advised jurors: "Any sexual penetration, however, slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required." (CT 989.)

California's rape statute encompasses vaginal intercourse, not other forms of criminal sexual penetration. (Pen. Code, § 161; People v. Holt (1997) 15 Cal.4th at p. 675-676; People v. Young (1987) 190 Cal.App.3d 248, 258, fn. 3.) The jury received no instruction advising them that Roy could not be convicted of attempted rape, or the attempted rape-murder special circumstance allegation, *unless* the Roy's intent was to accomplish penetration, however slight, of the victim's vagina, by Roy's penis. (Forecite Legal Publications, Volume 3, F 10.00f, pg. 1.) The failure to provide an adequate definition of sexual intercourse violated Roy's rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 16 of the California Constitution.

The Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (In re Winship (1970) 397 U.S. 358, 364.) A "defendant has a constitutional right to have the jury determine every material issue presented by the evidence." (People v. Modesto (1963) 59

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[79] Significant portions of this argument have been excerpted or paraphrased from briefing in the case of People v. Holt, supra, 15 Cal.4th 619, written by Robert M. Myers, Esq. and Jerry P. Gordon, Esq.

Cal.2d 722, 730; see Cabana v. Bullock (1986) 474 U.S. 376, 384 ["a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof"]; United States v. Mendoza (9th Cir. 1993) 11 F.3d 126, 128 ["when a trial judge omits an element of the offense charged from jury instructions, it deprives the jury of its fact-finding duty and violates the defendant's due process rights"].)

This Court, too, has observed that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (People v. St. Martin (1970) 1 Cal.3d 524, 531; People v. Cummings (1993) 4 Cal.4th 1233, 1311.) Additionally, according to California law a trial court must give explanatory instructions when terms in an instruction have a "technical meaning peculiar to the law." (People v. Anderson (1966) 64 Cal.2d 633, 639.)

In this case, use of the statutory language without any further definition was error. "An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court." (People v. Albertson (1944) 23 Cal.2d 550, 587.)

The definition of rape has undergone drastic transformations in recent years. (Commonwealth v. Gallant (Mass. 1977) 369 N.E.2d 707, 711-715.) More than 40 years ago, in 1962, the Model Penal Code expanded its common law definition of rape to include both vaginal and anal intercourse. (Model Pen. Code, § 213.0(2).) Many states other than California have followed suit, by expanding rape to encompass acts of vaginal and anal penetration, as well as other forcible sexual acts. (See, Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent (1992) 92 Colum. L.Rev. 1780, 1784, fn. 22; see, e.g., La. Rev. Stat. Ann. § 14:42 (A); Ariz. Rev. Stat. Ann. § 13-1406; see also The Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241-2245.) The dictionary definition of the term

"sexual intercourse" is no longer limited to vaginal intercourse. Webster's New Collegiate Dictionary defines sexual intercourse as "sexual connection esp. between humans." (Webster's New Collegiate Dictionary (1973), p. 1063.) In many states, more broadly defined sex offenses, such as sexual assault, sexual battery, sexual abuse, criminal sexual conduct or criminal sexual penetration, have completely supplanted the crime of "rape."

Courts have found jury instructions inadequate where words are used that may be familiar to jurors but which have specific meanings that not all jurors would necessarily understand. (See, People v. Failla (1966) 64 Cal.2d 560, 564-565 [failure to define "felony"]; People v. Purcell (1993) 18 Cal.App.4th 65, 74 [failure to define "reckless indifference to human life"]; People v. Valenzuela (1985) 175 Cal.App.3d 381, 393 [failure to define "assault"]; People v. McElheny (1982) 137 Cal.App.3d 396, 403-404 [failure to define "assault"]; People v. Burns (1948) 88 Cal.App.2d 867, 873-874 [failure to define "traumatic injury"].) In this case, it cannot be presumed that all of Roy's jurors had knowledge that California's legal definition of sexual intercourse only encompassed vaginal intercourse.

In People v. Holt, supra, 15 Cal.4th at p. 675-676, this Court rejected a defendant's claim that inadequate instruction on the definition of "sexual intercourse" was prejudicial error. In Holt, this Court reasoned that the jury could not have been confused because they were properly instructed on sodomy, which specifically referred to sexual penetration of the anus of the victim. In addition, in Holt, a supplemental instruction was given that informed jurors that "'[A]ny penetration of the male sex organ into the female sex organ, however slight, constitutes engaging in an act of sexual intercourse.'" (Id. at p. 676.) Furthermore, during closing arguments, both the prosecutor and defense counsel made arguments that made it clear that for conviction of rape, there had to be penetration of the victim's vagina by the

defendant's penis. (Ibid.)

Entirely different circumstances are presented here. In this case, a completed rape was not alleged, just attempted rape. In arguing for conviction, the prosecutor placed great reliance on the defendant's sexual *interest* in Laurie, as evidenced by pre-offense statements and statements made at the time of the crimes. (RT 9053-9056.) The prosecutor argued that an actual act of "sexual intercourse" was not necessary to prove attempted rape, nor did ejaculation have to occur. (RT 9053.) He further emphasized Roy's intention to have "sexual intercourse" -- not vaginal penetration (RT 9055), his willingness to use force to "realize this sexual interest" (RT 9056), and his willingness to be "sexually active" with Laurie against her will (RT 9060).

These arguments, contrary to making it clear that attempted vaginal penetration with the penis was a necessary element, implied that any attempt by Roy to be "sexually active" with Laurie would suffice to prove an attempted rape. Arguments by counsel did not make it clear to Roy's jury that direct, ineffectual, sexually motivated acts had to be directed toward committing the specific crime of rape – sexual penetration of the victim's vagina by Roy's penis. Indeed, there was evidence, such as the fact the victim was menstruating, and the condition of her clothing, from which it might more reasonably be inferred that other kinds of sexual contact were intended, rather than vaginal penetration. Accordingly, the instructional error cannot be deemed harmless in this case.

Several out of state cases are instructive. In Commonwealth v. Nylander (Mass. App. Ct. 1980) 410 N.E.2d 1223, the appellate court reversed a conviction for rape by unnatural sexual intercourse based on instructional error. The trial judge had instructed the jury that the offense required penetration"'into that area between the alleged victim's buttocks'"

(Id. at p. 1225.) The reviewing court stated:

> "Defining the penetration element of unnatural sexual intercourse of the sort in issue here as involving something less than an intrusion into the anus obscures the distinction between rape and these other crimes. That imprecision renders it entirely possible that a jury could convict someone of rape after finding that the Commonwealth's evidence only established a lesser offense.'"

(Id. at p. 1227.)

In Commonwealth v. Brattman (Mass. App. Ct. 1980) 410 N.E.2d 720, the appellate court found inadequate a jury instruction that defined rape as follows:

> "So rape, under our law today can encompass homosexual rape; it can encompass oral and anal intercourse as well as vaginal intercourse. It can encompass various types of touching, so long as there is penetration, however, slight of a bodily orifice of another person."

(Id.) At p. 723.) The Massachusetts court found that this definition of rape left the jury free to find an intent to commit rape if the defendant had intended to force is tongue into the victim's mouth, ear, or other orifice. (Id. at p. 724.)

In Roy's case, the lack of precision in CALJIC No. 10.00 was similarly prejudicial. The jury was free to find that Roy was guilty of attempted rape and the attempted rape-murder special circumstance if they believed he committed a direct, ineffectual act, directed toward sexually motivated act of penetration. Given the evidence actually presented, a jury could conceivably found an attempted rape if they believed Roy intended to put Laurie's breast in his mouth, or his finger in any orifice. These acts do not qualify as attempted rape, however. For reasons previously articulated in Arguments VI, and XXXXV, supra, and because a crucial element of the offense of attempted rape was inadequately defined, the attempted rape conviction, and attempted rape-murder special circumstance finding must be reversed.

ARGUMENT SECTION 8

GUILT PHASE PROSECUTORIAL MISCONDUCT

XXXXVII THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING HIS GUILT PHASE CLOSING ARGUMENT BY IMPLYING THAT MR. KINNEY HAD HOODWINKED THE JURY BY PRODUCING THREE DOCTORS AT THE LAST MINUTE WHO COULD "SEE THE TRUTH ABOUT THE DEFENDANT WHERE NO ONE ELSE HAS EVER BEEN ABLE TO SEE IT BEFORE."

A half a century ago, the United States Supreme Court observed that a prosecuting attorney "may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." (Berger v. United States (1935) 295 U.S. 78, 88.) Hence, a prosecutor's pattern of foul play violates the federal Constitution if it infects a criminal trial with such unfairness as to make conviction a denial of due process. (People v. Hill (1998) 17 Cal.4th 800, 819; People v. Harris (1989) 47 Cal.3d 1047, 1084; Donnelly v. DeChristoforo (1974) 416 637, 642-643.) State constitutional provisions are violated if the prosecutor uses deceptive or reprehensible methods to persuade the jury. (People v. Hill, supra, 17 Cal.4th at p. 819.) Under both state and federal constitutional standards, prosecutorial misconduct need not be intentional, or committed in bad faith, to require reversal of a judgment. (Smith v. Phillips (1982) 455 U.S. 209, 219; People v. Hill, supra, 18 Cal.4th at pp. 822-823.)

It is prosecutorial misconduct to launch a personal attack on the integrity of the accused's lawyer. (People v. Hill, supra, 17 Cal.4th at p. 832; People v. Espinoza (1992) 3 Cal.4th 806, 820.) For example, a prosecuting attorney may not make unsupported allegations that the defense attorney fabricated the defense. (People v. Bain (1971) 5 Cal.3d 839, 847; see also

People v. McCracken (1952) 39 Cal.2d 336, 348 ["What some people won't do for a fee"].) It is improper for a prosecutor to characterize a defense attorney's argument as "an octopus squirting ink." (United States v. Matthews (9th Cir. 2000) 240 F.3d 806.) Similarly, misconduct is committed by referring to a defense attorney's tactics as "cheap tricks." (Redish v. Florida (1988) 525 So.2d 928, 931.) A prosecutor may not properly argue that a defense attorney is "making stuff up." (Riley v. State (Nev. 1991) 808 P.2d 551, 556.) It is likewise completely improper to suggest that a defense attorney is engaging in deceptive or unethical behavior. (Yates v. State (Nev. 1987) 734 P.2d 1252, 1255-1256.) These kinds of attacks on a defendant's attorney "'can be seriously prejudicial as an attack on the defendant himself, and in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' [Citation.]" (People v. Hill, supra, at p. 832; see also Bruno v. Rushen (9th Cir. 1983) 721 F.2d 1193, 1194-1195.)

Misconduct also occurs when a prosecutor mounts an improper attack on the integrity of a defense expert witness. (People v. McGreen (1980) 107 Cal.App.3d 504, 514-519; see also Yates v. State, supra, 734 P.2d at pp. 1255-1256.) For example, this Court held that it was misconduct for a prosecuting attorney to argue "We are letting justice be decided on the basis of how well a psychiatrist can sell their bag of tricks." (People v. Babbit (1988) 45 Cal.3d 660, 697-699.)

During his guilt phase closing argument, Mr. Cooper made the following statement:

> "As you were jurors in this case you saw that the case went on for some time with two lawyers representing the defendant, and then as the case progressed there was a third lawyer. And I'd submit to you that there may be a dramatic effect from your seeing there's a third lawyer that enters the trial what might seem to you to be at the last minute and bringing with him three witnesses who say that they can see the truth about the defendant where no one else has been able to see it

before." (RT 9082.)

Later, in concluding this line of argument, Mr. Cooper characterized Roy's expert witnesses in the following manner:

> "So please, don't get the impression what they've been urging at you was sort of like a dramatic 11th hour discovery. Really what it is, I'd submit to you, an 11th hour packaging of a not uncommon defense by doctors from out of town which are what the defendant had been asking for." (RT 9084.)

The unmistakable import of this argument was to imply that the defense had at the last minute procured a third attorney to manufacture a fraudulent mental health defense using doctors from out of town, because the attorneys from the public defender's office had been unable, or perhaps unwilling, to produce local expert witnesses willing to bend the truth. The argument was egregious misconduct. "[I]n no situation in a criminal trial such as this one . . . is the mere act of hiring an attorney . . . probative in the least of the guilt or innocence of defendants." (Bruno v. Rushen, supra, 721 F.2d at p. 1194.)

Generally, a defendant cannot raise a prosecutorial misconduct claim on appeal unless, "in a timely fashion – and on the same ground," he objected to the misconduct and requested the trial court to admonish the jury to disregard the impropriety. (People v. Berryman (1993) 6 Cal.4th 1048, 1072; internal citations omitted.) There are exceptions, however. Neither an objection nor a request for a curative admonition is required if either would be futile. (People v. Arias (1996) 13 Cal.4th 92, 159.) The failure to object and request an admonition is not fatal if the admonition would not have cured the harm from the misconduct (People v. Bradford (1997) 15 Cal.4th 1229, 1333), or if the making of objections would be perceived by jurors as "obstructionist." (People v. Hill, supra, 17 Cal.4th at p. 821.)

In this case, no objection was made. However, a curative admonition would have been ineffective to cure the harm caused by implying that a third counsel was brought in with his army of personal mental health experts for the

purpose of hoodwinking the jury. Furthermore, the trial court had on several occasions intimated that defense counsel were making frivolous objections. For example, at one point, Ms. O'Neill objected when the court in front of the jury remarked to the prosecutor "It's not I that has the problems," in reference to counsel's objection to evidence on foundational grounds -- a comment which caused jurors to laugh. (RT 4168-4173.) On another occasion in front of the jury, Ms. O'Neill and Mr. Kinney both objected to Mr. Cooper laughing audibly during the testimony of a defense expert witness. (RT 7333.) The court's response was to concede that such behavior would be improper, *if* it had occurred; however, the court then chastised *defense counsel* for violating a court rule requiring objections to be made only by the defense attorney in charge of examining a particular witness. (RT 7333.) Accordingly, counsels' failure to make a contemporaneous objection should be excused because an objection and admonition would have been futile, in any event, and making an objection to the argument ran the risk that the jury would be further antagonized. (People v. Hill, supra, 17 Cal.4th at pp. 820-822.)

Even in prosecutorial misconduct alone is insufficient to require reversal of the guilt phase verdicts, the cumulative prejudice caused by prosecutorial misconduct and other guilt phase errors requires reversal of the judgment. (People v. Hill, supra, 17 Cal.4th at pp. 844-848.) For reasons previously stated (see Argument X), it was reversible error to appoint a third attorney, Mr. Kinney, when it was clear that there had been an irretrievable breakdown of Roy's relationship with is female public defenders (see Arguments VII, VIII & IX). Mr. Cooper's argument suggesting the "packaging" of a defense by Mr. Kinney particularly compounded the prejudicial impact of denying Roy's numerous meritorious Marsden motions. In the eyes of the jury, Mr. Cooper was able to use *against* Roy the fact that a third attorney had been assigned to help represent him. The deputy district

attorney also used *against* Roy the fact that changes in defense strategy were made as the result of Mr. Kinney joining the defense team.

Mr. Cooper's argument was particularly prejudicial because psychiatric testimony by Roy's out-of-town doctors was crucial to the only real defense presented -- diminished actuality. Hence, the effect of the prosecutor's misconduct was particularly pernicious and rendered the trial fundamentally unfair. Reversal is therefore necessary despite the absence of a timely objection by defense counsel.

ARGUMENT SECTION 9

ERRORS IN THE SANITY PHASE

XXXXVIII THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING APPELLANT TO PLEAD NOT GUILTY BY REASON OF INSANITY OVER DEFENSE COUNSELS' OBJECTION.

Despite defense counsels' failure to find even one psychiatrist or psychologist whose opinion it was that Roy was legally insane at the time of his crimes, the trial court permitted Roy to enter a plea of not guilty by reason of insanity [NGI] against defense counsels' advice. Under these circumstances, the entry of an NGI plea caused irremediable damage to the right to counsel, rendered the proceedings fundamentally unfair, and deprived all subsequent proceedings of reliability in violation of the state and federal constitutions.

In May of 1993, when Roy first expressed the desire to enter a plea of not guilty by reason of insanity [NGI], Ms. O'Neill informed the trial court in an *in camera* hearing that she did not feel not guilty by reason of insanity was a viable defense. The court continued the case to have a confidential psychiatric evaluation conducted. (RT May 24, 1993, pp. 40-43 [sealed proceedings].) On June 4, 1993, following a confidential sanity evaluation of Roy by Dr. Terrell, Ms. O'Neill informed the court at an *in camera* proceeding that Dr. Terrell had found no basis to assert an insanity defense. Ms. O'Neill expressed concern, inter alia, that if Roy were permitted to enter a plea of NGI against counsels' advice, they would be forced to release reports containing negative information to the district attorney. Ms. O'Neill also averred that in the prior two-and-a-half years, approximately seven psychiatrists and psychologists had evaluated Roy and none had concluded that insanity was a viable defense. Ms. O'Neill pointed out that the burden

was on the defense to prove insanity, and she did not "have anything to present." (RT 56-57 [sealed proceedings].) On June 4, 1993, against counsel's advice, Roy was nevertheless permitted to enter a plea of not guilty by reason of insanity. (RT June 4, 1993, p. 60.) The same jury that had found Roy guilty later found Roy sane on all counts (RT 9947-9960), and later imposed the death judgment.

An attorney representing a criminal defendant generally holds the power to make tactical judgments; however, courts have held that this power may not be wielded to deprive defendants of certain fundamental rights. (People v. Robles (1970) 2 Cal.3d 205, 214-215; People v. Frierson (1985) 39 Cal.3d 803, 813.) For example, the right to testify is considered so fundamental that a defendant may not be deprived of the opportunity to testify even if his or her attorney deems it tactically unwise. (Ibid.) Generally, the decision to plead, or to change or to withdraw a plea has also been considered a matter within a client's, rather than an attorney's, control. (People v. Medina (1990) 51 Cal.3d 870, 899-900; People v. Rogers (1961) 56 Cal.2d 301, 305-306.)

This Court has clearly held that a competent defendant has a fundamental right to refuse to enter a plea of not guilty by reason of insanity, even if his or her counsel believes that insanity would provide the best defense. (People v. Gauze (1975) 15 Cal.3d 709, 717-718.) On at least one occasion, this Court has also ruled that a competent defendant cannot be compelled to *abandon* an insanity defense merely because his counsel disagrees with the tactics of that decision. (People v. Medina, supra 51 Cal.3d at pp. 899-900.)

This Court has thus far *declined* to decide whether a defendant in a criminal case has a constitutional right to insist on the presentation of a defense which has no credible evidentiary support or on which no competent

counsel would rely. (Cf. People v. Frierson, supra, 39 Cal.3d at p. 803.) In Frierson, this Court reversed a judgment where a trial attorney refused to honor his client's express desire to present a defense of diminished capacity to special circumstance allegations in a capital trial, analogizing the circumstances "to those cases which have recognized the need to respect the defendant's personal choice on the most 'fundamental' decisions in a criminal case." (People v. Frierson, supra, 39 Cal.3d at p. 814.) In Frierson, however, this Court specifically noted that, "there was evidence to support the diminished capacity defense defendant wished to present," and "counsel's conduct would have fallen within the range of competent representation if he had chosen to present the diminished capacity evidence as a defense to the special circumstance allegations." (Id. at p. 816, fn. 3.) This Court, in Frierson, declined to decide whether the outcome would have been different had there been *no* credible evidence upon which to base a diminished capacity defense.

In People v. Medina, this Court held that the trial court had no discretion to deny a defendant's motion to reinstate his insanity plea "*solely* because his counsel opposed that choice on tactical grounds." (51 Cal.3d at p. 900; emphasis added.) In Roy's case, however, counsels' objections to an insanity plea were not "solely" tactical. *That is, counsel were not merely objecting because they believed an insanity defense would be less effective than other viable defenses.* At the time Roy was allowed to plead NGI, he had been examined by numerous psychologists and psychiatrists and *not a single doctor believed him to be insane at the time of the crimes.* So the question must be addressed: whether Roy had a fundamental constitutional right to force counsel to present a defense for *which there was at the time no supporting evidence.*

A defendant's right to control pleas and defenses is not absolute. In

People v. Merkouris (1956) 46 Cal.2d 540, for example, this Court held that a trial court abused its discretion by permitting a defendant to withdraw his NGI plea over his counsel's implied objection, where there was evidence in the record raising a doubt regarding the defendant's sanity. (Id. at p. 555.) Similarly, when there is no evidence whatever to support a defendant's claim of insanity, a criminal defendant should not be accorded an *absolute* right to force counsel to assert the defense, though factually unsupportable. This is particularly true with respect to an insanity defense, because it is "the defendant who [bears] the burden of proving his insanity." (People v. Weaver (2001) 26 Cal.4th 876, 969.)

Furthermore, there are times when an accused's individual rights must yield to a state's overriding interest in the fair and efficient administration of justice. (See, e.g., Martinez v. Court of Appeal (2000) 528 U.S. 152 [holding that a convicted defendant has no enforceable fundamental right of self-representation on appeal].) The state's overriding interest in the fair and efficient administration of justice weighs in favor of limiting a defendant's constitutional right to plead NGI to instances where there is at least *some* credible evidence available to counsel to support the defense. For these reasons, this Court should hold that Roy had no constitutional right to insist on a defense for which counsel had found no credible evidentiary support. (Cf. People v. Frierson, supra, 39 Cal.3d at p. 816.)

The Court of Appeals of Colorado recently had occasion to address the exact issue presented here in an apparently unpublished, but nevertheless instructive decision. In People v. Anderson (Colo. App. 2003) [2003 Colo. App. Lexis 626], a defendant entered a plea of not guilty by reason of insanity over his attorney's objection. Seven months later, the trial court vacated the insanity plea at counsel's request, over the defendant's objection, and entered a not guilty plea. Counsel had contacted 12 experts and been unable to

produce any credible evidence in support of an insanity defense. The Colorado appellate court concluded, reasonably, that the right of a defendant to determine the nature of a particular plea or defense was not absolute. That court held that it did *not* violate a defendant's right to refuse to submit to a jury an insanity defense that was wholly unsupported by any evidence. (Hendricks v. People (Colo. 2000) 10 P.3d 1231, 1241-1244; People v. Hill (Colo. 1997) 934 P.2d 821, 826.)

In this case, the trial court allowed the insanity plea despite the unavailability of evidence *at that time* to support it. The trial court's ruling not only substantially contributed to the breakdown of the attorney-client relationship in violation of the Sixth Amendment, and article I, section 15 (see Argument Section 2, Arguments VII, VIII, IX, X.) In addition, entry of the insanity plea over counsel's advice rendered all subsequent proceedings both unfair in violation of the Fourteenth Amendment, and article I, section 7 and 15, and unreliable in violation of the Eighth Amendment and article I, section 17 of the California Constitution.

First, at the subsequent competency trial (Pen. Code § 1368), evidence that Roy entered an NGI plea against counsel's advice was used *against* him as evidence of his competency to stand trial. (RT II 604-605, 618-630.) At the guilt phase trial which followed, counsels' entire trial strategy was necessarily predetermined by knowledge that the same jury who heard the guilt phase defenses would in all likelihood sit in judgment at the sanity and penalty phase trials. In fact, defense counsel later requested a new jury for the sanity trial, but the motion was denied. (See Argument XX.)

This did not just "impinge" on counsel's handling of the defense. It severely circumscribed the range of tactics and defenses that could be employed. When trial counsel are forced to make tactical decisions "in blind deference to a client's wishes," representation will almost certainly be

rendered constitutionally deficient. (Alvord v. Wainwright (1984) 469 U.S. 956, 961 [Dissenting opinion, Marshall, J.].)

The sanity trial was not held until January 1984, nearly eight months after Roy was allowed to enter his NGI plea against counsels' advice. By that time, counsel had successfully found *one* psychologist to testify that Roy was temporarily insane at the time of his crimes. After Mr. Kinney entered a midtrial appearance as full counsel, in November of 1993, he engaged Dr. Berg, a psychologist from Oakland, to evaluate Roy and testify as a defense witness. (RT 6353.) Dr. Berg later testified at the sanity trial, that Roy was temporarily insane when he strangled Laurie and Angie. (RT 9523 et seq.)

During guilt phase closing arguments, the district attorney emphasized the last minute arrival of doctors from out of town to "package" a defense. (RT 9084; see Argument XXXXVII.) During his sanity phase closing remarks, Mr. Cooper was also quick to argue that Dr. Berg's opinion was contrary to other doctors who evaluated Mr. Clark. (RT 9849-9850.) At one point he characterized the evidence at the sanity trial as "Dr. Berg versus the rest of the world". (RT 9853.) At still another juncture, the prosecutor argued that Dr. Berg had "contradicted every other witness regardless [of] whether they were retained or court appointed . . . ." (RT 9857; see also RT 9862.)

Hence, the trial court's ruling, which allowed Roy to insist on an insanity defense, did not just "impinge on defense counsel's handling of the case" and force counsel to "provide the best representation . . . under the circumstances" (People v. Frierson, supra, 39 Cal.3d at pp. 816-817.) It totally undermined the credibility of the attorneys, and defense witnesses, and thereby undermined fairness of the remainder of the proceedings.

So many events occurred subsequent to the trial court's ruling, including numerous changes in the number, status, roles and responsibilities of defense counsel, that one can only speculate how the decision to "hogtie"

the defense attorneys changed the course and the outcome of the trial. It suffices to say the outcome could not have been any *worse*, had the NGI plea not been entered. (Fahy v. Connecticut (1963) 375 U.S. 85, 91 ["Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense of trial."].) After pleading NGI against counsels' advice, Roy was found competent to stand trial (based in part on evidence he pleaded NGI against counsel's advice), then convicted at the guilt phase of all charges, enhancements and special circumstance findings. He was found sane on all counts, and his plea for life sentencing was rejected.

As such, the error in allowing Roy to plead NGI against counsels' advice "'undermined the structural integrity of the criminal tribunal itself, and [was] not amenable to harmless error review.'" (Arizona v. Fulmanante (1991) 499 U.S. 279, 294; People v. Flood (1998) 18 Cal.4th 470, 493.) Furthermore, because the error occurred in the context of a capital trial, the reliability and integrity of the death judgment was necessarily affected as well as the guilt and sanity verdicts. As is repeatedly noted elsewhere in this brief, capital trials must be policed at all stages for procedural fairness and accurate factfinding. (Satterwhite v. Texas, supra, 486 U.S. at p. 262; Strickland v. Washington, supra, 466 U.S. at p. 704; People v. Horton, supra, 11 Cal.4th at p. 1134.) Accordingly, the entire judgment should be reversed because the entry of a plea of NGI rendered counsel ineffective, and the entire proceeding both unreliable and unfair.

XXXXIX THE TRIAL COURT ERRED BY REFUSING A SPECIAL DEFENSE INSTRUCTION AT THE SANITY PHASE THAT WOULD HAVE INSTRUCTED THE JURY THAT THE TERM "MENTAL ILLNESS" COULD INCLUDE ANY MENTAL CONDITION WHICH PRODUCED THE REQUISITE EFFECTS.

At the sanity phase trial, defense counsel requested an instruction pursuant to the case of People v. Medina (1990) 51 Cal.3d 870, which would have instructed jurors that the term "mental illness," as used in the standard insanity instructions, referred to any combination of mental conditions which produced the requisite effects. A "Medina" instruction was refused. (RT 9830-9831; see Forecite Legal Publications, Volume 2, F 4.00b, p. 1 (2003).)

Denial of a clarifying instruction under People v. Medina, supra, was error. A defense of insanity will *not* lie if the defendant's mental illness is manifested *only* by a series of criminal or anti social acts. (People v. Fields (1983) 35 Cal.3d 329, 368-370.) However, if other symptoms, or manifestations of mental illness are present, a defense of insanity may still be available even if the defendant also suffers from antisocial personality disorder. Whether antisocial behavior *precludes* an insanity defense depends on "the ability of the psychiatrist to base a diagnosis upon facts additional to a list of defendant's criminal or antisocial acts." (People v. Fields, supra, 35 Cal.3d at p. 370.)

In this case, the insanity diagnosis was not based solely on antisocial or criminal acts. Roy suffered from a constellation of mental health symptoms which included, among other problems, a history of seizures, memory blackouts, and diagnosed brain damage, possibly caused by a blow to the forehead with a baseball bat. Therefore, Roy's temporary insanity was not exclusively a manifestation of a pattern of criminality. Hence, a clarifying

instruction under Medina was appropriate and necessary to insure that the jury understood that any combination of mental diseases, disorders, and defects could produce temporary insanity so long as Roy's myriad mental defects and disorders combined to produce the requisite effects.

California recognizes a defendant's right to pinpoint instructions highlighting the theory of defense. (People v. Gurule (2002) 28 Cal.4th 557, 660.) Federal courts have also held that a defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in proof, no matter how tenuous the defense may appear to the trial judge. (United States v. Dove (2nd Cir. 1990) 916 F.2d 41, 47; United States v. Oreto (1st Cir. 1994) 37 F.3d 739, 748.) The denial of factually supported instructions on the accused's theory of defense violates due process if there exists sufficient evidence for a reasonable jury to find in the defendant's favor on a particular point. (Matthews v. United States (1988) 485 U.S. 58, 63; Keeble v. United States (1973) 412 U.S. 205, 213; Whipple v. Duckworth (7th Cir. 1987) 957 F.2d 418, 423; overruled on other grounds in Eaglin v. Welborn (7th Cir. 1995) 57 F.3d 496.) Denial of instructions on the defense theory of the case may implicate the constitutional rights to trial by jury and representation by counsel, as well a due process. (Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 741.)

In this case, the requested special instruction would have supported Roy's theory of defense, i.e., that a panoply of mental defects and disorders rendered him temporarily insane at the moment of his offenses. Accordingly, the denial of defense special instruction #2 – the "Medina" instruction – interfered with Roy's fundamental constitutional rights due process, trial by jury, and effective representation by counsel.

ARGUMENT SECTION 10

COMPETENCY TRIAL (PEN. CODE, § 1368) ERRORS

L. THE TRIAL COURT ADMITTED IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE THAT APPELLANT PLEADED NGI AGAINST HIS ATTORNEYS' ADVICE, THAT HE WANTED TO PLEAD GUILTY TO THE CHARGES, BUT WAS REFUSED THE OPPORTUNITY TO DO SO, AND THAT HE THREATENED TO DISRUPT COURT PROCEEDINGS IF THE MEDIA AND THE VICTIMS' FAMILY MEMBERS WERE PRESENT IN THE COURTROOM; THE ENTIRE JUDGMENT MUST BE REVERSED

A. Evidence of appellant's entry of a plea of NGI against counsels' advice:

Court reporter, Rudy Garcia, testified that he was present during proceedings on June 4, 1993, when Roy had announced that he wanted to plead not guilty by reason of insanity. According to Mr. Garcia's testimony, on that date, Roy entered an insanity plea against his attorneys' advice. During the plea proceeding, Roy asserted that he was presently sane, but had been insane at the time of the crimes.

A partial transcript of these proceedings, transcribed by Mr. Garcia, was introduced, over objection, as proof of Roy's present mental competency. (III RT 524, 618-632.)

B. Evidence of appellant's wish to plead guilty, and his threats to disrupt court proceedings if there were members of the media or victims' family members in the courtroom.

At the competency trial, Randall Haw, the bailiff for the guilt trial judge, testified regarding his interactions with Roy on June 7, 1993, during transportation to and from court. According to Deputy Haw, on the way back

to the jail, Roy threatened that he would not go back to court and would disrupt the proceedings if forced to attend proceedings with television cameras, or members of the victims' families present. (RT 767-768.) Roy also told Deputy Haw that he wanted to plead guilty but his attorneys' would not let him. (IV RT 768.) Deputy Haw wrote a note to the trial court, reporting Roy's statements. The note and Deputy Haw's testimony were received over defense counsels' objection that the evidence was both irrelevant, and more prejudicial than probative (Evid. Code, § 352). (III RT 527.)

Receipt of all of the above evidence was prejudicial error requiring reversal of the entire judgment.

When a doubt arises regarding a defendant's present competency to stand trial, that issue must be determined before guilt or innocence is adjudicated. To do otherwise violates federal due process. (People v. Pennington, supra; Pate v. Robinson (1966) 383 U.S. 375, 378.) In Roy's case, the trial court had correctly suspended criminal proceedings to decide the competency issue before proceeding with the guilt and sanity phase trials.

At a competency trial, the jury determines whether, as a result of a mental disorder or developmental disability, the defendant is unable to understand the nature of criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (Pen. Code, § 1367; CALJIC No. 4.10; CT 552.) The burden is on the defendant to prove incompetency by a preponderance of the evidence. (Medina v. California (1992) 505 U.S. 437; Cooper v. Oklahoma (1996) 517 U.S. 348.) In Roy's case, the claim of incompetency was based on his delusional and paranoid feelings of distrust of Ms. O'Neill and Ms. Martinez, and his inability to cooperate and assist with his defense in a rational manner. There was no claim by the defense that Roy lacked the ability to understand the nature of the court proceedings.

A defense based on insanity embraces questions different from those raised in competency proceedings. (People v. Corona (1978) 80 Cal.App.3d 684, 713.) "While the latter encompasses the determination whether at the time of trial a defendant is able to understand the nature and purpose of the proceedings against him [or] to assist his attorney in the conduct of a defense in a rational manner [citations], the [Penal Code] section 1026 issue poses the distinct and separate question of whether a defendant had capacity sufficient to distinguish between right and wrong. [citations.]" (Id. at p. 713; citations and footnote omitted.) "[G]uilt or innocence and insanity at the time of the criminal act are irrelevant to a determination of competency." (Baker v. State (Ga. 1982) 297 S.E.2d 9, 12; Ellis v. State (Ok. 1992) 867 P.2d 1289, 1296.) A defendant may be legally sane at the time of his crimes, yet be incompetent to stand trial, or vice versa. (People v. Pennington (1967) 66 Cal.2d 508, 515-516.)

It was completely irrelevant to the competency issue that Roy had entered an insanity plea, much less that he had done so against the advice of counsel. An NGI plea admits nothing, and Roy's sanity at the time of his crimes had yet to be adjudicated. There were many possible tactical reasons why Ms. O'Neill may have preferred not to present a sanity defense, none of which had any relevance to the competency issue. (See, e.g., People v. Coogler (1969) 71 Cal.2d 153, 169 [decision not to enter insanity plea based on fear that plea would prejudice defendant's claim of diminished capacity].) Moreover, Roy's disregard of counsels' advice with respect to entering an NGI plea was hardly relevant to *rebut* evidence that Roy was incapable of rationally assisting his attorneys. This Court regards a defendant's decision to plead, or to change or withdraw a plea, as a matter lying within the defendant's, rather than his counsel's ultimate control. (People v. Medina, supra, 51 Cal.3d at pp. 899-900.)

The prosecutor offered the testimony of court reporter Garcia, and the partial transcript of the NGI plea proceedings, to show Roy's "demeanor at a time close to these proceedings," and to demonstrate his "understanding of court proceedings, his participation therein . . . ." (III RT 523-524.) The prosecutor argued substantially similar reasons for introducing Deputy Haw's testimony as "demeanor" evidence. (III RT 524-525.) However, since Roy's assertion of incompetency was based on his inability to assist defense counsel in a rational manner, and it was conceded that he was capable of understanding the court proceedings, the proffered evidence was irrelevant to any contested issue at the competency trial. Furthermore, much of Deputy Haw's testimony did not even relate to Roy's demeanor during courtroom proceedings.

If it were really the prosecutor's objective to present evidence of Roy's demeanor in the courtroom, to show legal competency, it would have sufficed to instruct jurors that they could use their senses to observe Roy's demeanor during courtroom proceedings to see if his behavior comported with the opinions of experts. (People v. Prince (1988) 203 Cal.App.3d 848, 856; cf. People v. Garcia (1984) 160 Cal.App.3d 82, 91 [a defendant's nontestimonial conduct in the courtroom is not relevant evidence admissible to prove guilt].) Roy's cooperative or appropriate conduct during recent court proceedings could have been described without referring to his NGI plea, his offer to plead guilty, or threats to engage in future disruptive behavior in the courtroom.

Admission of transcript of plea proceedings in which Roy eschewed counsels' advice not to assert an insanity defense went far beyond using evidence of nontestimonial demeanor to prove the ability to cooperate rationally with counsel and understand the proceedings. (People v. Prince, supra, at pp. 855-856.) The partial transcript of the NGI plea proceedings included the hearsay opinion of Roy that he believed himself presently sane,

as well as hearsay statements by his attorney, Barbara O'Neill, expressing the implied belief that Roy was sane at the time of his crimes and should not assert an insanity defense. Similarly, Deputy Haw's testimony contained hearsay which informed the jury that Roy wanted to plead guilty, but was being prevented from doing so by his attorneys. Use of this evidence violated the letter and spirit of Evid. Code, § 1153, which prohibits the introduction in "any proceeding of any nature" of "evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged . . . ." It also violated Pen. Code, § 1102.4, which contains a similar provision governing rejected guilty pleas. Roy's offers to plead guilty were, as the record shows, rejected by all and it was improper to introduce this fact at the competency hearing.

The prohibition against using plea evidence has common law and constitutional roots. Courts are careful that pleas of guilty not be accepted unless made voluntarily, after proper advice, and with full understanding of the consequences. (See, Kercheval v. United States (1927) 274 U.S. 220, 223.) When a guilty plea is annulled, it ceases to be evidence, and as a matter of public policy may not be used as evidence against the accused. (Id. at p. 224.) Similar policy considerations weigh against permitting unadjudicated NGI pleas, or rejected offers to plead guilty, to be used as substantive evidence against a defendant in a competency proceeding. Such evidence has little if any probative value, and creates an overwhelming temptation for jurors to reach their competency determination based on improper considerations, such as the defendant's beliefs about his own guilt or sanity.

Roy's offer to plead guilty, and his entry of an NGI plea against counsels' advice, thus had far greater potential to prejudice the jury than it had value to prove that he was capable of rationally assisting his attorneys with his defense. (Evid. Code, § 352; see, e.g., People v. Cain (1995) 10 Cal.4th 1,

64; People v. Fauber (1992) 2 Cal.4th 792, 856-857.) Roy's purported threat to disrupt proceedings in the event the media and victims' family members were in the courtroom likewise had little probative value to impeach defense evidence that he distrusted his attorneys had was therefore incapable of cooperating with them in his defense. Yet the evidence had great potential to inflame, and to confuse the jury about the issues.

Moreover, the evidence was wholly unnecessary for the purpose offered. Numerous other lay witnesses testified regarding Roy's apparent ability to function normally in the courtroom, and in the jailhouse setting, during the months prior to the competency trial. (III RT 695 et seq. [Charlotte Tilkes]; III RT 742 [Richard Egbuziem]; IV RT 734 et seq. [Peter Albert]; III RT 672 et seq. [Leonard Nichols].) Therefore, it was an abuse of judicial discretion to admit the testimony of Mr. Garcia and Deputy Haw, and related documentary exhibits, on the pretense that such evidence constituted mere "demeanor" evidence, necessary and relevant to show Roy's comprehension of the proceedings or ability to cooperate with counsel. (Evid. Code, § 352.)

Admission of the above evidence was intrinsically prejudicial and impermissibly burdened Roy's fundamental right to enter a plea of his choosing without his counsels' consent. (People v. Frierson, supra, 39 Cal.3d at p. 813.) Roy's Sixth Amendment confrontation right was also eviscerated because he was denied the opportunity to confront and cross-examination Ms. O'Neill – a hearsay declarant – about the reasons why she opposed entry of a plea of not guilty by reason of insanity and refused to permit Roy to plead guilty. (U.S. Const., Amendment VI; Cal. Const., Art. I, § 15.) Use of this evidence also impaired his right to counsel because, in effect, counsel became a witness against him in competency proceedings. (U.S. Const., Amendment VI; Cal. Const., Art. I, § 15.) Ms. O'Neill's disagreement with Roy's decision to plead NGI clearly implied a belief on her part that Roy was sane at the time

of the offenses.

Fundamental due process and the right to a fair trial were denied by the use of irrelevant, or marginally relevant but inflammatory evidence that Roy had ignored counsels' advice on important strategic matters, and had threatened to disrupt court proceedings in order to exclude the press and the victims' family members from the courtroom. (U.S. Const., Amendment XIV; Cal. Const., Art. I, §§ 7, 15.) In addition, it was a violation of due process that Roy was adjudicated guilty of capital murder and sentenced to die without a fair pretrial adjudication of his competency to stand trial. (Pate v. Robinson, supra, 383 U.S. 375; U.S. Const.; Amendment XIV; Cal. Const., art. I, §§ 7, 15.) Last but not least, fundamental defects in the competency proceeding deprive the guilt and penalty judgments of their reliability in violation of the Eighth Amendment, and article I, section 17 of the California Constitution.

Accordingly, the entire judgment should be reversed.

ARGUMENT SECTION 11

ADDITIONAL PENALTY PHASE ERRORS

LI THE TRIAL COURT COMMITTED PREJUDICIAL JUDICIAL MISCONDUCT, AND VIOLATED APPELLANT'S RIGHT OF PERSONAL PRESENCE BY COMMUNICATING WITH SEVERAL JURORS *EX PARTE* DURING THE DELAY BETWEEN THE SANITY AND PENALTY TRIALS.

On June 3, 1994, a Motion for Mistrial Based on Improper Communication Between Judge and Jury was filed on Roy's behalf, by attorneys O'Neill, Martinez, and Kinney. (CT 1327.) The motion was based on the following events.

On January 27, 1994, after the trial court granted the prosecutor's motion for reconsideration of the order relieving the public defender as Roy's counsel, the jurors were informed that the penalty phase of the trial would start no later than May 1, 1994. The court advised jurors that they would be notified by "Rosie," Judge Fitch's clerk, if it turned out the trial would not be starting within a few weeks. (RT 10118-10119.)

On March 8, 1994, the trial court sent a letter to the public defender's office enclosing a proposed letter to be sent to jurors, reminding them the case was still pending. (CT 1328; SCT #11335, 1337.) The proposed letter to jurors stated:

> "I wanted to let you know that you are still very much needed as a juror in our case -- which is still pending. [¶] The matter which is causing delay is still in the appeal courts, and everyday I am hopeful that we will have a resolution of the issue quickly. Of course, I will contact you immediately when a decision is received. Our case is still my number one priority."

(CT 1337; emphasis in original.)

Defense counsel, through attorney Gary Shinaver, who was representing the Fresno County Public Defender in pending proceedings to

determine whether that office would be permitted to withdraw due to conflict of interest, responded:

> "I respectfully object. Any out of court communication, by you with jurors in a capital case which is currently pending before you, seems wholly inappropriate. On January 27, 1994, you advised the jurors that the outside parameter for resuming this case was May 1st. Unless that has changed, or other circumstances have arisen of which I am not aware, it seems unnecessary for any contact to be made with the jurors at this time." (SCT #1 29.)

(RT 10353.) The letter was sent out over objection on March 16, 1994. (CT 1328; RT 10454-10406.)

On May 13, 1994, a status hearing was held in court with all parties present. A date of June 27, 1994, was agreed upon to start the penalty phase trial. (RT 10343-10358.) A letter advising jurors of the new proposed trial date, and asking them to contact the Court Clerk if the new date was unsatisfactory was sent out on May 16, 1994. (CT 1328-1329, 1339.)

On May 17, 1994, Juror Patricia Gosland called the court during the lunch hour when Judge Fitch was alone, answering his own phone. Ms. Gosland informed the court that the proposed penalty trial dates were acceptable except for two dates upon which she had appointments, which she would try to "work around." (CT 1343.) According to Judge Fitch, he merely thanked Ms. Gosling for the information and advised her she would be contacted. (CT 1343; RT 10408.)

On May 17, 1994, Juror Sandra Schmidt also contacted the court and told Judge Fitch's temporary clerk, Maureen Walsh, that she had planned a vacation from June 17 to July 4, 1994. Judge Fitch called Ms. Schmidt back several minutes later and asked if there was any possibility she could rearrange her vacation. Ms. Schmidt indicated that she had planned for several months to go to Washington D.C., and any change would be inconvenient and cause her to loose her deposits. According to Judge Fitch, he thanked Ms. Schmidt

for the information and said the court would contact her later. (RT 1343; RT 10408-10409.)

To the best of Judge Fitch's recollection, a day or two later, Mr. Kinney happened to come by the judge's chambers and Judge Fitch mentioned that he had spoken a juror who had a conflict with the proposed trial date. (RT 10411.) Mr. Kinney conveyed this information to Ms. Martinez and Ms. O'Neill. (RT 10411.)

On May 24, 1994, Ms. O'Neill wrote a letter to Judge Fitch, objecting that the court had spoken with a juror personally about scheduling problems. Counsel requested a meeting on the record to discuss the issue. (CT 1341.) In response, Judge Fitch wrote a letter to defense counsel describing his *ex parte* contacts with Jurors Gosland and Schmidt. (CT 1343.) In light of Juror Schmidt's unavailability on June 27, 1994, the trial court also proposed that jurors be sent a letter, asking if they could serve as jurors for the four weeks commencing on July 5, 1994. (CT 1344.)

On May 27, 1994, Judge Fitch once again answered the telephone when his bailiff and clerk were occupied, and spoke with Juror Ricky DeBeaord. Mr. DeBeaord informed the judge that he had a problem he needed to discuss. The judge told Mr. DeBeaord he could not talk to him, but indicated that the date for trial had changed to July 6th. He told Mr. DeBeaord to call back later and talk to Rosie. (RT 10409; CT 1346.)

Judge Fitch denied the motion for mistrial on June 17, 1994, finding that "no harm was done." (RT 10411-10412.)

A. Roy's right to be personally present is guaranteed by the due process and confrontation clauses of the state and federal constitutions and state statute.

In Argument XXXII, A, the law governing an accused's right to personally present at trial has been discussed in depth in the context of

arguments pertaining to the appellant's exclusion from unreported bench conferences. Appellant adopts and incorporates by reference the discussion contained therein, in lieu of reiterating the same legal authorities here.

B. The right to counsel at all critical stages of a criminal proceeding is guaranteed by the United States and California Constitutions.

The right to counsel exists at every critical stage of a criminal proceeding. (U.S. Const.; Amendment VI; Cal. Const., Art. I, § 15; United States v. Cronic (1984) 466 U.S. 648, 659; In re Resendiz (2001) 25 Cal.4th 230, 246; People v. Bishop (1996) 44 Cal.App.4th 220, 231.) The right to counsel is self-executing. It persists unless the defendant affirmatively waives that right. (People v. Koontz (2002) 27 Cal.4th 1041, 1069; Carnley v. Cochran (1962) 369 U.S. 506, 513; Johnson v. Zerbst (1938) 304 U.S. 458, 464-465.)

Furthermore, it is well settled that a trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel. (People v. Wright (1990) 52 Cal.3d 367, 402; Paulson v. Superior Court (1962) 58 Cal.2d 1, 7.) Such communications violate the defendant's right to be present and represented by counsel at all critical stages of the trial, and thus constitute federal constitutional error. (Wright, supra, at p. 403; Rushen v. Spain, supra, 464 U.S. at p. 117-120.)

C. The trial court's *ex parte* communications with jurors violated appellant's right to be personally present with counsel at all critical stages of the proceedings, and his right to due process and a reliable death penalty determination.

The trial court's *ex parte* communications with jurors violated appellant's right to be personally present with counsel at all critical stages of these capital proceedings. Though not binding precedent, the Colorado

Supreme Court's case of Key v. People, supra, 865 P.2d 822, is persuasive authority for reversal.

In the Key case, a jury had been deliberating for approximately three hours on a Friday afternoon when the judge reconvened the jury in the courtroom, without first notifying the defendants or their counsel. In the absence of the defendants and the attorneys, the trial judge held a scheduling discussion. One juror informed the judge that he would be leaving the following morning on vacation and not returning until December 31st. Another juror said she was getting married on January 1st, and intended to leave for a two-week honeymoon. The judge suggested that the jury reconvene on December 31st, to continue deliberations. The juror who was leaving on vacation expressed uncertainty whether he would be back early enough to deliberate on that date. The judge then asked the jurors to stay and deliberate a little longer that day, until 5:30 p.m., and they agreed. Before the end of the work day, the jurors reached a verdict finding the defendant guilty of an attempt to commit murder.

The Colorado Court of Appeals agreed with Mr. Key that the *ex parte* scheduling conference constituted error depriving the defendant of his constitutional right to counsel at a critical stage of the proceedings; however, the appellate court found the error harmless. The Colorado Supreme Court disagreed. It concluded that the presence of counsel at the scheduling conference was essential to gauge the reactions of jurors, and to preserve any objections or move for a mistrial if it should appear that the proposed schedule would infringe upon the defendant's right to a fair trial. The Colorado Supreme Court stated:

> "Not every communication between the judge and jury constitutes a critical stage of the trial. However, an impromptu conference with the jury during its deliberations may constitute a critical stage of the proceedings even where the discussions are purportedly confined to 'scheduling' matters, because the

content of such *ex parte* communications and the context in which they occur may create more than a 'minimal risk' that counsel's absence would impair the defendant's right to a fair trial. . . ."

(Key v. People, supra, 865 P.2d 822 [¶ 11].)

The Colorado Supreme Court concluded that the scheduling conference held outside counsels' presence had created a risk of coercion on the jury's deliberative process. The Colorado Supreme Court's reasoning is instructive and applies equally to this case.

> "The United States Supreme Court 'has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. . . .The *Fulminante* Court[80] segregated those cases in which the harmless error doctrine applies from those cases which may not be evaluated under the harmless error analysis. . . .Harmless error analysis does not apply when there is 'structural defect affecting the framework within which the trial proceeds, rather than simply error in the trial process itself'. . . .
>
> "Included within the category of 'structural defects' are 'total deprivations of the right to counsel at trial.' . . . .Conversely, harmless error analysis has been applied where mere 'trial error' deprived the defendant of his right to counsel during a discrete stage of the proceedings. . . .
>
> "In this case, the defendant was deprived of his right to counsel during only one stage of the proceedings – a scheduling conference with jurors during their deliberations. This does not amount to a 'total deprivation' of his right to counsel, nor can such error be classified as a 'structural defect affecting the framework in which the trial proceeded.' Apart from the short, impromptu scheduling conference, counsel for the defendant was present for the entire proceeding. Unlike Gideon,[81] where the defendant was erroneously denied any representation of counsel throughout the proceedings, the error in this case is more appropriately viewed as a 'trial error,' the impact of which can be quantitatively assessed on appellate review. . .

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[80] This reference is to Arizona v. Fulminante (1991) 499 U.S. 279.

[81] This reference is to Gideon v. Wainwright (1963) 372 U.S. 335.

> .Therefore, we agree with the court of appeals that the harmless error doctrine should be applied in this case.
>
> " * * *
>
> "In the instant case, we agree with the court of appeals that the trial judge was 'simply attempting to produce a schedule that would be acceptable to each juror' . . . . We do not agree, however, with its conclusion that the absence of counsel during that stage of the proceedings was harmless error. In our view, there is ample evidence to create a reasonable probability that the defendant was prejudiced by the deprivation of his right to counsel."

(Ibid. [¶ 13-19]; citations and footnotes omitted.)[82]

The "scheduling" correspondence and conversations between Judge Fitch and sitting jurors amounted to a "critical stage" of these proceedings, just as the *ex parte* scheduling conference was a critical stage of proceedings in the Key case. Like the judge in Key, Judge Fitch was attempting to produce a schedule for the penalty trial that would be acceptable to all jurors. However, at the time the *ex parte* communications occurred, there had already been a midtrial delay of several months and a much longer delay was a distinct possibility. Jurors' personal lives had been on "hold" for much longer than the four months originally estimated by the court. (RT 134.) Many jurors were suffering severe hardships as a consequence of the delay, including financial sacrifice, threats to, interruption of, or complete loss of employment. (RT 10121-10122; 10498; 10531-10537; CT 1327.) Counsels' presence during any scheduling discussions was absolutely essential to gauge the demeanor and reactions of jurors, to preserve objections, and to move for mistrial in the event it should appear that the scheduling problems were impinging upon Roy's right to a fair trial.

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[82] The electronic copy of the decision which is accessible to appellate counsel on Lexis Nexis research software does not contain internal pagination for the Pacific Reporter. Pagination of the case is numerical, starting with page 1.

The court's *ex parte* communications with jurors violated Roy's Fourteenth Amendment due process right as well as his Sixth Amendment right to the effective assistance of counsel. A defendant's or defense counsel's wrongful exclusion from any critical stage of a criminal proceeding violates due process if the absence of the accused or his attorney impairs the "fullness of [the defendant's] opportunity to defend against the charge." (United States v. Gagnon, supra, 470 U.S. 522, 526; accord: People v. Carpenter, supra, 15 Cal.4th at p. 377; People v. Bradford, supra, 15 Cal.4th at p. 1357.) In this case, the trial court's *ex parte* communications directly and palpably interfered with counsel's ability to insure that Roy would receive a fair penalty determination by an impartial jury, free of coercive influences.

In contrast to numerous other cases in which judges' *ex parte* or *in camera* interactions with jurors have been held harmless, in this case defense counsel were not present, nor was there a contemporaneous record made of the phone conversations that took place between Judge Fitch and Jurors Schmidt, Gosland and DeBeaord. (See, e.g., United States v. Willis, supra, 759 F.2d at p. 1500; United States v. Watchmaker, supra, 761 F.2d at p. 1466; United States v. Santiago, supra, 977 F.2d at p. 522; United States v. Feliciano, supra, 223 F.3d 102, 110-111; People v. Beeler (1995) 9 Cal.4th 953, 987 [trial court furnished counsel a transcript of *ex parte* discussion with a juror]; People v. Jennings (1991) 53 Cal.3d 334, 383 [the court offered counsel the opportunity to review the court reporter's notes of *ex parte* discussion with jurors]; People v. Pride (1992) 3 Cal.4th 195, 263-264 [judge's conversation with juror about employment difficulties was reported].)

Furthermore, in this case, the trial judge's transparently biased pattern of rulings during *voir dire*, and his tenacious refusal to declare a mistrial and start the trial anew despite the panoply of problems and interruptions in the continuity of Roy's legal representation, raise serious questions about his

impartiality, and suggest a rather injudicious willingness to force this case to judgment without regard for the fairness of the proceedings.[83] This makes the absence of a contemporaneous record of the telephone conversations even more problematic. As in the Key case, the denial of Roy's right to be personally present with counsel at a critical stage of the proceedings cannot be disregarded as harmless. Under the circumstances, even the slightest pressure applied by the trial court, such as the request to Juror Schmidt to change her vacation plans, could have had a coercive effect on the deliberative process. Even though the trial setting did not ultimately interfere with Juror Schmidt's June vacation plans, the judge's *ex parte* communications nevertheless made clear the expectation that jurors should continue to make significant personal and financial sacrifices if necessary to facilitate completion of the long-delayed trial.

Moreover, it is likely the judge's communications -- in effect imploring jurors to remain available for service apart from any personal hardship suffered -- would have made it even more likely they would feel pressure *not* to voice problems caused by the extraordinarily long delay between the sanity and penalty phase trials. Jurors whose lives were adversely affected by being called back to jury service after such a long hiatus may well have taken their frustrations out on the defense. At the very least, jurors very likely felt eager to conclude their deliberations more quickly. Such pressure, brought to bear on jurors in a capital sentencing proceeding, is constitutionally unacceptable, does not readily lend itself to posttrial analysis for prejudice, and cannot be deemed harmless beyond a reasonable doubt. (People v. Ebert (1988) 199 Cal.App.3d 40, 47 [improper exclusion of a *pro per* defendant from *in camera* proceedings which resulted in withdrawal of advisory counsel]; see also, People v. Wash (1993) 6 Cal.4th 215, 249 [improper *ex parte* discussions

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[83] See Argument Sections 2 and Argument Section 4, infra.

between the judge and jurors regarding their inability to reach a verdict, and the consequences of a hung jury]; cf. Rushen v. Spain (1983) 464 U.S. 114, 121 [*ex parte* communication with jurors held nonprejudicial].)

Because the error very likely infected the fairness of proceedings to determine whether the death penalty should be imposed, the court's *ex parte* communications created an unacceptable risk that the death penalty was meted out arbitrarily or capriciously, or through whim or mistake, in violation of the Eighth Amendment, and article I, section 17 of the California Constitution. (Caldwell v. Mississippi, supra, 472 U.S. at p. 343 [O'Connor, J., concurring in part and concurring in the judgment].)

LII THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, AND VIOLATED APPELLANT'S CONFRONTATION RIGHTS BY PERMITTING TESTIMONY, INCLUDING THE HEARSAY STATEMENTS ATTRIBUTED TO THE LONG-DECEASED VICTIM, TO PROVE THAT THE PRIOR TEXAS ROBBERY INVOLVED VIOLENT CRIMINAL ACTIVITY.

Evidence regarding Roy's prior conviction of a robbery in Texas was received at the penalty trial to show both criminal activity involving the use or attempted use of force or violence (Pen. Code, § 190.3(b)), and a prior felony conviction (Pen. Code, § 190.3(c)). The Texas robbery was committed in 1980 on a passenger of a train en route to San Antonio, Texas. The conviction itself was established using Pen. Code, § 969b records, showing that Roy had pled guilty to the aggravated robbery. (RT 10978-10979.) The "force or violence" component of the offense was proven through the testimony of two witnesses other than the victim, because the victim had long since died of unrelated causes by the time of Roy's trial. (RT 10980 et seq.; RT 11070 et seq.)

Defense counsel moved to prevent the prosecutor's use of testimony to establish the violent acts underlying the Texas robbery. Counsels' argument was threefold. First, because the prosecutor had not called the witnesses, Earl Bradley and Robert Steele, at Phillips[84] hearings held to adjudicate the admissibility of evidence of Roy's alleged prior violent acts at the penalty phase, counsel lacked proper notice. (RT 10966.) Counsel also argued that

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[84] The phrase "Phillips" hearing refers to an *in limine* hearing to determine whether prosecutors can show the corpus delicti for violation of a penal statute, when the "criminal activity" which they seek to prove under Pen. Code, § 190.3(d) did not result in a conviction. (People v. Phillips (1985) 41 Cal.3d 29,

the witnesses were unnecessary – counsel were willing to stipulate to the fact of the aggravated robbery conviction – and more prejudicial than probative. (Pen. Code, § 352.) (RT 10967.) Finally, the defense argued that the victim of the robbery was now deceased, and evidence of his statements was inadmissible hearsay. (RT 10968, 11003-11004.)

At the penalty trial, retired train conductor Earl Bradley testified that he discovered the victim of the Texas robbery slumped in his seat with his throat cut. A young Black man was found secreted in a locked train restroom. The man had several spots that appeared to be blood on his shoes. (RT 10980-11000, 11015-11022.) Mr. Bradley testified that the victim was conscious and able to talk, and made the following statement to him within 15 minutes of the incident: "'A [B]lack man cut my throat and took my wallet.'" (RT 11003-11004, 11015.) The statement was received as a spontaneous statement over a defense hearsay objection. (Evid. Code, § 1240.)

Former Texas Ranger Robert Steel also testified over defense objection. He identified Roy as the young Black man he took into custody for the robbery. Roy had no money in his possession, but there were several spots that appeared to be drops of blood on his shoes. (RT 11072-11084.)

A. Admission of the deceased robbery victim's hearsay statement violated appellant's confrontation rights, guaranteed by the state and federal constitutions.

An accused's Sixth Amendment right to confront witnesses is a fundamental right made obligatory on the states by the Fourteenth Amendment. (Dutton v. Evans, supra, 400 U.S. at p. 79. California has its own Confrontation Clause, article I, section 15 of the state constitution. The purpose of the Confrontation Clause "is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the contest of an adversary proceeding before the trier of fact." (Maryland v. Craig

(1990) 497 U.S. at p. 845.)

Even assuming the deceased's statement may have been admissible under the spontaneous statement exception to the hearsay rule, it was still error to admit this evidence under the circumstances of this case. The United States Supreme Court has often found violations of the Confrontation Clause even when hearsay has been received under an arguably recognized hearsay exception. (Dutton v. Evans, supra, 400 U.S. at p. 82; Idaho v. Wright, supra, 497 U.S. at p. 814.)

Whether hearsay violates the Confrontation Clause requires a two-pronged analysis. First, it must be demonstrated that the hearsay declarant is unavailable for cross-examination. (Ohio v. Roberts, supra, 448 U.S. at p. 66; United States v. Nazemian, supra, 948 F.2d at p. 525.) In this case, the hearsay declarant was unavailable; he died before the trial of causes unrelated to the injury inflicted during the robbery. However, the inquiry does not end here.

The second and most important component of the analysis requires assessment of the trustworthiness of the hearsay. The trustworthiness of a statement is determined by balancing four factors: (1) whether the statements are assertions of past fact; (2) whether the declarant has personal knowledge of the facts related; (3) whether there is a possibility of faulty recollection; and (4) whether the circumstances suggest that the declarant misrepresented the defendant's role. (Dutton v. Evans, supra, at pp. 88-89; United States v. Monks, supra, 774 F.2d at p. 952.)

Mr. Bradley's testimony, recounting the statement of the train robbery victim fails to survive constitutional scrutiny under the Dutton test. Even though the statement appears be a statement of past fact, based on a deceased declarant's personal knowledge, there is a significant risk under the circumstances of this case of faulty recollection by Mr. Bradley, and/or

misrepresentation or oversimplification by either the victim or Mr. Bradley of Roy's precise role in the robbery.

Roy had pleaded guilty to the 1980 Texas robbery. (See SCT #1 1253-1255.) This may arguably amount to a binding admission of the necessary elements of the offense. (See, CT 1630 [jury instructions defining robbery in the State of Texas].) Because there was no trial, however, other facts surrounding the offense were never adjudicated. The victim reportedly lost $700 in cash, but Roy was not in possession of the victim's money and wallet upon arrest, nor was the victim's property found in the restroom where Roy was hiding. (RT 11040-11041, 11084.) Roy was interrogated after the robbery, but admitted nothing. (RT 11078-11082.) There were three other Black males riding on the same train, all much older than Roy, who was only eighteen years of age at the time of this offense. (RT 11032, 11053-11054.) The evidence leaves lingering questions regarding whether another person was involved in the offense, and played a more prominent or violent role.

Furthermore, Mr. Bradley's penalty trial testimony differed in significant respects from his report of the incident, written the day after the robbery in 1980. For example, there was nothing in the report about spots of blood on Roy's shoes. (RT 11049.) More significantly, Mr. Bradley's report of the robbery did not quote the victim as saying, "A black man cut my throat and took my wallet." Bradley acknowledged the possibility that the man may have said, as his report states, "Someone beat me up and took my wallet." (RT 11032.) These discrepancies indicate that Mr. Bradley's account of the victim's statement was "not at all reliable." (See, e.g., Ellison v. Sachs (4th Cir. 1985) 769 F.2d 955, 957.)

Furthermore, the court's characterization of the statement as a "spontaneous declaration" is not dispositive of the confrontation issue. Even if the robbery victim's statements would qualify as a hearsay exception, a

violation of the Sixth Amendment Confrontation Clause still occurs if the surrounding circumstances do not provide sufficient "'particularized guarantees of trustworthiness.'" (Sherley v. Seabold (6th Cir. 1991) 929 F.2d 272, 274, fn. 4, 275 [excited utterance erroneously received because inconsistencies deprived the statement of trustworthiness].) Hence, whether or not the statement qualified for admission under a hearsay exception, it was an abuse of discretion and a violation of Roy's confrontation rights under the Dutton test to admit such obviously unreliable hearsay as evidence that Roy did in fact slit the victim's throat and take his wallet.

B. The trial court should have sustained the objection to testimony regarding the Texas robbery pursuant to Pen. Code, § 352.

The trial court should have sustained defense counsels' objections to the testimony of Mr. Bradley and Mr. Steele, regarding the facts underlying the Texas robbery.

Pen. Code, § 352 allows a court in its discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (c) create substantial danger of undue prejudice, of confusing the issues or misleading the jury." A trial court lacks discretion to exclude *all* Pen. Code, § 190.3(b) evidence on the ground that it is inflammatory or lacking in probative value; however, traditional discretion is retained to exclude particular items of evidence offered to prove prior violent criminal activity, if misleading, cumulative or unduly inflammatory. (People v. Davenport (1995) 11 Cal.4th 1171, 1205-1206; People v. Valentine (1986) 42 Cal.3d 170.)

It was unnecessary and therefore cumulative for the state to call witnesses to establish the violent character of the Texas robbery. Texas records established that Roy had entered a guilty plea to aggravated robbery. A robbery is "aggravated" in Texas if the defendant causes serious bodily

injury on another or uses or exhibits a deadly weapon. (CT 1630; Tex. Pen. Code, §§ 29.02, 29.03.) Hence, introduction of the Pen. Code, § 969b packet was itself sufficient to establish that Roy's prior Texas robbery involved a criminal act involving the use or attempted use of force or violence. (Pen. Code, § 190.3(b).)

Specific testimony by Mr. Bradley, to the effect that the elderly victim had reported that a young Black man had slit his throat and taken his wallet, had great potential to inflame the passions of the jury. Yet this particular evidence, for the reasons set forth in subsection "A," above, was lacking sufficient indicia of reliability to be truly probative. The evidence was hearsay, yet inconsistent with reports written by the conductor one day after the crime. The victim was dead, and could not be questioned about his recall of the crime.

Moreover, the prosecutor had not proffered the testimony of Mr. Bradley and Mr. Steele at the earlier Phillips hearing held to determine the admissibility of evidence to be proffered as prior violent criminal activity under Pen. Code, § 190.3(b). Hence, defense counsel had no opportunity in advance of the penalty trial to hear the witnesses' testimony and prepare to controvert its most damaging aspects.

In short, testimony describing the facts of the robbery was cumulative of other admissible evidence. In addition, Mr. Bradley's testimony about the victim's statements was completely unreliable, and had much greater potential to inflame the passions of the jury than it had probative value to establish violent criminal activity within the meaning of Pen. Code, § 190.3(b). Accordingly, it was an abuse of discretion to overrule defense counsels' objections under Evid. Code, § 352. (People v. Archer (2000) 82 Cal.App.4th 1380, 1394-1397; People v. Harris (1998) 60 Cal.App.4th 727, 737-738; United States v. Brown (9th Cir. 1982) 720 F.2d 1059, 1062; United

States v. Miller (9th Cir. 1989) 874 F.2d 1255, 1260-1266.)

C The error requires reversal of the death penalty.

As is repeatedly argued elsewhere in this brief, the severity of a death sentence makes it qualitatively different from all other sanctions. (Satterwhite v. Texas, supra, 486 U.S. at p. 262.) For this reason, capital sentencing proceedings must be policed with an especially vigilant concern for fairness and accuracy of factfinding. (Id. at p. 263.) Unreliable testimonial evidence suggesting that Roy was personally responsible for slitting a man's throat and taking his money was so shocking that it may well have tipped the scales in favor of a death judgment. Because the above-described errors occurred in the context of a capital sentencing proceeding, there is an unacceptable risk that the death penalty was imposed upon this appellant arbitrarily, based in part on completely unreliable evidence establishing the underlying facts of an out-of-state robbery conviction. Violation of the Eighth Amendment thus compels reversal of the death judgment.

LIII APPELLANT'S MOTIONS FOR A NEW TRIAL AND FOR REDUCTION OF THE PENALTY SHOULD HAVE BEEN GRANTED.

Following the death judgment, a motion for new trial was filed on Roy's behalf. (CT 1731 et seq.) As grounds for the motion, it was alleged: (1) the attempted rape-murder, and robbery-murder, and witness killing special circumstance findings, and the finding of premeditation and deliberation, were not supported by substantial evidence; and (2) that the ten month delay between the sanity and penalty phases of the trial was prejudicial and violated Roy's due process rights.

Counsel also filed a separate Motion to Reduce the Penalty to Life Without the Possibility of Parole, requesting that the Court independently determine whether the death penalty was the appropriate sentence. (CT 1725 et seq.) Both motions were denied at the sentencing hearing on February 3, 1995. (RT 12074 et seq.)

A. A new trial should have been granted, or the conviction reduced based on the insufficiency of evidence to prove the special circumstance findings, and the element of premeditation and deliberation.

Pen. Code, § 1181, subdivision 6 provides:

> "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

"It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on a motion for new trial." (People v. Roberge (1953) 41 Cal.2d 628, 633.) "In considering a motion for

new trial under section 1181, subdivision 6 (on the ground that the verdict is contrary to the evidence) the trial court is not bound by the jury's decision as to conflicts in the evidence or inferences to be drawn therefrom. It is under the duty to give the defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." (People v. Veitch (1982) 128 Cal.App.3d 460, 467.) The court must "weigh the evidence independently." (People v. Davis (1995) 10 Cal.4th 463, 523.)

In this case, the trial court independently weighed the evidence and found it sufficient to support the jury's judgment. (RT 12075, 12080.) The Court's conclusion that sufficient evidence supported all of the special circumstances and the finding of premeditation and deliberation is unsupported by the record. (See Arguments I - VI.)[85]

The preponderance of evidence against the verdicts finding true the special circumstance allegations "is so great as to produce a conviction that, in rendering it, the jury must have been under the influence of passion or prejudice." (People v. Hamilton (1873) 46 Cal. 540, 543.) This case involved the alleged attempted rape, murder, and attempted murder of White teenage girls by an adult Black defendant. As such, it was just the type of case that "'arouses in the public mind an intense indignation against the accused culprit; and it is not surprising that the same feeling sometimes finds its way into the jury box.'" (People v. Trumbo (1943) 60 Cal.App.3d 681, 686-687; quoting People v. Hamilton, supra.)

Furthermore, with respect to the sufficiency of evidence to support the robbery-murder special circumstance finding, the trial court gave lip service to the sufficiency of the evidence, but then gave "no weight" to the robbery-

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[85] Appellant incorporates by reference the arguments previously made alleging insufficient evidence to support convictions of robbery, attempted rape, or the three special circumstance findings.

murder special circumstance judgment in ruling on the defense motion to reduce the death judgment. (See RT 12113.) Such action suggests that the court harbored unspoken doubts about the sufficiency of the evidence to prove the robbery-murder special circumstance but was unwilling to exercise its independent judgment and overrule the jury.

The court's finding that evidence supported the jury's first degree premeditated murder conviction is equally infirm. As trial counsel argued in their motion for new trial, a significant quantum of evidence supporting premeditation was furnished by the testimony of Laurie's mother, Venus Farkas. (CT 1742) Mrs. Farkas had been convicted of welfare fraud as the result of her wrongful collection of benefits for daughter Laurie, after her death. Defense counsel were not informed of the welfare fraud conviction by the prosecutor and did not become aware of it until after the guilt phase trial, when it was too late to use the information to impeach this significant witness's credibility. (See Arguments XIII, XIV, XV and XVI.)[86] If Mrs. Farkas's testimony is discounted, there is no evidence of solid, credible value, proving that Roy had a preconceived plan to rape Laurie. Accordingly, for these reasons, and the reasons previously set forth in Argument Section 1 of this brief, the motion for new trial, or for reduction of the first degree murder to a lesser degree of murder should have been granted.

B The motion for new trial should have been granted because of the long delay between the sanity and penalty phases of the trial.

In the motion for new trial, defense counsel argued that the extremely

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[86] Appellant incorporates by reference these previous arguments pertaining to the prosecutor's wrongful failure to disclose the conviction of Mrs. Farkas, the conflict of interest produced by the discovery that the Fresno County Public Defender had represented Mrs. Farkas, and the trial court's denial of a mistrial after the conviction and resulting conflict of interest were discovered.

long delay between the sanity and penalty phases of the trial caused prejudice requiring a new penalty phase trial. (CT 1742.) The arguments advanced by trial counsel in the motion for new trial are generally mirrored in Argument Section 3 of this brief (Arguments XVII-XXVII), in which it is argued at length that Roy was prejudiced by the long pre-penalty phase delay, adverse and inflammatory midtrial publicity, and the trial court's persistent failure and refusal to give proper admonitions, or to poll the jury about publicity, or fading memory, prior to commencement of the penalty phase. (See, CT 1742-1751.)[87]

The trial court refused to grant a new penalty trial based on the long delay, and made a number of findings that are wholly unsupported by the record. For example, the court acknowledged that jurors were not properly admonished to avoid exposure to publicity after the sanity phase trial, but dismissed the omission as not prejudicial. (RT 12081.) The court never questioned jurors to determine the extent of exposure. (See Arguments XXI, XXIII, XXIV, XXVI.)

The Court made a factual finding that jurors did not discuss the case with outsiders. (RT 12081.) However, this finding was based on the court's single question to the entire group of returning jurors on October 4, 1994, which required no audible response. (RT 10527-10528.) The record contains no assurance that jurors did not discuss the case with anyone.

Furthermore, even assuming jurors did not speak with each other or anyone else about the case during the long recess, this does not necessarily mean that the prolonged recess was harmless. As trial counsel argued in the Motion for New Trial, the jurors were pressured by the court to remain

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[87] Appellant incorporates the Arguments included in Argument Section 3 by reference rather than reiterating the identical arguments at this point, in support of reversal of the trial court's ruling on the new trial motion.

available for jury service and many were detrimentally affected as the result of protracted service. (See Argument XXV; CT 1748.) Returning jurors were asked whether they had been exposed to "anything" in the media that would "make it difficult" to remain impartial, but no audible response to the question was required. (RT 10527.) No questioning was done to determine the possible scope of exposure to the barrage of prejudicial media coverage, and to assess the possible influence of such coverage on jurors' ability to be fair. (See Argument XXIV.) Nor were jurors asked if they were exposed to influences other than the media that would make it difficult to remain impartial, or perform the function of juror.

The trial court ruled that it would be improper to "presume" a loss of memory on the part of jurors; yet the court never asked a single juror about possible memory loss, despite defense counsels' request that the court make such an inquiry. (RT 12082.) Moreover, the trial court's finding of no memory loss completely disregards the substantial evidence proffered in the motion for new trial. The motion was supported by a newspaper article dated September 30, 1994, which quoted the jury foreperson as saying that the death penalty had been selected because Roy had "shown no remorse" for strangling Laurie. Mr. Wakefield told the press: "Even with the overwhelming evidence, . . . he didn't say he was sorry." (CT 1752.)

In the new trial motion, counsel cited to numerous places in the record of the guilt phase trial in which Roy had testified, and expressed great sorrow and remorse for his role in the crimes. (CT 1747; RT 5799, 5897, 5929, 5922; see also RT 6061-6062, 6993.) During the guilt phase, Roy also volunteered evidence of his prior criminal activity, offering mitigating explanations for why those crimes were committed. (See CT 1744; RT 5714-5738, 5755-5765, 5771-5784, 5949, 5950, 6990-6993.) Roy did not testify again at the penalty phase for tactical reasons, and his guilt phase testimony was obviously long

forgotten by jurors at the penalty phase trial.

In denying a new penalty trial, the court also relied in part on defense counsels' "unlimited opportunity" to refresh the jury's recollection during closing argument. (RT 12082.) In so doing, the court completely disregarded the fact that Roy's lead counsel – Mr. Kinney – had not been present for much of the guilt phase trial, and repeatedly objected and moved for mistrial because he felt that he was handicapped by his absence during the guilt phase testimony which formed the basis for much of the prosecutor's closing argument. (RT 11495 et seq.; RT 11929 et seq.)

In short, the trial court repeatedly refused defense counsel the opportunity to poll jurors in order to assess the magnitude of the prejudice that may have resulted from the extremely long delay in the proceedings, lapsing memories, and possible exposure to prejudicial midtrial publicity, yet denied the motion for a new penalty phase trial based upon the unsubstantiated presumption that jurors' memories of the guilt phase were adequate, and no prejudicial exposure to outside influences had occurred. For this reason, as well as the reasons previously articulated in Argument Section 3, infra, the trial court's order denying a new penalty trial should be reversed.

LIV THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE GUILT AND PENALTY DETERMINATIONS.

Even if each this Court rejects appellant's individual claims of guilt-phase error, appellant is entitled to reversal of his convictions based upon the cumulative prejudicial effect of the guilt phase errors. "In this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (People v. Hill, supra, 17 Cal.4th at p. 845; Taylor v Kentucky (1976) 436 U.S. 478, 488, fn. 15; Fahy v. Connecticut (1963) 375 U.S. 85, 91; United States v. Wallace (9th Cir. 1988) 848 F.2d 1464, 1475-1476; In re Jones, supra, 13 Cal.4th at p. 587; see also United States v. Bland (9th Cir. 1990) 908 F.2d 471, 473; United States v. Ham (4th Cir. 1993) 998 F.2d 1247, 1254; Virgin Islands v. Pinney (3rd Cir. 1992) 967 F.2d 912, 918.)

The errors committed in the guilt phase also require reversal of the sentence of death. Although guilt and penalty phase proceedings are often viewed as separate proceedings, when guilt and penalty are decided by the same jury, events occurring during the guilt phase of a capital trial will necessarily have an effect on the jury's decision during the penalty phase. (Magill v. Dugger (11th Cir. 1987) 824 F.2d 879, 888.) Guilt phase errors found not to have affected the jury's guilt phase determination may nevertheless be prejudicial as to penalty. (In re Marquez (1992) 1 Cal.4th 584, 609.) Numerous courts and commentators have acknowledged that expecting jurors to clear their minds of prejudicial matters on command is an expectation "of a mental gymnastic . . . beyond, not only [a juror's] . . . powers, but anybody else's." (Nash v. United States (2nd Cir. 1932) 54 F.2d 1006, 1007.) The problem is most acute in death penalty cases because the

enormous discretion entrusted to a jury in a capital sentencing hearing provides a unique opportunity for prejudice to operate. (Turner v. Murray, supra, 476 U.S. at p. 35.)

Indeed, in this case, the penalty phase argument and instructions virtually guaranteed that the jury would be influenced by guilt phase error in determining the appropriate penalty. The jury was instructed that in determining the penalty, it must "consider all of the evidence which has been received during any part of the trial of this case . . .." (CT 1614.) The jury was also instructed on their obligation to consider the "circumstances of the crimes of which the defendant was convicted in the present proceeding . . . ." (CT 1614.) In his penalty phase argument, the prosecutor broadly interpreted the "circumstances of the crime" to include all facets of guilt phase evidence not covered specifically by the special circumstance findings. (RT 11832 et seq.) Accordingly, it cannot be pretended that the errors in the guilt phase could have played no role in the penalty verdicts. To the contrary, when considered cumulatively, the errors produced a trial that was fundamentally unfair, and violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as article I, sections 7, 15, 16 and 17 of the California Constitution. (See Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 288; Caldwell v. Mississippi, supra, 472 U.S. at p. 341.)

Even if this Court finds that the death judgments need not be reversed based on the cumulative prejudicial effect of guilt phase errors, or individual assignments of penalty phase error, reversal of the death penalty is mandated because the cumulative prejudicial impact of guilt and penalty phase errors was sufficient to undermine confidence in the integrity of the penalty phase proceedings. The combined effect of the errors violated appellant's federal constitutional right to reliability and the absence of arbitrariness in the death sentencing process guaranteed by the Fifth, Eighth and Fourteenth

Amendments. (See, Johnson v. Mississippi, supra, 486 U.S. at pp.594-595 [Eighth Amendment]; Zant v. Stephens, supra, 462 U.S. at p. 885 [Fourteenth Amendment].) Appellant's due process right to proper operation of the procedural sentencing mechanisms established by state statutory and decisional law was also eviscerated. (Hicks v. Oklahoma, supra, 447 U.S. 343, 346.) The Fourteenth Amendment's due process guarantees were also violated by the cumulation of errors which tainted the fairness of the trial and presented an "unacceptable risk . . . of impermissible factors coming into play." (Estelle v. Williams (1976) 425 U.S. 501, 525.)

The test for prejudice from federal constitutional errors is well settled. Reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contributed to the verdict obtained." (Chapman v. California, supra, 386 U.S. at p. 24; Yates v. Evatt (1991) 500 U.S. 391, 402-405; Clemons v. Mississippi (1990) 494 U.S. 738, 754.) When any one error is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all errors, constitutional and otherwise, was harmless. (People v. Williams (1971) 22 Cal.App.3d 34, 58-59.) Reversal of appellant's penalty is clearly compelled under the standards applicable for federal constitutional error.

Reversal of the penalty determination is also compelled under state law. In People v. John (1988) 46 Cal.3d 432, 446-448, this Court reaffirmed the "reasonable possibility" harmless error standard articulated in People v. Hines (1964) 61 Cal.2d 164, 168-170. This is an extremely high standard under which it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is "the same in substance and effect" as the "reasonable doubt" standard of Chapman v. California, supra. It is a "more exacting" standard

than the standard of People v. Watson (1956) 46 Cal.2d 818, 836, used for assessing guilt phase error. (People v. Brown, supra, 46 Cal.3d at p. 447.) While a trivial or hypertechnical possibility that an error affected the outcome is insufficient for reversal (id. at p. 448), only in an "extraordinary" case can a death sentence be affirmed if penalty phase error has occurred. (People v. Hines, supra, 61 Cal.2d at p. 170.)

Even in a noncapital case, intrusion of improper considerations into a discretionary sentencing decision will usually require reversal of the sentence. (See, e.g., People v. Morton (1953) 41 Cal.2d 536, 545; see also United States v. Tucker (1972) 404 U.S. 443, 447-449; People v. Brown (1980) 110 Cal.App.3d 24, 41.) These cases recognize that determining whether improper considerations affected a sentencing decision is impossible, and the resulting uncertainty compels reversal. A finding of harmless error is all the more speculative in a capital case, in which 12 jurors impose sentence, and no unanimity is required as to the factors relied upon by each individual juror to support the sentencing decision.

In assessing prejudice affecting a death penalty determination, errors must be viewed through jurors' eyes, not those of the court. A reasonable possibility that an error may have effected any single juror's view of the case compels reversal. (People v. Hamilton, supra, 60 Cal.2d at p. 138; see also Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664, 669.)[88]

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[88] Use of a more forgiving standard of error than the one adopted in People v. Hamilton, supra, 60 Cal.2d at pp. 137-137, would also violate a defendant's federal due process rights under Hicks v. Oklahoma, supra, 447 U.S. 343. The Hamilton rule is part of the procedural scheme created by California law for the deprivation of human life. A California defendant's right to the benefit of the Hamilton rule is protected by the federal due process clause. A defendant's federal equal protection rights would also be violated if a more lenient standard for assessing sentencing error were applied in a noncapital case than in a capital case.

In this case, the sheer number and seriousness of guilt and penalty phase errors makes harmless error analysis "extremely speculative or impossible." (See Clemons v. Mississippi, supra, 494 U.S. at p. 754.) Reversal of the penalty is therefore mandated by the Fifth, Eighth and Fourteenth Amendments, and parallel provisions of this state's constitition. (Cal. Const., Art. I, §§ 7, 15 & 17.)

ARGUMENT SECTION 12

CHALLENGES TO CALIFORNIA'S DEATH PENALTY SENTENCING SCHEME

Introduction

Many features of California's capital sentencing scheme, alone or in combination with one another, violate the United States Constitution. Because constitutional challenges to most of these features have been rejected by this Court, these arguments are made in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that the death sentence be set aside.[89]

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[89] Appellant does not concede that these are the only constitutional defects in California's capital sentencing law. He anticipates that additional constitutional challenges to the death penalty law may be asserted in the Petition for Writ of Habeas Corpus to be filed by the counsel for the Habeas Corpus Resource Center, to the extent such claims require reference to extrinsic evidence, affidavits of experts, or statistical data not a part of the record on appeal.

LV APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Pen. Code, § 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in Pen. Code, § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[90] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[91] or had a "hatred of religion,"[92]

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[90] People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270; see also, CALJIC No. 8.88 (6th ed. 1996), par. 3.

[91] People v. Walker (1988) 47 Cal.3d 605, 639 n.10, *cert. den.*, 494 U.S. 1038 (1990).

[92] People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

or threatened witnesses after his arrest,[93] or disposed of the victim's body in a manner that precluded its recovery.[94]

The purpose of Pen. Code, § 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that the "circumstances of the crime" are aggravating, and to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[95] or because the defendant killed with a single execution-style wound.[96]

b. Because the defendant killed the victim for some purportedly

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[93] People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[94] People v. Bittaker (1989) 48 Cal.3d 1046, 1110 n.35, *cert. den.* 496 U.S. 931 (1990).

[95] See, e.g., People v. Morales, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No. S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT 160-61 (same).

[96] See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT 3026-27 (same).

aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[97] or because the defendant killed the victim without any motive at all.[98]

c. Because the defendant killed the victim in cold blood[99] or because the defendant killed the victim during a savage frenzy.[100]

d. Because the defendant engaged in a cover-up to conceal his crime[101] or because the defendant did not engage in a cover-up and so must have been proud of it.[102]

e. Because the defendant made the victim endure the terror of

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[97] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge).

[98] See, e.g., People v. Edwards, No. S004755, RT 10,544 (defendant killed for no reason); People v. Osband, No. S005233, RT 3650 (same); People v. Hawkins, No. S014199, RT 6801 (same).

[99] See, e.g., People v. Visciotti, No. S004597, RT 3296-97 (defendant killed in cold blood).

[100] See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[101] See, e.g., People v. Stewart, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No. S004464, RT 4192 (defendant did not seek aid for victim).

[102] See, e.g., People v. Adcox, No. S004558, RT 4607 (defendant freely informed others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

anticipating a violent death[103] or because the defendant killed instantly without any warning.[104]

f. Because the victim had children[105] or because the victim had not yet had a chance to have children.[106]

g. Because the victim struggled prior to death[107] or because the victim did not struggle.[108]

h. Because the defendant had a prior relationship with the victim[109] or because the victim was a complete stranger to the defendant.[110]

This case is no different than those that have preceded it. The Fresno County District Attorney argued that the "circumstances of the crime" weighing in favor of death included the fact that the murder was deliberate and premeditated. (RT 11842; see fn. 99 & 100.)

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[103] See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623.

[104]See, e.g., People v. Freeman, No. S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

[105] See, e.g., People v. Zapien, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[106] See, e.g., People v. Carpenter, No. S004654, RT 16,752 (victim had not yet had children).

[107] See, e.g., People v. Dunkle, No. S014200, RT 3812 (victim struggled); People v. Webb, No. S006938, RT 5302 (same); People v. Lucas, No. S004788, RT 2998 (same).

[108] See, e.g., People v. Fauber, No. S005868, RT 5546-47 (no evidence of a struggle); People v. Carrera, No. S004569, RT 160 (same).

[109] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish (1990) 52 Cal.3d 648, 717 (same).

[110] See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[111]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[112]

c. The motive of the killing. Prosecutors have argued, and juries were

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[111] See, e.g., People v. Deere, No. S004722, RT 155-56 (victims were young, ages 2 and 6); People v. Bonin, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); People v. Kipp, No. S009169, RT 5164 (victim was a young adult, age 18); People v. Carpenter, No. S004654, RT 16,752 (victim was 20), People v. Phillips, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was "elderly").

[112] See, e.g., People v. Clair, No. S004789, RT 2474-75 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S010723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[113]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[114]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[115]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have

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[113] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3544 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge); People v. Edwards, No. S004755, RT 10,544 (no motive at all).

[114] See, e.g., People v. Fauber, No. S005868, RT 5777 (early morning); People v. Bean, No. S004387, RT 4715 (middle of the night); People v. Avena, No. S004422, RT 2603-04 (late at night); People v. Lucero, No. S012568, RT 4125-26 (middle of the day).

[115] See, e.g., People v. Anderson, No. S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787 (same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41 (city park); People v. Carpenter, No. S004654, RT 16,749-50 (forested area); People v. Comtois, No. S017116, RT 2970 (remote, isolated location).

been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[116]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].)

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[116] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See Argument LVI below.)

LVI CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, Pen. Code, § 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive. Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A **Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and outweighed mitigating factors; appellant's constitutional rights to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death judgment was thereby violated.**

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. In fact, the jury was told that it was "not necessary for all jurors to agree." (CT 1632.)

All this was consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, that they outweigh mitigating factors, or that death is the appropriate sentence." But these interpretations have been squarely rejected by the United States Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466, 490 [hereinafter Apprendi] and Ring v. Arizona (2002) 536 U.S. 584, 122 S. Ct. 2428 [hereafter Ring].

Recently, in People v. Snow (2003) 30 Cal.4th 43, 125-126 [Snow], and People v. Prieto (2003) 30 Cal.4th 226, 262 [Prieto], this Court considered the constitutionality of California's death penalty sentencing scheme under Ring and Apprendi, and found it constitutional. For reasons set forth below, appellant respectfully submits that Snow and Prieto are wrongly decided and should be reconsidered.

In Apprendi, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (Id. at p. 478.) In Ring, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment.

While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in Apprendi, that when the state bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

1. In the wake of Ring, any aggravating factor necessary to the imposition of death must be found true beyond a reasonable doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[117] Only California and four

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[117] (See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev.

other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[118] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (State v. Wood (Utah 1982) 648 P.2d 71, 83-84.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (People v. Fairbank, supra; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-

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Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); State v. Pierre (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[118] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and State v. Goodman (1979) 257 S.E.2d 569, 577.

finding before the decision to impose death or a lesser sentence is finally made. Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.) This Court acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (People v. Brown (1988) 46 Cal.3d 432, 448.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[119] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these

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[119] In Johnson v. State (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore, "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that Ring requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (Id., 59 P.3d at p. 460)

factual findings.[120]

Furthermore, once the jury has engaged in weighing and imposed a death sentence, Pen. Code, § 190.4 requires the judge to review the evidence and "make a determination whether the jury's findings, and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (Pen. Code, § 190.4(e).) The trial court gives the evidence received at trial the weight the *court* believes it deserves. (People v. Marshall (1990) 50 Cal.3d 907, 942.) The trial judge must determine whether the trier of fact's "at least implicit conclusion that aggravation outweighs mitigation is contrary to law or evidence." (People v. Hines (1997) 15 Cal.4th 997, 1983 [Concurring opinion, Mosk, J.].) If the trial judge reaches a contrary conclusion, the death judgment is modified. (Pen. Code, § 190.4(e).)

If, as this Court has thus far interpreted the sentencing scheme, the jury in a capital case is merely "weighing" evidence and not engaging in factfinding, then it follows, *ipso facto*, that it is the trial judge, pursuant to Penal Code section 190.4(e), who decides whether the jury's implied finding of an aggravating factor or factors is supported by the evidence. Implicitly, the death penalty may not be imposed in this state unless the trial judge finds true at least one aggravating factor, which outweighs mitigation. In effect, the factfinding necessary for imposition of the death penalty is made by the judge, not the jury, in violation of Apprendi and Ring.

In People v. Anderson (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a

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[120] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown (Brown I) (1985) 40 Cal.3d 512, 541.)

special circumstance is death (see section 190.2(a)), Apprendi does not apply. This holding is based on a truncated view of California law. As section 190, subd. (a),[121] indicates, the maximum penalty for any first degree murder conviction is death.

Ring specifically rejected Arizona's identical contention. Just as when a defendant was convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ring, supra, 122 S.Ct. at p. 2440.) Pen. Code, § 190 provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death, and that which penalty is to be applied "shall be determined as in sections 190.1, 190.2, 190.3, 190.4 and 190.5." Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (Pen. Code, § 190.2), and death is not an available option unless the jury makes the further factual findings required by section 190.3, i.e., that one or more aggravating circumstances exist and that the aggravating circumstance(s) outweigh the mitigating circumstances.[122] As previously argued, the existence of factfinding by the jury is underscored by the fact that California's law provides for mandatory trial court review of the

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[121] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

[122] The fallacy of the Anderson Court's reasoning in this regard is highlighted by the fact that by the same rationale, section 190 itself provides a maximum penalty of death; therefore, once the jury has returned a verdict of first degree murder, the finding of any alleged special circumstance does not increase the maximum penalty and would not need to be found true beyond a reasonable doubt by a unanimous jury. Ring requires that the factual findings required by both sections 190.2 and 190.3 be subject to the same rigorous standard.

jury's conclusion – that mitigation is outweighed by at least one factor in aggravation.

In Ring, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed: "The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence." (Ring, supra, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's Apprendi dissent, 530 U.S. at p. 539.)

The fact that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (Ring, supra, 122 S.Ct. at p. 2443.) No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[123] As the high court stated in Ring, supra, 122 S.Ct. at p. 2443:

"Capital defendants, no less than non-capital defendants, are

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[123] In Monge, the U.S. Supreme Court foreshadowed Ring, and expressly found the Santosky v. Kramer (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at p. 732 (emphasis added).)

entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

2. Ochoa and Walton

Before Ring was decided, this Court rejected the application of Apprendi to the penalty phase of a capital trial. (People v. Ochoa (2001) 26 Cal.4th 398, 453.) In Ochoa, the appellant challenged a California jury instruction, CALJIC No. 8.87, on the basis that it did not require the jury to find beyond a reasonable doubt that the evidence established the attempted, threatened, or actual use of force or violence in order to find an aggravating factor under section 190.3(b). This Court found that Apprendi did not require a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 factor in aggravation:

> "Apprendi itself excluded from its scope state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *The Apprendi court cited as an example the sentencing scheme described in Walton v. Arizona,*[124] *whose holding compels rejection of defendant's instant claim.* Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided whether to sentence the defendant to death or life imprisonment. *A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California*; both events narrowed the possible range of sentences to death or life imprisonment. Walton held there was no constitutional right to a jury determination that death was the appropriate penalty. As the Apprendi court explained, a death sentence is not a statutorily permissible sentence until the jury

[124] Walton v. Arizona (1990) 497 U.S. 639

> has found the requisite facts true beyond a reasonable doubt. *In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further Apprendi bar to a death sentence. . . . As we observed in People v. Anderson, once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death. Therefore, a penalty determination of death does not result in a sentence that exceeds the statutory maximum prescribed for the offense of first degree murder with a special circumstance. . . .* Accordingly, Apprendi does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder."

(26 Ca04th at pp. 453-454; citations omitted; emphasis added.)

This contention was specifically rejected by the high court in Ring, which held Apprendi fully applicable to all factual findings prerequisite to a death judgment whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial: "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense'. . ." (Ring, 122 S.Ct. at p. 2443, quoting Apprendi, 530 U.S. at p. 494, n. 19.) In Ring, Walton was specifically overruled.

In People v. Prieto, supra, this Court acknowledged as much. This Court noted that the United States Supreme Court in Ring had acknowledged that "'the Apprendi majority's portrayal of Arizona's [capital sentencing law]'" was incorrect. (Prieto at p. 263, fn. 14.) Therefore, its reliance on the majority opinion in Apprendi was likewise incorrect. (Ibid.)

In light of Ring, this Court's holdings, made in reliance on Walton, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the "trier of fact" find one or

more aggravating factors, and that these factors outweigh mitigating factors, before it may even consider whether or not to impose death.

3. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (People v. Taylor (1990) 52 Cal.3d 719, 749; accord, People v. Bolin (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[125] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

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[125] See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; Murray's Lessee v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The United States Supreme Court has made clear that such determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (Ring, supra.)

These protections include jury unanimity. The United States Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (Brown v. Louisiana (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, supra, 524 U.S. at p. 732;[126]

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[126] The Monge court developed this point at some length, explaining as follows:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida 430 U.S. 349 (1977). Because the death penalty is unique "in both its severity and its finality," id., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

(Monge v. California, supra, 524 U.S. at pp. 731-732.)

accord, Johnson v. Mississippi (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, § § 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see Monge v. California, supra, 524 U.S. at p. 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no less (Ring, 122 S.Ct. at p. 2443).[127]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[128] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital

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[127] Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[128]The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See People v. Wheeler (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (People v. Raley (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (Monge v. California, supra, 524 U.S. at p. 726; Strickland v. Washington, 466 U.S. at pp. 686-687; Bullington v. Missouri (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed – particularly in a case like this one, where the chief evidence presented for imposing a death sentence was Roy's commission of two prior felonies, and six prior violent criminal acts, including the two prior robberies, two prison assaults, and two acts of battery on a former girlfriend.[129]

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a *foundational matter*. Instead, jury unanimity is mandated only on a final verdict or special finding." (People v. Miranda (1987) 44 Cal.3d 57, 99 (emphasis added).) But unanimity is not limited to final verdicts. For example, it is not enough that California jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (People v. Diedrich (1982) 31 Cal.3d 263, 281-282.)

In Richardson v. United States (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the

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[129]The penalty phase instructions specifically allowed the jury to separately consider the two robberies as unadjudicated acts of violence, as well as adjudicated felonies. (See, CT 1606, 1614, 1624, 1626, 1631-1632.)

jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> "The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire."*

(Richardson, supra, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly true when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a

"moral" and "normative" decision. (People v. Hawthorne, supra; People v. Hayes (1990) 52 Cal.3d 577, 643.) However, Ring makes clear that the foundational findings prerequisite to the sentencing decision in a California capital case are precisely the types of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

B Even if proof beyond a reasonable doubt were not the constitutionally required burden of persuasion for finding (1) that an aggravating factor exists (2) that the aggravating factors outweigh the mitigating factors, and (3) that death is the appropriate sentence, proof by a preponderance of the evidence would be constitutionally compelled as to each such finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., Griffin v. United States, supra, 502 U.S. at p. 51 [historical practice given great weight in constitutionality determination]; Murray's Lessee v. Hoboken Land and Improvement Co., supra, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (People v. Hayes, supra, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (Eddings v. Oklahoma, supra, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (Proffitt v. Florida, supra, 428 U.S. at p. 260) – the "height of arbitrariness" (Mills v. Maryland (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

Finally, Evid. Code, § 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that People v. Hayes – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting

life or liberty be based on reliable evidence that the decisionmaker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (Hicks v. Oklahoma, supra, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (Sullivan v. Louisiana, supra.) That should be the result here, too.

C. Even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (Sullivan v. Louisiana, supra.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[130] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any

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[130] See, e.g., People v. Dunkle, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (Sullivan v. Louisiana, supra.)

D California law violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown (1987) 479 U.S. 538, 543; Gregg v. Georgia, supra, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (People v. Fairbank, supra), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316 .) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (People v. Fauber (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who

believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (In re Sturm (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id., 11 Cal.3d at p. 267.)[131] The same reasoning applies to the far graver decision to put someone to death. (See also, People v. Martin (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Ibid.; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (Harmelin v. Michigan, supra, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence

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[131] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

imposed. In Mills v. Maryland, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., id. at p. 383, n. 15.) The fact that the decision to impose death is "normative" (People v. Hayes, supra, 52 Cal.3d at p. 643) and "moral" (People v. Hawthorne, supra, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-Furman state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[132]

Further, written findings are essential to ensure that a defendant

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[132]See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

subjected to a capital penalty trial under Pen. Code, § 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As Ring v. Arizona has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Pen. Code, § 190.3, the finding of an aggravating circumstance (or circumstances) and finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

E. California's death penalty statute as interpreted by the California Supreme Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory and disproportionate imposition of the death penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (Barclay v. Florida (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting Proffitt v. Florida (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in Harris, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at p. 52, n. 14.)

As we have seen, the statute lacks procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See Gregg v. Georgia, supra, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The United States Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a

particular person or class of persons is disproportionate – even cases from outside the United States. (See Atkins v. Virginia (2002) 122 S.Ct. 2248, 2249; Thompson v. Oklahoma (1988) 487 U.S. at 821, 830-31; Enmund v. Florida (1982) 458 U.S. 782, 796 n. 22; Coker v. Georgia (1977) 433 U.S. 584, 596.

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in Furman [v. Georgia (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (Gregg v. Georgia (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (Profitt v. Florida (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[133]

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[133] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii)

Pen. Code, § 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., People v. Marshall (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in Pulley v. Harris – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[134]

(1988).

Also see State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433,444; People v. Brownell (Ill. 1980) 404 N.E.2d 181,197; Brewer v. State (Ind. 1981) 417 N.E.2d 889, 899; State v. Pierre (Utah 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; State v. Richmond (Ariz. 1976) 560 P.2d 41,51; Collins v. State (Ark. 1977) 548 S.W.2d 106,121.

[134] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the

Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in Furman in violation of the Eighth and Fourteenth Amendments. (Gregg v. Georgia, supra, 428 U.S. at p. 192, citing Furman v. Georgia, supra, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

F. The prosecution may not rely in the penalty phase on unadjudicated criminal activity; even if it were constitutionally permissible to do so, such criminal activity could not constitutionally serve as a factor in aggravation unless found true by a unanimous jury, beyond a reasonable doubt.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the

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number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res.L.Rev.1, 30 (1995).)

Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578, 108 S.Ct.1981, 100 L.Ed.2d 575; State v. Bobo (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution relied heavily on previously unadjudicated criminal activity to support the death judgment.

First, the state presented testimony by two former inmates who claimed they were assaulted by Roy while doing time in Texas prison. The facts surrounding the assaults were largely disputed. One inmate, Edward Salazar, Jr., was allowed to testify regarding alleged assaultive conduct by Roy using a ball peen hammer, despite the fact that Salazar himself was disciplined for the incident. (RT 11151.) Also used as aggravating criminal activity were two unadjudicated assaults admittedly committed by Roy upon a former girlfriend. The defense relied on these assaults as foundational to psychiatric testimony offered in defense, and in mitigation of the death penalty. Of course, because of lack of any jury findings, it is impossible to know how each individual juror viewed this evidence -- as aggravating or mitigating.

Most significantly, over defense objection, the trial court permitted the prosecutor to introduce testimony proving the facts underlying Roy's prior robberies in California and Texas. Although Roy had pleaded guilty to both offenses, the prosecutor was allowed to go beyond the adjudicated elements of the convictions and introduce testimony to prove that both robberies constituted "violent activity" with in the meaning of Pen. Code, § 190.3(b). The prosecutor then devoted a considerable portion of its closing argument to arguing the aggravating significance of these alleged unadjudicated violent acts. (RT 11844-11863, 11868.)

Use of appellant's prior unadjudicated criminal activity did not end with the six specific offenses alleged by the prosecutor to qualify as "factor (b)" evidence. During the guilt phase, the jury received a great deal of

evidence that Roy had committed other offenses that were never adjudicated in a court of law. For example, there was much evidence about juvenile Roy's fire-setting episodes that led to his hospitalization, including the incident in which he locked his sister and a friend inside a room and light the door on fire. For impeachment purposes in the guilt phase, the jury also received evidence that Roy had committed several crimes of moral turpitude, including burglary and several auto thefts. Testimony was also elicited regarding Roy's practice of stowing away on public transportation without payment, and stealing food. The penalty phase instructions advised the jury they must consider "all of the evidence received during any part of the trial of this case . . . ." (RT 1614.)

The United State Supreme Court recent's decisions in Ring v. Arizona, supra, and Apprendi v. New Jersey, supra, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of Ring and Apprendi to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated *violent* or *threatened violent* criminal activity (factor (b)) as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury.

In this case, consistent with California's sentencing scheme, jurors were instructed that, as individuals, they must each find appellant guilty beyond a reasonable doubt of any prior felony conviction (CT 1624), or any factor (b) criminal acts or activity (CT 1631). However, they were also instructed that it was *not* necessary for all jurors to agree that the same act or

acts had been committed: "If any juror is convinced beyond a reasonable doubt that such criminal act or activity occurred, that juror may consider that act or activity as a fact in aggravation." The prosecutor emphasized the lack of any requirement for unanimity in his closing penalty phase remarks to the jury:

> "There is no requirement as to unanimity in the decision as to whether these things are proven to you by proof beyond a reasonable doubt. I submit to you that the evidence is sufficient, but, by example, if in reviewing these, for instance, well, any one you review that evidence and 11 of you conclude that, well, I'm convinced by proof beyond a reasonable doubt that that thing happened and one says, I'm not – I think it did, but I'm not really sure by proof beyond a reasonable doubt. [¶] Eleven of you can take that incident and plug it into that particular factor and include that in your weighing, and the one of you that feels that you're not convinced by proof beyond a reasonable doubt does not. In other words, there is no requirement of unanimity regarding those findings as (b) and (c)." (RT 11848.)

Hence, the jury was not just authorized, but encouraged to reach its death penalty decision independently, without any unanimous fact finding beyond a reasonable doubt.

G. The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as a barrier to consideration of mitigation by appellant's jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see Pen. Code, § 190.3(d) and (g)), and "substantial" (see Pen. Code § 190.3(g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Mills v. Maryland (1988) 486 U.S. 367; Lockett v. Ohio (1978) 438 U.S. 586; cf. People v. Holt, supra 15 Cal.4th at p. 702.)

In this case, psychological and psychiatric testimony dominated the guilt phase defense, and the mainstay of the penalty phase defense was the

testimony of psychologist Gretchan White, who emphasized the Roy's social and medical history as causes for his panoply of diagnosed mental disorders and his resulting explosive behavior. (RT 11314 et seq.) Hence, the defense against the death penalty relied heavily on factor (d), which encompasses a claim of "*extreme* mental or emotional disturbance." (Emphasis added.)

During closing argument, the prosecutor repeatedly emphasized that the defendant's testimony, describing what had occurred on January 26, 1991, proved he was suffering from "no extreme [or] emotional disturbance" and "no extreme emotional stress." (RT 11869.) Hence, the use of these adjectives actually acted as a barrier to the jury's consideration of Roy's "mental and emotional disturbance" because jurors were led to believe factor (d) had no mitigating effect unless the degree of disturbance produced was "extreme." Using the adjective "extreme" to define "mental and emotional disturbance" left factor (d) unconstitutionally vague, arbitrary, capricious and incapable of principled application in appellant's case. (Maynard v. Cartwright, supra, 486 U.S. at pp. 363-364; Godfrey v. Georgia, supra, 446 U.S. at pp. 428-429.) Because factor (d) evidence played such a predominant role in the defense, the jury's consideration of this factor, both vaguely and too restrictively defined, introduced impermissible unreliability into the sentencing process in violation of the Eighth and Fourteenth Amendments.

H. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable and evenhanded administration of the death penalty.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether

or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034; People v. Lucero (1988) 44 Cal.3d 1006, 1031 n.15; People v. Melton (1988) 44 Cal.3d 713, 769-770; People v. Davenport (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v. Mississippi (1988) 486 U.S. 578, 584-85.)

In this case the prosecutor made the following confusing argument regarding factors (d) through (j):

> "Now, I submit to you that it's obvious that a majority of some factors, if they apply anywhere, they apply to the murder of Laurie [F.]. Now, (d) through (j) essentially is a list of whether or not – whether or not this, whether or not that, and all in terms of the murder of Laurie [F.], things relating to evidence that you have already received and you've already tested by proof beyond a reasonable doubt." (RT 11844.)
>
> "* * *
>
> "And the rules are a little different concerning factors (b) and (c) as opposed to other factors (d) through (j) that have to do with the circumstances of the murder of Laurie [F.]. And because you've already tested the murder of Laurie [F.] by proof beyond a reasonable doubt, there is no need for you to test that again. And what you do is look through the evidence and see if there is anything that makes the particular factor on the list applicable to this particular case." (RT 11845.)

Later, the prosecutor discussed factor (d), (e), (f), (g), (h), (i), and (j), and why each was not "applicable" in the case. (RT 11869-11890.)

It is thus likely that the jury aggravated Roy's sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (Stringer v. Black (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (Tuilaepa v. California (1994) 512 U.S. 967, 973 quoting Gregg v. Georgia (1976) 428

U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, supra, 455 U.S. at 112.)

LVII THE DENIAL OF PROCEUDRAL SAFEGUARDS AFFORDED NON-CAPITAL DEFENDANTS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v. California, supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (People v. Olivas (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (Commonwealth v. O'Neal (1975) 327 N.E. 2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without

showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, supra; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See People v. Allen (1986) 42 Cal.3d 1222, 1286-1288.) Its reasons were a more detailed presentation of the rationale that has also justified the refusal to require any burden of proof in the penalty phase of a capital trial, or unanimity as to the aggravating factors that justify a sentence of death, or written findings by the jury as to the factors supporting a sentence of death: death sentences are moral and normative expressions of community standards. Appellant will therefore examine the justifications proffered by the Allen court, and show that they do not suffice to support denying persons sentenced to death procedural protections afforded other convicted felons.

At the time of appellant's sentence on February 3, 1995, California no longer required inter-case proportionality review for non-capital cases, although such review had previously been required. (Former Pen. Code

§ 1170, subd. (f).)[135] (See In re Martin (1986) 42 Cal.3d 437, 442-444, for

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[135] Until September 1992, Pen. Code, § 1170, subdivision (f) provided as follows:

> (f)(1) Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences imposed in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate.
>
> Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if the defendant had not been sentenced previously, provided the new sentence is no greater than the initial sentence. In resentencing under this subdivision the court shall apply the sentencing rules of the Judicial Council and shall consider the information provided by the Board of Prison Terms.
>
> (f)(2) The review under this section shall concern the decision to deny probation and the sentencing decisions enumerated in paragraphs (2), (3), and (4) of subdivision (a) of Section 1170.3 and apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing.
>
> (g) Prior to sentencing pursuant to this chapter, the court may request information from the Board of Prison Terms concerning the sentences in this state of other persons convicted of similar crimes under similar circumstances.

This language was removed by an amendment (Stats 1992 ch 695 §§ 10 (SB 97)), which took effect on September 14, 1992.

details of how the system worked while in practice).

Before inter-case proportionality review was repealed for noncapital prisoners, in People v. Allen, supra, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The decision is illustrative of the reasoning frequently relied upon to sanction disparate treatment of capital and noncapital defendants.

The Allen court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (People v. Allen, supra, 42 Cal. 3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (McCleskey v. Kemp (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (Coker v. Georgia, supra, 433 U.S. 584) or offenders (Enmund v. Florida (1982) 458 U.S. 782; Ford v. Wainwright, supra; Atkins v. Virginia, supra.) Juries, like trial courts and counsel, are not immune from error. They may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the state cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision maker's discretion to impose death.

(McCleskey v. Kemp, supra, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

The second reason offered by Allen for rejecting the equal protection claims was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (People v. Allen, supra, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright, supra, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina (1976) 428 U.S. 280, 305 [opn.

of Stewart, Powell, and Stephens, J.J.].) (See also Reid v. Covert (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; Kinsella v. United States (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; Gregg v. Georgia, supra, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; Gardner v. Florida (1977) 430 U.S. 340, 357-358; Lockett v. Ohio, supra, 438 U.S. at p. 605 [plur. opn]; Beck v. Alabama (1980) 447 U.S. 625, 637; Zant v. Stephens, supra, 462 U.S. at pp. 884-885; Turner v. Murray (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting California v. Ramos (1983) 463 U.S. 992, 998-999; Harmelin v. Michigan, supra, 501 U.S. at p. 994; Monge v. California, supra, 524 U.S. at p. 732.)[136] The qualitative difference between a prison sentence and a death sentence thus militates for,

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[136] The Monge court developed this point at some length:

> "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." (Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977)). Because the death penalty is unique "in both its severity and its finality," id., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding")."

(Monge v. California, supra, 524 U.S. at pp. 731-732.)

rather than against, requiring the state to apply its disparate review procedures to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (Allen, supra, at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification. The distinction drawn by the Allen majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 421 and 423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees each and every person that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (Bush v. Gore (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review, provided in virtually every state that has enacted death penalty laws and by the federal courts when they

consider whether evolving community standards no longer permit the imposition of death in a particular case.

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [Allen, supra, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (Ring v. Arizona, supra.)[137] California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., Mills v. Maryland, supra, 486 U.S. at p. 374; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (Monge v. California, supra.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as

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[137] Although Ring hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (Ring, supra, 122 S.Ct. at p. 2443.)

irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

LVIII CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former apartheid regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366; see also People v. Bull (1998) 185 Ill.2d 179, 225 [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; Thompson v. Oklahoma, supra, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist

Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)[138]

It is now widely recognized in the United States and abroad that the death penalty as administered in this country has been a complete failure. Two Columbia University studies by Professor James Liebman and colleagues have concluded that the American system of capital punishment is broken. The Liebman study of all available cases from 1973 to 1995 concluded that 2 out of 3 death penalty cases in the United States were reversed on appeal. An overall rate of prejudicial error was reported to be 68%, detected at one of three stages of appellate review. Liebman, James S., et al, A Broken System: Error Rates in Capital Cases, 1973-1995, June 12, 2000 [see also abridged version at Capital Attrition: Error Rates in Capital Cases, 1973-1995 (2000), 78 Tex. L. Rev. 1839.

Dr. Liebman's most recent study addresses why our death penalty system makes so many mistakes, and what needs to be done to correct the inadequacies of the system. Some of his findings include the following: (1) the higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error; (2) the more often states impose the death penalty in cases that are not highly aggravated, the greater the risk of error; (3) high rates of serious capital error are strongly associated with political pressure on public officials to use the death penalty aggressively, public fears about crime, and the frequency with which state trial judges are subject to popular election; (4) the poor quality of trial proceedings and poorly funded courts increase the risk of serious error; (5) high quality, well-funded lawyers significantly increase

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[138] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (Id.)

a defendant's chance of success on appeal; (6) chronic capital error rates are on the increase overall; (7) state and federal appeals judges do not catch all serious trial errors in capital cases; (8) some innocent defendants have had convictions affirmed despite error because of stringent rules limiting the scope review; (9) 76 % of reversals where data was available for study were the result of egregious incompetence on the part of trial lawyers, suppression of exculpatory evidence or misconduct by police and prosecutors, misinstruction on the law or juror bias; (10) when errors were found to have tainted the guilt-phase verdict as well as the verdict imposing the death penalty, 82 % of the cases sent back for retrial ended in sentences less than death, and 9% ended in acquittals. Liebman, James, et al., A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It [published online by The Justice Project, Campaign for Criminal Justice Reform at www.CJReform.org:http://justice.policy.net/proactive/newsroom/release.vtml?id=26641.]

These inadequacies in the administration of capital punishment in the United States are the subject of international condemnation. The perceived systemic deficiencies were eloquently summarized by the Canada Supreme Court in a recent case which denied extradition to the United States of two potentially death-eligible defendants. Among other problems noted: (1) "The adequacy of legal representation of those charged with capital crimes is a major concern. . . . The defendant's life ends up entrusted to an often underqualified and overburdened lawyer who may have no experience with criminal law at all, let alone with death penalty cases;" (2) "The U.S. Supreme Court and the Congress have dramatically restricted the ability of our federal courts to review petitions of inmates who claim their state death sentences were imposed in violation of the Constitution or federal law;" (3) "Studies show racial bias and poverty continue to play too great a role in determining

who is sentenced to death." The Canada high court also commented upon the Liebman study, cited in paragraph 10, above, the high incidence of wrongful convictions, and the troublesome "death row phenomenon," referring to the torturously long periods of pre-execution confinement on America's death rows. (United States v. Burns, et al. 1 S.C.R. 283 (2001 SCC 7): File No. 26129 [Ministers of Justice v. Glen Sebastian Burns and Atif Ahmad Rafay and Amnesty International, et al.].)[139]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot (1895) 159 U.S. 113, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (Furman v. Georgia, supra, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from

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[139] A copy of the Canada Supreme Court's opinion in United States v. Burns was found on the website of the Canada Supreme Court.

the evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1957) 356 U.S. 86, 100; Atkins v. Virginia, supra, 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (Atkins v. Virginia, supra, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, supra, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (Hilton v. Guyot, supra, 159 U.S. at p. 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. For all these reasons, and because it cannot be said "with any confidence that [the United States Supreme Court] is able to

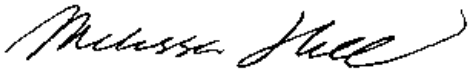
reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death the death penalty is unconstitutional and appellant may not lawfully be executed. (Callins v. Collins, supra, 127 L.Ed.2d at p. 449; dissenting opinion of Blackmun, J.) Appellant's death sentence should be set aside.

CONCLUSION

For the foregoing reasons, the entire judgment, must be reversed. The appellant should be afforded such other and further relief as is supported by the law and evidence including, in the alternative, reversal of the special circumstance findings, and the convictions of attempted rape and robbery; reduction of the conviction for first degree premeditated murder to conviction of a lesser degree of murder or manslaughter, supported by the evidence; reversal of the competency and/or sanity judgments; and reversal of the death penalty with a remand for a new penalty trial.

Dated: June 22, 2003

Respectfully submitted,



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I reside in and maintain a home office in Corrales, New Mexico, in Sandoval County. I am over the age of 18 years and am the attorney for Royal Clark, the appellant in this action. My business address is Post Office Box 2758, Corrales, New Mexico, 87048.

On June 26, 2003, I served the attached Appellant's Opening Brief and Request for an Permission to File an Opening Brief in Excess of 280 Pages on the interested parties in this action by personal service or by placing a true copy, postage prepaid, in the U.S. Mail in Albuquerque, New Mexico, addressed as follows:

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I declare under penalty of perjury that foregoing facts are true.

Executed this June 26, 2003, at Corrales, New Mexico.

MELISSA HILL